Neutral Citation Number: [2026] ECC Bla 1

Faculty *– Application by a private company to carry out works on consecrated land (forming part of a former private cemetery) ancillary to the construction of a crematorium in accordance with an extant planning permission – Works including the renovation of two existing chapels and a lychgate; the upgrading of the main central access road; the provision of car parking and landscaped areas; and the supply of utilities and drainage – Faculty opposed by the Friends organisation for the cemetery – Trial of preliminary issue on written representations and agreed or assumed facts – Whether the proposed use of the land, the subject of the faculty application, for purposes ancillary to the use of the adjoining, deconsecrated land for secular use as a crematorium is inconsistent with its continuing status as consecrated land? – Whether any faculty should be refused on that ground alone even if no human or cremated remains rest under the land ?*

Application Ref: 2024-102725

IN THE CONSISTORY COURT OF

THE DIOCESE OF BLACKBURN

Date: Thursday, 30 April 2026

Before:

THE WORSHIPFUL DAVID HODGE KC,

CHANCELLOR

In the matter of:

CALDERSTONES CEMETERY (No 2)

THE PETITION OF:

REMEMBRANCE PARKS CONSTRUCTION LIMITED

PRELIMINARY ISSUE JUDGMENT

Mr Philip Petchey (instructed directly) for the Party Opponent (The Friends of Calderstones and Brockhall Cemeteries), by written submissions only

Mr Benjamin Harrison (instructed by **Manleys Solicitors Limited**, Chester) for the Petitioner, by written submissions only

The following cases are referred to in the judgment:
In re All Saints', Harborough Magna [1992] 1 WLR 1235 (Coventry Consistory Ct)
In re Bentley Emmanuel Church, Bentley [2006] Fam 39 (Court of Arches)
In re Bideford Parish [1900] P 314 (Court of Arches)
In re Camberwell Old and New Cemeteries [2017] ECC Swk 2 (Southwark Consistory Ct)
Corke v Rainger and Higgs [1912] P 69 (Court of Arches)
Donoghue v Stevenson [1932] AC 562
In re Radcliffe Infirmary Burial Ground [2011] PTSR 1508 (Oxford Consistory Ct)
In re St Andrew's, North Weald Bassett [1987] 1 WLR 1503 (Chelmsford Consistory Ct)
In re St Barnabas Churchyard, Downham 18 May 2011 (2011) 14 Ecc LJ 137 (Southwark Consistory Ct)
In re St Botolph's, Bishopgate [1991] 1 WLR 28 (London Consistory Ct)
In re St Chad's Churchyard, Bishop's Tachbrook [2014] Fam 118 (Coventry Consistory Ct)
In re St Clement, Eastcheap with St Martin Orgar [1964] P 20 (London Consistory Ct)
In re St James's, Bishampton [1961] 1 WLR 257 (Worcester Consistory Ct)
In re St John's, Chelsea [1962] 1 WLR 706 (London Consistory Ct)
In re St Luke's, Chelsea [1976] Fam 295 (London Consistory Ct)
In re St Margaret's, Hawes and *In re Holy Trinity, Knaresborough* [2003] 1 WLR 2568 (Ripon and Leeds Consistory Ct)
In re St Mark's, Biggin Hill (unreported), 13 May 1991 (Rochester Consistory Ct)
In re St Mark's Church, Lincoln [1956] P 366 (Court of Arches)
In re St Martin Le Grand, York [1990] Fam 63 (York Consistory Ct)
In re St Mary's Churchyard, White Waltham (No 2) [2010] Fam 146 (Oxford Consistory Ct)
In re St Mary the Virgin, Woodkirk [1969] 1 WLR 1867 (Chancery Court of York)
In re St Mary, Warwick (2004) 23 Consistory and Commissary Court Cases, case 17 (Coventry Consistory Ct)
In re St Michael and All Angels, Tettenhall Regis [1996] Fam 44 (Court of Arches)
In re St Paul's, Covent Garden [1974] Fam 1 (London Consistory Ct)
In re St Peter and St Paul's Church, Chingford [2007] Fam 67 (Court of Arches)
In re St Peter the Great, Chichester [1961] 1 WLR 907 (Chichester Consistory Ct)
In re St Peter's, Bushey Health [1971] 1 WLR 357 (St Alban's Consistory Ct)
In re Welford Road Cemetery, Leicester [2007] Fam 15 (Court of Arches)
In re West Norwood Cemetery [1994] Fam 2010 (Southwark Consistory Ct)
In re Whixall Old Burial Ground [2001] 1 WLR 995 (Lichfield Consistory Ct)
R *v Twiss* (1869) LR 4 QB 407 (Court of Queen's Bench)

No additional cases were referred to in the written submissions

PRELIMINARY ISSUE JUDGMENT

Introduction

1. In this judgment, the court must consider the circumstances in which consecrated land in private (non-church) ownership may be used for secular purposes.

2. This judgment is a sequel to, and should be read in conjunction with, the case management judgment I handed down in this matter on 22 October 2025 which bears the neutral citation number: **[2025] ECC Bla 3**. Following on from that judgment, a directions hearing took place remotely, via the Teams video platform, on 17 December 2025. This was attended by Ms Sehar Hussain (of Manleys Solicitors Limited) for the petitioner, Remembrance Parks Construction Limited (**RPC**); and by Mr Philip Petchey (of counsel) for the party opponent, The Friends of Calderstones and Brockhall Cemeteries (**'the Friends'**). Before that hearing, I had attended a site visit, and viewed the land, accompanied by the Diocesan Registrar and the Registry Clerk, in fine weather, on Wednesday 10 December 2025. At the end of this judgment, I have attached four photographic images that I took during that visit. Following on from the directions hearing, the parties agreed that the court should determine a preliminary issue on the basis of written representations. After the hearing, I canvassed the possibility of slightly expanding the scope of the proposed preliminary issue so as to encompass the further issue:

Whether, should any faculty be granted, its implementation should be made conditional upon the Petitioner (or any successor in title) securing the written consent of the owner, lessee and occupier of any dwelling-house standing within 200 yards of the proposed crematorium in accordance with s. 5 of the Cremation Act 1902.

I made it clear, however, that I would only be prepared to do so should both parties agree to this course. The Friends were content to agree to this suggested further issue being considered as a preliminary issue, to be determined on written representations. In the unusual circumstances of the present case, they considered that its early determination would be of assistance to the parties, and this might be considered to outweigh the fact that its determination would, on the face of it, prove unnecessary should the first identified preliminary issue be determined in the Friends' favour. After careful consideration, RPC indicated that it was of the opinion that the preliminary issue should not be expanded, but should remain in the form of the previously agreed draft order. (I note that since this exchange of views, the Law Commission presented to Parliament (on 17 March 2026) its Final Report on *'Burial and Cremation'* (Law Com 425, HC 1762). This includes (at paragraph 13.55) a recommendation (numbered 58) that before building a crematorium, a copy of the plans showing compliance with the 200 yards radius clause must be approved by the Secretary of State.) It is against this background that, on 13 January 2026, the court issued its order for the trial of a preliminary issue on written representations, with a timetable for the sequential filing and service of written submissions on that issue, and the costs of the directions hearing on 17 December 2025 being reserved. Since it was the Friends who had first raised the preliminary issue, they were directed to deliver their submissions first. These were to be followed by submissions in response from RPC, and in reply from the Friends. The terms of the preliminary issue, and the agreed and assumed facts on which it falls to be determined, are set out in an Annex to the court's order; and these are reproduced at the end of this judgment.

3. The background to this preliminary issue is set out in my earlier case management judgment. In order to avoid the need to refer back to that judgment, I reproduce the salient background to, and the history of, this petition in the following three sections of this judgment.

Background

4. RPC is the registered freehold proprietor of land shown edged red on the plan of Title No LA885518 and described as Ribble Valley Remembrance Park, Mitton Road, Whalley, Clitheroe. RPC's land lies within the parish of St Mary, Whalley, in the Archdeaconry of Blackburn, and the County of Lancaster. The land lies a little under 1½ miles distant from the church building, and it forms part of a larger, three-acre, plot of land that was subject to a Sentence of Consecration executed on 30 June 1916 by the suffragan Bishop of Burnley, acting as commissary for the Bishop of Manchester (in whose diocese the land then fell, before the creation of the new Diocese of Blackburn). This document set aside and consecrated a one-acre plot of land (to the south-east) which was to form a burial ground for soldiers dying in the Queen Mary Military Hospital, and a larger, two-acre plot (to the north-west) as a burial ground for *"lunatics dying in"* Whalley County Lunatic Asylum, and for officers and servants belonging to the asylum. RPC's land falls entirely within the larger, two-acre plot. What had been the Whalley Asylum passed through various changes of name and function until it became Calderstones Hospital. This later closed, and the site was redeveloped. The burial ground was sold by the Regional Health Authority to a private developer in October 2000. There is therefore, at present, no prospect of any future interments of human remains in RPC's land. According to entry no 2 of the proprietorship register, RPC purchased the land, on 7 October 2019, for £200,000.

5. By a decision letter, dated 23 May 2024, the Bishop of Blackburn acceded to an application by the Archdeacon of Blackburn to direct, pursuant to s. 92 (2) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (the **2018 Measure**), that a designated part of the land owned by RPC should no longer be subject to the legal effects of consecration. The object of that application was to facilitate the construction of a crematorium on that part of RPC's land. The application proceeded on the basis that there were no human remains resting within that part of the land (as opposed to other parts of the burial ground which remain subject to the sentence of consecration). Notwithstanding the speculations of various objectors, the Bishop was satisfied that the totality of the evidence, both scientific and documentary, pointed to there being no human remains in the deconsecrated part of RPC's land. Even if there were, a condition was imposed requiring the reverent reburial of any such remains within that part of the burial ground that was to remain consecrated. Having regard to all the material that had been placed before him, the Bishop concluded that the part of the land that was to be deconsecrated had not been used for burials in the past; and, since the closure of Calderstones Hospital, it would not be used for any burials in the future. It was distinct and severable from the remainder of the burial ground, which would continue to be subject to the legal effects of consecration. The graves of anyone buried there would remain untouched and undisturbed.

6. The Bishop's order removing the legal effects of consecration was not to come into effect until RPC had executed a legally binding covenant giving effect to their representations and assurances that:

(1) the deconsecrated area of land would be used for the erection and operation of a crematorium, and for no other purpose, and was to be operated in an orderly manner, mindful of the consecrated character of the neighbouring land;

(2) landscaping and other works of restoration would be carried out in that part of the burial ground which would remain consecrated, subject to obtaining such consent as might be required;

(3) that part of the burial ground which would remain consecrated was to be open to visitors each day;

(4) a communal memorial was to be erected commemorating those whose headstones were wrongly removed in or about 2000;

(5) an electronic Book of Remembrance would be provided in one of the two side chapels; and

(6) appropriate signage and interpretative information boards, explaining the history of the site, would be erected in accordance with plans approved by the archdeacon.

7. A deed containing these covenants was duly executed on 5 December 2024. It contains a further covenant that any remains that are found by the covenantor in the deconsecrated area of land must be reported to the Ministry of Justice immediately upon discovery, with a request that they be lawfully relocated into the consecrated part of the covenantor's land, with all processes and requirements of the Secretary of State being followed.

The petition

8. By an online faculty petition, dated 10 April 2025, RPC now applies to the court for a faculty authorising the carrying out of ancillary works relating to the construction of the crematorium in accordance with planning permission granted by Ribble Valley Council (under planning application ref: 3/2019/0004). The proposed works include: the renovation of two existing chapels and a lychgate (including protection for bats); the upgrading of the main central access road (for which the archdeacon's approval has already been given); the provision of car parking and landscaped areas; and the supply of utilities and drainage. The petition emphasises that the work includes essential works of renovation to the two chapels, which have deteriorated severely over the years, and need to be renovated properly to bring them back into use, and to protect them from any further dilapidation.

9. The petition includes the following statement:

> *Planning Permission for a crematorium was first granted in 2009 and has been amended on a number of occasions since, the last of these were in 2018 and 2019, when the car park was adjusted to ensure account was taken of the Garden of Remembrance and Booth Hall baby graves, adjustments were made to landscaping plans.*
>
> *In December 2024, covenants were agreed between Remembrance Parks Construction Ltd and the Church of England and an area of land containing no burials was deconsecrated by Bishop Philip North of the Diocese of Blackburn. The covenants require the area of deconsecrated land to be used for a crematorium and will ensure the heritage of those buried in the cemetery is respected by the provision of a memorial, an electronic book of remembrance and interpretative signage. This can only be achieved if ancillary parking and associated works to the chapels and lychgate are carried out. These works are the subject of this faculty petition.*
>
> *Allegations continue to be made by certain parties that should RPC be allowed to proceed with the provision of a crematorium then burials will be disturbed. Extensive research has been carried out on hospital statutory/non-statutory records and a ground penetrating radar*

survey has been undertaken, proving there are no burials in the areas to be developed. In addition, construction plans have already been prepared and submitted with this petition, showing how burial areas will be protected.

Recent allegations about 20 catholic burials in the cemetery have proved to be inaccurate, with statutory cremation records from Accrington Crematorium disproving the allegations. There is evidence of one burial in 2003, however, the location of this is disputed. In any case, it is clear the burial has taken place outside of the area to be developed and so will not be disturbed. There is no evidence at all of any other burials within the cemetery that RPC is not already aware of.

RPC wish to re-affirm that this petition request for the car parking, chapels and associated works, is an essential element in the construction of a crematorium. It is in full compliance with planning approval given prior to the decision to deconsecrate an area of the cemetery last year and we hope it will be looked upon favourably by the Church to allow RPC to provide a much-needed service and protect the long term heritage of the cemetery.

The Notification of Advice

10. On 9 April 2025 the Diocesan Advisory Committee (the **DAC**) issued its notification of advice. This recommends the proposals for approval by the court, without any provisos or conditions. Before doing so, the DAC had consulted the Commonwealth War Graves Commission (the **CWGC**). They had responded, indicating that the CWGC's Whalley (Queen Mary's Hospital) Military Cemetery has 42 war graves, and is accessed through Calderstones Cemetery. As there are no war graves in Calderstones Cemetery, where the proposed works will be taking place, the CWGC do not wish to make any representations about the faculty application. However, should the faculty be granted, the CWGC ask that access for their staff, contractors, and visitors to the military cemetery should continue during the works (as previously arranged with the owner, RPC). They also ask that any construction works should cease around any Remembrance events, such as Remembrance Sunday, to ensure that visitors to the military cemetery are not disturbed by any construction works. I note that the DAC minutes of their 9 April 2025 meeting record that consideration of the application had been deferred from their previous meeting pending more information about the proposed use of the restored chapels and the drainage plans. The DAC noted that the drainage plans indicate that there are no toilets or foul water drains included in the development of the chapels. One chapel is planned to be the holding place for the electronic Book of Remembrance, and to offer tea and coffee-making facilities for those visiting. The other chapel would serve as a holding place for the deceased before moving them into the main crematorium. A certificate of lawful development had also been received. It was on this basis that the DAC recommended the application to the court for approval.

The objections

11. The usual public notice of the petition was duly displayed, between 11 April and 11 May 2025, on notice boards inside and outside the parish church, as well as on the gates outside the site of the former Calderstones Cemetery. I also directed that special notice of the petition should be given to the Friends, pursuant to rule 9.1 of the Faculty Jurisdiction Rules 2025, as amended (the **FJR**). The Friends describe themselves as a body who seek to preserve and honour the memory of those who are buried in the former cemetery, and to achieve its restoration. As such, I have already determined that the Friends have a sufficient interest in its

subject-matter to oppose this petition, and have admitted them as a party opponent. Indeed, RPC has raised no challenge to the Friends' standing to oppose this faculty petition. In addition to the Friends, the Registry received eight letters of objection in response to the public notices, although one of these was later withdrawn. As a result of determinations made, and directions given, in my case management judgment, the only remaining party opponent is the Friends.

12. The Friends object to the grant of a faculty on a number of grounds. They are concerned that since 2000, when the Department of Health sold the cemetery, without obtaining any guarantees for its future maintenance, it has been subject to neglect, vandalism, and work by the owners without the benefit of any faculty (including the clearance of the headstones). Rather than seeing the construction of a crematorium upon the site, the Friends wish to see the land restored as a cemetery. That is a solution which, they say, would respect the consecrated status of the land. The Friends says that the use of consecrated ground for development as access roads and car parking, ancillary to the secular use of the adjoining, deconsecrated land as a crematorium, is not an appropriate use of consecrated land: land which is permanently set apart for sacred purposes. Part of the Friend's objections relate to the consecrated status of the land as a cemetery, irrespective of whether or not there have been any burials or interments in that land. But the inadequacy of the treatment of any burials and interments within the land is said to provide a further reason for refusing any faculty. Thus, in summary, the Friends' objection is both an *'in principle'* one, based upon a submission as to the appropriate use of consecrated land, and also, and additionally, about the way that it is proposed to deal with any human or cremated remains that may lie within that land. Since what is proposed is inconsistent with the consecrated status of the land, it is not an appropriate form of development. Overall, a cemetery which was forever solemnly set aside for sacred purposes is proposed to be made over for secular development, as part of a crematorium. The Friends object that no faculty should permit this. I turn then to consider the Friends' detailed written representations on the preliminary issue.

The Friends' opening submissions

13. For the Friends, Mr Petchey begins by emphasising that consecration is the permanent setting aside of land to sacred purposes. Because it is permanent and indelible, he says that it is axiomatic that such land cannot, in the future, be used for any secular purpose. Thus, in the present case, since the relevant land is consecrated, no faculty can be granted to lay it out for the purposes of facilitating the use of the adjoining land as a crematorium. Such use of land is a secular use; and the ancillary use of adjoining land in connection with that secular use is also a secular use. It would be a contradiction in terms for a court, which derives its jurisdiction from the fact that the land is consecrated, and thus in the special category of land permanently set aside for sacred purposes, to give its permission for its use for secular purposes. To do so would make a nonsense of the sentence of consecration that was pronounced in 1916.

14. Mr Petchey refers the court to a passage from Volume 34 of *Halsbury's Laws of England (Title: Ecclesiastical Law)* which is now to be found at paragraph 780 of the 2025 issue. This paragraph is headed '*Use of consecrated ground for secular purposes*'. The full citation (omitting footnotes) reads as follows:

When consecrated a church or churchyard ceases to be the property of the donor, who, by dedicating their property to God, voluntarily sacrifices it for the attainment of sacred objects. Thereafter, in strictness only the authority of an Act of Parliament or Measure of the Church Assembly or General Synod can divest it of its sacred character, and a faculty should not be granted for applying it to secular purposes. Deviations from the strict rule

are, however, frequently allowed, and faculties may be granted for various purposes consonant with modern requirements. Thus, while there are limits upon the grant of faculties for the secular use of consecrated land, it may be possible to authorise by faculty the use of a portion of the consecrated ground for purposes which are advantageous to persons using the church, to the parishioners, or to the public.

In proper cases, a faculty will be granted for appropriating a portion of a churchyard for widening a public highway, at any rate where the churchyard is closed for burials, or for making and fencing a pathway across a churchyard as a private way to adjoining premises.

15. Mr Petchey cites the provision of sewers, drains and telephone lines as early examples of what may be viewed as deviations from the strict rule. More recent examples are the installation of telecommunications equipment in church towers. In approving the installation of such equipment in *In re All Saints', Harborough Magna* [1992] 1 WLR 1235 (Coventry Consistory Ct), Chancellor Gage QC emphasised (at p. 1237C-D) the importance of maintaining the sacred character of the land. The full citation reads:

I think I should just add that in general it is my view that a faculty for use of a church for secular purposes only should be granted only in rare and exceptional circumstances. In cases such as this one, each case must be considered on its merits and, though I shall give some general comments as to guidance, I recommend that each parish looks at any individual case very carefully before deciding whether or not to present such a petition to me.

Earlier in his judgment (at p. 1236E-H), Gage QC, Ch gladly adopted, and accepted, the position set out by Chancellor Goodman in *In re St Mark's, Biggin Hill* (unreported), 13 May 1991 (Rochester Consistory Ct) as follows:

First I must consider the law. The use of church buildings in these cases would of course be for wholly secular purposes. Generally speaking of course, any use of a consecrated church or a consecrated churchyard must be for ecclesiastical purposes. These days 'ecclesiastical' is often interpreted generously. Thus it will cover use of part of the church as a meeting room, for providing kitchen, washing and lavatory facilities and so on. Permission is sometimes given to use part of a church for a nursery school or an old people's day centre. But all of those activities can be comprehended within the expression 'pastoral outreach.' Here, however, the use is wholly secular and commercial even if the general public will benefit. There have been cases where faculties have been granted to approve rights of way over churchyards for the benefit of neighbouring landowners. Part of a churchyard can be permitted to be used for road-widening purposes and small electricity sub-stations have been permitted to be erected on the churchyard if it is judged that they will not adversely affect the essential character of a churchyard. Use of part of the church itself for wholly secular purposes is of course another matter.

16. Given that such uses: (1) do not interfere with the sacred use of the land; (2) are not intrinsically inconsistent with it; and (3) take up only a small part of the consecrated land, Mr Petchey points out that it is evident that they involve only limited deviations from the strict rule. He says that the law as regards deviations from the strict rule was exhaustively considered by Deputy Chancellor Newsom QC in *In re St John's, Chelsea* [1962] 1 WLR 706 (London Consistory Court). In that case, the vicar and churchwardens sought a faculty to enable the land on which the parish church formerly stood to be used for a commercial purpose, namely as a car park. Having reviewed the authorities, Newson QC, Dep Ch said this (at pp 714-5):

To sum up on this part of the matter:

1. Faculties can be granted, either in respect of a church site or a churchyard, for ecclesiastical user. One example is a church school, as in Corke v Rainger *[1912] P 69 but the principle is not, in my opinion, confined to buildings.*

2. Faculties can be granted for throwing small parts of a churchyard (whether still available for burials or not) into a highway, or for granting other rights of user in the nature of wayleaves. These faculties are justified by Walter v Mountague and Lamprell (1836) 1 Curt 253, as approved in the Bideford case. But those decisions have been somewhat stretched in practice. This part of the jurisdiction must be sparingly exercised and should not be extended .

3. Faculties may be granted for secular user where the original purpose of consecration can no longer lawfully be carried out (see the Bideford case and the Lincoln case).

I can find no jurisdiction in the reported authorities for any relevant class of faculty except these three. The result is, in my judgment, that a faculty for secular user cannot be granted unless the user falls in the restricted category of wayleaves, or if the purpose for which the ground was originally consecrated can no longer lawfully be carried out.

Since, on the evidence, the petitioners had failed to establish that the purpose for which the land was originally consecrated could no longer lawfully be carried out, the petition failed and was dismissed.

17. In a footnote to his skeleton argument, Mr Petchey suggests that there is a Class 2 case where the jurisdiction was *"stretched"* by the Chancery Court of York: *In re St Mary the Virgin, Woodkirk* [1969] 1 WLR 1867. He submits that the stretching that took place in that case was not a sparing exercise of the jurisdiction, and that the case is plainly wrong on its facts. However, he says that it is a decision on its own facts, and does not constitute any precedent.

18. Mr Petchey submits that none of the three classes of faculty identified in *In re St John's, Chelsea* applies in the present case. As regards Classes 1 and 2, this is said to be self-evident. But it is however appropriate to consider Class 3 in more detail:

Faculties may be granted for secular user where the original purpose of consecration can no longer ***lawfully*** *be carried out.* [Emphasis supplied by Mr Petchey]

As Newsom QC, Dep Ch indicates, this proposition is derived from the cases of *In re Bideford Parish* [1900] P 314 and *In re St Mark's Church, Lincoln* [1956] P 336, both decisions of the Court of Arches. Mr Petchey therefore proceeds to analyse these two authorities.

19. *In re Bideford Parish* concerned a churchyard that had been closed by order in council and, accordingly, in which further burials were prohibited . The Court of Arches was asked to permit a proposal to widen a street in Bideford by the provision of a footway. This involved throwing 337 square feet of the churchyard into the street. The work involved disturbing five graves, the remains in which were to be re-interred within the churchyard. The Court observed (at pp. 326-7):

Now, in the present case the faculty is asked for ***in respect of ground which can no longer be lawfully used for burials****. It remains nevertheless under the jurisdiction of the Ordinary, and now there are also many statutory restrictions upon the mode in which it may be used. For example, it can no longer be built upon either temporarily or permanently (47 & 48 Vict. c72, s3; 50 & 51 Vict. c32, s4). The care of it is vested in the churchwardens where there is no burial board, and they are bound to maintain it in order and do the necessary repairs of the walls and fences (18 & 19 Vict. c128, s18), and their expenses are to be repaid out of the poor-rate. It has become, in fact, simply an open space kept up by the parishioners,* ***but not available for use for its former ecclesiastical purpose****. If it still remained open, the Ordinary would undoubtedly have power to grant a faculty for a footpath to be made within it for the public convenience: Walter v. Mountague;*

and, regarding the question as one of jurisdiction as opposed to discretion, I can see no difference between a faculty for a path across a churchyard and for a path along one side of it. These paths so long as interments were lawful would also subserve the ecclesiastical purpose of burial; but I see no reason why the jurisdiction should not remain **although the ecclesiastical purpose can no longer be carried out**. *And in this case, as no question can arise as to the curtailment of the parishioners' rights of burial space for the future, there can, in my opinion, be no objection to authorizing the removal of the present boundary wall so as to allow the proposed path to be thrown into the public way. But if this be done, means must be taken to preserve a record of the exact measurement of the piece of land thus added to the road, for it will still remain a part of the burial ground subject to ecclesiastical jurisdiction and to the statutes as to the mode in which burial grounds may be lawfully used.* [Emphasis supplied by Mr Petchey]

20. Mr Petchey submits that there is a certain amount of special pleading in this. There is a difference between permitting a footpath across a churchyard and permitting one alongside it, where what is involved in the latter is throwing a piece of land into the highway where it will be walled off from the churchyard. Moreover, Mr Petchey suggests that this can readily be categorised as a Class 2 case. However, this may be, *In re Bideford Parish* was considered by the Court of Arches in *In re St Mark's, Lincoln*. That case concerned the provision of access to a new bus station by way of a new footpath to be created by using a small portion of the churchyard which, like the churchyard in *In re Bideford*, had been closed for burials. The case was principally about whether a shelter to be provided over a footpath was a building for the purposes of the Disused Burial Grounds Act 1884. With regret, the Court held that it was and so it could not be permitted. However, the case also considered the basis on which the footpath could be permitted.

21. The Court of Arches identified the following issues (at p. 341):

Can, and if so, should this area of consecrated ground be used as part of an omnibus station? If so, is the proposed roofing permissible?

The Court then said:

As to the first of these issues I see no reason to differ from the learned chancellor. Until the decision of this court in In Re the Parish of Bideford there was considerable doubt and some apparent conflict of authority whether it could be permitted that land once consecrated to a sacred use should be used for a secular purpose. This case is clear authority that when the purpose for which the ground was originally consecrated can no longer be lawfully carried out the use of it for a secular purpose may be authorized though the ownership of the land remains unaffected.

22. Mr Petchey invites this court to note that this case (like *In re Bideford Parish*) may be viewed essentially as one under Class 2. As Sir Henry Willink, Dean pointed out (also at p. 341):

… the earlier case of St Gabriel, Fenchurch Street (Rector, etc.) v City of London Real Property Co Ltd [1896] P 95 shows that the principle is not limited to the widening of a highway: the Court of Arches in that case protected and treated as valid a faculty permitting the construction and fencing of a private pathway to be used only by a commercial concern in common with the rector and churchwardens.

23. Mr Petchey contends that it is necessary to be clear: what Class 3 is all about is the power of the court to grant a faculty in respect of a closed churchyard, where further interments are not lawful by virtue of section 3 of the Burial Act 1855. He invites this court to note that Class 3 has not been considered in the context of a case where the works proposed were more extensive than the use of a small portion of the consecrated land. If more than a small portion of land

were involved, it would make a nonsense of the fact that the land remains subject to consecration. Mr Petchey points out that the instant case is not one where the land in question is a closed churchyard, nor is there any other legal impediment to the fulfilment of the ecclesiastical purposes for which it was consecrated. Accordingly, it is not a Class 3 case. Since this case does not fall under any of the three classes recognised in *In re St John's, Chelsea*, this court has no jurisdiction to grant a faculty. That is the end of the matter; and the preliminary issue falls to be decided on this basis. The answer to the question:

Whether the proposed use of the land, the subject of the present faculty application, for purposes ancillary to the use of the adjoining, deconsecrated land for secular use as a crematorium is inconsistent with its continuing status as consecrated land?

should be:

Yes, it is inconsistent with its continuing status as consecrated land.

The answer to the further question:

Whether or not any human or cremated remains lie under that land, any faculty should be refused on that ground alone?

should be:

Yes, a faculty should be refused on that ground alone.

24. Mr Petchey recognises that RPC may take no issue with this statement of the law. Nonetheless, RPC may urge that the law should be extended to cover the hypothetical case presented by the assumed facts of the preliminary issue and similar cases. If so, Mr Petchey submits that the law is clear; since this court is bound by *In re St Mark's, Lincoln*, there is no power so to extend the law. But as well as there being no power to extend the law, Mr Petchey contends that there is no factual basis for doing so either. In 1900, when *In re Bideford Parish* was decided, the only way in which the road widening scheme could have been authorised, apart from the grant of a faculty, was by the enactment of legislation. He instances the construction of the railway into St Pancras Station, which required taking part of the St Pancras Burial Ground, and the exhumation of about 8,000 bodies. This was authorised by sections 84 – 86 of the Midland Railway (Extension to London) Act 1863. It is clear both that such works were inconsistent with the consecrated status of the land, and also that they could not be authorised by faculty. Although, by that time, there were alternative ways of dealing with consecrated ground, Mr Petchey points out that section 39 of the Channel Tunnel Rail Link Act 1996 similarly authorised the removal of the faculty jurisdiction from burial grounds required for the construction of the high-speed rail link to the Channel Tunnel. The construction of that link required further exhumations from the same burial ground.

25. Mr Petchey submits that the way that the jurisdiction in *In re Bideford* is properly to be viewed is as a practical, but limited, extension to the jurisdiction to grant wayleaves over churchyards. It is very difficult to regard the land within the churchyard at Bideford that was thrown into the adjoining public highway as remaining set aside for ever for sacred purposes by virtue of its consecration, even though it remained subject to the faculty jurisdiction. This is why Newsom QC, Dep Ch observed of Class 2 that: *"This part of the jurisdiction must be sparingly exercised and should not be extended."* The same reasoning applies to the third class of case. It would be a nonsense, and a contradiction in terms, for any extended area of consecrated ground to be

authorised for secular use. A consistory court cannot authorise the use of land for secular purposes when it has been set aside for sacred purposes to the exclusion of secular purposes.

26. The severe constraints that consecration imposes upon the use of land for anything apart from sacred purposes is capable of obstructing alternative uses of land. Parliament has therefore taken the view that, despite the apparent permanent nature of consecration, its effects should not be immutable. It has already been seen how the construction of St Pancras Station was authorised by Act of Parliament. More generally, section 28 of the Town and Country Planning Act 1944 and the Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1948 enabled land to be freed from the effects of consecration in respect of land required for public purposes by a highway or planning authority. This power is now contained in section 238 of the Town and Country Planning Act 1990 and related regulations. In terms of land held by the church, powers to remove the legal effects of consecration are contained in section 74 of the Mission and Pastoral Measure 2011. Further, powers exist under section 92 of the 2018 Measure, enabling the bishop of a diocese to remove the legal effects of consecration in respect of land not held or controlled by the church where he is satisfied that no purpose will be served if it remains subject to the legal effects of consecration.

27. Mr Petchey refers the court to the decision of the Oxford Consistory Court in *In re Radcliffe Infirmary Burial Ground* [2011] PTSR 1508 to illustrate the way that these powers work. When the Radcliffe Infirmary opened in Oxford in 1770, part of the area it occupied was consecrated as a burial ground; and up until its closure in 1855, there continued to be a large number of burials within that land. As matters stood, the Bishop had no power under the predecessor to section 92 of the 2018 Measure to deconsecrate the land because the consecration clearly continued to serve some useful purpose. Accordingly, an application was made for the exhumation of human remains within the burial ground on the site of the former Radcliffe Infirmary, and their subsequent reburial elsewhere. This was to facilitate the construction on the site of a new school of government for Oxford University. Having considered the reasons for the proposed exhumation, Chancellor Bursell QC found that the public benefits of redeveloping the site outweighed the harm that would be caused by disturbing the human remains. It was a condition of the faculty that no building works should commence upon the site of the burial ground until the land had been deconsecrated. Mr Petchey suggests that the reason this condition was imposed was that, even after the permitted exhumations had taken place, it was still not considered appropriate for secular buildings to be constructed on consecrated land, or for such land to be used for secular purposes whilst it remained consecrated. I find that this suggestion derives no express support from the text of the judgment itself, which contains no discussion about the reason for imposing this condition. The case of *In re St John's, Chelsea* is referred to (at [2] of the judgment); but only as authority for the proposition that: *"By reason of its continuing consecration the burial ground remains within the jurisdiction of the consistory court of the diocese of Oxford"*: see [1962] 1 WLR 706, 709". The case of *In re St Mary the Virgin, Woodkirk* [1969] 1 WLR 1867 is considered (at [30]); but in the context of petitions for multiple exhumations in what counsel for the petitioners (Mr Timothy Briden) had called *'public works'* cases. It is in that context that Bursell QC, Ch cites the statement of Mr Owen Stable QC, Deputy Auditor, at 1873H:

In my judgment I ought not to grant a faculty unless I am satisfied that considerations of the public interest require that the proposed road improvements should be carried out; that there is no reasonable alternative and that

the public interest outweighs the interests of the objectors and the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.

The judgment contains no further discussion of the circumstances in which consecrated land may be used for a secular purpose, or consideration of the authorities that bear upon this issue.

28. Mr Petchey suggests that the relevance of the *Radcliffe Infirmary* case to the hypothetical scenario raised by the preliminary issue in this case is apparent. In that hypothetical scenario, there are no burials at all in the consecrated land. There will therefore be no need for any faculty to exhume any burials. If it is desired to develop the consecrated land for secular purposes, the owner, or the developer, can ask the Archdeacon to apply for an order under section 92 of the 2018 Measure to deconsecrate the land. As Mr Petchey points out, in the real, as opposed to the hypothetical, world, such an application has already been made (and has been unsuccessful). What cannot happen, so he says, is that the land is developed for secular purposes by reference to a faculty granted permitting such development whilst the land remains consecrated. Mr Petchey also invites this court to note that the faculty sought in the *Radcliffe Infirmary* case did not seek permission for the necessary exhumations **and then** for the consequent redevelopment of the site. If that had been possible, it would have been a much simpler procedure than having to pursue a separate application for the deconsecration of the site.

29. Mr Petchey suggests that *In re Bideford Parish* was decided at a time when the only way to overcome the effects of consecration was to obtain a private Act of Parliament. It is now much easier to overcome those effects. He recognises that it is too late now to put the clock back, and to call into question the decision of the Court of Arches in that case. He suggests, however, that had the case fallen to be decided after the enactment of section 28 of the Town and Country Planning Act 1944, the decision might have been different. As it is, he invites this court to note that there is no basis for extending the jurisdiction so that it is not *'sparingly'* exercised. If it were to be so extended, the court would be permitting a contradiction in terms.

30. Mr Petchey recognises that RPC's Form 6 Reply speaks to the totality of the Friends' objections to the petition, and is not limited to, or indeed focused upon, the matters arising on the preliminary issue. However, there is one matter that he suggests can helpfully be noted in the present context. RPC points out that the specific purpose of the consecration was for the *"burial of lunatics dying in the said Whalley County Lunatic Asylum and for officers and servants belonging thereto"*. Of course, the site was so used by the asylum/hospital until about 1989. In this context, it is not appropriate to distinguish between the original use of what was then styled an *'asylum'* and the use of what subsequently was called a *'hospital'*. The point that RPC makes is that the purpose which was identified in the sentence of consecration no longer obtains. Mr Petchey recognises that this may be accepted; and, in the hypothetical case that the preliminary issue considers, there are assumed to have been no burials at all in the relevant land, whether with reference to the asylum or the subsequent hospital. But, he says, this does not mean that with the non-use of the land in the hypothetical case postulated (or with the last hospital-related burial or interment in the real world), the land ceased to be consecrated, or subject to the effects of consecration. It is important not to confuse the **purpose** of consecration with its **legal effects**. The legal effect of consecration is the permanent setting aside of land for sacred purposes. Whilst it remains consecrated, whatever the original purpose or reason for its consecration, it cannot be used for secular purposes (save for the limited exceptions identified and explained in Mr Petchey's written submissions); and a faculty cannot authorise such use. Of course, the fact that the land will not be used in the future for *'hospital'* burials or interments does not mean that it cannot be used

more generally for that purpose. Indeed, after the land ceased to be used for *'hospital'* burials, Mr Petchey says that there were a limited number of non-hospital burials. He emphasises that there is generally a shortage of land available for burials generally.

31. Those are the Friends' opening submissions on the preliminary issue.

The petitioner's submissions in response

32. For the petitioner, Mr Harrison submits that the Friends' objection that this court lacks the necessary jurisdiction to grant the relief sought on this petition because the '*primary use*' of the application site would be as '*ancillary secular development to a secular use*' is misconceived. He contends that there is clear authority to the effect that this court has jurisdiction to grant a faculty authorising the development proposed, notwithstanding that this would be ancillary to the secular use of adjoining land. Mr Harrison submits that the proposed development is entirely consistent with the site's continuing status as consecrated land.

33. Mr Harrison begins his written submissions by emphasising a number of factual matters:

(1) On 14 March 2019, Ribble Valley Council (as the local planning authority) granted permission to vary the conditions attached to a previous planning consent which had been granted (in 2009) for the construction of a crematorium on the land adjoining the application site. The new conditions include:

(a) amendments to the existing entrance to the site, including by resurfacing the access between the highway boundary and the entrance gate (condition 4);

(b) certain parking facilities need to be surfaced or paved, drained and marked out (condition 6);

(c) an approved landscaping scheme needs to be implemented (condition 8); and

(d) the development needs to be carried out in accordance with a particular drainage strategy (condition 14).

(2) The crematorium itself will be situated on a parcel of land from which the effects of consecration have been removed by order of the Bishop of Blackburn, made pursuant to section 92(2) of the 2018 Measure 2018, on 23 May 2024. The Bishop of Blackburn's order of deconsecration was conditional upon RPC executing covenants to the effect that (amongst other matters):

(a) the deconsecrated land will only be used for the erection and operation of a crematorium; and

(b) landscaping and other works of restoration will be carried out in the part of the burial ground which remains consecrated (subject to obtaining the necessary consent of this court).

RPC executed the necessary covenants by a deed dated 5 December 2024.

(3) This court is now solely concerned with a petition for a faculty which seeks to give effect to the above covenants and to comply with the planning conditions imposed by Ribble Valley Council in respect of the development of the crematorium. The works for which a faculty is sought are limited to:

(a) the restoration of two chapels and a lych gate;

(b) the supply of utilities and drainage; and

(c) the provision of landscaped areas and a car park.

34. Mr Harrison submits that the law has moved on since *R v Twiss* (1869) LR 4 QB 407, where Cockburn CJ (with the concurrence of Hannen and Hayes JJ) affirmed (at p. 412) the correctness of the rule that:

… when ground is once consecrated and dedicated to sacred purposes, no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an act of parliament can divest consecrated ground of its sacred character …

In that case, the Court of Queen's Bench discharged a rule, obtained by an entire stranger to the parish, which called on the Worshipful Sir Travers Twiss, as the judge of the London Consistory Court, to show cause why a writ of prohibition should not issue to prohibit him from further proceeding upon a faculty petition presented by the guardians of the poor of the parish seeking to apply consecrated ground to secular purposes.

35. Having cited the passage from paragraph 780 of Volume 34 of the current (2025) issue of *Halsbury's Laws of England* cited in full above, Mr Harrison proceeds to consider: (1) the three traditional classes of permitted secular use of consecrated land identified in *In Re St John, Chelsea* [1962] 1 WLR 706; (2) a trend towards greater flexibility, and the need to treat the *Chelsea* case with caution; (3) the *'Class 1-type'* cases: faculties for ecclesiastical uses; (4) the *'Class 2-type'* cases: authorising the secular use of consecrated land in the public interest; and (5) the *'Class 3-type'* cases: authorising secular use when the original purpose of consecration has been frustrated. Finally, Mr Harrison responds to miscellaneous submissions from the Friends.

36. Mr Harrison recognises that when faced with a petition to authorise the use of consecrated land for secular purposes, the consistory court's usual starting point is *In re St John, Chelsea*. In that case, Newsom QC, Dep Ch concluded (at pp. 714-715) that there were three classes of case where a faculty could properly be issued authorising the use of consecrated land for secular purposes. Before considering each of those three *'classes'* of case in detail, Mr Harrison makes two preliminary submissions about the need to treat *Chelsea* with caution.

37. First, he says that there has been a wholesale shift in the way the court has approached the secular use of consecrated land. Whilst *Chelsea* is often seen as the starting point of the analysis in these types of petitions, Mr Harrison submits that it is not the end of it. The former Dean and Auditor, Mr Charles George KC, writing extra-judicially in an article entitled *'Shared use of Church Buildings or is Nothing Sacred?'* (2002) 6 Ecc LJ 306 considers the way in which this jurisdiction has developed since the 1960s. His conclusion (at p. 312) *"is that the nineteenth century outlawing of pure secular uses on consecrated land is now merely part of legal history"*.

38. In terms of the way *Chelsea* has been applied in modern times, in *In re St Barnabas Churchyard, Downham* 18 May 2011 (2011) Ecc LJ 137 (Southwark Consistory Ct), Chancellor Petchey explained (at [18-19]) that:

…As regards the principles enunciated in In re St John's, Chelsea, they obviously must be treated with great respect as indicative of the correct approach but I think they ***cannot now be tested as a comprehensive statement*** *– in short, the law has developed since 1962.*

As explained above, it seems to me that, since the Second World War, the Consistory Courts have approached the question of the secular use of consecrated ground with ***an increasing degree of flexibility****. Thus I do not think that merely to identify the secular and separate use of the proposal before me is automatically to identify reasons for rejecting it …* [Emphasis added by Mr Harrison]

Indeed, Petchey Ch was comfortable in concluding (at [17]) that:

… there is ***no absolute bar*** *to secular use of a consecrated churchyard involving* ***permanent works****.* [Emphasis added by Mr Harrison]

39. Mr Harrison says that this approach was endorsed by Chancellor Eyre in *In re St Chad's Churchyard, Bishop's Tachbrook* [2014] Fam 118 (Coventry Consistory Ct) at [25]:

… I agree with the conclusion reached by Petchey Ch in *In re St Barnabas Churchyard, Downham* *(2011) 14 Ecc LJ 137 to the effect that the law has developed since the decision in* *In re St John's, Chelsea**. There is now a greater flexibility as to permitting the secular use of consecrated land. ... It is not every secular use which will be permissible. The decision whether to permit such use will be* ***a matter of fact and degree with the nature, extent, and permanence of the proposed secular use all being relevant****.* [Emphasis added by Mr Harrison]

40. Finally, it is also important to identify that, in *Chelsea* itself, jurisdictional questions were explicitly left open by Newsom QC, Dep Ch in respect of *'Class 3-type'* cases.

41. It follows from all this that the Friends are wrong to suggest that the three classes set out in *Chelsea* represent fixed jurisdictional gateways for these purposes. They are also wrong when they submit that it would be impermissible, as a matter of principle, for this court to give permission to use consecrated land for secular purposes.

42. Second, the exercise of the consistory court's jurisdiction is different in respect of churchyards. In *Re West Norwood Cemetery* [1994] Fam 2010, Chancellor Gray QC held (at p. 224C) that the jurisdiction of the consistory court

… will be exercised ***sparingly*** *with regard to municipal cemeteries, and will be exercised only in the* ***clearest cases*** *where the jurisdiction has been invoked to control, in the interests of justice, or of the decent and respectful treatment of the dead, works being carried out which threaten either of those objects. One of the ways in which respect is shown to the dead by the bereaved is by ensuring their decent and undisturbed interment, and, particularly in those cases where the bereaved or a wider public have been moved to do so, to protect the monuments which have been erected to recall to future generations the achievements of those interred during their earthly life, and as a legitimate way of proclaiming and perpetuating those achievements to future generations.* [Emphasis added by Mr Harrison]

This statement was cited with apparent approval by Chancellor Petchey in *In re Camberwell Old and New Cemeteries* [2017] Ecc Swk 2 at [27]. At [25], Petchey Ch recognised that the consistory courts have held that it would not be appropriate to exercise their jurisdiction over consecrated ground subject to the faculty jurisdiction within cemeteries which are owned by private companies or by local authorities in quite the same way as they do over churches and churchyards. The Chancellor cited a passage from the 2nd edition of *Newsom on the Faculty Jurisdiction of the Church of England* stating that the only powers enforced by the consistory courts in respect of municipal cemeteries away from any church are those which are directed to protecting the remains of the dead, which are in such consecrated ground under the protection of those courts, leaving the municipal authority, which pays for the maintenance and upkeep of

the cemetery, within wide limits to make what arrangements it pleases. Mr Harrison points out that the *Chelsea* case was concerned with the use of land on which a church had been destroyed in the Second World War. Part of the reason why Newsom QC, Dep Ch refused the application for a faculty for the land to be used as a car park in that case was because it appeared possible for the church to be re-erected on the same site in the future: see pp. 719-720. The circumstances the court faced in *Chelsea* are therefore completely different to those facing the court on this petition. In this case, the court is not concerned with a churchyard. Mr Harrison says that it follows that this court should treat the principles articulated in *Chelsea* with caution.

43. Mr Harrison points out that when considering the *'Class 1-type'* cases (faculties for ecclesiastical uses) Newsom QC, Dep Ch in *Chelsea* applied (at p. 709) the test laid down by Sir Lewis Dibdin, Dean in *Corke v Rainger and Higgs* [1912] P 69 at p. 76:

The test of what is a sufficient ecclesiastical use for the purpose in hand I take to be this. The ecclesiastical purpose must be a substantial and not an incidental part of the whole scheme.

The development proposed in the present case will include uses ancillary to the secular use of a crematorium. It follows that *'Class 1-type'* principles do not strictly apply. However, RPC points out that: (1) funeral services conducted in the crematorium will include Church of England services; (2) it is hoped that the burial ground will remain open to a small number of interments; and (3) it is agreed between the parties that the Church of England accepts cremation as an acceptable way of disposing of mortal remains. Mr Harrison therefore suggests that the proposed use in the present case will in fact be *'mixed'* ecclesiastical and secular use.

44. Turning to the '*Class 2-type'* cases (faculties authorising the secular use of consecrated land in the public interest), Mr Harrison emphasises that their development was driven by public interest considerations. He points out that just before the decision in *Chelsea*, in the case of *Re St Peter the Great, Chichester* [1961] 1 WLR 907 (Chichester Consistory Ct) Chancellor Buckle (at p. 910) accepted that he had the necessary jurisdiction to grant a faculty to erect an electricity sub-station in a disused burial ground in a churchyard if he was satisfied that

… *the benefit to the parish and the public generally is sufficiently established, and the purpose for which the faculty is desired is not inconsistent with the effects of consecration.*

45. Mr Harrison points to the fact that in *Chelsea*, Newsom QC, Dep Ch emphasised (at p. 713) that:

… *it is not a wayleave, but exclusive possession of the* ***whole site*** *by National Car Parks Ltd. that is sought by the petition.* [Emphasis added by Mr Harrison].

Mr Harrison submits that plainly, the facts of the present petition are rather different. The car park proposed in this case, which appears to be the most controversial aspect of the development (since the Friends would, in principle, welcome the restoration of the former chapels) is modest in comparison to the remainder of the application site: Mr Harrison says that he is instructed that the existing hard standing is 1631 square metres, whilst the proposed additional hard standing is 636 square metres, making the existing hard standing some 72% of the total planned hard standing..

46. Mr Harrison draws the court's attention to subsequent authorities to demonstrate how the principles in *Chelsea* have been developed, and applied, over time in relation to *'Class 2-type'* cases.

47. The first, seven years later, is the decision of the Deputy Auditor of the Chancery Court of York in *In re St Mary the Virgin, Woodkirk* [1969] 1 WLR 1867. This was apparently the first sitting of that court in over 40 years. The Auditor (Sir Henry Willink) was indisposed and unable to hear the appeal. The Archbishops of Canterbury and York therefore appointed Mr Owen Stable QC (since 1959 the Chancellor of the Diocese of Bangor, and later a Senior Circuit Judge) as deputy auditor to determine this appeal from the refusal of the Wakefield Consistory Court to grant a faculty authorising the demolition of part of the churchyard wall and the taking of a large section of consecrated ground (comprising over 2,000 square yards) for the purposes of road improvements, which involved converting the main road between Dewsbury and Leeds into a dual carriageway. The land concerned formed part of a churchyard that was still being used as a burial ground, and involved the disturbance of 191 graves, and the resulting exhumation of approximately twice that number of human remains. These proposals were opposed by the vicar, the churchwardens, and the parochial church council. At p. 1871 the Deputy Auditor asked himself whether he had any jurisdiction to allow consecrated ground, which was still in use for sacred purposes, to be used for secular purposes. He identified, and clearly bore in mind, the important consequences which flow from a sentence of consecration, including that:

The sentence further pronounces, decrees and declares the churchyard to be so separated, dedicated and consecrated and that it ought to remain so for ever. The ground by the ordinary law of the land then becomes consecrated land, held to sacred uses and subject to the jurisdiction of the ecclesiastical courts. In every case the sacred uses are perpetual and can never be divested from the consecrated land save by or under the authority of an Act or Measure. Equally, this court's jurisdiction over the land cannot be destroyed save by or under the authority of an Act or Measure.

48. At pp. 1871-1873 the Deputy Auditor considered Newsom QC, Dep Ch's discussion in relation to *'Class 2-type'* cases in *Chelsea*. In applying these principles (at p. 1873) the Deputy Auditor:

(1) explicitly noted Newsom QC, Dep Ch's exhortation that *"this part of the* [court's] *jurisdiction must be sparingly exercised and should not be extended"*;

(2) concluded, nevertheless, that he had jurisdiction to grant a faculty in the circumstances raised by the petition before him; and

(3) framed the test he needed to apply (in terms of whether he should exercise his discretion to grant the petition) in the following terms:

In my judgment I ought not to grant a faculty unless I am satisfied that considerations of the ***public interest*** *require that the proposed road improvements should be carried out; that there is no reasonable alternative and that the public interest* ***outweighs*** *the interests of the objectors* ***and*** *the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.* [Emphasis added by Mr Harrison]

49. At p. 1875D-F, the Deputy Auditor found that the public interest weighed in favour of the faculty being granted:

In my judgment the appellants have shown that the ***public interest*** *requires this road. At the same time, Mr. Hallam has pointed out the inconvenience to churchgoers that losing this strip of churchyard to a dual carriageway will cause people wishing to use the church — the trouble that funeral corteges and wedding processions will have when they approach the church on the western carriageway — the very real unhappiness that an appreciable number of people will suffer by having the remains of close deceased relatives exhumed and re-interred —*

unhappiness to which I am fully alive, and the very real objection to such a large-scale exhumation and re-interment — a far larger operation than any I have ever heard of or read about, though the scale of this operation, when one really thinks about it, is to be expected.

The Deputy Auditor went on to explain (at p. 1875F-H) that it was inevitable that technological developments would require consistory courts to apply the older reported cases, and the principles they relied on, through a more modern lens:

In the days before cars and lorries, men were concerned with footpaths and bridlepaths, and the cases were concerned with footpaths and bridlepaths. In the days when the volume of traffic was nothing like it is today the widening of the highway by a few feet or the provision of a pavement where none was before was all that the public interest required, and the cases were concerned with little strips. ***But nowadays, what a large industrial area such as the West Riding of Yorkshire needs is a really modern network of roads and that means motorways and dual carriage-ways and in the future, I believe, cases will be concerned with much larger strips than hitherto****. … In my judgment there is no feasible alternative to the appellants' original scheme.* [Emphasis added by Mr Harrison]

50. After setting out the prejudicial consequences that would have followed had the petitioning local authority been required to re-route the road, the Deputy Auditor summarised his approach as follows (at p. 1876C-D):

In deciding, as I do, that this appeal should be allowed and a faculty should be granted, I have asked myself the question: ***What is the duty of the Church in this situation?*** *Put that way, I have had no hesitation in reaching a conclusion.* [Emphasis added by Mr Harrison]

51. Mr Harrison points out that this *'short-hand'* version of the test was later applied by Chancellor Newsom QC in *In re St Luke's, Chelsea* [1976] Fam 295 when explaining that, even if he had the necessary jurisdiction to grant a faculty authorising the installation of a *"massive"* monument upon consecrated ground which was enjoyed by the general public as a garden, and described as *"a sort of oasis of quiet"*, the Chancellor would have refused it: see pp. 314-315. Mr Harrison reminds the court that Mr Petchey submits that the *"stretching"* that took place in *Woodkirk* was not a sparing exercise of the jurisdiction, that the case *"is plainly wrong on its facts"*, and that it is a decision on its own facts which *"does not constitute a precedent"*. Mr Harrison points out that Mr Petchey offers no justification for these submissions. Mr Harrison says that *Woodkirk* is a decision of the Chancery Court of York, and so is binding upon this court. He emphasises that the Deputy Auditor's approach in *Woodkirk* has been applied, or mentioned, subsequently in at least eleven reported cases, in both provinces – including the Arches Court of Canterbury – without any scintilla of adverse judicial comment. In an extended footnote to his written submissions, Mr Harrison cites the following authorities in aid of this submission: *In re St Chad's Churchyard, Bishop's Tachbrook* [2014] Fam 118 (Eyre Ch in the Coventry Consistory Ct) at [22]; *In re Radcliffe Infirmary Burial Ground* [2011] PTSR 1508 (Bursell QC, Ch in the Oxford Consistory Ct) at [30]; *In re St Mary's Churchyard, White Waltham (No 2)* [2010] Fam 146 (Bursell QC, Ch in the Oxford Consistory Ct) at [42]; *In re St Peter and St Paul's Church, Chingford* [2007] Fam 67 (the Arches Court: Cameron QC, Dean, Kay QC, Ch and Tattersall QC, Ch) at [34]; *In re Whixall Old Burial Ground* [2001] 1 WLR 995 (Judge Shand Ch in the Lichfield Consistory Ct) at p. 999A; *In re St Michael and All Angels, Tettenhall Regis* [1996] Fam 44 (the Arches Court: Sir John Owen QC, Dean, Coningsby QC Ch and Seed Ch) at p. 50A-C; *In re St Botolph's, Bishopsgate* [1991] 1 WLR 28 (Newsom QC, Ch in the London Consistory Ct) at pp. 34-35; *In re St Martin Le Grand, York* [1990] Fam 63 (Coningsby QC, Ch in the York Consistory Ct) at pp. 71-72; *In re St Andrew's,*

North Weald Bassett [1987] 1 WLR 1503 (Cameron QC, Ch in the Chelmsford Consistory Ct) at pp. 1507-1508; *In re St Luke's, Chelsea* [1976] Fam 295 (Newsom QC, Ch in the London Consistory Ct) at pp. 306, 308 & 314; and *In re St Peter's, Bushey Health* [1971] 1 WLR 357 (Newsom QC, Ch in St Alban's Consistory Ct) at p. 359. Nor can Mr Harrison detect any adverse comment regarding the reasoning in *Woodkirk* at paragraph 780 of the 2025 issue of Volume 34 of *Halsbury's Laws* (2025). Mr Harrison further points out that even Newsom QC, Ch (in the London Consistory Court) in *In re St Botolph's, Bishopsgate* [1991] 1 WLR 28 at pp. 34-35, acknowledged that the Deputy Auditor in *Woodkirk* had simply followed the numerous cases, collected in *In re St John's, Chelsea* [1962] 1 WLR. 706, *"in which the consecrated land itself was diverted, wholly or partially, from its primary use as a place for burial, in some cases to purposes that were not ecclesiastical at all"*, albeit that it perhaps represented *"the most extreme example of the exercise of this power"*. In short, Mr Harrison submits that the jurisdiction to grant faculties permitting the secular use of consecrated ground in the public interest is clear and wholly orthodox.

52. Second, Mr Harrison cites the decision of the Arches Court of Canterbury (Cameron QC, Dean, Kay QC, Ch and Tattersall QC, Ch) in *In re St Peter and St Paul's Church, Chingford* [2007] Fam 67. This case concerned a petition for a faculty permitting the installation of a 3G mobile phone base station (a secular purpose) in the tower of a grade II listed church building. The licence was to be for an initial period of five years, which could then be renewed. This was therefore akin to a *'Class 2-type'* case (*"where only minimal possession is granted for the public benefit"*), as identified by the amicus curiae to the court (Mark Bishop, now Chancellor of the Diocese of Lincoln) in argument (at p. 71). The Dean emphasised that, when exercising the faculty jurisdiction, consistory courts are required to balance **public interest** factors against church-related interests. At [34], she noted that this *"… well established principle has been reiterated in decisions of the appellate courts for the provinces of Canterbury and York … which are binding on the consistory courts."* The Dean specifically cited the decision of the Deputy Auditor in *Woodkirk* in support of that proposition, including that part of his judgment (at p. 1873) in which he said that he had to be satisfied *"… that the public interest outweighs the interests of the objectors and the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated."*. At [24] to [30] and [57] to [59], the Dean considered evidence on the competing interests of: (a) the risks of children (and adults) accessing pornography or being drawn into sexual abuse, as against (b) the benefits of improved internet access for the wider community. The Arches Court upheld the appeal from the decision of Chancellor Pulman QC (sitting in the Chelmsford Consistory Ct), and issued a faculty permitting the installation of the mobile base station. Mr Harrison says that this authority emphasises the relevance of public benefit considerations in *'Class 2-type'* cases when the court is contemplating a petition which will permit the secular use of consecrated land.

53. Third, Mr Harrison submits that it is instructive to compare the approach of Chancellor Gage QC (in the Coventry Consistory Ct) in *In Re All Saints', Harborough Magna* [1992] 1 WLR 1235 (cited by Mr Petchey) with the conjoined judgment of Chancellor Grenfell (in the Ripon and Leeds Consistory Ct) in *In Re St Margaret's, Hawes* and *In re Holy Trinity, Knaresborough* [2003] 1 WLR 2568. In the former case, Gage QC, Ch was concerned with a petition to install telecommunication aerials. He held (at p. 1237C-D) that *"… in general it is my view that a faculty for use of a church for secular purposes only should be granted only in* ***rare and exceptional*** *circumstances."* [Mr Harrison's emphasis] Just over a decade later, in *Hawes* and *Knaresborough*, Chancellor Grenfell (at [99]), **rejected** any need for a test of *'rarity and exceptionality'* for the use of part of a church building for such purposes:

In the light of the development of secular use of churches in circumstances such as I have outlined over the last ten years, I consider it right to revisit the observation of Gage Ch in In re All Saints', Harborough Magna [1992] 1 WLR 1235, that it would only be in rare and exceptional cases that secular use would be permitted. In my judgment, if a church can receive financial support by taking rent for a commercial undertaking that is consistent with its role as a local centre of worship and mission, then I can see no objection. To that extent, respectfully, I should not follow his use of the words 'rare and exceptional' today.

I note that Chancellor Grenfell said this immediately after he expressly recognised that in a modern society there are ever competing calls on resources; and that churches are enormously expensive to maintain. Earlier (at [12]), Grenfell Ch said:

In my judgment, there is no reason as a matter of ecclesiastical law why a faculty should not be granted for wholly secular and commercial use of part of a church building. Each case must be considered on its own merits. It is for the petitioners to show that there is good reason why a faculty should be granted.

54. Mr Harrison says that the approach at [12] of *Hawes* and *Knaresborough* was later approved by the Court of Arches (Cameron QC, Dean, Bursell QC, Ch and Briden Ch) in *In re Bentley Emmanuel Church, Bentley* [2006] Fam 39 at [10]. The Dean went on to emphasise that, where the secular use of church buildings is contemplated: *"The primary consideration is that the secular use is not unseemly"*. Mr Harrison accepts that this is, of course, a material factor which needs to be considered by the court when applying the public interest test articulated in *Woodkirk* to the facts of this case. For the avoidance of any doubt, he submits that there is nothing unseemly in the proposed development in this case. He says that the Friends are wrong to submit that the test for permitting the secular use of consecrated land requires '*exceptional*' circumstances to be met. Mr Harrison says that this line of case law also crystallises how the jurisprudence of this court, on the question of authorising the secular use of consecrated ground, is not set in stone, and changes with the times.

55. Fourth, Mr Harrison refers the court to *In re St Barnabas Churchyard, Downham* 18 May 2011 (2011) 14 Ecc LJ 137 (Southwark Consistory Ct). This case concerned a petition for a faculty to erect a large, prefabricated storage shed (5.093m x 5.842m x 2.390m) to facilitate the use of the church hall by the 12th Lewisham South Scout Group. Chancellor Petchey found (at [7]) that the proposed construction would not be ancillary to the church: *"it would be ancillary to a (secular) use of the Church Hall. The use of the building would be for secular use.*" The Chancellor acknowledged (at [18]) that neither of the classes of permitted secular use set out in *Chelsea* were apt to cover the facts of the petition that was before him. He went on (at [18]-[19]) to acknowledge the *"increasing degree of flexibility"* with which consistory courts have approached the question of the secular use of consecrated ground since the Second World War. Whilst not expressly applying *Woodkirk*, the Chancellor then proceeded (at [19]) to take into account factors relevant to the public interest:

In this context I recognise the value to the community of assisting the Scout Group, and the importance the church generally, and this church in particular, places upon good community relations.

Recognising (at [19]-[21]) that: (1) the Scout Group might close in the future, (2) their storage requirements might change, and (3) the church itself might wish to redevelop the land in the future for its own purposes, the Chancellor was not prepared to hand over the land for such a large secular storage building on a permanent basis. A faculty was instead granted for the erection of a temporary building with a licence for an initial period of five years, albeit with the expectation that the licence might be renewed over time.

56. Mr Harrison submits that this decision is akin to a *'Class 2-type'* case: the court permitted the use of consecrated land for entirely secular purposes for reasons justified by the public interest. It provides clear authority (at [19]) that the secular use of consecrated land is, in principle, permissible '*as a matter of fact and degree*'. The factors which led Chancellor Petchey to permit only a temporary structure (i.e. the uncertain future needs of the Scout group and the church itself) plainly do not apply to the ancillary development proposed in the instant case. In any event, from a jurisdictional perspective, the Chancellor was clear (at [17]) that, in principle, *"there is* ***no absolute bar*** *to* ***secular use*** *of a consecrated churchyard involving* ***permanent*** *works."* [Mr Harrison's emphasis added] Mr Petchey is said to be wrong to assert that any such absolute bar exists in the present case.

57. Fifth, in *In re St Chad's Churchyard, Bishop's Tachbrook* [2014] Fam 118 Chancellor Eyre (in the Coventry Consistory Ct) was concerned with a petition seeking permission to erect a church centre within the consecrated churchyard of a grade I listed church. The site would be let to a trust for its construction and then its operation for mixed secular and church use. In granting the faculty, Eyre Ch noted (at [22]), the decision in *Woodkirk*. At [25], he acknowledged that:

There is now a greater flexibility as to permitting the secular use of consecrated land … It is not every secular use which will be permissible. The decision whether to permit such use will be a matter of fact and degree with the nature, extent, and permanence of the proposed secular use all being relevant.

Chancellor Eyre then went on (at [26]) to offer the following guidance:

What, then, is the approach which the court should take in considering applications such as this? Churchyards are consecrated to God, Father, Son, and Holy Spirit and proposed alterations have to be considered in the light of that consecrated status. Churchyards fulfil three principal functions. They operate to provide a suitable setting for the church in question; they provide a fitting resting place for the mortal remains of those already buried in the churchyard; and they provide a resting place for the remains of those to be buried in the future. ***The question to be addressed in each case is one of fact as to whether the building and its proposed use is appropriate for the particular churchyard in the light of the churchyard's consecrated status and the preceding functions****. In my assessment the effect of this means that in considering whether a building can be erected in a churchyard account has to be taken of:* ***(1)*** *The consistency between the building's use and the consecrated status of the churchyard bearing in mind the flexible approach referred to above and taking account of the nature, extent, and permanence of any proposed secular use.* ***(2)*** *The likely impact of the building on the setting of the church in question. Where the church is a listed building particular caution must be exercised in permitting changes which will impact on its special character. The guidelines laid down by the Court of Arches in* <u>*In re St Alkmund, Duffield*</u> *[2013] Fam 158 will be relevant.* ***(3)*** *Whether the presence of the building is likely to cause the churchyard no longer to be a fitting resting place for the remains of those interred therein.* ***(4)*** *The impact which the building's presence will have on the use of the churchyard for future burials. This will involve consideration of the extent of the land which will remain available for burials after the construction of the building and also of the ability of that remaining land to provide adequate capacity for future burials.* [Emphasis added by Mr Harrison]

58. *Bishop's Tachbrook* is said to afford another example of the *Woodkirk* principles being applied to the issue of whether or not secular development should be permitted on consecrated ground. Again, such development is clearly permissible, where appropriate. The four factors identified by Eyre Ch assist the court to consider where the **public interest** lies when considering proposals to introduce secular buildings into churchyards. In the present case, the court is concerned with a private cemetery, and so different considerations will apply (i.e. the

impact of the works on the setting of a church are not relevant). The court will need to be satisfied that any secular development will not cause the burial ground to become an unfitting resting place for those interred there. This is consistent with the statement in *Bentley* (at [10]) to the effect that *"the primary consideration is that the secular use is not unseemly."* Mr Harrison submits that there is nothing in the development proposals before the court that would make the burial ground an unfitting resting place.

59. Sixth, *Re Camberwell Old and New Cemeteries* [2017] Ecc Swk 2 concerned two petitions for permission to undertake works to a municipal cemetery which operated on consecrated land. The second petition concerned a proposal for the creation of a new footpath over land which had been used for burials. Chancellor Petchey saw no difficulty with this proposal, and dealt with this part of the petition briefly at [47]:

I do not think that there is anything objectionable in this. It must be the case that in many churchyards the paths that exist are over land which has been used for burials, probably many times over. Normally in a cemetery the burials will have all taken place around a network of paths established at the outset of the use so that the situation will be different to that obtaining in a churchyard but I do not think that this fact is a reason for refusing a proposal of the kind here proposed. There are some memorial tablets in this area but it will be possible for them to be moved if required.

Mr Harrison says that this is a standard application of a *'Class 2-type'* case, following *Chelsea*. He submits, however, that there is no material difference between: (1) a network of paths running over consecrated burial ground, and (2) the modest widening of existing hardstanding to create a car park over a consecrated burial ground. Neither are intrinsically inconsistent with the use of consecrated ground, even if they are ancillary to secular purposes. As acknowledged by Deputy Chancellor Newsom QC, in *Chelsea* at p. 709 (citing Sir Lewis Dibdin, Dean, in *Corke v Rainger and Higgs* [1912] P 69 at 76): *"A churchyard path is allowable although persons may pass along it who are not going to church."* In this case, members of the public would be using the car park to access a crematorium, and to visit loved ones in the burial grounds.

60. Finally in *Camberwell Old and New Cemeteries*, Petchey Ch acknowledged (at [42]-[43]) that it is permissible, in principle, to undertake sustainable landscaping on consecrated burial grounds. He also noted that, when weighing any objections to the proposals, it was relevant to consider how likely it was that the objectors' preferred outcome would be achieved if the faculty were refused. In *Camberwell*, some of the objectors wanted a pile of spoil removed; but there was *"considerable doubt if that would happen if a faculty for the works presently proposed were refused."* In this case, the Friends seek to restore the application site to a cemetery which (so RPC submits) is not financially viable.

61. In a lengthy section of his skeleton argument entitled *'Conclusion in relation to 'Class 2-type' cases'*, Mr Harrison returns to the hypothetical facts before the court on this petition. The important legal consequences which flow from the sentence of consecration passed in 1916 are not lost on RPC. It accepts that the jurisdiction of this court in relation to *'Class 2-type'* cases must be exercised with care. However, Mr Harrison says that it is wrong for the Friends to suggest that the sentence of consecration in 1916 leads inexorably to the conclusion that this court has **no jurisdiction** to permit the secular development sought by this petition. The authorities are said to be clear that secular development of consecrated ground is permitted, in appropriate cases, where such development is in the public interest. The exercise of this jurisdiction has, in the past, permitted:

(1) the grant of wayleaves to the public at large: *Chelsea* and *Camberwell Old and New Cemeteries*;

(2) the installation of utilities on consecrated land: *Chelsea*, *Hawes*, *Knaresborough* and *Bentley*;

(3) sustainable landscaping on consecrated land: *Camberwell Old and New Cemeteries*;

(4) the throwing away of consecrated land into a public highway (sometimes in very large quantities): *Bideford* and *Woodkirk*; and

(5) the grant of licences or leases to third parties, giving permission to develop consecrated land for (permanent and temporary) secular purposes: *Re St Peter the Great, Chichester* (electricity sub-station), *Chingford* (mobile telephone base station), *Downham* (a large hut ancillary to the scouts' use of the church hall), and *Bishop's Tachbrook* (a centre for mixed church and secular use).

Mr Harrison says that it is manifest that the ancillary development proposed in the present case (including the introduction of the car park) falls to be considered following these established principles.

62. So far as the preliminary issue is concerned, following the approach laid down in *Woodkirk* and subsequent cases, in *'Class 2-type'* cases:

(1) The consistory court has jurisdiction to grant a faculty permitting the proposed ancillary development for secular purposes (including the car park); and it may do so if the public interest in the development outweighs:

(a) the interests of the objectors, and

(b) the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.

(2) Each case should be considered on its own merits, and there is no test of '*exceptionality*'. The primary consideration is to ensure that the secular use is *"not unseemly"* (*Bentley* at [10]), and that the secular development will not cause the burial ground to become an unfitting resting place for the mortal remains of those already interred there (*Bishop's Tachbrook* at [26]).

(3) The question of whether or not a faculty **should** be granted pursuant to this jurisdiction, in the circumstances raised by this petition, is one of fact and degree, with the nature, extent, and permanence of the proposed secular use all being relevant: compare *Chelsea* at p. 712; *Woodkirk* at p. 1873; *Chingford* at [34]; *Downham* at [19]-[21]; and *Bishop's Tachbrook* at [25].

(4) The court will exercise its jurisdiction over a private cemetery, such as this, with more restraint (by which I understand Mr Harrison to mean with less rigour) than it would over a churchyard. The viability (or not) of any plans for the use of the application site proposed by the Friends is also relevant: *Camberwell Old and New Cemeteries* at [25] and [43].

63. Mr Harrison submits that the public interest in permitting the ancillary development in this case is overwhelming. The final resolution of this issue will, however, clearly require the court to consider evidence and further argument on the merits (if the Friends persist in their objections to this petition). Apart from the public interest considerations that are said to apply to the proposed development in this case, at this preliminary stage RPC asks the court to bear in mind the following six submissions, which are said to bear out the *prima facie* strength of their case:

(1) The Bishop of Blackburn deconsecrated the adjoining land in full knowledge that some secular development would be necessary over the application site to facilitate the use of the crematorium. The DAC supports the petition, as does the Archdeacon. Taken together, this diocesan support manifestly points to the conclusion that the proposed development of the application site is not, of itself, inconsistent with its status as consecrated land. The proposed development cannot sensibly be said to render the cemetery an unfitting resting place for the remains of those interred therein. Nor would the development render the area unseemly. The court should be mindful that the development proposed in this case relates to a private cemetery, and not a churchyard. Different considerations apply in this context: see *Re Camberwell Old and New Cemeteries* at [25].

(2) The local planning authority originally gave permission for a crematorium in 2009. In 2019, it gave permission for the revised access road and parking areas. The 2019 decision notes (at para 1.2), that the site has *"longstanding planning consent for the erection of buildings for use as a crematorium and funeral chapel* ***with associated car parking****. As such the* ***principle of the development has been established****"*. [Emphasis added by Mr Harrison] When considering the substantive merits of the proposal, Mr Harrison invites this court to accept the reasoned decisions of the planning authority as to the public benefit represented by the proposed ancillary development: compare *Re St Mary's Churchyard, White Waltham (No 2)* [2010] Fam 146 per Bursell QC, Ch, at [23], and cited by Petchey Ch in *Re Camberwell Old and New Cemeteries* at [24].

(3) The most controversial aspect of the proposed ancillary development in this case – the car park – is **modest** in comparison to the remainder of the application site, and will be a natural extension to the roads (and hardstanding) that **already exist** on the site. (Mr Harrison is instructed that the existing hard standing is 1,631 square metres and the proposed hard standing is a further 636 square metres, so the existing hard standing, as a percentage of total planned hard standing, is 72%.) The present case can therefore easily be distinguished from *Chelsea* (which concerned a request to hand over an entire parcel of consecrated land to be used as a car park). The car park in this case will facilitate members of the public visiting the crematorium to attend funeral services (including services conducted according to the rites and liturgy of the Church of England), and to pay their respects to their loved ones (including those resting in the adjoining CWGC military cemetery). To that extent, the car park is analogous to a wayleave. The remainder of the site in this case will remain undeveloped (save for the introduction of utilities, landscaped gardens, and restoration projects, which are entirely consistent with the land remaining consecrated).

(4) The application site currently has the appearance of a field with two dilapidated chapels. The adjoining (deconsecrated) land can **only** be used as a crematorium (by operation of restrictive covenants entered into with the Bishop of Blackburn). This court has no power to make a restoration order to remove the existing road and hardstanding which are already in place: see *Re Welford Road Cemetery* [2007] Fam 15 (Court of Arches). The only **realistic** way in which the application site can now be developed into an area which properly acknowledges and respects its consecrated status – including by restoring the chapels and sensitively landscaping the grounds – depends on the crematorium becoming operational: compare *Camberwell Old and New Cemeteries* at [43]. Planning conditions mean that the proposed crematorium cannot become operational without the proposed ancillary development being permitted.

(5) The car park proposed in this petition would in all likelihood be required even if the application site were to be returned to its use as a cemetery (which is understood to be the

Friends' preference): see policy DMG3 of Ribble Valley Council's Local Plan 2008-2028 (paragraph 10.6, at p. 91), which requires all development proposals to provide **adequate car parking** and service space in line with currently approved standards.

(6) Unlike *Woodkirk* or *Bideford*, the application site is not being thrown over to a public highway so as to be lost (for all practical purposes) for all time. The application site in this case will remain within the boundaries of the remaining parcel of consecrated land, and thus under the jurisdiction of the Ordinary, who will continue to exercise overall control over the land through the jurisdiction of this court.

64. Mr Harrison moves on to address the *'Class 3-type'* cases (faculties authorising the secular use of land when the original purpose of consecration has been frustrated). He begins by addressing a question left open in *Chelsea*. At p. 715, Newsom QC, Dep Ch set out the following principles in relation to secular use in *'Class 3-type'* cases:

The third of the propositions set out above is that secular user may be authorised where 'the user for which the ground was originally consecrated can no longer be lawfully carried out.' That is to say, to put it another way, that such purpose is frustrated by a ***change in the law****, of which an Order in Council forbidding burials is one example.* [Emphasis added by Mr Harrison]

However, the deputy chancellor was also clear that:

There remains the question whether, since frustration can found the jurisdiction, frustration in fact will do so as much as frustration by law. Mr. Ellison [who was counsel for the parties opponent] *has stated in argument that he was prepared to admit that jurisdiction could arise in such circumstances, though none of the reported authorities expressly so decides. The point was therefore not argued before me and it would, therefore, be wrong for me to decide it unless I must. It is not necessary so to do; for in my judgment and for reasons which I shall set out later, the facts here proved fall far short of establishing the requisite impossibility.* ***I therefore leave open this point for future decision.*** [Emphasis added by Mr Harrison]

It is therefore necessary to consider how the use of the court's jurisdiction in relation to *'Class 3-type'* cases has developed since the decision in *Chelsea*.

65. In *In re St Martin Le Grand, York* [1990] Fam 63 (York Consistory Ct), Chancellor Coningsby QC was concerned with a petition from the occupiers of printing works. These adjoined the churchyard of a parish church over which the petitioners had rights of passage to access the works. The petitioners sought a ruling as to the extent of their rights, and (if necessary) a faculty to ensure (amongst other matters) their future use. The judgment is clear (at p. 70C-E) that the parties were eventually able to agree that vehicular access rights should be granted to the petitioner for up to 30 months (with liberty to apply for an extension with good cause). The court, however, still needed to consider whether it had the necessary jurisdiction to grant a faculty giving effect to that agreement over land which was consecrated but which had not been used for burials for at least 100 years. Coningsby QC, Ch considered a number of authorities. At p.71C-F, he turned to consider *Chelsea*:

In <u>*In re St John's, Chelsea*</u> *[1962] 1 W.L.R. 706 Newsom QC, Deputy Ch. reviewed some of the earlier cases and said, at p. 714, that, in deciding whether or not to allow consecrated land to be used for secular purposes, the central question was: 'Can the purpose for which the ground was originally consecrated no longer be lawfully carried out?' If so a faculty may issue for a secular use. If not the faculty may only issue for an ecclesiastical use, except in the limited case of a wayleave. Seeking to apply that dictum to the present case I have reached the conclusion that in* ***practical terms*** *it is no longer possible to carry out the* ***purpose*** *for which the churchyard*

was consecrated, namely for burials, and that it is in fact closed for burials. That was the effect of the evidence given to me by the parties opponent and a visual examination of the site shows that in practice it would be impossible to bury people there. I consider that it is therefore open to me in my discretion to allow a limited secular use of the churchyard to the extent proposed … [Emphasis added by Mr Harrison]

Mr Harrison submits that *In Re St Martin Le Grand* is therefore authority for the proposition that frustration as to the original purpose of consecration *in fact* will also provide the court with jurisdiction to permit appropriate secular use.

66. I would not accept that *St Martin Le Grand* goes so far as Mr Harrison submits. That is because not only was it no longer possible in that case to carry out the purpose for which the churchyard was consecrated (i.e., for burials) in **practical** terms, but it had also been closed for burials for many years, so the case was one of frustration **by law** as well as **frustration in fact**. For completeness, I should also go on to cite the passage from the judgment in *St Martin Le Grand* (at pp. 71-2) that follows on from that cited by Mr Harrison:

This conclusion is further supported by In re St Mary the Virgin, Woodkirk [1969] 1 W.L.R. 1867 where the deputy auditor, Owen Stable QC, granted a faculty for a strip of graveyard measuring 260 yards by some 12 yards to be transferred to the borough council for the purpose of road widening, thereby allowing secular use of consecrated land, and this was done notwithstanding the opposition of the vicar, churchwardens and parochial church council concerned. Parts of the graveyard were still in use for burials. The deputy auditor granted the faculty because he was satisfied that it was in the public interest to do so. The land was required to widen an existing road into a dual carriageway, this being part of a very substantial road-widening scheme stretching over many miles. The case can be distinguished from the present one in relation to the public interest factor but it illustrates the proposition that the principle whereby consecrated land should be protected from secular use is not an absolute one.

Woodkirk was treated as a case where secular use was justified by reference to the public interest.

67. In the present case, the burial ground remains open (as confirmed by the Ministry of Justice by letter dated 3 July 2025). However, whilst there are no **legal** impediments to further interments taking place, Mr Harrison submits that the **purpose** for which the land was consecrated in 1916 has been frustrated. This is because the sentence of consecration explicitly states that:

… *And we consecrate and dedicate solemnly the said plot of land coloured blue as and for a Burial Ground* ***for the burial of the Lunatics dying in the said Whalley County Lunatic Asylum*** *and of the* ***Officers and Servants*** *belonging thereto* … [Emphasis added by Mr Harrison]

The hospital has now closed. As the Bishop of Blackburn notes in his letter of deconsecration, dated 23 May 2024:

What had been Whalley Asylum passed through various iterations until it became Calderstones Hospital, which has since closed and the site redeveloped. The Burial Ground was sold by the Regional Health Authority to a private developer in October 2000. Accordingly, there is ***no prospect*** *of any future interment of human remains in the Burial Ground.* [Emphasis added by Mr Harrison]

Mr Harrison asserts that Mr Petchey's written submissions seek to divert focus away from the fact that the original **purpose** of consecration has been frustrated. Mr Petchey invites the court to consider the more general **effects** of consecration, holding out the hope that future interments may be possible at some unspecified date in the future on the basis of the Friends'

proposals for the application site. Mr Harrison says that this approach is not consistent with *Re St Martin Le Grand, York*. Mr Harrison says that that case is clear authority that, when assessing whether the purpose for which the land was consecrated can be achieved, the presence of **practical impediments** to future interments are material considerations. On the agreed hypothetical facts in this case, it is to be assumed that there have been no burials within the application site **at all**. And now the hospital has closed, and the land has fallen into private hands, the court will be invited to conclude that there is absolutely no realistic prospect of the application site being used for any interments in the future, unless the ancillary (secular) development is permitted (in which event RPC hopes that the cemetery will be able to accept a small number of interments if required). The Bishop of Blackburn has already been persuaded of this reality. Mr Petchey disagrees; but the viability of each party's proposals will be a matter for the court to consider, on the evidence, when it comes to reach a determination on the substantive merits of the petition. It suffices for Mr Harrison to submit at this stage, when considering the preliminary issue, that this petition also falls to be considered – from a jurisdictional perspective – as being akin to a *'Class 3-type'* case as well.

68. Finally, Mr Harrison responds to two further submissions made by Mr Petchey. First, Mr Harrison finds it difficult to understand the relevance of the way in which the construction of the railway into St Pancras Station was authorised. For such an important national infrastructure project, involving the exhumation of some 8,000 bodies, he finds it unsurprising that Parliament should have decided to take control of that project. Simply because Parliament authorised that specific project is no authority for the proposition that the jurisdiction of this court to authorise the use of consecrated land for secular use (as set out in the authorities considered above) has somehow been diminished or constrained. Likewise, the existence of alternative statutory frameworks for dealing with consecrated land (much of which **pre-date** the relevant case law, and were in force at the time) does not mean that this court's jurisdiction has been fettered in any way.

69. Second, concerning *Re Radcliffe Infirmary Burial Ground* [2011] PTSR 1508, Mr Petchey notes that, even after the permitted exhumations had taken place, Chancellor Bursell QC thought it necessary to impose a condition that the land should be deconsecrated prior to any building works taking place. Mr Petchey alights on this feature of the case; and he suggests that this condition was imposed because *"it still was not appropriate for secular buildings to be built on land that was consecrated or the land put to secular purposes while it remained consecrated."* Mr Harrison contends that this case does not assist Mr Petchey. It concerned the wholescale redevelopment of what was consecrated land to turn it into a department of the university. The whole thrust of the proposed development was to hand control of the land over to the University of Oxford as part of a bigger scheme intended to realise 100,000 square metres worth of space to meet the needs of the University: see [9]. Mr Harrison submits that it would have been unthinkable that such a project – if permitted – could sensibly have remained under the jurisdiction of the Ordinary. Such an outcome would have fallen foul of the basic premise of *Chelsea* that possession was being sought of the whole site. The case of *Radcliffe Infirmary Burial Ground* is said to be completely different, in both fact and degree, to the present situation. In this case, the scale of the proposed development is restricted to a car park occupying a small portion of the consecrated land, the restoration of the chapels and lychgate, the installation of utilities, and landscaped gardens. All of this land will remain under the jurisdiction of this court, as intended by the Bishop of Blackburn when he executed the sentence of deconsecration for the smaller portion of land he set aside for the crematorium. This speaks to the overwhelming merits of the

present petition, which, if granted, will achieve both: (1) the sensitive restoration of the application site (in line with the expectations and requirements of the secular planning authority and the Bishop of Blackburn), and (2) the ongoing protection of this consecrated land into the future.

70. For all of the above reasons, Mr Harrison submits that this court has the necessary jurisdiction to grant this petition. It is a prima facie *'Class 2* ***and/or*** *Class 3-type'* case (as defined in *Chelsea*, and refined in subsequent cases). The proposed use of the application site is entirely **consistent** with its continuing status as consecrated land. There is nothing objectively unseemly about the proposals that would cause the burial ground to become an unfitting resting place for those interred there. The preliminary issue falls to be determined accordingly. The answer is **'No'**; and the faculty should not be refused for lack of jurisdiction. Mr Harrison submits that this case now requires robust case management directions to progress it towards a final hearing, so that this court can consider evidence and argument on the substantive merits of this petition. He proposes that the issue of costs for the determination of this preliminary issue should be reserved.

<u>*The Friends' submissions in reply*</u>

71. In his reply, Mr Petchey points out that the submissions of both parties start from the same place: that in strictness a faculty is not available for the secular use of consecrated ground, although (as explained at paragraph 780 of the current (2025) issue of Volume 34 of *Halsbury's Laws of England* (Title: Ecclesiastical Law)) *"deviations from the strict rule are however frequently allowed, and faculties may be granted for various purposes consonant with modern requirements"*. Mr Petchey recognises that it also seems to be common ground that Deputy Chancellor Newsom QC's identification of three classes of deviations from the strict rule in *In Re St John, Chelsea* remains good law. (In a foot-note, Mr Petchey criticises as *"potentially misleading"* Mr Harrison's characterisation of these three classes of permitted use as *"authorising the use of consecrated land for secular purposes"* on the basis that *'Class 1-type'* cases actually involve the use of land for ecclesiastical purposes. Mr Petchey suggests that it is strictly more accurate to categorise all three classes as *"ones where there is a deviation from the strict rule"*.) This leads Mr Petchey to inquire how two sets of rival submissions can possibly reach such diametrically opposed conclusions: Mr Petchey concludes that the grant of a faculty for purposes ancillary to the use of adjoining, deconsecrated land for secular use as a crematorium is inconsistent with the continuing status of the subject site as consecrated land whereas Mr Harrison considers there to be no necessary inconsistency. The answer Mr Petchey supplies is to be found in RPC's contention that there has been a wholesale shift in the way the ecclesiastical courts have approached the secular use of consecrated land, with a trend towards greater flexibility. In these circumstances, RPC submits that it is necessary to treat *In re St John, Chelsea* with caution. So much so, in the circumstances of the hypothetical case being considered, that there is no, *'in principle'*, objection to the grant of a faculty. As regards *'Class-2 type'* cases, the position has been reached, so Mr Harrison submits, that the court now simply applies a merits test, with the question being one of fact and degree. The public interest may outweigh the interests of any objector, and also the public interest that the consecrated land should continue to be used for the sacred use to which it was dedicated.

72. Mr Petchey emphasises that if this were correct, then the law would have come a very long way since 1962. If the position has indeed been reached that the court should simply apply a merits test, the three-fold classification in *In re St John, Chelsea* should be abandoned as an analysis; the language that the jurisdiction is to be sparingly exercised should be disapproved; and

the case itself overruled. Mr Petchey says that it is important to note that this authority was articulating a principle relating to the jurisdiction of the court. As the headnote correctly puts it, the court held:

That faculties could be granted, either in respect of a church site or a churchyard, for ecclesiastical user [Class 1], *for throwing small parts of a churchyard (whether still available for burials or not) into a highway or for granting rights of user in the nature of wayleaves* [Class 2], *and for secular user where the original purpose of consecration could no longer be carried out* [Class 3], ***but that there was no jurisdiction to grant any other relevant class of faculty*** [Classes identified, and emphasis supplied, by Mr Petchey]

Mr Petchey invites the court to note also that Mr Harrison does not suggest that the Deputy Chancellor got the law wrong: his proposition is that the law has changed over the years since 1962. Mr Petchey accepts that *In re St John's, Chelsea* is not an authority which is strictly binding on the Consistory Court of the diocese of Blackburn. But he submits that it is highly persuasive, it is not suggested that it was wrong, and it is based upon authorities decided in the Court of Arches (*Corke v Rainger and Higgs*, *In re Bideford Parish*, and *In re St Mark's Church, Lincoln*). Mr Petchey recognises that these are decisions of the Court of Arches (the appeal court of the southern Province of Canterbury), and not of the Chancery Court of York (the appeal court of the northern Province of York). However, since section 14A of the 2018 Measure requires this court to treat decisions of the Court of Arches as if they had been made by the Chancery Court of York, they are binding upon it.

73. Mr Petchey works through the *'Class 2-type'* cases upon which Mr Harrison relies as having developed the law since 1962. He submits that the installation of telecommunications equipment poses no difficulty for the law as stated in *In re St John's, Chelsea*. Such use: (1) does not interfere with the sacred use of the land; (2) is not intrinsically inconsistent with it; and (3) takes up only a small part of the consecrated land. A Scout hut permitted only on a temporary basis in a *"tucked away"* part of the churchyard (as in *In re St Barnabas, Downham*) does not look to be a very significant extension of the law. Nor (as in *In re St Chad's Churchyard, Bishop's Tachbrook*) is a hall for mixed church and secular use (which, but for the unusual arrangements regulating the management of the building, might have been treated as a *'Class 1-type'* case). That leaves *St Mary the Virgin, Woodkirk* as the potentially significant authority. Mr Petchey therefore proceeds to consider the case in some detail, noting, at the outset, that the Deputy Auditor nowhere suggests that he was extending, or developing, the law: as far as he was concerned, he was just applying it.

74. Mr Petchey describes *In re St Mary, Woodkirk* as an odd, and also as a remarkable, case. He says that it articulates the law correctly *"but then obviously fails to apply that law to the facts of the case, without explaining its non-application of the law"*. That in itself is said to be *"odd and remarkable"*. The Deputy Auditor begins his judgment by observing that it was unfortunate that the Auditor himself was unable to hear the appeal as a result of his indisposition. Thus, it came about that *"the very experienced Auditor"* did not hear the case. Mr Petchey suggests that the Deputy Auditor was not so experienced: he was the Chancellor of the (Welsh) Diocese of Bangor, but not of any English Diocese. Mr Petchey recognises that the case must be examined on its merits; but if, as he suggests, it is defective, he proffers the lack of experience on the part of the Deputy Auditor as part of the explanation. I am not impressed by such *'ad hominem'* criticism, or by the implicit slight upon the Consistory Court of the Welsh Diocese of Bangor (whose present Chancellor is, of course, the learned, and redoubtable, Professor Norman Doe KC (Hon)). I note that according to his entry in *Who's Who*, the Deputy Auditor served as the Chancellor of the Diocese of Bangor from 1959 to 1988; he was a Member of the Governing Body of the Church in Wales

between 1960 and 1988; and he served as a licensed parochial lay reader in the Diocese of St Albans between 1961 and 2003. Mr Owen Stable QC had been appointed to act as deputy auditor for the purpose of hearing and determining the appeal in *Woodkirk* by the Archbishops of both Canterbury and York, pursuant to the powers conferred upon them jointly by section 4 of the Ecclesiastical Jurisdiction Measure 1963 (since repealed). The Archbishops must therefore have been satisfied that Owen Stable QC was *"a fit and proper person to act as deputy Dean of the Arches and Auditor"*. Mr Petchey suggests that the case is odd because it is entirely unclear as to why the borough of Morley, as the highway authority, had applied for a faculty to extend this road through the churchyard, removing the remains of those who were interred in this consecrated land, rather than simply by relying upon its statutory powers to remove the effects of consecration. The result, Mr Petchey says, is that, to this day, a strip of the A653 from Dewsbury to Leeds (about half an acre in total) remains consecrated land, and thus subject to the jurisdiction of the consistory court for that diocese. That jurisdiction may continue to exist; but it cannot realistically be asserted that the land remains permanently set aside for sacred purposes.

75. Turning to the judgment, Mr Petchey accepts that the Deputy Auditor identifies the law correctly, setting out (at p. 1873C-E) the relevant passage from the conclusion of the judgment in *In re St John's, Chelsea* relating to *'Class 1- and Class 2-type'* cases. Mr Petchey emphasises the reference in the citation relating to *'Class 2-type'* cases to *"small parts of a churchyard"*; and also the sentence: "*This part of the jurisdiction must be sparingly exercised and should not be extended."* Mr Petchey points out that the Deputy Auditor does not go on to cite the third relevant class of faculty: *"Faculties may be granted for secular user where the original purpose of consecration can no longer lawfully be carried out."* The reason, Mr Petchey suggests, is that that this class had no application because the churchyard was still open. Nowhere in the Deputy Auditor's judgment does he engage with the words Mr Petchey has emphasised. What was proposed was not a *"small part"* of the churchyard; and he was evidently not exercising the jurisdiction *"sparingly"*. How then, Mr Petchey asks, should a court seek to apply *In re St Mary the Virgin, Woodkirk* in any subsequent case? *In re St John's, Chelsea* has been expressly approved as a statement of the law. But the judge has not applied the law that he has articulated. It is not just that he has got the answer wrong; he has not engaged with the law that he has articulated. The answer, it is said, is supplied in Mr Petchey's original submissions.

76. The judge (George Newsom QC) who decided *In re St John's, Chelsea* subsequently became the Chancellor of the Diocese of London. He had the opportunity to comment on the Deputy Auditor's treatment of his earlier decision in the subsequent case of *In re St Botolph's, Bishopsgate* [1991] 1 WLR 28. I note that this case was concerned with the power to divert to other ecclesiastical purposes a substantial sum of money received in consideration for the grant of a licence over a disused burial ground (authorised by faculty) which exceeded the needs of the parish. At pp. 34H-35B, Newsom QC, Ch said this:

For the decisions [on diversion orders] *are in line with the numerous cases, collected in In re St John's, Chelsea [1962] 1 WLR 706, in which the consecrated land itself was diverted, wholly or partially, from its primary use as a place for burial, in some cases to purposes that were not ecclesiastical at all. In re St Mary the Virgin, Woodkirk [1969] 1 WLR 1867 is perhaps the most extreme example of the exercise of this power. The court in that case, being the appellate court of the northern province, followed In re St John's, Chelsea [1962] 1 WLR 706. Corke v. Rainger [1912] P. 69 is on the other hand an example of a diversion to other ecclesiastical*

purposes. All that I now decide is what is currently before me, viz. that a diversion order of money can be made to other ecclesiastical purposes.

How much further beyond ecclesiastical purposes such a diversion order can go (if at all) is a matter for some future decision. I am quite unable to see why a diversion order to other ecclesiastical purposes of money arising from a faculty relating to consecrated land can be an illegitimate exercise of the jurisdiction of the court.

The Chancellor expressly stated that *In re St Mary the Virgin, Woodkirk* followed *In re St John's, Chelsea*, albeit that it was *"the most extreme example of the exercise of this power"*. This is how Mr Petchey suggests the *Woodkirk* decision should be treated: as an extreme example of the application of a clear principle. Comity always leads judges to be reluctant to say that a fellow judge has fallen into error; and here the error is of a particular kind: not as to the articulation of the law, but as to its application. In another case, there may be no need to go into the particular facts.

77. Mr Petchey suggests that it is instructive to consider how Chancellor Newsom QC, writing extra-judicially, interpreted *In Re St Mary, Woodkirk*. In the 1st edition of *Faculty Jurisdiction of the Church of England* (1988), he wrote:

The question what can lawfully be allowed in a consecrated burial ground was fully discussed by the London consistory court in Re St John's, Chelsea, which was approved by the Chancery Court of York in Re St Mary the Virgin, Woodkirk. Re St John's, Chelsea has not so far been considered by the Arches Court of Canterbury; but it is not likely that the court will take a different view from the appellate court of the northern province, and in practice the decision in the Chelsea case is normally regarded as correct throughout both provinces. ***Apart from principle, it is expedient that the limits imposed by the sentence of consecration should be observed scrupulously.*** *The legislature has provided, in particular by the Pastoral Measure 1983 and also the Town and Country Planning Act 1971, methods by which, in defined circumstances and subject to special and usually somewhat prolonged procedures, the effect of consecration can be cancelled.* ***However, it is not for the judges to lend themselves to evading the statutory safeguards.*** [Emphasis supplied by Mr Petchey]

Mr Petchey comments that it is hard not to feel that, as an author, George Newsom QC was being disingenuous. He takes approval from *In Re St Mary, Woodkirk* of what he had said in *In re St John's, Chelsea*; but he makes no direct comment on what the Deputy Auditor actually did in that case. Mr Petchey invites this court to note that this passage appears in the 2nd (1993) edition of *Faculty Jurisdiction of the Church of England* (by George Newsom QC and G.L. Newsom) save that the last sentence does not appear. Mr Petchey suggests that it is not possible to speculate on the reason for this (although one reason that occurs to me is that the learned co-authors no longer endorsed the statement).

78. Mr Petchey criticises Mr Harrison for failing to engage with the point made by Mr Petchey: that the land applied to highway use in *Woodkirk* was a large strip, and not a small part of the open churchyard, so this could not constitute a *"sparing"* exercise of the court's jurisdiction. Mr Petchey observes that his criticism of *In re St Mary the Virgin, Woodkirk* is either well-made or not. It does not matter that that criticism has not been made in any reported case. Moreover because *In re St Mary the Virgin, Woodkirk* expressly approves, and purports to follow, *In re St John's, Chelsea*, it was open to the decision-maker in any later case to apply the law it purports to be applying without drawing attention to the way that law was applied to the facts in *Woodkirk*. What is said to be key is that in none of the reported cases did the court apply *In re St Mary the Virgin, Woodkirk* in such a way as to produce a result that was inconsistent with *In re St*

John's, Chelsea. The court is invited to look carefully at each example given; but Mr Petchey submits that the weight to be given to any non-criticism of *Woodkirk* is limited. By way of example, Mr Petchey makes the point that in *In re St Peter and St Paul's Church, Chingford* [2007] Fam 67 one has the benefit of counsel's arguments. Counsel for the appellant petitioner (Charles George QC and Philip Petchey) did not refer the court to *In re St John's, Chelsea* or to *St Mary the Virgin, Woodkirk*. But the amicus curiae (Mark Bishop) articulated the following propositions (at p.71):

The principles on the use of church land for a secular purpose are (1) that the status of consecrated land is indelible; and (2) that there are certain circumstances where consecrated land may be used for secular purposes, namely, (a) when the secular purpose is incidental to the wider ecclesiastical purpose, (b) closed churchyards, (c) the granting of wayleaves or where only minimal possession is granted for the public benefit and (d) the original purpose of the consecrated land is no longer being carried out. [Reference was made to In re St James's Bishampton [1961] 1 WLR 257; In re St John's, Chelsea [1962] 1 WLR 706; In re St Mary the Virgin, Woodkirk [1969] 1 WLR 1867 and In re St Mary, Warwick (2004) 23 Consistory and Commissary Court Cases, case 17.] Mobile phone mast cases come within category (c) as being for the public benefit.

On this analysis, 'Class 2' becomes *"(c) the granting of wayleaves or where only minimal possession is granted for the public benefit"*. How, Mr Petchey asks, does *St Mary the Virgin, Woodkirk* fit into that? On the face of it, this was not an issue that the amicus drew to the attention of the Court.

79. At [34], the Court of Arches itself cites *In re St Mary the Virgin, Woodkirk* as an example of balancing the public interest against church-related interests; and (at [38]) *In re St John's, Chelsea* as an example of faculties being granted for wayleaves over a churchyard. The Court seems not to have engaged with the issue of how the grant of a faculty for the secular use of only small parts of the churchyard (or where minimal possession is granted) is consistent with the facts of *Woodkirk*. It did not need to because the amicus accepted that mobile phone mast cases came within category (c) (i.e., a *'Class 2-type'* case).

80. In *In re St Barnabas, Downham* (2011) 14 Ecc LJ 137 (Southwark Consistory Ct) Chancellor Petchey observed (at [18]) that *"the law has developed since 1962*" and that "the principles enunciated in *In re St John's, Chelsea "obviously must be treated with great respect as indicative of the correct approach but … they cannot now be tested as a comprehensive statement"*. Against that background, a faculty was granted for a scout hut on a temporary basis. Mr Petchey submits that the decision both respected those principles, and was loyal to the approach, even though it may fairly be regarded as a modest extension of *In re St John's, Chelsea*.

81. The same comments are said to apply *In re St Chad's Churchyard, Bishop Tachbrook* [2014] Fam 118 (Coventry Consistory Ct). Here the building itself was larger, but it did have an ecclesiastical use. It, too, may fairly be regarded as, in a modest way, an extension of *In re St John's, Chelsea*. The key paragraph is said to be [25]:

As I have already stated, in In re St John's, Chelsea [1962] 1 WLR 706 the court said that secular use of consecrated land would only be permitted if the purpose for which the land had been consecrated could no longer be carried out. In that regard I agree with the conclusion reached by Petchey Ch in In re St Barnabas Churchyard, Downham (2011) 14 Ecc LJ 137 to the effect that the law has developed since the decision in In re St John's, Chelsea. There is now a greater flexibility as to permitting the secular use of consecrated land. This conclusion is reflected in paragraph 839 of Halsbury's Laws of England as set out above [i.e., building in churchyards is frequently allowed]. *It is not every secular use which will be permissible.*

Chancellor Eyre concludes:

The decision whether to permit such use will be a matter of fact and degree with the nature, extent, and permanence of the proposed secular use all being relevant.

82. Mr Petchey recognises that Eyre Ch's conclusion that the law has developed since *In re St John's, Chelsea* accords with *In re St Barnabas, Downham* and it references that authority. This means that there is greater flexibility when permitting the secular use of consecrated land. But greater flexibility is one thing. Mr Petchey suggests that for the whole question of the secular use of consecrated ground simply to become a matter of fact and degree is quite another. Mr Petchey submits that if the court were to hold that the question of secular use is simply a question of fact and degree, it would not be following, and applying, *In re St John's, Chelsea* (albeit approaching the matter more flexibly than in that case); rather, it would be overruling that case. That authority is a careful exposition of the law, based upon existing, and binding, authority. It is submitted that what Eyre Ch was doing in *In re St Chad's Churchyard, Bishop Tachbrook* was explaining that the application of Class 2, **as defined** in *In re St John's, Chelsea* (albeit interpreted with a degree of flexibility), is a matter of fact and degree: that a sparing approach to the question whether or not a parcel of land is or is not small is a matter of fact and degree. If Eyre Ch was intending to go further, and to say that the whole question is simply one of fact and degree, then, Mr Petchey submits, he was wrong to do so – albeit that his actual decision would readily be justifiable, in terms of existing authority as regards the meaning of Class 2. If Eyre Ch had been intending a radical change to the approach articulated in *In re St John's, Chelsea*, one would, of course, have expected him to say so. The reason why Class 2 is not just a matter of fact and degree is the fundamental incompatibility between sacred use and secular use. If more than a small part of a consecrated churchyard, or cemetery, is used for secular purposes, the Court, that derives its jurisdiction from the fact of consecration, and which should be defending appropriately the sacred nature of the land, would be acquiescing in a significant, non-sacred use, which is incompatible with that sacred use.

83. Mr Petchey considers *In re St John's, Chelsea* in the light of *In re St Barnabas, Downham* and *In re St Chad's Churchyard, Bishop's Tachbrook*. He points out that *In re St John's, Chelsea* did involve questions of fact and degree, in the sense that whether one is looking at a small part of the churchyard or not is a matter of fact and degree. *In re St Barnabas Churchyard, Downham* and *In re St Chad's Churchyard, Bishop Tachbrook* are said to make the matter more one of fact degree – the chancellor has, if you like, more *'wiggle room'*. But, as Mr Petchey has explained, we are not looking at a wholesale shift in approach. The jurisdiction still has to be exercised sparingly. There is no way that the giving over to secular use of the land which is the subject of the current faculty application can be described as a *'sparing'* exercise of the jurisdiction to authorise secular use.

84. Mr Petchey notes that Mr Harrison invites the court, at this preliminary stage, to bear in mind the six submissions which, so he says, bear out the prima facie strength of RPC's case. The Friends do not accept that the public interest speaks in favour of permitting the secular use of consecrated land in the present case. Mr Petchey reminds the court that RPC has not thought it appropriate, in this context, to mention the fact that the construction of a crematorium on the site proposed is, as matters stand, contrary to the general law; and no legal advice to the contrary has been shown to this court. However such matters do not bear on the current issue. The court can postulate, if it so wishes, the maximum possible public benefit: the point is simply that all but modest secular use is incompatible with the consecrated status of the land. If the public

interest calls for the secular use of the land, the legislature has provided for the consecrated status of the land to be overridden. However, so long as the land retains its consecrated status, the faculty jurisdiction cannot authorise more than modest secular use. Insofar as RPC seeks to rely upon the fact that the Bishop of Blackburn deconsecrated the adjoining land in the full knowledge that some secular development of this site would be necessary, his views (such as they may be) about the merits of the faculty application are not relevant. Nor is it appropriate to derive from the deconsecration of the crematorium site, any view as to the law. If the proposed development, ancillary to the crematorium, cannot take place on the land that remains consecrated, the view of the Bishop to the contrary (if that were indeed his view) is said to be irrelevant.

85. Mr Petchey recognises that there would, of course, be no need to consider Class 2 if the present were a Class 3 case. He therefore turns to consider the *'Class 3-type'* cases. He reminds the court that Class 3 derives from two cases in the Court of Arches, namely *In re Bideford Parish* [1900] P 314 and *In re St Mark's Church, Lincoln* [1956] P 336. Mr Petchey has already sought to explain the effect of these authorities. In his submissions, Mr Harrison points out that in *In re St John's, Chelsea*, the Deputy Chancellor left open for future decision (at p. 715) the question whether Class 3 should be extended to *"frustration in fact"*. Mr Petchey points out that *In re St Martin Le Grand, York* [1990] Fam 63 is a straightforward Class 3 case: the churchyard was closed, and burials could no longer be carried out within it. In referring to the issue in practical terms, Chancellor Coningsby QC was not considering the distinction between frustration in law and frustration in fact. The case is no authority supporting the extension of Class 3 to frustration in fact. As to the factors justifying the secular use on the basis of Class 3, Mr Petchey invites the court to note that Coningsby QC, Ch was only granting a faculty for limited, and short-term, vehicular use of the churchyard: see p. 72.

86. Mr Petchey recognises that it is still necessary to consider the possibility of such an extension because RPC argues that what is proposed in the instant case should be considered as akin to a Class 3 case. He points out that the scope of Class 3 has never been explored in any actual case. The facts of *In re St Mark's, Lincoln* [1956] P 336 (which established the jurisdiction) concerned *"the use of a small part of a closed churchyard as part of a projected omnibus station"*: see p. 340. Nonetheless, on the face of it, had the churchyard of *In re St Mary the Virgin, Woodkirk* been closed, rather than remaining open, so that further burials were prohibited by law, a faculty might have issued on the basis that it was a Class 3 case. On that footing, it would not have been necessary for the petitioner in that case to show that only a small part of the churchyard was affected. The justification for granting a faculty on this basis – for allowing the permanent dedication of the land to God to be, in effect, set aside - is that the legislature – or, as seems more likely, the Crown, by Order in Council - has intervened, as a matter of law, to frustrate that sacred purpose. Thus, although, in such a case, there would be a contradiction in terms between the land remaining consecrated – i.e., set aside permanently for sacred purposes – and it being used entirely for secular purposes (e.g., use as a highway), it can be said that the contradiction is more apparent than real: the legislature (or the Crown) has intervened to frustrate the sacred purpose. Mr Petchey says that this justification does not exist when it comes to arguing for the extension of Class 3 to frustration in fact.

87. In the present case, the **actual facts** are that the consecrated land was used, as the sentence of consecration envisaged, *"... for the burial of lunatics dying in the Whalley County Lunatic Asylum ..."* until the closure of the asylum and later hospital. It could then be said that the

continuing use of the consecrated land, as envisaged, had been frustrated, although, of course, it had been so used until the closure of the asylum and hospital. However, in the **hypothetical case** that the Chancellor is presently considering, it has not been used in this way. What needs to be considered is whether, in these circumstances, the law relating to frustration in law should be extended to frustration in fact. Mr Petchey submits that it should not. He recognises, in these circumstances, a factual justification for allowing a purely secular use: the particular purpose for which the land was consecrated cannot be carried out; and since there are assumed to be no burials in the land, there can be no objection on this account to its secular use. What, then, Mr Petchey asks rhetorically is the objection to permitting the secular use of this land? Mr Petchey's answer is that the land has been consecrated, and permanently set aside for sacred purposes. The current formulation of the *'Class-3 type'* case can be justified on the basis of the legislative intervention of Parliament. There is no such justification in respect of frustration in fact. For the consistory court to extend this class of case to the instance of frustration in fact would in practice amount to legislation by the court; the judiciary would be trespassing upon the proper territory of the legislature. The court should evidently hesitate before going down this path. Mr Petchey recognises an argument that it may be inconvenient that the consistory court has no power, in effect, to remove the effects of consecration from land where the original purpose of consecration has been frustrated in fact. However, there exist powers under the planning acts to remove from land the effects of consecration. More particularly, specific powers exist under section 92 of the 2018 Measure for a diocesan bishop to remove the effects of consecration in respect of land not owned by the church where he or she is satisfied that no legal purpose will be served if that land remains subject to the legal effects of consecration. Where the legislature has provided a route to address frustration in fact, it cannot plausibly be said that it is inconvenient that the court lacks the necessary power to remove the legal effects of consecration; and that, as a result of that suggested inconvenience, the court should extend the law. In this context, Mr Petchey invites the court to note that the fact that the land can no longer be used for the burial of lunatics dying in the asylum does not mean that it cannot be used generally for burials. It potentially has a future use for this purpose.

88. Mr Petchey identifies *In re Radcliffe Infirmary Burial Ground* [2011] PTSR 1508 as a good example of a case where the development of consecrated land for secular use was appropriately progressed. If the approach of the petitioner in the present case is correct, there would have been no need for the land in that case to be deconsecrated; everything could have been done by faculty instead. This would, of course, have left land which was no longer being used for sacred purposes subject to the faculty jurisdiction. That would produce a result which Mr Harrison recognises would not have made sense. But if he is right, the result in the present case is that land used for secular purposes remains subject to the faculty jurisdiction. If this did not make sense in *In re Radcliffe Infirmary Burial Ground*, it is not sensible in the present case.

89. Mr Petchey recognises that the Friends' submissions treat the proposed use of this site as a secular one which is ancillary to the secular use of the crematorium itself. However, he notes that RPC hopes *"that the burial ground will remain open to a small number of interments"*. Should this come about, the land would be subject to a limited amount of what might be described as ecclesiastical or, at any rate, non-secular use. Any burials would then be subject to the restrictive law of the Church of England as regards exhumation. Mr Petchey asks whether this makes any difference. He submits that it does not, whether by itself, or in conjunction with the fact that some of the services in the unconsecrated crematorium would be conducted according to the

rites of the Church of England. That is because what RPC proposes is essentially a secular use, with potentially this minor element of ecclesiastical use.

90. Mr Petchey emphasises that there is no need for any extension of the existing law. Since *In re Bideford Parish* was decided in 1900, legislation has changed the law to facilitate the removal of the effects of consecration from consecrated ground. There is therefore no justification for any extension of the law, based upon any suggested difficulties that might otherwise arise. Mr Petchey explains that his reason for citing *In re Radcliffe Infirmary Burial Ground* is that it shows how this process works. Any application to the bishop under section 92 of the 2018 Measure in that case would have failed had it been made in advance of any faculty proceedings because consecration clearly continued to serve a useful purpose, by protecting the remains of those buried in the disused burial ground. An application to the consistory court to permit building, in addition to the exhumation of those remains, would have failed – even if all the human remains had been permitted to be exhumed – because the land would remain consecrated, and the secular use that was proposed was inconsistent with the consecrated status of the land. The Friends agree that it would have been unthinkable for the project to develop a new university department sensibly to have remained under the jurisdiction of the ordinary. Likewise - and for the same reason – that it is a secular use – it should be unthinkable that the secular uses proposed in the present case should remain subject to the jurisdiction of the ordinary. The fact that the secular use in the present case does not involve any built development may mean that it is intrinsically less objectionable than might otherwise have been the case; but it is still secular development, and thus inconsistent with the consecrated status of the land.

Analysis and conclusions

91. Those are the parties' written representations. I am grateful to both counsel for the considerable learning they have brought to bear on the subject-matter of this preliminary issue. This has been informed by the considerable experience that both Mr Petchey and Mr Harrison have in this specialist field of law, and not just as practitioners in the consistory courts: Mr Petchey is also the Chancellor of the Diocese of Southwark, and the Secretary of the Ecclesiastical Judges' Association; Mr Harrison is the current editor of the Ecclesiastical Law Journal.

92. Mr Petchey has identified the real point of principle in issue between the parties in his submissions in response to Mr Harrison. Has there been a wholesale shift in the way the ecclesiastical courts approach the secular use of consecrated land which has resulted in a move towards greater flexibility? Is it necessary to treat the threefold analysis in *In re St John, Chelsea* with caution? Has the position now been reached that the court simply applies a merits test, weighing wider considerations of the public interest against the narrower public interest that consecrated land should continue to be used for the sacred use to which it was dedicated, with the question resolving itself into one of fact and degree? More specifically, the question is whether the following statement in the headnote to the case of *In re St John's, Chelsea* [1962] 1 WLR 706 remains good law:

… faculties could be granted, either in respect of a church site or a churchyard, for ecclesiastical user **[Class 1]**, *for throwing small parts of a churchyard (whether still available for burials or not) into a highway or for granting rights of user in the nature of wayleaves* **[Class 2]**, *and for secular user where the original purpose of consecration could no longer be carried out* **[Class 3]**, ***but that there was no jurisdiction to grant any other relevant class of faculty*** [Emphasis supplied]

This in turn requires this court to consider the effect of the later decision of the Chancery Court of York in the case of *In re St Mary the Virgin, Woodkirk* [1969] 1 WLR 1867.

93. I consider that it is necessary to start by understanding what Deputy Chancellor Newsom QC was seeking to do in *Chelsea*. I do not understand him to have been engaged in seeking to formulate any principled statement of general application, identifying, and defining, the circumstances in which the ecclesiastical courts should be prepared to sanction, and authorise, the use of consecrated land for any particular secular use. Rather, he was seeking to identify the individual, and particular, instances in which previous consistory courts, and the Court of Arches, have permitted the secular use of consecrated land, and to classify such particular instances under a number of discrete headings. He was not engaged in seeking to identify any overarching principle of general application, in the style of Lord Atkin in his seminal speech in *Donoghue v Stevenson* [1932] AC 562 (at p. 579 and following). Even then, the Deputy Chancellor deliberately did not attempt any definitive, or comprehensive, statement of the law. That is because (at p. 715) he expressly left open for future decision the question whether, since frustration can found the jurisdiction, frustration in fact will do so as much as frustration by law. In short, the Deputy Chancellor's analysis was descriptive, rather than normative, in character. It is right that Newsom QC, Dep Ch stated in terms (at pp. 714-5) *"that a faculty for secular user cannot be granted unless the user falls in the restricted category of wayleaves, or if the purpose for which the ground was originally consecrated can no longer lawfully be carried out"*. In the particular case that was before him, the petition to use, as a car park, the land on which the church of St John's, Chelsea had previously stood failed, and was dismissed, because, on the evidence, the petitioners had failed to establish that the sacred purpose for which the land had originally been consecrated could no longer lawfully, or practically, be carried out: see pp. 719-720 (where Newsom QC, Dep Ch found that *"the petitioners fail to establish that it is impracticable to re-erect the church on this site in due course"*). The Deputy Chancellor's observations must therefore be treated as an essential part of the court's reasoning, and thus as forming part of its decision (although Mr Harrison is right to emphasise that the circumstances the court faced in *Chelsea* are completely different to those that confront the court on this petition). However, as Mr Petchey recognises, that case (in the consistory court of the Diocese of London) is only of persuasive, and not binding, authority upon this court (in the Diocese of Blackburn, in the Northern Province of York); and must, in any event, yield to later, and higher, authority.

94. That brings me to *Woodkirk* which, as a decision of the Chancery Court of York, is binding upon the consistory court of this Diocese of Blackburn (which lies within the Northern Province). When considering (at p. 1871) whether the court had any jurisdiction to allow consecrated ground, which is still in use for sacred purposes, to be used for secular purposes, the Deputy Auditor expressly identified, and clearly bore in mind, the important consequences which flow from any sentence of consecration. He cited extensively from Newsom QC, Dep Ch's judgment in *Chelsea*, including the entirety of his description of the *'Class 1- and 2-type'* cases, and, as regards Class 2, his observations that *"those decisions have been somewhat stretched in practice. This part of the jurisdiction must be sparingly exercised and should not be extended."* This led the Deputy Auditor to conclude (at p. 1873) that the court had the necessary jurisdiction to grant a faculty. He did not refer to Deputy Chancellor Newsom QC's description of Class 3; but since the churchyard was still being used for burials, that class of case was not engaged on the facts of the case before the Deputy Auditor. He then moved on to consider the question whether he should grant a faculty in the particular case that was before him. At p. 1873H, he framed the test he should apply in the following terms:

In my judgment I ought not to grant a faculty unless I am satisfied that considerations of the ***public interest*** *require that the proposed road improvements should be carried out; that there is no reasonable alternative and that the public interest* ***outweighs*** *the interests of the objectors* ***and*** *the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.* [Emphasis supplied]

The Deputy Auditor found (at p. 1875D-H) that the public interest weighed in favour of the faculty being granted, explaining that it was inevitable that technological developments would require consistory courts to apply the older reported cases, and the principles on which they relied, through a more modern lens. After setting out the prejudicial consequences that would have followed had the petitioning local authority been required to re-route the road, the Deputy Auditor summarised his approach as follows (at p. 1876C-D):

In deciding, as I do, that this appeal should be allowed and a faculty should be granted, I have asked myself the question: ***What is the duty of the Church in this situation?*** *Put that way, I have had no hesitation in reaching a conclusion.* [Emphasis supplied]

95. This *'short-hand'* version of the test was later applied by Chancellor Newsom QC in *In re St Luke's, Chelsea* [1976] Fam 295 at p. 314 when he refused to exercise any discretion he might have had to allow anything which would interfere, or tend to create interference, with the substantial facility that a disused burial ground, which had been laid out as open gardens for the benefit of the parish, afforded to members of the public:

I approach the exercise of the discretion keeping clearly in view the question which the deputy auditor put to himself in <u>*In re St Mary's, Woodkirk*</u> *[1969] 1 WLR 1867, 1876: 'What is the duty of the Church in this situation?'*

96. I bear in mind that in *In re St Botolph's Bishopsgate* [1991] 1 WLR 28, at pp. 34H-35B, Chancellor Newsom QC later described *Woodkirk* as *"perhaps the most extreme example"* of the exercise of the power to divert consecrated land, wholly or partially, from its primary use as a place of burial to purposes that are not ecclesiastical at all. I note also that in *In re St Andrew's, North Weald Bassett* [1987] 1 WLR 1503, Cameron QC, Ch (in the Chelmsford Consistory Court) observed (at p. 1508) that:

Whilst a decision of the Chancery Court of York is not binding on a consistory court in the Province of Canterbury, it is deserving of considerable respect and is of persuasive value. The deputy auditor made it quite clear, at p. 1873, that the burden of proof was on the petitioner to satisfy him that considerations of the public interest in having the road improvement carried out outweighed 'the interests of the objectors and the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.'

97. Mr Harrison rightly emphasises that the Deputy Auditor's approach in *Woodkirk* has been mentioned in at least eleven reported cases, in both provinces – including in the Arches Court of Canterbury – with no real hint of any adverse judicial comment. As a decision of the Chancery Court of York, *Woodkirk* is clearly binding upon this court. It is not sufficient, in order to justify this court in disregarding the authority of that case, for Mr Petchey to submit that the case is plainly wrong on its facts; or that it does not constitute any precedent. It clearly does. Since the case was clearly not a *'Class 3-type'* case (because the original purpose of consecration was still being carried out) and, as Mr Petchey has demonstrated, it cannot properly be treated as a *'Class-2 type'* case (because it involved very much more than *"a small part"* of a churchyard), the decision in *Woodkirk* has clearly operated to extend the class of cases in which a faculty may be granted for secular use beyond those identified in *Chelsea*, however unwelcome that outcome might have

been viewed by Chancellor Newsom QC in that case (or by Chancellor Gage QC in *In re All Saints', Harborough Magna* [1992] 1 WLR 1235 at p. 1237C-D). If the outcome in *Woodkirk* cannot be reconciled with the analysis in *Chelsea*, then that analysis clearly falls to be reconsidered. Such reconsideration is best approached from the perspective of seeking to identify the considerations that may justify the use of consecrated land for a secular purpose, rather than seeking to shoehorn any particular factual situation into the framework presented by earlier case law. That is how case law develops in our courts. It involves recognising the reality that notions of what may be regarded as permissible activities on consecrated land need to adapt with changes in contemporary society and faith communities. Today, the concept of *'pastoral outreach'* extends far beyond the use of part of a church for a nursery school, or for an old people's day centre, to (for example) the operation of a foodbank (with all the considerable storage facilities that this may require), or even a village post office. As Chancellor Coningsby QC observed in *In re St Martin Le Grand, York* [1990] Fam 63, at pp. 71-2, whilst *Woodkirk* could be distinguished from the case before him, because of the public interest factor, *"it illustrates the proposition that the principle whereby consecrated land should be protected from secular use is not an absolute one"*.

98. I am satisfied that the law has indeed moved on since the analysis in *Chelsea*, and that Mr Petchey is wrong to suggest that the three classes of faculty identified in that case represent fixed, and immutable, jurisdictional gateways, for present purposes. This has been recognised in the authorities. Thus, in *In re St Peter and St Paul's Church, Chingford* [2007] Fam 67, the Arches Court of Canterbury (Cameron QC, Dean, Kay QC, Ch and Tattersall QC, Ch) emphasised that, when exercising the faculty jurisdiction, consistory courts are required to balance public interest factors against church-related interests. At [34], the Dean noted that this *"… well established principle has been reiterated in decisions of the appellate courts for the provinces of Canterbury and York … which are binding on the consistory courts."* The Dean specifically cited the decision of the Deputy Auditor in *Woodkirk* in support of that proposition, including that part of his judgment (at p. 1873H) in which he said that he had to be satisfied *"… that the public interest outweighs the interests of the objectors and the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated."*

99. This shift in approach is evident from earlier authorities. In *In Re All Saints', Harborough Magna* [1992] 1 WLR 1235 (in the Coventry Consistory Court), Chancellor Gage QC had been concerned with a petition to install telecommunication aerials. He held (at p. 1237C-D) that *"… in general it is my view that a faculty for use of a church for secular purposes only should be granted only in rare and exceptional circumstances."* Just over a decade later, in his conjoined judgment (in the Ripon and Leeds Consistory Court) in *In Re St Margaret's, Hawes* and *In re Holy Trinity, Knaresborough* [2003] 1 WLR 2568, Chancellor Grenfell (at [99]) rejected any need for a test of *'rarity and exceptionality'* when considering the grant of a faculty authorising the use of part of a church building for secular purposes, as follows:

In the light of the development of secular use of churches in circumstances … over the last ten years, I consider it right to revisit the observation of Gage Ch in <u>In re All Saints', Harborough Magna</u> [1992] 1 WLR 1235, that it would only be in rare and exceptional cases that secular use would be permitted. In my judgment, if a church can receive financial support by taking rent for a commercial undertaking that is consistent with its role as a local centre of worship and mission, then I can see no objection. To that extent, respectfully, I should not follow his use of the words 'rare and exceptional' today.

Earlier (at [12]), Grenfell Ch had said:

In my judgment, there is no reason as a matter of ecclesiastical law why a faculty should not be granted for wholly secular and commercial use of part of a church building. Each case must be considered on its own merits. It is for the petitioners to show that there is good reason why a faculty should be granted …

What was cited as the *"proper approach"* of Chancellor Grenfell in *Hawes* and *Knaresborough* at [12] was later approved by the Court of Arches (Cameron QC, Dean, Bursell QC, Ch and Briden Ch) in *In re Bentley Emmanuel Church, Bentley* [2006] Fam 39 at [10]. Nothing in the Canons of the Church of England was said to conflict with this statement of the law. The Dean went on to emphasise that, where the secular use of church buildings is contemplated: *"The primary consideration is that the secular use is not unseemly"*.

100. These authorities reflect the shift away from the rigid approach in *Chelsea*, and emphasise the relevance of public benefit considerations whenever the court is considering a petition which would permit the use of consecrated land for a secular purpose. Indeed, just before the decision in *Chelsea*, in the case of *Re St Peter the Great, Chichester* [1961] 1 WLR 907 (in the Chichester Consistory Court) Chancellor Buckle (at p. 910) accepted that he had the necessary jurisdiction to grant a faculty to erect an electricity sub-station in a disused burial ground within a churchyard provided he was satisfied that

… the benefit to the parish and the public generally is sufficiently established, and the purpose for which the faculty is desired is not inconsistent with the effects of consecration.

I note that this authority was neither referred to, nor cited, in *Chelsea*, although the decision is clearly justifiable as a *'Class 3-type'* case.

101. This modern approach has been endorsed, and followed, in later authorities. In *In re St Barnabas Churchyard, Downham* 18 May 2011 (2011) Ecc LJ 137 (in the Southwark Consistory Court), Chancellor Petchey explained (at [18]-[19]) that:

…As regards the principles enunciated in In re St John's, Chelsea, they obviously must be treated with great respect as indicative of the correct approach but I think they ***cannot now be tested as a comprehensive statement*** *– in short, the law has developed since 1962.*

As explained above, it seems to me that, since the Second World War, the Consistory Courts have approached the question of the secular use of consecrated ground with ***an increasing degree of flexibility****. Thus I do not think that merely to identify the secular and separate use of the proposal before me is automatically to identify reasons for rejecting it …*

Indeed, Petchey Ch was comfortable in concluding (at [17]) that:

… there is ***no absolute bar*** *to secular use of a consecrated churchyard involving* ***permanent works****.* [Emphasis supplied in both citations]

102. This approach was endorsed by Chancellor Eyre in *In re St Chad's Churchyard, Bishop's Tachbrook* [2014] Fam 118 (in the Coventry Consistory Court) at [25]:

… I agree with the conclusion reached by Petchey Ch in In re St Barnabas Churchyard, Downham (2011) 14 Ecc LJ 137 to the effect that the law has developed since the decision in In re St John's, Chelsea. There is now a greater flexibility as to permitting the secular use of consecrated land. ... It is not every secular use which will be permissible. ***The decision whether to permit such use will be a matter of fact and degree with the nature, extent, and permanence of the proposed secular use all being relevant****.* [Emphasis supplied]

Chancellor Eyre then went on (at [26]) to offer the following guidance:

What, then, is the approach which the court should take in considering applications such as this? Churchyards are consecrated to God, Father, Son, and Holy Spirit and proposed alterations have to be considered in the light of that consecrated status. Churchyards fulfil three principal functions. They operate to provide a suitable setting for the church in question; they provide a fitting resting place for the mortal remains of those already buried in the churchyard; and they provide a resting place for the remains of those to be buried in the future. ***The question to be addressed in each case is one of fact as to whether the building and its proposed use is appropriate for the particular churchyard in the light of the churchyard's consecrated status and the preceding functions****. In my assessment the effect of this means that in considering whether a building can be erected in a churchyard account has to be taken of:* ***(1)*** *The consistency between the building's use and the consecrated status of the churchyard bearing in mind the flexible approach referred to above and taking account of the nature, extent, and permanence of any proposed secular use.* ***(2)*** *The likely impact of the building on the setting of the church in question. Where the church is a listed building particular caution must be exercised in permitting changes which will impact on its special character. The guidelines laid down by the Court of Arches in* <u>*In re St Alkmund, Duffield*</u> *[2013] Fam 158 will be relevant.* ***(3)*** *Whether the presence of the building is likely to cause the churchyard no longer to be a fitting resting place for the remains of those interred therein.* ***(4)*** *The impact which the building's presence will have on the use of the churchyard for future burials. This will involve consideration of the extent of the land which will remain available for burials after the construction of the building and also of the ability of that remaining land to provide adequate capacity for future burials.* [Emphasis supplied]

103. I agree with Mr Harrison's submission that *Bishop's Tachbrook* affords another example of the *Woodkirk* principles being applied to the issue of whether or not secular development should be permitted on consecrated ground. Again, such development is clearly permissible in appropriate cases, provided such development is in the public interest. The four factors identified by Eyre Ch are of assistance to the court when it comes to consider where the **public interest** lies in the context of a proposal to introduce a secular building into a churchyard. In the present case, the court is concerned with a private cemetery, and so different considerations will apply, since the impact of the works on the setting of a church building are of no relevance. Here, the court will ultimately need be satisfied that any secular development will not cause the burial ground to become an unfitting resting place for anyone who may be interred there. This is consistent with the statement in *Bentley* (at [10]) to the effect that *"the primary consideration is that the secular use is not unseemly."*

104. For all these reasons, I am satisfied that Mr Petchey is wrong to suggest that the three classes of case identified in *In re St John, Chelsea* [1962] 1 WLR 706 represent fixed jurisdictional gateways for the purposes of the present faculty application. I also recognise, and bear in mind, that part of the reasoning which led Newsom QC, Dep Ch, in that case, to refuse the application for a faculty for the land to be used as a car park was driven by his finding that it was possible for the church to be re-erected on the same site in the future: see pp. 719-720. The circumstances the court faced in *Chelsea* are therefore very different to those which are presented to the court on this petition. In my judgment, the following principles, which are intended neither to be comprehensive, nor exhaustive, can be derived from the authorities:

(1) There is no absolute bar to the grant of a faculty authorising the secular use of consecrated land.

(2) The law has developed since the decision in *In re St John, Chelsea* in 1962 and there is now a greater flexibility about permitting the secular use of consecrated land. It is therefore necessary to treat the three class analysis in *Chelsea* with caution.

(3) When considering whether to allow consecrated ground to be used for secular purposes, the court should bear firmly in mind the important consequences which flow from any sentence of consecration.

(4) Not every secular use should be permitted. The decision whether to permit such a use is a matter of fact and degree, with the nature, the extent, and the permanence of the proposed secular use all being relevant.

(5) The court should not grant a faculty permitting any secular use of consecrated land unless it is satisfied that: (a) considerations of the public interest require such use; (b) there is no reasonable alternative; (c) the public interest outweighs the interests of any objectors, and the weighty public interest that consecrated land should continue to be used for the sacred use to which it was dedicated; and (d) the proposed secular use is seemly, and entirely consistent with the effects of consecration, and the sacred character of the land.

(6) At its core, the touchstone should be to inquire: *What is the duty of the church in this situation?*

105. I would also be prepared to accept the alternative way in which Mr Harrison would seek to formulate the principles governing the grant of a faculty for the use of consecrated land for a secular purpose, as follows:

(1) The consistory court has the jurisdiction to grant a faculty permitting the proposed ancillary development of consecrated land for secular purposes (including hardstanding and car park provision); and it may do so if the public interest in the development outweighs:

(a) the interests of any objectors, and

(b) the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.

(2) Each case should be considered on its own merits, and there is no test of '*exceptionality*'. The primary consideration is to ensure that the secular use is *"not unseemly"* (*Bentley* at [10]), and that the secular development will not cause the burial ground to become an unfitting resting place for the mortal remains of those already interred there (*St Chad's Churchyard* at [26]).

(3) The question of whether or not a faculty **should** be granted pursuant to this jurisdiction, in the circumstances raised by this petition, is one of fact and degree, with the nature, extent, and permanence of the proposed secular use all being relevant: compare *Chelsea* at p. 712; *Woodkirk* at p. 1873; *Chingford* at [34]; *Downham* at [19]-[21]; and *Bishop's Tachbrook* at [25].

(4) The court will exercise its jurisdiction over a private cemetery, such as this, with less rigour than it would in the case of a churchyard.

(5) The viability (or not) of any plans for any alternative use of the application site (as suggested by the Friends) is also relevant: *Camberwell Old and New Cemeteries* at [25] and [43].

(6) In short, the court now simply applies a merits test, with the question being one of fact and degree. The public interest may outweigh the interests of any objector, and also the public

interest that the consecrated land should continue to be used for the sacred use to which it was dedicated.

106. Applying these principles to the assumed facts of the present case, I am satisfied that the proposed use of the land, the subject of the present faculty application, for secular purposes ancillary to the secular use of the adjoining, deconsecrated land as a crematorium, would not necessarily be inconsistent with its continuing status as consecrated land. On the assumption that there have been no burials, or interments, of human or cremated remains within the application site, a faculty should not be refused solely on the basis of the continuing consecrated status of the subject land. I am satisfied that Mr Petchey is wrong when he submits that it would be impermissible, as a matter of principle, for this court to give permission to use this parcel of consecrated land for secular purposes ancillary to the secular use of the adjoining, deconsecrated land as a crematorium. Whether or not such a faculty should be granted is a matter for the exercise of the court's discretion, to be determined on all the evidence, and after full argument, at the substantive hearing of this petition. At such a hearing, the court will need to consider such factors as whether: (a) the public interest requires such ancillary use; (b) there is any reasonable alternative; (c) the public interest outweighs the interests of any objectors, and the weighty public interest that consecrated land should continue to be used for the sacred use to which it was dedicated; and (d) the proposed secular use is seemly, and entirely consistent with the effects of consecration, and the continuing sacred character of the subject land.

107. For completeness, I should add that in addressing this preliminary issue, I derive no material assistance from the provisions of section 92 of the 2018 Measure, which enable a diocesan bishop to remove the legal effects of consecration in respect of land, not owned by the church, where he is satisfied that no legal purpose will be served by the land remaining subject to those legal effects. I can well envisage circumstances (of which the present may well be one) where a bishop might well take the view that land should remain subject to the legal effects of consecration (thereby preserving the faculty jurisdiction of the consistory court in relation to any human or cremated remains that may rest there) whilst recognising the propriety of some secular use of that land where this would be in the wider public interest, seemly, and entirely consistent with the effects of consecration, and the sacred character of the land.

108. If I am wrong in my conclusion that the three classes of case identified in *Chelsea* no longer represent fixed jurisdictional gateways for present purposes, then I would, if necessary, be prepared to hold that Class 3 extends to cases of frustration in fact, as well as by law. I have already mentioned (at paragraph 85 above) that in *In re St John's, Chelsea*, Deputy Chancellor Newsom QC left open for future decision (at p. 715) the question whether Class 3 should be extended to *"frustration in fact"*. I have also held that since *In re St Martin Le Grand, York* [1990] Fam 63 is a straightforward Class 3 case (because the churchyard was closed, and burials could no longer be carried out within it), that case is not authority which would support the extension of Class 3 to frustration in fact. However, such an extension would seem to me to be entirely consistent with the way in which the case law has developed since 1962, with its emphasis upon considerations of the wider public interest, and inquiry as to the duty of the church in any particular fact situation. On this basis, the grant of a faculty in the present case may be justified on the basis that this may, depending upon the facts found at any full hearing, be a *'Class 3-type'* case.

109. In this context, I note two authorities that are cited at footnote 7 to paragraph 780 of the 2025 issue of Volume 34 of *Halsbury's Laws of England* (Title: Ecclesiastical Law) that were

not relied upon either by Mr Petchey or by Mr Harrison. Since they are cited in a section of a practitioner's work to which both counsel have made express reference in their written representations, and because they merely serve to reinforce a conclusion at which I had already arrived, I have not thought it necessary, or appropriate, to call for any further representations about them. The first is *In re St Clement, Eastcheap with St Martin Orgar* [1964] P 20, in the London Consistory Court. There Chancellor Wigglesworth granted a faculty for the grant of a licence to a firm of chartered accountants to convert a long disused parish churchyard into a private garden for the firm's use, subject to rights of access for the rector and churchwardens, and for such parishioners as might be authorised by the rector. Since it was unlawful to use the churchyard for further burials, so that it could not be used for any purpose for which it had been consecrated, this was clearly a *'Class 3-type'* case of frustration by law and in fact (and was treated as such by counsel for the petitioners, Bryan Buckle, in argument). The second is *In re St Paul's, Covent Garden* [1974] Fam 1, again in the London Consistory Court. There Chancellor Newsom QC was prepared to grant a faculty authorising the parochial church council to enter into an agreement to lease parts of the churchyard, which was a disused burial ground, to a company for use as a car park. Again, this would appear to have been a case of frustration both by law and in fact (although *In re St John, Chelsea* was not mentioned). I mention these two cases because it seems to me that it should have made no difference, in principle, to the outcome of either of them that the land in question could no longer be used for the purpose for which it had originally been consecrated as a matter of law, rather than of fact. Irrespective of the legal position, in reality, the proposed users – in one case, as a private garden, and in the other, as a car park – were equally at variance with the original purpose for which the land had been consecrated.

110. For these reasons, I determine the preliminary issue in the petitioner's favour. I invite counsel to attempt to agree a form of order to give effect to this judgment, to include directions to take this case forward to a full hearing. As I was invited to do by Mr Harrison, I propose to reserve the costs of this preliminary issue. I record that I have spent at least 24 hours preparing, and writing, this judgment. As with my earlier case management judgment, I wish to make it clear that, in determining this preliminary issue, I am not, at this stage, expressing any view whatsoever on the substantive merits of this faculty application.

David R. Hodge

The Worshipful Chancellor Hodge KC

Thursday, 30 April 2026

Annex

Preliminary issue for the determination of the Court

The petitioners have applied to the Court for a faculty authorising the carrying out of ancillary works relating to the construction of a crematorium in accordance with a planning permission granted by Ribble Valley Council (3/2019/0004). The area which is the subject of the petition ('**the application site**') is consecrated by virtue of a Sentence of Consecration executed on 30 June 1916.

The preliminary issue that arises for determination is whether the proposed use of the land, the subject of the present faculty application, for the purposes ancillary to the use of the adjoining, de-consecrated land for secular use as a crematorium is inconsistent with its continuing status as consecrated land; and whether or not any human or cremated remains lie under that land, any faculty should be refused on that ground alone.

For the purpose of the determination of the preliminary question (and for that determination only), it is agreed that the Court should assume that there have been no burials or interments of human remains in the application site.

Further for the purpose of the determination of the preliminary issue, the following matters are **agreed**:

1. Planning permission has been approved on a number of occasions.

2. Part of the cemetery has been deconsecrated by the Church of England.

3. The MOJ has now confirmed the cemetery should not be managed under the Disused Burial Grounds Act. (The Friends caveat this fact, stating that they do not agree the MOJ is correct.)

4. In appropriate circumstances, a faculty can be issued for secular use of consecrated ground. Case law shows what case law shows. (The Friends caveat this with *"...submissions can be made to the Chancellor in due course about its meaning"*.)

5. The Church of England accept both burial and cremation as acceptable means for the disposal of the dead.

6. That for determination of the preliminary issue it is assumed no burials are contained within the area subject to the faculty petition.

And the following matters are **not agreed**:

1. In planning terms a public cemetery, as Calderstones Cemetery, is considered entirely secular; it was developed and has consistently been used for the burial of multiple faiths, even to the point where two chapels were established one for Church of England and one for Roman Catholics.

2. The cemetery was established as and has continued to be used as a secular, multi-faith cemetery.

3. The Friends wish to re-establish Calderstones as a publicly funded cemetery (secular), which will then require off-street, car parking to comply with current legislation.

4. Any car park will be used for existing multi-faith users of the cemetery, users of the military cemetery, and any new multi-faith users of the crematorium.

5. All documented evidence demonstrates the area to which the petition appertains does not contain any burials, and this includes confirmation of some 20 Catholic burials to be entirely unsubstantiated.

6. The renovation of the two chapels will be entirely beneficial, whatever the future use of the cemetery.

7. The installation of utilities and drainage are entirely consistent with the *Chingford* (2007) judgment.

The Lychgate and the Chapels looking into the Site

The Lychgate and the Chapels from within the Site

The Gates to the Military Cemetery from the Site

The Military Cemetery viewed from the Site