Petition No. 9044

IN THE CONSISTORY COURT OF
THE DIOCESE OF OXFORD

Date: 19th September 2013

Before :

ALEXANDER McGREGOR
DEPUTY CHANCELLOR

- -

In the matter of :

St Peter in the East, Oxford

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- -

Mr Timothy Briden (instructed by Debenhams Ottaway) for the Petitioners

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JUDGMENT

The Deputy Chancellor:

Background

1. St Peter in the East dates from the twelfth century and is one of the ancient parish churches of the city of Oxford. By an Order in Council dated 31st January 1966, confirming a pastoral scheme prepared by the Church Commissioners, the benefice of St Peter in the East and Saint Cross, Oxford was united with that of St Mary the Virgin, Oxford. The united benefice formed by that scheme comprised two parishes, the United Parish of St Cross and St Peter in the East with St John the Baptist, Oxford and the Parish of St Mary the Virgin, Oxford.

2. The scheme included provision which appropriated the church of St Peter in the East "together with any land annexed or belonging thereto (not being land which shall have been used for burials) … to the uses specified in the Schedule". The Schedule provided that the church of St Peter in the East was to held by the Diocesan Board of Finance "on trust to allow the same to be used by Saint Edmund Hall, Oxford … in connexion with the religious and educational life of Saint Edmund Hall." The use by Saint Edmund Hall ("the College") of the church was on condition that they were responsible for repairing, maintaining and insuring it and that they were not to carry out any alterations to the interior or fabric "except in accordance with and subject to lawful authority".

3. The Schedule also contained a provisions as follows–

> 5. Subject and without prejudice to anything hereby authorised the jurisdiction of the Consistory Court of the said diocese in respect of the said church shall not be affected.

It is clear from the context of the scheme as a whole that in the Schedule "church" is used to mean the church together with the land annexed or belonging to it which is appropriated to the uses specified in the Schedule.

4. In accordance with the appropriation under the scheme the church and its churchyard were physically incorporated into the College. The church itself is now used as the college library and the churchyard for various purposes associated with the life of the College. A large part of the churchyard is laid out as a garden with benches. It also contains bicycle racks, gardeners' sheds and other paraphernalia associated with its maintenance by the college.

5. Not all of the "land annexed or belonging" to the church was appropriated under the Scheme because at least some of it has been used for burials. The result is that at least part of the churchyard remains vested in the incumbent of the benefice of St Mary the Virgin with St Cross with St Peter in the East (which has been subject to further pastoral reorganisation since the Order in Council was made in 1966). Precisely how much of the churchyard remains vested in the incumbent is not at all clear and would not be easy to ascertain. But that does not matter for the purposes of this judgment. What is clear is that both what was appropriated under the Scheme and what was not all remains subject to faculty jurisdiction.

The petition

6. The College wishes to carry out various improvements in the churchyard. Dr Ernest Parkin, the Home Bursar and a Fellow of the College, has accordingly submitted a petition (dated 15 January 2013) to the court on behalf of the College. The Schedule of Works or Proposals includes the replacement of existing structures in the churchyard with a new gardener's office, greenhouse and cold frames and three storerooms and the removal of existing sheds and other structures. Existing bicycle stands are to be replaced with a new arrangements of open racks. New oak stave screens are to be constructed to replace hazel fencing. The proposals involve the re-location of six monuments within the churchyard (five headstones and one box tomb). Detailed plans showing what is proposed have been prepared and submitted to the court.

7. The College has applied for and been granted planning permission for the proposals (in so far as it is required).

8. The Diocesan Advisory Committee issued a certificate on 12 November 2012 advising that they had no objection to the proposals. In response to the usual request when a petition is submitted, the Committee has confirmed to me that it does not wish to alter that advice.

9. Following the submission of the petition, there was some communication between the registry and Dr Parkin. A number of matters were drawn to Dr Parkin's attention. These included the need to advertise the proposal to re-locate the monuments in a local newspaper and in the parish newsletter.

10. A potential difficulty with what was proposed arising from the Disused Burial Grounds Act 1884 – section 3 of which makes it unlawful "to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other place of worship" – was also drawn to his attention. As a result of that, the proposals were altered to a certain extent. In an email to the registry dated 3 June 2013 Dr Parkin wrote–

> "In order to comply with the requirements of ecclesiastical law, we believe we should meet our functional need with temporary structures rather than permanent buildings. We accept that there is a ban on permanent buildings, except for a few exceptions which do not apply to our proposals.
>
> In that spirit, we have instructed our structural engineer to redesign our structures for that they would not be based on foundations but would rather sit upon a rigid base that would allow them to be lifted by a crane and taken away, should that be desirable at some future date. Outwardly they would appear as they do in all materials previously submitted. Internally they would have a steel grid that provides a rigid base. The structures would sit on top of the pavers that have already been proposed and discussed. A greatly magnified view of the detail of the design is attached to this email. All other elements remain the same. …"

11. I have seen the greatly magnified view referred to in the email.

12. There has been no formal application to amend the petition but I am content to treat the petition as having been amended in accordance with the revised proposals.

Procedural matters

13. When the petition first came before me in June I gave some preliminary directions. These required the public notice to be amended and redisplayed as the notice that had previously been displayed omitted the proposal to relocate the box tomb and other monuments. I also directed that the petitioners were to advertise the proposals to relocate these monuments in a local newspaper and in the parish magazine or other parish publication for reasons that will appear below.

14. Because it appeared to me that there remained an issue as to whether some of the proposals would infringe the prohibition on building on a disused burial ground contained in the Disused Burial Grounds Act 1884, I also gave a direction that the petitioners must set out in writing their case for saying that their proposals for a gardener's office, greenhouse and store rooms did not infringe that prohibition.

15. As a result of that third direction the petitioners, through their solicitors, instructed Mr Timothy Briden to prepare written legal submissions on their behalf. Those submissions were received in the registry on 17 July. As a result of reading those submissions and reviewing the other papers on the file I gave further directions, with a view to determining the proceedings on consideration of written representations on the basis that I considered that it was expedient to take that course. Those directions were sent to the petitioners by the registry on 26 July.

16. In a letter dated 7th August the petitioners have agreed to the determination of the proceedings on consideration of written representations. There are no other parties to the proceedings. I therefore order under rule 26(1) of the Faculty Jurisdiction Rules 2000 that the proceedings are to be determined upon consideration of written representations instead of at a hearing in court.

17. The Parochial Church Council, with the concurrence of the incumbent, has passed a resolution consenting to the proposals. No letters of objection have been received either as a result of the public notice or otherwise.

18. I have been greatly assisted by Mr Briden's written submissions in which he identifies the authorities that are concerned with the interpretation and application of the 1884 Act and presents a number of arguments in the light of those authorities. I deal with his detailed submissions below but in summary it is Mr Briden's case that none of what is proposed in the petition amounts to the erection of a building such that it would contravene the prohibition contained in section 3 of the Act.

Secular use of the churchyard

19. In his submissions Mr Briden says, "It is envisaged that, apart from the legal issues identified below [i.e. those concerned with the 1884 Act], the proposals contained in the petition will be viewed by the Court as being consistent with the consecrated character of the churchyard and (if brought into effect) an enhancement of its appearance and amenity value."

20. That is my view. So far as the secular use of churchyards is concerned, the legal position is helpfully summarised in *Halsbury's Law of England,* vol. 34 at paragraph 1084 as follows–

> A faculty is required for the erection of any building or other structure in a churchyard. Subject to certain statutory restrictions in the case of a disused burial ground the court may grant such faculties both for ecclesiastical purposes (for example for a church hall) and also, within certain limits, for other purposes which are not inconsistent with the character of consecrated land even though the land may still be in use for burials.

21. The proposals contained in the petition are ancillary to the use of the churchyard as a garden and open space within the boundary of the College. It is intended that it should also continue to be used for the storage of bicycles. Neither use is inconsistent with the consecrated character of the land and I consider that the same is true of the petitioners' proposals. The churchyard has been used for such purposes since the pastoral scheme was made in 1966 and no difficulty has arisen from such use. To the extent that any part of the churchyard has not been used for burials it has in any event been appropriated to be used "in connexion with the religious and educational life of Saint Edmund Hall" under the pastoral scheme.

Relocation of monuments

22. The proposals if implemented will necessitate the relocation of six monuments within the churchyard: five headstones and one box tomb. Faculties are often granted authorising schemes for the re-ordering of churchyards that involve the relocation of large numbers of monuments, for example to facilitate the maintenance of a churchyard. The position here is that it is proposed to remove only some of the monuments in the churchyard, in order to clear space for some of the proposed new structures.

23. A legal complication that arises in relation to monuments is that they are the property of the person who set them up during that person's lifetime and thereafter become the property of the heir at law of the person commemorated (*Corven's Case* (1612) 12 Co Rep 105, 77 ER 1380). At common law, the court was not normally able to grant a faculty authorising works to, or the removal or relocation of, a monument without the owner's consent because such works etc. would amount to a trespass.

24. It was for that reason that section 3 of the Faculty Jurisdiction Measure 1964 was enacted. That section empowers the court to grant a faculty authorising "the moving, demolition, alteration or execution of other work to any monument" in certain circumstances. The circumstance covered by the section include the situation where the owner of the monument withholds his consent or where the owner "cannot be found after reasonable efforts to find him have been made".

25. The petition states that except for the table tomb, the inscriptions on the monuments are illegible. In a letter to the registry dated 25 April 2013 Dr Parkin states that the tomb and five other monuments "have not been visited in 12 years". I do not take this, in the context of the other content of the letter, to mean that any of the monuments are known to have been visited prior to 12 years ago but simply that that is the extent of Dr Parkin's knowledge. He says that the College keeps a record of relatives who visit the graves in the churchyards and that such visits have not been to the graves that would be affected by the proposals contained in the petition. He also says that the incumbent of the benefice had told him that he has had no contact with any relatives during his time in office (which began in 1986).

26. Nevertheless, given that section 3(2)(i) of the 1964 Measure allows a faculty to be granted where the owner cannot be found "after reasonable efforts to find him have been made", I considered that it was necessary for some such efforts to be made, even if they were unlikely to result in any of the owners being found. It was for that reason that I required the proposal to re-locate the monuments to be advertised. A notice was accordingly placed in the Oxford Times and in the parish newsletter of St Mary the Virgin, Oxford. Neither notice has elicited any response.

27. In all the circumstances I consider that reasonable efforts to find the owners of the monuments it is proposed to relocate have now been made and that the owners cannot be found. The situation described in section 3(2)(i) of the 1964 Measure has therefore arisen and the court has jurisdiction to grant a faculty authorising the relocation of the monuments in question without the owners' consents.

28. No one has objected to the relocation of the monuments. Their relocation is necessary if other aspects of the proposals are to proceed. I will therefore permit their relocation to the extent that that is the case.

Disused Burial Grounds Act 1884

29. Section 3 of the Disused Burial Grounds Act 1884 provides as follows–

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

30. Section 2 (Interpretation) contains the following definition–

> "building" includes any temporary or movable building.

(Although section 2 of the 1884 Act as it now stands was only inserted by the Statute Law (Repeals) Act 1993, the same definition of "building" has applied for the purposes of the 1884 Act since 1887 when section 4 of the Open Spaces Act 1887 enacted that the expression "building" in the 1884 Act included any temporary or movable building: see *Bermondsey Borough Council v Mortimer* [1926] P 87, 91.)

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

32. The leading authority on the meaning of "building" for the purposes of the 1884 Act is the decision of the House of Lords in *Paddington Corporation v Attorney General* [1906] AC 1. That case concerned a disused churchyard that was held and administered by a local authority as an open space under the Metropolitan Open Spaces Acts 1877 and 1881. An adjoining landowner built houses on his land which overlooked the churchyard. In order to prevent the houses from acquiring rights of light the local authority proposed to erect a screen in the churchyard. The question arose whether the screen was a "building" for the purposes of the 1884 Act so that erecting it was unlawful.

33. At first instance Buckley J held that the screen was not a "building" for the purposes of the 1884 Act. In doing so he said,

> "What I have to consider is whether such a hoarding as the defendants would put up to prevent the plaintiff from acquiring prescriptive rights would be a building within the Acts with which I have to deal. In my opinion it would not. It would be an erection, put up not for any purpose of building, but as an erection necessary to prevent the acquisition of a prescriptive right. The word in s. 5 of the Act of 1881 occurs in the connection that the land is to be enjoyed "in an open condition free from buildings." I think this means such buildings as would preclude or diminish its enjoyment in an open condition for exercise and recreation (Act of 1877, s. 1). In s. 3 of the Act of 1884 the erection of any buildings upon a disused burial ground is forbidden except for the purpose of enlarging a church. I think the word "buildings" there means erections which would cover some part of the ground, as the enlargement of a church would do. It does not refer to something in the nature of a fence or barrier to prevent the acquisition of prescriptive rights to light." (*Boyce v Paddington Borough Council* [1903] 1 Ch 109, 116-117)

34. The Court of Appeal reversed the decision of Buckley J but on further appeal the House of Lords reversed the Court of Appeal and restored the decision of Buckley J.

35. In their speeches, each of the members of the House of Lords said that the judgment of Buckley J was right. The leading speech was given by the Earl of Halsbury LC and includes the following material passages–

> "In the first place, I think it is necessary to consider what is the meaning of the prohibition contained in either of the Acts referred to. I am of opinion that it meant what it said - that the space was to remain unbuilt upon. It is to be disused as a burial ground, but it is not to be used as building ground - that is the meaning of it; and it appears to me that anything that approaches to the character of a building, whether temporary or permanent, is obviously within the prohibition. …" ([1906] AC 3)

> "But now, my Lords, I have to look at the word "building" here with reference to this subject-matter and what the Act of Parliament was doing. It is very obvious, I think, that what was intended to be done was to keep this disused burial ground from being used as building ground, to keep it as a place of exercise, ventilation and recreation, and what not, - to prevent anything being done in the nature of building which would interfere with or restrict the free and open use of these spaces as constituted under the statute. But when I look at the question here, I am bound to say that I have to look at it under some difficulty, because I have to consider not only whether a screen is a building, but whether an undescribed screen of unspecified size and nature would be a building within the meaning of the Act. If you put the proposition in the abstract in that way without any reference to concrete facts, it must be put thus: that any screen is a building within the meaning of the Act of Parliament. I am not prepared to affirm that proposition. I think Buckley J. was perfectly right - I think it is not a building; and that decision that it is not a building appears to go to a great part of the argument. The open space is not to be used for any other purpose than that which the Act provides - no other purpose than as a place for recreation, enjoyment, or what not. I find nothing in the letters

which have been referred to which indicates the slightest restriction of any other purpose in the use of this ground." ([1906] AC 4)

36. In his submissions Mr Briden, having set out the second of the two passages from the speech of the Lord Chancellor, submits that "one aspect of the question is whether the proposed structure will diminish the amenity of the burial ground as an open space. Most obviously a building will have this effect through its physical restriction upon the opportunity to roam".

37. I accept that that consideration may constitute one aspect of the question but I do not think that it is the principal consideration. If screens were to be set up across the middle of an area of land they might well have a significant effect on the opportunity to roam across that land but they would not be buildings for the purposes of the 1884 Act. The principal consideration must be the words of the statute – what Lord Halsbury referred to as "the meaning of the prohibition contained in either of the Acts referred to". He held that "anything that approaches to the character of a building, whether temporary or permanent, is obviously within the prohibition".

38. Mr Briden refers to "another approach … exemplified by the threefold test adopted by Chancellor Buckle in *Re St Peter the Great, Chichester* [1961] 2 All ER 513 at 519I – 522C, namely

    (i) Would the ordinary man think it was a building?

    (ii) Has the relevant structure four walls and a roof?

    (iii) Can one say that the structure is built?".

39. In that case Buckle Ch held that what he described as "a rectangular-shaped container or receptacle in the nature of a cupboard with doors" and which was four feet three inches in height was not a building for the purposes of the 1884 Act. I have no doubt that that was the correct decision. I do however have some doubt about the threefold test suggested by counsel in that case and adopted by the chancellor. As Newsom Ch noted in *Re St Luke's, Chelsea*, the decision of the House of Lords in *Paddington Corporation v Attorney General* was not cited to Buckle Ch in the *Chichester* case. That meant that he was unaware of what Lord Halsbury had said about the meaning of the prohibition in the 1884 Act or of what Buckley J had said at first instance about the meaning of "buildings" in that Act. I am therefore inclined to agree with Newsom Ch that the decision of Buckle Ch cannot be accepted as laying down any principle relevant to the question of what amounts to a building for the purposes of the 1884 Act.

40. Even were that not the case, I would in any event have some difficulty in accepting the threefold test in the *Chichester* case. The question whether "the ordinary man" would think something was a building is not, in my view, a helpful question to ask. Whether something is a building for the purposes of the 1884 Act depends on construing the true meaning of the Act and applying that meaning to a particular set of facts. The ordinary man is unlikely to have read the 1884 Act.

41. Whether the structure in question has four walls and a roof may be of some assistance but that is likely to be limited. The cupboard in the *Chichester* case might be said to have had four walls and a roof but it was not a building.

42. As to the question, "can one say that the structure is built?", again I do not think that that is a helpful question. If by the question is meant, is the structure in question

created in situ, by means such as placing brick upon brick or stone upon stone or by the fabrication of a timber frame that is then covered over using timber or other materials, I do not consider that to be a useful test at all in the context of the 1884 Act. Section 2 of the Act provides that "building" includes any temporary or movable building. The Act clearly contemplates the possibility of a structure that is created other than using traditional building methods as being capable of coming with the definition of "building" in the Act. If a building within the Act can be a temporary or movable building, the fact that a structure is created somewhere else and then placed on the burial ground does not of itself assist in determining whether that structure is a building.

43. Mr Briden submits that "even if the structure technically falls within the description of a building or "anything that approaches the character of a building" … it will nonetheless involve no contravention of the Act if it is de minimis and/or is consistent with the overriding purpose of the land as an open space." He cites part of the judgment of Hansell Ch in *Bermondsey Borough Council v Mortimer* [1926] P 87 as authority for this proposition.

44. It may be right that a structure that is de minimis might not amount to a building, on the basis of the general principle *de minimis no curat lex* (although I cannot easily imagine something that approaches to the character of a building that would be de minimis). But I regret that I cannot extract from the judgment of Hansell Ch the principle which Mr Briden seeks to advance, namely that even if something does prima facie amount to a building, the Act is not contravened if that building is consistent with the overriding purpose of the land as open space.

45. The relevant passage from the judgment of Hansell Ch is as follows–

> "The proposed urinals as shown on the plan annexed to the Petition are clearly "buildings," and I hold that the Court cannot sanction them. The plan also shows that it is proposed to erect a small wooden shed as a place in which to store gardeners' tools, etc. A place where such tools may be kept seems to be a necessity if the ground is to be improved and laid out as an open space as contemplated by the [Open Spaces] Act of 1906, and the Court would desire not to be extreme to mark the shed as constituting an infringement of the Act, if it can properly take that course. I think I may in this case hold that the shed as shown on the plan is not a building, and I allow it. ([1926] P 91)

46. Neither the report nor the judgment itself gives any more detail about the shed than that it is "a small wooden shed". It is therefore impossible to know precisely the nature of what the chancellor was allowing. In any event, it seems to me that Hansell Ch did not go nearly as far as to say that there would be no contravention of the Act if a structure, although technically within the meaning of "building" in the Act, was necessary for maintaining the land in question. What he said was that the Court would not hold that such a structure infringed the Act "if it can properly take that course" and on the facts of the case before him he held that the shed was not a building. I do not read Hansell Ch's observations as establishing any principle of law. It seems rather that on the facts of the case before him he was prepared to give the petitioners the benefit of the doubt in respect of the shed.

47. In any event I cannot see how any such principle could be established contrary to the express provisions of the 1884 Act. I cannot identify any principal of statutory construction which would enable the 1884 Act to be construed as excepting from the

prohibition in section 3 a building that is necessary for maintaining the churchyard. It may be undesirable that the Act does not exclude such a building from the prohibition but that is a different matter. If I am wrong in my explanation of Hansell Ch's approach and he did intend to establish a principle of law to that effect then I consider that he had no basis for doing so and I decline to follow his decision in this court.

48. Accordingly, I have concluded that I have to approach the petition on the basis that "anything that approaches to the character of a building, whether temporary or permanent, is obviously within the prohibition" (per Lord Halsbury) and that the word "buildings" in the 1884 Act "means erections which would cover some part of the ground, as the enlargement of a church would do" (per Buckley J).

Decision on petition

49. In his submissions Mr Briden has helpfully divided the various elements of the proposals in the petition into the following categories–

(a) Cycle racks and screens
(b) Greenhouse and cold frames
(c) Gardener's office and tool shed
(d) Stores.

50. I accept Mr Briden's submission that the cycle racks and screens are not buildings. The screens are akin to the screens in the *Paddington* case and the open cycle racks do not approach to the character of a building in any way. Both will be a significant improvement on the current arrangement and I allow them.

51. With regard to the greenhouse and cold frames (G02 on plan 6164.202), Mr Briden argues for them on the basis that their presence is requisite for the maintenance of the churchyard and that they are permissible on the basis of the proposition he has sought to extract from the *Bermondsey* case. He also argues that because these glazed enclosures rest on the ground without foundations, the ordinary man would not consider them obviously to be buildings. They are said to lack conventional walls and roof and "are not built but rather assembled (potentially off-site) from pre-formed components".

52. For the reasons set out above I do not consider that the *Bermondsey* case established any principle of law that assists the petitioners. Nor, for the reasons already given, do I consider that any assistance is to be gained by asking whether the ordinary man would consider that something was a building. I have also explained why I do not accept that the fact that something is assembled elsewhere and then placed in a churchyard of itself means that it is not a building for the purposes of the 1884 Act.

53. I have considered the plans that have been submitted by the petitioners. Plan 6146.102B shows elevations of the greenhouse and cold frames and gives detail of the materials proposed to be used. The greenhouse has a sloping roof and rises from approximately 2.5 to 3 metres in height. The footprint is approximately 5 metres by 2.3 metres. The design includes a natural finish larch gate. It seems clear to me that the greenhouse does approach to the character of a building and that it is within the prohibition. The cold frames do not in my view constitute a building but are more akin to a series of cupboards or boxes. I have concluded that I cannot allow the greenhouse. The cold frames are allowed but without the greenhouse I assume that there would be no point in constructing them.

54. Mr Briden argues that the gardener's office and tool shed should be allowed on the principle he seeks to extract from the *Bermondsey* case and that being pre-fabricated they are not "built" and therefore not buildings. I have already given my reasons as to why I cannot accept those propositions as a matter of law. It appears to me from plan 6146.102B that the gardener's office and tool shed (G03 and G04 on plan 6146.202) form a single block, albeit divided into two parts by an internal partition. Again, they have a sloping roof that rises from approximately 2.5 to 3 metres in height. Together their footprint is approximately 5.2 metres by 2.8 metres. Externally they are covered in natural finish larch vertical boarding. I consider that they do approach to the character of buildings and are within the prohibition. I am unable to allow them.

55. Mr Briden submits that the proposed stores (G01 and G06 on plan 6164.202) should be permitted by analogy with the gardener's shed in the *Bermondsey* case on the basis that they are ancillary to the function of the churchyard as an open space. He also submits that by eliminating brick or stone from their construction and the avoidance of foundations the stores are outside the scope of the threefold test adopted by Buckle Ch in the *Chichester* case. He points out that they are prefabricated with wood cladding and a terne coated stainless steel covering towards the sky and that they are freestanding on a paved surface, being capable of assembly elsewhere and positioning on site by crane. Removal by crane is also feasible. He argues that taken together, these features point to the stores amounting to something less than buildings and that they are akin to the rectangular metal box in the *Chichester* case.

56. I have already set out why I do not accept that there is a principle of law that permits buildings that are ancillary to the function of a churchyard as an open space as an exception to the prohibition in the 1884 Act. I have also explained why particular methods of construction, that do not involve brick or stone, and which may involve construction otherwise than in situ, do not of themselves remove a structure from the definition of building in the 1884 Act. I also consider that the absence of foundations and the ability to assemble the buildings elsewhere and to remove them by crane makes no difference for that purpose, as the Act expressly includes temporary and movable buildings within the definition of "building".

57. From plans 6146.102B and 6164.202 it is clear that the proposed store G01 clearly approaches to the character of a building and is prohibited by the 1884 Act. It has a sloping roof rising from 2.5 to 3 metres and covers a footprint of approximately 5.5 metres by 2.3 metres. It is covered with natural finish larch horizontal boarding. I think that the proposed store G06, which is 2 metres in height with an approximate footprint of 2 metres by 1.6 metres, is more of a borderline case. It is more akin to a large cupboard. On balance I consider that I should allow store G06.

58. Mr Briden invites the court to conclude that the entirety of the proposals do not contravene section 3 of the 1884 Act. For the reasons given above, I have been unable to reach that conclusion.

59. The petitioners request that in so far as any of the elements of the petitioners' proposals are found to constitute a building prohibited by the 1884 Act, a faculty be granted in respect of the balance of the proposals that fall outside the prohibition. I am content to follow that approach.

60. The consequence is that a faculty is to issue to authorise the following items only–

(a) the relocation of such of the memorials identified on plan 6164.100B as it is necessary to relocate in order to carry out the other proposals authorised by the faculty;
(b) the removal of the existing sheds and outbuildings shown on plan 6164.100B;
(c) the removal of the existing cycle stands and the existing hazel fencing.
(d) the introduction of cycle racks and screens as shown on plan 6146.202;
(e) the introduction of the cold frames shown on plan 6146.202;
(f) the introduction of store G06 shown on plan 6146.202;

61. The faculty will not authorise the introduction of the following items–

(a) the greenhouse (G02 on plan 6146.202)
(b) the gardener's office and tool shed (G03 and G04 on plan 6146.202)
(c) store G01 on plan 6146.202

62. I appreciate that this may mean that the petitioners will not wish to implement all of the proposals that are authorised by the faculty. But the faculty will operate as permission to carry out what it authorises; it does not require the petitioners to carry out any of the proposals.

63. The faculty is to be subject to the following conditions:

a. If any disarticulated human remains are discovered they are to be reverently reburied.

b. If any articulated human remains are discovered, all work in the immediate area of the remains must cease until further order of the court.

c. No artefact or ecofact is to be removed from the churchyard without either an order by the archdeacon under section 21 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 or an order of the court.

64. I consider the outcome of this petition to be unsatisfactory. In my view the entirety of the petitioners' proposals were not only satisfactory but also desirable for the reasons given by Mr Briden at the end of the first paragraph of his submissions. The fact that a number of elements of the proposals (which would represent significant improvements to the churchyard) cannot be authorised is entirely because of the prohibition imposed by section 3 of the 1884 Act. Were it not for that statutory prohibition I would have granted a faculty for the proposals in their entirety.

65. The petitioners have gone to some trouble in seeking to produce proposals that would not infringe the 1884 Act and Mr Briden has argued everything that could properly be argued in favour of the proposals. It is unfortunate that the 1884 Act presents an obstacle to various aspects of them. It is not at all clear that the Act serves a useful purpose. It certainly has not done so in the present case. Its effect has already been modified to a significant extent by the Disused Burial Grounds (Amendment) Act 1981 which permits the erection of buildings on disused burial grounds where certain conditions are met. Unfortunately the 1981 Act does not apply to any consecrated ground so it is of no assistance to the petitioners.

66. Mr Briden concludes his submissions as follows–

> "In order to protect their position, the Petitioners also ask that they be given liberty to restore the petition in respect of any element dismissed at this stage. This course will enable them to seek the assistance of the Court in the event of

section 3 of the Disused Burial Grounds Act 1884 being modified by forthcoming legislation."

67. It remains to be seen whether the 1884 Act will be modified by forthcoming legislation. I do not think that the petitioners do require liberty to restore the petition in order to protect their position because if there is legislation in the future that modifies the effect of the 1884 Act they can present a fresh petition to address the remaining aspects of the proposals. It is not desirable for petitions to stand adjourned for long periods when they have in reality been determined. It is also possible that if the petitioners return to the court they might modify or add to the proposals contained in the current petition. For that reason too, it would be more satisfactory for a fresh petition to be submitted if the petitioners wish to seek the authorisation of proposals that cannot be authorised now.

68. The petition is accordingly allowed to the extent indicated in paragraph 60 but dismissed in respect of the items mentioned in paragraph 61.

69. Court fees under Table 1 in the Schedule to the Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2012 are payable by the petitioners. I will make a separate order fixing the fees that I am required to fix under that table and dealing with other related matters.