Neutral Citation Number: [2023] ECC Lon 3

IN THE MATTER OF CHRIST CHURCH, SPITALFIELDS

-and-

IN THE MATTER OF FACULTY 3736

FOR THE RECTOR AND PAROCHIAL CHURCH COUNCIL ("PCC") TO ENTER INTO A MANAGEMENT AGREEMENT WITH THE LONDON BOROUGH OF TOWER HAMLETS ("LBTH") UNDER SECTION 6 OF THE OPEN SPACES ACT 1906 RELATING TO MAINTENANCE OF THE CHURCHYARD AS PUBLIC OPEN SPACE, WITH PROVISION FOR LBTH TO LICENSE BACK PART OF THE LAND WHICH IS SUBJECT TO A MANAGEMENT AGREEMENT WITH THE GOVERNING BODY OF CHRIST CHURCH PRIMARY SCHOOL ("CCPS") AS PLAYGROUND FOR THE SCHOOL (BEING PART OF CCPS'S EXISTING PLAYGROUND) WHICH LICENCE AND MANAGEMENT AGREEMENT SHALL BE SUBSTANTIALLY IN THE FORM SUBMITTED TO THE COURT FOR APPROVAL

-and-

IN THE MATTER OF THE AMENDED AND OPPOSED PETITION OF (1) THE REVEREND DARREN WOLF, RECTOR (2) PCC OF CHRIST CHURCH, SPITALFIELDS, (3) LBTH AND (4) CCPS (PETITIONERS) AND SPITALFIELDS OPEN SPACES & OTHERS (PARTIES OPPONENT)

JUDGMENT ON PRELIMINARY LEGAL ISSUES

July 25, 2023

Etherington Ch:

A. NOTE ON ACRONYMS AND ABBREVIATIONS

The Parties Opponent have submitted a cross-referenced electronic bundle to which reference will from time to time be made in italicised and bolded brackets.

Inevitably, in cases involving a long history, terminology has emerged which has not always been used consistently. Although, shortened forms of words or phrases, acronyms and the like are convenient to a writer, they can themselves become confusing (particularly in a lengthy document) as the reader may forget what the abbreviation means.

I set out below the principle shortened forms that I have used in this judgment.

AFP: **Amended Faculty Petition dated February 18, 2022**

CA: **Arches Court of Canterbury**

CCDL: **Consistory Court of the Diocese of London**

CCPS: **Christ Church (Church of England) Primary School, Spitalfields**

EJCCM: **Ecclesiastical Jurisdiction and Care of Churches Measure 2018**

The Deputy: this refers to Rogers Ch, who at the material time was Chancellor of the Diocese of Gloucester. She sat as an appointed Deputy Chancellor to hear the application for a Restoration Order in respect of the Garden Building (nursery school) which had been erected in the churchyard following the grant of faculty permission by Seed Ch (then Chancellor of the Diocese of London). The Deputy Chancellor of the Diocese of London at that time (then Turner Dep Ch) could not hear the application for good reason.

FJR: **Faculty Jurisdiction Rules (as amended)**

Garden Building: the building marked 'G' on the site plan and which must be demolished before February 1, 2029

ILEA: **The Inner London Education Authority (abolished on April 1, 1990)**

LGA72: **Local Government Act 1972**

LBTH: **The London Borough of Tower Hamlets**

MA: **management agreement**
MA49: **Management Agreement of June 5, 1949**
MA09: **Management Agreement of September 7, 2009**
MA14: **Management/Licence Agreement of September 4, 2014**

OSA06: **Open Spaces Act, 1906**

PsO: **Parties Opponent *in all plural forms***

PCC: **Parochial Church Council**

PrS: **Petitioners *in all plural forms***

PMA: **Proposed management agreement, part of this petition**

PHA75: **Public Health Act 1875**

SSFA: **School Standards and Framework Act 1998, Schedule 3**

§: **Section**

SOS: **Spitalfields Open Spaces**

B. SOME IMPORTANT DATES

The PsO prepared a useful chronology, part of which is reproduced below as an aid to understanding the issues before me. Italicised parts (save for page references) are my own words:

1857:	**the original churchyard was full and closed by Order-in-Council (*D1461)*.**
1857:	***A faculty appears to have been granted for works pursuant to the creation of a lawn/ornamental garden to secure an open space (needed because of the density of the local population) and* a faculty permitting the erection of new school buildings on the Brick Lane site: *(C453-6)*.**
1873:	**The existing CCPS was erected pursuant to faculty and the school land ceased to be part of the churchyard.**
1884:	**The Disused Burial Grounds Act 1884. The Garden Building dispute was concerned with whether the erection of that building breached this Act.**
1887:	**The Open Spaces Act 1887 later consolidated in the OSA06.**
1891:	**The faculty petition for a public garden, management agreement (the 'Meath' agreement) and closure of the churchyard to enable laying out;**
June 5, 1949:	**A Deed was entered into by the Rector and Stepney Council.**
1957:	**The church itself was closed by the diocese of London but the churchyard remained open to the public;**
1963:	**The Local Government Act 1963: Stepney Borough Council became subsumed in LBTH and *any* Deed of 1949 and *any trust thereby established* were assigned in their entirety to LBTH;**
April 15, 1970:	**The Rector (in a Deed of Agreement with LBTH and faculty under licence) granted LBTH permission to convert part of the churchyard into an Adventure Playground and to erect a building**

for use by children using the churchyard *(C473-4). This was for use children in general accompanied by appropriate adults.*

1976: **The Friends of Christ Church Spitalfields was established to raise funds to restore the church and churchyard;**

April 15, 1987: **LBTH granted the trustees of the Adventure Playground Association and ILEA a licence under faculty in respect of what is, *I understand*, agreed to be areas D and E in the current site plan and gave permission to erect a multi-use games area on area E. The relevant documentation is from *(C475-87). The licence permitted the areas to be used as a playground for the use of the pupils of CCPS during normal school hours and to make adequate provision for the supervision and safety of the school children using the land, but otherwise in conjunction with the existing use of the land by the Adventure Playground Association as an adventure playground. The licence was time-limited for a period nearly 5 years (March 1992) subject to earlier termination should there be a failure to comply with its terms by the licensee (subject to one month's notice).***

1991: **The Local Government Act 1991 abolished ILEA and transferred the licence to LBTH.**

1992 onwards: **After the licence period expired the same arrangement continued until 2009.**

May 28, 2008: **The Rector (the Rev'd Andy Rider from 2004, having been Priest-in-Charge from 2003) was registered as the owner of areas A to C and F to G. Areas D and E were not registered then *and, I understand, since.***

September 2, 2009: **A petition for a licence under faculty was granted by Seed Ch as Chancellor of the diocese of London; *(C488-57).***

September 7, 2009: **MA09 was signed by the Rector, LBTH, the Adventure Playground Association Trustees and the CCPS Governing Body; *(C576-95).***

August 5, 2011: **Planning permission for the Garden Building was granted;**

October 10, 2011: **Non-conflicted trustees of FCCS objected to the erection of the Garden Building;**

February 17, 2012: **A faculty for the Garden Building was granted by Seed Ch;**

September 2014: **The nursery school occupied the Garden Building;**

September 4, 2014: **A new licence agreement (MA49) was signed by Rider, LBTH and the CCPS chair of governors under the authority of the faculty of February 17, 2012.**

June 17, 2017: **Rider wrote to LBTH *(C827)* stating that the 1949 Deed was terminated due to a breach of Clause 8 of MA49;**

December 17, 2017: **The Deputy gave her final judgment and granted what she termed a confirmatory faculty *(C828-1350)*;**

June 1, 2018: **George, Dean of the Arches, granted SOS permission to appeal the Deputy's judgment. He refused permission to appeal the issues surrounding MA09.**

January 15, 2019: **The date of the undertakings on behalf of the church and (January 20) those of LBTH: *(C1352-5)*;**

March 25, 2019: **The CA quashed the Restoration Order and the school's licence to occupy the Garden Building: *(C1420 and D1407)*.**

December 9, 2019: **The present faculty application and the PMA;**

April 30, 2020: **The resignation of the Rev'd Andy Rider as Rector of the church (his successor being the Rev'd Darren Wolf);**

February 18, 2022: **The PrS amended petition and amended PMA.**

C. THE FACULTY PETITION AND THE AMENDED PETITION

i. By an original petition for Faculty (undated) but apparently issued in December 2019 and in the name of the Reverend Andy Rider, Rector, the PCC of Christ Church Spitalfields, LBTH and the Governing Body of CCPS sought the permission of the court for the Rector and PCC to enter into a management agreement with LBTH under §6 of OSA06 to maintain part of the churchyard as a public open space within the meaning of OSA06, with provision for LBTH to license back a smaller part of the land, the subject of a management agreement, to the Governing Body of CCPS as a playground for the school (being part of the school's current playground) with the management agreement and licence to be substantially in the form submitted for approval by the court. A site plan was enclosed. ***[B294-400 – including the decision of the CA]***.

ii. The **PrS** sought to amend the petition in early 2022. I granted this application. The site plan remained the same. Form 3a was amended to replace the Rev'd Andy Rider with the new Rector, the Rev'd Darren Wolf. The PMA had been amended as had the licence to occupy. Some minor amendments were simple updating ones, given the passage of time: ***[B401-432].***

iii. Clause 2 in the (amended) licence to occupy reads "The Governing Body shall make the Property available for community use and for viewing of the Church by the public out of school hours during term time and during school holidays

in accordance with the Undertakings given by the Governing Body and the Rector to the Court of Arches dated 20 January 2019" ***[B404]***. Clause (E) in the Introduction to the PMA reads: "By a Restoration Order, made by the Court of Arches, dated 25 March 2019 the building currently standing on the part of the Churchyard marked G (the 'Garden Building') is to be demolished on or before February 1, 2029 after which the land marked G and the curtilage marked F will become incorporated into and form part of the open space of which the Council shall undertake the care management and control under the terms of this Agreement". It was clarified in paragraph 10 of the PMA that this would happen on or before the "Restoration Date". Paragraph 11 set out that prior to the demolition of the Garden Building it would be available for community use at such times as it was not being used by the school or the church: ***[B428-431]***.

iv. Further, paragraph 15 of PMA stated that "the powers of care management and control conferred on the Council by this [*the*] Agreement shall replace those powers conferred in respect of the Churchyard by any prior agreements including in particular those management agreements dated 5 June 1949 and 4 September 2014 which it is acknowledged by the Parties have been terminated and are no longer subsisting or of any effect": ***[B430]***.

v. It appears that in the period between the original undertaking and subsequent petition and early 2022 there had been negotiations between the parties which had broken down. There had also been the pandemic.

D. THE RESTORATION ORDER

i. On March 19, 2019, the CA (George, Dean; Tattersall Ch and Pittaway Ch) made a Restoration Order under §72(3) of EJCCM. The court ordered that the Respondents, namely (1) the Governing Body of CCPS, (2) the Reverend Andrew Rider, Kim Gooding, William Spiring and Richard Wasserfall (then Rector, Church Wardens and former Church Warden) (3) the London Diocesan Board for Schools and (4) LBTH must take the following steps:

(i) *Demolition of the building, currently used for nursery and community purposes* [the Garden Building] *within the disused churchyard of Christ Church, Spitalfields* on or before February 1, 2029, unless its use by the Governing Body of Christ Church Primary School as a Foundation Stage building, or for any other school purpose, were to cease before that date; in which case demolition of the building had to be carried out forthwith.

(ii) The erection of the Garden Building referred to in paragraph 6 above involved extensive litigation.

ii. The substantive judgment of the Deputy in the CCDL gave a comprehensive history of the church and its locale and took in a good deal of social and political history over an extensive period. It was exceptional in its breadth of knowledge: [2017] ECC Lon 1.

iii. The decision of the Deputy was appealed to the CA by the Parties Opponent. Judgment was handed down on January 28, 2019. At the conclusion of the judgment the CA invited the parties to submit within 28 days a draft order of the court allowing the appeal and incorporating the Restoration Order, making reference in its preamble to the fact that the Governing Body, the Rector and

Church Wardens and LBTH had entered into undertakings, the terms of which had been annexed to the proposed Restoration Order.

iv. The judgment of January 19, 2019 dealt with the issue of the undertaking under "On what terms should the Restoration Order be made" at paragraph 118 of the judgment ***[C1390-4]***. The undertakings were considered as part of the court's determination as to the time needed to comply with the Restoration Order.

v. The court stated that "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 the demolition of the nursery." The rules surrounding the offering and acceptance by the court of such an undertaking are set out in the FJR at Rule 16.9.

vi. By the time of the judgment the court had received the first undertaking from the Governing Body of CCPS and the Rector and Church Wardens signed and dated January 20, 2019 and a second undertaking from LBTH signed and dated January 15, 2019 with associated correspondence from the Respondents and responses from the Appellants.

vii. The CA received a plan attached to the undertakings which showed five areas.
   (i) *Area A: the area to the east of Commercial Street and coloured green.*
   (ii) *Area B: an area between Area A and the Nursery. It was coloured blue.*
   (iii) *Area C: an area of hard-standing between the church and the Nursery.*
   (iv) *Area D: an area situated to the east of the Nursery, between the Tennis Court and to the rear of the Fournier Street properties, thus to the west of the original School boundary. It was coloured orange.*
   (v) *Area E: represented the area known as "The Tennis Court" and coloured red.*

viii. The first undertaking was that Areas A and C would be available for access to the public. Area A would remain available for public access during daylight hours.

ix. Areas B and C would within 1 year of the grant of planning permission and the grant of a faculty (whichever occurred later) be laid out according to a garden design approved after local consultation and then amalgamated with Area A. The whole area A, B, and C would thus be available for public access subject to the exclusion of a defined maximum area adjoining the Nursery on health and safeguarding grounds. The proposed garden works to areas B and C were the subject of the second undertaking which undertook to make funding available for the garden works.

x. The first undertaking also stated that the Rector and PCC would within the next year enter into a new management agreement under the OSA06 with LBTH covering Areas A, B, C subject to the grant of a faculty upon completion of the landscaping works to areas B and C which formed part of the second undertaking.

xi. Area D would not be subject to general public access.

xii. Area E would not be subject to general public access but would continue to be available for the playing of tennis out of school hours and during the whole day during school holidays.

xiii. The tennis to be played in Area E would be by a booking system managed by the Church Office. Access would be via Area D with no separate use of Area D save for that purpose. The public would additionally be permitted to view the profile of the church from areas D and E by arrangement with the Church Office

during the same hours that area E was available for the playing of tennis and, in the case of area E, on two advertised 'open days'.

xiv. The first undertaking also provided for the establishment within three months of an advisory group consisting of persons from certain named interests and the second undertaking provided for the appointing of a representative to that body.

xv. The undertakings would be operative during the life of the nursery and thereafter subject to any variation sought from and granted by the CCDL.

xvi. The first undertaking provides for the situation pertaining after any demolition of the nursery by stating that the area on which it stood together with its curtilage would, within 1 year of such demolition (and subject to the appropriate ecclesiastical and secular consents) be incorporated into Area B and also be subject to the management agreement with LBTH. The second undertaking provided that LBTH would enter into a variation of the management agreement to include this enlarged area.

xvii. The CA pointed out that the terms of the first undertaking incorporated a number of concessions in respect of matters raised by the (then) Appellants' solicitor. Concerns, however, were raised.

xviii. Areas D and E. It was said by the then Parties Opponent (the Appellants to the Deputy's Order) that these should be subject to the same open space managements as areas A,B,C and that these areas should be subject to the same management as Areas A,B,C following demolition of the Nursery.

xix. Areas D and E were also said to lack any faculty authorising school use of these areas and, as the judgment put it: "along with various arguments canvassed before the Deputy concerning open space trusts over those areas."

xx. The (then) Parties Opponent suggested that the advisory body should be established and run by a "neutral entity". Certain of the Parties Opponent, particularly SOS, questioned the power of LBTH to be a party to the second undertaking if MA49 had been terminated and argued that the trustees of the school (rather than its governors) should be party to the first undertaking and complained there were not fuller discussions relating to the undertakings.

xxi. The CA, in evaluating the time necessary for any suspension of the Restoration Order, said it understood the reluctance of the (then) 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 remained in its present Position. The court also reminded itself of the Deputy's finding that the land on which the Nursery stands and the land to the east (Areas E and D) were excluded from any management agreement by MA09 and therefore no public rights have existed thereon since 2009, nor has there been any public access to those areas since then.

xxii. The CA declined to re-open the question of authorised use of, and claimed public access rights to, those areas which it felt would take it into issues beyond the limited grounds to appeal granted by the Dean of Arches. The court also concluded that the proposed undertakings in respect of the Tennis Court Area involved little change from the present situation but welcomed the new opportunity that would be afforded to view the church profile from Area E.

xxiii. The court accepted ***[C1394]*** the two undertakings which it believed offered considerable public benefit in the proposal for future landscaping and public use of the site of the nursery and its curtilage following its demolition. This encouraged it to depart from the Deputy's view 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".

E. THE 1949 DOCUMENTATION

i. The 1949 petition for faculty was that of Stepney Council. It describes the churchyard as "now an open space" and the purpose of the petition was to provide "improved amenities for adult members of the public" and also "arranging a suitable playground for children having regard to the populated area adjoining and the busy traffic thoroughfares in the district". It envisaged laying out the eastern portion of the churchyard with the installation of suitable modern play equipment and for the rest of the area to be plants and foliage. A plan ('A') was annexed to the application. The petitioners proposed to enter into an agreement with the incumbent in accordance with a draft also annexed ('B'). Proposals (not relevant here) were set out relating to existing tombstones ***(C461-463)***. A faculty as prayed was granted.

ii. As I understand it MA49 ***(C469-472)*** is not the actual agreement but a copy of a draft. The Rector (stated to be the owner within OSA06) on the one hand and Stepney Council on the other entered into an agreement with Stepney Council whereby the latter was to undertake the entire care, management and control of the disused burial ground to the extent shown on a plan marked 6728/102 which was appended to the Deed. That defined area was to be managed etc by Stepney Council *for the purpose of administering in trust to allow the enjoyment thereof by the public as an open space within the meaning of the OSA06.* Stepney Council was to have all the powers of management conferred by the OSA06 on a local authority which has secured control of a disused burial ground and for the preservation of order and prevention of nuisance within it conferred by the OSA06 or any other Act in respect of open spaces subject to an inappropriate use provision. The draft Deed states that Stepney Council will petition the CCDL. Additionally, the Deed states that the council will not permit the carrying on of sports or games by children except in that part of the open space to be used as a Children's Recreation Ground.

iii. There is apparently no copy of the plan or drawing in existence that identifies the areas in question.

iv. These arrangements were silent as to what, if anything, might bring the agreement to an end (save for breach of its terms) and did not include any limitation of time. This is different from, say, the 1891 faculty petition where the management agreement between the Rector and the Earl of Meath (on behalf of the Metropolitan Public Gardens Association) stipulated a term of years for the agreement not exceeding five: ***(C457-8)***.

v. I have looked at the Borough Surveyor's Drawing of 1946: ***(C460)***.

F. THE 1987 FACULTY

i. This granted to the Rector with the consent of LBTH, which had succeeded Stepney Borough Council under local government reorganisation in 1963, and with the consent of a body called the Christ Church Gardens Association Adventure Playground Association (the Adventure Playground Association) a

licence under faculty to the Inner London Education Authority (ILEA) to use part of the disused burial ground as an adventure playground: (***C477-8).*** ILEA was the licensee.

ii. This land in question was described as "part of a larger area of land…the whole of such larger area being in use as an Adventure Playground under the authority granted on (day and month not included)…1970." I understand it to be agreed that the area in question was what is now called D and E.

iii. The terms of the licence at clause 2 (a) states that the licensee was to use the land as a school playground during normal school hours in conjunction with its existing use by the Association as an Adventure Playground and at (b) to make adequate provision for the supervision and safety of the school children and at (c) to comply in all respects with the requirements (in force) "as far as the same affect the use of the said land *as a playground*" – my italics: ***(C479-484).*** The powers and rights of the local authority under the Agreement for Care and Maintenance (where it is termed a Children's Recreation Ground) authorised by faculty on June 7, 1949 were preserved: ***(C469-72).***

iv. The faculty itself was not, as far as I can see, time-limited. The licence between the Rector and ILEA to which the Adventure Playground Association agreed and consented was time-limited and expired on March 31, 1992.

G. 1992-2009

During this period, I understand it to be common ground between the parties that the arrangements which were the subject of the agreement continued in much the same form. No application, however, was made to extend the faculty under licence.

H. THE MANAGEMENT AGREEMENT UNDER FACULTY 2009 (MA09)

i. The **PsO** regard this agreement as highly significant in their objections and it forms part of the preliminary legal matters upon which the parties have asked me to rule (or not objected to my so doing).

ii. Public Notice given in respect of the 2009 faculty application (July 16, 2009) stated the schedule of works and purposes to be as follows: "to allow the current licence held by Christ Church Gardens Youth and Community Centre to be surrendered and to allow LBTH to grant a 25-year licence agreement to CCPS in respect of land adjacent to the church." Notice was given of where the relevant plans and documents could be examined. The certificate of publication shows public notice having been exhibited between July 16, 2009 and August 13, 2009: ***(C489)***.

iii. The petition was sent to the Registry under cover of letter on July 23, 2009: ***(C491-503)***. The PCC had unanimously approved the petition on July 20, 2009: ***(C490)***. The Registry acknowledged the petition on July 31, 2009: ***(C504)***. The petition was granted on September 2, 2009.

iv. On August 11, 2009 the Registry wrote to the petitioners to say that Seed Ch had approved the aims of the application and the form of the licence in principle but that Clause G (4) (2) of the draft the Chancellor had received was

unacceptable as the jurisdiction for resolving any disputes arising from such a licence should have been the Consistory Court: ***(C514)***.

v. On August 13, 2009 it was confirmed that such a clause had been added: ***(C516-7)***.

vi. There is an agreement with the appearance of a draft dated July 14, 2009 between the Rev'd Andrew Rider, LBTH, the Trustees of the Christchurch Gardens Youth and Community Centre and the Governors of CCPS. It describes itself as an "Agreement in relation to the Gardens". It shows the jurisdiction to be that of "the courts of England and Wales". It has an attached plan ("Plan A 2009") which is self-explanatory: ***(C527-544)***.

vii. The actual MA09 is dated September 7, 2009: ***(C576-595)*** with associated "best" versions of the 1949 documents thereafter.

viii. There was a licence agreement between LBTH and the Governors of the CCPS which is undated (other than by the year of 2009) and unsigned and there is a manuscript tick on the cover sheet dated August 25, 2009 which could be a note or someone's initials: ***(C507-12)***. There is a second such agreement ***(C520-525)***. The cover sheet has no annotations. Both versions have taken into account the jurisdictional issue raised by Seed Ch so I take both to post-date August 11, 2009 and both have the appearance of a draft.

ix. Seed Ch granted the faculty on September 2, 2009: ***(C574-5)***.

x. The principal terms that I find relevant to this judgment are at clause 3 and encompass using the land as a school play area or for general school purposes and for community use after appropriate safety checks have been carried out. Use of the land by the school is restricted to normal school hours and community access was to be offered for 3 hours a week and 6 hours at weekends in accordance with the relevant departmental guidelines of the then Department of Children, Schools and Families save for an additional prohibition of usage on Sundays unless the incumbent was not using the land on a particular Sunday. The incumbent's rights were preserved. The second version of the draft licence is the same in respect of these provisions. It may be the same in all respects, but I have not performed a word-by-word comparison.

xi. The MA09 is a lengthier and more complex document. Clause 2.4 stated that the petitioners wished to be bound by the confirmed 1949 Deed (in its best available form). In clause 3.1 the petitioners averred that the extent of the area transferred to the management of the LBTH should be redefined because the plans of the garden annexed to the 1949 Deed had been lost and for *future clarity* and *ease of regulation* (my italics).

xii. Paragraph 3.2 deemed the area managed by (now) LBTH pursuant to the 1949 Deed to be an area edged by dark blue on a plan called "Plan B 2009", stating that the 1949 Deed had been varied by the 1987 Deed and the land coloured yellow and hatched brown had been removed from LBTH's management obligation whereas the land managed by LBTH (by the 1949 Deed as *purportedly varied* in 1987) was to be coloured pink on Plan B 2009.

xiii. Clauses 4-5 dealt with what the 2009 petitioners described as the conversion of part of the Gardens for a recreation centre in 1969 to 1970. The variation was that the Rector allowed LBTH to grant to what by 2009 was called the Christchurch Gardens Youth and Community Centre Association (formerly the Adventure Playground Association) permission to convert part of the Gardens and to erect and maintain certain buildings within them for use as a recreation centre for local children. The originals of that 1970 Agreement together with

the draft licence and plan had been lost but there existed a draft Deed which the 2009 petitioners annexed. There was a licence dated April 15, 1970 between LBTH and the trustees of the Association to give effect to the variation. This had also been lost and yet another draft document was relied upon called the "Best 1970 Licence". The Deputy commented on the shocking failure to preserve important legal documents by the relevant parties. I do not need to add my strictures. The trustees of the Association wished by 2009 to surrender the (lost) 1970 licence which was agreeable to LBTH.

xiv. Clause 6 reprised the 1987 licence.

xv. In clause 7, a letter dated March 30, 1987 had been annexed to the draft licence indicating that LBTH agreed to surrender the new playground land out of its control under the OSA06 as provided by MA49 which land, it is said, was also part of the 1970 agreement in order to give effect to the 1987 licence saying that it would otherwise be unlawful since LBTH was not a party to the 1987 Deed. In clause 8, the parties wished to confirm their belief that the new playground land was released from LBTH's management control from the date of the execution of the 1987 licence.

xvi. It appears from what is said in Clause 9 that the new playground land when laid out and fenced incorporated a small area of rectangular land to provide for a rectangular sports court which was hatched brown on "Plan B 2009", referred to as the anomalous land, and which it is said was not released from the terms of the 1949 Deed and could not be deemed to be released and appears to have formed part of the school playground from 1987 or 1988 onwards. ILEA was abolished in 1990 and its interest in the licence passed to the education board of LBTH. LBTH in this clause indicated that it wished to release, or confirm the release, of the anomalous land from MA49.

xvii. Clause 10 said that LBTH wished to surrender and the Rector to accept such surrender of the 1987 licence. The parties acknowledged in the 2009 licence (clause 9.6) that the 1987 licence had only been intended to continue in force until March 31, 1992 unless it had been determined earlier. LBTH, CCPS, the Rector and the Association confirmed that the new playground land had continued to be used in common by the Association and CCPS up until 2009. They do not say why the termination date had not been extended by the grant of an additional period of years, whether this continued usage had been because the expiry date of March 31, 1992 had been overlooked or whether there had been a positive decision to agree between themselves to an extension. Whichever it was, faculty permission for this extension was not obtained at any time during the period of April 1, 1992 to September 1, 2009. In clause 12, the trustees of the Community Association bowed out of the existing arrangements in order to provide community services somewhere else other than Christ Church Spitalfields. In clause 13 the contemporary redesign of the Gardens and playgrounds were envisaged with four improvements in mind: (i) the school's playground facilities; (ii) the Gardens as a green space available to the public; (iii) security and prevention of anti-social behaviour and (iv) further provision for youth and community services.

xviii. It was said that the CCPS in consultation with LBTH would work together with the Rector towards obtaining planning permission or consents to redesign the gardens, the school and school grounds including listed building consent and faculties prior to the grant by LBTH to the CCPS of a new longer term further licence in the event of the aforementioned consents being obtained.

xix. The faculty application was published in the normal way. It was granted and, since it was unopposed, no question of appeal arose. There appears to have been no application by anyone ever to become a Party Opponent to the petition whether within time or out of time.

I. THE 2012 FACULTY AND ITS CONSEQUENCES INCLUDING THE MANAGEMENT AGREEMENT OF 2014 (MA14)

i. The original petition for a faculty in respect of the Garden Building was made on November 8, 2011 and granted by Seed Ch on February 17, 2012: ***(C688)***.

ii. In a letter dated September 14, 2012 notice was sent to the Interim Chief Executive of LBTH and Seed Ch by those who, having explained their various interests, said they had what they described as "serious concerns". Their principal concern was about the proposal to replace the recently demolished youth centre with what is the present Garden Building and they stated that the protection of the church was a matter of great importance and further stated that LBTH had the opportunity to correct a previous decision of 40 years before *(which was presumably a reference to the 1970 faculty)* and what was described as "…even then – [the] highly controversial decision…which allowed the construction of a dry space area for an adventure playground (a public facility) within the grounds of Christ Church by reinstating the land to public space for the benefit of a community as a whole": ***(C692)***.

iii. The letter made some other points about MA09 saying that (i) it attempted to transfer the land where the Garden Building was to be (and was) sited *(now areas G and F)* out of LBTH's management which was said to be unlawful; (ii) that the land must remain under the management of LBTH unless the terms of the previous trust *(presumably that of 1949)* had been varied with the approval of the Charity Commission and such variation made the subject of a faculty.

iv. I do not propose to rehearse all of the steps taken by SOS and others, but by August 2014 SOS applied for a Restoration Order under (then) Section 13 (5) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991: ***(C774-5)***.

v. On September 2, 2014 there was correspondence from the Diocesan Registrar indicating that the chancellor had considered a letter from Christine Whaite (of SOS) and an email from Owen Carew-Jones (solicitor) producing draft licences for the approval of the chancellor: ***(C790)***.

vi. The first licence ***(C779-783)*** is between Andrew Rider, LBTH and the governing body of CCPS. It is undated and unsigned (except by reference to the year 2014). Reference to "the faculty" is said to be the faculty of 2012 (not that of 2009).

vii. Importantly, the parties averred that they were aware that the Garden Building (they referred to it as "the new building") is the subject of litigation in the High Court and the CCDL and "in the light thereof" have agreed to a licence relating to the occupation of the new building in the form of a draft (Annex 1). It is said that the parties had agreed that the licence shall be "the full management agreement" and "fresh agreement" referred to in MA09. It is said that the "form" of this licence had been approved by the CCDL pursuant to the 2012 faculty.

viii. The licence stated that the parties agreed that the management of the gardens should continue to be the responsibility of LBTH subject to the OSA06 and gave the rights of access to the Garden Building by the church and stated that

the rights of occupation of the Garden Building would be governed by the licence contained in Annex 1. LBTH and others "duly authorised" were entitled to use the Garden Building for community services, governed by Annex 2 and the hours granted to the school in Annex 1.

ix. There is a document originally entitled "schedule 4" (but which I presume is Annex 2) which set out the community use and a second licence undated (except by reference to the year 2014) and unsigned.

x. The second draft licence is between the same parties as the first but dealt with a discrete issue as to the position if the claimants in the other litigation (SOS) obtained an injunction preventing CCPS from occupying the Garden Building.

xi. The Rector and two church wardens petitioned the CCDL for what they called a retrospective/confirmatory faculty which is signed but not dated.

xii. The application for a Restoration Order was refused by Seed Ch as being out of time and an abuse of the processes of the court. The applicants (SOS) appealed to the CA (George, Dean; Tattersall and Pittaway Chs) ***(C801-823)*** who remitted the application for a Restoration Order to CCDL where it was heard by the Deputy (together with the application for a confirmatory faculty) on June 13-17, June 23-24, July 18-19, 2016 and June 6, 2017: ***(C828-1324) (C1324-1346)*** and ***(C1346-C1350)***. She gave judgment in several parts: the first part was handed down in March 2017. She refused a Restoration Order and granted a confirmatory faculty. The parties were unable, however, to agree the form of order to be made and the point of contention was the status of the 1949 Deed. As a result, the Deputy felt it was necessary to amplify certain of her findings and make further findings. These were announced in her judgment (the second part) of November 22, 2017.

xiii. I shall refer in more detail to these amplified and additional findings of the Deputy when I consider the respective arguments of the **PrS** and **PsO**.

xiv. She then further adjourned to consider the question of costs. I am not concerned with that aspect.

xv. She then announced her final judgment (part three) on December 17, 2017.

xvi. Her final Order (other than Costs) was that a "confirmatory" faculty was granted to the Rector and churchwardens to retain the Garden Building. She dismissed the application for a Restoration Order. She found that the area set out on the plan (including areas D and E) had ceased to be subject to any arrangements for management by LBTH under OSA06. A faculty was granted authorising the use and occupation of the Garden Building annexed by CCPS without limit of time and the detailed use etc was to be agreed between the Rector and CCPS in a memorandum of understanding to be submitted within 3 months for approval or variation by the Chancellor.

xvii. On June 22, 2017 (after the first part of the Deputy's judgment) the Rev'd Andy Rider gave notice pursuant to clause 8 of the Deed dated June 5, 1949 made between the then incumbent and Stepney Council under §6 of the OSA06 to terminate the Deed in relation to *all* of the land the subject of the Deed because of what he alleged to be the failure of LBTH to undertake the care, management and control of the land (the subject of the 1949 Deed) contrary to the duty of care imposed by clause 1 of the same Deed. The evidence that such failure had occurred was said by the Rector to arise from the findings of the Deputy at paragraphs 22, 25-26 and 101 of her judgment.

xviii. The Deputy described the third part of the graveyard as "a mess": she said that it should have been the final, western-most part as an open space entered from

Commercial Street, but had become "a wasteland of nettles and unkempt shrubs". It was not being used as an open space for public use due to its fencing and she described LBTH has having without explanation given up on maintaining that part of the graveyard. She said it was an uncared-for waste area and an inducement for users of the remaining part of the western-most part of the garden to misuse what was there and described this part of the site as not a good advertisement for open space management by LBTH. She described it as a factor that the Rector might query as it might well be said that LBTH were and had been failing in the terms of the agreement to manage "this open space". She described the public management of the graveyard by LBTH to have resulted in the "failed disgraceful slum of an open space and not a safe area for local residents or their children, save when their play area was fenced off from the public area." She commented that "for well over a century, the public have abused this graveyard. Public management by LBTH has done virtually nothing to stop this." These criticisms are made within ***(C839-842)***.

xix. The Deputy also said that counsel on behalf of SOS had accepted that the management agreement could be ended by either or both parties to it provided, if one party opposed the termination, that it was for good reason. In other words, the open space agreement could be ended on all or part of the churchyard. She gave a variety of examples: ***(C896)***.

J. THE UNDERTAKINGS BEFORE THE ARCHES COURT OF CANTERBURY (CA)

i. I have already dealt with this in part. The "confirmatory" faculty granted by the Deputy was set aside and a Restoration Order was granted which had to be complied with by February 1, 2029 or earlier if the present use, as defined by the CA, ceased before then.

ii. The Rector and churchwardens of Christ Church and the governing body of CCPS gave Undertakings, as did, separately, LBTH. A plan dated December 18, 2018 was prepared: (***C1415-1419)***. The most westerly part of the gardens nearest to Commercial Street (and the part that looks most like a garden) was coloured green and marked "A"; behind it, slightly further east was another area coloured blue (this looks like a garden too) and marked "B". At the eastern edge of the blue area is a small area in blue with black hatchings. There is then to the southerly side of the land behind the blue area going east a strip of land coloured orange with black hatchings. It turns to an area in front of the Garden Building. A hard-standing strip on the northerly side, coloured yellow and marked "C", indicated land extending east to west from the point where the orange hatched land ends west to the edge of the land marked green ("A"). It does not currently look like any kind of garden. Returning to the orange hatched land; behind that further east and moving from the Garden Building east towards the school were two areas marked "D" and "E" respectively. "D" was coloured orange and was centrally located and "E" was coloured pink and is the hard court area. "E" was clearly designed for sports or play of some kind. I should make clear that these impressions were confirmed by a site visit made by me to the churchyard on March 10, 2023.

iii. The church/CCPS undertakings were that area A was and would remain open to the public. Areas B and C would (subject to the availability of grant funding,

planning permission and faculty permission) be laid out within one year according to a garden design approved after local consultation. Once completed, areas B and C would be amalgamated with area A subject to an area having as its maximum the dimensions of the blue hatched area (being part of the curtilage of the Garden Building) which would be excluded whilst the Garden Building still existed. The unhatched areas "A", "B" and "C" would be open for public access without conditions during daylight hours.

iv. The orange and pink areas would have no general public access but the pink area, area E, would be available to be booked by members of local organisations approved by the church through a booking system managed by the church office. The times in which bookings could be made would be out of school hours in term time and during school holidays for the playing of tennis and for the purpose of viewing the church. Both areas D and E would be available for viewing purposes at the same times as sporting access to area E was allowed (either on an individual or group basis) and on two advertised open days a year. It followed, logically, that area D would be accessible to the general public for the sole purpose of accessing area E during permitted times.

v. It was asserted that the whole churchyard was consecrated ground vested in the Rector.

vi. The Rector and the PCC agreed that within one year of the undertaking they would enter into a new management agreement with LBTH under the OSA06 covering areas A, B and C subject to the grant of a faculty in respect of the landscaping works contemplated for areas B and C. The area of open space would increase after the demolition of the Garden Building so that the area occupied by the Garden Building and its immediate curtilage (which later has come to be termed areas F and G) would amalgamate with areas A to C including, at that same time, the blue hatched area and the orange hatched one. In other words, in the end the two areas that would be outside of the OSA06 would be areas D and E although they too would have, albeit more restricted, public access.

vii. LBTH gave a complementary undertaking including the making of funding available for areas A-C (and in due course by variation of the managing agreement G, F and the hatched blue and orange areas).

viii. One issue that did not arise in the appeal was "the significance of various agreements relating to open space and the role of the OSA16 on which the Dean refused permission to appeal": ***(C1368)***. The CA said: "…these areas would take this court into issues beyond the limited grounds on which permission to appeal was granted by the Dean." It also said: "…we recognise that the proposed undertaking in respect of the tennis court on area E involves little change from the present situation…although we welcome the new opportunity by arrangement to view the church profile from area E. …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 [Garden Building] and in respect of the site of the [Garden Building] 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 the day-light hours and funding is now assured, subject to planning permission and faculty, for areas B and C to be landscaped thus amalgamated with area A. This would be a significant public benefit, though much less than that hoped for by the Appellants": ***(C1393-4)***

ix. The CA also said at (***C1393)***: "we understand the reluctance of the Respondents to make available for general public access areas D and E, to the east of the [Garden Building] which are very much part of the curtilage of the school, whether or not the [Garden Building] remains in position…the Deputy held that the land on which the [Garden Building] stands and the land to the east (areas D and E) were excluded from MA49 by MA09 and, therefore, no public rights have existed thereon since 2009, nor has there been any general public access to those areas since then."

x. It is important to remember that the relevance and significance of the undertakings in the CA's proceedings went to the question of the length of the suspension (if any) of the Restoration Order.

K. THE INTENTIONS OF THE PETITIONERS IN THE AMENDED FACULTY PETEITION (AFP)

i. Following my Directions and Orders, I am concerned primarily with the AFP of February 2022.

ii. The AFP was accompanied by an explanatory note. The AFP was described as a simple petition for the Rector to enter into a new managing agreement under the OSA06 with LBTH, covering what is said to be the majority of the churchyard. As was said in the Statement of Need, the **PrS** suggested they were honouring their undertakings to the CA.

iii. In respect of the Licence to Occupy the **PrS** aver that the **PsO** wish to have the long-term status of areas D and E clarified although agreeing that the school should be able to use them as a playground as they do currently. The **PrS** say that LBTH has used a 'licence back' agreement in the past for open space to meet such circumstances. The **PrS** ask the court for permission (if they need it) to withdraw the licence thereby excluding areas D and E from the management agreement should it decide against approving the Licence to Occupy.

L. THE PARTIES OPPONENTS' OPPOSITION TO THE ORIGINAL PETITION

i. SOS said it supported MA14 which it said could be used to achieve what it described as "all reasonable objectives quickly and at no additional cost". It then set out what it described those reasonable objectives as being:

(i) The implementation of the Restoration Order;
(ii) The return of the entire churchyard open space to its lawful use for public outdoor recreational purposes;
(iii) The satisfaction of the school's best interests;
(iv) The repayment to the school of over £2m of its funds which SOS alleged had been misapplied by the church to erect the Garden Building;
(v) The long-term and fully-funded upkeep of the entire restored churchyard public open space;
(vi) The reasonable access by the public to areas D and E outside of school hours and
(vii) The establishment of a competent, community-based long term management arrangement for the open space.

ii. It was averred that the 2014 agreement is in force, that the petition is unnecessary and that it would be unlawful to introduce new arrangements. The petition was said to be defective and based on errors and misconceptions.

iii. Under "overall objections" it is said that the PMA would
   (i) Delay the implementation of the Restoration Order, possibly indefinitely;
   (ii) Drastically reduce the size of the open space;
   (iii) Introduce a management regime that would be unlawful;
   (iv) Replace an entirely satisfactory churchyard management under MA14 with one that benefits the church;
   (v) Avoid the need to reimburse the school the £2m (or part of it) that was unlawfully taken from it in order to build the Garden Building for the church.
   (vi) Avoid planning and budgeting to ensure compliance with the Restoration Order.

iv. There was then a proposed way forward suggested with a neutral chairman or facilitator to attempt to agree a binding overall settlement.

M. DETAILED OBSERVATIONS BY THE PsO – Ecclesiastical and Civil Law

i. There is a limited overlap between ecclesiastical and secular (civil) law since both are concerned with, inter alia, property rights. The ecclesiastical courts will adopt and accept any statute or other principle of civil law that is mandatory and which affects land, building or property unless it is expressly excluded. Consistory courts are confined to granting faculties and granting remedies where faculties have been or are in danger of being breached.

ii. It is said that this petition is a rare example of this overlap which is explained by OSA06, Section 11.

iii. The PMA would require LBTH to exercise management functions over the open space that have not been previously exercised and therefore must be approved by faculty. The CCDL must apply mandatory civil law provisions including whether the land is open space within OSA06. LBTH must apply any mandatory provisions of civil law when exercising management functions.

iv. The Garden Building was authorised by planning permission and a faculty. The CA decided the erection of the building was unlawful because it infringed the Disused Burial Act 1884. It is said that there were further breaches of civil law and argued that the Restoration Order has to be complied with in a way that remedies those breaches.

v. It is contended that the entire churchyard is an open space that is governed by a MA14 which requires LBTH to manage and control the entire OS without intervention from the Rector or any other third party. It is said that LBTH can meet what the **PsO** say are its obligations only by the churchyard land being under LBTH's control in its entirety. Split control is said to be unsatisfactory. The PMA is said to be unlawful under civil law.

N. DETAILED OBSERVATIONS BY THE PsO – The Open Spaces Legislation

i. The PMA must be lawful under the OSA06 and other legislation. It is said that it has been both an open space and a disused burial ground since 1857 and first subject to an open space management agreement in 1949 on the basis it was an open space as a result of the 1859 charitable trust (open space) and the 1857 order-in-council. It is said it has been subject to an open space management agreement ever since 1945.

ii. LBTH may acquire from the incumbent the open space rights enjoyed by the public, being the public rights created by the 1859 public trust. LBTH is responsible for undertaking the care, management and control of the entire area as both an open space and a disused burial ground: OSA06 §9 (a)-(c) and §20.

iii. A local authority may manage and control an open space under an agreed management agreement and it is argued that neither the "owner" (the Rector) nor LBTH can grant any school a lease or licence since LBTH has no interest to lease or licence and the Rector lacks the control enabling him to do so. It is argued that the since the church is a charitable trust, the regulator thereof is the Charity Commission.

iv. It is submitted that if the position is that LBTH ceases to be the manager and controller of an open space and the trust management agreement is terminated successfully, the open space does not cease to be such because of the 1859 trust, long usage and the definition of space in §20 of the OSA06.

v. LBTH may not licence the school to use areas D and E in the way required by the licence since the licence would not enable the public to be given access to the churchyard or enable it to be preserved as a public space or lay it out for public access or open space preservation.

vi. It is stated that an open space is one to which the public has access, can enjoy open-air recreation and one on which no building may be placed.

vii. The **PsO** accept that the Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 ("the 1967 Act") permits LBTH to provide and maintain a building used by organisations whose activities are educational or to provide tennis courts or other recreational facilities but argue that land used by the school would not be recreational.

viii. It is submitted that any variation of the 1859 public recreational trust or the OSA charitable trust that was created by the MA14 would require the prior authorisation of the Charity Commission by an appropriate scheme and references §71, Charities Act 1971 and §10 of the OSA06. The variation in the MA14 created only changes to the administrative arrangements.

O. DETAILED OBJECTIONS BY THE PsO – The 1859 'Trust'

i. The **PsO** submit that what they describe as "the Church" created an irrevocable public recreation charitable trust in 1859 by applying for a faculty dedicating the disused burial ground "in perpetuity as a lawn or ornamental ground…to secure an open space in a crowded and dense population" although the churchyard was reduced in size in 1871. The say this "public" trust was confirmed by "long user" and confirmed by the Open Spaces legislation culminating in the OSA06 as defined by §20 of that Act. The **PsO** submit that

this "charitable trust" can only be varied or terminated pursuant to a scheme issued by the Charity Commission which has never happened.

ii. Next, the submission argues that "the trust and the open space is managed and controlled by the LBTH", as it was by its predecessor council (Stepney) pursuant to MA49 "that in turn was made pursuant to §9 and §10 of OSA06."

iii. It is said that LBTH's powers require it to manage and control the open space so as to observe the 1859 trust purposes, particularly that the entirety of the open space should be maintained as a public garden and to ensure that the entire open space is kept open *at all times* (my italics) for the public for open recreation. The **PsO** rely on §11(3) of the 1967 Act in support of that proposition and concludes that LBTH may not use the powers otherwise available to it as the controller of the land (pursuant to articles 7 and 10 of the 1967 Act) that are at variance with the 1859 trust's purpose unless authorised by the Charity Commission.

P. DETAILED OBSERVATIONS BY THE PsO – The Management Agreement of 2014

i. The **PsO** have made submissions about the motivation for the MA14. From the documentation it appears to me that the approval of the MA14 (by Seed Ch) attached to, and was dependent upon, the faculty of 2012 which was quashed by the CA.

ii. It is said that in June 2017, the purported decision to terminate MA49 was not valid because it had been replaced by MA14 and also because there had been no breach, or, in the alternative, that the breaches were trivial, or, in the further alternative, that the breaches had been waived by the Rector and finally because the Rector's letter referred to matters in a draft judgment which the Deputy had apparently said "could not be looked at by anyone" and had been withdrawn.

iii. Further, submissions are made about what the Deputy ruled and it is said that part of her ruling was inconsistent with other parts and that she lacked jurisdiction to make the rulings she did in respect of (for the purposes of my judgment) areas D and E. The **PsO** says that whether the Restoration Order should be complied with forthwith, or how it will be complied with by February 1, 2029, is a contentious matter between the parties.

iv. In short, the **PsO** contend that LBTH has always accepted it was a party to the management agreements and controller of the open space. It is said, therefore, to be an abuse of the process of this court, for it to support a petition, based on there being presently no management agreement. The **PsO** contend that LBTH has always been the open space manager and, since 2014, the manager under MA14.

Q. DETAILED OBSERVATIONS BY THE PsO – Differences between management exercised by the London Borough of Tower Hamlets (LBTH) and by other parties

i. The **PsO** repeat their contentions concerning the status of the land and LBTH's powers and duties. It is submitted that LBTH is required to maintain and keep the churchyard in a good and decent state appropriate to its purpose and for funding these obligations and is responsible for seeing that the land is kept

properly even if it delegates its obligations to another. Since the **PsO** argue that the churchyard was "acquired" as a pre-existing open space from the 1859 charitable trust, LBTH's obligations may theoretically be greater (as governed by the charitable trust) although they concede this makes little practical difference in this case. They say that this is reinforced by the statutory definition of open space. They argue that maintaining an open space would require a higher standard of upkeep than simply looking after a disused burial ground and claim no standard of maintenance is defined in MA14 or the PMA. This is not a matter for my preliminary legal judgment. If I conclude I have the jurisdiction to grant this faculty then it is a matter that can be raised as to whether I should grant it at all or grant it with Conditions.

ii. The **PsO** discuss the church's obligations if there is no management agreement. It is stated that the situation would be even worse under the PMA since parts would be an open space, parts would be outside the open space and parts would be in neither category. It is said that this mixed regime would be unlawful as it is not permissible to have open space land where parts are managed as an open space and other parts are not managed in this way. Other objections are made about who would bear financial responsibility for the area not managed by LBTH. Again, these other objections are potentially relevant as to whether I *should* grant the faculty but not, in my judgment, as to whether I *can* grant it.

iii. First, in my judgment, there is an issue as to whether areas D and E are open spaces at all and, second, there is a further issue relating to whether recreational amenities within an open space may be governed by different conditions or rules than other parts of the open space. The shared arrangement between the school and the Adventure Playground Association existed without legal challenge when areas D and E were being treated as open space (whether correctly or incorrectly) and was actually more restrictive than the PMA proposes since the public element was always limited to children presumably accompanied by appropriate adults who would not use the area for their own recreation.

R. DETAILED OBSERVATIONS BY THE PsO – the Management Agreement of 2009 (MA09)

i. The **PsO** submit that the **PrS** are averring that MA49 was varied by MA09 by excluding it from the site of the Garden Building and the hard-court area (D-G inclusive) and objects to that contention on a number of grounds. They say that later on the previous Rector and LBTH agreed that the variation had never taken effect since it purported to vary the 1949 charitable trust by reducing the area of open space land and had not received the authority of the Charity Commission and should no longer be relied upon, although it is said that this concession was tactical in nature. It is said that LBTH had received advice from leading counsel as to the ineffectiveness of the said variation. I have not seen and have no wish to see advice from counsel although, of course, any of the parties are entitled to make submissions to the court which, in effect, adopt the submissions of counsel if there is no legal constraint on their so doing. Advice is, of course, just that. Whether the Rector and LBTH accepted the advice is not conclusive of whether the contentions were correct.

ii. The proposition next put forward is that the Deputy had no jurisdiction to contend that an agreement reached between the parties identified *(none of whom*

*were SOS or the present **PsO** – as I understand it)* was invalid and that she was not free to find that MA09 remained "good law".

iii. If, as in the next submission, it is correct that the unvaried MA49 was (or needed to be) relied upon by what are called 'the building parties" in order to defeat the application for a Restoration Order, that might have *evidential* value (depending on the issues) but it is not of itself determinative of the legal effect. It might also have been a consideration in the prior proceedings if any question of abuse was raised.

iv. It is also submitted that the plan correctly identified the Garden Building as being part of the open space being managed by LBTH. It is suggested that no mistake (which the **PrS** claim was what had happened) is obvious from a reading of MA14. I note, and no more at this stage, that the draft annex marked "SCHEDULE 4" (scored out) and replaced by "Community Use" ***(C785)*** at clause 18 says: "The School shall be the Manager of the Building".

v. It is said that the Rector's attempt to terminate MA49 in June 2017 was invalid, since MA49 had already been replaced by MA14.

S. DETAILED OBSERVATIONS BY THE PsO – Analysis of the Present Position

i. It is submitted that the CCDL is bound to accept MA14 as being "valid". It is also submitted that MA14 was approved by a faculty of 2014. I assume that is a typographical error. There is no faculty of 2014.

ii. My attention is drawn to the fact that the **PsO** argue that LBTH could not lawfully grant a licence to the CCPS.

iii. Submissions were advanced to show that LBTH accepted it was the open space manager until MA14 and therefore that it is an abuse of process to support a petition based on the fact that there is no current MA. I do not follow this argument if I have correctly understood it.

T. DETAILED OBSERVATIONS BY THE PsO - Difference between LBTH OS and Church 'non-OS' Management

This has already been summarised in the **PsO** broad submissions. I do not find it to be a matter for this judgment. The concluding part of this section is saying, more centrally, that the division of the churchyard into open space and non-open space areas would worsen the management issues. Whether that point has any validity is really directed as to whether I *should* grant the faculty as opposed to whether I have the jurisdiction so to do. Of course, I make clear that this is not in any way a criticism of the **PsO.** These submissions were directed to the faculty application as whole.

U. DETAILED OBSERVATIONS BY THE PsO - Comments by the PsO on what are said to be the PrS contentions about MA09 and MA14

i. It is said that the **PrS** contend that the Deputy ruled that MA09 varied MA49 by excluding from it the Garden Building and the school playground but that this cannot be advanced because the Rector and LBTH agreed that the variation

had never taken effect because permission had not been given by the Charity Commission. That does not, in my judgment, affect what the Deputy did or did not rule.

ii. The **PsO** contend the Deputy had no jurisdiction to contend that MA49 was invalid and that the CCDL had to accept it as a valid contractual agreement. It follows the Deputy "was not free" in ecclesiastical law to find that MA09 remained valid.

iii. The **PsO** contend that the **PrS** position on this topic (that the plan attached to MA14 showing the excluded land as being part of the open space managed by LBTH was in error and contradicted by what was written in MA14) is flawed because MA14 replaced MA49 in its entirety, that what was written in MA14 was simply confirming that the same area was being managed by LBTH and that the plan is correct unless rectified in a High Court civil action. The **PrS** contend that the Deputy's judgment in respect of this issue was not quashed by the CA and therefore stands. The **PsO** say that CA dealt with specific issues for which it granted permission and that this point has not been argued on appeal.

iv. The **PrS** contend that the Rector in any event terminated MA49 by his letter of June 17, 2017. I am not going to repeat the **PsO** contentions which have been sufficiently stated already. I note that it is said that the purported termination was fraudulent because of motives ascribed to the **PrS.** The question of whether the Deputy was correct that MA14 was authorised by faculty (or not) is raised in this context as well.

v. The question of whether areas F and G should be included in the open space by reason of whether the Garden Building would exceed the permitted proportion of building on an open space is not fundamental to the question I have to decide since (a) the Garden Building is there at present and the CA has decided the period of time during which it may continue to exist and (b) it is the **PrS** undertaking and intention that areas F and G should be open space after the demolition of the Garden Building in the same way as areas A, B and C. I am asked to consider whether the school is a trespasser in the Garden Building by virtue of the quashing of the licences. I am not asked to make a judgment about this in my legal ruling, but, in any event, the judgment of the CA in respect of how long the Garden Building may exist as a school until it must be removed is clear and binding on me.

vi. On the issues before me, I cannot see that the approval of the Charity Commission is or was required – a point that is made a number of times. The question of whether the undertakings add anything to existing legal obligations or were offered with ulterior motives is irrelevant to what I have to decide.

V. DETAILED OBSERVATIONS BY THE PsO - The Approach of the CCDL in considering the Proposed Management Agreement (PMA)

i. The use of the powers of management to be exercised by LBTH must first have been authorised by the Charity Commission.

ii. Any breach of a relevant civil statute is a breach of ecclesiastical law.

iii. The CCDL must take into account any breach of ecclesiastical law inherent in the PMA.

iv. The CCDL is not otherwise concerned with whether the PMA complies with OSA06 or the 1967 Act, but if a breach is inevitable or possible the CCDL should not permit the faculty authorising it to pass the Seal.

v. If it is possible that a breach of ecclesiastical law that does not amount to a breach of the civil law may be occasioned if the faculty is granted, then the court would have a discretion whether or not to grant it.

vi. The CCDL must consider whether MA14 is based on any breach of ecclesiastical law and whether any contemplated or potential use by LBTH of its management powers will breach ecclesiastical law in the future. *The **PsO** do not explain how I would divine what ecclesiastical law will be in the future, so I imagine they are meaning existing ecclesiastical law.*

vii. The CCDL should treat MA09 as irrelevant due to a leading counsel's view of its legality, the Rector's view of that advice, and the signing by the Rector of MA 14.

viii. The school is now a trespasser in the Garden Building.

ix. The declaration by the Deputy that LBTH was no longer the open space manager is void and of no effect as it purports to recognise MA49 as providing for the management in its reduced size. The error in varying the boundaries of the space in MA09 was acknowledged in MA14. LBTH needs to enforce the Restoration Order under MA14.

W. THE PrS RESPONSE - Response to Particulars of Objection by PsO – April 27, 2020

i. The **PrS** say that they are obliged to seek this faculty because of the undertakings they gave to the CA, which court accepted both undertakings in the form given and that it is an abuse of process for the **PsO** to try and reopen matters litigated before the CA.

ii. The **PrS** state that MA49 covered all of the churchyard from Commercial Street in the west up to the historic boundary with the school and rely on the Deputy's judgment of December 17, 2017 in which she declared that MA49 was varied by MA09, excluding all of the land now the site of the Garden Building and school playground *(i.e. areas D-G)* from the management of LBTH under OSA06 and declared the same in her Order and emphasises that this part of her Order was not quashed.

iii. The **PrS** dispute that MA14 terminated or replaced MA49 and submit that it confirmed that the management of the gardens should continue to be the responsibility of LBTH pursuant to OSA06. It is conceded that this does refer to a plan which includes areas D and E *(and presumably F-G)* but it is said that if this area had been excluded by MA09 then these areas cannot *continue* to be the responsibility of LBTH and that, in any event, the decisions of the Deputy and the CA put that beyond doubt.

iv. The **PrS** also aver that the Rector terminated the MA over *all* of the land that had been the subject of MA49 even prior to MA09. The Deputy concluded that he did not need a faculty to terminate an MA by right of his ownership of the churchyard.

v. Therefore, say the **PrS** there has been no MA under OSA06 since June 2017 and this land has not been public open space. *That would seem to be two separate contentions: there has been no MA since 2017 and none of the land has been open space since then.* The undertaking by the Rector stated that he and the PCC would enter into a new MA under OSA06 covering areas A, B and C, subject to the grant of a faculty. Following demolition of the Garden Building

the land on which it stands and its curtilage will become subject to the MA with LBTH.

vi. The **PrS** do not accept that the 1859 faculty was to create an open space trust. A faculty is not competent to create a trust. It is submitted that the first open space designation of the part of the churchyard not then occupied by the school was MA49 which was terminated in part by MA09 and wholly by the termination in 2017. Additionally, areas F and G (the curtilage of the Garden Building and the Garden Building itself) will be incorporated into the open space once the Garden Building is demolished. Since it is argued that the petition does not relate to areas F and G, involvement by the Charity Commission is irrelevant.

vii. It is said that the CA invited the undertakings, and that the **PrS** undertook to enter into the PMA which, combined with the need for a faculty before entering into the PMA, made them bound to apply for the faculty.

viii. The **PrS** say that they had originally intended to exclude areas D and E from the PMA, but, because of a previous representation, they agreed to provide a guarantee as to the future status of D and E should the school close at any point, but should the **PsO** not be seeking comfort and if the court is not content with the licence-back to CCPS, areas D and E should not feature in the PMA.

X. CCDL's First Directions – January 27, 2022

i. Following correspondence from the **PsO**, I directed that the **PrS** indicate in writing whether they intended to proceed with the petition and, if they did, to provide the CCDL with any amendments and to serve an amended petition on the CCDL and the **PsO**. And for the **PsO** (on receipt) to indicate whether they agreed that the any changes could be by amendment or (in their submission) needed a fresh petition.

Y. THE PrS RESPONSE TO THE FIRST DIRECTIONS – February 18, 2022

i. These were introduced with a Note to the Court dated February 18, explaining that the request was for a simple petition for the PMA under the OSA06 covering the majority of the consecrated ground in question and advanced in order to comply with the undertakings given to CA and regrets the delay which includes the period of the pandemic. The **PrS** stated that they would prepare a fresh petition if the CCDL would not permit proceeding by an AFP.

ii. Second, the **PrS** said that in the intervening period, there had been a change of Rector.

iii. The **PrS** contended in the Note that the original undertaking to the CA only covered areas A-C. The **PrS** say that the SOS were very anxious to clarify the long-term status of areas D-E although agreeing that the school could continue to use them as a playground.

iv. It was said that LBTH has used a "licence-back" arrangement before for open space to meet this kind of circumstance. The **PrS** ask that if a licence to occupy (for the school) is not approved then the licence aspect be withdrawn and areas D and E be excluded from the PMA.

Z. THE PsO RESPONSE TO THE FIRST DIRECTIONS – March 3, 2022

i. The **PsO** raised what they said were various procedural errors in the AFP (which are not the subject of this judgment) and set out their reasons for contending that the AFP should be withdrawn and a fresh petition served. It took issue with various statements made by the **PrS**.

AA. CCDL's SECOND DIRECTIONS OF MARCH 29, 2022

i. I granted the **PrS** permission to amend the petition as requested provided there was another period of Public Notice for 28 days. I then gave a list of items that needed resolution before a full Directions Hearing and selection of a date for the final hearing.

ii. Following correspondence suggesting that a preliminary ruling of law would be of assistance to the **PrS** and **PsO**, I decided that under FJR 18.1 – (2) (k) and (j) the court may (k) decide the order in which issues are to be tried and (j) direct a separate trial of any issue.

iii. I directed that the process would begin by (a) the **PrS** being requested to answer questions relating to the preliminary legal point and (b) the **PsO** being requested to respond to those answers. I directed and subsequently was assured that all of the **PsO** were content to join in the submissions made by SOS.

BB. CCDL's THIRD DIRECTIONS OF MAY 30, 2022 AND THE PrS ANSWERS OF JUNE 21, 2022, THE PsO RESPONSE OF JULY 12, 2022 AND PrS SHORT RESPONSE OF JULY 28, 2022

i. The first question was whether in Sections 9, 10, and 11 of the OSA06, the churchyard was both a disused burial ground and open space land. If the answer is "no" for each area, A-G, what provisions of the OSA06 were relied upon in support of a negative answer? Subject to the answers given was the entire churchyard land immediately prior to the issue of the amended petition subject to being open space land and/or held in an open space trust pursuant to OSA06? If not, how did such an area lose its status?

ii. The **PrS** answered that the entire churchyard is a disused burial ground within OSA06. The entire churchyard was consecrated in 1729, closed in 1857 and 1859. The present school was built on part of the churchyard and the remainder of the land is not open space within the meaning of OSA06 because the Garden Building would exceed one twentieth part of areas A-G, but that upon its demolition area A-G will become open space. MA49 provided for the control of the churchyard to be to Stepney (subsequently LBTH). Such an agreement would come to an end when the agreement provided for that or upon subsequent termination of the agreement of one of the parties. In 2009 Areas D and E ceased to be subject to the control of LBTH by agreement between the Rector and LBTH (MA09). In 2017, the remainder of the churchyard ceased to be subject to the control of LBTH by the termination of MA49, a termination that was accepted by LBTH. The Deputy rejected the submissions of the **PsO** that the

churchyard continued to be subject to the control of LBTH by virtue of MA49. The **PrS** say that areas D and E lost their status as open space by virtue of MA09 and the Rector's termination in 2017.

iii. The **PrS** were asked to say (separately) which parts of which paragraphs of the undertakings given to CA were relied on in the AFP and which undertakings were relied upon.

iv. The **PrS** answered this question jointly – in other words indicating that their position was held in common – they rely on all of the undertakings. The **PrS** make the point that they view this question as having arisen because of opinions expressed Mr Anthony Thornton (His Honour Anthony Thornton) which the **PsO** submitted as part of their documentation. Whilst, of course, any party is free to adopt a point made by anyone as his, her, its or their point, I should make clear, to be fair to Mr Thornton, that these were views he expressed in an opinion that was part of the 'to and fro' of negotiations between the parties. He is not a party himself and nor has any party sought to adduce expert evidence from him.

v. The **PrS** contentions were sought as to what was meant by §6, 9(b) and 10 of OSA06, whether "open space" and "burial ground" referred to in §6 and 10 of the Act were capable of referring to part of the open space land. If so, the **PrS** were asked to identify which parts were held apart, by what mechanism and whether any conditions were relied upon in support of any such contention, what was meant by "persons interested therein" in 9(c) and "powers of management" in §11(1).

vi. The **PrS** contend that §6 provides that an <u>owner</u> may convey a disused burial ground to a local authority or grant a lease of it to the local authority or give the local authority control of it by agreement. If the land is conveyed to the local authority or leased to it, the local authority acquires a legal interest thereby. If the local authority merely acquires control by agreement, it can still exercise over the land the powers contained in §9 and 10 of the Act. §20 of OSA06 should be read as applying to the land that is brought forward by an owner for possible management and maintenance under the Act. This may include part of a disused burial ground. The land on which the Garden Building was built is not open space (within the meaning of §20). The designations of areas A-G is to assist description. Originally the intention of the **PrS** was to agree with LBTH the management of areas A, B and C. D and E were then added (subject to licence back to CCPS). F and G would become part of the managed area after demolition.

vii. The **PrS** put their submissions on the issue of a "person interested therein" (§9(c)) in this way: the local authority may make an agreement with any person authorised by the Act to make an agreement (i.e. the person expressly so authorised, namely the owner) who in the case of §20 is "the person in whom the freehold of the burial ground is vested whether as an appurtenant or incident to any benefice or cure of souls or otherwise." This person is said to be the Rector. The local authority may also make an agreement with someone otherwise authorised to make an agreement under the Act. The local authority might also make an agreement with someone else who is not the owner but has a legal interest in the land. Powers of management are those identified in §9(b) and 10.

viii. The final areas asked about were whether there were any restrictions on LBTH holding the powers of management referred to in §6 and 9 simultaneously with holding open trust obligations of administration and maintenance under §10.

The **PrS** answered in the negative and contended that the powers under §10 were additional to the power under §9.

ix. The final question was whether the administration and maintenance of areas held in trust pursuant to §10 could be varied, added to, reduced in size or terminated and, if so, by what mechanism. The **PrS** said in this case it was (MA09) and the remaining arrangements were terminated by the Rector's June 22, 2017 letter.

x. The **PrS** in conclusion stated that they thought it may be more helpful for the court to address the overriding issue – the power of the court to grant the faculty which the **PrS** seek. It was thought that this may also commend itself to the **PsO**.

xi. The **PsO** responded to these answers on July 12, 2022 enclosing appendices of a site plan, a chronology and the open space memorandum from Anthony Thornton to which I have already referred.

xii. They considered that the central issue for the court to engage with is whether a statutory trust was created in 1949 under §10 of the OSA06; whether that statutory trust still exists over the entire churchyard land (A-G), if so what the correct (and lawful purpose) is or was for ending such a statutory trust, whether any prescribed process (if one exists) has been followed. The **PsO** say they further rely on §146 of the Public Health Act 1875 which is said also to be relevant as to whether a statutory trust exists and, that, finally, that there is a jurisdictional issue: namely whether a petition which involves the creation, variation or termination of an open space trust can lawfully be determined by the Consistory Court in the sense of whether an open space trust (or any statutory public trust) has been terminated where it is contended that there is no statutory mechanism for so doing.

xiii. The **PsO** say that the **PrS** contention is that the trust must be capable of being terminated by clause 8 of MA49, particularly when they allege that LBTH was in breach of its obligations to fulfil the statutory objects of the trust. This relates to the Rector's termination letter of June 2017. The **PsO** agree that there is a lack of authority or legislation from which helpful analogy can be drawn but that guidance in the case of *Day* [2020] EWCA Civ 1751, Court of Appeal (Civil Division) on appeal from the Queen's Bench Division Planning Court [2019] EWHC 3539 (Admin) demonstrates that the trust "established in this petition" is clearly a statutory public one. At the stage of these submissions, the case of *Day* had been appealed from the Court of Appeal to the Supreme Court. The Supreme Court gave its decision {*R (on the application of Day) v. Shropshire Council (Respondent)* [2023] UKSC 8} on March 1, 2023.

xiv. The question arose, therefore, as to whether I should postpone ruling on any preliminary legal points until such time as *Day* had been decided, about which there were a number of possible views. I decided initially simply to keep an open mind about possible guidance and assistance from that source as I examined the evidence and the arguments. Given that a period of time occurred when I awaited a cross-referenced electronic bundle that the **PsO** were kindly preparing voluntarily and the fact that the likely decision in *Day* was (in lawyers' terms) imminent, I concluded it would be more sensible to await the final decision in *Day* from the UKSC and permit the parties to make submissions thereafter. I will turn to *Day* as a separate item in due course.

xv. In any event, at this stage of submissions, the **PsO** put their principal argument in this way. They said that a statutory trust could only be terminated by

reference to statutory provisions identifying the terms in which such a termination might occur. They considered also the provisions of LGA72 which the **PsO** argue is not of assistance since LBTH is not the owner of the churchyard and that to terminate it in any other circumstances would require an Act of Parliament or (if that is incorrect) an application by an aggrieved person (or the church) to the High Court for variation or termination. If this is wrong, in the further alternative, the **PsO** say that an application could be made to the High Court (Chancery Division) to determine how the trust could be terminated or varied and that until one step, both steps or all of these steps have been taken the CCDL has no jurisdiction to decide whether the trust has or has not been terminated, this being a matter of civil, and not ecclesiastical, law.

xvi. Finally, the **PsO** said that even if the §10 OSA06 trust was terminable and has been terminated, the land does not cease to be open space or a trust under other legislation and that whether in fact the land is open space is a matter for the civil courts.

xvii. The **PsO** concluded in respect of the jurisdictional issue by stating first, that it is the **PrS** who must satisfy the court that the manner in which they claim the trusts have been terminated is correct and lawful and that I should direct them to explain what actions they took or should have taken in respect of these issues.

xviii. In their responses to the **PrS** answer, the **PsO** say that the churchyard (A-G) meets all the definitions in §20 of the OSA06 and has done since the late nineteenth century, that no faculty is required to create an open space and that the law applied immediately and automatically once the Royal Assent was granted to the relevant statute(s) and that the size restriction is not applicable to the Garden Building since it post-dated the earliest date that the **PrS** contend represented the termination of the §10 trust. It is said that §9 cannot be invoked by the **PrS** as LBTH holds no interest in the land A-G. §6 is said to be applicable and, in this case, it is said that the "necessary agreement" was set out in the 1949 Deed. It is said that the agreement "preserved" the Burial Ground as an open space that was accessible to the public and under the control of Stepney and subsequently LBTH. It is said that this control created the §10 trust and the necessary approval under §11(1) was given by a faculty authorising the 1949 Deed. It is said that §6 concerns a *burial* ground and relies on its wording to demonstrate that fact. It is said that relevant section that defines the land is contained within §336 of the Town and Country Planning Act 1990, given that CCPS was granted planning permission for the Garden Building pursuant to §57 of that Act.

xix. It is said that a public walk for recreational use was created within the entire churchyard land in perpetuity by the 1859 agreement with the PCC.

xx. The **PsO** contended in their observations to the **PrS** response that the 1949 deed (approved in accordance with §11(1) by faculty) caused the land to be managed in a §10 (OSA06) trust and that §9 cannot be invoked by the **PrS** as it requires LBTH to hold an interest in the land which it does not.

xxi. In summary, the **PsO** argue that clause 1 of the 1949 deed is clearly a §6 OSA06 agreement referring to the entire care, management and control of the disused burial ground. This is not a reference to §9(c) of the Act but is part of the agreement under §6 giving the public access to the burial ground which may provide for the local authority's control of the land and (in that eventuality) impose a §10 trust over that land which *necessarily* involves management, care

and maintenance of the trust as part of its purpose. In short, it is said that the 1949 deed enabled the §10 trust to come into being.

xxii. The **PsO** urge attention to the drawing of a distinction between the existence of an open space over the churchyard land and a §10 trust over that land. They say that MA49 identified and recognised that the churchyard land was to be held in a §10 trust by its wording which mirrors that in §10 (a) of the OSA06 and that the trust as a creature of statute can only be terminated by the statute or another statute.

xxiii. The **PsO** say that the **PrS** appear to assert that the §10 OSA06 trust no longer exists because of:

(i) The 1987 licence;
(ii) MA09;
(iii) MA14;
(iv) The 2017 termination by the Rector;
(v) The judgment of the Deputy, having heard the same or similar arguments from the then Parties Opponent, as from the **PsO** in respect of this AFP; and
(vi) The Undertakings given to CA.

xxiv. The **PsO** have already made their position clear on a number of these issues. Their overriding assertion remains that the trust that arose under §10 of the OSA06 and could not be terminated as the **PrS** claim happened.

xxv. The **PsO** say that the termination by the Rector in 2017 is only the termination of the managing agreement and that it did not and could not terminate the §10 trust.

xxvi. The **PsO** say that LBTH was a trustee of the open space trust and had no authority to terminate its control of the churchyard land.

xxvii. The **PsO** observe that irrespective of the fate of the §10 trust, there is also a trust arising from the Public Health Act 1875. I am not sure whether this is said to be in addition to what the **PsO** say is a trust established in 1859 or the same trust protected by the 1875 legislation. This did not form part of the specific questions posed by me in the Third Directions. In any event, for reasons I will explain in my decision, I consider that the operation of any open space trust on this land is governed by the OSA06 alone.

xxviii. The question of control is dealt with in the next question that was posed; the **PrS** argue that "control" in §6, 9(b) and 10 of the OSA06 is something which falls short of acquiring a legal interest but entitles LBTH to exercise the powers contained within §9 and 10 of the OSA06.

xxix. The **PsO** in their response agree that control is not (or falls short of) an interest in the land but they define it as "the means whereby a local authority is able to influence and dictate how both the open space or burial ground land can be administered and looked after so as to remain an open space and burial ground and fulfil the purpose of a trust created by §10." The land must be open to the public for the sole purpose of recreation, maintained in a good and decent state, and LBTH are not permitted to "shed" any or all of the trust's purposes, nor permit it to acquire or hold land so as to turn it into land that is no longer an open space or burial ground. Control cannot be given up or shared with another except as permitted by statute. In short, LBTH and whoever has partial control of the land must between them control as much of the open space or burial ground as fulfils the definition of that land under the OSA06.

xxx. The next question posed was whether the "open space" and "burial ground" referred to in §6 and 10 of the OSA06 are capable of referring to part of the open space land and, if so, which areas are held in which part, identifying when and how that happened and whether there were any express or implied conditions in relation to each area. The **PrS** aver that §20 should be applied to whatever land is brought forward to be managed and maintained under the OSA06. Part of a disused burial ground may be managed by a local authority under the Act, the Garden Building does not stand upon open space, within the meaning of the Act and there is no formal designation for different parts of the land, the designations A-F being for convenience in identifying different areas. The OSA06 is set out in plain and ordinary language and should be read as such.

xxxi. The **PsO** contend that the wording of §10 refers to the entire open space or burial ground because it would have otherwise referred to the possibility of it being partial as in §9. The disused burial ground must have once been a churchyard by reason of having been closed for interments. Such land must therefore be subject to an agreement with, in this case, LBTH allowing the public to have access to it and preserving it as an open space under LBTH's control.

xxxii. The **PrS** contend that "persons interested therein" in §9(c) are anyone with a legal interest in the land. The **PsO** give a relatively lengthy explanation, although agreeing that it means those with a legal interest in the land, but go further to say that a legal interest could extend to an equitable interest. It follows they say that CCPS does not have a legal interest, save as beneficiaries of the trust (i.e. members of the public who are beneficiaries of the trusts).

xxxiii. In respect of "powers of management" the **PrS** say these are the powers identified in §9(b) and 10. The **PsO** say there is a hierarchy of control: i) administration that only LBTH can undertake; ii) superintending of new work and maintenance and ensuring it is carried out properly and iii) maintenance, carrying out of new work and keeping the churchyard tidy. It is said that management functions are in the middle of this hierarchy and require a faculty to approve their exercise before they can be carried out. The **PsO** say that this is because of potential disturbance to remains.

xxxiv. The parties answer the question as to whether LBTH may hold the management powers in §6 and §9 of the Act simultaneously with holding open space trust obligations of administration and management in §10 that **(PrS)** there are no restrictions and no suggestion that the public trust can be held apart from powers of management with the added comment that since the three concepts of administration, management and maintenance overlap, it is not practicable to compartmentalise them.

xxxv. The question as to whether the administration and maintenance of the areas held in trust to §10 may be varied or terminated and, if so, how was answered by the **PrS** by saying that the area of the churchyard land was reduced in size by MA09 in the judgment of the Deputy before the remaining area was terminated by the Rector. The **PsO** answer that variation is possible provided it does not change the Management Arrangement's purpose. A faculty would be required, it is said, if the burden on the land would be significantly altered by the variation. It is said that the area or size of the OS cannot be terminated or reduced without statutory authority and that such statutes that would permit it are not applicable to this particular land.

xxxvi. The **PrS** gave a short response dated July 28, 2022 in which they argued against what they claimed was the submission of the **PsO** that the Consistory Court had no jurisdiction to determine whether the 1949 trust was still subsisting which they argue is fallacious in that it is necessary on occasion for the ecclesiastical issue arising to require the Consistory Court to determine issues of secular law.

CC. FURTHER DIRECTIONS – "PROGRESS OF 3rd DIRECTIONS

On September 2, I gave further Directions described as "Progress of 3rd Directions" which were substantially drafted on August 22, 2022 in which I stated that the jurisdictional issue raised by the **PsO** required determination at the outset. I noted that this issue was bound up in questions relating to the subsistence or otherwise of a statutory trust of 1949 relating to the churchyard. In my judgment, this too was a fundamental issue that needed determining. The parties agreed that these issues would be conveniently dealt with as preliminary points of law. Both parties were content that these issues should be determined as preliminary matters of law; no party requested an oral hearing. Having given some directions as to process, I agreed that I would either deliver judgment on these issues or seek further submissions on specific aspects, either in writing or orally.

DD. THE PsO FINAL REPRESENTATIONS – SEPTEMBER 30, 2022

i. The **PsO** submitted what were described as "Final Representations" on September 30, 2022. This is an extensive document of a further 35 pages. It contains some repetition of points already made. This is not a criticism; simply an observation. It also contains some fresh observations and submissions, some of which I consider to be far outside of the matters I am required to consider in this preliminary judgment. Where these responses relate to (a) the Deputy's Judgment; (b) the CA decision and the Undertakings and (c) the Supreme Court case of *Day*, I will deal with them as separate topics.

ii. The **PsO** emphasise the limits to the CCDL's jurisdiction and remind me of §7(1)(a) of the EJCCM ***(D1712-14)*** together with *Halsbury's Laws* and argue that the CCDL is bound by existing civil law in the exercise of its discretion.

iii. It is said that the grant of a faculty would breach §10, 11 and 20 of the OSA06, §164 of the PHA75 and Paragraph 4(1) of the SSFA and that the CCDL would exceed its jurisdiction by "endorsing" or "legitimising" the unlawful termination of the Open Spaces Trust, the Public Health Trust and the relevant provisions of the SSFA. It is said that a faculty is not needed to protect the relevant land. The **PrS** are accused of not engaging with the jurisdictional issue.

iv. In these submissions, the **PsO** argue that the three matters that fall to be determined by the CCDL are the termination issue of 2009 in relation to areas D-G, whether §11(1) of the OSA06 provides the means by which the open space is managed and whether the arrangement sought in the petition can proceed under §9 of the OSA06 as, it is argued, neither LBTH nor CCPS has an any interest in the churchyard land. They challenge the **PrS** interpretation of the meaning of management.

v. The **PsO** emphasise that a statutory trust is a trust imposed by a statute in specific circumstances and arises automatically when the relevant statutory criteria are fulfilled citing *Day* and also *Burnell v. Downham Market* [1952] 2 QB 55 at page 65. In a statutory trust where land is used by the public for its recreation, it is said that the public are its beneficial owners and that the public must be allowed free and unrestricted use of it. Authority is cited for that proposition.

vi. The **PsO** dispute the **PrS** contention that the Garden Building's size serves to cause control of an open space to be lost. If a remedy is needed, then the answer is to demolish it: the error in describing the land as unconsecrated in the 2011 faculty petition (leading to the 2012 faculty) was that of the Rector and the church is the author of its own misfortune. It is said that it would be outside the CCDL's jurisdiction to consider the 2019 petition since it could only do so if the petition was based on the churchyard land being an open space.

vii. Submissions are made about the role and representation of LBTH. In my judgment these issues lie outside of the preliminary legal issues I am asked to consider, even if they lie within the remit of the CCDL at all. If the court concludes it has the jurisdiction to decide the faculty petition, then I am urged to use my discretion not to grant it. I repeat that I am not deciding here whether I *will* grant the faculty (and if so with what – if any -- Conditions) but rather whether it is open to me to consider the faculty petition in the first place – the jurisdictional issue.

EE. REMAINING SUBMISSIONS – REPLIES BY THE PrS DATED OCTOBER 20, 2022 AND A FURTHER SHORT RESPONSE BY THE PsO DATED OCTOBER 28, 2022

i. The **PrS** interpret the submissions by the **PsO** on jurisdiction to state or imply that the CCDL has no power to determine whether the grant of a faculty would necessarily involve any breach of secular law and must refer the matter to the secular courts or decline to consider the faculty until such adjudication has occurred. The **PsO** deny that this is their assertion.

ii. The **PrS** answer the **PsO** assertion that the churchyard is subject to two open space trusts (§10 OSA06 and §164 Public Health Act 1875) and the proposition that neither have been *(or can be)* terminated by a decision of the **PrS** by saying that there was an open space trust under OSA06 but that the Management Agreement was terminated and, with it, the trust. The **PrS** do not accept that there ever has been an open space trust under the 1875 legislation but argue, in the alternative that if there was, it was terminated by the same action in 2017.

iii. The **PrS** accept that the 1949 Deed of itself does not appear to contain any power of termination of the open space status of any land covered by it, but argue that the Rector and LBTH could bring it to an end by an agreed variation. They say that MA49 could be terminated for breach and that this eventuality is contained within the 1949 Deed.

iv. The **PsO** also say that LBTH cannot grant a licence to areas D and E because CCPS has no interest in the land but the **PrS** disputes that this prevents LBTH from granting CCPS a licence. They also say that the purpose of including the proposals to add Areas D and E was to give comfort in respect of the position should the school close: namely that it would become an open space. The **PrS**

say that should the court be unpersuaded in respect of its proposals relating to areas D and E and not wish to include those areas within the faculty, then this is not central to their petition.

v. The **PsO** gave what they termed a 'short' response of 12 pages. They deny that the interpretation given by **PrS** as to the **PsO** jurisdictional objections are correct and state that the objection is two-fold: (i) the CCDL cannot consider this petition because it is not seeking authorisation for "an act relating to land or to something on, in or otherwise appertaining to land" and (ii) because, additionally, the statutes relied upon will be breached if the contents of the proposed management agreement were to be permitted. *I comment at this stage that I had hitherto understood (ii) to be the main objection to the CCDL granting a faculty.*

vi. The **PsO** argue that the petition seeks authorisation for a new management agreement pursuant to §6 of OSA06 and that the petition itself does not refer to works relating to the churchyard land (on, in or appertaining to it) and that the management of the churchyard land does not involve seeking specific permission for an act or acts relating to land (or one that is in, on, or appertaining to land) and repeat previous arguments as to the operation of §9 and §10 of OSA06 arguing that §9 is inapplicable to the petition.

vii. In respect of the 1949 Deed and MA49, the **PoS** stress that that the trust and the management agreement are two different things and that terminating the latter does not vitiate the former.

FF. THE DEPUTY'S JUDGMENT

i. I turn now to the Deputy's Judgment and its status in these proceedings.

ii. She was determining a petition for what was termed a confirmatory faculty to authorise the retention of the Garden Building and an application by the (then) Parties Opponent - whom I shall call SOS to avoid confusion – for a Restoration Order to restore the *status quo ante* before the Garden Building was erected. Many of the matters reviewed, analysed and decided upon are not relevant to my task except as explanatory narrative. I note that the churchyard in the past is said by the Deputy to have become (at the time of her visit) a magnet for drug dealing and vagrants. I note that the removal of public lavatory facilities is often justified by the availability of such facilities in cafés and the like. Vagrants are not always welcome in such places: that poses another potential management problem for the churchyard on which I do not need to dwell. At ***(C842)*** the Deputy sums it up by saying "when under the public management of LBTH this graveyard has been a failed disgraceful slum of an open space…For well over a century the public have abused this graveyard. Public management by LBTH has done virtually nothing to stop this."

iii. The Deputy observed in respect of the 1859 closure that it "did not freeze the graveyard for ever as a secure open ground…within 15 years about one-third of this graveyard became built on and used as the current church school. Competing needs had to be balanced, then as now" ***(C867).*** She explains how the Metropolitan Gardens Association provided protection but without much success and quotes Jack London's description of it in 1903 including the phrase "a welter of rags and filth" ***(C871)***. Its nadir was in the 1950s and the revival of the building after 1959 is all detailed by the Deputy.

iv. The development of the Adventure Playground in 1968 is a significant moment in the history of the churchyard and was concerned with building a youth centre on part of the land next to the school. I share the Deputy's doubts about the legality of this construction (by reason of the Disused Burial Grounds Act 1884) but, like her, I agree that the fact that it went legally unchallenged and was in due course demolished requires no judgment on that aspect. I do not need to consider the detail of this development in the way done by the Deputy, but I note the Deputy's view that this area (whether within an area of open space or not) restricted entry to a sub-class within that of the general public, namely the children and accompanying parents drawn from members of the general public.

v. According to the Deputy, LBTH initially refused outline planning permission (loss of amenity of a quiet open space and adverse impact on the view of the south side of the church). Eventually (and after revisions to the original plans) it was recommended for a period of 5 years. In the end, the 1970 licences under faculty were granted for the adventure playground. The Deputy was shown (another) undated and unsigned draft Deed in which the Rector permitted LBTH to grant in a form annexed (but not placed before the Deputy) a licence to the trustees of the adventure playground to erect buildings as a recreation centre for children. The Deputy noted that it was provided that the 1949 Agreement was to continue in full force and effect *save* as to that part of the churchyard the subject matter of the licence. The faculty passed the Seal on April 16, 1970. As far as I know the grant of this faculty was never appealed.

vi. The Deputy said this: "As conceded during the hearing on behalf of the represented objectors, and not disputed by those acting in person, LBTH appreciated that their management of the graveyard as open space could be terminated, here so that the school could receive the benefit of formally, through ILEA, becoming the owner of the land. The school and the youth club/adventure playground would share its use."

vii. Thus, a licence was granted to ILEA for the use of the adventure playground and for shared use by the school. The faculty was granted in April 1987. The shared use of the playground was to terminate on March 31, 1992 and the licence was not to interfere with the exercise by LBTH of its rights and powers under MA49 and authorised by the faculty of that year. The Deputy noted that there was a termination clause for breach.

viii. The Deputy remarked: "So, by 1987, ILEA had a licence for the school to use the school playground extension and the council had surrendered it. However, the Christ Church Adventure Playground Association which had become known as the Christ Church Youth and Community Centre ("the youth club") obtained a licence to use the playground in 1970 via an amendment of the 1949 Deed. She noted by 2003 that this area of land between the school and what the Deputy described as the "wilderness land" served as a youth and community centre rather than an adventure playground.

ix. The Deputy's view of the evidence she received was that whilst the church was being restored, the youth club/adventure playground was going downhill. This came to a head in March 2009. The Rector, CCPS, LBTH and a number of others aimed to rid themselves of the failed youth club, provide enhanced building for CCPS (the Garden Building) and provide an improved public space.

x. The Deputy noted that by 2009, efforts were being made to sort out the issue of the legal ownership of the land next to the school that had been used by the

adventure playground/youth club and the Deputy noted the views of at least one solicitor as to the legal tangle that characterised this area of the churchyard.

xi. The Deputy made criticism of some aspects of the process followed to obtain the faculty of 2009 (September 2, 2009). She, in a passage which she underlined for emphasis, said this: "the agreement had to set out that the church, LBTH and the Diocesan Registry had all managed to lose the original and counterpart of the 1949 Deed and the originals of the 1970 agreement together with its draft licence and plan." She noted that areas which may have formed part of this respective land on the earlier plans were *ex necessitate* deemed. She also rehearsed the fact that the new agreement approved by faculty (paragraph 13.4) said that "the school in consultation with the council intends upon the grant of the interim licence to the school to use its reasonable and prompt endeavours, and to work with the Rector, towards the submission or submissions of the appropriate planning application(s) and obtain the requisite consents to redesign the gardens, the school and school grounds including building regulations, listed building consents and faculties as the case may be prior to the grant of a new longer term further licence in place of the interim licence being granted under this agreement, in the event of planning permission being obtained. It included a revision of the 1949 Deed by the Rector and council with the prospect of entering into a fresh management agreement when the school obtained satisfactory planning permission in respect of the redevelopment of the gardens at which time the parties would agree the full terms of a further licence to the school and a new management agreement with the council in relation to the gardens to get all necessary planning consents, listed building consents and faculties.

xii. Accordingly, although the faculty of 2009 is a freestanding permission and has never been appealed, it was in contemplation of the wider scheme to erect the Garden Building. It is not necessary for me to review the detail of what followed except to note certain key dates. Mrs Whaite, who is part of (and an important part) of the **PsO** in this present faculty application, and whom I had the pleasure of meeting when I viewed the churchyard on March 10, 2023 wrote to the Rector on August 10, 2010 (according to the Deputy) to say that the Friends of Christ Church Spitalfields ("FOCCS") would be objecting to the construction of the Garden Building.

xiii. The Deputy observed that from November 2010 "everyone was focusing on the…garden plans, but no-one appears to have given any thought to the legality or otherwise of how a new school building (with community use) could be built to replace the old building."

xiv. The Deputy noted that the trustees of CCPS applied for planning permission to demolish the youth club and to erect a new nursery and community building (the Garden Building) in its place and on July 16, 2011 the PCC resolved to apply for a faculty. Conditional planning permission was granted to the Rector and churchwardens on August 5, 2011 to demolish the existing youth centre and build a new nursery and community building in its place. Public Notice for a faculty was displayed from July 16 to August 12, 2011 and the Deputy said that no objections had been received and on November 8, 2011, the Rector and churchwardens applied for a faculty. The Deputy noted that on December 7, 2011 the Registrar informed the petitioners that the Objectors did not wish to become Parties Opponent, but wished to have their original letter of objection

taken into account. Seed Ch granted the faculty on February 13, 2012 and handed down his reasons on February 14.

xv. The Deputy then detailed the principal events that occurred after the grant of the faculty up to the point of an application by SOS (which had been formed in this period) for a Restoration Order seeking the demolition and removal of the Garden Building. On September 2, 2014 the Deputy says that the Chancellor approved by faculty the building parties' draft licence for the occupation of the school and that this licence was to stand as the "full management licence" referred to *(or perhaps, more accurately, presaged)* in MA09. The documents relevant to this issue in 2014 that have been produced before me are the Agreement and Licence [September 1, 2014] which I have referred to as MA14 ***(C776-791)*** and [September 4, 2014] the Licence Site Plan ***(C792-793)***. I have not been shown any faculty issued in 2014.

xvi. The history of the proceedings thereafter is well known to all parties.

xvii. There was a peculiarity in the Deputy's judgment. It was handed down on March 12, 2017. There was then a disagreement between the parties as to the form of the Order that should be made. This resulted in a further hearing on June 6, 2017. When a certified copy of MA09 surfaced on June 17, together with authenticated annexures, further submissions were invited which were made in writing. This resulted in a supplemental judgment of November 22, 2017 and yet a third judgment relating to costs and the form of the Order to be made. The final judgment, which promulgated all three judgments in final form, is dated December 17, 2017.

xviii. It is the supplemental judgment that is of particular relevance in the matters I have to consider. The **PrS** submit that the Deputy has ruled on the principal argument of the **PsO** already and that permission to appeal on that aspect of her ruling was refused by the Court of Arches. The **PsO** argue that her observations on the matters that are now raised again before me are wrong in law and in any event constitute *obiter dicta* as opposed to being part of the *ratio decidendi* of her decision.

xix. It is clearly important, therefore, that I examine with some care what happened that caused the Deputy to feel it necessary to give a supplemental judgment and the extent to which it assists me decide the status of the Deputy's findings.

xx. The Deputy said that "at the core of the parties' disagreement as to the terms of the Order was the status of the 1949 Deed. Mr. Seymour *(Counsel for SOS)* submitted that the 1949 Deed remained in full force and effect; that it was not in issue in these proceedings…" She said Mr Seymour argued that the consequences were that the Deputy had no jurisdiction to grant any faculty…in respect of the land on which the school stood, because of an on-going breach of the statutory trust under the OSA06. She explained how the 2009 licence document was discovered and sent to her the day after the first hearing in June 2017 and was part of the original of MA09 together with authenticated annexures, readable coloured plans and executed by the Rector. It appeared to be a copy of the part executed on behalf of the trustees of the Youth and Community Centre, the governing body of CCPS and the Rector. She was satisfied of its authenticity which, taken together with the other documentation allowed her to make findings about MA09, its consequences and effects.

xxi. She found first that MA09 varied whatever was the plan to the previously supposed, but now deemed, 1949 Deed to exclude from the management of LBTH all the land now the site of the new building and school playground from

the management of LBTH under OSA06 and that a faculty had been issued to authorise this. The parties to MA09 acknowledged "the absence of the original or satisfactory copies of the executed 1946 [*sic*] Deed and the 1970 Licence." The Deputy ruled that the 2009 faculty stood *in rem* and was binding. It has never been appealed and given that there were no Parties Opponent to its grant no appeal could or did arise.

xxii. The Deputy found that this disposed of the challenges that the Rector and LBTH were not entitled to do what they did (by excluding the areas in question) and that the 1949 Deed has no continuing effect over those excluded areas and that what the parties agreed was to deem the past regime and define the new. She also found that, although not necessary given her finding, that in any event the Rector had a right to terminate by virtue of his freehold right in the land.

xxiii. The Deputy explained that she had heard further submissions on the Rector's powers arising from his freehold interest, on the question of her discretion and the absence of a power to grant a faculty in the face of an on-going and continuing breach of statute. She rejected those arguments as she found that the MA09 terminated the open space management arrangements with faculty approval. She considered the case of *Re St Luke's Chelsea* [1976] Fam. 295 where the Rector had transferred his freehold to the local authority and where it was held that there was no jurisdiction to grant a faculty for a monument (having the character of a building) in a consecrated disused burial ground because of §3 of the *Disused Burial Grounds Act* 1884 and where the Chancellor said that even if he had a power to grant the petition he would, in the exercise of his discretion, have refused it. The Deputy accepted that the public open space element was a factor to be taken into account when the court's discretion was being exercised. She also considered *In re West Norwood Cemetery* [1994] P 210 that a confirmatory faculty cannot authorise an ongoing and continuing breach of statute but that, in her judgment, this was not what was happening here. She found that the effective termination of the open space arrangements over the site of the new building and the playground was by the Rector and that his action was authorised by faculty. What she termed the 'illegalities' of LBTH and the conduct of the Rector and churchwardens were part of the considerations she bore in mind when exercising her discretion.

xxiv. The Deputy referred to the fact that subsequent to the June 2017 hearing she had been informed that the Rector had now terminated in their entirety the open space management arrangements with LBTH although she confined her determination to the site of the new building and the playground. She made clear that had it been necessary for her to determine that issue (the Rector's termination) in the context of the Garden Building and the playground she would have arrived at the same conclusion in the exercise of her discretion and jurisdiction to protect consecrated land because, in short, "the open space management arrangements had failed for many years and were failing."

GG. THE APPEAL

i. Dealing with the Order (not related to costs), the Deputy (i) **granted** what was termed a confirmatory faculty to retain the Garden Building, (ii) **refused** to grant a Restoration Order, (iii) **declared** the area set on the plan (the excluded areas) had ceased to be subject to any arrangements for management by LBTH

under OSA06 or otherwise and (iv) **granted** a faculty authorising the use and occupation of the Garden Building without limit of time.

ii. The CA **quashed** (i) the grant of the confirmatory faculty, **quashed** (ii) the refusal to grant the Restoration Order, **left in place** (iii) the Order declaring the area set out on the plan (the excluded areas) that had ceased to be subject to any arrangements for management by LBTH under OSA06 or otherwise and **quashed** the faculty for occupation.

iii. Both the **PrS** and the **PsO** make observations about the significance or otherwise of the CA's decision in respect of (iii) the declaration. The **PrS** rely on it. The **PsO** say it is of no significance because (apart from the fact that it was a wrong decision and outside of the issues that the Deputy had to decide) they were not given permission to appeal it.

HH. THE UNDERTAKINGS

i. Criticism is made by the **PrS** of the Undertakings given by or on behalf of the governing body of CCPS, the Rector and churchwardens and LBTH and they fall into two categories: one, the substance of those undertakings and two, alleged breaches of them.

ii. I am not making any decisions on the Undertakings in this preliminary judgment. It will, however, be clear from the substance of my decision that I am bound by the rulings of the CA and the Order it made, whilst accepting that the responsibility for implementation lies with the CCDL.

II. THE CASE OF *DAY*

i. *R (on the application of Day) (Appellant) v. Shropshire Council (Respondent)* [2023] UKSC 8 was heard on December 7, 2022 and judgment was given on March 1, 2023.

ii. The question raised by the appeal was what happens to the public's right to use land when a local authority disposes of land in its possession (particularly where it has been land used for recreation) which is subject to a statutory trust, but where the local authority fails to comply with the consultation requirements of Sections 123 (2A) and (2B) of the Local Government Act 1972, provisions of which were inserted into that Act in 1980. These subsections provide that before disposing of land which is subject to a statutory trust under the PHA 1875 or OSA06, councils must advertise in a prescribed way their intention so to do and consider any objections. If the council disposes of land, having complied with the prescribed procedure, the land is freed from any public trust.

iii. I note that this would put a local authority (a public body that might be thought to have a particular role in protecting its local citizens' opportunity to enjoy recreational facilities) in a better position than a private individual who is the freeholder of land (and who has no such corresponding general public duty). Whereas the local authority can rely on §123 of the 1972 Act (if used properly), the private freeholder would have to obtain an Act of Parliament through a private bill. That would be an extraordinary position.

iv. The Supreme Court commented at the outset that recent events related to the pandemic (a pandemic which post-dated all the events with which I am concerned except the present petition) confirmed that "recreation areas" have a

"vital role to play in the physical and mental well-being of people living in an urban environment."

v. Lady Rose (giving the judgment for a unanimous court) rehearsed two particularly important considerations: first, that where local authorities have used powers conferred by the PHA75 or OSA06 *(I note Lady Rose did not say 'and')* to acquire and provide recreation land or open space to the public, the land is subject to a statutory trust. The public are its beneficiaries and its members have a right to go onto the land for the purpose of recreation.

vi. The second consideration, which must follow logically from the first, is that the powers of local authorities to dispose of land *in their possession*, "particularly land used for recreation" has necessarily been subject to limits imposed over the years.

vii. Immediately, there is clearly a major distinction to be drawn between the land, the subject matter of this petition, and the land being referred to in the case of *Day.* No-one suggests that LBTH (or its predecessor) ever acquired possession of the churchyard land in this case. The freehold remained and remains that of the Rector of Christ Church Spitalfields.

viii. Accordingly, that much of *Day* which is dealing with the position of a local authority such as Shropshire Council and the procedure that must be adopted to dispose of land being used for the purpose of recreation under the LGA72 cannot assist me. The **PsO** have set out their submission that LGA72 is irrelevant to this petition. I do not understand the **PrS** to dispute that contention and in any event and irrespective of the views of the parties, it is my judgment that LGA72 is irrelevant on this point as far as this petition is concerned.

ix. Furthermore, arguments around whether LBTH (or anyone else) failed to consider the question of whether, and if so to what extent, the churchyard land was an open space would be plainly untenable in this case. Considerable thought was clearly given to the question in 2009. The dispute between the parties is about whether the correct assumptions were reached by the petitioners in the 2009 petition and whether Seed Ch should have granted the petition. That in itself is dwarfed by an even more fundamental issue, namely whether, given it is clear the faculty of 2009 was never successfully appealed (or appealed at all as far as I can see) whether the same court (the CCDL) can act as a court of appeal in its own decisions well after the time for any appeal under ecclesiastical law has expired. Permission to appeal to the CA on the open space question was refused – a matter I will turn to in due course.

x. At paragraph 23 in the UKSC judgment in *Day*, the court cited a passage from the decision of the Court of Appeal Civil Division, in which the court observed that a §10 trust under OSA06 is a statutory construct in respect of which Parliament alone has determined the obligations and rights involved and that, should the purpose of the trust (the enjoyment of the relevant public space by the public) fail there are no residuary beneficiaries making *in that sense* (my italics) the land and the trust inseparable. Those passages are a useful reminder of an important principle and I read them as such.

xi. At paragraph 129, the court sets out the issues with which it is concerned. It describes the principal question raised by the appeal to be the effect of the relevant sections of LGA72 relating to the disposal of land and whether if, the notice requirements have not been observed, the land is still freed from the statutory trust by reason of the disponee having no actual knowledge of the existence of the statutory trust before disposal. This particular aspect is of no

relevance whatsoever to the issues I have to decide any more than are the alternative arguments of Dr Day.

xii. The part of the judgment that deals with the rights created by statutory trusts (PHA75 and OSA06) clearly has relevance to the present petition and this encompasses Paragraphs 38 to 50. I also consider paragraphs 53 to 64 have a limited relevance to the appeal although no transfer of ownership of the churchyard land ever appears to have occurred at Christ Church Spitalfields during the time period I am considering. I do not find paragraphs 65 to 118 have any direct relevance except and in so far as they elucidate general principles relating to statutory trusts.

xiii. The **PsO** submissions on *Day*:

(i) That the nature of a trust created under §164 of PHA75 is the same as that created under §10 OSA06.

(ii) A §10 trust is a statutory construct with all that this entails.

(iii) The difference between the present petition and *Day* was whether a statutory public trust could be terminated through a disposal of the land under LGA72.

(iv) The Supreme Court's view as to how a public statutory trust can be terminated provides useful further clarity and guidance and is consistent with the **PsO** views in their submissions.

(v) That importing concepts from private trust law seems doubtful but does not arise for decision. The **PsO** say that it is clear that the court did not accept that private trust law concepts could be appropriately applied to statutory public trusts which the **PsO** say is the object (or effect) of this petition.

(vi) *Paragraph 11 of the **PsO** submissions is a repetition of previous argument. Paragraph 12 is also repetition of previous argument.*

(vii) *Day* means that the approach taken by the **PrS** to claim to have terminated a statutory public trust is neither lawful nor correct. Illegally dividing and enclosing areas held in open space trusts for the benefit of the general public, which is said to be the effect of the PMA, the subject of this petition, cannot be correct.

(viii) The **PsO** seek to rely on the court's observations in respect of how local authorities may seek to respond to its decision in *Day.*

xiv. The **PrS** response to the **PsO** submissions on *Day*:

(i) The **PrS** repeat their initial observations about the scope of *Day* and its relevance to this petition: its subject matter (LGA72), is concerned with a particular example of how a statutory trust can be brought to an end, and cannot be used to decide whether the 1949 Trust and/or MA49 could be brought to an end and that therefore does not deal with the circumstances pertaining to this petition.

(ii) The **PsO** wrongly describe the termination of the statutory trust by the Rector's action in 2017 as an example of importing private trust law into a statutory trust and wrongly

confuse dicta from the court on a set of different facts and under a different statute as giving clear guidance as to the termination of an agreement made under §6 and §9 of OSA06 and resulting in a trust under §10 of the Act.

(iii) The issue for the CCDL is whether the Rector had power to terminate the agreement which the **PrS** contend he had. The **PrS** reprise their argument that a trust arising from §10 of OSA06 was dependent on the local authority having an interest in the land, which it had by virtue of an agreement between the Rector and (as it then was) Stepney Borough Council (now LBTH) expressly provided for by §6 OSA06 and that the trust came to an end because the agreement came to an end.

JJ. LEGAL DECISIONS

i. I am asked at the invitation of the parties to give legal judgments on the jurisdiction of the court to hear and decide this petition and on the status of the 1949 Trust and MA49. This involves me necessarily in considering any faculties issued in and after 1949 and the various Management Agreements in and after that year.

ii. I do not intend to rule on any matter of law which I consider does not bear on the issues I have to decide. The rulings I make do not prejudge whether (assuming I find in law that I have the capacity to grant the faculty) I will in fact grant it or what (if any) Conditions I would attach to it.

KK. JURISDICTION - RULING

i. The parties have considered the ambit of my jurisdiction in their respective and various submissions.

ii. The jurisdictional issue may manifest itself in a number of ways. First, does the court have jurisdiction to hear the petition at all? Is the permission sought one within the general jurisdiction of the court to grant? Second, does consideration of the petition involve the court making determinations of secular law beyond its competence to make? Third, would the decision of the court involve the court knowingly permitting the breach of secular law and, if so, is the court able to do that?

iii. The relevant jurisdiction of the CCDL is set out in §7 (1) (a) of EJCCM. It has jurisdiction to hear and determine proceedings for obtaining a faculty to authorise an act relating to land in the diocese, or to something on, in or otherwise appertaining to land there, for which a faculty is required. Land includes messuages (a dwelling house with outbuildings and land assigned to its use) tenements and hereditaments, houses and buildings of any nature.

iv. The faculty petition with which I am concerned plainly pertains to land and involves proposed acts which just as plainly require faculty jurisdiction. Indeed, if the existence of a statutory trust was itself sufficient to protect consecrated ground and somehow rendered the need for faculty permission otiose then presumably §11 of OSA06 would be unnecessary also, except and in so far as it applied to tombstones. I reject this part of the argument relating to jurisdiction

which is advanced by the **PsO** (see paragraph 10 of the **PsO** final representations ***(A245)***) and I regard it as unarguable.

v. There has been an issue (already referred to) between the parties as to whether any point is being taken as to the jurisdiction of the CCDL to make findings as to matters which are the province of other jurisdictions, such as, for instance, the existence and terms of a trust. I will give a ruling on it to put beyond doubt, in my judgment, the answer to that question for the avoidance of any such doubt now and in the future.

vi. The general position is summarised in *Attorney-General v. Dean and Chapter of Ripon Cathedral* [1945] Ch. 239, 245 where Uthwatt J. said: "Ecclesiastical law is part of the land: *Mackonochie v. Lord Penzance* (1881) 6 App.Cas. 424 at 446. The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts. When a matter of general law arises incidentally for consideration in a case before an ecclesiastical court, that court is bound to ascertain the general law and order itself accordingly; and where a matter depending on ecclesiastical law finds a place in a cause properly before the temporal courts those courts similarly will ascertain for themselves the ecclesiastical law and apply it as part of the law they administer. Each court ascertains the law by reason and argument – not by evidence…The unity and coherence of the law is not affected by the division of jurisdiction as to its enforcement."

vii. The correctness of this judgment can be seen at work in the courts of England and Wales every day. Issues concerning a trust, for example, may arise in a case before the Family Division, the commercial courts, in a criminal trial or in a case involving assessment of tax liabilities. The work of the courts would be virtually impossible if different aspects of cases before a particular court within a particular division of the overall jurisdiction had to be switched to another part of the jurisdiction for an answer to a particular issue nor is there any mechanism for so doing. As G. H. Newsom (sometime Chancellor of the dioceses of London, Bath & Wells and St Albans) and G.L. Newsom comment in the Second Edition [1993] of their work *Faculty Jurisdiction of the Church of England*: "the ecclesiastical courts, while not subject to any process of appeal to the temporal courts, are subject to the control of those of the temporal courts which now make orders of judicial review to the extent, but only to the extent, that prohibition *(now a prohibiting order)* will issue to an ecclesiastical court which entertains a matter not within its jurisdiction, and perhaps also mandamus *(now a mandatory order)* to such a court if it refuses to deal with a matter that is within its jurisdiction. But certiorari *(now a quashing order)* can never issue to an ecclesiastical court and the only way its errors can be corrected is by appeal under the Ecclesiastical Jurisdiction Measure 1963 *(now EJCCM §14 and FJR Parts 21 to 27)"*.

viii. This leaves one area which is the overlapping one: whether this court has the power to grant a faculty petition that would involve a breach of the secular law. At least, that is the legal question that the **PsO** would wish me ultimately to answer. I doubt it is a question of jurisdiction at all. It is really a question as to whether granting a petition that would necessarily breach the secular law gives rise to an objection to the grant of the petition in the first place. Put simply like that, the answer would obviously be in the affirmative, but as both sides recognise, the issue is not as simple as that and has resulted in my being faced with submissions and documents totalling 1797 pages with numerous, and in

some respects, intricate and complex arguments which have required a great deal of thought and which required me to consider a number of very different issues.

LL. STEPPING BACK

i. It is necessary to step back a little. This case does not come before me by itself as an issue that has recently arisen simply in respect of the gardens and recreational area of Christ Church Spitalfields. It has come following a period of long and, I sense, bitter litigation which has seen the erection of the nursery school that is called the Garden Building which, together with its curtilage, is being called areas F and G in this petition, a first appeal to the CA which resulted in a lengthy hearing in front of the Deputy who, in a comprehensive and very lengthy judgment, approved and permitted the retention of the Garden Building and refused the then Parties Opponents' application for a Restoration Order before it finally came to the CA for a final hearing in which the Deputy's Order in respect of the approval and permission for the retention of the Garden Building was quashed (although other parts of her Order stood) and a Restoration Order was granted requiring the Garden Building to be demolished by 2029. At that appeal hearing the then **PrS** gave undertakings to CA which were the genesis of what they propose to do now in this petition in respect of areas A-C and subsequently what they intend to do in respect of areas F-G. I accept that their motivation in seeking to include areas D and E was to grant comfort to the public that this area would in fact be used as it had been since 1987 and which, in the event of the school's existence ceasing, would become part of the open space sought by this proposed faculty comprising already areas A-C and (after demolition) F-G.

ii. The history of the land comprising the churchyard of Christ Church Spitalfields has been the subject of numerous faculties and management agreements with *at least*, before 2009, the following: **1859** – a faculty in respect of the (recently) closed burial ground relating to its use by the public *and* a faculty for the Brick Lane school site; **1891** – a faculty petition for a public garden *and* a time-limited agreement involving Lord Meath on behalf of the Metropolitan Public Gardens Association; **1949** – a faculty to Stepney Borough Council (which later became LBTH) *and* a deed of agreement between the Rector of Christ Church Spitalfields and Stepney (or at least an apparent draft of it); **1970** – what is called a "provisional" faculty to create an adventure playground under the auspices of the Christ Church Gardens Adventure Playground Association; and in **1987** – a faculty authorising a grant by the Rector of a licence in favour of ILEA (with the consent of LBTH and the Christ Church Gardens Adventure Playground Association) to authorise the use of part of the disused burial ground as a school playground in common with the Association *and* a licence agreement under particular terms which specified, inter alia, that it would be a school playground only during normal school hours. This licence was to be for five years duration although it was clearly continued for a much longer period than that by consent of the parties. This extension should have been ratified by CCDL but I have no reason to think consent would not have been given.

iii. In **2009,** and following the ending of the Adventure Playground Association/Youth and Community Centre, a faculty was granted to the Rector which permitted the current licence held by the former playground association

to be surrendered and transferred to CCPS in respect of the playground area. Again, although on rather more stringent terms doubtless arising out of society's wider issues relating to safeguarding, this land would be the school's during school hours with permitted community use outside of those hours. In a document entitled final draft Agreement was the important deeming provision in which the parties agreed that the area shaded in yellow on "Plan B 2009" (including areas D and E) were outside the 1949 agreement (in so far as that could be properly construed in any event).

iv. So far, none of the faculties to which I have referred have ever been the subject of any appeal to any court.

MM. THE PRE-1949 FACULTIES AND AGREEMENTS - RULING

i. I do not propose to take into account, except as narrative history, the faculties or the agreements reached before 1949. My judgment and ruling is that they had been superseded by the 1949 faculty and agreement (as best as it can be construed).

ii. The notion that the land is governed by three separate trusts all relating to the same open space aspect of the churchyard is in my judgment flawed. It is plain that, in 1949, the faculty is sought under OSA06 and not under PHA75 and nor is it relying on the existence of any trust dating back to 1859. The 1891 faculty is plainly putting its faculty application within the various OSA between 1877 and 1890. OSA06 was a consolidating Act drawing together the preceding legislation. The OSA contains specific legislation in respect of disused burial grounds.

iii. I can find no evidence that PHA75 was ever engaged or in the mind of anyone (including CCDL) at any stage until it was introduced by the **PsO** in respect of their arguments in opposition to this faculty.

iv. Faculties bind *in rem* as the Deputy correctly stated. They do not exist, in the same way as unrepealed statutes, potentially colliding or conflicting with each other. An existing faculty may be superseded (or indeed varied) by the grant of a subsequent faculty or a variation of the original one that has been approved by the court which granted it. It is usual in such circumstances for the superseding faculty to indicate what it is seeking to depart from or vary from in the faculty that preceded it, or at least for the change to be clear on the face of the faculty. Where a faculty has not been superseded in this way by a subsequent faculty it continues to bind as it did from the moment it passed the Seal unless it has been quashed by order of the CA or, in exceptional circumstances, set aside with the permission of the Consistory Court that granted it.

NN. THE FACULTIES FROM 1949 UNTIL 1987 AND A REVIEW OF THE AUTHORITIES CONCERNING USAGE OF PUBLIC OPEN SPACES

i. The important change that occurred between 1949 and 2009 was the creation of the recreational area with the 1970 permission for the adventure playground and the 1987 faculty permitting shared use of the playground area with the school. I understand from the papers that this change may have been controversial, but I cannot see any evidence that any faculty was appealed.

ii. There is nothing necessarily inconsistent with the provision of amenities within an area designated as an open space provided they relate to recreation. They

may, however, impose a restriction on which class of members of the general public may use this area. A children's playground is a classic example of this. The school, a voluntary aided establishment, doubtless has as its pupils the children of members of the public and even when not used by the school, the playground area was restricted to use by children accompanied by appropriate adults, such as parents. This latter arrangement continued until 2009 by consent of the parties.

iii. The use of the land designated an open space in part for other purposes, provided these were not inconsistent with its general purpose, has been the subject of judgments for well over a century. Sometimes these have been concerned with the question of the lawfulness of such use on its own merits and sometimes in respect of related issues such as rateable value. I have considered these following cases cited by the **PsO**.

iv. *Attorney-General v. Corporation of Sunderland* [1875 A. 46] concerned a municipal corporation which purchased a piece of land in 1864 which, when added to an existing public garden, made a total space of 25 acres. This land was expressly purchased under the Public Health Act of 1848. In 1875, the corporation decided to take one-quarter of an acre of the recently purchased land for the erection of town buildings, a museum, public library, school of art and conservatory. Bacon V.C. held that no portion of this land could be appropriated except for the erection of the museum and the conservatory. On appeal it was held that a public library might also be built. The distinction that Bacon V.C. drew was that the buildings had to be connected with public walks or pleasure grounds. In the appeal, James L.J. held that the words "public grounds or pleasure grounds" should not be construed too narrowly and that nothing was improper that was conducive to that object of providing a place of enjoyment or recreation.

v. *Attorney-General v. The Loughborough Local Board* [The Times, May 31 1881] dealt with a question of whether a local football club could use the Loughborough Recreation Ground for a fixture on a particular day during Whit Week and decided that the local authority was not competent to exclude the public for even one day since the Board had acquired the recreation ground for the people of Loughborough.

vi. *Western Power Distribution Investments v. Cardiff Council* [2011] WL 664386 in the Administrative Court discusses within the judgment the question of restrictions including *Loughborough* above. I bear in mind, in as far as it is relevant, that the principal legislation in the case is not the OSA06.

    (i) Beginning where *Loughborough* left off, so to speak, Ouseley J. reminded himself of *Hall v. Beckenham Corporation* [1949 1 KB 716 (a PHA case) where Finnemore J. found that "the corporation are the trustees and guardians of the park, bound to admit any citizen who wishes to enter it within the times when it is open. I do not think that they can interfere with any person in the park unless he breaks the general law or one of their bye-laws."

    (ii) He referenced *Sheffield Corporation v. Tranter (Valuation Officer)* [1957] 1 WLR 843 which made clear in Lord Evershed MR's judgment that in the case of what is *prima facie* a public park, what is to be treated as being in the occupation of the public and therefore free from rating

liability is not removed by circumstances that in certain respects and in certain parts of the park, may, in the course of the ordinary necessities of proper management, exclude the general public. This is another PHA case.

(iii) He also referred to *Blake (Valuation Officer) v. Hendon Corporation* [1962] 1 QB 283 (also a PHA case) that the public were to have free and unrestricted use of the space (qualified, it may be, by a limited exclusion for ancillary purposes) and, indeed, if exclusion were to go beyond what was justifiable as ancillary, the land (or the part of it subject to exclusion) would be rateable.

vii. Ouseley J's judgment was on the particular facts of *Western Power* and under different legislation. It is, nevertheless, a useful comparator: He said: "the public trust under §164 requires the council to permit the public to use the land for public walks or pleasure grounds. There are limits which can be imposed on hours of use and to restrict anti-social behaviour. The public may not be able to wander everywhere since ancillary facilities are permitted where they are ancillary to the provision of public walks or pleasure grounds…restrictions and prohibitions may be permitted but only in the recreational interest." In paragraph 79 of the report he says "Mr Steel *(John Steel KC)* is also right that study of nature by local schools may involve restrictions on what the public can do by way of recreation…"

viii. *Barkas* which is cited by the **PsO** does not seem to me to add anything to the issues I have to consider. *R. (Friends of Finsbury Park) v. Haringey London Borough Council (Open Spaces Society intervening)* - involving closure of 27% of the total area of a park for a 16 day music festival - was permissible only by the use of specific powers in the LGA72.

ix. I conclude that the right of the public to use a public space such as the churchyard in this petition is and never was unfettered in the sense that the public had a right to use it at any hour of the day or night. Provided the opening and closing times of the churchyard are reasonable, I cannot think that anyone with the interests of the churchyard at heart could possibly imagine that this would be desirable. From what I read in the documents (particularly those connected with the 1970 faculty) and the Deputy's narrative history this churchyard has had an unhappy history with it at times becoming a focal point for vagrancy, being used as a lavatory, and also used as a cover for substance abuse. I cannot think of anything more likely to deter the general public from using the churchyard for recreation or pleasure than its having or regaining a reputation for attracting vagrants and drug users.

x. This was what influenced the seeking of the 1970 faculty to convert part of the available space to an adventure playground. As the prayer in the petition read: "That your petitioners also feel very strongly about the nuisance caused by the use of Christ Church Gardens by considerable numbers of methylated and crude spirit drinkers for whom the gardens have for some time been a centre. This nuisance has meant that the facilities provided at this open space are not used to their greatest advantage, and in this connection extreme concern has been expressed by local councillors, parents, social workers and welfare workers etc: that the children must pass through what can only be described as unpleasant circumstances to gain access to that part of the gardens used at present as a children's playground."

xi. It is clear from the prayer that even before 1970 part of the gardens were being used as a children's playground.

xii. The faculty in 1987 added school usage to that of the adventure playground on the sharing basis already described. The presence of CCPS is another feature of this particular churchyard. Again, although CCDL is not a court of review or appeal, I see nothing inconsistent in the area in general being an open space and having an ancillary amenity such as a children's playground that shares its usage with the school. It is obvious that if young children, such as those at CCPS, are to use the playground safeguarding issues alone dictate that it must be used without the presence of others not employed by or at the school. As I say, the 1987 faculty was not appealed (or if it was, not successfully).

xiii. The area's existence as an open space, however, was altered by what followed, to which I now turn.

OO. THE FACULTY OF 2009 AND MA09 - REVIEW

i. Seed Ch granted a faculty the schedule of which described the works as "To allow the current licence held by Christ Church Gardens Youth and Community Centre to be surrendered to LBTH and to allow LBTH to grant to CCPS a 25-year licence for the land adjacent to the church."

ii. There was an Agreement (MA09) between the Rector, LBTH, the Trustees of the Youth and Community Centre and the governing body of CCPS. It was said to be in relation to the gardens. The whole of the relevant land was identified on Plan A annexed to the agreement with a coloured designation.

iii. MA09 then recites the content of the 1949 Deed (granted under faculty) and its effect of transferring the powers of management of the gardens to Stepney (subsequently LBTH) for use as an open space under OSA06. It states that both the original and the counterpart of the 1949 Deed are lost.

iv. MA09 states that the parties have produced a "likely form" of that Deed based on what is thought to be the last available draft to have been approved by the then Bishop of London, stating that the Rector and LBTH wish to confirm its terms and be bound by it, subject to the originals being found.

v. In light of the loss of the plan which included identification of the land transferred to the management of the local authority, the parties state they seek to redefine the area deemed to fall under that management both for the purposes of the MA09 and a "future contemplated agreement intended to modernise the relations and agreement between the parties" *(whatever that means)* and for future "clarity and ease of regulation" of the management of the gardens by LBTH, CCPS and the Rector.

vi. MA09 states that the parties have agreed that the area that was originally that transferred to Stepney in 1949 shall be deemed to be an area marked and identified in colour described by the parties on an annexed Plan B which also shows an area which was removed from the Council's management obligation (coloured yellow and hatched brown) and an area marked in pink which designated the area within Stepney/LBTH's management as set out by the 1949 Deed as it was varied by the 1987 Deed.

vii. MA09 further refers to the licence between LBTH and what was then called the Adventure Playground Association (the 1970 faculty), which together with its plans was also lost save for a draft version referred to as the "Best 1970 licence." The Agreement then states that the parties wanted to define this area that had

been licensed in this way. The Trustees of the Adventure Playground/Youth and Community Centre wished to surrender their licence, LBTH agreed to such surrender and (subject to vacating the premises) the obligations of the trustees of the Youth and Community Centre came to an end as did LBTH's obligations to the Rector.

viii. The 1987 licence under faculty was then reviewed. This was between the ILEA, the Rector and the aforementioned trustees of the adventure playground which licensed the use of part of the gardens called the "New Playground Land" for use as a playground, which appears to have been originally shown in colour on a plan annexed at the time, but which was to be deduced on the only surviving black and white copy by its being partly hatched. It originally encompassed also the proposed building of two additional classrooms on the former school playground.

ix. By a letter dated March 30, 1987 from LBTH to the Rector, LBTH had agreed to surrender the New Playground Land out of the control of LBTH (which control was under OSA06) as had been provided by the 1949 Deed (the relevant land being part of that land the subject of the 1970 Agreement) and had explained the purpose, which was to give effect to the 1987 licence to which (as I understand it) LBTH was not a party.

x. The documents establishing the release of the New Playground Land from LBTH's management (OSA06 and the 1949 Deed) had either been lost or never "perfected". Thus, LBTH wished to assert by MA09 that the land had been released from its control.

xi. MA09 dealt further with what was described as "anomalous land" which was a small triangular area incorporated into the playground to allow for a rectangular court, and which had apparently formed part of the school playground which had never been released or been deemed to have been released from the 1949 Deed but had in fact been part of the school playground since approximately 1987.

xii. ILEA was abolished on April 1, 1990 and so the 2009 Agreement wished to reflect a desire by the Education Board of the Council (which had received ILEA's interest on its passing) to surrender any residual interest LBTH had in the 1987 licence. LBTH also wanted to confirm the release of the anomalous land from MA49.

xiii. MA09 also proposed that CCPS, LBTH and the Rector would redesign the layout and structure of the gardens, the school and the school grounds to improve the following: the school's playground facilities, the gardens as a green space available to the public, the security of the site to prevent or minimise anti-social behaviour in the gardens and also to "further provide for youth and community services". CCPS agreed to take interim occupation of the buildings and gardens within a defined area on the plan and, subject to a draft licence, to be responsible for security, insurance and health and safety aspects of such occupation.

xiv. It also set out the future intention of CCPS in consultation with LBTH to work with the Rector towards obtaining the requisite consents to redesign the gardens, the school and the school grounds prior to the grant of a further licence for a longer term of years and that the Rector and LBTH agreed that the 1949 Deed needed "revising" and its terms amended by a fresh Management Agreement once CCPS obtained satisfactory planning permission in respect of the redevelopment of the gardens at which time the parties would agree the full

terms of a further licence to the school and a new management agreement with LBTH in relation to the gardens.

xv. There then followed three deeming provisions to MA09. The first (B1) deemed that the area subject to LBTH's management would be an area edged in dark blue on Plan B. The second (B2) deemed that the area that was removed from LBTH's management obligation in 1987 will be as marked on Plan B in yellow. The 'anomalous' land would be hatched and coloured brown. Finally, that the area managed by LBTH under OSA06 pursuant to the 1949 Deed as varied by the 1987 licence would be hatched and coloured red on Plan C together (also on Plan C) with the area currently maintained as an open space coloured green.

xvi. There was also a Licence Agreement between LBTH and the governing body of CCPS, although I have only been shown a draft of it. The preamble states that LBTH (and CCPS (the licensee)) were acting in accordance with the MA09 and in accordance with a faculty.

xvii. The terms of the licence permitted CCPS to use the designated land (in the Agreement) as a school play area or for general school purposes only after proper safety checks had been made and any safety recommendations made had been complied with.

xviii. CCPS was to be granted exclusive use of the land during normal school hours and outside of those would offer community access in accordance with government guidance except on Sundays (unless the Rector was not using the land on that day).

xix. There were also terms relating to the position if the community centre were to be demolished.

xx. This faculty was unopposed and as far as I know has never been appealed.

PP. THE 2012 FACULTY AND THE DEPUTY'S ORDER

i. The Schedule of Work or Proposals described the dismantling of the current youth centre site and the development of a single storey School (the Garden Building) to be used in accordance with the licence agreement of 2009 between LBTH, CCPS and the PCC.

ii. In the correspondence which followed, there was a letter from Christine Whaite and others, dated September 14, 2012 ***(C692-695)*** which encapsulated the views of some of those who objected to the erection of the Garden Building. I note in paragraph 3 that these writers make this observation: "LBTH has the opportunity to correct the -- even then – highly controversial decision made 40 years ago, which allowed the construction of a dry space area for an adventure playground (a public facility) within the grounds of Christ Church, by reinstating the land to public space for the benefit of the community as a whole." This was a course which it was possible for LBTH to consider taking, but it also shows the length of time the dry space area had been in existence, a space since 1987 which had been shared with the school. [It has been drawn to my attention by Christine Whaite since this judgment that the Youth Centre structure (now areas F and G) had never been shared with the school at any time. I am happy to make that correction with apologies and am grateful to her for drawing it to my attention.]

iii. The writers also make this observation: "The 2009 Agreement and the Licence Agreement in relation to land at the gardens between LBTH and (CCPS) only

specify that an application for planning permission may be made. If the construction of the new nursery and community building is to be authorised, a further licence agreement will therefore be required authorising the building work and setting out the terms on which the work and the licence are held".

iv. A draft of Particulars of Intended Claim appears at **(*C714-744)*** which includes a number of contentions relating to the 2009 faculty and the 2012 faculty that have been repeated in the written submissions before me.

v. There is also a draft application to CCDL from SOS for a Restoration Order pursuant to Section 13 (5) of the Churches and Ecclesiastical Jurisdiction Measure 1991, the relevant Measure in force at the time, which required the Rector and the governing body of CCPS to take steps to restore the churchyard of Christ Church Spitalfields, demolish and remove or cause to be removed the (Garden Building) because the erection of the Garden Building was illegal under the provisions of section 3 of the Disused Burial Grounds Act 1884. There was also an application for an interim injunction. This was dated August 21, 2014. SOS wished consideration of the licences to be delayed until the CCDL had heard the applications for an emergency interim injunction and for a Restoration Order. This the Rector and CCPS resisted as the beginning of term was imminent. It was said that SOS had requested sight of the draft licences and these are at ***(C779-789)***.

vi. I find that these licences were submitted and approved pursuant to the faculty of 2012 (as is clear on their face) albeit they were heralded in the Agreement of 2009. The first licence was between the Rector, LBTH and the governing body of CCPS. In it the parties agree that the licence shall be the "full management licence" referred to in "the Faculty" (which it is said means the faculty of 2012) and, even more specifically, that "the form of this licence has been approved by the Consistory Court pursuant to the Faculty". It set out the detailed conditions of community use (which I need not rehearse here) and that CCPS should be the manager (as defined) of the building. The parties indicated that they were aware that the Garden Building was the subject of litigation in the High Court and in the CCDL and the potential consequences of that, namely demolition of the Garden Building. In a further licence entered into by agreement with the same parties, arrangements were made for the school to vacate the premises if required so to do by LBTH with accompanying indemnity and insurance provisions.

vii. The history of the subsequent litigation is well known. The Rector petitioned CCDL for a retrospective or confirmatory faculty and in due course, as detailed earlier, the Deputy heard and decided both that petition and the application for a Restoration Order.

viii. The Deputy's Order included a ruling (para 3), described as a declaration, that the area set out on the plan annexed ceased to be subject to any arrangements for management by LBTH under OSA06 or otherwise. The area was edged in red and included the hard area and the Garden Building edged in blue ***(C1351)***.

ix. The further argument that gave rise to para 3 (of the Order) arose because the (then) Petitioners and Parties Opponent could not agree to the form of the Order to be made following her judgment in respect of the application for a Confirmatory Faculty and the contrary application for a Restoration Order. The problem, according to the Deputy, centred on the status of the 1949 Deed. Further, as previously stated, an evidential issue had arisen during the further submissions on this aspect which the Deputy heard on June 6, 2017. Whilst oral

submissions were being heard it appears that a search was instituted for a certified original of the September 7, 2009 licence held by LBTH and on June 7, 2017 (the day after the additional hearing) it was produced to the Deputy and the parties were invited (if they wished) to make further submissions, orally or in writing. The parties then made further written submissions or comments.

x. As a result of this, the Deputy was able to find that MA09 was executed by the parties making the agreement and allowed the Deputy to find for "the first time as a matter of admissible evidence that the Agreement of September 7, 2009 was executed by the parties thereto and its terms are apparent and proven." She found that it was now "necessary to make findings about the Agreement of September 7, 2009 and its consequences and effects." She then recited the terms of the Agreement and found it was clear that "the Rector and LBTH had varied whatever was the plan to the previously supposed, now deemed, 1949 Deed to exclude from the management of LBTH all the land now the site of the new building and school playground from the management of LBTH under OSA06. A faculty was issued in respect of this" – ***(C1331).*** Further on she said: "the Rector and LBTH have now limited the operation of the management agreement to that land only, which excludes the site of the new building and the playground." ***(C1334)***.

xi. She found that the Agreement "was approved by faculty…None of the Open Space Parties were Parties Opponent to that faculty and no appeal could or did arise. That faculty stands *in rem* and is binding. That disposes of any challenges along the lines of the Rector and the LBTH were not entitled in law to exclude from the operation of the management agreement under the OSA06 the site of the new building and playground or otherwise. Any submission along [the] lines that the 1949 Deed has any continuing effect whatsoever over the site of the new building and playground must fail accordingly."***(C1335)***

xii. The Deputy, in looking at MA09, concluded and determined that "what the parties have agreed is thus to deem the past regime and define the new" - ***(C1337)***. I shall not rehearse the Deputy's findings in respect of all of the points raised on behalf of SOS.

xiii. With regard to the first issue of law that arises, I rule that the question of whether the 1949 Deed can lawfully have been varied by the 2009 Agreement cannot be reopened before the same court at first instance. These are the reasons for my ruling: first, the Agreement was made between the parties, the licence was entered into and ecclesiastical permission was given by faculty. Second, those with an interest in the petition had a right to Object to the petition and either to have their views taken into account by the Chancellor in reaching a decision or to become Parties Opponent and, if unsuccessful in their opposition to the faculty, had the right to seek to appeal its grant. That course was not taken. If for some reason, particularly if it were argued that the faculty had been obtained by, for example, fraud, trickery or deceit which had somehow precluded the complaining party from becoming a Party Opponent, it might have been possible for the CCDL to have set it aside. The party seeking CCDL to take that exceptional course would have needed to have acted promptly on discovering any such impropriety in the grant of the faculty.

xiv. It is highly arguable that the Deputy needed to go no further than establishing the existence of MA09, the Licence and the grant of the (unopposed) faculty, but, given the degree of contention and the fact that the parties engaged in further submissions together with the fact that agreement could not be reached

about the form of her Order because of this issue, it is entirely understandable that she took the course that she did. I am now faced with the additional fact that the Order (para 3) *was* made.

QQ. THE DETERMINATION BY THE CA IN RESPECT OF THE DEPUTY'S ORDER (PARA 3)

i. There was a potential to appeal the Deputy's Order (para 3) and, indeed, permission was sought to appeal it and that permission was refused by the Dean of the Arches. The Deputy had also refused to give permission.

ii. I am asked, in effect, to place no reliance on this, because, first, SOS (as I shall call the Appellants in the proceedings before the CA for simplicity but which includes Christine Whaite in her own right and other named persons) never therefore had the opportunity to argue the point before the CA, because the appeal was being heard primarily on the consequences of a failure by those erecting the Garden Building to take account of the Disused Burial Grounds Act 1884.

iii. The issue with which the CA was dealing arose prior to the EJCCM and prior to the FJR. The appeal to the CA would, however, have been governed procedurally by the FJR. There are two stages to any appeal: first, permission to appeal needs to have been obtained for each separate ground of appeal which an Appellant seeks to argue and, second, in the case of multiple grounds of appeal, the CA may order its proceedings as it sees fit so that, should the success of one ground mean that the appeal must succeed as a whole and is what I will call in that sense 'determinative' of the appeal, there is no necessity to go on and consider remaining grounds unless the court concludes that it is necessary for other reasons so to do.

iv. In view of what is said by the parties and, despite my principal finding about the status of the 2009 faculty, I shall set out what I consider to be the correct interpretation of the CA's decision not to permit a ground of appeal relating to the Order (para 3) of the Deputy based on the procedural rules set out in the FJR.

v. I do this, because I found it strange that the CA would refuse to grant permission on a particular ground of appeal on the basis it had (in effect) already decided before hearing the appeal that another ground would succeed. I discovered that this was not the case.

vi. No proposed grounds of appeal involved questions of doctrine, ritual or ceremonial. Permission to appeal was therefore required.

vii. Rule 23 (1) establishes that, first, application had to be made to (in this case) the Deputy for permission to appeal. The Deputy refused permission. The application to her required (Rule 22 (2) (c)) that the proposed grounds were set out clearly identifying those parts of the judgment, order or decree to which the grounds related.

viii. Rule 23.3 permits an applicant to apply to the Dean for permission to appeal if (as in this case) the Deputy has refused it. Where (as here) permission to appeal is granted, the Dean may (under Rule 23.5 (1) (a)) limit the issues to be considered on appeal.

ix. The test for whether permission to appeal to the provincial courts may be granted (both for the Deputy and the Dean) is set out under Rule 22.2 (a) namely that the appeal would have a real prospect of success; or (b) that there is some

compelling reason why the appeal should be heard. In my judgment, the CA's inherent jurisdiction in respect of case management can be no less than that of the consistory court, namely the power to decide the order in which issues are to be tried.

x. In other words, if the CA considered two grounds of appeal had a real prospect of success or (even if not) had compelling reasons to be heard then it is both possible (and has been done) for the court to take the determinative ground first, leaving itself the option of hearing the second ground should the first fail.

xi. The application for leave to appeal – *Re Christ Church Spitalfields* [2018] EACC 3 refused permission to appeal on Ground 2 (alleged breach of s.10 of the Open Spaces Act 1906 under the 1949 agreement). The Dean gave the reasons as follows:

"Reasons:

a. The Applicants contend (see in particular para 7(2) of the Reply), that, assuming the New Building was, at the relevant time, unlawfully occupied and used in breach of s.10, the deputy chancellor was thereby precluded from jurisdiction to grant a confirmatory faculty and of jurisdiction to withhold a restoration order". Neither of these contentions are properly arguable. The confirmatory faculty might not be implementable unless the 1949 agreement was varied or terminated, but it would not be a nullity; and the discretion not to make a restoration order would remain.

b. In any event, at the date of the consistory court's original order…and later revised order of 17 December 2017, either the scope of the 1949 agreement had been varied by agreement of the parties under the 2009 agreement to exclude the relevant land from s.10, as the deputy chancellor found (para 839)…or it had been terminated in its entirety by the Rector by his notice of 22 June 2017 to the London Borough of Tower Hamlets, which is now the "primary submission" of the Building Parties (who include the London Borough of Tower Hamlets). There is not therefore a real prospect of the appeal on Ground 2 succeeding. In particular the contentions of the Applicants in respect of the later termination are not considered to be even arguable.

c. As the Response states, "this proposed ground is otiose and academic" and "the grant of permission to appeal on a ground that relates to a "continuing" breach of s.10 in circumstances where there is no longer, if there ever was, such a breach would be disproportionate and wasteful of costs".

d. The Open Space Parties have separately issued a protective application for judicial review against the Rector and the London Borough of Tower Hamlets to the Administrative Court challenging the Rector's decision to terminate the 1949 agreement (CO/4434/2017, filed 22 September 2017); and their Statement of Reasons to the Court of Arches states an intention to invite this Court "either (a) to extend permission to the determination of the issues arising as to termination or, failing that, (b) to permit a separate application for such permission to be made at, or before, the appeal hearing". There may well be insuperable problems facing the challenge by way of judicial review, but that is not a reason why the Rector's decision should be subjected

to legal challenge in the present proceedings, when it is considered unarguable.

e. The Open Space Parties' contention that the acting deputy chancellor acted unfairly in the way she reached her decision in respect of the 2009 variation of the 1949 agreement is unarguable for the reasons she gave at page 5 point 18 of her decision refusing permission to appeal.

f. Given the highly specific factual background to the Open Space issue in the present case, and in the absence of a real prospect of the appeal succeeding, there is no other compelling reason under rule 22.2(b) of the FJR 2015 why the appeal should be heard. This is notwithstanding that the proposed appeal "relates to a churchyard which constitutes the setting of a church of special architectural and historic importance and world renown" (para 56(2) of the Statement in support of application for permission to appeal).

g. In particular, the possibility that the deputy chancellor's order in relation to costs between the parties might have been different, but for her conclusion in relation to the effect of the 2009 agreement to vary, is not considered sufficient to permit the appeal, although the particular arguments in this respect in the Response para 17 are coherently rebutted in para 7(3) of the Reply."

xii. It is plain that the Dean refused the application to appeal in respect of Order (para 3) not because it was surplus to requirements or because the Deputy's Order was somehow irrelevant or inappropriate but because the ground advanced by the Applicants stood no real prospect of success and had no other compelling reason for being heard, particularly in light of the factual circumstances pertaining by the time the CA came to consider the matter.

xiii. The summary of the CA's reasoning as set out on behalf of the **PsO** in the chronology for June 1, 2018 ***(A168)*** which was submitted to the CCDL in the course of these proceedings read: *"The permission application was dealt with on paper. The refusal of an appeal in the OS management issue was because it added nothing to the appeal in the Disused Burial Grounds Act issue."*

xiv. Again, in the **PsO** Response of July 12, 2022 paragraphs 120 and 121 this is said: *"At this point, the **PsO** address the issue raised by the **PrS** that there was no appeal against the [Deputy's] findings…The Dean, who considered the application to appeal on his own and on paper, decided that the issue was periphery [sic] to the DBG Act and refused permission because the OS trust issue was irrelevant to the appeal."* I do not know what the significance of the Dean deciding the application on his own or that the decision was on the papers is said to be or why those facts are mentioned to me.

xv. Neither of those summaries appear to reflect the actual reasons that the CA gave for refusing permission to appeal "the management issue".

xvi. Finally, the judgment of the CA ordered that paragraphs 1 (Confirmatory Faculty), 2 (the dismissal of the application for a Restoration Order) and 4 (the faculty authorising use and occupation of the Garden Building by CCPS) of the Deputy's Order should be quashed, but that paragraphs 3 (the declaration concerning management), 5 and 6 (Costs) should stand.

xvii. Accordingly, I rule that the 2009 Faculty which approved MA 09 and the Agreement of 2009 was binding on the Deputy as it is on me unless it became displaced by any subsequent faculty.

xviii. Additionally, I am bound by the decision of the CA. Matters of detail were left for CCDL to determine. Accordingly, and for the avoidance of doubt, the Restoration Order stands in the terms that it was granted by the CA.

RR. MA14

i. One of the difficulties with the situation faced by all sides in the affairs of Christ Church Spitalfields is the unfortunate effect of the unlawful erection of the Garden Building and separating out what flowed as a consequence of that act.
ii. I can deal with MA14 (in which I include the Agreement and Licence) speedily.
iii. MA14 was clearly approved under the 2012 faculty and was directed towards issues concerning the Garden Building to a considerable extent. With the quashing of the confirmatory faculty and the other faculty for occupation of the Garden Building, as well as the imposition of a Restoration Order, the ecclesiastical permission for the arrangements set out in MA14 lapsed also.
iv. The CCDL's ability to settle any differences arising in connection with construction matters (indeed in respect of anything permitted under the faculty) clearly ceased when the faculty of 2012 was quashed.

SS. THE RECTOR'S TERMINATION OF JUNE 22, 2017

i. In June 2017, the Rector terminated the Deed dated June 5, 1949 made between the (then) Rector and Stepney Borough Council (now LBTH). His reason was that LBTH had failed to undertake the care, management and control of the land which was the subject of the Deed and he made it clear that this termination was in relation to the whole of the land and was contrary to the obligation of management, care and control imposed by clause 1 of the Deed. The Rector stated that the failures were recorded in specified passages of the Deputy's judgment. This was clearly, however, his own decision.
ii. As far as I can see, the decision to terminate the Deed was not opposed by LBTH.
iii. Clause 1 of the presumed Deed between the Rector and Stepney set out the obligation of the Council to undertake the entire care, management and control of the disused burial ground to the extent shown on the *(missing)* plan and Clause 8 states that "In the event of Stepney Council failing to obtain the grant of a faculty which will enable it to exercise the said powers of management or in the event of Stepney Council failing to perform or observe any of the terms of this Agreement on its part to be performed or observed or attempting to do or permitting to be done in the said disused burial ground without a faculty from the said court any thing or act for the doing of which the faculty of such court is required by law the Rector or any of his successors in title may by writing under his hand delivered or sent by registered post to the office of Stepney Council put an end to this Agreement and thereupon all powers of care management and control of the said disused burial ground hereby conferred upon the said Stepney Council shall cease and determine."
iv. The faculty was granted in these terms. Out of interest, I note that the faculty also permitted laying the eastern portion of the churchyard as a children's playground with the installation of modern-day play equipment and the remaining of the area to be laid out with lawns and a rest garden.

v. The Rector did not need ecclesiastical permission to terminate the Deed. If the termination was not effective for any reason then the operative MA would be MA09. I can see no reason why it was not effective as a termination. It appears on its face to comply with the "breach" provisions of the 1949 Deed, even to the sending of the letter by Registered Post. In the first instance, it is a matter for the parties who seem to have been in agreement about it.

vi. As I have been reminded numerous times, any §10 OSA06 trust in respect of the churchyard land is a statutory trust. Under §6 the transfer is effected (in this case) by the agreement (since LBTH has no interest) and in my judgment it is the agreement which transferred the disused burial ground and the agreement that governs the terms of the existence of the trust, which is why in my judgment the Act does not need to have a section dealing with how to terminate the arrangement. The obligations on local authorities which have acquired an interest in land may well be different, but that is outside of what I am required to consider.

TT. AREAS D-E

i. OSA06 is only engaged as follows in my judgment with:

(i) The present faculty as it relates to areas A-C;

(ii) The future plans in respect of (following demolition) the Garden Building which is not the subject matter of the present petition. Given the terms of the Restoration Order which binds the CCDL, I would reject any suggestion that OSA06 could be used to circumvent the Order of the CA, including the time allowed for such demolition.

(iii) Areas D-E if the **PrS** are seeking to bring those areas back within the OSA06 to be the subject of shared usage unless the school should cease to exist in which case it would presumably exist as an amenity within the open space of the disused burial ground.

ii. Whilst young schoolchildren are in the Garden Building, its curtilage or whilst they may be using the playground area or its curtilage, it is clear that inter-mingling with unconnected members of the public would pose a wholly unacceptable safeguarding risk.

iii. In my judgment, there is force in the argument made by the **PsO** that if Areas D-E are within open space governed by the OSA06, then LBTH lacks the necessary interest in the land to grant a licence back to CPPS.

(i) §6 of the OSA06 is titled "Transfer of disused burial grounds to local authority" and is clearly concerned with the transference of a *disused* burial ground to a local authority. It concerns *only* disused burial grounds and I reject the suggestion that the failure to repeat the word 'disused' throughout the section makes any difference;

(ii) The method of transference may be by any agreement with any local authority and acquiring an interest in the land is not required for transference under this section provided the transference is for the stated purpose. In my judgment, the agreement determines the terms of the transference including

its duration and the conditions under which the agreement and hence the trust may be terminated. Otherwise, a freeholder of land would be in a worse position than a local authority that had acquired an interest in the land.

(iii) §9 is entitled "Power of local authority to acquire open space or burial ground." A burial ground in general includes a disused burial ground. This section is not limited to disused burial grounds. The acquisition requires the local authority to be receiving an interest or limited interest in land which interest includes a right or an easement. I cannot see that a licence can be an interest in land since it merely constitutes permission to do something on or with the land. Accordingly, it would appear that §9 does not apply to LBTH's agreement under §6.

(iv) The title of §10 is "Maintenance of open spaces and burial grounds by local authority." Again, it applies to all burial grounds including disused ones and, unlike §9 which is concerned with acquisition, it applies also to a local authority which has control over a burial ground and states that the authority shall hold and administer the ground in trust for the stated purpose and ensure proper control and regulation and maintain and keep the burial ground in a good and decent state. This is subject to the conditions under which the control was acquired.

(v) The title of §11 is "Special provisions as to the management of burial grounds and removal of tombstones." It is my judgment that the section is concerned with two things: the management of a burial ground (disused or otherwise) by the local authority in general and the removal of tombstones in particular. I do not accept that the section is only concerned with the management of churchyards in respect of the removal of tombstones. Local authorities may not exercise any of the powers of management under the Act as a whole without faculty permission and, additionally, special provisions apply to the removal or alteration in position of tombstones. The faculty in respect of the management of a local authority may be subject to such conditions and restrictions as the court sees fit.

iv. The problem, put shortly, is that it does not appear to me that §10 would permit the licensing-back to CCPS suggested in the petition.

v. Given that the **PrS** say that the proposals in areas D-E are not central to their petition, and that areas D and E did not feature in the Undertakings to the CA, it seems to me, that given that the reservations I entertain presently in respect of the mechanism under OSA06 by which areas D and E would be managed, the **PrS** should consider amending the petition to remove that element of their proposals in the way they had already considered. I make clear that, if in the future a suitable way of permitting CCPS to manage the day to day running of areas D-E under the provisions of OAS06 could be found then I can see a number of advantages in such an arrangement. I do not share the **PsO** concerns based on the supposed complication of such an arrangement.

vi. I noted that LBTH said it had used a licensing-back mechanism in like circumstances elsewhere and it may wish to explore how that has been achieved without encountering the difficulty I see under §10 of the OSA06 on the facts of this petition.

vii. In light of the view I have expressed, I do not at this stage need to consider the arguments in respect of the SSFA.

UU. FURTHER DIRECTIONS

i. If the **PrS** are content to amend the petition to remove the proposals in respect of areas D and E, I invite them to consider a timetable to achieve this, allowing the **PsO** an opportunity to respond.

ii. The next stage is to set a timetable for the final determination of the petition by the court. I am content for the parties to agree one and to set out via correspondence with the Registry the remaining stages leading to my final determination of the faculty. If, however, this cannot be agreed then will the parties please provide a selection of dates to the Registry covering the next few weeks and a proposed written agenda for such a hearing which I can convene online to give such directions. It should also set out the time estimated as needed for the hearing.

VV. COSTS

The question of costs in relation to the legal rulings on the preliminary issues will be determined with all other costs' matters at the conclusion of the proceedings as a whole.

Plan of the gardens as attached to the management agreement: