IN THE ARCHES COURT OF CANTERBURY

Charles George QC, Dean of the Arches

Chancellor Tattersall QC and Chancellor Pittaway QC

On appeal from the Consistory Court of the Diocese of London

APPLICATION FOR RESTORATION ORDER PURSUANT TO THE PROVISIONS OF SECTION 13(5) OF THE CARE OF CHURCHES AND ECCLESIASTICAL JURISDICTION MEASURE 1991

BETWEEN:

(1) SPITALFIELDS OPEN SPACE LIMITED
(2) CHRISTINE WHAITE
(3) PHILIP VRACAS — **Appellants**

- and -

(1) THE GOVERNING BODY OF CHRIST CHURCH PRIMARY SCHOOL
(2) THE REVEREND ANDREW RIDER
(3) RICHARD WASSERFALL
(4) KIM GOODING — **Respondents**

- and –

(1) LONDON DIOCESAN BOARD OF SCHOOLS
(2) LONDON BOROUGH OF TOWER HAMLETS — **Interested Parties**

JUDGMENT
(approved with corrections)

Appearances:

Mark Hill QC and Thomas Seymour of Counsel, for the Appellants, instructed by Richard Buxton, 19B Victoria Street, Cambridge CB1 1JP
Justin Gau of Counsel, for the Respondents and the First Interested Party, instructed by Winckworth Sherwood, Minerva House, 5 Montague Close, London SE1 9BB
Charles Mynors of Counsel, for the Second Interested Party, instructed by David Galpin, Service Head – Legal Services, London Borough of Tower Hamlets, Mulberry Place, 5 Clove Crescent, London E14 2BG

1. These are highly unusual proceedings both in respect of the subject matter of the application and the procedures by which it was determined below.

The application

2. On 1 August 2014 the First Appellant issued an application seeking (amongst other relief) a restoration order under section 13(5) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 ("the CCM") in respect of a school building ("the Building") erected by the First Respondent between Autumn 2012 and Spring 2013 on a churchyard/disused burial ground ("the Site"), immediately adjacent and to the south of Christ Church, Spitalfields ("the Church").

The chancellor's judgment

3. On 15 December 2014 Chancellor Seed QC handed down judgment. The key parts of his short judgment were:

> "1 ....about the status or locus of [the Applicants] to make this, or any other application to the Court, I specifically make no findings at this stage...
> ...
> 4. The basis of the Applicants' application is that the grant of the Faculty and the erection of the building were unlawful as they were in contravention of Section 3 of the Disused Burial Grounds Act 1884.....
> ...
> 6. I took into account the points of objection that were made, which, as I say, did not include one based on the Disused Burial Grounds Act...
> 7. ...[1] I am satisfied that all the points now raised by the Applicants could and should have been raised in 2011 in response to the original petition. No appeal was mounted after the Faculty was granted and, in my judgment, this application is nothing more than an attempt to re-litigate settled issues long out of time and as such is a blatant abuse of the process of the Court. I therefore direct that these proceedings should be stayed and no further action taken in pursuit of them. [2] If it be suggested that the Consistory Court has no power of its own motion to stay proceedings in this situation, I would then decline to exercise the discretion conferred by Section 13(5) of the [Care of Churches and Ecclesiastical Jurisdiction] Measure for the same reasons. [3] Furthermore, on the subject of the discretionary nature of a Restoration Order, the Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure (which makes provision for a Faculty to be granted in circumstances such as this notwithstanding Section 3 of the DBGA) received final approval from the General Synod and was laid before the Ecclesiastical Committee of Parliament last Thursday (11 December) and, as I understand it, is now to be laid before Parliament. I would therefore additionally decline to exercise the Court's jurisdiction under Section 13(5) in view of the pending change in legislation.
> 8. The Applicants should pay any costs of the Respondents and Interested Parties incurred in responding to this application."

4. We have added the numbers to para 7 of the judgment, so that the three rulings can be referred to below as rulings [1], [2] and [3].

Addition of parties

5. At the outset of the hearing of the appeal we gave permission for Ms Whaite and Mr Vracas to be added as Second and Third Appellants respectively. Ms Whaite has lived in Spitalfields since 1983 and has a long association with the Friends of Christ Church, Spitalfields ("FCCS"), becoming a trustee in the 1980s and chairman of the trustees in 2002. Mr Vracas is a trustee and Hon Treasurer of FCCS. Both Ms Whaite and Mr Vracas are parishioners of the Church and on its electoral roll, and Mr Vracas is the Parish Clerk. Their individual "interest" in the proceedings is incontestable.

The relevant provisions of the CCM

6. S.13(5) of the CCM provides that:

> "Where at any time (whether before or after faculty proceedings have been instituted) it appears to the consistory court of a diocese that a person has committed, or caused or permitted the commission of, any act in relation to a church or churchyard in the diocese....which was unlawful under ecclesiastical law, the court may make an order (a "restoration order") requiring that person to take such steps as the court may consider necessary, within such time as the court may specify, for the purpose of restoring the position so far as possible to that which existed immediately before the act was committed."

7. S.6 of the CCM provides that a restoration order may be made on application made "by the archdeacon or any other person appearing to the court to have a sufficient interest in the matter or on its own motion". S.8 provides that the court shall not make a restoration order in respect of an act unless the court is satisfied that less than six years have elapsed since the act was committed.

8. S.18A of the CCM, inserted by s.4 of the Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure 2015 ("CCEJ(A)M"), provides that:

> "(1) Notwithstanding section 3 of the Disused Burial Grounds Act 1884, a court may grant a faculty permitting the erection of a building on a disused burial ground otherwise than for a purpose permitted by that section, provided that one of the conditions set out in subsection (2) below is satisfied.
>
> (2) The conditions referred to in subsection (1) above are –
>
> (a) that no interments have taken place in the land on which the building is to stand during the period of 50 years immediately prior to the date of the petition for the faculty;
>
> (b) that no personal representative or relative of any person whose remains have been interred in the land during that period have objected to the grant of the faculty or that any such objection has been withdrawn.

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

9. S.3 of the CCEJ(A)M came into force on 1 April 2015 (see Art.3 of the Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure 2015 (Commencement, Transitional and Saving Provisions) Order 2015, made on 9 March 2015). This was several months after the chancellor's judgment.

The Disused Burial Grounds Act 1884 ("the DBGA")

10. S.3 of the DBGA provides that:

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

Initially the prohibition in s.3 applied to all burial grounds, whether consecrated or not (see the definition of "burial ground" in s.2). The prohibition was significantly reduced in the case of unconsecrated burial grounds by the Disused Burial Grounds (Amendment) Act 1981 ("the DBG(A)A"). However, s.5 of the DBG(A)A provides that:

"This Act shall not apply to any consecrated land and shall not affect the jurisdiction of the Consistory Court".

11. In certain limited circumstances, an exception to the prohibition in s.3 of the DBGA is provided in London by the Ministry of Housing and Local Government (Provisional Confirmation Order) (Greater London Parks and Open Spaces) Act 1967 ("the MHLGA"). The exception includes, under art.7(1)(a)(vi), the provision and maintenance by local authorities on disused burial grounds controlled and managed by them (see art.6) of:

"centres and other facilities (whether indoor or open air) for the use of clubs, societies or organisations whose objects or activities are wholly or mainly of a recreational, social or educational character".

Matters of statutory interpretation to be left over

12. There are at least four important matters of statutory interpretation which were raised in skeleton arguments or during oral argument at the hearing of the appeal which are not for this court to resolve at this stage:

(a) the interpretation of the expression "unlawful under ecclesiastical law" in s.13(5) of the CCM. Mr Gau, for the Respondents and the First Interested Party, and Mr Mynors, for the Second Interested Party, contend that the prohibition under s.3 of the DBGA is a provision of planning and/or public health law, rather than of ecclesiastical law. Mr Hill and Mr Seymour for the Appellants contend that s.3 is plainly a provision of ecclesiastical law, a breach of which is self-evidently constituted by the unlawful erection of a building in a consecrated churchyard, the title to which is vested in the Second Respondent as an ecclesiastical corporation sole; and that the erection constitutes a breach of ecclesiastical law both in the technical sense of the law administered by the ecclesiastical courts and for which a specific remedy is granted in those courts, and in the broader sense of a breach of the law relating to a matter concerning the Church of England. Although this was a

matter originally raised by the chancellor, it would appear from his judgment that he (at least provisionally) accepted that s.13(5) was engaged.

(b) the ambit of the phrase "restoring the position so far as possible to that which existed immediately before the act was committed" in s.13(5). Mr Gau, supported by Mr Mynors, contends that if a restoration order were made, this would have to require the re-instatement of the previous building, since they allege that part of the foundations of the previous building has been incorporated into the Building, and therefore the building-site was not entirely cleared prior to the erection of the Building. The factual position is disputed by the Appellants, and their position on the legal issue if the facts are as alleged by Mr Gau is unclear. Although this matter was initially raised by the chancellor, he reached no conclusion on it.

(c) the construction of the MHLGA or its application to the Building. It was not mentioned in the chancellor's judgment which is under appeal. Mr Mynors contends, the Building benefits from the MHLGA exemption; the Appellants contend that the MHLGA has no application. The position of Mr Gau on this matter is unclear.

(d) the interpretation of the new s.18A(1) of the CCM. All agree it is not wholly retrospective, and thus a faculty cannot legitimise the unlawful erection of a building from the time of its erection. However, Mr Hill contends that the wording is inapt to cover any faculty in respect of a building which has been unlawfully erected, whereas Mr Mynors contends that a faculty can be issued to permit the retention of such a building, although it cannot cure the illegality in the period between erection and faculty. Mr Gau has not so far disclosed his hand in respect to this issue, though his contentions on (b) above suggest that he is likely to endorse the stance of Mr Mynors. It would appear from the chancellor's ruling [3] that (at least provisionally) he accepted the broader interpretation.

Background

13. The Church was consecrated on 5 July 1729. It is widely regarded as one of the major examples of European baroque architecture. The Site is consecrated land, which was closed for burials on 6 June 1859, pursuant to an Order in Council, and has since been used by the public as open space, under various agreements and statutory provisions which it is not necessary here to record. Over the 130 years that the Site was in use as a burial ground, some 67,000 persons were buried in it or in the vaults of the Church.

14. In 1873 Christ Church Primary School was lawfully erected at the eastern end of the Site. This was before (and therefore unaffected by) the enactment of the DBGA and is irrelevant to anything we have to decide.

15. In 1970 a recreation centre for children was erected on part of the land now occupied by the Building. No one disputes that its erection was lawful under art.7 of the MHLGA. In 1999 this became the Christ Church Gardens Youth and Community Centre.

16. On 5 August 2011 conditional planning permission was granted by the Second Interested Party to the Second, Third and Fourth Respondents (the Rector and Churchwardens of the Church) "to demolish the existing youth centre and build a new nursery & community building in its place". This is the permission that has now

been implemented by the construction of the Building. On the limited materials we have seen, no reference seems to have been made by anyone, including objectors, to the DBGA (or indeed to the MHGLA). Mr Mynors, who appeared for the Second Interested Party, suggested that because the Building would replace another lawful building, it may have been assumed by everyone, including his client, that the DBGA did not apply. The only measurements we have seen (contained in a letter of 10 October 2011 from Ms Whaite to the diocesan registrar) are:

> "The existing building is about 3.2m high and 245m2 in area. The proposed building is about 4.8m high and 491m2 in area. That is about twice as big an area, and even more in volume".

On these figures, if the assumption advanced by Mr Mynors was relied upon, this was plainly wrong.

17. On 8 November 2011 the Second, Third and Fourth Respondents applied for a faculty for:

> "Dismantling of the current Youth Centre site...in the Christ Church Gardens...and the development of a single storey school and community building in its place...to be used by [Christ Church Primary School] during school hours as a foundation-stage building".

As in the case of the planning application, no mention of the prohibition in the DBGA seems to have been made by anyone. Entirely erroneously, para 33(a) of the petition gave the answer "No" to the question "Is the land in question consecrated?". Equally erroneously, para 33(f) of the petition gave the answer "No" to the question "Will any graves, reserved grave spaces, monuments or inscriptions be interfered with?", whereas in fact, when works commenced on the Building, numerous human remains and remains of gravestones were discovered. In his first Skeleton Argument before the chancellor, Mr Gau "conceded that errors may have appeared in the petition", but contended that "it is manifestly apparent that this was due to human error". The grant of a faculty was recommended by the Diocesan Advisory Committee, and although there was at least one letter of objection (that of Ms Whaite of 10 October 2011, which strictly preceded the lodging of the petition), no one chose to become a party opponent (see rule 16 of the Faculty Jurisdiction Rules 2000) ("FJR 2000"). Accordingly, although the chancellor was bound to take into account any letters of objection (see rule 16(6)), he was not obliged to hold a hearing or call for further written representations, and he was procedurally entitled to treat the matter as an unopposed petition and grant it, as he did, on 17 February 2012 (see rule 17). Conditions imposed by the chancellor included (i) completion within 12 months (later extended to 16 months in February 2013 as a result of the discovery of human remains); and (ii) completion of "a full management licence for the land between the Rector, the School and LBTH". In granting the faculty the chancellor commented that he had "given most careful consideration to this proposal and to the objection from Ms Whaite"; and that:

> "There are no ecclesiastical reasons for refusing this Faculty and the neighbourhood considerations have been fully examined by the Borough who has granted planning permission. It would be wrong in principle and perverse in the circumstances if I were not to grant a faculty in this case".

18. In January 2012 £2m of central government funds were granted to the First Respondent to fund the works. Demolition of the 1970 building commenced in June 2012, and construction of the Building began in August.

19. At about this time, in circumstances about which we have no information, those opposed to the erection of the Building seem to have become aware of the prohibition contained in the DGBA. Letters were written by Ms Whaite and others to the Second Interested Party and to the chancellor on 14 September 2012, repeated in letters from their solicitor on 15 October 2012, objecting to the works as being contrary to the DGBA. A pre-action protocol letter of 8 March 2013 was sent by the First Appellant's solicitor to the First Respondent and the Second Interested Party, with copies to others including the other Respondents and the First Interested Party, seeking a mandatory order for demolition of the Building, and other relief.

20. This followed incorporation of the First Appellant as a company limited by guarantee on 1 March 2013.

21. On 26 July 2013 the Second Interested Party purported to grant a licence to the First Respondent to maintain the Building under the MHLGA. This led to a judicial review application by the First Appellant which was stayed by agreement on terms that there would be no use and occupation of the Building without prior notice.

22. There then followed almost a year of unsuccessful negotiations. Matters came to a head in August 2014 when the First Respondent gave notice that it intended to seek approval of the chancellor to a licence for interim occupation, with vacation if required by the Court. On 21 August 2014 the First Appellant issued its application for a restoration order, coupled with an application for an interim injunction to restrain use and occupation of the Building, and a Skeleton Argument.

Procedure following the application

23. On 2 September 2014 the chancellor approved the draft licence without considering any representations of the Applicant/First Appellant and declined to grant any injunction. In response to the application for a restoration order, the diocesan registrar notified the parties by letter of 5 September 2014 that the chancellor had decided to hold a preliminary hearing in Chambers to consider four preliminary issues:

> "1. Whether the Consistory Court has jurisdiction to deal with this application;
> 2. Whether this Court is the appropriate forum for the issues raised;
> 3. Whether the application is in any event an abuse of process;
> 4. If a Restoration Order were to be granted, on what basis would this not require the reinstatement of the building previously on the site in addition to the demolition of the new building?"

The notification said that:

> "If the Chancellor is satisfied on these preliminary points, he proposes at the hearing to give case management directions as to the conduct of the application".

24. On 8 September a date for the hearing of 26 September 2014 at 3pm was set. On 10 September 2014 the diocesan registrar sent an email to the parties stating that he had conferred with the chancellor, and which included the following:

"The Chancellor considers that he is *functus officio*, and that none of these matters is currently within the jurisdiction of the Consistory Court. His view is that they should have been the subject matter of appeal to the Court of Arches (which would have been possible if your clients had joined themselves in the proceedings as formal objectors), or of proceedings in the High Court.

....

It is for the proposed Applicants to persuade the Chancellor otherwise. That is why he has directed the proposed hearing rather than simply decline jurisdiction on the papers. His view is that he could have done so, but that this might have been perceived as discourteous – hence the preliminary hearing.

It is therefore incumbent on the proposed Applicants to produce the first skeleton argument to explain how and why the Court has jurisdiction, and why it should be exercised - at this time, so long after the original notice of these proposals was given.

...

It is perhaps worth noting that your client – SOS – was never a party to the original proceedings, and nor was Ms Whaite. The fact is that Ms Whaite declined to become a party to the proceedings, but opted only to have her letter of objection taken into account by the Chancellor."

25. There then followed an exchange of skeleton arguments, and a letter from the Applicant's solicitors to the diocesan registrar stating that:

"It is clear that there are substantial issues to be tried, and it also appears to be common ground that the Consistory Court is the appropriate, and probably the least costly, forum for their resolution. They need to be resolved on evidence. None of the Respondents has, as yet, served any evidence....

A very limited time has been set aside for tomorrow's hearing....

We therefore suggest that the matter is substantively put over when a full day can be set aside to resolve the specific matters ....We would suggest therefore that tomorrow's hearing be used for giving directions if they cannot be agreed in advance.

....[I]t would appear that this is a case where the Chancellor ought properly to recuse himself. He may well have come to the same conclusion. Whilst we would not demur from uncontentious procedural directions being made by the Chancellor tomorrow, any substantive matter hereafter ought properly to be determined by a Deputy Chancellor".

(The matter of Respondents' evidence in restoration order proceedings is governed by rule 15.4(3)(c) of the Faculty Jurisdiction Rules 2013 ("FJR 2013"), providing for service within 14 days of the service of the application. No Respondents' evidence has ever been served in these proceedings).

26. At the short hearing on 26 September 2014 (to use the chancellor's wording in para 2 of the judgment under appeal):

"it was common ground between the parties and accepted by me that I should not determine substantive issues in this matter, only procedural matters."

Any remaining substantive issues would be determined by the deputy chancellor.

27. The fullest account of the hearing of 26 September is contained in Mr Gau's second skeleton argument of 6 November 2014, the contents of which do not appear to be disputed by the Appellants:

"3. On 26 September at the hearing the Respondents and Interested Parties submitted that...the hearing should proceed as a substantive hearing rather than a directions hearing. The Applicants repeated their application that the hearing be converted to a directions hearing, effectively asking for an adjournment of the argument regarding the matters raised by the Chancellor and setting out a proposed timetable for a full hearing.

4. The Chancellor declined the request by the Respondents and the Interested Parties to deal with [the Four Matters]. He took the view that it would be unfair not to allow the Applicant to reply to those additional points raised in the respective skeleton arguments of the Respondents and the Interested Parties: hence the directions which he made (see below). The Chancellor specifically asked whether any of the Parties considered it unfair not to be afforded the opportunity to make oral representations to him before he came to a view on the Four Matters. All Parties indicated they were content to proceed by written representations.

5. By an order dated 26 September the Chancellor directed that;

a. The Applicant shall on or before the 17 October 2014 lodge and serve response to the skeleton arguments of the Respondent and the Second Interested Party

b. The Respondents and the [Second] Interested Party shall on or before the 7 November 2014 lodge and serve responses to any new matters raised by the Applicant

c. The Court shall deliver Judgment on 21 November 2014

d. Costs reserved"

28. In its supplemental skeleton argument of 16 October 2014 the Applicant noted:

"the considerable degree of overlap between the suggested 'strike-out' issues now raised (by the First Respondent and the Second Interested Party) and the matters for determination in the substantive Application. The scope for the Chancellor at this stage to make anything more than case management directions is limited as such would involve an investigation of matters which, by his entirely proper decision to recuse himself, it would not be appropriate for him to determine."

The skeleton argument contended that none of the reasons given for summary striking out justified striking out, which it described, by reference to case law, as "a draconian remedy which, having regard to the overriding objective, should only be exercised in the last resort". Therefore what the Applicant sought was that the chancellor merely make case management directions. If there were any preliminary issues to be adjudicated upon, they should be set down for hearing before the deputy chancellor with provision for the filing of evidence. The skeleton argument also dealt comprehensively with the various arguments which Mr Gau and Mr Mynors had raised in their skeleton arguments.

29. There then followed Mr Gau's second skeleton argument of 6 November 2014, which suggested that the Applicant was in effect submitting with no explanation that direction c) of the order of 26 September should be set aside:

"The comment made by the Chancellor to the effect that he was minded to recuse himself in favour of the Deputy Chancellor was in respect of "full

argument" (should he decide that is appropriate) and not in respect of preliminary issues".

It was also submitted that s.3 of the DBGA was not a provision of ecclesiastical law, and thus did not fall within s.13(5) of the CCM; and, in relation to the proposed s.18A(2)(b) of the CCM, it was asserted that:

> "There have been no interments on the land **on which the building is to stand** (emphasis added) during the period of 50 years immediately prior to the date of the petition for a faculty. The re-burial of human remains (disarticulated bones) discovered during the building works cannot be deemed to be an interment for this purpose in particular because it is impossible to ascertain their identity (they must have been buried prior to closure in 1859) and therefore no personal representatives or relatives could be consulted."

30. In his second skeleton argument of 7 November 2014 Mr Mynors aligned himself with Mr Gau's position. He repeated the Second Interested Party's stance on estoppel, namely that:

> "Clearly the point as to whether a faculty can authorise a breach of the 1884 Act could have been raised at the time a faculty was sought for the erection of the New Building. In reality, the Chancellor, when granting a faculty, was or should have been fully aware of the position in relation to the 1884 and 1967 Acts, since they had been taken into account in the authorisations for the earlier building in 1969, when the legislative framework was in essence identical to that which applies now."

In relation to the proposed s.18A of the CCM, the point was made that:

> "it must be at least a possibility that a further faculty will be granted once the legislation has changed; and in the Council's view the grant of such a faculty is highly likely".

Attention was drawn to rule 1.4(2)(c) of the FJR 2013, to which we shall return below.

31. The chancellor delayed his judgment beyond the date he had set himself in his order of 26 September. In his judgment he explained that:

> "4. ...In paragraph 7 of the Application it is asserted of the 12 February 2012 Faculty that: "[Spitalfields Open Space] made objection to the works and drew attention to the breach of statute but these objections were disregarded". It is surprising, to say the least, to see such an assertion, which is demonstrably false, in a pleading signed by Counsel.
>
> 5. One of the reasons for the delay in handing down this Judgment is that, in view of that assertion, I sent for the original Faculty file, to which I believe the Applicants were accorded access, and I have gone through all the original material. There was a letter of objection in response to the statutory Public Notices at the time: a 5 page discursive – and in places hectoring – letter dated 10 October 2011 from Christine Whaite, chair of the Friends of Christ Church, Spitalfields (who is a director of SOS and a major party in making the current application). Nowhere in that, or in her subsequent letter of 5 December 2011, is there any mention of SOS, which I infer did not even exist in 2011 and even if it did, no communication was received from it by the Court. More importantly, amongst the many points of objection taken by Ms Whaite...no objection was made on the basis that the new building would be in breach of the Disused Burial Grounds Act. There was no reference to that

statute. Furthermore, she was given the opportunity to become a Party Opponent (as is the norm for anyone who writes a letter of objection) but she did not adopt that course."

32. We have already at para 3 above set out the substantive parts of the chancellor's judgment of 15 December 2014, by which he imposed a stay.

Jurisdiction and procedure

33. In relation to the first two questions raised by the chancellor (jurisdiction of the consistory court and appropriate forum), all parties were, and still are, agreed that the consistory court had jurisdiction and that the consistory court (subject to the question of abuse of process – the chancellor's third question) was the appropriate forum.

34. Rule 1.4(2)(c) of the FJR 2013 provides that a consistory court must further the overriding objective of the rules (to enable the court to deal with cases justly) by actively managing cases. That includes, under rule 1.4(2):

"(b) identifying the issues at an early stage;

(c) deciding promptly which issues (if any) need full investigation and a hearing in court and accordingly disposing of others summarily or on consideration of written representations."

35. It is now common ground that, although unmentioned in the judgment (or in the skeleton arguments that preceded it), rule 19.5(2) of the FJR 2013 is also relevant. This provides that a chancellor must, where no express provision is otherwise made in the FJR 2013, be guided, so far as practicable, by the Civil Procedure Rules ("CPR"). There are two relevant rules in this case. CPR 3.4(2) provides:

"The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of proceedings; or

(c) …"

CPR 24.2 provides:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of success on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other reason why the case or issue should be disposed of at a trial."

36. Practice Direction 3A draws a link between the powers to strike out and to give summary judgment in civil proceedings. Para 1.2 explains that they are two distinct powers which may be used to achieve the summary disposal of issues which do not need full investigation at trial. Para 1.7 reads as follows:

> "A party may believe he can show without trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under Rule 3.4 or Part 24 (or both) as he thinks fit."

As explained by Lord Wilson in *Wyatt v Vince* [2015] UKSC 14 para 24:

> "It is indeed common practice in civil proceedings to join an application to strike out under Rule 3.4 with an application for summary judgment under Rule 24.2. But in *Swain v Hillman* [2001] 1 All ER 91 at p 92 Lord Woolf MR observed that the power under Rule 24.2 was wider than the power under Rule 3.4 and that under the latter, unlike the former, the general focus of the court was only upon the statement of case which was alleged to disclose no reasonable grounds for bringing the claim. Or, as my Lady, then Hale J, crisply put it three months later, "the essence of a strike out is that one does not look at the evidence on the claim": *Bridgeman v Brown*, Court of Appeal, 19 January 2000, All England Official Transcript, p 4."

37. Given the chancellor's acceptance that he should recuse himself from determining substantive issues (see para 26 above), it was unfortunate (and in our view wrong) that he then proceeded to make his rulings [1], [2] and [3], each of which purported to be dispositive of the entire proceedings and which crossed the line between the merely procedural and the substantive. That apart, we can see no reason why a chancellor should not of his own motion raise the issue of abuse of process; and we consider the registrar's letter of 5 September 2014 identifying the four matters on which the chancellor expected to hear submissions as a proper exercise of the court's duty to manage cases under those provisions. Given the terms of the order the chancellor made at (or immediately after) the hearing on 26 September, the parties should have expected that the judgment referred to therein would lead to a decision whether to strike out the application under CPR rule 3.4(2) or alternatively give summary judgment under CPR rule 24.2. That is precisely what the chancellor then did by his judgment of 15 December. In that the chancellor appears not to have confined himself to the contents of the application itself, but rather looked at matters more widely, his rulings [1] and [2] on abuse should probably be regarded as summary judgment under CPR rule 24.2, rather than strike out under CPR rule 3.4(2); and that is certainly so in respect of his ruling [3], declining to exercise the court's jurisdiction in view of the pending change in legislation. However, precise categorisation is not important.

Sufficiency of interest

38. Under s.13(6) of the CCM it is a precondition for an application for a restoration order that a person should "have a sufficient interest in the matter. As stated in the White Book at 54.1.11 in respect of standing to apply for judicial review:

> "The question of what is a sufficient interest is a mixed question of fact and law; a question of fact and degree having regard to the relationship between

the claimants and the matter to which the claim relates and all the other circumstances of the case (*R v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617)."

The same is true in the ecclesiastical jurisdiction. As stated in Hill *Ecclesiastical law* (Third edition 2007) p.237:

> "The question of sufficient interest is one of fact and degree, to be determined by the chancellor in each case."

39. In relation to the question of sufficiency of interest to petition for a faculty Chancellor Newsom QC said in *In re St. Luke's, Chelsea* [1976] Fam 295, 305 (which concerned a proposal to erect a memorial in a consecrated churchyard to the Polish soldiers and citizens massacred at Katyn during World War 2, notwithstanding the prohibition in the DBGA):

> "I come now to the questions of law. First there is the issue as to the locus standi of the individual petitioners. The council obviously has a right to petition the court because it is freeholder. But the other petitioners are not parishioners, nor are they on the electoral roll of St. Luke's Parish. Unless they can establish a sufficient and relevant interest they have no locus standi in this court. Several cases were cited to me, and I found most helpful the observations of Sir Robert Phillimore, Dean of the Arches, in *Fagg v. Lee* (1873) L.R. 4 A. & E. 135, 150 that it would be a great evil if persons having no connection with a parish should be entitled to interfere in matters relating to the church (or of course the churchyard). I do not accept the submission of [counsel for the petitioners] that these remarks relate only to proceedings for the removal of articles from churches. To put things into a church or churchyard, or try to do so, can equally cause trouble, as has been proved by this very case. In my judgment they apply to any interference with a church or churchyard. It is not the law that anyone can confer upon himself a sufficient interest to be a litigant in the consistory court merely by deciding that he wants to do something in a church or churchyard in the diocese. *The concept of a party interested is in its origin proprietary and is comparatively narrow.*" (emphasis added).

40. In *Hansard and Others v The Parishioners and Inhabitants of St. Matthew, Bethnal Green* (1878) 4 P.D. 46, 54 (proposal to erect a mortuary in a closed churchyard) Chancellor Tristram, after referring to *Fagg*, said:

> "...to entitle a person to oppose the granting of a faculty he must shew some interest in the subject-matter of the application....The true test of interest in a case of this nature may be, whether the building in question may by possibility be injurious to any person as the owner or occupier of property in the neighbourhood, and if it be shewn that it might become so, I think that would give a locus standi to such owner or occupier, whether he be or be not a resident or ratepayer in the parish, to oppose the faculty."

41. The most recent authority to which we have been referred is *Re St Michael and All Angels, Isel* (2011) 13 Ecc LJ 248 (proposal to block up a pedestrian gateway in the boundary wall of a churchyard). Chancellor Tattersall QC held that

occupiers of the former vicarage had no standing to object since they did not satisfy the test of "interested person" in rule 16(2) of the FJR 2000 because they resided primarily in the Isle of Man, did not appear on the parish electoral register and the freehold of the former vicarage was vested in a Manx-registered company, with the objectors holding no apparent legal or beneficial interest.

42. Mr Gau and Mr Mynors submitted to the chancellor (a submission repeated by Mr Gau on appeal) that the First Appellant does not have a sufficient interest, being a private company limited by guarantee and created recently, whose directors are traceable, but whose membership is entirely (and, as the Respondents contend, deliberately) opaque. On appeal Mr Gau accused the First Appellant's representatives of improperly seeking to pierce the company veil in order to establish that it had sufficiency of interest, an argument we had some difficulty in comprehending.

43. The position so far established by the evidence is that the company was incorporated on 1 March 2013. Its Memorandum and Articles of Association do not contain an objects clause. It has four directors, including the Second and Third Appellants. According to a witness statement of Ms Whaite, dated 21 August 2014, the company is engaged in seeking to secure the preservation and reinstatement of the Site as an open space for the enjoyment of the public; it works with and for residents and other community users of the Church and the Site; and its incorporation was supported by the trustees of FCCS, by the Spitalfields Society and by Spitalfields Historic Buildings Trust, all of which are said to share the aspiration and objective of securing the long-term protection of the Site as an open space for the public benefit in perpetuity. Mr Hill, who appears for the Appellants, accepts that the company has no assets.

44. Whilst we have seen nothing to cast doubt on the bona fides of the company, we consider that ecclesiastical courts should generally adopt a fairly restrictive approach to sufficiency of interest; the prospect of country-wide litigation by shell companies set up for that purpose is deeply unattractive. Nevertheless, we consider that the question of standing cannot, and should not, be resolved without the opportunity for evidence from all the parties and the possibility of cross-examination. We note that in *Hansard* the question of sufficiency of interest was only decided after filing of affidavits by the respective parties and cross-examination of several of the witnesses. In any event, as mentioned in para 5 above, at the outset of the appeal we allowed the application to add Ms Whaite and Mr Vracas as Appellants, rendering the question of the company's standing to some extent academic. Besides, where proceedings raise an issue of considerable public importance, as here in relation to the lawfulness of the erection of the Building, it would be regettable if that matter turned on the standing of the company to bring them.

45. In any event, the chancellor in para 1 of his judgment specifically (and rightly) made no finding at that stage about the status or locus of the First Appellant to make the application for a restoration order. There has been no application to cross-appeal or serve a Respondents' Notice on this issue. Accordingly we take the view that the question of sufficiency of interest is not for determination in the present appeal.

The status of the faculty of 17 February 2012

46. Prior to the coming into force of s.18A of the CCM, there was ample legal authority that a consistory court has no power to grant a faculty for the erection of a building which would be contrary to the prohibition in s.3 of the DBGA (see, for example, *In re St. Luke's, Chelsea* at 312 and, more recently, *In the matter of St Peter in the East, Oxford* (2014) 16 Ecc LJ 248 para 31. The latter decision triggered the inclusion of clause 4 in the CCEJ(A)M.

47. Before 1 April 2015, in order to erect a building lawfully on consecrated land forming part of a closed churchyard, there needed to be both a faculty and (unless the building was "for the purpose of enlarging a church chapel, meeting house, or other places of worship": see s.3 of the DBGA) a statutory authorisation (such as, in London, under the MHLGA).

48. If it were clear that the erection of a building would conflict with the DBGA, then, prior to 1 April 2015, no court could lawfully grant a faculty for the works. But where the position was unclear the court could lawfully grant a faculty, but the subsequent erection of a building based on it would not be lawful, absent statutory authorisation.

49. Therefore, returning to the facts of the present case, if, as at 17 February 2012, the erection of the Building would have been contrary to the DBGA, there was no power to grant a faculty for it. The difficulty is that it is undecided whether the Building was erected unlawfully, for it may, so Mr Mynors contends, have been erected lawfully under a combination of the faculty and the MHLGA, something all agree is not for this court to decide on the present appeal.

50. The true analysis, for which counsel for the Appellants contended and contend, is that a faculty is merely permissive. It does not compel the construction of the works it permits, nor can it (save pursuant to the new s.18A(1) of the CCM) authorise a breach of the DBGA.

51. Some assistance can be derived from the reasoning of Sir Lewis Dibdin, Dean, in *LCC v Dundas and ors* [1904] PD 1, a case with facts relatively close to those with which we are dealing. The law at that time was significantly different from what is now contained in FJR 2013 rule 19.2(2), so that a faculty was not revocable, save in very narrow circumstances, which were held not to arise on the facts of that case (at 32-33). The Dean, however, went on to hold (at 33):

> "All that can be said is that, if I am right, the [DBGA], properly construed, makes the faculty inoperative so far as it authorizes the erection of the hall. But in other respects the faculty is effective. It is not, therefore, a nullity".

52. Thus, as at the date of the chancellor's judgment, the position was not that the faculty of 17 February 2012 rendered the erection of the Building lawful; nor, on the other hand, that because of the provisions of the DGBA, the faculty was in whole or part a nullity. Rather it was a faculty the operative effect of which was dependent on whether the prohibition in s.3 of the DBGA applied, or whether the prohibition was displaced by reason of the MHLGA. That is one of the matters, perhaps even the key

matter, which will need to be decided in the course of these proceedings for a restoration order.

53. It is, of course, most regrettable that the petition for faculty erroneously stated that the churchyard was not consecrated land. Whilst it is surprising that this assertion was not queried either in the diocesan registry or by the chancellor, it would appear that the faculty was granted on the basis that the erection would not be in breach of the DBGA prohibition. That may indeed still be the case by reason of the MHLGA; but, on the materials we have seen, that provision does not seem to have played any part in the chancellor's reasoning in granting the faculty.

The chancellor's ruling [1] on abuse

54. One of the principal planks of Mr Gau's argument on abuse of process both below and on appeal was that the application for a restoration order was "vexatious" and "amounts to harassment" of the Respondents and Interested Parties. In support of this he placed considerable emphasis on the absence of sufficiency of interest in the First Appellant. We have already explained that, in the absence of a cross-appeal, the question of insufficiency of interest cannot be argued in this appeal, and that, in any event, it is not a matter capable of determination without further evidence and cross-examination. In any event, Mr Gau sensibly recognises that with the addition of the Second and Third Appellants the argument on abuse of process cannot any longer be based on this issue.

55. The chancellor appears to have approached the question of abuse of process on the basis set out in the first sentence of para 1 of the judgment, namely that "all the points now raised by the Applicants could and should have been raised in 2011 in response to the original petition". This was a shaky foundation for what followed for two reasons. First, the First Appellant was not incorporated until a year after the date of issue of the faculty (as the chancellor correctly inferred in para 5 of his judgment). Second, even if for "the Applicants" one substitutes the directors of the company, and especially Ms Whaite, it is not at all clear why they "should" have known in 2011 of the existence, and relevance, of the prohibition in the DGBA, when (a) no one in the diocesan registry, nor the chancellor, appears to have appreciated its relevance; and (b) anyone reading the petition would have seen that the petition was being made on the basis that the land was unconsecrated (in which case, by virtue of the DGB(A)A) the prohibition in the DGBA would not have applied).

56. The second sentence in para 7 of the judgment correctly states that no appeal was mounted after the faculty was granted, but goes on to find that the application "is nothing more than an attempt to re-litigate settled issues out of time...." For the reasons we have already given, we do not consider that the grant of the faculty did "settle the issue" of whether the erection of the Building was lawful; accordingly the application for a restoration order should not have been considered to constitute re-litigation of the issue. Nor do we understand how the application for a restoration order could be said to be "out of time", when s.13(8) of the CCM provides for a six year time limit for the making of a restoration order. Delay in making an application for a restoration order can be relevant to the exercise of the court's discretion under s.13(5), but that is an altogether different matter.

57. Mr Gau and Mr Mynors have attempted to bring the application within the concept of issue estoppel, one of the two branches of the doctrine of res judicata, the other being cause of action estoppel. Their argument is that there is "identity of subject matter" (see see the analysis of Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853,913-917), because in the faculty proceedings the matter of the DBGA could have been raised, and a finding in the restoration proceedings would necessarily involve a finding that the faculty should not have been granted. Therefore, they say, the proceedings are an attempt to re-litigate something which could have been raised before the faculty was granted. Further they contend that there is "identity of parties", because there is privity between the company and Ms Whaite, arising from the fact that she is one of its founders and directors; and the company, they say, was acting as agent for, or on account of, Ms Whaite in bringing the restoration proceedings (see per Lord Reid in *Carl Zeiss* at 910-912). Therefore, they conclude, the company is bound by her participation in the faculty proceedings, through her letter of objection to the grant of a faculty (the letter of 10 October 2011 referred to in para 5 of the judgment).

58. Even if they are right in relation to identity of subject matter, a matter which we do not need to decide, we reject the submission in relation to privity of parties, for the simple reason that (as the chancellor correctly recognised in para 5 of the judgment) Ms Whaite never became a Party Opponent (and thus a party to the faculty proceedings). Thus there was no party to previous proceedings to which the company could be privy. There are two further matters. First, on the limited facts so far established, neither we nor the chancellor could be satisfied that the company in bringing the restoration proceedings was doing so as agent for, or on account of, Ms Whaite. Second, although no authority was cited to us on the matter, we have grave doubt whether an issue estoppel could ever arise so as to prevent challenge to a claimed breach of a statutory prohibition existing for the public rather than private benefit. Mr Hill also contended that there could be no issue estoppel because the chancellor had no jurisdiction to issue the faculty in February 2012. He relied on the passage in *Halsbury's Laws* Vol 12: Civil Procedure (5th ed. 2009) para 1170:

> "In order that estoppel by record may arise out of a judgment the court which pronounced the judgment must have had jurisdiction to do so; lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise".

However, for the reasons we have already given, until the question whether the MHLGA applies has been resolved, it is not possible for us to find that the faculty should not have been issued, much less that it is necessarily void.

59. Aside from res judicata, and looking at the wider, though related, concept of abuse of process, we cannot understand how the conduct of the company in bringing the restoration proceedings can properly be castigated as "a blatant abuse of the process of the court" (the phrase used at the end of the second sentence of para 5 of the judgment). This is especially so, given the misrepresentation (whether innocent or deliberate) in the petition relating to the land not being consecrated, a key matter in relation to the application of the DBGA. In *Johnson v Gore-Wood & Co* [2002] 2 AC 1, 31, Lord Bingham addressed the situation where argument on abuse of process is not based on cause of action estoppel or issue estoppel:

> "The underlying public interest is the same; that there should be finality in litigation and that a party should not be twice vexed in the matter....The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied, (the onus lying on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all...*[T]here will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party.* It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion *be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case*, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before." (emphasis added).

Here, at any rate on the present state of the facts, we can see no harassment, and the public interest requires that the matters raised by the restoration proceedings be properly investigated.

60. Accordingly the chancellor was not entitled to impose a permanent stay as he purported to do in the third sentence of para 5 of the judgment, whether for issue estoppel or any other form of abuse of process. In the state of the proceedings, and the evidence, as at the date of judgment, there were no grounds for a stay pursuant to CPR 3.4(2)(a) or (b); nor for exercise of summary judgment under CPR 24.2.

The chancellor's ruling [2] on abuse

61. The difference between the chancellor's two rulings on abuse is slender. In both rulings he was acting of his own motion. The only discernible difference is that his ruling [2], contained in the fourth sentence of para 5 of the judgment, was a purported refusal to exercise "the discretion conferred by Section 13(5)", which did not result in a stay, but rather in dismissal of the application.

62. For the reasons we have already given in respect of his ruling [1], we do not consider that the chancellor was entitled at this stage to find "blatant abuse of the process of this Court". Accordingly it was also an erroneous exercise of, or rather refusal to exercise, the discretion under s.13(5) of the CCM. Ruling [2] also fell outside CPR rule 3.3(2)(a) or (b), nor could it properly constitute summary judgment under CPR 24.2.

The chancellor's ruling [3] by reference to the CCEJ(A)M

63. Although the Dean did not specifically give leave to appeal in relation to ruling [3], the matter has been fully argued without objection from the Respondents and Interested Parties. Even if it be assumed (as the chancellor appears to have done) that a faculty under the new s.18A in the CCM could retrospectively legitimise the Building, the chancellor's ruling [3] cannot, in our view, stand for three reasons. First,

and most fundamentally, as at the date of the judgment the draft Measure had not completed its progress through Parliament, nor received the royal assent. True, as the chancellor stated, it had been laid before the Ecclesiastical Committee of Parliament, but the committee had not yet reported as to its expediency. Second, even assuming its enactment, the chancellor had no means of knowing when it would be brought into force. Third, the proposed power under s18A was a discretionary one, and, without a full investigation of the facts (which would be inappropriate at the stage of strike out or summary judgment, and which had not in any event taken place), the chancellor could not simply assume that it made the grant of a faculty so inevitable that he could on this ground alone summarily reject the application for a restoration order.

64. In the terminology of CPR 24.2, the chancellor was wrong to consider that the applicant (the First Appellant) had no real prospect of succeeding on the claim; and in any event the importance of the issue was such that it ought to have been disposed of at a trial, rather than summarily. Of course we now know that the CCEJ(A)M *did* receive the royal assent, and that the new s.18A *did* come into force on 1 April 2015, before the hearing of this appeal. But that later knowledge cannot retrospectively justify the way the chancellor approached the matter; and in any event there are a whole range of issues relating to the exercise of discretion under both s.13(5) and s.18A of the CCM which remain outstanding and undetermined.

65. Shortly before the date set for the appeal a suggestion was made by the provincial registrar to the parties that the appeal be stayed pending a petition by the Respondents for a confirmatory faculty under the new s.18A of the CCM. That suggestion was acceptable to the First Appellant and to the Second Interested Party, but was declined by the Respondents and the First Interested Party. Mr Gau told us that such a petition had already been prepared, with a view to submission if the appeal were to succeed. It may therefore be that such a petition will be granted so as to make the present proceedings otiose. But that depends on a number of other considerations, including a dispute as to the ambit of s.18A itself, to which we have already referred.

Other procedural matters

66. As mentioned above, there are a number of issues, including matters of statutory interpretation, which remain outstanding. But there are also certain procedural aspects which call for comment, albeit these form no part of our reasoning in allowing the appeal.

67. In respect of the conduct of counsel there are three matters:
(1) There is an important difference between, on the one hand, submissions in skeleton arguments and, on the other hand, admissible evidence. This was a distinction ignored by all counsel in this case, who too readily submitted skeletons asserting facts which were not supported by admissible evidence. In part this may have been consequential on the wording of the chancellor's directions and order of 5 and 26 September 2014 respectively, neither of which contemplated the service of further witness statements.

(2) We emphasise the need for restraint in the use of language by counsel in skeleton arguments. Some of the language used was in our view inappropriate, particularly in proceedings in the ecclesiastical courts, and unhelpful.
(3) The skeleton arguments served for the appeal hearing (and oral submissions at the hearing) made considerable reference to the contents of previous skeleton arguments without those passages (including references to case law) having been expressly incorporated into the appeal skeleton arguments. The task of an appeal court is best assisted if an outline of all the arguments to be advanced by counsel (and case law relied upon) is included in the most recent skeleton argument, whilst taking care that the resultant skeleton is not of excessive length. An appeal court should not have to trace its way through, in this case, four skeleton arguments of the Appellants and three each from Mr Gau and Mr Mynors to be sure it has properly understood the submissions of counsel. (In relation to skeleton arguments all who practise in the ecclesiastical courts should heed the observations in *Tchenguiz and ors v Director of the Serious Fraud Office* [2014] EWCA Civ 1333; [2015] 1 WLR 838, 839-40, and in *Inplayer Limited (Formerly Invideous Limited) and ors v Jack Thorogood* [2014] EWCA Civ 1511 paras 52-57).

68. In respect of the chancellor's approach, there are three additional matters which have caused us concern:
(1) We do not criticise the chancellor for sending for the original faculty file (see para 5 of his judgment). But if he was then to use material disclosed by that file to criticise counsel for making a "demonstrably false" assertion (as he did in para 4 of the judgment), he should have given counsel the opportunity of responding on the issue before the criticism was included in the judgment. In para 7 of Mr Seymour's skeleton argument of 20 August 2014 in support of the application (which the chancellor wrongly described as "a pleading signed by Counsel") he stated that "SOS made objection to the works and drew attention to the breach of statute but these objections were disregarded". This was an accurate statement, and counsel did not say that representations along these lines were made in the antecedent process leading to the grant of the faculty, as the chancellor had assumed. We do not criticise the chancellor for his misunderstanding, but merely for the procedure he followed before adverting to the matter in his judgment. Similarly until the parties received the judgment they had no means of knowing that the chancellor had seen Ms Whaite's letter of 10 October 2011 on which he purported to rely in para 5 of the judgment.
(2) By ruling [1] the chancellor purported to impose a stay on the proceedings, with provision that "no further action [be] taken in pursuit of them". This was in effect a final order, and, following his conclusion on abuse of process, it would have been more appropriate to dismiss the application altogether.
(3) The contested trial of issues in the ecclesiastical courts very rarely exceeds one or two days in duration; and the preparation of evidence for such trials is seldom burdensome. Accordingly the saving of time by issue of strike outs or summary judgment is unlikely to achieve similar cost savings to those frequently achieved in the secular jurisdiction. And there is always the risk that, as has happened here, the result is to increase overall costs. These procedures, although available, should rarely to be invoked.

69. Finally, it was orally argued by Mr Gau, on the specific instruction of those instructing him, that a person considering whether to participate in faculty

proceedings had no right to see the petition form itself. The Public Notice which petitioners are required to display states that "Copies of the relevant plans and documents may be examined at...." (see Form No.3 in Appendix C to the FJR 2000, now replaced by Form 4A in Schedule 3 to the FJR 2013). According to Mr Gau the word "documents" does not include the petition form itself. We reject that submission. Not merely is the petition form a "relevant document", it is a document which is essential if a person wishes to understand the nature of the faculty sought, including matters such as time-scale, cost, and what consultation has already taken place and what permissions obtained.

Disposal

70. For the reasons given above the appeal is allowed in respect of all three findings by the chancellor. The application for a restoration order is remitted to the London consistory court, to be determined by the deputy chancellor, or if he is for some reason unavailable, by such deputy, being already a chancellor of another diocese within England, as the Bishop of London may appoint for that purpose. This form of wording was agreed by all counsel to be appropriate in the event that the appeal were to succeed.

71. It will be for the deputy chancellor to give appropriate directions for the expeditious resolution of the application, including (if appropriate) directions in relation to the resolution of such preliminary issues as he may identify. It may be that he is also called to determine a petition for a confirmatory faculty, to which we have previously made mention.

Costs

72. There are two costs orders to be made: (a) in respect of costs below, both inter party costs and court costs; and (b) in respect of the costs of the appeal, again both inter party costs and court costs. There is also the question of repayment of security given for costs. The allocation of costs in the present case is not simple, and what follows is merely the order the court is presently minded to make. If the parties can agree an alternative order, or wish to make submissions for a different order, they have 21 days from the handing down of this judgment in which to do so, such representations to be made in writing to the provincial registrar.

Costs below

73. The chancellor ordered that the applicants should pay the costs of the Respondents and Interested Parties. His judgment was silent as to court costs. In the Statement accompanying the application for a certificate and leave to appeal, it was pointed out that he made this determination before a draft of his judgment had been disclosed to the parties' representatives and without affording them an opportunity of addressing him on the issue of costs in the light of his judgment. It would seem that the chancellor failed to take into account rule 18.1(2) of the FJR 2013 which provides:

"If a court proposes to make an order for costs other than at a hearing it must afford the persons against whom the order is proposed to be made an opportunity to make representations to the court, either in writing or at a hearing, as the court thinks fit".

74. It is clear that the chancellor's order on inter party costs cannot stand. There is a principled argument that costs below ought to be reserved for determination by the deputy chancellor at the conclusion of the proceedings. For if he were to find that the First Appellant lacked "sufficient interest" to seek a restoration order, then it might be right that the First Appellant should pay the other parties' costs up to and including the chancellor's judgment; and if the deputy chancellor found that it had "sufficient interest", he might order Mr Gau and Mr Mynors's clients to pay the First Appellant's costs, not least because they failed to discourage the chancellor from proceeding to summary judgment for abuse of process. On the other hand, given that the Second and Third Appellants have now been joined as parties, we consider it undesirable that time and expense be spent in determining that issue, which has become academic save as to costs. Accordingly we incline to the view that each party should bear its own costs below, accepting that this is a pragmatic rather than principled conclusion.

75. So far as court costs below are concerned, the normal rule in faculty proceedings is that the petitioner bears the court costs at first instance (see *In re St Mary the Virgin, Sherborne* [1996] Fam 63, 70). We do not consider that such a rule is applicable in restoration proceedings such as these. The appropriate order is that Mr Gau's and Mr Mynors' clients should each pay half the court costs below. We leave it to Mr Gau's clients to resolve the contributions each of them should make, but each is to be severally and jointly liable for the whole amount of the half share.

Costs of the appeal

76. The Dean's grant of leave to appeal was conditional on the proposed appellant not seeking to recover any of its costs of the appeal, including the application for leave, from the Respondents in any event. The grant was silent in relation to the position in relation to the Interested Parties. We consider the position of the First Interested Party to be indistinguishable from that of the Respondents. On the other hand we consider that the Second Interested Party should bear half the First Appellant's costs of the appeal. In *In re St Luke's, Chelsea* at 313 the chancellor held that in Inner London the borough councils were the enforcement authority in relation to violation and enforcement of the observation of the provisions of the DBGA. There has been much restructuring of local government powers in London since 1975 when that case was decided, but, when the point was put to him during argument, Mr Mynors was inclined to accept that as a unitary authority the Second Interested Party probably had inherited that enforcement role. That appears to us to be some additional support for making the Second Interested Party responsible for half of the First Appellant's costs of the appeal.

77. In respect of court costs of the appeal, again we do not consider that we should apply the rule in *In re Sherborne.* We consider that the appropriate order is that the court costs of the appeal should be borne as to half by Mr Gau's clients and

as to half by Mr Mynors's clients. Again, each of Mr Gau's clients is to be severally and jointly liable for the half share.

Recovery of monies paid into court

78. This then leaves the question of the substantial amounts already paid into court as security for court costs by the First Appellant under the condition of the grant of leave to appeal. Unless our proposed order is subsequently varied, the sum (including VAT) paid into court in respect of court costs below under condition 2) of the grant of leave to appeal will need to be repaid to the First Appellant (with any interest accrued) within 56 days of judgment; and the sums (including VAT) paid into court in respect of the appeal court costs under conditions 2) and 3) of the grant of leave to appeal will need to be similarly repaid within the same period.

79. We reject the application by the Second Interested Party, contained in the final paragraph of Mr Mynors's skeleton argument for the appeal, that we should ourselves make an order for security for costs in favour of his client. It will be for the deputy chancellor to determine in due course what (if any) orders for security of costs (whether for the consistory court costs or those of the Respondents and the Interested Parties) are appropriate, under CPR rules 15.12 and 15.13(2(c), applied by rule 19.5(2) of the FJR 2013.

24 July 2015

IN THE ARCHES COURT OF CANTERBURY

Charles George QC, Dean of the Arches

Chancellor Tattersall QC and Chancellor Pittaway QC

On appeal from the Consistory Court of the Diocese of London

APPLICATION FOR RESTORATION ORDER PURSUANT TO THE PROVISIONS OF SECTION 13(5) OF THE CARE OF CHURCHES AND ECCLESIASTICAL JURISDICTION MEASURE 1991

BETWEEN:

(1) SPITALFIELDS OPEN SPACE LIMITED
(2) CHRISTINE WHAITE
(3) PHILIP VRACAS **Appellants**

\- **and -**

(1) THE GOVERNING BODY OF CHRIST CHURCH PRIMARY SCHOOL
(2) THE REVEREND ANDREW RIDER
(3) RICHARD WASSERFALL
(4) KIM GOODING **Respondents**

\- **and –**

(1) LONDON DIOCESAN BOARD OF SCHOOLS
(2) LONDON BOROUGH OF TOWER HAMLETS **Interested Parties**

DECISION ON COSTS

1. In paras 72 to 77 of our judgment of 24 July 2015 we indicated the order for costs which the court was minded to make, but provided the opportunity for the parties to make submissions for a different order. Following various agreed extensions of time, such submissions have been received from (1) the Respondents and the First Interested Party; and (2) the Second Interested Party; together with a response thereto from the Appellants seeking to affirm the proposed order for costs set out in the judgment. Abbreviations used in this decision are the same as those used in the judgment.

Costs below

2. No submissions against the proposed order for costs below have been received. Therefore the proposed orders (contained in the final sentence of para 74 and in the last two sentences of para 75) are affirmed.

Parties' costs of the appeal

3. The only submission is by the Second Interested Party, which does not expressly seek a different order from that proposed, but relates to the point made in last three sentences of para 76, that there is support for half of the First Appellant's appeal costs being paid by the Second Interested Party on the basis that it is the authority charged with enforcing the DBGA. The Second Interested Party's submission highlights that it has not made any concession that there has been any breach of the relevant provisions of the DBGA, and that that is therefore an issue that remains to be determined by the consistory court when that matter reconsiders the matter.

4. In para 12 of the judgment we expressly did not resolve the issue whether the Building benefits from the MHLGA exemption. Whilst therefore we find it surprising that there was nothing in the papers before the Court to suggest that there had been any reference by anyone, including the Second Interested Party, to the DBGA or the MHLGA at the time a faculty was sought in November 2011 and thereafter granted in February 2012 (see para 17 of the judgment), those papers may have been incomplete, and in any case we accept that it would not be right, at this stage of the proceedings, to have regard to the Second Respondent's statutory enforcement role in relation to the order for costs. On the other hand, the normal rule on appeal in this court is that the parties' costs follow the event (see *In re St Mary the Virgin, Sherborne* [1996] Fam 63, 70F), and therefore on that ground alone we consider that the order proposed in the fourth sentence of para 76 should be affirmed.

Court costs of the appeal

5. The only submission is by the Respondents and First Interested Party. They contend that it is unfair that they should be expected to pay any part of the court costs when their decision to contest the appeal was in large part based on the identity and therefore status of the only then appellant (the First Appellant); and the issue of joinder as appellants of Ms Whaite and Mr Vracas could and should have been addressed by an application by the First Appellant, or in directions from the court, prior to the hearing, rather than at the hearing itself, which may well have avoided the need for the hearing and saved considerable costs.

6. For the reasons set out in para 45 of the judgment, the question of sufficiency of interest of the First Appellant was not for determination in this appeal. Insofar as the Respondents and First Interested Party considered that it was, and persisted in argument to that effect at and before the hearing of the appeal, that was misconceived. Further, as recorded in para 65 of the judgment, the parties were offered a way of avoiding the costs of the appeal, acceptable to the First Appellant and to the Second Interested Party, and rejected solely by the Respondents and First Interested Party. In all the circumstances we see no unfairness in the order for court costs of the appeal proposed in the second sentence of para 77, which we affirm.

24 September 2015

CHARLES GEORGE QC

GEOFFREY TATTERSALL QC

DAVID PITTAWAY QC