Neutral Citation Number: [2017] ECC Lon 1

Before: Chancellor June Rodgers, sitting as a Deputy Chancellor of the Diocese of London

IN THE CONSISTORY COURT OF THE DIOCESE OF LONDON

IN THE MATTER OF A BUILDING IN THE CHURCHYARD OF CHRIST CHURCH SPITALFIELDS and

IN THE MATTER OF AN APPLICATION FOR A RESTORATION ORDER AND A PETITION FOR A CONFIRMATORY FACULTY

B E T W E E N:-

(1) The Governing Body of Christ Church School

(2) The Rev'd. Mr. Andrew Rider

Kim Gooding, Will Spring and Richard Wasserfall

(Rector, Church Wardens and former Church Warden)

(3) The London Diocesan Board for Schools

(4) The London Borough of Tower Hamlets

(Building Parties)

Applicants for a Confirmatory Faculty &

Respondents to the Application for a Restoration Order

and

(1) Spitalfields Open Space (S.O.S.)

(2) Christine Whaite

(Open Space Parties)

(3) Professor Kerry Downes

(4) and others

Applicants for a Restoration Order &

Respondents to the Application for a Confirmatory Faculty

JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC

1. For a church not yet 300 years old Christ Church Spitalfields has had a chequered history. The church lies just outside the boundary of the City of London in the Borough of Tower Hamlets, the Council of which is one of the Parties in this case. The church is situated to the east of Liverpool Street Station, and to the west of Brick Lane. To-day, it stands on the boundary between the expanding office blocks of the City, and the curry houses of the Muslim community of the Spitalfields/Bangla Town Ward of Tower Hamlets. The gentrification of the streets surrounding the church from the 1970s onwards not only escalated house prices but also provided another layer of residents, many of whom were fascinated by the architecture of the streets surrounding Christ Church, and the architecture of the church itself, which they did much to save and restore. In the last few years there has been not only salvage and restoration of the housing surrounding the church, but also changes in the local economy. The old Spitalfields Fruit and Vegetable market now houses trendy wine bars and bijou stalls. Brick Lane has its curry houses. The Trumans Brewery site, a little to the north of the church, has become a tourist attraction to rival Covent Garden. The lanes of Artillery Row and around cater for both office workers and tourists, with restaurants and specialist shops. It has not always been thus. The church was by the early 1950s onwards on the point of being demolished, having become a virtual wreck. It has, structurally, been saved, and the parish is now an active and successful worshipping community, rooted within an area which itself has undergone immense social change. It is this success which, far from uniting the parishioners and the other residents living in its shadow, has given rise to a dispiriting and bitter dispute which has resulted in an application for Judicial Review against the Council, an

application to the Attorney General with a view to having the Rector criminally prosecuted, a successful appeal to the Court of Arches, which subsequently resulted in a ten day Consistory Court hearing before me, several thousand pages of documents, lever-arch files of legal authorities and costs, estimated at the beginning of this hearing (which itself doubled its initially estimated time) of over half a million pounds on the side of the objectors and about a quarter of a million pounds on the side of the other parties, costs that many, many churches struggling to fund repairs or necessary extensions, as I said at the opening of this hearing, can only read of and weep.

2. **THE PARTIES**

On one side of this dispute are ranged the following: the Governing Body of Christ Church voluntary aided Church of England School, the Rev'd. Mr Andrew Rider, who is the Rector of Christ Church, the current Churchwardens and a past Churchwarden of the church, the London Diocesan Board for Schools (LDBS), the London Borough of Tower Hamlets (LBTH), and Graysons Venues Ltd (the latter not being involved in the main case, there being subsidiary litigation which was adjourned at the beginning of this case, and on which I have heard no oral evidence). Although each of these bodies has a slightly different position in the litigation, which I will deal with individually in the course of the evidence, overall they seek a Confirmatory Faculty to authorise keeping an existing building currently standing in and on the disused graveyard of Christ Church, the "new building".

3. On the other side are an organisation called Spitalfields Open Spaces (SOS), and individual objectors, both formal and informal, some parishioners, some not. They all seek a Restoration Order to demolish the new building, thus providing for a greater open space than is presently available in the graveyard. They wish to restore the churchyard as an open space. Many of these objectors are members of, or connected with, other local bodies, such as the Spitalfields

Trust and the Friends of Christ Church Spitalfields (FoCCS). Those last two bodies in themselves are not Parties (nor as representative bodies did they even appear as a witnesses), one reason, perhaps, being the restrictions placed on the ability of charities to spend charitable money on litigation unless strictly within their objects.

4. To set out here the full cast list of persons involved in this case would begin to resemble the *dramatis personae* of a 19th century Russian novel, so that for ease of reference I will adopt the shorthand used by many of the Parties during the case and refer to them respectively as the Building Parties/Petitioners and the Open Space Parties/Objectors. This is a simplification of the arguments, both legal and aesthetic, of the individual Parties. In the course of this judgment, I will address the respective nuances of their individual arguments when considering their evidence. In the documents before me, many other people from Council officials, elected Councillors, objectors and supporters of each side, amenity societies, both local and national, make cameo appearances on paper, but these, too, have helped in trying to clarify the whole of this sorry tale.

5. By reason of the interest in this particular parish church and its well known role in English architectural history, this judgment will review, in much greater detail than normally required, the history and background of the church. I more than bear in mind the need to consider and identify the architectural and/or historic interest in respect of this church as set out in the judgment of the Court of Arches in *St John the Baptist Penshurst* (Arches Ct, 9 March 2015). Indeed, it is this very importance that lies at the root of the whole case, certainly as far as the objectors are concerned. Others involved have been more interested in the legal interface between the civil law involving open spaces, and the duties upon local authorities and other bodies when obtaining public finances for building on such an area. From the point of ecclesiastical law, this problem has become the more acute in that the building complained of has actually been built, at the cost of just under £1.5 million. The objectors seek to

have it knocked down, which demolition in itself would be costly. These latter arguments only surfaced relatively late in this case, as it was the aesthetic, and not the legal position, which dominated the early years of this litigation.

6. Because of what has happened at Christ Church Spitalfields, there has been interest both locally, nationally and in the media. As in many campaigns, views have been expressed, both orally and on paper, on all sides, which have generated more heat than light. There have been allegations of bad faith, of secrecy, of class conflict, of incompetence, and of fanaticism on all sides. I therefore have decided, as I have said, to set out in much greater length than might have been otherwise necessary, in so far as I can establish it, from the voluminous documents and oral evidence before me, just what has happened up to this present hearing. These extensive documented details of the history of this litigation were not, as I understand it, before the Court of Arches, where discrete specific points were successfully argued by the objectors. This present judgment may provide a clearer overview as to what has happened (and how it has happened) for many people, both those who have had an interest in this church and local residents, but who may not have been made fully conversant with the events leading up to this Court case, nor with the needs of the wider community which this church serves. There have also been, as I have said, accusations of secrecy and of a lack of consultation, and I have read smearing allegations against many of the people and bodies involved. For this reason I have set out from their own recorded words and documents of the Parties themselves (obtained from the results of their own requests for full disclosure) as full a history of what has happened in this matter, and also because, until the factual matrix became clear, the legal position could not be analysed fully and properly. I have, therefore, set out below in their own words, emails and letters, what the Parties have said and claimed during the course of this whole dispute. This judgment is a public document to be available on the Diocesan and Christ Church websites, and to be displayed in the church in printed form, for the

avoidance of further inaccurate gossip and misleading rumours. This judgment has had to be of substantial length in order to cover a variety of other matters which surfaced in the course of the litigation, and which caused me concern; matters which are of more general importance in the conduct of the work of the Consistory Court in the exercise of its Faculty Jurisdiction.

7. Some events in this matter, occurring even in the last 60 years, have differing dates as memories are fallible and documents have gone missing, so that I have had to, on occasions, make the best reconstruction of some events as I can from the documents and evidence before me. I have not been helped by the admitted fact that several crucial documents are missing, and cannot be traced in the local authority or Diocesan Registry files. This history plays a crucial role in the legal position round which the present arguments are centred. This case also serves as a warning to churches that what might seem "a good idea at the time" can, potentially, have a dreadful outcome decades, if not centuries, later.

8. Unfortunately this hearing has exposed other matters of wider concern in the operation of the Faculty Jurisdiction, in the conduct of a Consistory Court hearing, in the relationship between an individual church being aided by an external fund-raising body, and in the interface between a church and a local council. It also provides an object lesson in the need for careful retention of documents. I have had reason to be concerned about aspects of the practice which appears to have arisen in the operation of Consistory Court hearings, the interaction of local authorities who might have some legal duties in respect of their operation of disused graveyards under the state Open Spaces legislation, the legal restrictions of the use of such burial grounds under the *Disused Burial Grounds Act* 1884, the effect of the recent amendments to that Act, the meaning of a "restoration order", the power of a Chancellor to grant a confirmatory faculty, the duties of a Rector and other trustees of a Church school, the duties

upon a local authority in their management and/or development of an open space under their control which is a also a disused burial ground .

9. This case also serves as a really dreadful warning to churches who seek to rely on moneys raised by active groups of "Friends" without giving sufficient thought to how such groups are organised or controlled, and what their legal relationship with the church they wish to help really is. As will be seen in this case, the fund raising charity whose initial aims were to help restore Christ Church grew into a self perpetuating body whose aims took on a life of their own.

10. I have also a very real concern, arising from this case, in that many national and large business charitable donors may be much more circumspect in future in giving out grants to Church projects, were they to consider that the effects of a grant of their largesse might be to set the wishes and aspirations of certain keen groups within the heritage lobby against the needs and wishes of the local residents and parishioners. Many large charitable donors may not want to be associated or involved in disputes which, potentially, could polarise community relationships. Other churches might well suffer a potential financial backlash from the unanticipated consequences of this particular case.

11. The site, which is the subject of this dispute, is made the more complicated in that a local primary school, having already been built on part of the disused graveyard, now uses the new building being an addition to the school, which is the *casus belli* between the Parties to this hearing.

12. To make matters worse, this case has been bedevilled by lost or missing documents, supposedly held safely by the relevant local authorities and the diocesan solicitors. No-one was able to adduce any rational excuse or explanation for this. There was not even fire or blitz damage to explain just why the documents had disappeared and were untraceable.

13. As if all the above were not enough, the real concern of the objectors is that the church in itself is of such national, if not, indeed, international importance, being a masterpiece of the architect Nicholas Hawksmoor. This has excited the attention of enthusiasts of his work from far beyond the parish boundaries, who have been prepared to front and support a campaign of objection to the new building in the churchyard, which has resulted in this Consistory Court hearing. Their concern has been for this Hawksmoor church in its immediate setting to be restored to its original appearance in 1750, so that the church can be seen as an entire architectural set-piece. As it happens, the Victorian school (as long as it is there) precludes that plan being complete in its entirety, and Christ Church itself, although immaculately restored following research, is not exactly a full restoration. The objectors want the graveyard to be an open space to allow the public to view the church in it full grandeur from the east and south perspectives. They claim that the new building interferes with this, that it blocks the view. The objecting bodies (individual objectors aside) have a somewhat convoluted legal structure to which I will return later in the judgment.

14. The above outline gives only a passing flavour of the whirling and vituperative arguments in this case. What I want to make clear at the outset is that the church building of Christ Church Spitalfields has been magnificently saved for its original use as a church, and for use in the wider community as a musical and artistic venue. All this remains unaffected by this case. The tragedy is that the dispute between worshipping community and the Hawksmoor *aficionados* has reached such a pitch that common sense and balance, necessary in any urban community where competing interests might conflict, has become so fractured that the objectors continue to challenge it, relying on legal arguments, which came to hand rather late in the day. On the other side, the proponents of the building went about it in so careless a way, thoughtless of any potential legal argument which might be (and has been)

taken. Had the church received any legal advice or guidance, this dispute might have been either avoided, or, at least, conducted in a different way.

15. It is of concern that this whole matter brings the operation of the Faculty Jurisdiction into, quite bluntly, disrepute. The many advantages which the Church of England gains from being exempted from state listed building control can only be justified if the operation of this ecclesiastical system works competently and fairly. We operate as a Court of Law, within the legal system of this country, not a rather cosy club. To behave as such is always the risk in small specialised legal jurisdictions. Just because there are fewer practitioners in the fields of ecclesiastical law does not indicate that the work is of such speciality that only the chosen few, all of whom know each other, can do it. In other legal jurisdictions, such as commercial litigation, financial pressures from the litigants involved and greater competition between practitioners works in favour of the lay parties. Applicants for Faculties should not expect that their Petitions should just be nodded through for convenience. This present case highlights what happens when an outside spotlight, including Freedom of Information requests, is turned on this jurisdiction and its operation.

16. It is, however, an imperfect world in which inexplicable mistakes are made by professional people be they doctors, lawyers or similar. It is why professional negligence insurance exists.

17. In this truly dreadful legal mess I am faced with an application by the objectors to demolish the existing "new" building at a substantial cost, as they claim it was erected illegally. They seek a restoration order, but a restoration to what? All Parties agree that the previous "old" building on the site had become a useless eyesore. The objectors, seeing this as the method to obtain their desire of an open graveyard, seek to argue that once that "new" building is demolished, the vacant site is the desired restoration position, which they say can then be properly landscaped and available to the wider community. The

last thing they actually want is the "restoration" of the "old building". The Rector, PCC, and the London Borough of Tower Hamlets say that the "new" building serves a wider community purpose as well as for the school. Another problem appears to have been that the Hawksmoor enthusiasts (with some exceptions) were not interested in the activities of an evangelical church, whose churchmanship, membership and out-reach work was not their taste, interest or choice. They complain that many of the worshippers come from outside the parish. Equally, the worshipping body of Spitalfields were not really interested, for example, in the three quarters of a million pounds or so recent restoration of the Church organ funded by the Friends of Christ Church Spitalfields (FoCCS), as the church only on occasions uses it for funerals or a carol service, preferring to use one of the largest sound systems I have ever seen in a church. This dichotomy can be seen in the sparse, almost empty, photographs of the fund raising enthusiasts to show the purity of the great work they had achieved as against the reality of the Spitalfields' vibrant worshipping community. The two enormous blue sofas prominently installed in the church, which I saw on a recent visit, would not, I rather think, have featured on the FoCCS Christmas cards for Hawksmoor enthusiasts. A sad line in evidence was the Rector's regret that initially he had difficulty getting anyone with "grey hair" to act as a treasurer for the PCC. The objectors to the "new" building complained that the Rector and others in the church considered them to be "middle class..." In some way the needs and wishes of a worshipping community and a body of architectural "groupies" (not forgetting the musical festival goers, the Huguenot family history enthusiasts, the bell ringers, the tourists and others) all were managing to co-exist, leading, it appeared, almost separate lives in this church. A good building caters for the needs for which it is built; a great building can cater for many more needs and functions. Christ Church Spitalfields in its restored state did that and more. I now turn to the history of how and why the

local council became a player, and then I will consider the evidence in respect of the faculty applications.

18.THE CHURCHYARD SITE

The current arguments involve the graveyard of Christ Church, which is **a closed graveyard which has remained consecrated.** No burials have taken place since 1857, save for the introduction of the ashes of the late architect, Sir James Stirling, interred, with some legal difficulty, contiguous to the south side of the church and not directly involved in the land in dispute. I stress that this case does **not** involve a still open or a de-consecrated graveyard.

19. The churchyard, sited along the southern flank of Christ Church itself, initially formed a long rectangle running from Brick Lane in the East to Commercial Street in the West. It had been open for burials since the church was consecrated in 1729, but closed in the 1850s by Orders in Council. It is now bordered in the north by the whole southern flank of Christ Church, and on the east by the buildings, playground and tennis court of the Christ Church Church of England primary school, built on the east most end of the graveyard. The graveyard is bordered on its south side by the backs of the buildings facing on to Fashion Street. The west end of the graveyard is open on to the busy Commercial Street. There is, unsurprisingly, no graveyard on the northern flank of the church, given the un-ease of many parishioners (even now) for burials on that liturgical side of a church. The northern flank of the church itself immediately borders the southern footpath of Fournier Street. This layout provided a rectangular graveyard space to the south side of the church. The legal development of the current site I will deal with in more detail below, as it is that which causes concern.

20. At present, the graveyard, on inspection, can be divided into four parts, described as follows. The extreme eastern part is taken up with the Victorian school premises, the tennis court and school playground. There is

also what appears to be a short blocked access yard from Brick Lane along the side of the school, but this has not featured in the arguments before me.

21. The next part, moving to the west, is now made up of the new building and some surrounding playground land round it. There is a short access way, which is used for private parking, running from Fournier Street into the graveyard, between the east end of the church and the Hawksmoor rectory, which itself fronts Fournier Street and which backs onto the new buildings and the graveyard. The graveyard end of this entry is at present fenced off to ensure the new school building's safety and privacy, but it would be possible to open up the walk way round the east end of the church into the graveyard proper by a slight adjustment of the current fencing.

22. Continuing westward, the third part of the graveyard is, at present, a mess. It could, and should, be part of the final western most part, an open space entered from Commercial Street. Instead, it has become a wasteland of nettles and unkempt shrubs. It is not, at present, being used as an open space for public use, as it is fenced off from the new school building and from the existing westernmost area open to the public. It is supposed to be under the care of the Council of the London Borough of Tower Hamlets. No evidence was adduced by LBTH as to how or why they had appeared just to have given up in maintaining this part of the graveyard. Their failure to manage it has meant that it has become, not a natural garden or nature reserve, but an unkempt, uncared for waste area, an inducement for users of the remaining western most part of the garden to misuse what is there. It also has the effect of making the new building look worse, as its open lines and glass through-views are masked by a straggling shrubbery and by nettles and weeds. Proper maintenance and thoughtful gardening could work wonders for this site. This part of the site is not a good advertisement of open space management by LBTH, and a factor which the Rector as landowner might query, as it might well be said that the LBTH have been, and are failing in the terms of their

agreement to manage this open space. I find this part to give, at least, the appearance of having being just abandoned. It showed no sign of any "active management" by the LBTH or use by general public.

23. The remaining part at the western end of the graveyard is open to the public, entering from Commercial Street. Much has been made of it as a necessary open space in a very urban area. On several occasions, both before and during this case, I walked round it, both on my own and with the Parties. Currently, save at lunch times on a hot summer day when office workers were there eating their sandwiches, it presents as a tired and unappetising sight. It appears to be a magnet for drug dealers, tramps, defecating dogs and other persons whose behaviour would cause any parent to think very hard as to whether any young child of theirs should enter it, certainly not unaccompanied. At least in this case there was no reliance placed on the usual wild creatures which patter or flutter through the pages of many planning enquiries: as one objector, Ms McKoen, said in her statement that: **"…a colony of bats have lived in Christ Church roof all the years I have been here. Their foraging area has been greatly reduced by the astroturf and play equipment associated with the school and the buildings site needed for the crypt redevelopment. I have not seen not seen any bats for the last eighteen months".** Even the bats appear to have abandoned this urban space. Ms Thompson in her statement ***(2963)*** refers to: ***"English bluebells such as those seen in Spitalfields Churchyard are a protected species".*** I note in passing that, if they are there, they have survived on a building site over many years, and can only now be on what remains on the surviving graveyard, where they need not be further disturbed, if they can be found.

24. This shows the difficulty in balancing sectional interests. The wish to restore the church roof and empty the crypt for the café development may have put an end long since to the occupation by bats. I will consider later the effect of tree preservation orders in this graveyard.

25. The graveyard has fine trees which are the subject of tree preservation orders. In all fairness, over the years local volunteers have tried, on and off, to grow vegetables and to plant bits of the un-built on graveyard, but it has been an uphill struggle, as can be seen from the statement of Ms McKoen (**3102-3111).** It is prized by residents as being, however rundown, a rare open space right in the centre of London. One of the matters I have been asked to consider is whether the new building, described as a "squashed barn", encroaches illegally on what open space there is in the graveyard, or whether it itself can come under the umbrella of being a structure which a Council could legally authorise to be erected under its open space powers. Ironically, under the *Open Spaces Acts*, an open space does not have to open to be open air, or open to all of the public all of the time. Subject to a size restriction, it could be a reading room, or a rifle range, or a swimming pool, all covered structures built on an open space to which there would have to be some restriction on free movement of all persons. Toddlers would not expect to be given access to a rifle range, nor should they. It is clear that the management of this open space by the LBTH in recent years has left much, as I have said, to be desired. Over the years various attempts had been made to "garden" the graveyard, by boys from a local youth club, and then, by homeless men under a previous Rector. Again, I quote from the statement of Ms McKoen of her experiences in tending the graveyard in 2011: ***"…I worked hard on the gardens pretty much every day, on planting the beds and clearing weeds and rubbish. I also spent a considerable amount of my own money on gardening tools, plants and materials. It was hard work, occasionally very unpleasant (clearing faeces, used condoms, used syringes) and occasionally it felt very dangerous (very drunken homeless men approaching me with their genitals on display)". (3107).*** She felt very hurt when she learned in 2011 that an architects' plan, the Latz plan, which she described as being "commissioned" by the Rector was going to create a new pathway through the

gardens. (Later in this judgment I set out the genesis of this design following public competition and consultations). ***"It involved in removing nearly all of the planting and grass from the area I had been tending, and paving it…I was horrified. Shortly after this I withdrew from working in the gardens …"*** So strongly did she feel that in 2011 she wrote to the LBTH head of Parks complaining about their lack of maintenance: ***"Unweeded beds, dying grass, plants dying /failing to thrive through lack of feeding and watering …the gardens are often not locked at night and this has led to the place being used for sleeping, one of the trees has become a defecation space for groups of homeless men who drink in there all day and sleep there at night".***

26. I am afraid that all this goes to show that when under the public management of LBTH this graveyard has been a failed disgraceful slum of an open space, and not a safe area for local residents or their children (save when their play area was fenced off from the public area). This was not, as described by some objectors " a sacred site", and certainly not as would have been recognised by the parishioners in 1750. For well over a century the public have abused this graveyard. Public management by LBTH has done virtually nothing to stop this.

27. Much time was taken up during this hearing providing measurements to the last square metre as to what percentage of land was being lost as an open space, as to whether measurements should include or exclude the overhanging eaves of the new building. For descriptive purposes only, I have explained the graveyard's overall divisions into the four parts described above. Using the measurements prepared on behalf of the Open Space Party, the overall area of the whole original graveyard was 5,265 sq. metres. From this some 1643 sq. metres became the Victorian school area (31%) of the whole area. This argument concerns the remaining 3,622 sq. metres, of which 971 sq. metres is not in dispute as it is and remains open space for public use. It is what has

happened and is happening in the remaining 2651 sq. metres, which comprise the land on which the new building stands and the wilderness part, at present out of use for anything. Those figures were disputed by the LBTH, but the discrepancies were, I find, to be *de minimis*. The objectors tried to argue that the area taken up by overhanging eaves on the new building should be counted as a reduction of open space. In the course of a site view we all huddled out of the rain under these eaves. We were under cover, but in the open air. I found this argument to be just playing with figures.

28. OUTLINE TO THE RECENT EVENTS

This dispute concerns a building, "the new building", which has been erected west of, but very close to, the existing Victorian school building, built on the extreme eastern edge of the grave yard, fronting Brick Lane. This is still the Christ Church voluntary aided Church of England school. That Victorian school, itself listed Grade 2, although built in 1874 on the disused graveyard, had been built there before the *Disused Burial Grounds Act* 1884 and the statutory restrictions on building upon disused burial grounds came into force**,** and was therefore legally built there. All parties accepted that, so to that extent any complete restoration of the Hawksmoor churchyard vista could not be fully achieved as the Victorian school takes up about a third or so of the original space of the graveyard.

29. This new building, the subject of this litigation, substantially replaced, but stands not within the exact footprint of a previous building, "the old building", which LBTH had erected under their management powers under Open Spaces legislation to serve as a children's playground in 1970. The covered shelter building for this gradually became used as a youth club. As far as use by all of the general public, the open space land on which the "old building"/youth club stood has been the subject of limited public use since it

was built in 1970. Indeed, there have been complaints from local interest groups about the general public having been excluded from the youth club area while it was still functioning as a youth club. The youth club fell on bad days, and the building became derelict. The Rector and Churchwardens of Spitalfields, who at the relevant time were school governors of the voluntary aided church school, worked with LBTH, the other school governors, and the London Diocesan Board for Schools to obtain funding and erect a "new" building, in the churchyard. This new building was to serve the expanding needs of the school, to provide enhanced nursery facilities, and facilities for the wider community. It was built on those parts of the graveyard, all of which, save for the Victorian school, had been "managed" by agreement between the LBTH and the Rector as freeholder of the land as an open space for many years previously. That meant that the land had come under the management of the local council, firstly the Borough of Stepney, then LBTH. The ownership of the land remained and remains as the Rector's. It was, and is, all his freehold, including the land on which the Victorian school stands. The objectors say that the erection of this new building is unlawful, and that there was no power to approve its erection under the Faculty Jurisdiction, notwithstanding that such a Faculty had been obtained before it was built. They want it demolished, irrespective of cost. This, they say, would provide an improved architectural view of the church, being what they say Hawksmoor, its architect, intended. The graveyard could then be suitably re-landscaped. They wish to have the graveyard restored to what it was in 1750. They also queried the legality of the local council's actions in this matter in the operation of its planning decision and on its management of open space land, and the actions of the London Diocesan Board For Schools in obtaining government funding to build it. However, in this Consistory Court, my first consideration must be to consider the legality or otherwise of what was built under a Faculty, "the new building", and whether such a building should have been built. If it should not have been

built, what should now happen to it? Should it be demolished? Have the recent changes in legislation effected the legal position of that new building? Can I authorise this new building to remain? Should it remain, not just in legal, but also on architectural/heritage terms, next door to the Church itself?

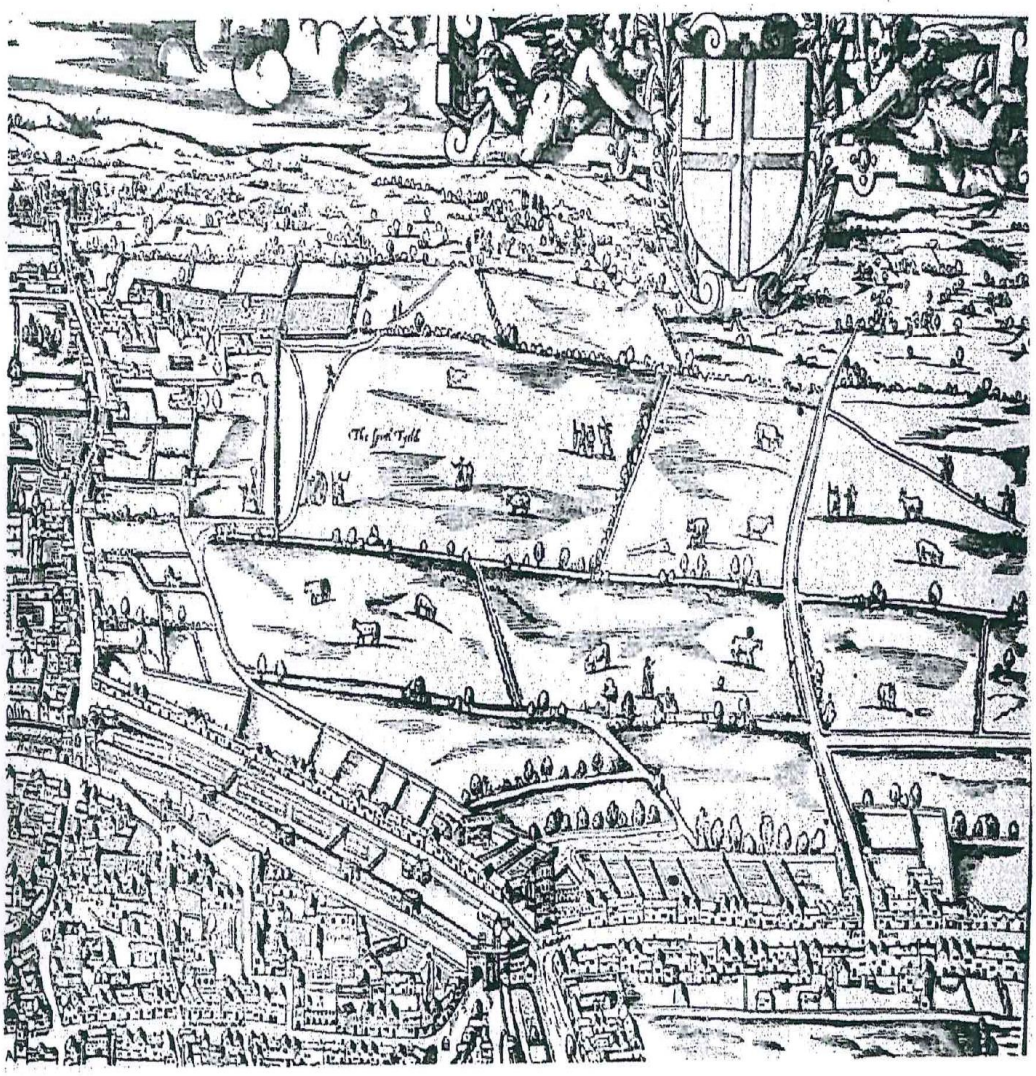
30. **THE HISTORICAL BACKGROUND**

It is necessary to set out below an introduction to the church and its parish in order to give some historic background to many of the arguments, legal and aesthetic, raised in evidence before me. Much appeared in the documentary and oral evidence before me, but so architecturally famous is this church as a building, that it has to be considered in its wider historic and architectural, but changing, context.

31. Unusually for a church, as I have said, less than 300 years old, a brief overview history of how, where and why it was built is necessary in this case. Situated just outside the boundaries of the City of London, the Spitalfields area and its neighbouring area of Norton Folgate, a liberty until early in the 1900s, and which is itself at the moment the subject of a planning controversy, initially comprised part of the land of St Mary Spital, the large mediaeval hospital attached to the Augustinian priory of St Mary, itself standing on or near the Roman cemetery, which bordered a major Roman road leading out of London. After the dissolution of the monasteries, the land was ripe for development, with bricks made in the nearby Brick Lane. The open fields lying to the north of the City boundaries can be clearly seen on Agas's map of 1560-70 and Braun & Hogensburg's map of 1572.

32. However, places do not develop by chance. There was open space, which came to be

02.02.2011



http://www.british-history.ac.uk/

Extract from Agas's map, c. 1560–70

utilised for archery practice and gunnery practice in the Old Artillery Ground, another liberty, and the open space, which came to be used by local cloth-workers as a teasel ground, and, further east, were the tenter fields on which cloth could be stretched on tenterhooks.

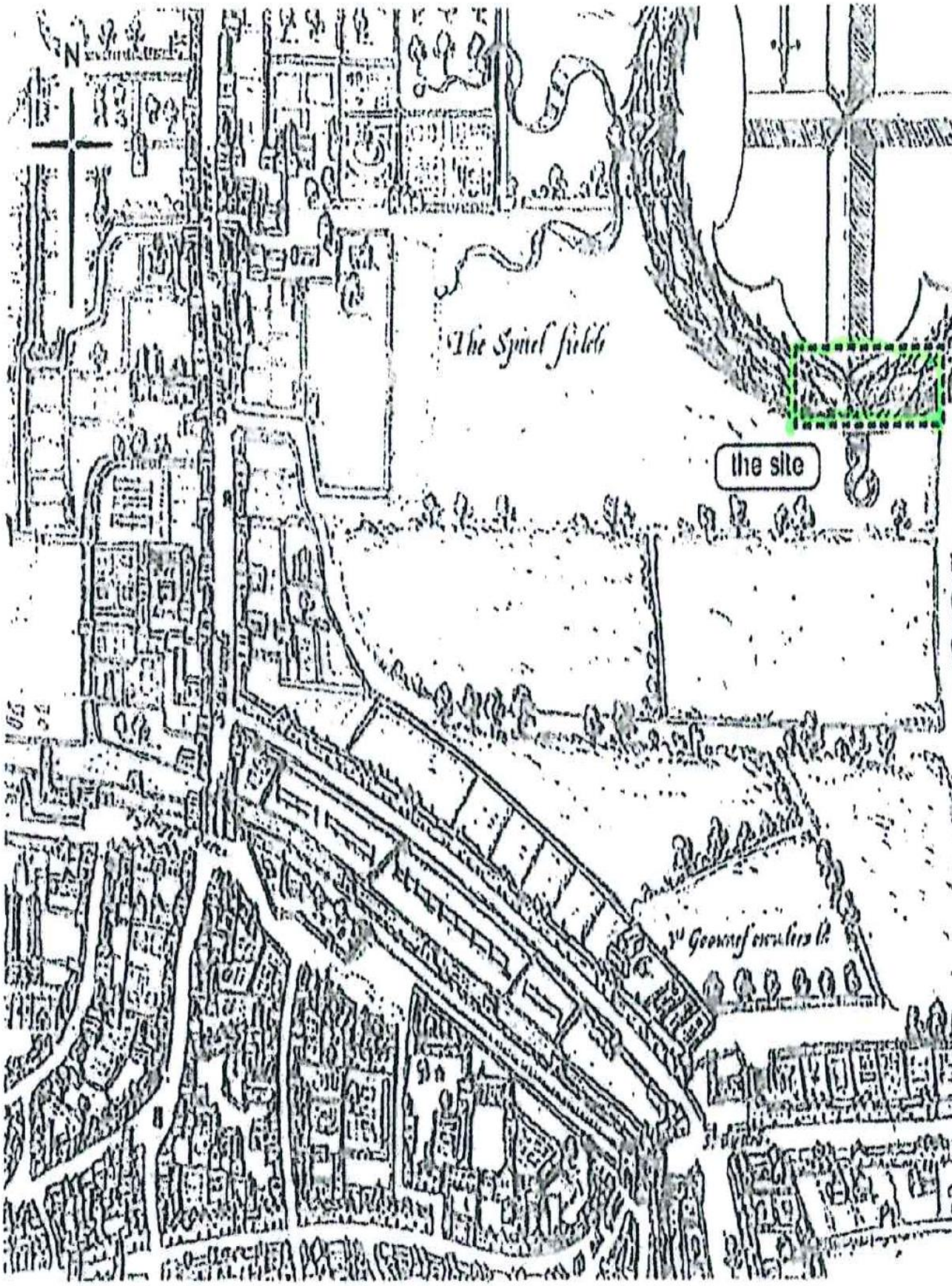


Fig 3 Braun and Hogenburg's Map of 1572

33. The growing development of the site can be seen on the Ogilby & Morgan map of 1681-82. This map shows that there are houses and buildings along the northern side of Fashion Street, backing on to an open tenter field which stretches up northwards to a line of other buildings, which will, in due time, become Church Street (now Fournier Street). Red Lion Street to the West (which will become Commercial Street) is also lined with buildings save for two small openings, which lead into the tenter field. It is on the tenter field that the church and grave yard will be built.

.

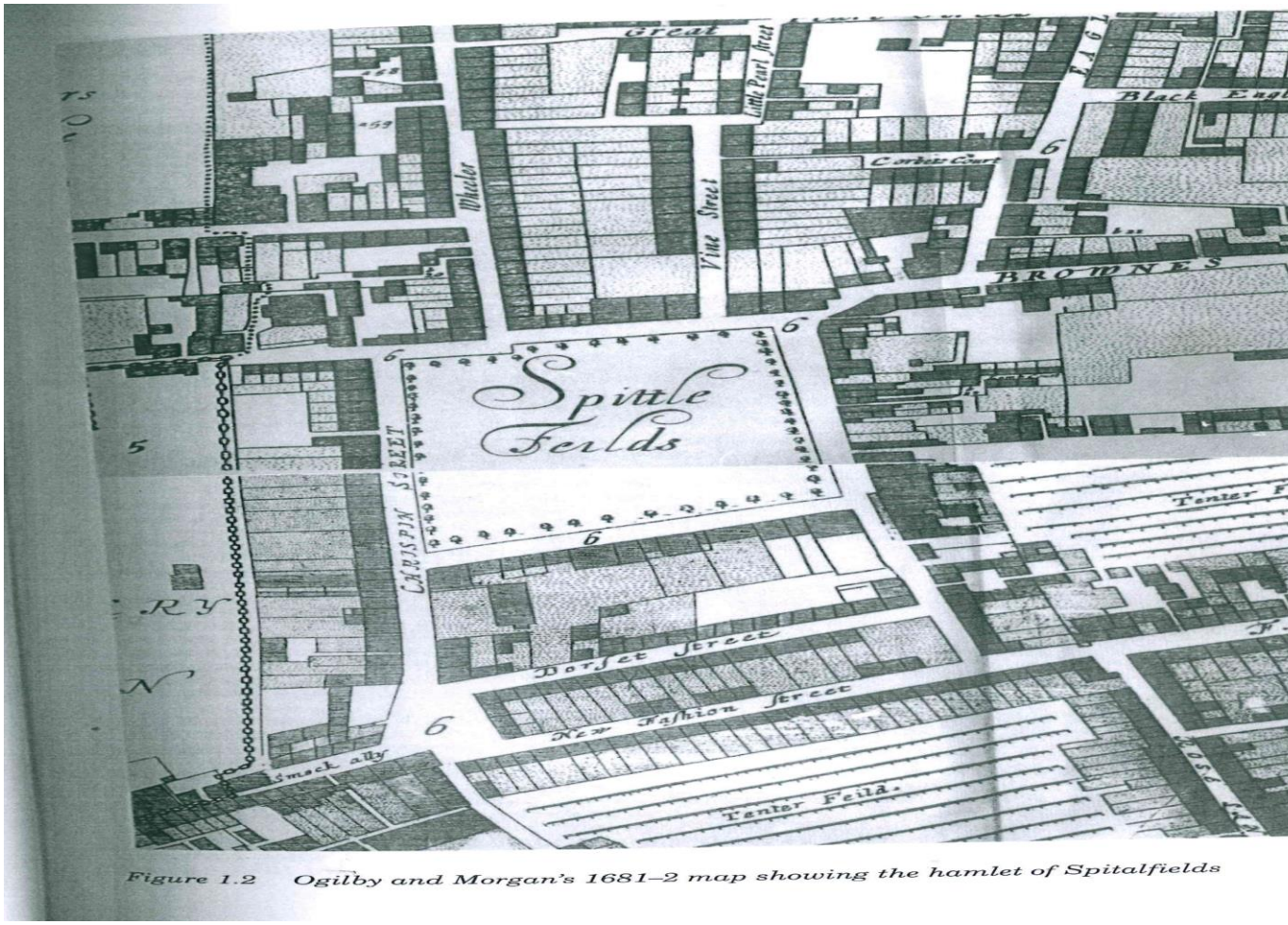


Figure 1.2 Ogilby and Morgan's 1681–2 map showing the hamlet of Spitalfields

34. These are not just matters of passing historical interest. They are the reasons which led to the construction of Christ Church. By 1685 open space so near the City of London, but outside its jurisdiction, invited development, a fact not lost on the seventeenth century property developer, Nicholas Barbon. A

franchise had been obtained in 1638 from the Crown for a market in Spitalfields "for flesh, fowl and roots", which lasted as a major London fruit and vegetable market until the late 20th century. Who would come to live in this new development? Although part of the very large parish of Stepney, the liberties of the old St Mary Spital were outside manorial or parochial control, so that they initially attracted recusants and non- conformists to free enclaves, an early example of such a free spirited resident being Christopher Marlowe. With its cloth-working connections and proximity to the market of the City of London, Spitalfields became a centre for Huguenot immigrants fleeing the religious wars of persecution in France. This tide of Huguenot refugees grew after the revocation of the Edict of Nantes in 1685. Spitalfields became known as Petty France and it became the centre of silk weaving and silk manufacturing. It also attracted unemployed Irish linen weavers. By being outside the boundaries of the City of London, they were able to avoid the restrictive trade practices of the City Guilds. By the early 18th century, the area had some nine French Churches but only two Church of England Chapels of ease. There were also two early schools, one of which became the Christ Church Spitalfields School founded in 1708, and a National School founded in 1817, which later joined it. The existence of those schools becomes more important as time goes on.

35. Although the Huguenots were welcomed and recognised by the Church of England, the times were tense. The potential of a Jacobite rising would be continue to be a real threat for more that another 30 years, and later the Spitalfields silk manufacturers, some 75% of them being Huguenot, realising the importance of demonstrating their loyalty to the British Crown, raised some 2,000 volunteers in the face of the 1745 threat of the Young Pretender. The effect of La Rochelle and the Revocation of the Edict of Nantes had not been easily forgotten.

The government of the day was therefore faced with growing areas of immigrants and nonconformists, who were choosing to ignore the Church of England; parish churches in large parochial areas being by-passed by people who preferred their own forms of worship in their own buildings, often much more conveniently situated than a distant parish church an inconvenient distance away. The rationale for the building of Christ Church must be seen against this background. Fifty years after the great fire of London, the population of the metropolis had doubled. Many City churches had been destroyed in the fire or were still in a dilapidated condition. Outside the City of London boundaries, there were areas with no near or convenient churches in over-large parishes. Spitalfields, being part of the very large parish of St Dunstan Stepney had only two chapels of ease, one, Sir George Wheeler's tabernacle in Norton Folgate, in private hands, which itself became the subject of disputes.

36. The legal difficulties in altering/modifying parochial boundaries were also hampered by a variety of interests (patron, incumbents and parishioners). Proprietary chapels catered mainly for well to do pew renters. While dissenters had no such difficulties in opening their own Meeting Houses, the Tory parsons in the Lower House of Congregation were blocked by the Whig Bench of Bishops in the Upper House of Congregation from discussing the need to create, certainly in London, new Churches.

37. However, the Tory election victory of 1710 allowed the opportunity of the high church party to consider how, especially in London, non-conformity and liberalism could be countered in a way which provided access to more organised provision of buildings for the Church of England. For once, piety and pragmatic politics went hand in hand.

38. After the Great Fire of London, a fraction of coal dues had been used to finance the rebuilding of St. Pauls Cathedral. Some monies looked like being left over and Parliament was asked in February 1711 whether such funds could be used to rebuild the parish church of Greenwich, its old church having collapsed in a storm in November 1710. A parliamentary committee considering this petition expanded their debate to consider: "*what churches are wanted within the Cities of London and Westminster and the Suburbs thereof*". Seeing how the political wind was blowing, which, rather like the National Heritage Lottery Fund applications these days, might produce hard cash, other parishes petitioned the House of Commons in a similar way. The *New Churches in London & Westminster Act* 1710 paved the way for the provision of moneys for new churches.

39. Francis Atterbury, then the High Church Prolocutor of the Lower House of Convocation, drew up a scheme for building new churches in London. It was commended by Queen Anne to Parliament on 23rd March 1711. This was the genesis of the Commissioners for Fifty New Churches.

40. The initial 1710 Act of Parliament authorised the raising of coal dues, additional to those required to finish St. Pauls, for the building of what the Commissioners, appointed later to implement the Act, calculated on the basis of population, to be 72 additional churches; later this had to be reduced to 50. These were to be grander than the earlier Wren churches and to be: "*built of stone and other proper materials…with towers and steeples to each of them".* The Commissioners had to acquire the land for the new churches and oversee their building. Later Acts, the *Churches in London & Westminster Act* 1711 and the *Building of Churches in London & Westminster Act* 1714 dealt with the formation of the new parishes which were, as was the case in in Stepney, to be carved out of larger old parishes. Section XXXI of the *Churches in London & Westminster Act*

1711 forbade intramural burials in the new churches as injurious to public health, a prohibition subsequently totally ignored over the years by the Christ Church parishioners, as will be seen below in the terms of the various Orders in Council requirements to close the churchyard at Christ Church, and the need to empty the crypt of just under a thousand bodies as part of the modern restoration of the church. There also had to be statutory provision in 1715 for the endowment of the livings attached to these new churches.

41. Of these planned 50 churches, only 12 were built. The 50 Churches Commission was disbanded in 1758. However, the fall of the Tory government, the return to power of the Whigs on the death of Queen Anne in 1714, the defeat of the Jacobite threat after 1745, and changing tastes, architectural and political, meant that the architectural style of the Commissioner Churches became within a very few years a matter of ridicule. The Baroque had given way to Palladianism, although as Professor Downes has written, Hawksmoor himself, whatever his "contempt and hatred" of Campbell and neo-Palladians, was not uninfluenced by their architectural vocabulary, while also considering the earlier influences of Alberti. However interesting a consideration of the architecture of Christ Church itself (altered in Victorian times and restored) may be, I make it clear that the church building of Christ Church itself is not the subject of this case. It remains restored and renewed and in use. This case is about the surrounding graveyard. This is <u>not</u> a case about demolishing, altering or selling a Grade 1 listed church. The objectors are seeking to restore the surroundings of the church to a pre-lapsarian state to which they think Hawksmoor would have intended it to have looked.

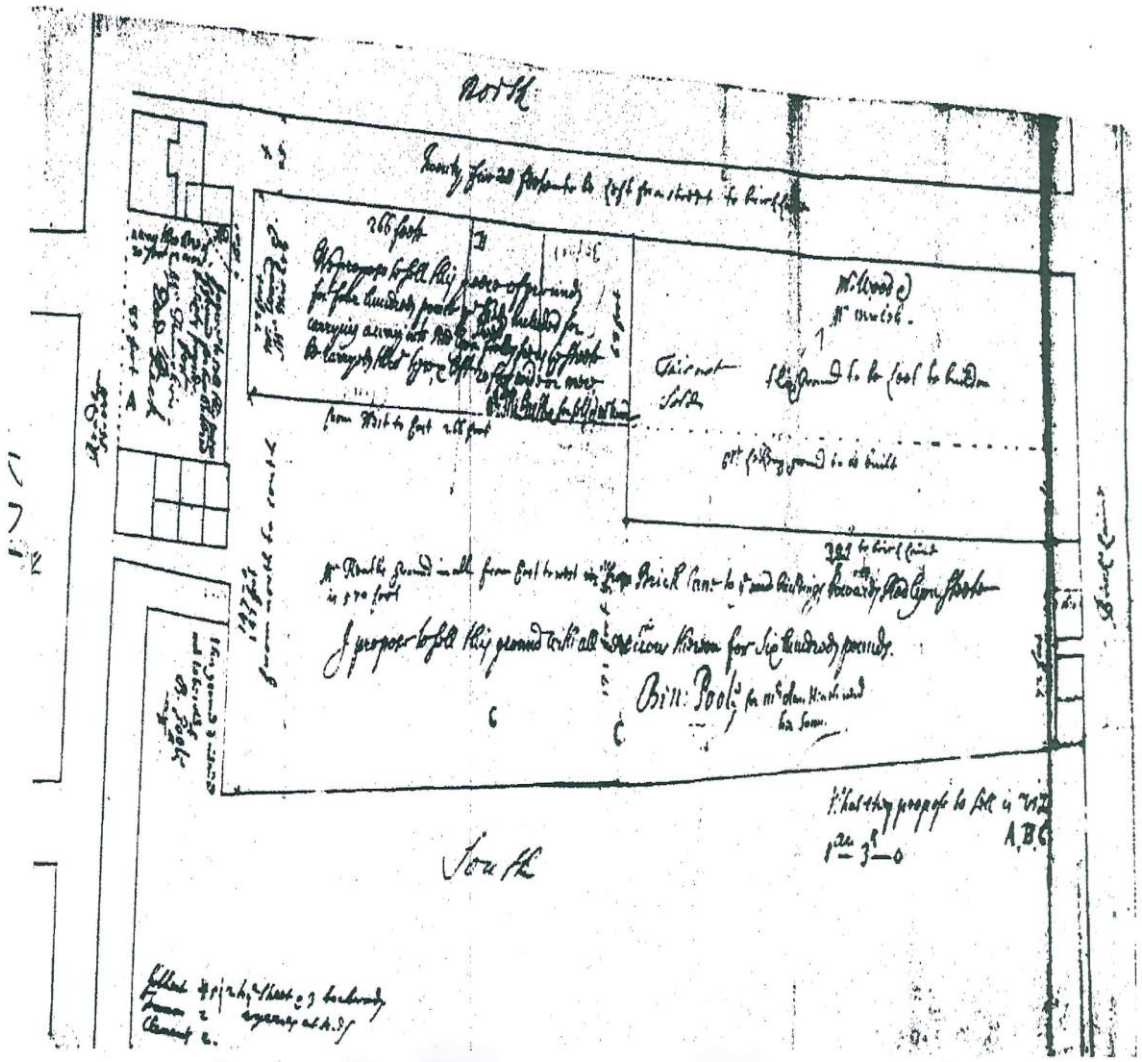
42. THE HISTORY OF CHRIST CHURCH SPITALFIELDS

It is against the above background that the 50 Churches Commissioners began to plan the building of Christ Church. By November 1711 the Commissioners

had decided that the original parish of Stepney was to be divided, so that new parishes could be formed, one of which was Christ Church Spitalfields (and there was to be another Hawksmoor Church, St George in the East, also constructed by the Commissioners). Then there was the problem of dealing with the patron of St Dunstan's, the existing Stepney parish church, that being an Oxford College. New parish boundaries and the provision for the division/provision of stipends had all to be sorted out.

43. The land on which Christ Church stands was purchased in 1713 by the Commissioners. It had been open ground with some "old, ruined and un-tenanted tenements". It had been sold in the 16th century by the Manor of Stepney, and the tenter ground, with its gooseberry bushes and tenter racks, passed through various hands. Originally owned by a Sir William Wheler of Datchet, it had come into his family's possession via an Elizabeth Wheler who had married Richard Hanbury, a goldsmith and the land's previous owner. The convoluted series of trusts and ownership history I set out in somewhat simplified detail. Sir William Wheler in 1675 had divided the land into seven "schedules", one for each of his seven daughters. Two of his daughters held two tranches, on which would be built the church. From their successors in title the three separate parcels of land on which would stand the church and its graveyard were bought for £1260 in November 1713. These two "schedules" belonged to May Vandenancker, née Wheler, and her sister Katherine, now Mrs Balch. She was a minor until attaining her majority in 1716, so that her trustees, and those who had purchased another part of her "schedule", in 1708 had to apply to the Court to authorise its sale for the land for the church. The churchyard land was sold on by Martin and Mary Vandenancker in 1687, when it went through the hands of a distiller, and then to a Mr Heath, who left it to his widow in 1711, and she and her son sold it on to the Commissioners. The third tranche of the land which was to make up the church and churchyard was

leased by the Vandenanckers to weavers, who later joined with the life tenant Martin Vandenancker, to sell their portion to the Commissioners. This somewhat convoluted history of land ownership resulted in the '50 Churches' commissioners acquiring the rectangular plot of land for the building of Christ Church Spitalfields and the provision of its graveyard in a developing area when Church Street (now Fournier Street) were about to be built. The initial site can be seen on what appears to be a contemporary sketch:



From this can be seen a rough draft of the site immediately prior to the building of Christ Church. This can also be seen on Gascoyne's map 1703.

44. It was only in early 1714, following representation from Spitalfields' parishioners themselves, did the Commissioners' surveyor, Nicholas Hawksmoor, produce the design for this church. Given the aim of providing churches with towers and steeples aiming at providing a dominating Anglican church building in a landscape inhabited by nonconformists, radicals and the un-churched, let alone Huguenots, to demonstrate the presence of the Church of England, this design did just that. Raised by vaults above ground level, thus providing for the crypt, and with a magnificent west steeple, itself subsequently altered, damaged and repaired and not now as originally totally designed, this building shows the *terribilità* of the Baroque, demonstrating in Vanbrugh's words: "the awful majesty" of God.

45. The Open Space Parties wish to achieve what they consider would have been Hawksmoor's aim at spatial domination, not just by the powerful design of the steeple, but by the clearance of the graveyard space round a building, which was originally designed to produce a church demonstrating political and Anglican control by using landscape and architecture.

46. The original church was to cost £9,129.16s. The foundation stone was laid by Mr Edward Peck, a local dyer, and himself one of the original 50 Church Commissioners, in 1715. Not only was he to have a prominent memorial in the church itself, but he obtained in 1727 a family vault: so much for the 1711 Act's prohibition of intramural burials. As will be seen, many, many others followed suit.

47. Lack of sufficient revenues from the coal tax, debts, theft (a labourer had to be hired for 63 nights in April 1720/21 for "watching the lead", a problem with which many current churchwardens will be all too familiar) and vandalism delayed the building work, and changing taste led to modifications to the design. The money ran out and work stopped in 1719. Until the mid 1720s there was some doubt as to whether the original steeple could even be built. Hawksmoor had to chivvy the Commissioners in April 1720 for money to protect the carcass of the church from weather damage. Construction went on erratically, depending on the availability of funds from a declining income from official sources. By 1723 the parishioners themselves petitioned the Commissioners to complete the church. At last, it was at last consecrated on 5th July 1729.

48. Ten years late and more than four times over budget, Hawksmoor' s Christ Church Spitalfields was completed at a final cost of £39,162.17s.8d. A massive building in white Portland stone, utterly different from the brick of the surrounding houses, intellectual and complex, ferociously Baroque, described by Professor Pevsner as "megalomaniac".

49. But then changing architectural tastes and differing political opinions were ridiculing this Baroque building, which was being regarded as a rather old fashioned joke. Palladianism was the rage, and taste. By 1734, Christ Church was being described as "*one of the most absurd piles in Europe*", having been built at "*monstrous expense*".

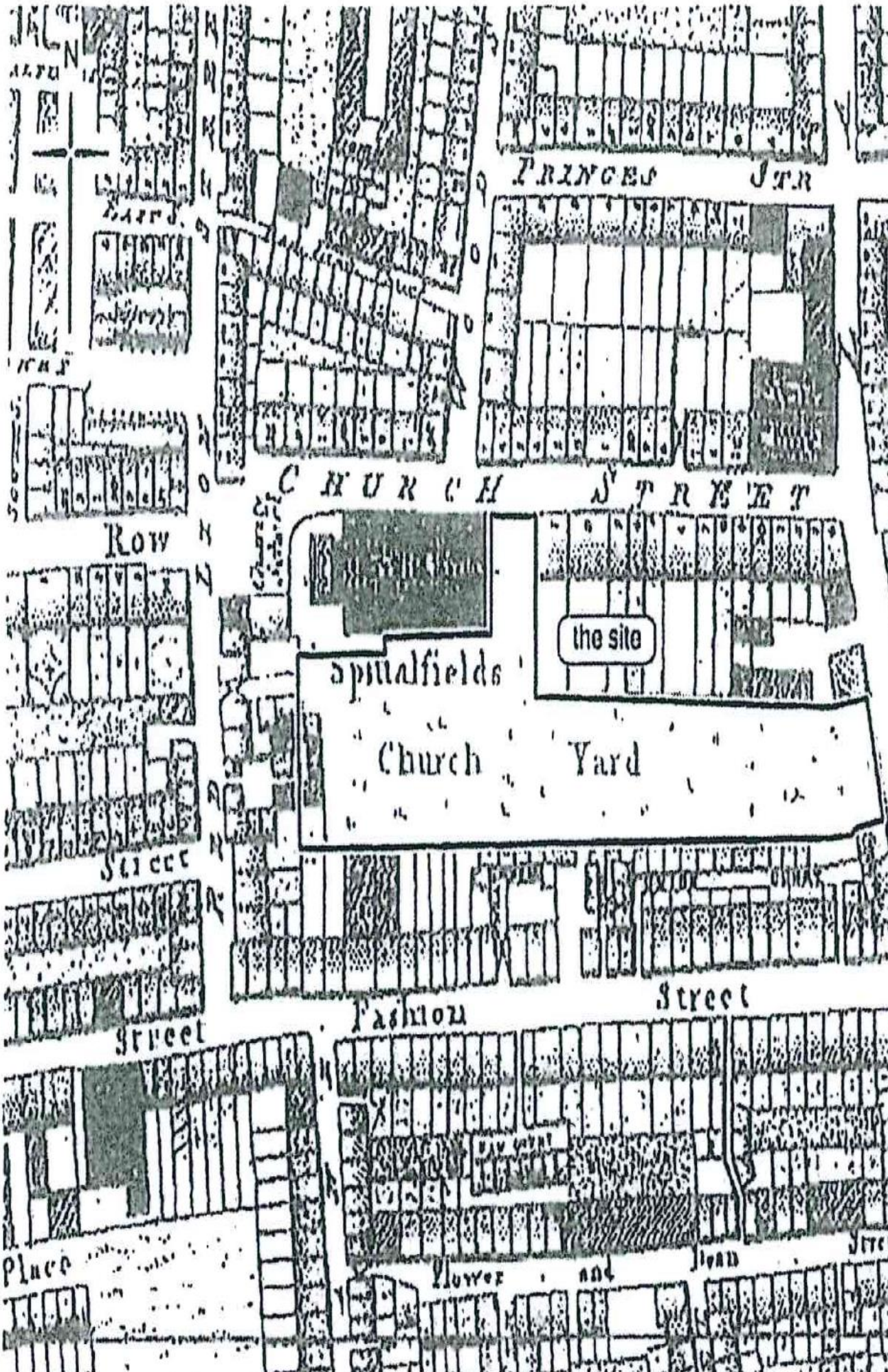
50. What was built was a very, very large church, orientated liturgically and geographically east – west. Its northern flank was immediately parallel to Fournier Street, and is separated from the church by only the width of a narrow footpath, on which stands the Hawksmoor rectory immediately east of the

church, separated from it only by a small entrance way which would have led, beyond such service outhouses, into the churchyard, which appears to have originally formed a long rectangle running from the back of the houses, originally fronting Red Lion Street, right back to Brick Lane. There was a gap in the buildings at the west end of the Church to allow access to the church via imposing steps. The north, together with a short north-south dog leg fronting Brick Lane, and south sides of the Churchyard were, on the Rocque map, lined with buildings by 1746.

Rocque map 1738-1746

51. In 1779 the Spitalfields Vestry decided to replace the brick wall at the easternmost end of the churchyard (the gap, it would seem, where the school was later to be rebuilt) with an iron fence, so until then it would seem that entrance to the churchyard was blocked that way and could only be gained from the south western side of the church's main entrance. By the late 18th century the churchyard consisted of three parts for burials, "the Best Ground" at its western end, "the Middle Ground" and "The Lower Ground" at the east end, not to mention the burials in the crypt. The vestry had to enlarge the churchyard area in 1791 "*heretofore set apart and appropriated for the interment of the poor*" by the addition of a strip of ground "*under the South wall"* and a row of trees were to be planted by way of boundary to ascertain the same. It would appear that the tree line was to demarcate poor people's burials from burials of the better sort.

52. Looking at Horwood's maps of 1792 and 1799, in comparison to the Rocque map, it appears that the houses running along the Southern side of Fournier Street had begun to nibble into the churchyard to extend their back gardens/yards. Indeed by 1799, buildings had begun to appear at the rear of these gardens. There appears to be no garden layout in the churchyard.


CHURCH STREET
Row
the site
Spitalfields
Church Yard
Street
Fashion
Street
Street
Place

53. By 1874 such gap as there might have been on to Brick Lane from the graveyard was filled in by the rebuilt church school. By then the churchyard was surrounded by buildings, both residential and business, save for the opening which had been made by the demolition of the western side of Red Lion Street when it was redeveloped into Commercial Street. The buildings which lined each of the western sides of the west church steps, including the school premises which had moved there in 1782, were demolished to make way for street widening. Until then it would seem that only by standing in the churchyard itself could a view of the southern flank of the church be achieved, as that view from outside would be blocked by the surrounding buildings, save for the small gap on Brick Lane once the Vestry had replaced the brick wall there by an iron fence, which, as I have noted, they did in 1779. The school was a Church of England school, so that it was no surprise that it moved from the western part of the church land to occupy by 1874 the eastern end of the by now disused part of the churchyard.

54. In this Consistory Court I remind myself of what Hawksmoor was actually paid to do. He was employed to build a parish church, true an architecturally dominating one, for which his interests and training had wonderfully fitted him to do. However, he was not here employed to build a stately home, nor a mausoleum, nor a redesigned Oxford College, nor a stand-alone architectural set piece. His building was to be a functioning Anglican church, albeit of an 'in your face' design. This church was to witness to the faith and provide for its parishioners in baptising them, educating them, marrying them and burying them. In spite of its many, many vicissitudes, which I set out below, Christ Church Spitalfields and its clerics have plodded on through good times and bad times, trying to do just that. There have been very, very bad times for this church, but those who have helped to save and restore the building should remember just what they were saving and hoping to restore, namely: a

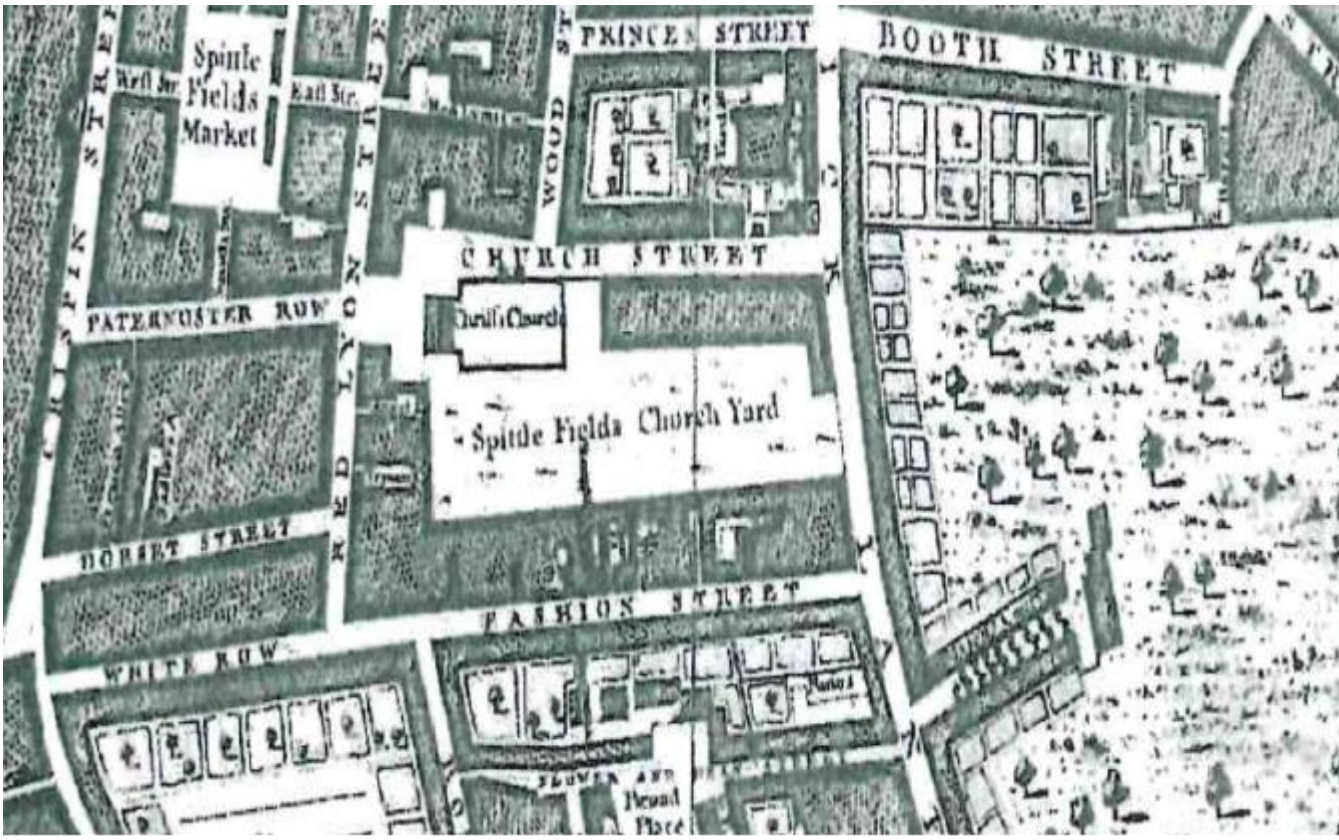
functioning parish church building. Maybe, had it not been such a fine building or not designed by an architect who was becoming fashionable again in the 1970s when the surrounding properties were being saved and increasing in value, the fund raising supporters and residents would not have been so interested in restoring the church, but might have raised money to spend on other worthy projects elsewhere. Maybe. However, for whatever reason the support group began to try to save a church building which was, structurally and as a parish, on its last legs. Maybe they would have been happier, with hindsight, saving and caring for a completely defunct church in which they could have had the freedom to operate as they wished, rather like the former blitzed St John's Smith Square, now a concert hall, but that did not happen, and they are where they are. Equally, the Rector and P.C.C. were able to return and function in a superbly restored building, thanks to the efforts of the fund-raisers without whom the church would not have survived. Both groups appear to now find themselves trapped in a symbiotic relationship which, currently, is under severe stress, having, at one time, been a happy and constructive one.

55. DEVELOPMENT OF THE PARISH OF CHRIST CHURCH

As the church was being built, the surrounding land was being laid out by residential developers as Hanbury Street and Fournier Street between 1718-1728. The church was aligned east/west parallel with Fournier Street, and, indeed, the northern steps were later altered when, it would seem, a sliver of church land went to road widening so that they were closed , and the area under the steps provided more vault space Nearby streets were also being added about this time. Street lamps were introduced in 1745/6. This development can be seen on the Rocque's map of 1746.

This map is of some interest, given the stated object of the Open Space Parties is to return the graveyard to what it was in 1750. This map, of the scene four years earlier than that chosen date, shows no trees, and a number of grave

mounds; and certainly no garden plan. It is a working graveyard. Given its heavy use, this may well have meant the removal and sale of bones from the graveyard for fertiliser to London suburban nurseries, a not uncommon practice. I was left, evidentially, unsure just why the date of 1750 was chosen by the objectors, but that was what I was told in evidence, so that I have to look at the nearest contemporary evidence of what is was like then. That is the 1746 Rocque map *vide:*



It shows no gardens but numerous grave mounds. Given that I have been told that this grave yard contained in excess of 66,000 bodies in just over 200 years, the Alexander Pope line of 1717: "And frequent hearses shall besiege your gates" is apposite. The evidence I heard as to garden design bore, I find, no reality to what the churchyard looked like at least in 1746. What the objectors were appearing to want was an enhanced, improved version of a garden graveyard, not what actually had been there in the mid 18th century. Rather as

the current restoration of the church building in itself is superb, but it is not a totally accurate reconstruction: for examples: no box pews, no credence boards with the Creed, the Lord's Prayer and the Ten Commandments as required by the ornaments rubric, a café in an empty crypt, under-floor heating, electrics, large blue sofas in the aisles, a really enormous sound system etc., all perfectly understandable and necessary for its current role and churchmanship (though possibly not featuring in the FoCCS Christmas cards of the current church interior), but I find that the objectors have persuaded themselves that their views of what could be designed for the churchyard were what Hawksmoor would have thought of and designed, if he had had a free hand and was not building to contract. I hesitate to use the term "pastiche" for a restoration based on research from what scholarly records, paint traces and investigation and removal of 140 years of alterations as remained, but, in reality, this magnificent shell of a church has been subtly and excellently restored as a different building. The demands of Heritage Lottery Fund money to ensure wide public access means the church can now be used as a concert venue, a conference venue as well as a church. The crypt has a café, not several hundred bodies. The acoustics are superb. It still looks like a Hawksmoor church risen from dereliction but, actually, there have been many subtle changes, as indeed the Victorians in their day also made radical alterations to the fabric under Ewan Christian, not to mention earlier tinkerings and necessary repairs. Whatever may be said as to the purity of their vision for restoration, whenever it suited the modern restorers to adapt or to improve, they did so. There may be excellent, necessary, commercial and practical reasons for so doing. The end result is magnificent, but it is not pure, unaltered, original Hawksmoor and it would be misleading to claim otherwise. What has been restored is a working church, intellectually and tastefully modernised, from a substantial original carcass, restored to allow multiple use, secular and ecclesiastical, but it is not a completely original building.

To think otherwise would be a somewhat romantic delusion.

"Restoration" here of the building meant the introduction of improvements and subtle changes to a building saved from ruin.

56. At highest, the arguments of the objectors rests on a wish for an open churchyard, thus allowing the whole southern flank, cleaned and repaired in 1999 when the formerly removed south steps were rebuilt, of the church to be seen as a whole. There may be aesthetic arguments now for an improved modern garden design in the un-built part of the churchyard, but I see no evidence of any garden design by Hawksmoor being intended for or completed at this church. I am reminded of Hawksmoor's thwarted wishes in respect of St George's Bloomsbury, another great Commissioners' church, when he tried to persuade the Commissioners to buy and demolish a couple of houses so that the view of the church could be improved; the Commissioners refused to spend money for that. Many architects must have had the experience of clients with shorter pockets and less good taste than their commissioned architects might have wanted.

57. **PARISH LIFE**

Once built and consecrated in 1729, Christ Church might have hoped for a substantial and financially supportive parish congregation. That was not to be. The predominance of silk weaving suffered a number of crises, as French silk came to be imported during periods between the Anglo- French wars. There was silk smuggling to avoid excise duty. Slumps in trade led to depression, unemployment and protests; the weavers rioted to the point that the military had to be called in in 1719, and, indeed, in later disputes. Trade decayed and rents fell. A workhouse was established in 1774. In 1769 there were violent

riots by the weavers as price controls had removed incentives. The Spitalfields' population began dropping during the 18th century as residents moved out to more salubrious suburbs. (A pattern repeated in the mid 20th century when the Jewish population of Spitalfields dispersed to North London and the Essex coast). The differential between market rates and fixed labour rates became so distorted that what was left of the silk industry had left the area, and only those catering for the higher margins in luxury goods survived. The parish was going steadily downhill in economic and social terms during the 19th century. Cholera was an acknowledged risk. The silk weavers' trade seriously began to fail after the *Spitalfield Act* 1824 was repealed, ending some 50 years of wage controls, and Cobden's Treaty of 1860 encouraging the import of cheap, duty free French silk sounded the death knell of the silk industry in the parish, but the cloth skills of the area were being carried on by a new influx of emigrants: Jews escaping the pogroms of Eastern Europe. Small scale clothiers, tailoring and furriers now emerged. Abandoned Huguenot churches and Meeting Houses were converted into Synagogues. Thus, Christ Church again found itself in a position where it had to cope with the majority of its parishioners not being Anglican. The memorials now inside Christ Church show the efforts being made by the Diocese in the 19th century to provide scholarly clerics, lecturers in Hebrew at the new King's College London, to integrate with the predominantly Jewish population living in the parish. The church contains memorials to many of these clerics, moved here from the nearby Episcopal Jews Chapel. Trumans Brewery and the commercial growth of Spitalfields as a fruit and vegetable market for the metropolis, with the very close mainline stations, the Great Eastern, then Liverpool Street railway stations, providing transport links encouraged a new kind of urban development. By the mid 19th century road improvements had whittled away land at the church's west frontage as Commercial Street, redeveloped on the line of the old Red Lion Street, now provided a busy urban through road immediately to the west of the church, so

that the buildings which closely packed along Red Lion Street on either side of the steps by the church's west entrance were demolished, and this entailed demolishing the 1782 church school, which had stood there adjacent to the parish pump house. As mentioned above, it was ultimately rebuilt on land at the east end of the disused graveyard in 1874, where it remains as a listed building still functioning for its original purpose as a church school.

58. The crypt, too, had undergone changes. Since Mr Peck had obtained his family vault in 1727, there had been continuous burial in the crypt, presumably of the richer sort of parishioners, whose family could afford it. It is clear that at least some of the Huguenots were christened, married and buried in the church or churchyard, although others may have chosen to attend their own services in the many Huguenot chapels in the parish, though as assimilation continued this practice may have declined.

59. **THE VICTORIAN PARISH**

The graveyard was finally closed in the summer of 1859, and there was a Faculty **[1-4]** by which the then Bishop of London authorised the graveyard to be used as: *"a lawn or ornamental ground …to secure an open space in the midst of a crowded and dense population*". In spite of my requests, I have been provided only with an illegible photocopy of this document, all Parties saying that "its details did not matter"**.** Given that the Parties had chosen to place this illegible document in the bundle, I had to assume that it served some purpose relevant to this litigation. Struggling through it, I note that its main purpose was to incorporate some land, then in the ownership of the Commissioners of Works and Public Buildings who were willing to grant a lease of it, bordering "the new" Commercial Street into the burial ground, and railed off. This land was to be levelled up to the graveyard height. Interestingly "public notice in writing affixed upon the door of the parish church" was considered proper notice. It

was clearly indicated that this ground, now forming the currently open western part of the graveyard was not consecrated, and there had to be a clear demarcation between the consecrated and un-consecrated ground. Although the word "lease" is used there are no terms in respect of it. The aim of this Faculty appears to be that the graveyard area will be extended by the addition of this extra strip of land on it extreme western edge. In the event in the present case there is no dispute but that this parcel of land now still forms the open garden area currently used by the public and not built on. His strictures as to none of the "graves, gravestones, monuments or tombstones" being disturbed during this work was to become a dead letter, as will be seen below.

60. **The graveyard was closed for burials, but it was not deconsecrated, and there begins the basis for this current case.** As I have set out above, this church, its graveyard and the parish have seen a variety of social and economic changes. What was envisaged by the then Bishop of London did not freeze the graveyard for ever as a secure open ground. It was not deconsecrated, sold or given away. It remained as part of the Rector's freehold. Rector after Rector of this church was and is the legal owner of this graveyard. Faculty succeeded Faculty over the years. Within 15 years about one third of this graveyard became built on and used as the current Church school. Competing needs had to be balanced, then as now.

61. **DECLINE OF THE PARISH**

During the 19th century the parish population rose again, but property values fell, reflecting overcrowding and multiple occupation of housing. The area itself was becoming a rough, drunken slum. The market opposite the church attracted casual labourers. There were other markets in Petticoat Lane and Brick Lane. The graceful 18th century houses became overcrowded tenements. One of Jack the Ripper's victims, all of whom, it is said, lived in the parish, was

murdered opposite the church, having drunk in the public house still next to the Church, the Ten Bells, itself a reference to the former ring of bells in the church steeple, itself augmented from eight to ten (subsequently all melted in the fire of 1836 but replaced in part from another demolished church in 1972). By the late 19th century, the parish was notorious as a run down inner city slum. Local government re-organisation resulted in the merging of the liberty of Norton Folgate into the civil parish of the London Borough of Stepney in about 1900, (or maybe not as current development objectors are claiming). The Borough of Stepney together within which was the parish of Christ Church, was in turn re-organised into the London Borough of Tower Hamlets in 1965. I set out the above to demonstrate how the needs of a parochial area change and develop over the centuries. The Victorians later built other Anglican churches in the area in the hope of reaching a growing population, for instance in 1860, St Stephens, but this was demolished in 1930. Christ Church soldiered on.

62. SUBSEQUENT HISTORY OF THE CHURCH

As the new parish of Christ Church Spitalfields underwent changing fortunes during the 18th /19th centuries, there were varying alterations to the church building itself. Rarely, in my experience, can vestries/ PCCs leave any church alone to its own devices. They are for ever tinkering, repairing and re-ordering, as Chancellors are only too aware, for such alterations as are thought to be necessary or fashionable. In 1743 the Christ Church Vestry resolved to remove the north side steps; wainscoting was installed in the church in 1763; substantial repairs were effected in 1797, apparently at reasonable cost. The church spire was simplified in 1822-3, and there were internal repairs and re-decoration carried out at that time. These were acrimonious, the costs and the personnel being involved were in issue, and feelings ran high. How these repairs were financed and contracted obviously festered away in the minds of resident

nonconformists burdened with having to pay the parish rate, and seeing it used for additional things not relevant to them. Among the repairs and redecorations then done, not perhaps surprisingly for a parish heavily involved on the textile industry, were "hangings: *"rich crimson genoa velvet for the front of the gallery…rich gold silk fringe for the doors … ..stout crimson silk and worsted damask for the pew …best in grain crimson moreen for curtains round the national school pews*" and as for the communion table: "*rich crimson genoa velvet, real gold lace on edges, real gold fringe round the hanging and a rich real gold glory in front",* never mind *"the gorgeous cushions and rich curtains"* for the parish officers' pews; all funded from the parish rate. As it turned out that the tradesmen used for this work were, all but one, members of the Vestry, and the money to pay them had been raised by a loan for £5,000 at 5%, the lenders being mostly other vestry men, and that no attempt had been made to borrow at a lower rate, the repayments via promissory notes of £100 to be re-paid out of the parish rate. It was legally challenged, not surprisingly, in a parish peopled by non-conformists and dissenters, who objected to paying the church rate anyway. People would not pay, and were summonsed for non payment of the rate. The Magistrates said it was outside their jurisdiction; the Bishop of London approved the borrowing at 5%. Eight inhabitants still refused to pay, and were cited in Doctors' Commons. Public meetings were held, so that gave rise to a Consistory Court to deal with the affairs of this church. In 1827 the Consistory Court decided the levying of the church rate for those purpose was legal. That was a somewhat brave decision in the years immediately before the *Great Reform Act* 1832, but, in the event, the matter was compromised. In a period of growing agitation leading up to the *Reform Act* 1832, the anger felt by the disgruntled non-Anglican rate payers in the parish of Spitalfields was shared more widely. The matter festered away (the promissory notes being paid until at least 1835) but was raised in the Hobhouse Parliamentary Committee on Vestries in 1830, when the extravagance of the gold lace and the crimson velvet were specifically complained about, it being

said that: "*not even the dress boxes in Covent Garden had more of fringes and ornament*". If nothing else, these hangings must have given a lot of local employment and acted as an advertisement for Church fittings locally manufactured. All this led Parliament to a change in the law with the passing of the *Vestries Act* 1831, which tightened up on vestry elections and auditing of vestry accounts. As a footnote to this whole episode, it may be noticed that one of the churchwardens in office at the relevant time had failed to settle his accounts, and had absconded with £300.

63. Christ Church then suffered a serious fire in 1836, which damaged the upper woodwork, masonry and clock. The steeple was then struck by lightning in 1841. All this entailed redecorations in 1851, when the original altar piece and later communion table were sold. Then, in about 1866, there was a radical re-ordering and alteration carried out by the architect Ewan Christian. The side galleries were removed, the side windows altered, the box pews were removed (The Victorian reredos, which flickers through this case, may date from this time). In 1880, they proceeded to chamfer the corners of high bases to the nave arcade, thus destroying Hawksmoor's original proportion. As Professor Downes subsequently wrote in his book on Hawksmoor: "*the loss of the galleries, the side entrances and the steeple ornaments and the lowering of the side windows have damaged Christ Church irreparably; nevertheless it remains a compelling masterpiece as any of the churches*". The subsequent modern restoration has attempted to restore and re-create, at least in part, what was then lost. I set out this history to show how the church has subtly mutated during its existence. It was not an untouched Hawksmoor building until it fell into disrepair.

64. By the 1880-90s the parish had become a byword for deprivation, and the graveyard had become a magnet for down and outs. The then Vestry

was clearly finding that it could not manage (or afford?) to deal with this problem. Outside assistance became necessary.

65. By 1891 the disused (but still consecrated churchyard) came under the "protection", at least for a short time, of a body known as the Metropolitan Gardens Association (of which more later). That does not appear to have been a great success, and the churchyard, albeit open to people using it, appeared to remain an unsavoury and unhappy place.

66. In Jack London's *The People of the Abyss* (1903) the state of the church yard is described as what he terms Spitalfields Gardens at a mid afternoon:-

"The shadow of Christ's Church [sic] *falls across Spitalfields garden and in [the] shadow… I saw a sight I never wish to see again …no flowers in this garden …only grass …we went up the narrow gravelled walk. On the benches on either side was arrayed a mass of miserable and distorted humanity…it was a welter of rags and filth, of all manner of loathsome skin diseases, open sores, bruises, grossness indecency, leering monstrosities and bestial faces".... "Those using the gardens could only sleep there during the day….on the pavement by the portico of Christ's Church where the stone pillars rise towards the sky in stately row were rows of men…all too deep sunk in torpor….those women there….. will sell themselves for thru'pence or tu'pence or a loaf of stale bread"*

To the locals of the parish, the churchyard became known, not for nothing, as "Itchy Park", a description arising from its habitués, which it has not shaken off. It is noticeable that some of the current outreach work of Christ Church is still for the alcoholics and prostitutes of the area.

67. By the mid 20th century the Jewish population had mainly moved out of the parish, but was, in turn, replaced by Bangladeshi immigrants, also

specialising in the textile trade. Some old meeting houses and synagogues became Temples and Mosques for the new residents. Even now, the manic building development round Spitalfields is bringing a change, even to this most recent local Bangladeshi community, who began arriving in the parish in the 1970s and continued the tradition of textile working. Even now that is changing, and immigrants from Eastern Europe and Somalia are coming to live here as many Bangladeshi families move out, some returning only to work here. Now their Bengali restaurants in Brick Lane cater for tourists and residents. These changes can be evidenced from one building very close to Christ Church: on the corner of Fournier Street and Brick Lane stands the Jamme Masjid Mosque. That building started life as a Huguenot Church in 1743, La Neuve Eglise, and then in 1809 it was sold to the London Society for Promoting Christianity Among the Jews. By 1819 it had become a Methodist Chapel. Then in 1897 it was purchased by the ultra Orthodox Machzike Hadath Jewish community and became the great and famous orthodox Spitalfields Great Synagogue with its attached Talmud Torah school. That congregation moved to Golders Green, so that the building was sold and in 1975/6 it became the Jamme Masjid Mosque. As an inscription above its entrance in Fournier Street still states, very accurately, given its history, "Umbra Sumus", or as Mr Mynors, counsel for the building parties, remarked, inelegantly but accurately, in respect to the Parish's changing social makeup, at one of the initial Direction hearings in this case: "stuff happens". I set out the above to show that this parish has been under continual change and development. There was never some golden time to which we can return.

68. Since 1998 the local government ward is now known as '*Spitalfields and Banglatown'*, reflecting its demographic make up. I will return to this aspect when considering certain specific objections concerning the current residents and their children.

69. **CHRIST CHURCH IN THE 20TH CENTURY**

Much of the above background has appeared in either written or oral evidence, but it is clearer to present it in narrative form, rather than in bits and pieces from the witness. However, the parish is home to many, and it is those parishioners to whom I now turn. The Anglican parishioners of Christ Church declined in numbers, and the Church appeared to be yet another inner city church in retreat. By 1952, the then Bishop of London recommended its demolition, a fate, as I have said, which befell other later Anglican churches built in the neighbourhood. Christ Church had become derelict, the roof unsafe, and it was closed, locked precipitately to the surprise of the remaining parishioners, for public worship in 1956 as being a dangerous structure, so that from 1957 the parishioners were reduced to worshipping in their church hall, an ex- Huguenot chapel in Hanbury Street, a building which had hosted in its time Annie Besant and the striking match girls in their strike at Bryant & May's. The remaining parishioners hoped to raise money for repairs to the church, but that must have seemed a fantasy aim to them at that time. Some of the churchyard memorials were removed and some trees had been chopped down by Stepney Borough Council in 1950. This body had become involved in 1949, and I set out below how this had come about. The then Bishop of Stepney, Trevor Huddleston, proposed the church's demolition.

However, this marked the absolute nadir of this church's fortune.

70. In 1959, a then young architectural historian, Kerry Downes published his seminal book, which started the re-habilitation of Hawksmoor and his churches into the canon of English architects: "*They will repel us or fascinate us, but we cannot escape from their strange, haunting power*". He was to become the guiding light of the restorers, and has remained a passionate exponent of

what he would wish the restored Christ Church to look like, and a hero of FoCCS; he gave evidence before me, and was not just *in loco* an expert witness, but also a formal objector, in respect of a church building which mattered deeply to him, and as an architectural adviser greatly admired by the Trustees of FoCCS and Spitalfields Open Space ["SOS"]. To him, it must have seemed that his time had come, yet again, to save the Hawksmoor concept at this Church.

71. However, others, too, became interested in the decayed grandeur of Christ Church Spitalfields. Geoffrey Fletcher, the illustrator, caught the elegiac mood of the building and its meths drinkers, and Iain Nairn the travel writer.

72. It was against this background in the late 1960s (the dates vary but it seems to have been in 1966) that a body of interested enthusiasts calling themselves the Hawksmoor Committee stepped in to raise the initial capital to start trying to raise funds for the rebuilding of the church roof to save it from demolition. They had, it would seem, the financial acumen, useful contacts and the energy to face what must have then seemed a hopeless task. However, they were a separate body from the Christ Church PCC and its parishioners. This fund raising body managed to get hold of funds obtained from the sale of St John's Smith Square, which was being turned from a church into a concert hall. It seems that growing concern and criticism of the Church of England's treatment of our architectural heritage had stung the church authorities. Bishop Huddleston complained in a letter to the *Times* in 1975 that neither the parish of Spitalfields nor the Church of England had failed, or been responsible for the neglected state of Christ Church. He complained that: *"such a building of cathedral – like proportions was an appalling responsibility for the Church"*. In the Spitalfields crypt at this time a shelter for homeless alcoholics was being run by the church, an example of its continuing Christian witness in the parishioners' own gloomy days. Although I am reconstructing this relatively recent history from oral

evidence and documents provided by the Parties, there are inconsistencies in dates and documents conflict, but I can see the overall picture.

72. In any event, in 1976 the Hawksmoor Committee morphed into a charitable trust, known as Friends of Christ Church Spitalfields (FoCCS), which continues to this day. Whatever concerns I have about how this group has developed and what its relations have been with the Parish, I make it clear that since 1976 they managed to raise some £12 million plus towards this church's restoration. (I have been given in the evidence an even higher recent figure of £15 million). Without their expertise and driving enthusiasm this project could not have been done. The worshipping community of parishioners were, it would seem, just rather dispirited and downtrodden with the way "their" church had been closed, but they did, tenaciously, continue as a worshipping body of parishioners. However, they needed a group with City friends, financial competence and ambitious social connections to explore the possibility of professional fund raising to save the church building itself, which was by now becoming a decaying (and dangerous) wreck. The FoCCS had found an architectural cause close to their hearts, defining both an architect and an area which was becoming fashionable and which, I rather think, provided a non-religious meeting point for many of the initial settlers, who were bravely coming to live in the not yet gentrified surrounding streets. As one of the main objectors said in my notes from a Directions Hearing in respect of the group's early days: *"we had terribly, terribly nice parties"*.

For understandable reasons at that time, neither group gave much thought to what would happen if and when the money was actually raised, and no-one, I rather think, really expected it was going to be such a successful venture. Perhaps it was initially hoped that, if the roof was restored, the church could remain as a dramatic ruin. The tragedy has been that now this fantastically successful venture has ended in tears.

73. In any event, and there is some uncertainty as to dates, but it would seem that the roof was restored first. Spitalfields Market across the way acted as a magnet for casual workers, so that the crypt, used during the last war as an air raid shelter, was then used as a rehabilitation shelter for homeless alcoholics. This lasted until it was re-sited in purpose built accommodation, and exemplifies this church's on-going social commitment to its neighbourhood.

From the 1960/70s onwards the gentrification of the streets immediately surrounding the church began, spearheaded by individuals, the Spitalfields Historic Building Trust, the Dennis Severs' house and other local civic groups showing what can be done.

74. Christ Church Spitalfields had also attracted around this time more literary interest, and has been, since the 1970s, a lode stone for the psycho-geographical novels. Ian Sinclair's poem *Lud Heat* (1975) and Peter Ackroyd's *Hawksmoor* (1985) caught the zeitgeist of renewed interest in Hawksmoor's work. Both have been followed by a slew of somewhat more lurid films and other works of fiction, also based on pagan sacrifices, druidical forces, diabolical freemasonry and occult codes (let alone the unending interest in the Jack the Ripper saga). I mention this only to show that many more people than just art lovers and historians have found this church and its surroundings to be of fascination. More seriously, the growing interest in Hawksmoor's work is reflected in more recent scholarly works by Vaughan Hart and Owen Hopkins. An exhibition in the Royal Academy in 2012 by Ptolemy Dean and Philip Pullman showed the fascination of Hawksmoor's work.

75. THE FRIENDS OF CHRIST CHURCH SPITALFIELDS

In 1976 the Friends of Christ Church Spitalfields (FoCCS) had, as I said, been founded as an independent charity to raise money and project manage the restoration of this Church. This is a registered charity with the aim of restoring

Christ Church. However, unlike many similar organisations, it does not have a paid up voting membership as such, but acts on behalf of a body of supporters, who provide the money for the restoration, and who receive a regular magazine/newsletter, "Columns", telling the supporters about the current state of the restoration work in hand. These supporters are not members with a vote. This body is not like, for example, the National Trust where members have an annual general meeting where they can elect/throw out members of the ruling executive. FoCCS have "supporters", not members. Although a registered charity, these supporters were not the paid up members of a club or society, so that these supporters could not really influence (save by ceasing to subscribe) the actions and decision of the small board of trustees, who themselves were self-electing and not the subject of any annual election by their supporters or similar, to call them to account for their actions or have any democratic direction given to their future actions. There is, of course, nothing illegal or untoward about such an organisation, but it can have drawbacks. FoCCS is run, as I have said, by what are called Trustees, who self-elect and fill such vacancies as arise by co-option. I deal later with the effects of this. Their "AGMs" are comprised of about a dozen or so people, often fewer, who re-nominate themselves for the various necessary posts, often, apparently, in rotation. The term "AGM" usually implies a broader, more formal meeting than the small group who took part in them, as can be seen from their minutes. As large and serious amounts of money came in, and large contractual obligations for research and repair to the church arose, the trustees of FoCCS set up (I have no doubt for practical tax and contractual reasons) a separate body, the Restoration Trust, whose responsibility it was to negotiate and enter into contracts for the particular work in hand. However the members of the Restoration Trust overlapped with the FoCCS trustees. Members of both bodies held their meetings together; the minutes show how one meeting would follow the other. They consisted of the same group of people. Outside experts

were from time to time co-opted, but the reality was that a very small body of dedicated enthusiasts took on the time-consuming burden of raising and spending large sums of money on the church restoration. The Rector for the time being and, usually, two other church members, served on the FoCCS trustee committee, but were not, in any way, a controlling majority. However devoted, hard working and effective as a fund raising group they were, their un-controlled actions and demands to be treated almost as an equal to the church have caused much difficulty. Now I say at the outset, there was nothing illegal or concerning about this method of fund raising for a specific charitable purpose. Many, many pressure or fund raising groups operate in just this way. Financial donors /supporters of FoCCS from abroad or outside London may have neither the time nor the ability to take a more "hands on" role of involvement, but financially support the aims of the fund raising body, relying, perhaps with not too much thought or enquiry, on the inner circle of trustees to spend the money subscribed in the way that the subscribers intended. I make it absolutely clear that, although I have seen few accounts, no party in this case makes any adverse financial allegation at all against FoCCS, and it is accepted that large sums of money subscribed for the restoration of this church have been properly and superbly spent on the restoration. The issue of the FoCCS becoming involved with this present litigation, I will deal with below.

76. The draw back, however, of this supporter structure can be seen. I appreciate how it morphed from a small band of enthusiasts, the Hawksmoor Committee, who had the enthusiasm and the drive to start the restoration. Sensibly, as money came in, the charitable status was obtained. However, the FoCCS Trustees cannot be controlled nor questioned on their activities (save under charity legislation as to their administration and spending of the funds collected). When the Trustees say that they represent FoCCS, the reality is that they represent the views of a handful of people, who are only all or some of the

Trustees, however devoted and enthusiastic those people may be. The views of the Trustees, and their actions, may be shared by all or none of the supporters. I know not. The exhortations from the Trustees and/or the Chair of the FoCCS, which these supporters may have received to object in the current case, have been based, at least on what I have seen, on partial and incomplete analyses of what was being proposed. The enthusiasm of a small group (who with their predecessors) had managed to implement superb work has, I find, in this case carried them away to the point that they regard their fund raising and spending role as giving them as they see it, rights and duties far beyond their legal position. I heard repeatedly in their evidence that this body had "a right" or "a duty to protect" Christ Church. Subsequently, in cross examination, their current Treasurer accepted that this was not the case. Their undeniable success in raising money for the church does not give them even partial ownership of the building and its surroundings. It is right that Christ Church Spitalfields Restoration Trust is a party to the contract with the Heritage Lottery Fund along with the churchwardens, the PCC and the Incumbent, and with them has on-going contractual obligations set out in the HLF Contract at **[148].** Ironically, the objections raised in the satellite litigation with Graysons as to the running of the café in the crypt if successful might have exposed such objectors as were Trustees of the Restoration Trust to personal financial liability for being in breach of their duties under the terms of this HLF contract. Those Trustees of the Restoration Trust, who were party to the National Lottery Heritage fund grant might find themselves financially liable, at least in part, if the terms of that grant are broken, which does give them a more than passing involvement (given their personal financial risk). I wonder if this risk was fully comprehended by those Trustees involved, when litigation was commenced in respect of the tax position of the café in the crypt. Had that litigation been successfully concluded for them, the café might have had to close, and the end result might have been that at least some of the public access terms of the HLF

grant would have been frustrated. The effect of the financial consequences of the café closing or restricting its activities might have had disastrous financial effects on the ability of the church to run itself and finance its work and maintenance. I consider that this satellite litigation (whatever its alleged legal merits) was just another device (albeit a financially high risk one for those Restoration Trustees who supported it) to further their objections to the new building. This splatter-gun litigation did not serve to impress me with their substantive objections. It had become cynically unprincipled; the objectors appeared willing to adduce any argument if they considered it would advance their cause.

77. However, their legal duties are as charitable trustees of FoCCS. Some of their Trustees who are residents in LBTH have a right to challenge the activities of their local council as council residents. This appears to be how this dispute has developed. It was as if this church was being torn between the needs of its congregation and the demands of a group of enthusiasts who could not, or would not, recognise the restrictions of their own ideals on the needs of the parish church. They appeared to consider that their work and that of their predecessors, in someway, gave them an almost special legal status. It does not, save as set out above. Those of them who were parishioners could have chosen to utilise the normal democratic channels of the annual parish meeting to object and question developments proposed by the PCC. They could have stood for election as a PCC member (though that, of course, means a lot of often thankless work, were they to have been elected). They could have tested whether their views were reflected in the views of the majority of parishioners. The objectors could have put their views to these annual meetings and tried to get the parishioners to change their minds. It may well be that, at least some of the objectors considered that their views and those of the practising parishioners were so different that such a democratic 'testing of the water'

would have been a waste of time. It became clear to me during the hearing that their respective views of churchmanship (possibly totally irrelevant to some of those, non church goers, involved), and even the musical taste of the two groups, before me was very divergent so that dialogue was difficult. The vibrant Sunday Evensong youth service would not, I fancy, have appealed to the more middle aged supporters of the Spitalfields Festival. To that mix should be added the predominantly Muslim residents, or the views of people who just wanted to use the church building for concerts and conferences, and all the other disparate groups such as bell-ringers. This made dialogue difficult when church activity and enthusiasm for architectural heritage had become so polarised. Against that background was a local authority, which just wanted to get on with providing a school extension for local people and, as I will set out later, appeared indifferent and bored with what they considered rather irrelevant nonsense about building on a disused graveyard.

78. Those supporters who are residents within the Borough of Tower Hamlets have legal rights to challenge how that Council acts or how it spends its money. That is a different matter, which some of these objectors embarked on when they began their judicial review proceedings, which was and is the proper forum to have ventilated those arguments.

79. Equally, the Rector and PCC find themselves, for historic reasons, with enthusiasts for a project which, bluntly, is, after nearly 50 years, coming to an end, but which the FoCCS Trustees appeared to consider should continue, if not to the crack of doom, at least for a long time. It will be seen what their demands were and became as this case proceeded. Only in the FoCCS minutes in late 2015 do I read some recognition that their role may have to change and develop. Moneys which might have very properly gone to forward their aims of providing the church with a maintenance fund may well have gone to

supporting this litigation. This is in contrast with the Spitalfields Trust which has moved on to carry out distinguished restorations of historic buildings elsewhere in the country.

I make it clear that as a charitable body the Trustees of the FoCCS did not become a Party to this case, nor appear as a representative witness, but, I do find that in the early stages of the litigation, their views, influence and local standing were important.

80. However, from being a "stake holder" as they were referred to, I find their role has been exaggerated by some of their members to the claiming of an enhanced legal status which they do not have. 'Being consulted' is not the same as being able to hold an absolute veto on the views and aims of others.

81. I also find that many of the letters and e-mails of objection organised and encouraged by the FoCCS may have been written by supporters of that body wanting to be supportive of it, without having been given the full background to this whole situation. It may have been for reasons of charity law that the FoCCS have taken no formal part in this case, rather they have encouraged and given free rein to many of its Trustee members to litigate under the shield of an off the peg company limited by guarantee of £1 per member, "Spitalfields Open Spaces", "SOS", thus endeavouring to limit the risk of legal costs to £1 a head to their individual members. It is fair to say that the individual formal objectors in this case did have the courage of their own convictions, and became objectors in their own right, with all the financial risks that might entail. Equally, the Spitalfields Trust, some of whose members took a large part in the initial objections to the new building, was also not a formal Party or appeared as a representative witness, but, rightly, concentrated on getting on with trying to influence garden design once the new building was

built. It appears that that body paid for some initial legal advice, but took no further direct involvement as an organisation, though some of their individual members may have subscribed and supported this litigation.

82. THE RESTORATION WORK

Christ Church was gradually being restored to use, and this entailed the FoCCS Trustees obtaining very large grants from charitable bodies and the Heritage Lottery Fund, the latter requiring a commitment to public use and a plan for on-going financial viability. In 1985, work began clearing the crypt of just under 1000 bodies. It was difficult and unpleasant work, with the potential risk of smallpox, but those raising funds for the church's future deemed it necessary. I should say I make no complaint at all in respect of the work done by the professional archaeologists, who have produced scrupulous records of their work. It freed up the crypt, once more money had subsequently been raised, first for church worship and then for its really superb conversion into conference venue and a café, which it was hoped would produce an income producing stream for the church, as being a venue for exhibitions, concerts, drinks receptions, corporate meetings, conferences and the like, and meant that the Lottery Fund money conditions as to a wide public use could be achieved. Christ Church could again become a community hub. The very interesting and important research work carried out on the excavated bodies has been amply documented elsewhere. It is not without some irony that the voluble current complaints about development in the churchyard disturbing stray bones seemed to have been very muted when identifiable whole bodies were excavated and removed by the barrow-load from the crypt to provide the current excellent crypt facilities necessary to fund the church and its work, and to provide the income stream and public access required by the HLF grant. All of these works were then enthusiastically supported by both FoCCS and the parish, when the

"disturbing the dead" argument did not feature in the enthusiasm to empty the crypt to prepare it for a variety of uses.

83. THE GRAVEYARD AND THE BURIAL ACTS

During all the above history of squalor and neglect in the church and parish, what was happening to the graveyard? The church, by its Rector as his freehold, still owned its disused graveyard. In it are estimated to have been buried about 66,000 persons since its consecration in 1729. Why had the churchyard become disused? There was a reason.

84. The early 19th century had seen a growing population, confirmed after the *Registration Act* 1836. That Act ensured that, inter alia, the compulsory notification of deaths in statistics which were laid annually before Parliament, and were therefore available for medical and municipal consideration. A population growth from some nine million in 1800 to some eighteen million by 1850 could be properly registered. The population living in towns of more than 5,000 people had increased from some 20% in 1801 to 54% in 1851. To the increased fertility rate must be added the high incidence of child and infant mortality, and the prevalence of epidemic disease such as cholera in overcrowded inner city areas. Graveyards were suffering from intense pressure, which were not being met by sufficient increased provision for all its parishioners by the Church of England, and hence the growth of private commercial cemeteries, rate-funded burial boards and large Nonconformist cemeteries. The public health lobby also added pressure, so that Parliament acted with the first of a series of Burial Acts in the 1850s. The Church of England's monopoly on burials was over. Inner city over-stretched graveyards, such as that at Christ Church Spitalfields, had to be closed. There was no more room.

85. How was this to be done? Parishioners were attached to their own parish graveyard. Their families and children were buried here at Spitalfields as well as at many other inner city churches. The State was firm. By an **Order in Council of 20th March 1857,** following the Burial Act of the previous year, it was ordered:-

"Her Majesty by and with the advice of Her Privy Council is pleased to order and it is hereby ordered, that burial be discontinued in the under-mentioned places from and after the 1st April next…Christ Church Spitalfields… Beneath Christ Church Spitalfields, and also in the vaults under the entrance steps and porch of the said Church..."

On **6th June 1857 an Order in Council** ordered that: "burials ***be discontinued from and after the fifteenth day of this instant June in the said churchyard of Christ Church Spitalfields"***.

Obviously, this was a somewhat overhasty decision, which must have caused the then Rector, Churchwardens and parishioners some consternation that they were to have, it would seem, just over a week to make alternative provision. One can but imagine their frantic efforts which resulted in getting more time to make arrangements.

A week later, on **13th June 1857** by another **Order in Council**, the graveyard was closed to **new** burials, following the earlier *Burial Act*s ***"for the protection of public health":-***

*"**All that portion of the churchyard of Christchurch Spitalfields, which has already been used for interments should with the exception of existing rights, be at once closed, and that with the same reservations, interments should be wholly discontinued in the same churchyard after the end of this present year.."***

So burials were to cease by the end of 1857. The key being the exception **"of existing rights".** A little time was gained. I assume that the parish obtained a parochial burial plot elsewhere, where parishioners could feel a sense of still having their own parochial burying ground, as did many inner city London churches, but any details of that were not before me.

However, there was still some tidying up to do, so that another **Order in Council** of **18th April 1859** was necessary whereby: " …***it shall be lawful for her Majesty …to order such acts to be done …for preventing {any vaults of places of burial] from becoming or continuing dangerous or injurious to public health .. Christ Church Spitalfields ... That the ventilation gratings connected with the vaults beneath Christ Church Spitalfields and openings on the north and east sides of the church, be closed be closed with stone or brickwork".***

There was yet still some more detail to be attended to. By a further **Order in Council** on **2nd February 1867,** it was ordered: "***that the coffins now unenclosed beneath the parish church of Spitalfields Middlesex be embedded in soil mingled with charcoal and enclosed either by concrete or brickwork properly cemented".***

86. I have set out the above in some detail to show how even graveyard uses change. Nothing is permanent. The dead do not, and should not, control the living. However, the dead should not be disturbed save for very good reason. Those eighteenth century parishioners burying their families in "their" graveyard might not ever have imagined what that grave yard was to become: "Itchy Park" within 50 years with tramps urinating over their family graves. The Victorians were brutally realistic. Churchyards were closed when they had become a risk to the health of those living nearby. Living people and their needs took priority; a stance not different from the on-going mission of the

church itself. However, again, I note in passing, that the objections being taken in this present case in respect to the disturbance of what might remain of some 66,000 bodies buried in the graveyard between 1729 and the grave yard being closed for burials in 1859 did not appear to have overly concerned those raising funds to empty the crypt of nearly 1000 bodies when it was necessary to do so to provide the space for the really excellent conversion of the crypt into a community and entertainment space for the living.

87. I also note with some concern, that during the hearing before me no-one seemed very sure as to the whereabouts of the substantial remains excavated from the crypt in the late 1980s. Some might be in Cambridge; some might be in academic institutions in London. More research might still be being carried out on them. Who knows? Certainly their whereabouts or potential reburial had not until now figured very high on the list of concerns raised by the Open Space Group of objectors, nor indeed on anybody's list of concerns. Yet many of these crypt remains had been fully identified. Had efforts been made to contact descendants? The current concern of some witnesses for the Open Space Parties for such other, less well preserved remains which were disturbed in the building of the new building and were, I find, reverently reburied by the Rector, with the reburial site marked and following a short but proper service, carry much less weight when I consider what the FoCCS themselves organised to have funded, and wanted to take place, in respect of the excavation of the crypt burials. It was necessary to empty the crypt by the barrow load of intact bodies, some identifiable, to facilitate future development of the crypt into a café and reception rooms. I find that the complaints now as to some disarticulated bones being disturbed during the building works for the new building seem a somewhat contrived argument raised to support the current objections. (Indeed, this argument was subsequently withdrawn by the objectors in the course of the hearing).

88. However, the graveyard is still a consecrated graveyard, albeit a disused one. Any of the derelicts and their dogs, whom I observed at Spitalfields, shooting up or drinking, in a large green railed-in open space immediately adjacent to a big inner city church, which still had some graveyard memorials in it, would have thought: **"This is a graveyard",** even if they did not know the peculiarities of its legal status. There were others, professionals, who should also have known this and recognised the consequences.

89. For some bizarre reason, which remained totally unexplained to me throughout this whole hearing, the basic fact that the Parties were dealing with a disused but still consecrated burial ground was ignored. What is extraordinary here is that so many people nodded this through. I was given no rational, or indeed any, explanation as to why this happened. One asks 'how can this actually have happened?'

90. Various things, however, did happen to the graveyard after it was closed. It is not as if it had just lain dormant. There were, as will be seen, various faculties applied for in respect of it. Over one third of it was built on in 1874 for the Victorian school. It had come under the "care" of the Metropolitan Gardens Association and then had become an open space subject to the management of the local council, Tower Hamlets. (I am told that those aspects raised novel matters of undecided law of particular interest to planning lawyers.) I have no doubt that former Rectors and Vestry/PCCs in involving outside bodies to help them run and maintain this graveyard space in an overcrowded and socially declining area thought that they were acting for the best, but these actions have given rise to the current problems. Any parish must think very carefully about loss of even partial control of its land, even if it is considering that the local council can pay for its up-keep, as the parish cannot afford it. Who knows what a church might want to do with its own land years in the future. What happens if the local council fails to manage the graveyard

properly? Too often the local council (as here) fails to do just that. There are then complaints from parishioners at its state, but the public may have come to regard it as an open space and the legal position has become complicated. Either the Church keeps total control, or by pastoral measure it abrogates all control. Each of these choices may be unpopular, but a mid course may be much worse (and more difficult to police), as here. I simplify, as there may be many examples of a happy and constructive working relationship between a council and a parish. However, if a Council decides to spend money on other matters or treat the graveyard open space in a way the parish church does not like, unscrambling this situation may be both difficult and expensive to resolve. This present case demonstrates the problems which can arise at the interface of ecclesiastical and state control of a graveyard. Those potential and actual problems should have been identified early in this case. They were not.

91. Alarm bells should have rung, and questions should have been asked as to just what could legally have been built (if anything) in **a disused but still consecrated** graveyard which was being managed as an open space by the local council. Ecclesiastical lawyers had the benefit of a significant number of reported cases on disused burial grounds. It is terrifying to consider that much of the subsequent problems in this case could have been avoided. The Rector said in evidence: ***"if I had known, I would not have gone on".***

92. Churches who pay their quota are entitled to expect expert legal warnings/advice, at least when they file their Faculty petition at a Diocesan Registry. The objectors, fixated on their vision of Hawksmoor's building, did not notice it or, apparently, did not realise its importance, until two years after the new building was built, when they appear, having taken legal advice, to have been told that they could utilise the *Disused Burial Grounds Act* 1884 , *inter*

alia, as an argument to obtain what they wanted. The Diocesan Registry did not appear to notice, nor, I am sorry to say, did the Chancellor. The Borough of Tower Hamlets gave the legal situation little thought, and less interest, and even the London Diocesan Board for Schools (whom I find to have been trying to act as an honest broker in this mess) did not pick up on the potential problem which the *Disused Burial Grounds Act* 1884 raised. (I will deal below with this Act and the recent changes to it in considering what should now happen). It seems that everyone thought that as the Council had (possibly legally) built the old building as a youth club under their open spaces powers, they could facilitate the new one while working with the Church and the LDBS. That appears to have been what happened, but it is an opaque scenario.

93. In the middle of these conflicting views was a church primary school, catering for the needs of local children, a beautifully restored church with a growing and active congregation, which provided the venue for the Spitalfields Music Festival, together with a cafe and conference facilities, all of which was to help provide funding for the church and ancillary functions. As I have said it is an indication of how high feelings have run in this case that even the operation of the cafe has resulted in satellite litigation from some of the objectors as to its tax position, notwithstanding that it appears that a cafe was a necessary fund raising adjunct to the church restoration project and future use, to the point that the intra mural burials in the crypt had to be excavated to provide the appropriate space. There have also been a plethora of other objections, including the effect of building on a graveyard, the disturbance of human remains, even an argument as to the effect on the Muslim community of having their children educated on top of dead bodies.

OPEN SPACES AND DISUSED BURIAL GROUNDS; STATE INTERVENTION

94. *The Disused Burial Grounds Act* 1884

As this forms a major plank in the Open Space argument, its genesis and effect should be considered.

It was only in 1884 that it was passed. Until then there appears to have been no restriction as to what could be built on graveyard land that was part of the rector's freehold provided a faculty was obtained. There were no such restrictions in respect of Nonconformist graveyards. Then, as now, it would appear to have been mounting commercial pressure, especially from railway companies, to develop on disused graveyards, especially in the City of London. Railway Directors discovered that graveyards were in the way of new train lines. It appears that a mixture of concern for the disturbance of the dead, loss of financial rights and the preservation of graveyards as open spaces in urban area provided the impetus for this 1884 Act

For the purposes of this present case it is Section 3 which is crucial and it provided and provides:

> "3. It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other place of worship."

Over the years this blanket prohibition has been watered down. The Act was amended in 1981 to give the right to allow wider development in disused graveyards, but it specifically excluded consecrated Church of England disused burial grounds from the relaxation from control, and that amending Act exceptions would not have been immediately available in respect of the new building here (the old building being, it is accepted by all Parties, although I think arguable to the contrary, erected legally under the Open Spaces legislation

by LBTH.). Development of a consecrated Church of England graveyard which is a disused burial ground might in certain circumstances be allowed:-

- if the land has previously been sold under statute
- under the procedure set out in the Schedule to the *Disused Burial Grounds (Amendment) Act* 1981
- under the provision of a pastoral scheme
- in the exercise of compulsory purchase powers under the *Town & Country Planning Act* 1980 ss239 & 240

In passing, that way forward would be available to the LBTH should they wish to utilise it

None of the above "get out" clauses were used in this case, but they could have been. Nor has a Private Act of Parliament been sought to regularise this mess.

95. ***Open Spaces Acts***

Since the burial ground closures of the 1850s already referred to, there appears to have been growing concern about the limited number of open spaces in the London area, notwithstanding some 78 disused burial grounds, and many squares were private and not open to the public, save by (limited, often temporary) permission of their owners. I am reminded of the satisfaction expressed by the Benchers of Lincoln's Inn who, having opened Lincoln's Inn Fields one summer for the children of the poor slums at Clare Market, said that: "not one flower was damaged". The first relevant Act was the *Metropolitan Open Spaces Act* 1877. This Act was indeed referred to in a Parliamentary debate in 1881 in respect of the *Metropolitan Open Spaces Bill* 1881 second reading which considered the legal restraint on the private owners or trustees of open spaces, London squares and the like to open them to the public but obtaining the cost of up-keep was difficult without charitable donations or support.

That debate specifically referred to disused churchyards. An MP said: -

"With regard to the disused burial–grounds in the Metropolis, he did not hesitate to say that many of them were a disgrace and a scandal, and it was impossible to conceive anything more wretched than their appearance. Any movement to improve them , which would at the same time, have the effect of providing open spaces for the recreation of the people, would therefore be great public benefit. Anyone at night scampered over them. It was possible to obtain lead from the coffins, and to break the tombstones. Some of them, he was glad to say had been converted into gardens and thrown open to the public, and he urged that power should be given to have more of them beautified that way …..Parochial Vestries either had no funds or objected to apply them in taking care of these grounds, and they were now the scenes of nightly desecration and depredation…..something should be done, both in a sanitary and a social point of view, by throwing open and planting these grounds with trees and shrubs and flowers"

Not all agreed. Another MP said, disagreeing that by opening these spaces surrounding property would be increased in value as claimed,

" …the disused graveyards , if thrown open would become the playgrounds of the children of the poor, and …would this be conducive to their health? The air surrounding graveyards, however, was far from wholesome, in fact no place could be worse for children to play about in than disused burial grounds. He must protest against this invasion of the rights of a minority, especially at a time when they were trembling on the brink of a democracy"

Another Member argued that: "the selfishness of a few should not prevail against the good of the many".

The *Metropolitan Open Spaces Act* 1881 gave the Metropolitan Board of Works powers over disused Burial grounds.

96. It was, however, one thing to use a disused burial ground as open space. It was another to build on it. It would seem that at least one railway company in London needed to purchase at least half a burying ground, which would have meant the removal of several thousand bodies and that caused concern, so that it was not surprising that a specific Act to cover disused Burial

grounds was introduced to the House, receiving its first reading in **February 1884.** On its second reading the object of the bill was said to be "**to prevent buildings being erected on disused burial grounds …the Metropolitan Board of Works…. could not interfere until building operations actually commenced and it was doubtful if they could even then interfere successfully".**

97. This bill aimed at prohibiting building on a disused burial ground. This was just the position at Spitalfields. The school had already been built ten years earlier on part of the graveyard, and so was legally there before the 1884 Act. The question of very old burial grounds, compensation to private owners, and the possible need to build vicarages on such disused burial grounds was raised in Parliament. The Bill received its third reading in **August 1884**, and again after arguments as to compensation, passed successfully to the Lords where the need of the church was raised as an exception, and the need, according to the then Bishop of London, for the ability to build mortuary chapels on such land.

98. When considering the 1884 Act it is of some interest to look at its genesis, and to note that within a year it was being used as a shield for even very small open spaces of 100 square feet against the London, Tilbury and Southend Railway Company.

99. So the outcome was that there was to be no building on a disused but consecrated churchyard unless the proposed building could be brought under the exceptions set out in the Act which I have set out above.

100. For the purposes of this case, it is important to note that while the *Metropolitan Open Spaces Act* 1881 authorised the actual transfer of the legal

interests in disused burial grounds to local authorities for the purpose of being maintained as open spaces, the disused graveyard of Christ Church Spitalfields was never transferred nor leased nor sold outright to the Local Council. It has only been managed by the Council. The legal ownership remains the Rector's as part of his freehold.

101. In the course of argument, **Mr Seymour on behalf of the SOS objectors accepted that the management agreement could be ended by either or both Parties to it**. No other objector in person demurred from this position. The Rector could give notice (on proper grounds such as mismanagement as I have seen on the waste space or church need) or, indeed the LBTH for reason could also end the agreement, or both Parties could agree to end the arrangement. I accept that there would have to be good reason to do so were either Party to oppose ending the agreement, and proper consideration of those reasons. The hoops would have to be gone through, but that open space agreement can be ended on all or part of the churchyard. LBTH does not own the land; the Rector does. If there has been mismanagement of the land (as clearly there has been on the tranche which is just waste) then the Rector can seek to end the agreement with LBTH as it is not working; it is a failed agreement. Indeed, also, I suppose that a pastoral scheme could end the church ownership of all or part of the graveyard. (Indeed, it appears that this was being considered some years ago but, for whatever reason was not carried through then). Whatever powers or duties the Local Authority might have under its open space powers, it cannot exercise those duties if the owner of the land over which these duties are exercised ceases to allow them to be so exercised. If they wanted to in those circumstances, then a Council could compulsorily purchase the graveyard, if push came to shove. If the legal land owner ends the agreement or relationship with the Council, what further powers/duties have any Council? After the school was built in 1874, the land used by it has been

for all practical purposes not part of potential open space land, and could not have been so envisaged. It is clear from what was envisaged to happen in 1919 between the Rector and the school was that the school land should cease to belong to the Rector but was for school use. Similarly, more recently, the time limited agreement setting out 25 years was not in respect to the actual building itself which was put up, but in respect of the time that might be necessary to untangle the legal nexus between various parties, prior to the land leaving, by what ever means, the ownership of the Rector.

102. The conduct of the LBTH in spending council tax and rate payers' money in building this building is a matter for the council tax and rate payers of LBTH and/or the Audit Commission. I consider below what significance this may have when I consider my discretion to grant a Confirmatory Faculty. Some of the objectors in this case instigated judicial review proceedings in respect of the activities of LBTH at an early stage. That was the proper forum to do so if they were dealing exclusively with the powers of the Local Authority. They choose not to continue that litigation, and their application was "adjourned". Not, I notice, formally withdrawn. I was told at a Directions' hearing that this was because they hoped that the Building Parties could be "persuaded to settle" when faced with this threat of civil litigation. Their chosen course of action was in the Consistory Court, where, as we will see from subsequent correspondence, it appeared to the objectors that the church authorities might be afraid "***of bringing the Church into disrepute",*** and thus might also achieve for the objectors the same successful result. As there really was such an unbridgeable gulf between an empty graveyard and a graveyard with a building on it, I find these to be weasel words.

103. I found the objectors' use of litigation as a tool to bully those who did not agree with them to be unattractive to say the least. Similarly, they could have

brought a private prosecution against the Rector, had the mood taken them, rather than announce to the world that they had written to the Attorney General to do so on their behalf. The phrase "prepared to strike but not to wound" comes to mind. I am told now that the adjourned judicial review proceedings are too late to be resurrected. Well, that was the choice the objectors made. They could have gone on, but chose not to, and yet they still kept those proceedings hanging in the air as if they constituted some threat to the current litigants. It may be that in some branches of the law this kind of attitude to litigation can carry a litigant a long way, and litigants can be browbeaten into unjustified submissions before the matter comes to Court. Here the objectors were faced with a number of Parties who were not prepared to lie down and give up, and who regarded their position as valid and arguable as the next man's.

104. OUTSIDE HELP: THE METROPOLITAN GARDENS ASSOCIATION

Clearly very shortly after it was closed for burials the Vestry were reluctant/unable to care for the Christ Church graveyard. In 1861 a Mr Buxton of the great Brick Lane brewery, a church warden and the then Patron of the living, offered to "*lay out and improve the churchyard*", but was told that the Vestry could *"not legally do more than keep the churchyard in decent order"*. The Christ Church now had its graveyard**,** unusable as such, but, as can be seen above, a magnet for the indigent. There were complaints in 1891 that the Church Wardens had "*neglected their duties*" and had allowed the boys from the school to play in the churchyard "*or made opening or opened the gates into Commercial Street"* ***(7.)*** That same year on **20th October 1891** the then Rector as freeholder of the graveyard entered into an agreement with the Earl of Meath, representing the Metropolitan Public Gardens Association. The terms of this agreement are not without note **as this is the first time that the Rector as the land owner has**

had to call in outside help to organise the graveyard. The Rector authorised the Earl of Meath on behalf of the Metropolitan Gardens Association ***"to lay out and maintain the churchyard attached to Christ Church Spitalfields ...as a public garden for all the purposes of the Open Spaces Act 1877-1890 and to hold the same at the annual rent of a peppercorn for any term of years as the Earl of Meath seem fit not exceeding five years".***

That was to be a time limited agreement. (Maybe the then Rector wanted to see how and whether this would be a successful scheme). A proposed plan of the garden lay out was annexed to this agreement. This appears to be the first formal garden layout attempted in the churchyard by Fanny Wilkinson, apart from the tree planting in the previous century, and its pale shadow remains in outline. Although in evidence I was told that this was of importance in the history of garden design, I note that various local bodies and, indeed, some of the objectors in person have been keen in last few years to discuss and consider fairly radical new landscape improvements. I find the current stress on the original Victorian garden design to be yet another device to try to serve the purpose of supporting the objectors' case. That Victorian design does certainly not accord with what this churchyard may have looked like in 1750. I return to the involvement of the Metropolitan Gardens Association with the Rector. During the term of their agreement both Parties could agree to convey the churchyard to a local authority who would maintain it as a public garden. There is no evidence that any such conveyance was ever executed. There were quite stringent conditions in this agreement allowing the Rector to close the public gardens for services and, indeed, "*during the hours of divine services", and "nothing ….shall authorize the Earl of Meath to interfere with the access between the Church and the schools".* There is some discrepancy in the plan between what the Metropolitan Garden Association were managing and the 1859 faculty, but for the purposes of the land the subject of this present dispute, I need not deal further with this as it concerns the extreme western boundary. Similarly there may be

inconsistencies as to who owned the land where the church war memorial was placed in Commercial Street, but again this forms no part of the present dispute.

105. It would seem that apart from the laying out of the garden (the vestigial remains of which can still be seen in the extreme western tranche of the churchyard next to Commercial Street), the Metropolitan Gardens Association did little. A witness called on behalf of the objectors was Mr William Frazer, the current Chairman of the Metropolitan Gardens Association. I think it would be fair to say that all hearing his evidence were left puzzled as to what, if anything, his Association had ever really done at Spitalfields, save for the Victorian garden layout, or for how long they were even involved, (notwithstanding the efforts of an objector, whom I had to silence during the hearing, from trying to prompt him loudly while he was giving his evidence). The Association appeared to have given some gardening tools to the school at some time in the past, but had now no existing records to assist the Court about this graveyard. As can be seen from the Earl of Meath's earlier finger in the disused Burial Acts legislation, the noble earl had advanced ideas but, as can be seen from the earlier description by Jack London of the users of the garden not 10 years later, those ideals proved difficult to put into practice. It appears (or rather there is no evidence to the contrary) that the Metropolitan Gardens Association's involvement with the graveyard lapsed at an early stage. (I note, in passing, for the avoidance of doubt, that this witness Mr Frazer, was produced by the objectors at a late stage in the proceedings. I informed the Parties that I had been acquainted with him over 20 years ago while we were both serving as Common Councilmen in the City of London, but had not seen him since. No party took any objection to my hearing his evidence, which, as I say, in the event did not take the matter very far forward as far as any Party or the Court was concerned).

106. **THE SCHOOLS**

As I have mentioned above, before Christ Church was built, there were from 1708 onwards parish charity schools, a boys' school in a room in Brick Lane and a girls' school in Booth Street (now Princelet Street) both of which became Christ Church School, a Church of England primary school. When the church was completed in 1729, the west steps entrance opened onto what was then Red Lion Street (now Commercial Street). The steps, as can be seen from Rocque's map, formed an entrance to the church with housing abutting right against their sides. In 1782 the school moved from its previous sites to a building just by the steps to the west door. It had been funded by a parishioner's legacy, and built under a Faculty with the agreement of the Rector and the approval of a Parishioners' meeting, on the western edge of the churchyard on land previously occupied by the parish engine-house, which was itself rebuilt adjacent to the new school. This was a church school immediately beside the church. This 1782 building flourished as the Parochial Charity schools on that site, funded by voluntary contributions and one-off donations or annual subscriptions whereby any such donor could become a Governor of the school. From Horwood's map of 1792 it can be seen how this restrained school building sat back into the churchyard parallel to the western church steps. This school building was extended in 1808. In 1817 a separate National School was founded in Wheler Street, but it soon moved to Quaker Street. It was founded for: "**the education of the poor in the principles of the established church**". It was declared that: **"no poverty however extreme and no difference in religious sentiments in the parents shall be deemed a sufficient cause of exclusion to the children, provided they conform to the regulations of the school**". Those aims I find to be as clear today as then, and not repudiated when the schools merged. The "religious sentiments" of the parents are as irrelevant now as then.

107. These charity schools were united for the purposes of instruction only in 1842 with each school, it would seem, remaining under separate management. The declining social makeup of the area was reflected by the arrival of the railway. By the mid 1840s the Commissioners of Woods and Forests made plans for metropolitan improvements which entailed the development and expansion of Red Lion Street into the present Commercial Street. Houses were demolished to facilitate road widening, and this included the school premises together with the other houses which hemmed in the western steps of the church. However, in 1851/1852 that school building along with the two ranks of houses on each side of the church entrance steps were demolished to make way for the new urban clearway of Commercial Street. Indeed, the church itself had some of its entrance frontage shaved off as part of that development, as was seen in the 1859 Faculty referred to above. The church schools (boys and girls) and the National School were formally united in 1850, but there was a delay in implementing this planned development expansion, and paying for the old school. There were concerns about the difficulty of letting adjacent houses because of the presence of "loiterers and women" in the area. The Church school occupied its old site until April 1851, but the building had been pulled down by April 1852 when its pupils moved to share the National School premises. The two schools were run by a joint committee though the funds of each establishment were kept separately for a period of time. A Faculty was granted in 1869 for the erection of the present school building, and the funds of both the National and the charity school went to paying for its costs. The building was erected between 1873/74, and was constructed on arches to avoid any disturbance of graves. When it was ready for occupation, the National School gave up the lease on its Quaker Street site, and thereafter the united school has remained on this site to the present day. The

1874 replacement building was constructed in the south east of the graveyard, but beyond the east end of the church.

108. As I have already set out above, the whole area had fast become a problem, and particularly so for the School Governors, as the children were having to attend a school surrounded by drunks and prostitutes. In consultation with the London County Council and the Rector, it was agreed in 1904 that the school playground (which might have been argued to be forming part of the Open Space) should be only accessible to children under 14 and their parents, and that only during the summer month; this to protect the children from the general public, and to control access. Indeed , anyone patrolling the playground was to wear a uniform. In their analysis of the history of the school the architects SCABAL set out the school's subsequent history. In the Inland Revenue survey in 1912 the owner is said to be the then rector. The unnamed occupiers, who are, presumably the school trustees, pay rates and property tax. Similarly the Inland Revenue description of "the playground of "Christ Church Nat. Schools" as having an area of "about 37,784 sq. feet….the whole is thickly packed with bodies, now used as a recreation ground under the control of the L(ondon) C(ounty) C(ouncil) The owner was the clerk to the LCC". That was most certainly not legally the case. However, it did indicate how those involved were thinking.

109. The next development in respect of the churchyard was in 1919. The Rector as freehold owner of the churchyard and the churchwardens apparently entered into a trust deed setting out that they (and their successors) were to hold 280 ft. of land running westward from the eastern boundary of the churchyard land up to an "imaginary line" [sic] in the deed **(11-14).** This document is only in draft, and is unsigned.

This is yet another unsigned draft document among others which have bedevilled this case. In this draft deed (**11-14)** the Rector and Churchwardens declared that the land occupied by the school, at the eastern end of the churchyard, was to be held on trust for school use. The Rector and Church Wardens and their successors were: ***"to permit the said premises and all buildings erected thereon or to be erected to be forever hereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring manufacturing and other poorer classes in the said united parish and for no other purpose…".***

The school was to be at all times open to government inspection: **"*and shall always be in union with and conducted according to the principles and in furtherance of the ends and designs of the National Society for Promoting the Education of the poor in the Principles of the Established Church throughout England….the said schools and premises and the funds and present endowments thereof and such future endowments....shall be directed controlled governed and managed….[by] the principal officiating minister for the time being of the….parish."***

The school premises could be used for a Sunday school. There were terms as to the appointment and dismissal of staff which need not concern me here. The annexed plan shows the school buildings and playground eating into the church yard. In any event, the parties appear to all accept that this document should be relied on. It states that the existing buildings, erected or to be erected on the land: "***is for ever hereafter appropriated and used as a for a school for the education of children and adults or children only of the labouring manufacturing or other poorer classes of the said united parish*** (i.e. Christ Church and the now merged St Marys) ***and for no other purpose*"**. I underline here that adult education is envisaged in this school. The education to be provided was to be **"*conducted according to the principles and in***

furtherance of the ends and designs of the National Society for Promoting the Education of the poor in the Principles of the Established Church throughout England"…. "The principal officiating minister shall have the superintendence of the religious and moral instructions of all scholars attending the same school with power to direct the premises to be use for the purpose of a Sunday School under his exclusive control and management" ... "but in all other respects the management direction control and government of the said school and premises and of the funds and endowment thereof …. shall be vested in and exercised by a committee consisting of the said rector… a churchwarden and….Foundation managers appointed by the Rector".

110. No signed deed, or document or faculty for this has been produced by the Diocesan Registry (not, I think the present Registry solicitors). It is unclear what was ever agreed, if anything, or executed. What is clear is that the intention was to provide the school with certainty as to its existence on Church land, by way of a declaration of trust.

No document produced by the church, School or Diocese tells me what finally happened in respect of this proposed declaration. All one can say is that the school continued functioning on its 1874 site.

111. It would seem that this document seeks to make clear a situation that had continued since the faculty for the building of the Victorian school was obtained in July 1869. This was and continues to be a church school. It was clearly envisaged in the above document that that land on which the school was built "***and all buildings erected thereon or to be erected to be forever hereafter appropriated and used for a school for the education of children and adults or children only of the labouring manufacturing and other poorer classes in the said parish…"***.

Whatever complaint made in these proceedings that the school did not "own" the land it sat on and that therefore it had no right to apply for state money completely misunderstands the status of a church school and the security which it has, given its history and close relationship with Christ Church. This document (albeit no signed copy is available) is some evidence to show that the Rector and churchwardens intended to give security to the future of "their" church school which has continued on the graveyard since 1782 -1852, and then 1874 to date.

112. The 1920s demonstrated a need for school space, and temporary accommodation was added (albeit on a disused burial ground). The problem of space was a recurring one. Interestingly, a memorandum of 26th May 1939 raised the possibility of the disused burial ground being recommended for approval for development. I take it that the Second World War put that potential plan on hold. The school itself was not bombed in the War, but by 1947 there was again pressure for expansion, but then the *Town & Country Planning Act* 1947 was about to come into effect, and therefore any material development of the school property would have to be the subject of planning permission, which, in the event, did allow some infilling and western extension to the school.

113. Throughout the 1950s-1960s there were desultory proposals to enlarge /modernise (or even move) the school and in the 1950S there were proposals for new washing and cloakroom accommodation; this for the purposes of planning was then not considered "development" as they were mainly internal alterations, notwithstanding that the site was within the disused burial ground. However in 1956 planning permission was granted for this work. It was then considered that the primary school was in a "light industrial area zoning". Similarly in 1965 there was no objection in planning terms to the

building of a new classroom at the back of the school During the next twenty years there continues to be desultory correspondence and discussion about the school, its needs and potential enlargement. The first Conservation Area of Fournier Street was so designated in 1969, which was extended in 1978, and again in 1998 (thus charting the gentrification of this area).

114. I set this out to show the importance of the school on its site, and the apparent fact that everyone had gone on tinkering and extending it without apparently giving any thought or consideration to the restriction of the *Disused Burial Grounds Act* 1884. The school appeared to have taken on a life of its own, and the origins of its site appear to have been ignored by then education authorities, and by the then Rector owners of the land on which the school sat. This situation appears to have continued into the current dispute. No one noticed or was even interested (save when the ubiquitous tree preservation orders surfaced).

POST WAR DEVELOPMENTS OF THE CHURCHYARD

115. THE 1947 DRAFT AGREEMENT

It appears that the next development occurs in about 1947 when the Rector and Church Wardens appear to have tried to reach an agreement with the Borough of Stepney **(32-34).** Again I have only the draft of an undated and unexecuted Deed.

At that time the Rector and the Borough of Stepney were in negotiation about the Council taking over the management of the disused burial ground. There is a draft agreement in the papers before me, unsigned, from 1947 to that effect.

This is yet another missing document. No signed and completed agreement could be produced by anyone, and all I have before me is a draft. Again, I am asked by all to assume that it was a perfected agreement.

Under it the Rector as freehold owner of the disused burial ground agrees, ***"with the approbation of the Parochial Church Council"*** that Stepney Council shall undertake ***"the management and control of the ...disused burial ground... in trust to allow the enjoyment thereof by the public as an open space within the meaning of the [Open Spaces] Act* 1906*".***

It is to be noted that no interest in land was proposed to be transferred to the Stepney Council. This agreement deals only with management and control. Children's games were to be restricted to the children's recreation ground in the graveyard (and not even there on a Sunday). The Rector had the right to demand closure of the gardens on certain days of the year, and church access and use was to be a priority. This agreement did not, therefore, produce an open space open to all the public all the time. There were restrictions. According to this draft agreement, the Borough of Stepney apparently petitioned (**15-18)** for a Faculty to lay out the eastern portion of the churchyard as a children's playground, which would entail various works: "…***there are fifty-one vaults and six tombstones projecting above the surface of the churchyard and eight tombstones or gravestones lying flat on the ground and it will be necessary to remove them".*** Impeccably, Stepney Borough stress in their Petition that they had advertised in the local paper their intention to remove these, and that they had given notice of the same on the church door. They knew of no-one nor had anyone come to object to the proposed removal of tomb stone nor protruding vaults, this barely 80 years after the churchyard was closed for burials. (Given that there has been some current dispute as to the method of advertising Faculty Petitions I note that in this and other Faculty Petitions, the church door has been the accepted and acknowledged place for such notices to be placed). The Borough planned to lay out the remainder as a garden with suitable planting, and to enter into a Deed of Agreement with the Rector for the transfer of management to the

Stepney Council under the *Open Spaces Act* 1906. (It is however, clear that there was to be substantial removal of vaults and surface grave stones prior to the laying out of the children's play area).

There is some correspondence to show that the PCC were in agreement with this petition, but there was also correspondence about the fact that gardener's huts and a tool shed could not be built on consecrated ground, and as to who should actually be the Petitioner for the Faculty **(3391-5).**

116. It would have been instructive to have seen the Faculty with the final annexed agreement which they applied for, and apparently were granted on 7th June 1949, but it cannot be found. There is a poor, partly illegible photo copy of the faculty with the draft agreement at **(24-27).** There is in this case what is referred to as the 1949 Management Deed but the original of that Deed in its executed form is missing. All that is before me is an unsigned draft, which may or may not reflect the final agreement. The Diocesan Registry and the local authorities (Stepney and its successor Tower Hamlets) could provide no explanation why such a relatively recent document, which is the basis of the current local authority involvement, is missing. There was no excuse that it had been lost in fire or bombing. It had just disappeared. The then Rector appears to have had his copy, but efforts in 1996 to locate what might have been a signed final Deed resulted in the Head Archivist of the then Greater London Record Office writing to say that the un-catalogued Christ Church records did, indeed, include a Deed of Management, but: **"it was extremely fragile having been damaged by damp, the growth of mould and insect attack, and I am reluctant to allow anyone to handle them; handling would….cause even more damage".** I am not even sure if that Deed of Management is the 1949 one, or (possibly even) the 1891 one. Alas, in this case, this has not been the only missing document.

117. What is clear is that the then London Borough of Stepney petitioned the Diocesan Chancellor for a Faculty to authorise their involvement **(15-16).** I might say that that Petition is a model of how matters should proceed, showing that consideration from 1948 onward has been given to a variety of matters from advertisements to the removal of tomb stones, and to show that this Petition was unanimously supported by a PCC resolution.

The sketch plan (**18)** shows the proposed demarcation line between the school buildings and surrounding land and the remaining churchyard which is the open space. That line appears to run directly North/South just shy of the extreme eastern end of the Church not quite in alignment with the entrance way (which appears to be blocked at its southern end) leading from Fournier Street between the rectory and the church. A dotted line appears to show an access route running immediately along the south flank of the church. This plan also shows the outline of what remains of the public garden (about which evidence will be given later). This is the area of land in dispute.

There then follows some correspondence (again only before me in draft) which appears to be from the Diocesan Registry to the Town Clerk of Stepney. There is some concern about the possible need to erect an attendant's hut on the open space, and it is noted that as the land in question is immediately adjacent to the school "costs" could be kept there; (I take this to be a typing error for "coats") (**3392-3393).** This led to the proposed faculty being amended to delete the proposed attendant's hut. The then Chancellor noted the agreement of the Rector and PCC but was of the view that the Stepney Council were the proper petitioning body, drawing his attention to "**the fact that the Chancellor has no power to grant a Faculty for the erection of a building on consecrated ground except [for] an extension of the church, chapel or meeting house."**

118. I have been invited by all Parties to work on the assumption that the draft having amendments in manuscript before me, of the 1949 Management Deed is the one that was finally annexed to the 1949 Faculty petition, and can be regarded as a final copy which can be relied on. I do not consider that a reliable or acceptable way forward. It is all most unsatisfactory. It is not surprising that a later solicitor, trying to sort out the legal position of the ownership of the church's land, described many of the legal documents which will be subsequently referred to as being "hypothetical conveyancing". What does seem to have happened is the Stepney Council became the formal managers of the graveyard from at least 1949 onward.

119. By 1949/50 Stepney Borough council had removed most of the monuments in the graveyard and felled a number of the trees. Again, the complainants, who now express concerns about the "removal" of monuments, appear to have been unaware of earlier, very substantial demolition. It is fair to say that that complaint, although featuring in somewhat inflammatory correspondence as will be seen below, was dropped in argument before me; wisely as it was totally unsustainable on the evidence.

120. **THE FUNDRAISERS CONTINUE THEIR WORK FOR THE CHURCH**

In any event, when the basic work of securing the church was completed, in 1987 the parishioners were able to return from their Babylonian exile in their Church Hall in Hanbury Street to resume their worship, at least to start with in the crypt of Christ Church. It says a lot for the spirit of the Parish and its then Rectors that they were still a cohesive worshipping community after 30 years away from their Church. I also note the wide range of social work and provision which the parish has been providing for the very mixed community at Spitalfields over the years; from hostel provision for down and outs, work with

prostitutes, English language classes and the involvement of the Bangladeshi Christian community.

121. The restoration of the church continued round them for many years thereafter, and part of the disused church yard had to a building site for these works. By the mid 1990s English Heritage and the Heritage Lottery Fund and other donors provided very, very substantial amounts of money which allowed the interior restoration work on the church to take place. The west portico was cleaned and repaired, the tower shored up and cleaned, and very substantial, almost archaeological, restoration work was then done on the interior between 2000-2004, and the southern end of the church and the steps restored, and subsequently the railings, and most recently the great organ. The box pews were not restored. All this, costing some £12,000,000, raised by the Friends of Christ Church Spitalfields by obtaining grants and donations.

122. The City, too, was expanding and the whole Spitalfields market was undergoing a transformation. Even now, the current demolition of the Fruit and Wool Exchange just across the road from the church provides just at this moment a long vista of the west and south side of Christ Church, which will soon disappear when that site development is complete. However this is yet another example of the changing land use of this intensely inner city parish. In turn that has resulted in an increase in tourism, from architectural historians to Jack the Ripper tours to curry lovers, the area surrounding this church appears now to be firmly a place to visit as well as being an artistic enclave from Mark Gertler to, currently, artists such as Tracey Emin, and Gilbert and George. Even in the last ten years, Bangladeshi families have been priced out and many return to Spitalfields for work only, in the same way that the earlier Jewish community also moved away.

123. **THE SCHOOL**

In the course of this hearing I, together with a cross section of all the parties, inspected the school twice (as the Open Space Party wished to ensure that I was shown a second staircase apparently missed on our first visit) under the guidance of its headmaster. Like Christ Church, this school has suffered difficulties, but under his guidance it has pulled itself up by its bootstraps, and presents as a positive, thriving and happy school. Given the evidence I had heard and read about it in the past I was really very impressed with what I saw. This was a Church of England school working with the Church and providing what many parents in central London would dearly wish for their children. It is to be regretted that in the flyers sent round to whip up objections, the need for a school such as this was not mentioned. Perhaps many of the objectors, especially from distant parts and other countries, albeit fascinated by architectural heritage, might have thought twice about balancing the purity of their architectural vision as against the need of the children of the parish. Of course, for those living nearby, a primary school can be noisy; some might even think that house prices could be affected. However I remind myself that the Victorian school has been functioning on its current site immediately adjacent to the new building since it was built in 1874, providing education for the children of the tenements, before these same houses were saved and gentrified in the last 40 years. Indeed, I note from the document before me that however much the need for local children to have access to open space is stressed by all, no-one seems much to want them to actually play in the churchyard. Among the objectors' letters, every one seemed to want the children only to have grass but no swings, see-saws or similar, and play elsewhere. They could play anywhere else but in the graveyard open space. I really do take judicial notice that it is fantasy to think that a young child will just sit on the grass and look at the architecture. The middle aged may have to accept that children have to be enticed into their architectural heritage with a swing or a slide, rather as adult

concert goers to the restored church may be tempted in by the promise of music and a glass of wine at the interval in the churchyard on a summer evening.

124. None of the objectors before me gave any evidence as to their own experience or that of any children they may have had at the school, but not without interest is the letter of support for the new building from a local GP, which I quote below.

125. I take judicial notice of the well known research done by Oxford University in 2015 that children who receive a pre-school education from the age of 3 onward are twice as likely to sit AS levels. I bear in mind the difficulties which this parish has in educational terms.

126. Christ Church as a church is involved in a number of activities. There is the Bengali Christian ministry meeting in the new building, the Crypt Trust which provides rehabilitation for alcoholics, and Christian Counselling for those who could not normally afford it. They are involved in the City Gateway to help the young access training and city apprenticeships. They are involved in running a food bank, and in the Street Pastors scheme, and in Door of Hope for Prostitute street workers, and it supports medical workers in India. Their Church hosts concerts and the Spitalfields Festival. In the Consistory Court, unlike in other jurisdictions such as a planning enquiry, I can take into consideration the pastoral aspect of the effects of the arguments before me. I found in this hearing that, at best, and grudgingly, the objectors here paid limited lip service to the aims and activities of this parish church, which is working with non English speaking immigrant children, prostitutes and drug takers while building up a vibrant evangelical congregation. This was really just not on the radar of many of the objectors whose "Hawksmoor vision" was a

world away from the reality on their doorsteps. As this area has become more polarised these divergent attitudes were to become, sadly, more strained. However, it is fair to say that, as set out below, some thought was given to ameliorating the local conditions by utilising the graveyard.

127. THE 1970 "OLD" BUILDING AND ITS HISTORY

Whilst it appears that during the 1950s the churchyard was being managed as an open space by the Borough of Stepney in accordance with a 1949 "agreement", Christ Church itself was becoming more and more run down, until it was closed for worship in 1957. By 1959 there was even correspondence between the then Rector and the London Diocesan Fund about the possibility of building a new Church, but even if the Borough of Stepney could make a site available, how would it be funded? It was accepted that it was "highly unlikely" that they would ever be able to demolish the existing church, let alone finance a new one **(35).** Correspondence (some incomplete, only the opening pages being produced and replies missing) meandered on during the 1960s. Bones were found while the school was being repaired/extended. The fact of the ground being still consecrated and that occasional human remains were being disturbed is frequently referred to, but, apparently, ignored by all in a desultory way. The need to involve the then Chancellor for a ruling on the ***"three sacks of bones in the rectory",*** which in 1964 the then Rector was said to be ***"rather relieved if these could be dealt with [by the Chancellor] in the not too distant future".*** The following year the then Chancellor authorised their proper disposal.

By the late 1960s plans were in the air as to the building of further class rooms for the school by the then Inner London Education Authority (ILEA). It was being raised by LDBS then that this ***"may be a temporary palliative but is no answer to the long-term needs of the school. These are to have complete assurance that the school can remain forever on its present site, or***

alternatively that a new site can and will be found for it". **(43)** There was not even hope of an alternative site for the next 15-20 years **(44).** The LDBS stressed that the school would need to function as a unit of sufficient size but the LDBS Deputy Director raised with the then Rector suggesting that it might be possible to organise a transfer of the playground land to the school. Even then there appeared to be some doubt as to who actually "owned" this land which was thought ***"to be the church's".***

128. Nothing seemed to have been followed up in respect of this until, in about 1968, the National Playing Fields Association recommended a specialist firm of architects to a body known as the Christ Church Gardens Adventure Playground Spitalfield. The Borough of Stepney had merged into LBTH, who had continued to manage the graveyard under the open spaces agreement and legislation. Under that legislation it was considered (and common ground between the Parties in this case, that the LBTH could build a youth centre on the part of the land next to the school ("the old building"). I am not entirely persuaded that that building could have been legally erected under the 1884 Act, but it was. It remained unchallenged, and it was subsequently demolished and so it is now unnecessary for me to express any view on its legality or otherwise.

129. Much is made by the current objectors about the objections at that time to this building, so I turn now to considering how it came to be erected. It is fair to say that, in comparison to the current building, it appears, at least from the plans and the photographs to be both closer to the church and a less attractive building than the current one. Then, as now, the London Diocesan Board for Schools had been seeking a site on the advice of the National Playing Fields Association for use in Tower Hamlets. "***There was a desperate need for a playground but a prolonged search had not revealed a site. When the old churchyard of Hawksmoor's famous church was eventually agreed, the Royal Fine Arts***

Commission were not unnaturally opposed to its use. The search was resumed without success. A new submission with a fine perspective by David Eccles was eventually approved after much discussion". There were other site problems with the position of a long established coffee stall for market workers, sunlight was blocked by tall buildings and ***"by the marvellous churchyard trees".*** There were fumes from a nearby factory and problems about burial disturbance and vaults to add to the remedial costs **(46-51**). Initial enquiries in 1968 had found no other available site than the graveyard, but the Royal Fine Arts Commission objected to its use as a children's playground. Further searches for an alternative site proved fruitless, but a new design was subsequently approved. The site was not without its problems (**46**):-

> ***"The gardens were frequented by meths drinkers, and known as 'Itchy Park'. The site for a strictly separate playground entrance, beside the huge church porch was blocked by another incongruous use in the form of a long established coffee stall, essential for night workers in the market opposite. Sunlight was in short supply being blocked by the enormous buildings on each side and by the marvellous churchyard trees. Underground were vaults which not only complicated the foundations but involved special dispensation for decent reburial of the inevitable bones. Negotiations and remedial works were needed to mitigate the fumes emerging from the factory on the South side".***

130. Michell & Partners, an architectural practice then specialising in this kind of work, provided a working design in 1968 for what became the children's play area and playground building, which later became the youth club, "the old building". It is sad now reading their glowing prospectus **(48-51)**, then full of high hopes for this building and the architect Ms Michell's aims for improving the life of the people who were to use it, and to see what happened later to it as it descended into an anti- social wreck, closed to the general public and

encouraging a new generation of vandals. At its unlamented final closure only broken equipment remained. The architect had envisaged a playground area where children could: **"*…build houses, dens and climbing structures, cook in the open, play with sand and water…there will be a good playground building in which such activities as painting, modelling and dressing up can take place ... pre-school groups will use the building during school hours …*";** it was hoped that the playschool's ball game area should be made available for school use. ***"…The grass and trees will be protected and the area will be used by mothers and younger children. The new building will screen the adventure area [playground] from the road*".**

It would seem that such a development would not, by its very nature, have been an open space for the use of all the general public. Indeed, its aim appeared to be, for understandable reasons of safety, to restrict entry to it to children and their parents.

131. The planning application for this was made on 12th September 1968 for an **"*adventure playground with one single storey building. Part of site remaining as public garden"***. It was clearly stated that the permission was being sought for ***"permanent development"*** (**52**).

There then followed correspondence with the LBTH and the Diocesan Registry as to how this could be done. All agreed that the LBTH would have to obtain a faculty for this development, and then grant a lease to the Christ Church Gardens Adventure Playground Association (CCGAPA). The LBTH initially refused this application for outline planning on grounds very similar to those of the current objectors' arguments, namely loss of the amenity of a quiet open space and the adverse impact on the view of the south side of the church **(55)**.

132. The document, from the Mitchell Partnership, with its accompanying illustrations shows a single story, somewhat utilitarian building (money was tight) placed low but close to the church's south front. Realistically, it left only the two western tranches of the garden open to the general public (the wilderness tranche and the current public area). The adventure playground group wanted to lease this area, and there followed somewhat convoluted correspondence from the LBTH who, subject to faculty approval, were prepared to lease part of "their" open space land to the playground association, and they considered that they, LBTH, had powers to do so under Articles 7-11 of the *Ministry of Housing and Local Government Provision Confirmation (Greater London Parks and Open Spaces) Act* 1967 **(53).** Between 1968-1971 there was desultory correspondence (some unsigned and un-attributable). Initially the proposal was refused by the LBTH planning committee in 1968 by reason of the building's potential effect on the church and the loss of a "relatively quiet community area". Someone (it would seem from the Diocesan Registry) wrote to the then Archdeacon, stating **(57),** that: ***" if the Adventure playground were dissolved*** … "***the building erected on the disused burial ground would revert to the London Borough, as it stands. <u>There would of course be no question of its returning to the Rector, and indeed, we would not want to have it</u>, owing to the necessity of maintaining it, but the London Borough would still be bound by the terms of their original faculty to maintain it generally as an open space***".

No grounds are given for this somewhat sweeping statement.

The Planning Committee recommended refusal of the first plan, but it was re-jigged and re-submitted so that in 1969 the planners on the Council recommended to the committee approval "***for a period of 5 years in the first instance*****".** Much is made by the objectors of this, claiming that the old building was "temporary". However, if one reads the rest of the minute **(59)**:-

"***The reason for suggesting a temporary consent is that it may be possible with the redevelopment of the area to re-site the adventure playground to its advantage and at the same time improve the visual amenity of Christ Church Gardens. The applicants could further be informed that in the event of the redevelopment of the area not having been undertaken within this period, then it is likely that favourable consideration would be given to an application for renewal of the temporary planning permission".***

Now certain things are clear following from that minute:-

1) the Council granted a 5 year planning permission for the old building (as slightly altered)

2) the Council appear to be assuming that redevelopment would free up space for the adventure playground to be re-sited; if not, the temporary planning might be extended

3) that did not happen; redevelopment became more intense

4) the adventure playground stayed where it was in the graveyard

5) nothing is more permanent than the temporary

6) all this must be seen against the background of the plans for disposals of the school playground land out of church ownership as can be seen from the views expressed by the Diocesan Registry above.

133. The London DAC had some reservations about the old building, and referred it to the Royal Fine Arts Commission. I remind my self that their views then were in respect of the previous building, not the current one, and that the old footprint was slightly different from the present one. Even then their views **(63)** were not as passionate as they might be. They objected to "***the untidiness of the playground***" and urged that another site might be found. They accepted that if that proved to be impossible, then the old building should be sited as far from the church as possible, near the southern boundary of the

graveyard. ***"If it is eventually decided that the playground must be provided on this site and if it would help towards an alternative scheme on the above lines, the Commission would be glad to arrange an informal discussion between one of its Members and the architects for the scheme with a view to a revised design being submitted" (64).*** Then the Fine Art Commission had to realise: ***"that this will involve the loss of the trees***". As I saw myself on the site view from a neighbouring roof, it is the trees (now the subject of tree preservation orders) which have hampered site alteration for both the old and new buildings. I find that these trees also block the view of the church, even at ground level. The trees (or their predecessors) were certainly not there in 1750. The new building has tried to move south from the church, and be framed by the trees. The Fine Arts Commission appeared to understand the juggling act in progress and offered to liaise with the architect, but still thought that ***"this is a development that in the interests of posterity should not take place" (65).*** On the 20th May, 1969, following that proposed informal discussion, they accepted that the revised design was an improvement but objected ***"to the use of this open space for any such purpose. Whilst the church is at present in a neglected state there is the hope that someday it will be restored and when this happens the loss of the churchyard will be irremediable. The Commission thinks that every effort should be made to avoid building on this site".*** However The Royal Fine Arts Commission agreed in a meeting on 10th September 1969, having considered ***"the desperate social need for the facilities",*** that ***"the Commission … would not now oppose your proposals as long as they did not impinge on the fabric of the Church. This could mean that if in the distant future the Church were to be restored to its former splendour the possibility would exist of the removal of these ancillary buildings" (71).***

That time has now come almost 50 years on, but the social problems and the site restrictions still remain.

134. In the event, a provisional faculty was cited on 12th March 1970, envisaging a somewhat convoluted arrangement between LBTH, the Church and the Adventure Playground. There was real and recognised concern: ***"about the nuisance caused by the use of Christ Church gardens by considerable numbers of methylated and crude spirit drinkers for whom the gardens have for some time been a centre. This nuisance has meant that the facilities provided at the open space are not used to their greatest advantage, and in this connection extreme concern has been expressed by local councillors, parents, social and welfare workers etc. That the children must pass through what can only be described as unpleasant circumstances to gain access to that part of the garden used at present as a children's' playground".***

The aim was to ensure that the children using the adventure playground could be left to play ***"under organised and effective supervision".*** The LBTH and the church had both formally passed resolutions supporting this proposal on 12th March 1970 (**3401-3402**), and the proposed licences obtained a Faculty, but were accompanied with clear warnings not to construct buildings on the land. It was a playground **(3404).**

135. **THE ADVENTURE PLAYGROUND/YOUTH CLUB**

The work began for the children's play area and 'the old building' which was later to become the youth club. Bones were disturbed, so that both the Home Office and the police were informed. They were re-buried **(90-91).** In passing, I note that for the 1970 building there was always envisaged that there would be grave and vault disturbance and disturbance of disarticulated bones. Much of what was more recently complained of may well have happened earlier (before the current complainants lived in the area). There was the usual public advertisement then,

46 years ago, but no relative then came forward nearly 50 years ago to object or to claim bodies for reburial.

It is clear from the accompanying correspondence that all involved at this time were aware of the conflicts between the open space gardens, the needs of children for a safe play area and the architectural importance of the church. It was then, as now, at least in the terms of ecclesiastical law, a matter of balance.

136. Yet another unsigned and undated draft Deed (the "1970" Deed) was produced for my attention **(85-88)** under which the then Rector agreed to permit ***LBTH " to grant in the form annexed hereto"*** (no copy before me) " ***a licence to the trustees of the Christchurch Gardens Adventure Playground Association pursuant to Article 8 of the 1967 Order to erect buildings on the said churchyard and layout part of the said churchyard for use as a recreation centre for children and to use manage and control the same in accordance with the plans and terms and conditions contained or referred to in the same licence. "*** It provided that the 1949 deed shall otherwise continue in full force and effect save as to that part of the churchyard the subject matter of the licence. A Faculty then issued on 16th April 1970 **(92-94).**

137. It is common ground that the history of the youth club/adventure play ground run by the Christchurch gardens adventure playground did not match the hopes for which it was built. Changing social patterns meant it had become a dubious meeting place for the young with drugs being taken, ill run and failed as a project (though the playground was apparently initially loved by the children of the parish). In 1974 an inspection of this facility showed: ***"at Christchurch gardens there were no children at all and there were several meths drinkers actually inside the playground. The leader was watching TV in the building".*** **(98)** As early as 1976 the management had financial concerns: **"*we cannot make ends meet"*** reported the treasurer (**99).**

It became clear to its trustees, and to the then Inner London Education Authority, that conditions for management were not being met. Something had to be done **(102).** Matters dragged on, but by 1985 the then Archdeacon of Hackney had some concern that the London Borough of Tower Hamlets might be thinking they could grant a sublease, a lease for the adventure playground land **(102-103).** He drew that to the attention of the then Rector (whose original letter is not before me) to the illegality of that under the faculty jurisdiction, saying: ***"it may not be such a wicked thing to have done, although it may be illegal".*** The then Archdeacon, the Ven. Roger Sharpley, was concerned to know whether or not the churchyard had been deconsecrated, and promised to get in touch with the Diocesan Registrar at Messrs Winckworth & Pemberton to clarify what the situation was; which he did two days later **(103).**

138**.** I regard that as an important letter as it raises by way of question, enquiries as to most of the problems which have subsequently arisen in this case: the school's need to expand, their proposed use of the adventure playground land, the legal position of the LBTH in respect to the land they are managing as an open space, and the possible sale of part of the Rector's freehold to achieve this. The Registry replied setting out the 1949 and 1969 licences, both done under Faculty. The Registry suggested a further licence under Faculty to achieve the school's extension onto the adventure playground land, as a final disposal of the freehold land would have to be done under a Pastoral Scheme which ***"will take time and will need a lot of complex planning"*** **(105-106).**

A letter from the Educational Valuer **(107-108)** set out the history of the ILEA thought processes from 1985 onward. It is perfectly clear that what was envisaged was to buy the school land and the playground land from the church. It was recognised that, without the land being deconsecrated and sold under a pastoral scheme, this would be complicated and take time ***"…which is expected to take a minimum of 12 months, it is proposed to take initial***

possession of the land for the purposes of contractor's storage and workspace by way of a licence to avoid delaying a start on site".

Here there was no possible conflict of interest as open space trustees as ILEA, not the Council, were the education authority, and there was an absolute need to expand the school premises. "***The pressure on the school is also compounded by the fact that the accommodation is extremely restricted and the existing recreational area is below the minimum standard required by the school" (107).***

139. No one seemed to regard the Open Space agreement (now with LBTH) was going to be a bar.

140 As one might have gloomily predicted, given the history of this graveyard, the children's playground and associated building was not a success, but had difficulties. As I have said, in or about 1974 representatives of the National Playing Fields Association went on a tour of playing fields they had helped to fund. At Christ Church they found: "***there were no children at all, and there were several meths drinkers actually inside the playground. The [playgroup] leader was watching TV in the building" (98).***

This flagged up what was to become a litany of complaints about the running of the adventure play/youth centre ground over the next few years. Discussions took place among various committees, the playground association, who ideally wanted to control the whole of the gardens, the church, ILEA, who wanted to ensure use of the facility during term time, and the school, which needed more space. The school wanted to buy the adventure playground/youth centre land. The legal problems were tossed about and no one seemed to agree. The general view was that a further licence under faculty might help. Nothing happened, and the situation drifted on from bad to worse. The adventure playground/youth centre continued to be badly run, and its finances declined.

Discussions went on slowly, and there were discussions as to costs, the time needed to deconsecrate, and the pressing needs of the school. However by September 1986, ILEA formally wrote to the Diocesan Registry requesting that a licence be granted under faculty to allow site work to begin as soon as possible, and accepting that a pastoral scheme would take some time **(110**). By 1986, as I have set out above, ILEA wanted (and badly needed) to extend the school, and wanted ultimately to buy the land after it had been freed up by a pastoral scheme, which was accepted as being necessary to achieve this (see above). In the meantime, they were considering applying for a licence under faculty to obtain school use of the land. The then Chancellor was willing to consider this, subject to the agreement of the LBTH, the Adventure Playground Association and ILEA, but ILEA were put on notice that: ***"Perhaps for the record you would just confirm that there is no intention to construct any building on the land".*** This was provided **(112).** It was clear from the correspondence before me that any then talk of a licence was only going to be relevant <u>until</u> the pastoral scheme could be obtained to free the churchyard from its existing legal constraints. The Chancellor, by March 1987, made it clear that:-

"…the Chancellor does not like being rushed like this …and cannot make an Order which derogates the management rights of the London Borough of Tower Hamlets under the 1949 Faculty without their leave, or presence as a Party. Again, he cannot approve an unconditional licence for buildings to be put up on a Disused Burial Ground, unless he assumes some statutory exemption to the 1884 Act"……"The other point he raises is that you say that proceedings under pastoral measure are impending [sic] but the proposed licence is expressed to be for an [sic] unlimited in time".

In the event, LBTH on 30th March 1987 wrote to confirm that they would surrender part of their maintenance, control and supervision land at Christ

Church: "***so that you are able to complete the transfer to ILEA"*** **(121).** In other words, LBTH appear to be quite content to surrender their management duties on at least part of this land, to enable the church to be able permanently to part up with the Rector's ownership for the school to expand.

The Chancellor was also concerned that the licence was expressed to be for an unlimited time although proceedings under a Pastoral Scheme were being envisaged **(110**). It is clear that all were trying to end church ownership of the two easternmost tranches of the graveyard by way of a pastoral scheme. The length of time for the necessary licence was to control matters until the land was freed from church control.

What was clearly being envisaged was a holding legal position of a licence by faculty, pending the detachment of the school and the playground from the church's ownership by a pastoral scheme with the overriding purpose of allowing the school more space to expand and develop, and that the land was to be for both school and community use. It is clear that this whole agreement was seen as a holding arrangement pending a pastoral scheme.

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

142. In the event, a licence was granted to ILEA for the use of the adventure playground and by the school **(117),** and the Registry confirmed that LBTH had written to say they did not object **(112).** It was confirmed by the

Registry that "***no buildings were to be constructed on this land*"(112).** The old adventure playground land was licenced to the school for use as a playground **"*in common with the association*" (114).** It is not clear to me what consultation had allowed an officer of the Local Authority to agree to this.

The Faculty was granted on **13th April 1987**, but the licence described as being in accordance with that Faculty between the then Rector, the Trustees of the Adventure Playground and ILEA was dated **15th April 1987**. The playground land was to have shared use between the Adventure Playground and the school until 31st March 1992 ***" and to facilitate if the same be lawful under the Disused Burial Grounds Act 1884 the construction on part of the former school playground of two additional class rooms"*** and the exercise of this licence was not to interfere with the exercise by the LBTH of its rights and powers under the agreement for care and maintenance ….authorised by the 1949 faculty **(118-120)**. **There was a termination clause for breach.** So by 1987, ILEA had a licence for the school to use the school playground extension and the Council had surrendered it. However, the Christ Church Adventure Playground Association, which had become known as the Christ Church Youth and Community Centre ("the youth club"), who had obtained a licence to use the land, obtained a license to use the playground in 1970 via an amendment of the 1949 Deed, agreed to this surrender in 1987 but the community centre retained some use of the surrendered area outside school hours.

143. It is quite clear that what was intended here (but for whatever reason not actually done) was that what appears to be the playground land to the west of the school and up to the south of the rectory was to be detached from LBTH maintenance, and from church ownership, and a pastoral scheme was to be sought so that the title of the land on which the school stood was to be transferred to ILEA.

144. In any event no pastoral scheme was obtained. **(I22).** It is not clear why not, or if any efforts were made to obtain one. The potentiality of building two extra classrooms on this land "***in so far as the same may be lawful*"** was left hanging in the air. The land in question was taken in hand by the school and that has continued until the present.

145. It was not until 1996 that the next Faculty (**5th December 1996**) was obtained in respect of the wilderness tranche, when it was hoped among other works to improve the play equipment for children (**160).** There had been no objections to that.

146. **RESTORATION ACTIVITY AT THE CHURCH**

While all these discussions were going on, the FoCCS had been busy raising substantial funds for the restoration of the church.

A preliminary Master Plan had been prepared in 1990, but put on hold because of difficulties in raising funds. This plan was updated in 1995 (**124-130).**

That Master Plan usefully reviews the situation and history:

"***FoCCS is a registered charity formed in 1976…the Friends as agents of the Rector and PCC are leading the restoration, repair and maintenance of the fabric. Subscribers and donors support the running costs of the Friends' appeal as well as contributing to the restoration appeal".***

It makes clear, as I do, that the Spitalfields' Festival, although founded also in 1976 by the Friends, has now no legal or financial connection with FoCCS. I make it clear that this body has been in no way party to this litigation (save for one individually expressed view). It is a body which is yet another user of the church itself. The Master Plan acknowledges that the Adventure Playground is occupying a building under licence in the churchyard, that building having been erected by the local authority. The Master Plan stressed that the FoCCS is a

fund raising body, separate from other church users, but that they are "***committed to co-operation with other users of Christ Church***". ***"The trustees of the friends as the leaders of the restoration effort are committed to co-operation with other users of Christchurch. Notwithstanding the variety of uses to which the building is put it is essential that the restoration of Christchurch is planned from an understanding of the whole of the building and its setting as an indivisible entity"*** but this must be seen against the following ***"this master plan focuses on the restoration of Christchurch as a major architectural monument, a living church and a valuable community resource". "….the friends established an upkeep and maintenance endowment, interest on which provided in 1995 an income of approximately £4,000 as a contribution toward these costs. This arrangement will continue".*** The aims of FoCCS as set out in this plan were:-

- the restoration of the church as close to its state in 1750 as possible
- to consolidate it as a place of worship, to install modern services, heating, lighting, WCs
- to consolidate public use, film shoots, the Spitalfields' Festival etc.
- to develop the crypt for all users of the Church and wider community use
- to rationalise office/vestry space
- to programme the works to minimise disruption to the Spitalfields' Festival, the Crypt Trust, residents, parish worship, the playground and the bell ringers.

The perceived order of importance in the last paragraph is not without interest. The Rector is to be advised by professional consultants, but those consultants, although their instructions are issued by the Rector, but only on the advice of the FoCCS Building Committee, on which the PCC, Spitalfields' Festival and Crypt Trust have representation. How far those requirements have been followed over the years is not entirely clear to me. The Trustees of FoCCS must approve any building works which they are to fund. It is quite

clear that over the last 20 years that the make-up of the trustees has changed. Looking at their scheme of control, it seem that the building committee (Restoration Trustees) is commissioned by the Trustees of FoCCS to instruct consultants, whom the Rector formally instructs; a cumbersome division of responsibility. From the Minutes before me of FoCCS it seems that this organisational arrangement has begun to get blurred. I have to remember how the FoCCS initially saw their role. It does not always read like this as the years go on, as it seems that the Trustees of the FoCCS, rightly proud of their fund raising expertise and specialist identification of skilled craftsmen etc., began to forget that they were not acting "as agents" to the Rector but were thinking of themselves as free agents. Only years later did the current Rector see this Master Plan. A substantial appendix of proposed works was annexed to this Master Plan. The last item, after dealing with the interior of the church, roof etc. is one headed **"*curtilage and graveyard*"**. It deals with the replacement of railings, access improvements, and repairs to gate posts restoration of a monument and the installation of floodlighting. That is all.

147. **Nowhere in this document is "landscaping" of the graveyard (save as set out above) a priority nor mentioned, save in the third appendix: "landscaping of churchyard; long term strategy for use and management under development".** That is all.

This document appears to have been the necessary basis for a successful HLF application (**132-145)** by the Rector, PCC and the Spitalfields Restoration Trust (the commissioning arm of FoCCS), which was successful and they were awarded £2,441,500 in June 1996.

148. In 1996 there had been a Faculty for new playground equipment. Work continued on the church itself. The crypt had had to be further emptied of bodies, and apart from the archaeologists involved, the professional

exhumation firm of Troop were in dispute over their fees for this work in about 2003.

149. In 2005 time was taken up by the church having successfully to apply for a Faculty to bury the ashes of the architect Sir James Stirling under the southern walkway immediately round the church, and for a memorial plaque. There were problems as to burial in or under the church, let alone in a closed churchyard. Time and effort was needed to get this sorted out by Faculty. Otherwise, the restoration work organised by FoCCS went on as the money came in, and the church built up its parishioners.

150. **THE INCREASING INFLUENCE OF FoCCS**

By 2003 the tranche of land between the school and wilderness land was described as being 'a youth and community centre' (i.e. the old youth centre), rather than an adventure playground. It was photographed by the original architect at **(170)** with a note saying: "***I was thankful that the Friends of Christ Church showed no signs of resenting its presence beside their magnificent church. The Secretary of the Friends, who lives in Fournier Street, said she and her children wishes it was still a playground"*** (**170).** I note the use of the word "their".

151. One of the saddest parts of this case was to have to listened to the original architect of the 1970 youth club, whose original drawings and outline had such high hopes for a community and social use, have to decry if not her own work, at the least the building of anything in the graveyard. When asked why she had chosen to give evidence, her reply was that she had been approached by Ms Whaite to do so. In fact, Ms Michell became a formal objector in these proceedings.

152. Work on the restoration of the church continued. In 2002 there was a Faculty appearing to deal with alterations to the crypt and the railings and the laying of paving stones. It did carry a condition as to further directions if remains are to be disturbed, and for the work to be carried out in consultation with the Georgian Group (**3430-1).**

153. By this time serious money was being raised by FoCCS for the crypt works. Now I can understand that in making their very substantial pitches for money, FoCCS wanted to know the legal position, as did the Church, in respect of land ownership (as Christ Church owned other buildings such as the Hanbury Hall). The then Rector and Churchwardens in 2003 asked a solicitor to provide for them an analysis of the legal situation in respect "***of land adjoining the church, and rights affecting such land*****" (171-204**). This covered other land and buildings owned by the church which are not relevant here. However, this overview, provided *pro bono* by a solicitor, set out the problems which the intervening 20 years have not improved:-

- the declaration of trust in respect of the Victorian school site in 1919 but which existed only in draft
- the 1949 deed granting management of the Churchyard excluded the path beside the church
- the adventure playground (then known as the Christchurch Youth and Community Centre) had been granted by the 1970 licence, the adventure playground including the school playground extension and (probably) not the path by the Church
- the 1987 surrender by the Council of the playground extension which was then licenced to ILEA with the consent of the adventure playground trustees who could still use that land outside school times.

He bemoans the loss of many necessary documents. I do not understand how the Rector and PCC could have been allowed to let this legal mess develop, nor

why the Diocesan Registry could not have provided more guidance and advice at every stage.

It appears that the church deeds and other historical papers were removed from the safe at the Church by the chief librarian of Tower Hamlets in December 1980, being badly affected by damp and in extremely poor condition. From there, they went to the Greater London Record Office (London Metropolitan Archive). Many were un-catalogued and too fragile to handle, and it was unclear what had been sent or received where.

154. It was not explained to me how documents which would have been in the control of the Diocesan Registry and/or the Diocesan archives could not be located.

155. Lest one thinks that more recent information might be better cared for, I note that in the course of the objectors making their Freedom of Information requests (an unusually fashionable application in ecclesiastical law cases), it came to light that more recent correspondence had been stored on the Rector's computer. However, the ceiling of his study in his Hawksmoor designed Rectory fell down and squashed his computer flat, so that its contents were irretrievable. Truly, at that point in this history, the Rector, whom the objectors had by then delated to the Attorney General with a view to having him prosecuted, must have considered that the Book of Job might be regarded as a little light holiday reading.

156. In any event, many of the earlier documents in respect of the school were then still un-indexed. When Red Lion Street was enlarged into what became Commercial Street in 1897, there was a substantial parcel of land between the churchyard and the pavement for Commercial Street, 16-30 feet in width, which was to be added to the extreme western edge of the churchyard

but the church would not pay for it. The Commissioners for Works apparently leased this extra land forming past of the Churchyard extension to the Whitechapel Board of Works for, initially, 500 years, then 100 years. Like many other documents in this case, that lease cannot be found. In the event, it would have expired in 1997, and would cover the western edge of the graveyard which is not affected by this case. However, it is symptomatic of the cavalier attitude virtually every formal body, both in church and state, involved with this church has shown to agreements and their effects. Government bodies evolved from being the Metropolitan Board of Works, whose duties devolved to the LCC, and then to the GLC, but the property owned by the Commissioners for Works was seemingly not transferred to the Metropolitan Board of Works, nor on to the LCC. The Board of Works became the Ministry for Works in 1945, then the Ministry for Public Buildings and Works in 1962, and then it fell into the hands of the Secretary of State for the Environment in 1970. The solicitor writing this inventory metaphorically throws up his hand. Did the Council retain that land by adverse possession? Who knows? Did that land through many changes of governmental nomenclature fall back into the hands of the Department of the Environment? Who knows? Who cared? Later in 2009, another London solicitor assisting the church *pro bono* was to update what he described: ***"this extraordinary exercise of what I can only describe as 'metaphysical conveyancing"*** from three missing deeds.

157. **EVENTS LEADING UP TO THE NEW BUILDING**

The church was being restored, but the youth club adventure playground, as I have said, was continuing to go down hill. Trying to operate next door to a building site cannot have helped much. In 2007 the new Rector, the Rev'd. Mr Rider, was concerned about the situation. He discovered that the relevant Deeds had been lost by church and Council, and that the LBTH had spent little

time looking after the site (probably very difficult when the builders were sharing it). For years the restorers had turned much of the graveyard into a builders' yard to which the public would not have had access. There were growing concerns about the conduct of the youth officer, that people were ***"shooting up and having sex in public in the graveyard***'. The Rector stressed there need to be: *"**joined up thinking between the church, the school and the Youth Club".*** He produced some handwritten notes of meeting he had on 4th October 2007 with a variety of interested persons. He complains about the running of the youth club, about the confiscated knives held there, about the noise and antisocial behaviour (**250-253).** This started discussions with LBTH, the church and the Youth Club trustees in respect of the legal position of the churchyard and its operational use. The LBTH itself was preparing a "Primary strategy for change" during this period, and into the mix came the potential s106 money from the Bishops Square development projects.

158. Conflicting evidence makes it necessary to try to tease out just what happened leading up to the surrender of the 1970 licence for £25,000 to the Youth Club trustees (the club having finally ceased to function by about 2008). An agreement was entered into by which (the youth club trustees having been bought out with sufficient moneys to pay off the youth worker) LBTH was granted an interim licence for the school use of the land in contemplation of planning permission for redevelopment of the gardens, school and school grounds (all save the public westernmost tranche of the graveyard), and to revise the management agreements (**2621).** Time and again in various minutes of meetings, the phrase "on-going discussions" reappears. It is of note that it is someone from the Spitalfields Society, rather than anyone from FoCCS, who is involved in these discussions. It is not necessary for me to rehash all these

discussions save to note that by early 2009, it became clear that the youth centre was to be wound up. It was insolvent.

On 11th February 2009 the Rector reported to the FoCCS trustees that: ***"Although the winding up may in practice take some time, the responsibility for the building and its garden will eventually be handed back to the church …..and that LBTH had earmarked £1 million for redevelopment of the school".***

159. **THE SCHOOL**

From 2005 onwards various bodies, the school governors, the LBTH, the LDBS and others, were each, in their own way concerned about what was happening with the school. The demand by the objectors for a plethora of minutes from the Education Department and the Board of Governors of Christ Church School served only to weaken their argument in respect of the school. Indeed, the head master was barely cross-examined as to the very real need of the school (as distinct from how those needs could/should be funded). I find as a fact that this was, and is, a school with very great social needs. A large percentage of its intake are immigrants and Muslim, and English is not their first language. Children come and go to and from the subcontinent. There is a need to expand the pre-school age group to lay the foundation for growing school numbers to guarantee growth, but additional classrooms were needed, and these could also serve the community by way of parent outreach classes and other community work. In the course of the hearing, we had two site views to the school; in one I saw a busy, clean, well- presented establishment. This school had gone through bad times. The Rector had resigned as Chairman of the Board of Governors. The school had had to be put into the equivalent of special measures (I rather have the impression that this was what put the idea into the heads of, at least some, of the objectors that, with any luck and bad publicity, the school might close). In any event, this school under a new

headmaster has pulled itself up by its bootstraps, and I pay tribute to the teaching and the staff I saw, who were clearly encouraging the pupils to enjoy learning. The impression I formed of Christ Church School was that it had now become a credit to the parish and the church, of which it continued to form a part with a clearly continuing Christian ethos. Our second site view (as it was considered by the objectors that I had not been shown earlier a secondary staircase) took place when the school was being used as a polling station for the European Referendum so that I saw the community use of this building as a polling station by what appeared to be totally Muslim voters, most courteous poll clerks and a police constable, the latter being understandably somewhat bemused as to whether the appearance en masse of a number of participants from a Consistory Court hearing might amount to intimidation of prospective voters. As it happened, these site visits left me with no sense that there was any concern or hesitation by local residents to use a building built over the dead, as has been raised in argument on behalf of the objectors. I accept that, at best, I only saw snapshots of a school in action, on a par with the impression many parents have when deciding on their own children's school, but I heard the current Headmaster give evidence and I was impressed by his demeanour, attitude and common sense in a situation into which he had come relatively recently. I accept his evidence as to the very real needs of this school and its future plans, and I was impressed by his obvious enthusiasm in showing us round the school, and that of the staff I saw teaching there. Where there was any conflict in evidence in respect of the school I have no difficulty in preferring that of the Headmaster, who more than backed up all I had read in the interminable documents, which the objectors had demanded to have produced, as to the very real needs of the school for more classroom space and of its plans to expand its community outreach for the families of its pupils. These documents, bluntly, just destroyed the objectors' arguments that this

school was failing so badly that it might have to close, and/or just did not need the space.

160. The objectors also raised that, were space to be needed, it could be obtained elsewhere so that there would be no need to build alongside the church. Various places were suggested by the objectors; a closed pub immediately adjacent to the school on Brick Lane might well have served the purpose, but, unfortunately, its owner would not sell to the school as a more lucrative commercial development was being considered. I was really very surprised as to how incompetently details of the other possible sites put forward by the objectors had been prepared. I was provided with no information in respect of each of these potential sites as to their availability during term time, whether for all day or part of each day, of whether the other sites even had availability, or whether the use of these other premises could accommodate and deal with the child security now absolutely necessary for accommodation for the schooling of pre-school children. (Security we all, very properly, experienced on the site views, as having to sign in and out of the school). I was given no indication as to costings of such potential room hirings, and the witnesses for the school and the LDBS were not even cross-examined about how such outside hirings were to be paid for. It was as if some of the objectors had just sat down with a list of local Mosques, church halls, public rooms etc. It seemed that their view was that if any of these spaces could provide a space for children, it would do. They produced no evidence from each of their proposals as to cost, availability or agreement to be so hired. I was given, initially, an un-scaled map of where these buildings were in relation to the school, but no indication as to how long it would take to walk a toddler from the school to any of these places, let alone pushing another child in a buggy as well as many parents might have to. In desperation to see if any of these places might be viable (even if affordable or available), I myself walked to, and

identified, each one of these proposed sites on a weekend. Overall, the proposals (even un-costed and with no evidence of availability) were just, bluntly ridiculous: just names plucked out of the air as being alternatives without any real thought or rational analysis to their suitability or availability. For the objectors these were just places away from the graveyard, where the children could be sent. I fear that many objectors who raised these other places as potential alternatives for the use of children rather than a purpose built building immediately adjacent to the old school had either not themselves checked the reality of the situation and/or had relied on inaccurate second hand "advice". They were far too far from the school to be viable options, and, in many cases involved heavily trafficked roads. The church crypt itself was also proposed as a nursery school. Not only was it accepted that it was unsuitable for a pre-school nursery (no direct light), but the effect of term time use for children and parents groups would interrupt the commercial use as a café. No thought was given by the objectors as to the required HLF public access use, much stressed in their other arguments, nor to the realities of providing security for children away from direct public access. Of any proposal made by the objectors, their "alternative venue" proposals were muddled, incoherent and scrabbled together, almost as if on the back of an envelope.

161. **AFTER THE DEMISE OF THE YOUTH CLUB**

Not only had the youth club failed as an operation, as I have set out above, it was also insolvent and its organisers desperately wanted out and needed cash. The Christ Church Gardens Youth and Community Centre was formally warned by LBTH in May 2008 that they (the Youth Centre) only had a licence to occupy the land which was not capable of being sold off by them, but that if they tried to offload it to another body it could only be done by another licence to which the LBTH would have to agree **(304**). There then followed numerous discussions as to how the body running the youth club could be enabled to

close and leave the site, given their financial difficulties in even paying off their employees.

All this was a sorry end of the hopes of Ms Michell over 46 years before as aims of a community place for children.

Other matters were also stirring in the borough. The Council, LBTH, (now the education authority after the demise of ILEA) were prepared to put £1 million pounds in to improving the school facilities. That was seized on by the LDBS and at a meeting on 19th March 2009, Mr Woolf reported that to his committee of the LDBS: ***"The land needed for the work may become available through the closing of the youth club, which needs funding to complete its accounts for the closure. Mr Woolf has indicated to the charity that runs the youth club that the school can find the required £25K by 30th April, if it can get everything ready in time … the deal he would broker would be for a long term interest in the site for the school. He commented that the school would have to make equivalent community use available" (451).*** To get the government money, the buy out of the Youth Club and the appointment of an architect would have to be completed by April 2009, and the building finished within 2010/2011. From that meeting everything else flows.

162. There then followed a number of meetings between the LBTH (legal and parks departments), the school and the Rector, LDBS and a variety of others (FoCCS being listed as a stakeholder). The aims were to get rid of the defunct youth club, provide enhanced building for the existing school and, as the parks representative said as early as March 2009, to provide "**an enhanced public space"**.

The LDBS were criticised as to their own application for state funding "not having made the correct enquiry as to the land ownership". In this the objectors appeared to have failed to realise the reality of a Church school,

being in existence since 1708, longer than the church itself, and as Mr Woolf of LDBS said in evidence: ***"it would not have made a blind bit of difference to the award of government funding"***.

163. At last, efforts were made to sort out the legal ownership of the land which had been used by the adventure playground/youth club; the tranche of land next to the school. A solicitor, as I have said, described the history of the land ownership/licences documentation as being "metaphysical conveyancing". He could not explain how by now ILEA had apparently managed to pass the land licensed to the Youth Centre and then to ILEA, on to the school trustees themselves. It is clear **(464)** that the land licences are a shambles, but that the school needed certainty, or at least the promise of future certainty, as to their right to occupy the youth club land before they could get the government money.

164. Much is made by the objectors that the LBTH were conflicted, being both a planning authority, an education authority and an open space manager for the churchyard. They also argued that the LDBS was not correct in their application for state money. At this time it is clear from the papers that everyone was under pressure not to miss the window of opportunity to get the education money to allow the school expansion.

165. By 22nd April 2009 it was proposed **(468)** the Youth and Community Centre would surrender their 1970 licence (bluntly having been bought off by the payment of £25,000 to the youth worker who was otherwise going to claim redundancy compensation against the Playground Association, which itself was insolvent). Once the youth club disappeared, LBTH would grant the school a temporary licence to take over the youth club buildings for 18 months or until planning permission was granted for alterations to the school or former

churchyard. At the end of that 18 months (or after planning permission was granted), the Rector and LBTH would cancel the 1949 agreement, and the school would be granted a long term licence of part of the church yard, and there would be a new management agreement for the rest of the churchyard to LBTH. All three bodies were to work together to achieve this.

The Rector reported this to the Trustees of FoCCS meeting on 12th May 2009. The school, he reported would receive an area of land (smaller than then currently occupied by the youth association). The remaining land would be reshaped and redeveloped for public space **(472**) with money from LBTH, who were to put in some £1.5 million to the school project (**489**). **It is noticeable that at that Trustees meeting at which only 4 Trustees were present, there was no objection raised and no one mentioned the Hawksmoor graveyard landscape vision or the loss of open space.**

166. Meetings continued throughout the summer of 2009 as it took longer to buy off the youth worker than had been anticipated, but at last there was a proposed agreement to achieve all the above, and a licence which looked to the future 25 years ***"and is an interim document***". Complaint is made by the objectors that the school should not/could not have got state money as it did not "***own the site***", though that completely misunderstands the security of the Rector's ownership of the land on which this church school stands. (**532-533).** Boundaries giving the church access to its south side was also discussed.

167. Much has been made that this was only a licence for 25 years and an interim agreement. From all the previous documents it seems clear to me that what was really intended (the school needing more space, the youth club having failed) was that the youth club land would ultimately come under the full control of the school, probably by way of pastoral scheme, and the church and

LBTH would enter into a new management deed for the remaining open space land. Such parts of the churchyard that became the school's could then all also be deconsecrated. Quite bluntly, that was an overall plan that was both sensible and rational at the time. Meeting after meeting complained about the state of the churchyard gardens and its litter.

168. The LDBS raised the need for a Faculty, and, the PCC having passed a resolution to do so on 20th July 2009. This was applied for on 23rd July 2009, to allow the surrender of the Youth Club licence back to LBTH who would grant a new 25 year licence to the school. The public notice was certified on 26th August 2009 as having been advertised between 16th July -13th August 2009 **(541-542).** Had one read it, the long term intentions of the parties might not have appeared completely clear. The schedule to the public notice said that the purpose was**:-**

"to allow the current licence held by Christ Church Gardens Youth and Community Centre to be surrendered to the London Borough of Tower Hamlets, and to allow the London Borough of Tower Hamlets to grant to Christ Church Primary School a twenty five year licence agreement for land adjacent to the church".

But did it clearly set out the full story? It is true that the public notice said that copies of the relevant documents might be inspected at the rectory basement.

Now in other judgments I have stressed the importance **of plans and proposals to be immediately and clearly available in a church for anyone interested to see.** Here I accept that the substantial correspondence and negotiations to buy off an employee of the youth club was the subject of some commercial confidentiality, let alone individual protection given the allegations against him, now long lost in the demands of the objectors for production of documents in this litigation.

This Faculty petition was dated 23rd July 2009 (**548-559**). It was said in that Faculty that no external works to the building were proposed. That was somewhat misleading. Nothing was proposed to the church itself, but to the youth club's, now wrecked, buildings. It is right to say that everyone was concentrating at that point on getting the legality of the land holding reorganised. Buildings would come later. However, the seeds of the subsequent slapdash paperwork begins. In answer to the enquiry as to "whether the land in question was consecrated", the answer is given: **"No: maybe partly consecrated", although the answers continue to say that the land in question has been used for burials.**

169. In many dioceses, it is more usual for the Petition to be sent to the Diocesan Registry first, where it can be checked, and then the Public Notice to issue. I remain puzzled why the underlying problems of the disused burial ground were not picked up from here onwards, especially as they had been referred to many, many times previously. Now given the amount of correspondence and notice that this land was all a consecrated graveyard (save for the extreme 1859 western strip), I just do not understand how that question could have been replied to in that way. I do not understand why the Diocesan Registry did not immediately pick this up before even the petition was sent out for public notice. It seems that everyone appeared to be considering that all this could be done under the Open Space legislation.

170. There were no objections, probably because everyone wanted to see an end to the failed youth club and its disruptive clientele, dislike of which was about the only common factor between the parties in this current case. The Chancellor approved this faculty for the new licence.

171. Time was spent sorting out jurisdiction clauses. The Youth & Community Centre signed the relevant documents, and got their 'buy off' money, but wrote on 17th August 2009 that they hoped that the land they were vacating would become the responsibility of the church and the school as LBTH "***does not have a good record of making Christ Church gardens a safe place in which families with children can play"*** **(568).** They regretted the almost inevitable demolition of "their" youth centre. Given their own failure to ensure it had been properly and responsibly run, this was a somewhat inflammatory comment from a failed and bankrupt organisation who had been bailed out by everyone else.

172. The Faculty **(573),** was granted in the terms as prayed after certain jurisdictional amendments to the agreement **(574-594)** on 2nd September 2009. The agreement had to set out that the Church, the LBTH and the Diocesan Registry had all managed to lose the original and counterpart of the 1949 Deed ,and the originals of the 1970 agreement together with its draft licence and plan.

173. Areas which may have formed part of this respective land on the earlier plans had just had to be "deemed". It really beggars belief, in the absence of fire or war damage, just how all these documents have come to be lost by everyone who was under a duty to keep them safe. No explanation was given during this hearing by anyone as to how or why this had occurred.

174. However, the new agreement approved by the Faculty set out in paragraph 13.4 that: "***the school in consultation with the council intends upon the grant of the interim licence to the school to use its reasonable and prompt endeavours and to work with the Rector towards the submission or submissions of the appropriate planning application or applications and obtain the requisite consents to redesign the gardens***

the school and school grounds in including building regulations listed building consents and faculties as the case may be prior to the grant of the council to the school of a new longer term further licence in place of the interim licence to be granted under this agreement in the event of planning consent etc. being granted". In turn, the Rector and council agreed that the 1949 deed needed to be revised ***"to take into account the modern needs of the parties by their entering into a fresh agreement….this was best served by the Rector and the council entering into a fresh management agreement when the school obtains satisfactory planning permission in respect of the redevelopment of the gardens at which time the parties will agree the full terms of a further licence to the school and a new management agreement with the council in relation to the gardens to get all necessary planning consents, listed building consents and faculties".***

175. In the light of that agreement **(574-594)** I reject the argument raised by the Objectors that this proposed building "the new building" was only to be for a finite length of time namely, at most 25 years. This, I find, was a holding agreement which envisaged a much longer use of the new building than just 25 years. It was entered into to allow applications to be made for state grants. Matters had to be sorted out but the intention was clear that the school was going to obtain the right to use the youth club land by one means or another.

176. Following up the Faculty being granted, the LBTH granted a licence of the old building land to the school (**597-602**) to remain in force until 2034 or being ***"surrendered upon the grant of a further licence up on the achievement of successful planning permission…"*** The land was to be made available to the community for 3 hours a day during weekdays and 6 hours at weekends.

177. **THE NEW BUILDING**

At that point it must have looked to the Building Parties as if the worst was over. Now all they had to do was to get the school extension designed, obtain planning approval, built and in use. They were wrong.

178. A document (**604-613)** was prepared to set out the requirements for the expansion of this primary school which was being masterminded by the LDBS, which erroneously stated that the LDBS on behalf of the school had: "***acquired an interest in the land adjoining the school site*** (which they had not) ***currently being used as a youth club and in the grounds of a community gardens adjacent to and in the ownership of Christ Church Spitalfields church***". It also went on to say that the LDBS had ***"also purchased an interest in the adjoining land to the rear of the school so that the buildings and playgrounds might be extended".*** This I take it was how they had viewed the £25,000 pay- out money to the Youth Centre, but it was not correct in ownership terms. However, in the brief was stated:- **"it is envisaged that school grounds be extended into this area and that an access point next to the church might also be utilised for the school, and the community area might also be expanded up to the new school boundary….it is hoped that community gardens and school site should be sympathetically and uniformly landscaped by the same landscape architect, whilst making the best use of the area for community, recreational and educational purposes" (605).**

The LDBS do make the point that the Rector and Churchwardens own the freehold of the land on which the church school stands [in fact it is the Rector's] but they stress "**there are no known or restrictive covenants or easements affecting the site but these should be investigated**".

Indeed, they should have been investigated because under everything was the still consecrated disused burial ground with all the legal issues that entailed. This LDBS brief also allowed for a degree of flexibility as to how the youth centre land was to be utilised or incorporated for school/other use **(609).**

179. From 7th September 2009, the youth club land became the school's under the terms of the licence. The next month, October 2009, all this was reported to the trustees of FoCCS by the Rector. He told them, inter alia: **"the front section of the youth centre's garden will become part of the public garden nearest Commercial Street"** and that there **"will be wider consultation as to how to develop this area (including crypt, school and garden) and this will include talks with LBTH Parks and Gardens ...there will be a celebration tea party on 22nd November".**

The FoCCS Trustees, among who at that meeting were Ms Whaite and the late Mr Vracas, congratulated the Rector **"on all his hard work in getting this far in the process" (618).**

180. There was no mention of the Hawksmoor vision for the churchyard.

181. That meeting concentrated on the restoration of the organ and other similar matters. A week later there was a meeting in the church crypt to establish a process for the co-ordination of the redesign of the public space of Christ Church gardens. This was attended by representative of the Council Parks and Gardens, LDBS, the church and others. There was recorded a sensible discussion among all those present, but the wrecked youth club building now was thought to have asbestos. The food growing project which some people had started in the graveyard would also now have to be revisited. (Presumably the growing of food in the graveyard might not be continued under a new improved garden plan? I

heard no evidence on that. As in many aspects of this case good ideas, and community ideas, potentially conflict).

Proposals for the design of the new building now went out for architectural competition. Amongst those interested was a local architect, Mr Christopher Dyson, who produced a thoughtful proposal. He appeared to think that the school held the new land as leasehold, which of course it did and could not, remaining in the ownership of the Rector. Mr Dyson proposed an interesting building design in the "new Land" as well as internal extension within the existing school **(624- 702**) in brick. His design was not chosen. Instead, that of the architectural practice of SCABAL was chosen. Mr Dyson's design would have involved building on the disused burial ground on which the school was situated, but given that had occurred for earlier extensions, he might have been forgiven for assuming that that was lawful.

182. As far as the Trustees of FoCCS were concerned at their meeting on 26th January 2010 **(703-707)** nothing was mentioned about these developments, save that the Rector reported that the celebration tea party held for the gardens on 9th November 2009 had been a "small and sweet occasion".

183. Given later developments in this case, any later "celebration" might well have taken the form of a bar-room brawl which would have done Victorian Spitalfields proud.

184. Matters proceeded with the chosen architects, and by the Spring of 2010 a number of landscape architects for the proposed renewal of the gardens were interviewed at a meeting organised by Mr Woolf of LDBS (**708**). Mr Dyson and a Ms Jones, both of the Spitalfields Society (another local group), were present and joined in the scoring of the various designs. Mr Dyson was

enthusiastic in subsequent e-mails about the chosen designer. **(715**), and there was much serious discussion by way of e-mails between the judges present, and the participants were thinking of long terms planning: ***"we have one opportunity for the next fifty years to find the right solution"* (722).** Ms Jones raised questions as to the funding of the scheme and the proposed division of the s106 money **(726**) but overall agreed with another attendee that the day had been **"very productive".** Mr Woolf sought to explain the division of the moneys for the garden design as distinct from the school landscape design, partly from s106 money and partly from primary capital.

These developments were reported to the PCC by the Rector on 15th March 2010, and he added that in respect of the gardens:

- the school has money for this which they have to spend within a certain time
- they, together with Christ Church, "***a building will need to be erected somewhere in the garden area to provide the required expansion of the school*" (750**).
- any plans would need to meet with Christ Church's approval.

185. Despite complaints now being made about lack of Council consultation, it is clear that as early as March 2010 the LBTH Parks Development Officer was writing to a representative of the Spitalfields Society about canvassing the views of local people to get: "an idea of your aspirations for the public gardens". This also referred to an earlier public consultation.

186. Various e-mails show how the Spitalfields Society was going to canvas local opinion as to what the public gardens should look like, and what people wanted. Not everyone agreed what the gardens should have. Apart from aesthetic suggestions, it is of note that the views of this Society, as reported on 24th March 2010 by its Chairman, were that their members

reported: "***reluctance for a children's playground with swings, slides etc.… residents felt there were other locations where this facility was offered such as Attlee Centre, Allen Gardens …Keep the design simple and elegant".***

187. An e-mail from Miss Jones, the Chairman of the Spitalfields Society, on 27th March 2010 **(756),** following one of their meetings on 24th March 2010, reported that her members suggested the following :-

- extensive swards of grass (not formed into mounds or moguls)
- re-use of some grave stones
- seating
- reluctance for a children's playground with swings, slides etc.; residents felt that there were other locations where this facility was offered such as the Attlee Centre, Allen Gardens
- the War Memorial should be moved to a less prominent position. Apparently, the Friends of Christ Church moved the War Memorial into the gardens from its former position in front of the church.

They raised other points in respect of bins, maintenance etc. **(756).** This note was courteously replied to on behalf of the Parks and Gardens Manager of LBTH. The Parks and Gardens Manager profoundly disagreed with the "**no children's play equipment**" stance of the Spitalfields Society. The Manager said: "***if she is speaking on behalf of her society, they will have to justify that to the community. I seem to remember that play was the key community priority at the last consultation exercise***" **(772**). In the light of the desire to provide the local children with the advantage of the fresh air of an open space, so relied upon by the objectors in this case, it would seem that the presence of playing children was not at the forefront of the minds of the members of the Spitalfields Society (or others) when considering what the gardens should provide. Of course, given what must have been their experience

of the users of the defunct youth club, the attitude of the Spitalfields Society might be understandable. It is of interest to note that at the March 2010 an interview day for prospective garden designers, to which were invited representatives from the church and the School, the LDBS and two members of the Spitalfields Society (Mr Dyson and Ms Michell) that being, it would seem, a group representing a wider range of local interests rather than FoCSS (though of course some members/supporters of both bodies may have overlapped).

188 The initial plans for the school extension had, inevitably, become more complicated. Not only was the school to be part funded from Government funding under the "building schools for the future " project and partly from LDBS funds but, because of local planning developments, there came potentially into play what is referred to as the **S106 money**, some £350,000 available for community use as a sweetener for more commercial development nearby. I express that somewhat crudely, but it appears to have been the realistic view of everyone involved with it. In respect of this leprechaun's gold, various subsidiary discussions/rows are recorded as the project of integrating an enlarged school and the rest of the land began to take shape during 2010. Just how much s106 money was to be spent where on this whole site became unclear and muddled as time went on. All that could be said in the PCC meeting minutes of 15th March 2010 was the school had money to spend on the gardens which had to be spent within a certain time, the school and the church had appointed a landscape gardener [this was after the consultation/competition] and that a building would need to be erected somewhere in the garden to provide the necessary expansion for the school (**750).**

189.The second statement of a leading objector, Ms Christine Whaite **(3017-3050)** set out her activities on behalf of FoCCS once the potential new

scheme was brought to their notice in October 2009. On 30th March 2010 the Rector emailed Ms Whaite describing what he wanted. "***My mind is not set in concrete one way or the other. I want lively, beautifully used gardens with spillage area from the crypt, a school that is full and relates well to the church A building on the site, if there is one that looks great and does the job"*** **(761)**. The Rector wished her well in her visit to SCABAL. Ms Whaite wrote: ***"Please do let me know how I can best support you in whatever you want to achieve"*** **(762).** Thus, at this point Ms Whaite of FoCCS appeared positive with the Rector, but she had arranged her own visit to SCABAL (whom I note she was neither paying, nor commissioning) so that firm might have been put in some difficulty if, during her visit, her ideas went beyond help or earnest enquiry. Their employer was LDBS. Ms Whaite and another went to see SCABAL after Easter 2010.

190. Plans were moving constructively (if illegally) forward, but at a church resources committee meeting on 19th April 2010, the first little cloud appeared. The Rector reported the outcome of the landscape architect competition, but also reported that the school had said that, as the church was putting no money into the project and was not the client, its role was only advisory. The Rector made it clear that he owned the land, but it was licensed to the school, so the church should have a veto/or power of influence on what is decided, and that a diocesan representative should sit in on meetings with the Council, school and architects. (I think by this he may have meant someone from the LDBS) **(764-767**).

191. Nevertheless FoCCS did become directly involved. Ms Whaite and "the Director" of FoCCS attended an informal meeting in **20th April 2010** with SCABAL, a representative of the LDBS and where the details of the proposals for the new building was set out. The note I have before me was

prepared by Carolyn Fuest of the FoCCS, and I do not know if that was ever circulated or agreed. This appears to be a note taken for information for FoCCS. At that meeting Mr Woolf explained that: ***"the school had paid off the debts of the playground in exchange for taking it over short-term to be extended indefinitely. Playground and garden had been given section 106 money that had an urgent time limit for spending (playground 350k garden 50k)"*** **(768).** From this meeting it was clear that the potential objectors were on notice that these were long-term plans. Inigo Woolf from LDBS explained in terms that. He went on to explain: "…***problem of big fencing as barrier across garden so propose to make the new building the boundary … [told new building] was a barn type structure with a high middle roof that can be seen through to keep idea of avenue East /West. Appeared from the draft plans that the curtilage of the new building a little further away from Christ Church South steps than existing building".*** In the light of that, it appears perfectly plain that the Building Parties were planning for a long term future, and the allegation that this was to be a temporary building I reject.

192. Indeed, all present went on to discuss emerging plans as to aims, levels of height and distance from the Church as well as the garden, and the possibility of a café terrace.

193. Others continued to be involved. The LBTH, LDBS and the architects continued to have various meetings and the plans for the extension developed. The school governors, too, continued to meet and discuss developments. The PCC approved the appointment of Mr Vracas as the parish clerk. (**778).** The Parks and Gardens' Manager was concerned about the garden design, and that the consultees were too narrow (presumably being only the Spitalfields Society). She suggested a wider meeting but not held in a church crypt where certain members of the local community would not feel happy going

into church property, so that a meeting in a crypt might prove unrepresentative (**786).** Interestingly, in the light of subsequent argument, no one appeared to have any problems of going to a meeting or attending classes in a Church of England school built on a disused burial ground. Given the use I saw of the graveyard by the surrounding (often veiled) community during my visits that did not seem to be a matter of any great concern (but it was a sensible and sensitive approach by LBTH). It certainly did not seem to affect any child using the school. Nor indeed, as I saw during the hearing in the church crypt, certain members of the Muslim community sitting in the public area of the Court.

194. On 4th May 2010 (**769**) the FoCCS trustees (including a now defined Trustee Director) held a meeting. Six people including the Rector and a PCC member were present, and 5 apologies. There were constructive discussions about a range of restoration and restoration matters. In the event, nothing was said about the garden plans. There was discussion as to the HLF business plan, money and the role of the Restoration Trustees in paying part of the organ repair bills, and the crypt catering, all fairly necessary if routine matters for them to consider. Ms Whaite showed the plans for the proposed development of the school and gardens to those present, and these were kept to be shown to the absentees so that the trustees ***"could think about them and form an opinion".*** Ms Whaite is recorded as: ***"reminding the meeting that the remit of the Friends was to look at these plans in the context of the setting of a Grade 1 listed building on which we have just spent £10 million, and the impact on the business plan which continues to be a condition of the HLF grant".*** Their next meeting was to take place on 21st September 2010.

195. Throughout the summer of 2010 consultations continued. The church organised a garden public consultation day on 9th June 2010 when SCABAL was to deliver a presentation, open to all, in the school at 5pm. I have

set out the history of these discussions as it negates the allegations of "secrecy" which the objectors have raised against the Rector, the PCC and the LBTH. Not only in these discussion meetings, but also in the planning application phase was there no "secrecy"; quite the reverse. The objectors were prepared and did mobilise objections in the secular planning field. This was the correct time and method to do so. It is of some surprise that Ms Whaite's powerfully connected aesthetic heavy weights did not appear to give support at this meeting. If one is going to object, the sooner what objectors perceived to be their heavy artillery is brought to bear, the better.

196. During the summer of 2010 it appears that it was Ms Jones heading the Spitalfields Trust who was making the running with suggestions as to the garden design, mentioning the Spitalfields Trust, SAVE and English Heritage. In an e-mail of 16th June 2010 she made a variety of suggestions as to the garden design. She readily accepted that the outcome of SCABAL's plans were as yet unknown. She writes: ***"facilities for young children to play. Not a huge amount of enthusiasm for this in such a small area. Children like grass which we all want. Ideally, the area of the old youth club building would be the perfect place for young children and would conform to the requirement of a public open space for use by the community".*** …***"Community opinion is that the old youth club building should not be a precedent for a new building, as it was erected when the church was derelict and the needs of the area were very different. There is considerable resentment that when the local community raised funds and worked on a 'pro bono' basis for a children's playground, the community was then unable to use it as the youth club locked the gates …there is substantial opposition to a new building in what was once public open space. Not only is there concern about the quality of a new building next to a grade 1 church, but also that the school will greatly restrict the use of the new building by the community." (792).*** The historic irritation of local

residents as to how they had been unable to use the youth club area because its gates had been locked was also raised **(792).** Pausing there, it is clear that the youth club in its declining days did keep gates locked and restrict access, but, having heard evidence from the school and church authorities, I am more than convinced that they want as much open access and community involvement, school hours aside, as possible with their new building. Mr Woolf for the LDBS was concerned about the possibility of a community hall being too costly and too close to the church, but he asked for a small re-siting and the hall, in effect, shrunk to a community room for which s106 money might be obtained **(793).**

THE OBJECTORS?

197. While all these applications were proceeding, were there any objections? I have dealt above with the development of the fund raising pressure group FoCCS and its supporters. This had been now in existence, one way or another, since about the mid 1960s, and it had, by 2011, completed the mammoth task of restoring the church itself, the organ and (as they now see it) the surrounding churchyard remaining to be done. At this time the Rector together with at least one Churchwarden was a trustee of the FoCCS. He reported to those trustees (**3020)** on 13th October 2009 that he had signed the 2009 agreement which was to last a year, during which the school would submit a planning application to obtain a 25 year licence for the school to use part of the churchyard land. Of course, as I have set out above, this was all to be a holding arrangement in preparation for further legal changes for the school, both in ownership and planning.

198. Much complaint is made on behalf of FoCCS that they were not party to these negotiations, and that they had to make a Freedom of Information request in January 2011 to see this agreement. Many times during the course of this case I was harangued about the "***legal position***" and "***the legal duty***"

which this fundraising body claimed to have had in respect of the church. Let me be blunt. Their only legal duty was to spend the moneys they raised for this church in accordance with the objects of their charitable trust, and such legal conditions placed on the Restoration Trustees who were parties to the HLF grant. I will return later to the further demands they were to make. This body, however worthy and enthusiastic, does not own, nor even co-own, the church. Civil relationships do not amount to legal obligations save in respect of the obligations of all signatories to the HLF grant. There was no duty or obligation, save courtesy, on the Rector or PCC to inform the FoCCS of their plans, over and above the statutory requirements of public planning law. I find many of the activities of the objectors to have gone beyond proper concern for local planning issues and turned into hectoring and interfering demands for a legal status and a say well beyond any legal position they were claiming, wrongly, to have.

199. Churches who are blessed to be assisted by fund raising bodies to help, (for example with roof or tower repairs) should always ensure that the PCC has a majority of controlling members on any such fund raising committee, or that it is made legally clear to the fund raisers that it is the Parish which controls the use of such funds raised, albeit grateful for advice and assistance. Even if there is a small specialised steering or building committee to organise large works, care should be taken. It might even be a good idea, at least for relatively small projects to have a time frame after which the fund raising body is wound up. As this case shows, the bigger, more successful the fund raising body becomes, the more there is a risk of the tail wagging the dog.

200. Again, in respect of the complaints made by FoCCS (and I note here at this Consistory Court hearing the lack of formal objections by FoCCS) this may be presumably either by choice or because of the potential issues in charities indulging in litigation to further their objects. Any resident parishioner member of FoCCS could have taken the opportunity to raise, annually, at the PCC AGM

such concerns. Had the groundswell of opinion been such, the parishioners could have voted the churchwardens and PCC out of office (though that would have meant the objectors taking on the burden of running a parish church). In any event, they were, apparently, not prepared to do that, nor even interested in doing so. It might be because the objectors did not feel (possibly rightly) that their views would chime with the majority of parishioners, but their objections might have been at least raised at this relatively early stage. It is another forum in these kind of disputes for objectors to let their views be known, and from which constructive discussion might flow.

201. I look in vain in the voluminous documents before me for any records of any additional or extra meeting of FoCCS trustees between May and September 2010 when a formal decision to object might have been recorded as taken.

202. However, other groups had heard the stirrings of dissent. The school governors at their meeting on 24th June 2010 recorded, not just that the school would be short of space from September (**810**), but:- ***"At 3.30 on Wednesday 30th June there would be a pre-planning meeting with the planning department [of LBTH] and English Heritage, which might affect what happened and when. Various bodies were vociferously canvassing the planning department and the Chief Executive for their own ends, so in order to redress the balance, the Governors need to send their own letters to the Chief Executive (of LBTH) and councillors on the Planning Committee making it clear that they were in favour of the development".*** It was recorded that one of the Governors: *"**was aware of the possibility that there might be political issues involved…..Alan West (a Foundation Governor of the school) would be attending the meeting, and was wary of the possibility that there might be political issues involved …..it was***

hugely important that the building went up because the school needed it to be able to deliver the service it was there to provide".

203. Now so far this might be seen as an everyday story of local planning applications. Groups and individuals had a complete democratic right to lobby and express their (conflicting) views.

204. The notes of that meeting went on: "***It was hugely important that the building went up because the school needed it to be able to provide the service it was there to provide. Governors and any parents who could be persuaded to do so should lobby their local councillors and those who were involved in planning, stressing the benefits to the school and to the community --- the school's relationship with the community was one of its established strengths".***

205. Now I make it clear that at this stage, lobbying, the presentation of differing views on all sides is perfectly proper. This is the right time to air those views, to have them discussed and debated. It is the subsequent lobbying at a later stage after the democratic process has taken place which concerns me.

206. On 30th June 2010 SCABAL the architects organised a pre-proposal meeting on the school premises in respect of the triple heads of work, work on the school itself, replacement of the old building and the open space upgrade together with the use of the s106 monies (which itself was the subject of various Council meetings) (**823).** When complaints are being made of "secrecy" many of the complainants do not seem to have realised just how complicated the obtaining and spending of monies from different commercial and state funds actually is. One elects a Council who employs staff to deal with it, and no single resident can expect to be consulted or to be privy to every changing twist in negotiations as they develop.

207. Those who are so keen can stand for election to a Council or to a PCC where they can try to influence matters, if their views are in accord with a voting majority. However, I draw to the attention of PCCs that Freedom of Information requests, let alone the application of the ordinary rules for disclosure of documents in civil litigation, means that they may have to justify their minutes/correspondence etc. long afterwards if challenged by objectors to any faculty petition they might bring. Given they conduct their affairs in a proper and business- like manner (unlike the earlier, unwise vestry men of Christ Church and their expensive "hangings" to which I have referred above), this really should not pose a problem, but it should be noted.

208. What is of interest is that at this time the Council planners were well aware of the history of the graveyard **(829).** They were envisaging that the proposed development would actually increase the size of the open space from the extreme western tranche of 960sqm to have the currently inaccessible wasteland tranche added. The Parks Department did not consider that any loss of public open space would be acceptable under the OS7 policy directive; the planners would not accept that normally there should be any reduction of open space save that *"**in exceptional circumstances where development is permitted the Council may require equivalent or better recreational facility is provided as replacement**'***(829).** That letter to the architects comprehensively covers the problems which are now before the Court. The Council noted that the proposed scheme of redeveloping the community facility, providing better public access around the site and improving Christ Church gardens could: ***"greatly improve the existing situation and create an attractive and functional space for a variety of users…. Justification would need to be provided for the loss of open space to show how the community benefits would outweigh the loss of a section of the gardens".*** **(831-832)**. Having considered the evidence, I find that that is what, once the

renovated gardens are finished and the waste strip brought back into public use, will be the case.

209. Discussions continued during the summer involving the landscaping of the gardens and the architects made a 20sqm reduction in the internal size of the new building. Reading the intense correspondence going on between the commissioning parties and the LBTH and the architects, I am impressed by the amount of time taken up with trying to get the detail right. Throughout the summer, the officers of the LBTH exchanged papers on the proposed developments of "Christ Church gardens", and, (**818-820)** in the light of the pre-application process, SCABAL had made a presentation on 30th June 2010. Consultation with English Heritage was regarded as crucial. That document set out the aims to be achieved. The Council's aims were: **"*heritage protection and conservation, better accessibility and safety, improved biodiversity, visual integrity and interest, and better opportunities for active communities, including local children***". The increased footprint of the new building was estimated as being about 100sq m. but the access to the land would be increased by the new layout, necessary for a school of its size.

210. The s106 money was in people's minds. The Council understood the balancing acts between the proposed work on the new school, the replacement community centre building and the open space upgrade, especially in the light of the initial time limit on the licence agreement ending in March 2011.

211. I find here that the LBTH did give a great deal of consideration to juggling all the competing problems in respect of this site. Indeed, their aim was to increase the available open space, which they considered could be achieved, notwithstanding that various bits of the proposed separate planning applications were at that time still unresolved. Certainly, that was made clear to the architects also in the letter of 16th July 2011 referred to above from the Council

applications' team leader:- ***"The principle of the loss of any open space was discussed at our meeting and a view of the parks department was expressed that no loss of open space would be acceptable. The licence already requires a sizable portion of the currently closed off space to be opened up to general public use and any building which encroaches into this space is in conflict with policy OS7 which states that planning permission which results in a loss of public or private open space will not normally be granted. The policy does however go on to state that in exceptional circumstances where development is permitted the council may require an equivalent or better recreational facility is provided as a replacement" (829-830).***

212. In general what was being proposed was gaining favour with the council officials. The council official went on to say:- ***"… it is imperative that the new community building is discussed with English Heritage to gain a view on its acceptability in relation to Christ Church, which as you are aware is a Grade 1 listed building. Clearly there is an existing building on the site which could remain in place if no permission is granted for a replacement scheme so this is a material consideration however the council would need to be convinced that given the increase in size of the replacement building it would not detract from the setting of this important historic building…the proposed [new] building would be both higher and wider than the existing portacabin style building which is on the site. The existing building is very discreet and is not really visible from the wider area, only coming into view once you step into Christ Church gardens. If the replacement building …was more visible to the wider street scene, it would need to be a high quality building which contributes positively to the gardens, adjacent listed church and wider conservation area"***. Pausing there I do find that the new building is of higher

quality than the old building and given its glass centre it is not more visible to the wider street scene. The official considered the possibility even of sinking it (but the burial ground lurking below was not, apparently, then considered).

213. Overall, the Councils preliminary conclusion **(832)** was as follows: ***"The proposed scheme of redeveloping the community facility, providing better public access around the site and improving Christ Church gardens could potentially greatly improve the existing situation and create an attractive and functional space for a variety of users. Consideration needs to be given to the setting of the Grade 1 listed building Christ Church and a clear demonstration of how the proposal will benefit the local community needs to accompany any planning application. Justification would need to be provided for the loss of open space to show how the community benefits would outweigh the loss of a section of the gardens".*** This Council official stressed the need to engage with English Heritage, the Georgian Group and the Spitalfields Trust.

214. By 6th August 2010 English Heritage replied (**833)**. They welcomed the demolition of the existing old youth centre building, but had concerns about the potential increased height of the proposed new building and its width which would appear to block views across the historic space. They had concerns about the geometry of the building shape and the proposed garden layout. They raise the question as to whether any study had been made of Hawksmoor's original intentions with regard to the setting of Christ Church**. *"The geometry that underpins the architecture of Hawksmoor's designs would seem to be a useful means of informing any new garden design, and ensuring that it reflects the architecture of the Church in a purposeful way"*** **(834)**. That said, this e-mail implies a cautious curate's egg kind of expressed views; on the one hand and on the other….. Well, a look at the Rocque map of 1746 would have

shown what the graveyard looked like then very shortly after the church was constructed.

215. English Heritage's regional landscape architect also commented on the scheme.**(834).** She mentions the Metropolitan Garden design of "post 1885" {sic}, and raises the points as to the need for Faculty for removal of human remains, and the site views to the trees: "***allowing the former burial space to continue to be read as a space in the urban fabric".*** Surely in the light of this, some questions should have been asked: was it thought that the graveyard had ceased to be consecrated?

216. As far as I can see the aims of the church, the school and, to a different degree, the FoCCS, are now being surrounded by a plethora of other views coming at this graveyard from different approaches.

217. **In anguishing properly over space in an urban fabric, everyone seems to have lost sight of the one basic, if inconvenient, fact, that they were proposing to build on a disused, but still consecrated, graveyard, and that, unless what was going to be put up could be sufficiently brought under the umbrella of something which a council could fund/build under the Open Spaces legislation, this was not going to be lawful.**

218. On **10th August 2010** Ms Whaite formally wrote "as trustee" (although the words FoCCS were not used) to the Rector to tell him that the FoCCS trustees would be opposing the new building, wanting all the gardens to be free of buildings west of a North/South wall in a line with the west wall of the rectory to the Rector **(839**). Although, as I say, I cannot see any formal adoption by the trustees of her objections, she addresses her letter: **"*As trustees, and having spent £10 million of public money on the restoration, our responsibility….*"** Of course, she has an absolute right to express her own views, and it may be at least a majority of the trustees would have supported her,

but the stance she takes in this letter goes beyond this. She more than implies that she is speaking for then all. What she wanted and wants can be set out as follows: "***we are presented with an un-missable opportunity*** **to reveal the whole of the glorious south façade of Christ Church and to expand the public gardens, the precious green lungs of Spitalfields" (839).** It was the visual impact on the views of the church **"*from Commercial Street and from the public gardens***" of a bigger building and its siting which caused her distress. This represented a substantial change in her views from her earlier support for the Rector's plans.

219. Meetings and negotiations continued from the summer of 2010. The architects met representatives of English Heritage, who are now said to support the revised design for the new building **(840-844);** the architects stress that: ***"the (new) building is more open and transparent than the existing youth centre whilst its setting away from Christ Church allows views to the South East corner of the church currently blocked by the existing (old) building."***

220. During August and September 2010 there were various meetings with English Heritage and the architects trying to refine the design. Ms Whaite writes on 13th September 2010 **(849)** on Friends of Christ Church Spitalfields headed note paper (and still I see no note of a majority trustees decision being minuted about this) to the planning department objecting to the proposals. She complained: **"*that SCABAL have presented to us (but not consulted us about) a possible plan for the primary school*".** She rehearses the "responsibility" of the financial involvement of FoCCS. I have set out above the extensive consultation and meetings which had already taken place, with the wider community and the Spitalfields Trust. Again, Ms Whaite repeats her view that the: "***The Friends' responsibility, having raised and spent £10 million***

of public money on the restoration is to comment…". She wants the preliminary planning application involving the school to be rejected.

221. The FoCCS had their next Trustees' meeting, 7 people present (reporting no other meeting from their last meeting on 4th May) (**853-856) on 21st September 2010.** There were various business discussions about work in hand on the restoration, new trustees etc. and the trustees were: **"*reminded of the special conditions in the HLF contract …regarding ..the obligation to increase public and community access and use*."** At this meeting Ms Whaite reported the two current planning applications SCABAL had submitted in respect of he school. The Minutes state:- ***"that SCABAL had submitted two planning applications ….which had mentioned the proposal to knock down and rebuild the adventure playground building to be part of a later planning application*".** {Ms Whaite} reported that: **"*she had heard that there was a pre-planning consultation going on between the client and Tower Hamlets but that there had been as yet no public consultation … she reminded the trustees that it was their responsibility as the Friends to look after Christ Church from the point of view of the setting of Christ Church and its ability to fulfil the business plan. It was not within the trustees' remit to solve the problems of the school. However it was noted that the school boundary had crept and the proposal now is for it to be on the west side of the proposed new building. This would have implications for the setting of Christ Church and for the access by the public to the open space." (856).***

222. I find this report by Ms Whaite does not present to the trustees a fair reflection of her own activities and objections (apparently on behalf of the trustees earlier) as I have set out above. Perhaps they were told more at that meeting, but nothing is recorded in the Minutes.

223. Ms Whaite (according to the Minutes) goes on to report: **"*Christine Whaite and Christopher Woodward had been to see Andrew Hargreaves at English Heritage. Although he had not consulted the Friends, he had made his report supporting the project based on what he had been told by SCABAL and is not minded to change his report*"**.

224. I am somewhat surprised that the Trustees were not, apparently, told at that meeting of the letter their Chairman had sent off a week before on their headed notepaper, which a passing reader might have considered as reflecting the decided views of the trustees, rather than, possibly, just the view of the writer.

225. The trustees appear to have made no decision as to further action, nor voted on it, though it was noted that: **"the PCC are supportive of the project and are hopeful that they will get community facilities".**

226. I accept that minutes in many organisations may often only be a snapshot of what has been said and discussed at a meeting, but I have some concern here that this committee may have been led by the enthusiasm of some of its members, and I bear in mind that FoCCS are not formal objectors in these proceedings (although some of their individual member are). Again, I note that the FoCCS trustees, or at least some of them, appear to be considering that they have an overriding duty to a building for which they raised money. The Trustees of FoCCS have a legal duty to spend the money raised from outside bodies and individuals in accordance within the terms of the charity's objects and the Restoration Trustees and other signatories are not to be in breach of the HLF contractual terms. Each Trustee may have a personal interest in the church, but that is no more or no less than any other individual objector.

227. At a meeting of the School Governors on 23rd September 2010 (**857-868**), the Rector stood down as Chairman after seven years, although he was to remain *ex officio* on the Board as Rector. He reported that during his seven years

as Governor the school: "***had had its ups and downs…from serious weaknesses up to good with elements of outstanding and then back down to a Notice to Improve" (857).*** The two planning applications were discussed; one was for the re-modelling of the old school building and a separate one for the new building. The meetings with English Heritage were also discussed, and the objections. Later in this judgment I will deal with the school itself and its particular needs. The Rector reported the presentations given by the architect, the meetings with English Heritage and the garden designers. He reported that the FoCCS had said they would object to the project and that it was likely that the Spitalfields Society would also object. (I note that this was notwithstanding that no vote had been taken on this or recorded in the FoCCS minutes). During the autumn of 2010, the building parties and LBTH continued discussions as to money and further detailing, including consideration of funding any potential problems as to disturbance of burials and archaeological matters, but still no discussion about the effect of the *Disused Burial Grounds Act* 1884. By October 2010, Mr Woolf of LDBS was beginning to get concerned that the application had got to be moved on, otherwise funding might be lost (**985).**

228. On 6th October 2010 **(869-881**) the officers of LBTH reported again in respect of the school planning schemes running in time ahead of the garden project, which had a different designer company for the garden scheme. The need to use the s106 money also reappeared. That report was considered (among others) on the same day at a council officers' meeting. It was clear that the Council wanted everything (school, new building and gardens) to be reconciled before March 2011. They did not want there to be a delay so that education money might be lost and they were liaising with the Spitalfields Society, the architects, English Heritage and others.

229. Concern about the potential need for exhumations/site archaeology and its cost now surfaced but because of the light weight raft foundations there

was to be minimum disturbance **(881).** Meanwhile, the School F&GP committee were wrestling with the potential charitable difficulties from the lettings of the tennis court on the school site. By October 2010 the LDBS was beginning to get concerned about delay which could adversely effect anticipated capital funding.

230. During the autumn of 2010, various discussions with the architects, DAC and the Museum of London etc. took place as one would have expected. Arising out of the mountain of documents, minutes and working papers generated in this case, Ms Whaite and others now complain that they were not part of all this, that there were ***"quite extensive behind the scenes discussions"*****,** the details of which ***"they did not know until disclosure in 2014",*** between the architects, the LDBS, the DAC and the Diocesan Director of property. All these groups were carrying on their business discussions in a normal way. What right had the trustees of FoCCS to take part, any more than any ordinary member of the public? Their time would come at the public planning stage. Why should they have been involved in these discussions? Their legal duty was to spend the money they had raised for the church restoration as agent for the Rector and PCC.

231. In the event on **4th November 2010** the DAC had a site visit, at which Ms Whaite attended with Ms Fuest and Ms Jones from the Spitalfields Society, which is hardly indicative of some secret plot on the part of the church. On behalf of FoCCS, she wrote a written objection for consideration by the DAC **(898)** and the Rector wrote in reply **(899-900)**. The report of that meeting is at (**901-905).** The Rector explained the project, the buying out of the dysfunctional youth club and the proposal of the LDBS to take a 25 year lease on the site to extend the nursery and reception school facilities and to provide community use facilities, and to landscape the western gardens using s106 money. The objectors repeated the views which had been expressed some 40 years earlier. They wanted the old building to be razed to the ground and its site

incorporated into the western gardens in accordance with general conservation principles. They also said that there was no evidence of the need for any additional community space, and in any event, another nearby building in Commercial Street would suffice for that (a suggestion rejected by the DAC) as to provide nursery provision on the other side of Commercial Street was not practicable. She also referred to the "Master Plan" (of 1995) to which I have already referred. I note that this was a document for the FoCCS use. It had not then been seen by the present Rector until much later in these proceedings.

232. Overall the DAC members at the site view supported the outreach of the church's proposals. They supported the proposed uniting of the two westernmost tranches of the garden but recommended further discussion with English Heritage as to the design details of the new building. It appears that Ms Whaite, as I have said, turned up in person to object while the DAC were inspecting the site, and Ms Jones of the Spitalfields Society also was present. At this point it does not seem that the Public Advertisement for the Faculty had been issued, so that whatever complaint Ms Whaite made subsequently as to the method of public notice, she, and others, apparently had been able to find out about this DAC meeting and attend it to make their views known. Ms Whaite raised the planning objections. The Rector, too, made his input to the DAC considerations. In the course of her evidence before me, Ms Whaite complains of the complications of dealing with the planning process, let alone the faculty process. I remind myself of the expertise she and her committee of trustees had shown on raising money, dealing and commissioning substantial works for the church restoration, and the expertise which she said various of her trustees had in dealing with large grant making organisations. She and others had visited the architects. She had lobbied English Heritage. She had addressed a DAC meeting. I understand she had obtained access for herself to see and inspect the school

(**3022).** I know not why. I assume this was to allow her to assess the school needs.

233. Many, many objectors are less actively involved in planning controversies, and much less experienced in knowing how to and where to object, or muster public opinion in the way SOS did, as will be seen later.

234. The DAC provided the Chancellor with a detailed report on 11th November 2010 (**901-905**), being the outcome of the 4th November 2010 DAC meeting. The DAC's views, only of course advisory to any Chancellor, were positive, notwithstanding having heard the **"*strong objections*"** from some present at their site meeting. In principle, they supported the re-development of the youth centre and its re-siting a little farther from the church, and found the "***siting and layout of the proposed new building ...both impressive and reassuring".*** They were concerned: **"*that there was such vocal opposition locally"***. This I find a little odd (at least at this point) for as I have set out above the objectors were limited in number. That was to change. They accepted the garden design need to be "***of the highest quality".*** Their only real point of concern was the material to be used. The DAC specifically rejected that the objectors' suggestion of placing a nursery and reception class on the opposite side of Commercial Street as not practical.

THE GROWTH OF FORMAL OPPOSITION & THE PLANNING PROCESS

235. On 8th November 2010 Ms Mitchell, the original architect of the old building, wrote a formal letter of objection to the LBTH planning Officer **(906-907),** the Council having approached various bodies and residents to obtain their views **(919).** On 10th November 2010 the LBTH Development Committee met to consider the prospective planning application. (**908-910).** A Mr Wheeler on

behalf of the Spitalfields Society and as a local resident, spoke doubting if there was really a need for the [new building] to be built, but stating that, if the extensions to the old school building really was inadequate, then the Spitalfields Society would: ***" be happy to withdraw their objection".*** He expressed the objection that the community facility would be ***"at the expense of much needed community space. The gardens should be reserved for community use"***. The meeting was then addressed by Ms Whaite, speaking as Chair of FoCCS and as a local resident, and objecting to the new development, stating that the FoCCS trustees considered that it should have been the subject of proper consultation. She urged that the church was a designated heritage asset, as defined by planning policy. She objected to the formulation of the provision of 6 extra classrooms when 8 had been required; she re-iterated the need for the return to public space as raised in the much earlier objections when the old building had gone up.

236. Supporters of the scheme also addressed the Committee. At the end of the meeting the Development Committee **unanimously** voted in favour of the scheme, with various conditions including the root protection of the trees. The full planning application would have to be brought within 3 years (**909**). This vote was duly reported to the Christ Church PCC.

237. I have summarised numerous emails and letters over the 2010 period to show how various bodies involved with this project were all working away on the bits of it which affected them individually. I set this out so that those far less involved can see just what a lot of care was being devoted to this whole scheme. There were discussions as to whether the school needed to set up a charitable trust for this work. It did not as it was already a charity as a voluntary aided school. However, it would have to so that the proposed work was charitable in nature as it had to get exemption from VAT and tax. It also shows the unreality of the current complaints from the objectors that they were not at all times fully

"in the loop" of what was happening. Here there was not so much a loop, but a whole circus of spinning plates being spun by a variety of bodies, with one aim in mind. There was concern in October that the school had missed a July deadline for obtaining funding **(891)** because of all that was going on.

THE PLANNING MEETING AND ITS AFTERMATH

238. On 11th November 2010 LBTH held a planning meeting in public which was addressed by Ms Whaite, who wanted a "proper consultation". Her second statement says that says that the LDBS and the architects denied at that meeting having any: "***immediate intention for further development beyond refurbishing and consolidating the existing school buildings".*** Given what I have set out above in respect of the various meetings and discussions which had taken place by then, I find it hard to accept that anyone was under any illusions that the school development was a forerunner of the gardens' improvements. The school development needed to move forward so that the education money would not be lost, while the s106 money was also in the pipeline. The Council minutes of that meeting are set out at (**908-909).** That committee, which was concerned with the extension to the school itself, was addressed by a Mr Russell Wheeler, a resident and a representative of the Spitalfields Society. He is recorded as saying that: "… ***the scheme would spread over two sites and may be constructed in two phases. It was this second phase of the scheme that was really contentious***". Indeed, that was what was being proposed as being in the pipe line. (There was work inside the school and the work in the graveyard). This objector said that if the extensions to the school, which this application was concerned with, were to turn out to be adequate for its needs, then [the Spitalfields Society] would withdraw their objection. In other words, it was the graveyard gardens, not the school which was his main concern. He regarded the community facility as being unnecessary and urged that the gardens should be reserved for community use. Ms Whaite

also addressed the Committee as a local resident and as Chair of FoCCS; she stressed that Christ Church as a designated heritage asset, and its churchyard as a heritage asset; while agreeing with the school's proposed expansion, she was concerned she considered this application should be dependant upon a further application, and repeated the objections raised by the earlier objectors to the 1970 scheme. Mr Woolf on behalf of the LDBS addressed the meeting as did a representative of the school as to its pressing need for additional facilities. Council Officers also addressed the Committee as to the scheme, the public consultation, the loss of open space and the impact any delay would have on funding. It was stressed that any later development of the site (the new building area) would have to be the subject of a separate application. At that meeting planning permission was granted for the school's remodelling/expansion with various conditions attached.

If it was then considered that there was a material fault or misuse or improper operation of that planning decision, the point should then have been taken, not some years afterwards.

239. Immediately after that meeting, discussions were still taking place about the lay out of the gardens. However, by now it was clear that the church was going to face objections about any proposed redevelopment of the "old building" site. Indeed, this was flagged up to the PCC at their meeting on 15th November **(913-916**) when the Rector, having reported the grant of planning permission for the school, informed the meeting that: ***"...the PCC should be aware that the Friends are against any new building on the garden site. What would be the consequence of falling out with the Friends (1) interpersonal relations (2) difficulty with staff relations e.g. the organ (3) less co-operation around the crypt development".*** That analysis was to prove prescient.

240. The Spitalfields Society continued to discuss via e-mails with the LBTH planners designs for the garden, which seemed to concern them more than the "Hawksmoor vision". The DAC wrote to the architect on 16th November **(917-918)** that, having considered the impact of a new building on this church and its setting and the benefit of its community and outreach: **"The DAC supported the re-development of the youth centre site and could not accept the view that any redevelopment was unacceptable in principle**". This was a long and thoughtful letter, and did take into concern that they were aware of "***vocal opposition locally***". Ms Fuest on behalf of FoCCS wrote with formal objections on 16th November 2010, citing their objection that the Master Plan for the gardens (as the proposals had now come to be known) did not conform to *Planning Policy Statement 5 (Planning for Historic Environment)*. They wanted no building to the south of the church **(921-922**). It was made clear to her on behalf of the Council that the objections made at the meeting on 10th November had been noted and that a planning application for the old building ground was awaited. Two days later, the Head of Planning replied to Ms Fuest summarising that the oral objections which had been put to the Council members: "***The committee's decision to approve the application did not presuppose or commit the committee to a decision, or any Masterplan, on the future development of the Gardens or the former Youth Club Buildings at Christ Church".*** The officer made it clear that he was still waiting for SCABAL's proposals for the old youth club development which, when made, would: **" *be assessed on its own merits, taking into account the setting of the Grade 1 listed buildings and comments of stakeholders, including English Heritage, landowners, the Friends of Christ Church, other groups and residents".*** They would be informed when the formal planning application was to be made **(923).**

241. **From here on it becomes clear that everyone was focusing on need, design and garden plans, but no-one appears to have given any thought to the legality or otherwise of how a new school building (with community use) could be build to replace the old building.**

242. I pass over the details of the activities of the next few months. The Museum of London, commissioned by SCABAL, prepared an Historic Environment assessment dealing with, inter alia, the archaeological impact of the site **(926-985).** It stated that **(931)** the site does not contain any nationally designated (protected) scheduled monuments or registered parks or gardens. There are a number of listed buildings and structures on and around the site. (These being the church itself the school and the Nash monument in the churchyard. I note none of these would be affected). It said: ***"The proposals have been designed to have a minimal impact on human remains but the precise impact will depend on the depth of any burial. It is possible that the foundations …of the new nursery and community building would result in localised removal and truncation to the top of the sequence of burials but… the precise impact remains uncertain"… "From the original construction of the school on arches in 1869 the intention has been to preserve the burials and any other archaeological remains in situ beneath the modern buildings the proposals for the school extension and the new nursery and community centre have been designed to have a minimal impact on archaeological remains and permit most of the burials to remain in situ beneath the new buildings .."*** It specifically mentioned the need for a Faculty for the removal of any human remains from the site. Still no-one paused to consider the *Disused Burial Grounds Act* 1884.

243. The Church Building Council wrote in December **(998-999): *"The Council was broadly supportive of the proposals to demolish the youth centre and to build a new facility in its place on a different footprint***

related to the position of the former building and further away from the church. The Council welcomed the fact that the proposed replacement would be built further away from the Church, as well as the overall design and materials" save that the garden design was still a matter of discussion. The CBC wrote: ***"The Council noted the proposal increases the size of the public open space and improves access round the outside of the church".*** I note here that the earlier objections in 1968/69 in respect of the old building were in respect of a different design and a slightly different site.

244. As I read it, there were continuing discussions and meetings over the garden design into the New Year of 2011. The funding proposals for the school and its extension were going on apace, and even in these application documents, it was recognised that it was a burial ground which would need the attendance of an archaeologist. The application **(1018-1030)** for the project document was filled in by a Quantity Surveyor. Much has been made by the Objectors that this form was incorrect in that **(1020)** the freehold of the site was owned by LDBS. That was incorrect, but, as Mr Woolf said in evidence, that would not have made **"a blind bit of difference**" in obtaining the funding. The reality here is that the Rector owned the land used as a school. He could not sell it without a Pastoral Measure. It was clear from the earlier documents I have referred to that it was always intended that the land should be transferred to the school in this way. It still can be. The Quantity Surveyor is not a lawyer. One can see how mistakes can be utilised by objectors, but central government money could not be obtained if it were for a new site, and the tie-in with the LBTH had to be obtained as well. The total came to just over £2 million, raised as to £300,000 from s106 money, £1.3 million from the government primary capital programme, and about half a million from diocesan sources **(1031).**

245. Of greater concern is that in December 2010 reports provided for the attention of the Chancellor referred to the more than probable existence and

potential disturbance of the tombs, vaults etc. in the course of the work **(1033-5)** which would entail exhumation ***"once permitted by the Chancellor"*** which will have to be done sensitively.

THE EVENTS OF 2011

246. During the early part of 2011, the DAC were discussing with the architects their somewhat tinkering proposed amendments, but they were aware that any major alterations would have to go back to planning **(1042-1043**). I must say that from here on it would seem the DAC were talking to themselves, and everyone else was getting on with the job in hand. On 18th January 2011 there was meeting of the Restoration Trust as an AGM, when the three longest serving directors resigned by rotation and were unanimously reappointed by the eight people present **(1050-1055).** This was followed by a meeting of the trustees of the FoCCS, being the same 8 people. There was general discussion about a variety of items, including the on-going organ restoration project. In respect of the churchyard, Ms Whaite reported her actions as set out above in setting out the objections to LBTH, and saying that she had also written to the DAC. Ms Whaite then is reported as also asking the Rector (who was still then on this Committee) as to whether there had been any progress on her request to see the agreement between Christ Church, LBTH and the school. He said he was unable to release this, and suggested that she contact the school. Mr Vracas, another trustee, noted that Spitalfields had more than enough community space and that community space rarely sits happily within a school context, but the Rector, fearing that (then) there would be no money for the crypt, said the PCC would like the use of the community space.

247. Now up to this point the objectors had conducted the presentation of their objections in a proper way. They had lobbied, written letters and been heard at the initial Council planning meeting in respect of the first planning application for the extension of the school premises itself. I am afraid to say that

from this meeting onward, they were to become strident and more demanding. The notes of that meeting reflect this. The objectors stated that the new building proposals appeared to be: **"very likely to fall at a legal challenge" … "The trustees had a duty to their thousands of supporters who had given millions of pounds to save and restore Christ Church to make responsible decisions about its setting which is also a Heritage asset".**

248. **It is to be regretted that these fighting words of the FoCCS and the Restoration Trust were not acted upon, if not at that point then when the planning application was made and granted. Much money, effort and time might well have been saved.**

249. FoCCS is a registered charity with all the legal duties that entails. As a body, it is not a formal objector in this case, although individual members are.

250. I struggle with certain concepts here. There is no legal duty on the FoCCS or the Christ Church Spitalfields Restoration Trust to do anything but to spend the monies they raise from whatever sources on the restoration project, and for the Restoration Trustees to comply with the agreement with HLF. I pause here again to consider just how these two bodies integrate. The Christ Church Spitalfields' Restoration Trust appears to be the "engine room" of the FoCCS. The Restoration Trust appears to be self electing, as is the ruling committee of FoCCS. I was told that when someone left one of these committees or, if they needed a particular expert, the trust members, who never seemed to number more than a dozen or so at most, would co-opt a suitable person for the particular work in hand, and to advise them. The Restoration Trust is the body who contracted with the experts and contractors, who did the restoration work. It was considered to be a streamlined way of getting the work done competently. So far, so good, but it appears that the Restoration Trust and the trustees of FoCCS held joint meetings, or at least one meeting immediately

following the next. However it was not clear to me just what control over the members of the Restoration Trust could be exerted by any interested person who subscribed to restoring Spitalfields. There appeared to be no accountability. There appeared to be no open annual general meeting where trustees of the Restoration Trust could be voted on or off, or added to by those chosen by a wider constituency. I have seen no documents like that. Each year the FoCCS appears to have had their small and select meeting, and these two bodies decided how to spend the money their supporters (corporate and individual) had subscribed. I make it clear that, although I have been shown few accounts, I have absolutely no reason to think that all the moneys subscribed by supporters was other than properly and intelligently spent by this small inner group in accordance with its stated charitable aims, but the subscribers were just that; subscribers/supporters to a registered charity, not members. There appeared to be no means by which subscribers/supporters could control or direct this inner group of trustees upon whom, it is fair to say, the hard work of many years fell.

251. However, as can be seen in the late developments, that small group purported to hold themselves out as representing their subscribers, who do not seem to have been accorded the opportunity of voting on a proposed course of action. The views expressed to the outside world as being those of the FoCCS are only, in fact, the views of some (and not all) of this small committee. It may be that many of the outside subscribers might well not have objected to its course of action, or they might equally have considered that the planning proposals, and the reasons for them, were acceptable (had they known of the reasons). They did not have the chance to do so, before Ms Whaite and others launched into their course of objection. Had these objections, in the years that followed, flowed from an open AGM with plans on display and a presentation by the school of its needs that might have been different. Here a small number of people, deeply involved, made their own views felt. I will consider below the use

of e-mail flyers which were used to try to whip up support for a particular point of view, rather than inform in a balanced way.

252. I am aware that the Church of England is, at present, preparing advice for parishes in their relationship with fundraising bodies, so that what I say here may be overtaken, but I do consider that any church, grateful for the largesse which might flow to them from generous volunteer fund-raisers, should ensure just how such bodies are organised. Are they a registered charity? What is their legal construct? Just what are their aims? How are they to spend the money raised? Are the fund raisers to organise the spending of funds raised themselves? If so what control has a church over how and on what such money is spent? Is the money to be given to the PCC for that latter body to spend? Is there a time frame after which the fundraising body comes to an end? Most importantly, are the organisers subject to a degree of control and scrutiny at an AGM, or even, if subscribers are concerned at a specially convened EGM? What if the aims of the fund raising body become in conflict with the aims of the church being funded by an outside body? There seemed no method in this case where the subscribers/supporters could question (or indeed agree or disagree) with what the small number of FoCCS Trustees and the Restoration Trust Trustees were doing or saying. Each of these trustees as an individual has, of course, the absolute right in a free and democratic society to express their own views as some of them have chosen to do in this case.

253. The point of published judgments in Consistory Court hearings is not just to deal with a particular problem involving the parties themselves, but it should, if at all appropriate, act as a warning or as a guidance for others. Parishes, here I am not dealing with the in-house parochial sale of work, the duck race or the church summer fete or other small scale of fund raising, but with large and lengthy projects, must ensure that the parameters of the fund raising

body and the parish are defined. Parishes contemplating this kind of intense fund raising must make sure:-

- if for church purposes, a fundraising body is formed for specific purpose such as major repairs; the Rector/PCC must have at least a controlling vote on the activities of that committee
- the Rector and PCC must not be bullied or forced to accept donations for things which the PCC/Church Architect does not consider necessary or even wanted
- if the separate fund raising body do not want the actual effort of commissioning any restoration works, then all they should be able to do is to present the cheque to the PCC for the latter to organise the works
- it may be that the PCC can agree that specialist contractors can be employed by the fund raising body (who may have specialist knowledge) acting on the church's behalf but contractual care should be taken in that situation, and especially in respect of the Faculty Petition (as to, for instance, who actually petitions)
- care should be taken that any fund raising arrangement should be time limited and/or limited to an identified purpose e.g. the roof to be repaired in, say, 5 years, after which, consideration should be given to winding the fund raising body up
- questions should also be asked about the form such a fund raising body is to take. Is it just a committee of people organising the raising and collection of money to repair the roof? Is it a body which will commission, pay for and oversee the work (with the approval of the PCC and under Faculty)? Is it a charitable body for (sensible) tax reasons? How is it controlled? If there is a conflict between fund raisers and a Rector/PCC, how is that to be resolved unless the PCC or its representatives form a majority on the fund raising committee?

- I appreciate that many local bodies of "Friends" may continue usefully and sensibly in friendly constructive amity with a church for many years, raising money for various on-going improvements, but care should be taken to ensure, as I have said, that the "Friends" cannot insist on paying for unwanted items, which the PCC may not consider to be either wanted, necessary nor useful. This can lead to a somewhat sulky standoff, which can be adverse to the necessary fund raising itself. I should stress that most bodies of Friends are more than helpful to churches, work with them and all sides want to do the best they can , but a little thought should be given to what might go wrong, and how such an unpleasant situation can be avoided or dealt with
- I would not want to discourage helpful committees of the county "great and good" or heritage lobbyists from getting involved with any church. Quite to the contrary. Very frequently churches are not interested in their own heritage, and/or need semi-professional help to raise money (and to spend it)
- individual "one off" donations or bequests may be easier to deal with, though the same problems of "is it needed or wanted" may arise. All I would counsel is some thought be given about how the fund raising can be happily and productively organised.

This area of potential problems has surfaced, peripherally, in this Spitalfields scenario and I consider it right to draw attention to it, as a basis for further consideration and discussion.

254. In many, many cases all the above may seem cumbersome and unnecessary, but the above advice should at least make it clear to everyone involved in serious fundraising just what is involved. Architectural interest and church needs may not always be identical. Lack of thought at an early stage can, as here, result in some of the problems now before me. In all fairness, the position of Christ Church as a functioning parish appears to have been so dire when the Hawksmoor committee started, that it is understandable how the present

arrangements came into being. I do not want to sound over-legalistic in a world where church repairs are so necessary, and its funding relies on wider good will from many more than regular church goers, but enthusiasts involved in large projects can become, as I find here, so mesmerised by their own concepts of what they are doing that a worshipping parish may find itself at odds (and seriously at odds) with the fundraisers. In all fairness, I acknowledge that when the original Hawksmoor Committee was set up and then morphed into FoCCS, the church involvement, although supportive, was a pale shadow of what it is now, and no real thought appears to have been given to an almost unimaginable future success. I just flag up this potential hazard.

255. As it was becoming clear that the church and school were continuing with their plans for the new building opposition became more organised. The Spitalfields Society held a public meeting in March 2011 at which Ms Whaite spoke. I am not told the outcome of that meeting. According to Ms Whaite, neither school nor church sent a representative. If that is right, perhaps that was not the best way to communicate with "outsiders" who might not have had the full picture of need placed before them. It had become clear that the church was going to face opposition, but "quiet calm deliberation disentangles every knot", or, at least ought to have been given the chance in mutual discussion to do so.

256. On 28th March 2011 the school made their planning application for the new building, it having been before the Council Bishops Square Programme Board on 19th January **(3/1056-1059**) along with other items. At that meeting it was minuted:- ***"The school has planning permission to commence Phase 1. The Youth and Community Facility buildings, that it proposes, will require a separate planning application to proceed; the Community building will be used by the school. There is an August deadline for the project to commence. The full £300K that is allocated will be used. Any***

planning application will be submitted by SCABAL architects for the Diocese. The £50K that is to be used for the open space project will remain for that purpose and at this stage proposals for the open space have yet to be prepared …it was recommended that the funds be used towards the preparation of a masterplan for the open space …".

257. Ms Whaite wrote on 21st January 2012 to the Chief Executive of LBTH **(1064-1067)** making a detailed request under the Freedom of Information Act 2009 for all licences, leases and deeds etc. in respect of the Adventure playground land, and all reports, minutes of meetings etc. in respect of this; to these requests was added this request: ***"Specifically did your authority undertake any steps for public marketing or procurement prior to disposing of the recent interest created in favour of the school".*** That letter also fails to understand that the £25,000 payment was to pay off the youth club superintendent rather than as a payment by the school to LBTH for, as was alleged, ***"a legal interest in the part of the gardens until recently occupied by the adventure playground".***

258. It is right to say that the objectors throughout this case appear to have struggled to grasp the concept of a church school, not being a state school, which exists by licence on the Rector's freehold. Again, Ms Whaite writes as "Chairman of the Trustees" **(1067).** I struggle to find any Minute of either the trustees of FoCCS or the Restoration Trust recording this authorisation**.** In condemning the shortcomings of others, the objectors might well look at their own conduct of their own affairs.

259. In the documents before me there follows a series of working reports from the architects SCABAL, the Church working party and the DAC on the proposed new building, its access etc. I need not refer to these in detail save to note that by 15th February 2011 the DAC wrote, following a meeting at the

architects office, to say as follows:- ***"Both the DAC and E[nglish] H[eritage] representatives agreed that the broad design of the new building was acceptable and that the designs as now proposed were better in every way than those seen previously. There was also some concern that it was now time to stop tinkering and that the design team should be given the confidence to take the design forward and work it up in greater detail"(1076-1077).*** They considered that the landscaping could be done separately. On the 17th February 2011 the school committee was made aware of the DAC and EH approval, but that now the PCC itself had to approve. It was noted that there were some local objections from people who wanted just gardens, but only objections on planning grounds would be valid **(1082**). The school was wanting to get the go ahead for the project.

260. Although the statutory amenity society, the Georgian Group, had also attended the DAC site view on 4th November 2010, which was apparently followed by some discussions, it was not until 27th February 2011 that their views were sent to the DAC **(1084-1085**). The Georgian Group declared itself in favour of the churchyard being restored: ***"to once again provide a more open character to the south of the church, more in line with Hawksmoor's original design ….if a clear justification cannot be produced for a new school building"…. "the church was designed to be viewed in the round and the land to the south and east kept clear of buildings for the churchyard".*** The practical need for an open graveyard may not necessarily equate to its provision from which an architectural view can be obtained. I have already considered this above. If it were to be seen in the round, it could have been placed in the middle of the graveyard, but it was not. The church was placed so that its great west end was aligned on Brushfield Street. They doubted that there was a genuine need for additional educational facilities, unlike the need for a youth club in 1969, but invited more clarification.

They raise the view that the old building was to be temporary in 1969 (which I have already considered above). They also raise PPG5, which is not an absolute bar to development, but must be considered. They accept that the church's open setting to the south is compromised. Having stressed their views as to the church being viewed in the round, they stress: ***"It is relevant to the churchyard in that the south axis with its entrances was designed to open out on to views of the monuments to the silk weavers and mercantile families that lived in the area".*** *[my emphasis added]*. However, those monuments have, over the years been virtually all cleared and indeed were introduced in the years after the church was built, and, at best, the views of the church as can be seen from the various maps were hedged by the backs of houses, and , later, by the Victorian school. I was not assisted with specific evidence from plans, journals, notes, contemporary documents as to Hawksmoor's own views on how this church should be viewed. Subsequent views have been expressed by others as to what they consider might have been the architect's intention. I remain un-persuaded. At the most this may be the result of some *post hoc* views, improving on the original.

261. I have considered with care the views of this amenity society, but I find that there is and was a clear and convincing need for the school extension, that it cannot be placed conveniently anywhere else in anything like a sensible vicinity to the school, and the development will actually enhance and expand what remains of the open churchyard space, and hence the view of the church. It will not be a whole loaf of a view (as one third of the graveyard is even now permanently under a school) but it will be a greatly improved and enlarged one.

262. I am also struck by the absence of any current objection at all five years later, and the new building having been built, from the Georgian Group. They were neither a Party objector in this case, or, perhaps even more surprisingly, called as witnesses (so that they would not themselves be liable for costs). Had

their worst fears about the effect of the new building and/or its design been so awful, I would fully have expected them (and indeed others such as English Heritage, etc.) to have been called as expert witnesses to howl and wail before me, with cries of: " I told you so". I would have expected someone from the newer school of Hawksmoor studies to have been called to analyse and comment on the reality of seeing the new building before our eyes. Rehashing old objections about a different building in a different site in 1968 does not add weight to the objections to this new building built a little farther from the church.

263. ***Apart from the current objectors, there was a deafening silence from groups or individuals I might have expected to express a view. They could have been called as expert witnesses so that the excuse of the risk of costs against them would have been irrelevant. I must ask myself why? Bluntly, that lack of contemporary objections to the reality now before them greatly weakens the architectural arguments which have been raised (and which I consider below in assessing the weight of the objections from the witnesses I heard from).***

264. It may well be that, once this new building was built, was actually looked at (concerns about the mess of the open gardens aside), it really did not justify the Georgian Group's initial concerns.

265. However, back in 2011 another objection went in to the Council from a local resident Mr Jeffery **(1086-1088**), which contains some thoughtful analysis of the proposed new building itself, and the history of the site development, but this was countered by a letter from the (new) Chairman of the Board of School Governors on behalf of the school on 15th March 2011:- ***"As Christ Church school is situated in an area where there is very limited access to public green space, we have been very mindful of the need for the interface***

between our proposed development and Christ Church gardens to be harmonious. A lot of time has been devoted to consulting with community groups in order that the development can both complement existing and possible future uses of the whole site as well as acting as a deterrent for some of the less desirable patterns of use that have grown around the abandoned youth centre. Most importantly the building has been designed so that more land can be returned to the public gardens than has been the case for many years. Although it is not in our remit to include the development of the public gardens in our proposal, it is our sincere hope that by re-animating the old youth centre site for educational and community use, the adjoining green space will also be populated and used in a positive and interconnected way by local people" (1103-1104).

266. I find that statement to be a balanced résumé of the proposals. I find that the school really needed to expand both for the pupils and for the envisaged community use. It is greatly to be deprecated that all groups could not unite around this aim to master the complexities of the legal position of the site, which would then have given everyone something, but I find as a fact that the objectors were becoming fixated by their vision of an empty graveyard providing a view. They were appearing to lose all rational consideration, and had begun to put their aims above anyone else in the Spitalfields' community.

267. In the Spring of 2011 the various stake holders pulled together their final plans, so that on 25th March 2011 a formal planning application for alteration/demolition of the old building was made to LBTH. The accompanying Conservation Management Plan **(1119-1123)** pithily set out the school's needs in 2011: "***Christ Church is a smaller than average Church of England inner-city primary school. Almost all pupils are of Bangladeshi heritage, and have English as an additional language. Many pupils join***

the school with little English. The proportion of pupils who are eligible for school meals is three times the national average …the proportion of pupils with special educational needs and/or disabilities is broadly average but the proportion with a statement of special educational needs is above average, these are mostly for speech and communication difficulties. There are more pupils who join and leave at unusual times throughout the school year than in most schools. The school has experienced high staff turnover in recent years …and has had to employ supply teachers for extended periods … There are outstanding efforts to involve families in the life of the school and to involve parents and carers in their children's learning" (1121-1122). That document ***(1124-1133***) together with the development control application **(1134-1137**) was filled in by the architects as agents for the School Trustees, and contains errors. It states **(1126)** that: "***the new nursery and community building will be built on the site of the existing youth centre built in 1972***" repeated at **(3/1134).**

268. That was not right, as it has actually been built a little to the south of the old site, thus being further from the south flank of the church. It does not mention the legal complexities of the site, following the occupation of the school by the terms of the 2009 Deed. It is depressing here to note that the careless filling in of various forms, civil as well as ecclesiastical, give an opportunity to other parties to complain and cry "foul". I cannot urge strongly enough the importance of forms being accurately filled in, and the proper procedure being followed. It may not stop objections, but at least red herrings can be avoided.

269. The garden designs for the graveyard were also in gestation **(1138-1150**), starting from a description of the site in the landscape design statement as being: **"*..a prime churchyard and later a cemetery that has been divided over the last centuries through a constant flow of faculties, changes of***

use and layout to include the C of E school to the east, an outmoded public garden to the west and an inaccessible community garden associated with a disused youth club in the middle."…. "the possibility of demolishing the youth centre and extending the public gardens presents a great opportunity in terms of green space provision and the setting and enjoyment of Christ Church… It is inward –looking, inefficient 'pocket' park that - true to its stigma- is deemed unsafe and unfit for purpose" … "the strength of our proposal lies in addressing fundamental issues of activity and security the introduction of the nursery and community building is instrumental in aligning the interests of the local community, the church , LBTH and the school". Now, even allowing that this firm was pitching for the job, what they set out here I find to be an absolutely correct assessment, and that their aimed for end result would provide ***" a generous public accessible open space".***

270. On **25th March 2011** the Trustees of the Church school applied for planning permission (**1124-1137**) to demolish the youth club, and to erect a new nursery and community building in its place. That application stated wrongly that the school had "a long lease" of the land on which it stands. Many recent documents in this case have been filled in carelessly, and those mistakes have given rise to objections, many of which are claimed to carry more weight than common sense, let alone legal effect bears out. Nevertheless I repeat that any church filling out a legal document such as a planning application or an application for funding, let alone their own Faculty petition, should strive to do so correctly. This is not legal gobbledy gook, but the whole purpose of planning law, both secular or under the ecclesiastical exemption, is to ensure proper information being given to the outside world.

271. During April and May 2011 objections flowed into the Council; from the Chief Executive of the UK arm of the World Monuments Fund (**1161-1163),**

who appears to repeat the brief which many subsequently use as objections namely;-

- the new building is intrusive and unsympathetic
- the proposals are built on last mistakes of the existing (temporary) buildings. Should the school need additional facilities they can be accommodated nearby rather than to the south of the Grade 1 listed Christ Church
- he lists a number of alternative venues for the children including the crypt itself (an interesting suggestion given the need to use that venue to generate cash flow)
- he raises the site as a designated asset and the importance of PPG5
- he rehearses the objections which were raised in 1969
- he rehearses the immense amount of money raised to restore the church and concludes that it is "imperative" that the church setting be protected for Spitalfields and the Nation
- he claims that extending the churchyard gardens will have a positive impact on Spitalfields' carbon footprint and the well being of the wider community
- he says that Spitalfields has little public green space and, as such the garden represents a precious amenity
- he stated that the burial grounds should be respected as the resting place for the former citizens of Spitalfields and offer an area for contemplation.

272. I have set out these objections as being representative of many which came in. Many of these had identical wording of the "cut and paste" variety. Very, very few of these objectors added their weight or bothered to attend to give evidence at this Court. I would have been more interested to have heard their views on actually seeing the built new building. I remind myself of how small a space it actually is when "carbon footprint" is being considered.

273. I do not know when last, if at all, Dr Foyle, the Chief Executive of the World Monuments Fund UK, actually tried to use this graveyard as he envisaged it as "an area of contemplation": clearly he did not see, as I did, the ping pong tables in action in the churchyard (of which more later) or the ubiquitous dossers. I fancy he would have had a somewhat exciting contemplative experience amid the current drug dealers, and drunks I myself saw in the churchyard (a situation apparently over a century old).

274. I do not set out all the other letters of objections, which I have read, as they raise virtually identical points as if many of the writers are working from prepared "points"; what I have to consider is whether each is valid and, if so, what weight should be given to it. A strong letter of objection to the planning committee came from Christ Church's own appointed architect **(1164**), Michael Morrison of Purcell Miller Triton, stressing the importance of the whole south side of the church being seen clearly, and the mistakes in erecting the 1970 youth club building. It is unclear to me if he discussed his objections with his employers, the PCC, nor whether he did them the courtesy of sending his letter of objection to the PCC. As an individual he is, of course, free to express his own views. Those more local and more knowledgeable do carry potentially more weight. For instance, a former treasurer and Fournier Street resident of the school wrote to object, denying that the school actually had the needs it said it required (**1165-1166),** and stressing the need for even a small bit of open ground. He alleged that the school would be wanting: "**t*o take up all the land up to Commercial Street for their own use".*** I specifically reject that last argument on the evidence before me, as more than sufficient efforts were even then being spent on potential public garden design. As a former treasurer of the school, he was concerned about the sources of its funding (an argument which surfaced with more detail during these proceedings) and the reality of school needs. I found this allegation even five years later to be farfetched and unfounded. The school was going through a bad patch. Numbers had fallen but that has been reversed (though many schools

fluctuate in numbers). If the school cannot build up a reception class, it will have difficulty building up numbers, and, of course, pupils may have to be bussed in. Now, of course, any pressure group is entitled to summon friends and supporters as they can, to brief them and to try to influence a local authority planning committee with weighty objections. There is nothing wrong or surprising with that.

275. Indeed, Ms Whaite did just that, as on 6th May 2011 she as chairman sent an email to all the Friends of Christ Church Spitalfields, **(1168- 1171**) saying that this was an *"**urgent call"*** to protect Christ Church and its setting, the churchyard gardens, which are ***"under threat from unsympathetic and intrusive development"*.** She described the plan as being to: **"*build a large structure for nursery and community use in the churchyard gardens*".** In fairness, links to the actual planning applications were annexed to this e-mail. She urged supporters to object to the Council, and, indeed, provided a draft "cut and paste" letter for their use. They could adopt it all or, presumably, pick and choose such paragraphs as appealed to them individually. They were told where to write to, and to put their own name and address to their objection. The "urgent call" is for an attempt to block the new building by mustering objections. This letter is virtually in identical terms as the letter from Dr Foyle which I have set out above. It was accompanied with a briefing note in which, *inter alia*, stated that the architect of the old building: ***"now advocates its demolition in order to re-establish the proper setting for the church***". Well yes, having been approached by Ms Whaite in the first place, as Ms Mitchell said in her own evidence*.* This briefing note concentrated on the green space element, doubtless to rally people who really were not very concerned or knowledgeable about Hawksmoor.

276. The objections continued to be put in: on behalf of the persons involved in the Spitalfields' musical festival; for instance from Jonathan Balkind **(1175-1176),** who had also worked in the GLC's historic Buildings Division in the 1970s. His

objection was thoughtful, having done much to help restore the church and who valued its acoustics. That said, many of the arguments about alternative space, the "temporary" nature of the 1969/70 buildings and the original architect's own views are repeated. There is a qualitative difference between the thoughtful objector writing from observation and personal experience, and the views of the "cut and paste" variety. I make it clear that I have given thoughtful consideration to the former, while noting the number of the latter.

277. In the middle of this activity, there appears a short and civil note from one of the Churchwardens, Kim Gooding, **(1177)** to Ms Whaite hoping that this planning application, about which they differ, will not be an obstacle to their working relationship, but will remove an eyesore and be a resource for the church and the community. That note stressed the acknowledgement of the PCC to the Friends for all their work.

278. Other objections followed, from a former Chairman of the Spitalfields Festival, and others, the majority living outside the parish, indeed outside the LBTH, or, indeed the UK. The arguments suggested in Ms Whaite's "Now or Never" call to rally potential objectors are rehashed. No one appears to deal with what I observed, namely the trees get in the way of an unobstructed view of the south of the church. The trees have preservation orders on them.

279. The Georgian Group objected formally on 12th May 2011 **(1180-1182)** for the previous reasons but stating: "***if a clear justification cannot be produced for the new school buildings the churchyard should be restored to once again provide a more open character to the south of the church, more in line with Hawksmoor's original design".*** I have found that the school has such a pressing need***.*** Again the alleged ***"temporary nature"*** of the 1970 building is raised, but as I have set out above the reason for this was because it was then envisaged that the school would actually take over the land formally, rather than

that the old building should be "temporary". A short note of objection followed from the Ancient Monuments Society ***(1183)*** on 12th May 2011 stressing the "***unworthiness***" of the 1970 building, and that there was now a **"*chance to undo that damage*".**

280. On 13th May 2011 the Rector wrote to Ms Whaite explaining his vision for an improved, enhanced public garden together with an enlarged school: "***It would more than double the size of the public gardens and open them up ready for new landscaping and it would give the school the right sized accommodation for the 21st century***" **(1184).**

281. On 13th May 2011 Professor Kerry Downes wrote from York to object **(1185-1186).** He expressed the objections of others in a more erudite and balanced way, knowing more of the historic development of his own role in the rehabilitation of Hawksmoor and this church, a church which he considered that in 1952 Pevsner did not know of what to make. He complains, rightly, of the then unsightly clutter of fences and play equipment round the south door. He wanted the open setting of the south of the church to be restored to allow: "***Hawksmoor's magical effects of rhythm, scale, harmony and visual metaphor***" to be restored. He was of the view that it would not be impossible for the school to find alternative additional accommodation, as ***"he had been given to understand that there was no shortage of suitable accommodation in the vicinity".***

282. There was a further DAC site meeting on 13th May 2011 at which various aspects of the design were again queried **(1187-1189).** At a meeting of the PCC on 16th May 2011 the Rector reported that there had been 120 letters of objection and 180 letters in support of the scheme sent to the Council, and finally the PCC agreed to apply for the necessary Faculty for the development on 16th July 2011 "**allowing the development of school/church/community building on the**

land currently occupied by the closed youth centre in accordance with the 2009 licence and if required modified by the premises committee on 31st August (1193)".

283. On 7th June 2011 the Trustees of FoCCS and the Restoration Trust had a meeting, there being a total of nine persons in attendance**. (1194-1197**). The Rector corrected the previous minutes, saying that he had not seen nor been consulted about the most recent plans for the proposed building issued by SCABAL; that was in the minutes of 18th January 2011 meeting. There was much discussion about the organ restoration. Ms Whaite in the Chair told those present that the churchyard application was going to the planning committee in July 2011. The minuted notes of that meeting make interesting reading:- ***"Andy Rider [the Rector] told the Trustees that he personally found it quite difficult that the Friends' website had encouraged people to write and object when there had not been a board vote, and he had had to talk to the Bishop as he was confused. He said that he would have preferred the letter to reflect the wider view. [Ms Whaite] agreed that this was a really difficult situation. [The Rector] said we should have had an emergency meeting".*** Pausing there, I have already expressed disquiet at the way that a few people among the trustees had been purporting to act on the behalf of them all without any wider vote or formal decision, unanimous or otherwise. Ms Whaite, as minuted, went on to say: ***"... <u>as trustees it is our role</u> to care for the church and its setting. SCABAL architects acting for the school presented draft plans for the planning application to some trustees. However, the trustees were not consulted; we were not involved in the strategic stage nor consulted later".*** A Mr Woodward addressed the trustees to say that "***it was not too late*** [for the trustees to vote] ***but we did not have a motion*****".** The late Mr Vracas said that the Friends should have been involved and that he was embarrassed that his own PCC was: *"**intent on putting up a totally inappropriate building in a totally inappropriate place**"* **(1194-1196).**

284. Again I pause. It would have been perfectly possible from 2010 onwards for any parishioner to have raised these proposals at the Annual Meeting of Parishioners and/or the Annual Parochial church meeting for discussion, debate, even to have voted down. No one appears to have done that. From the very outset of these proposals, anyone could have gone on the parish roll, with all their friends and supporters, demanded a debate and had even the idea defeated, were that the will of the voters. You don't have to be a practising Anglican to join (those early 19th century non-conformists, whom I mentioned at the beginning of this judgment, fuming at the overspend on their friends by the Vestry, did not take matters lying down). Again, I was faced with what appeared to be a yawning gap between FoCCS and the Bangladeshi community, whose interest in or knowledge of Hawksmoor did not seem to be encouraged by the FoCCS. It was as if that community was not considered by FoCCS as forming the kind of group they considered as being "relevant" nor did they expect them to show any knowledge of or interest in the British architectural heritage movement. I heard no evidence of FoCCS going out to talk to involve the local Bangladeshi community. No mention in their minutes. It would have been nice, one might say sensible, in terms of building community relations, to have seen a children's drawing competition in the school of the church or child/parent orientated talks about its history. Who knows what child's interest in architecture might have been fired to become a future architectural historian? I am aware that this may sound idealistic, but this educational, inspirational aspect of church heritage for children is of <u>such</u> importance that the great and good of Church and Heritage must not ignore it. To do so is an intellectual and moral failure. There is no point in saving heritage for the future if you fail to interest the future in it.

285. If such educational things happened at Spitalfields, I was not told about them by anyone. Even the professional architectural lobby, of whom I had the

impression that the worshippers at the church had nothing in common with nor interest in, themselves seemed to be existing in their own, rather precious, world.

286. What should have been a unifying community building appeared to exist as a centre of totally unconnected worlds, at best ignoring each other and, I am afraid to say, at worst, despising each other.

287. Of course, there will always be exceptions. The bell ringers, as bell ringers everywhere, got on with their self contained activities. As always, the musicians carved their own path, and the successful Spitalfields Festival continues unabated, and uninvolved with this case, as the church is restored and available for concerts. Only an increased garden space for interval drinks is currently missing (though that may form part of the separate argument in respect of the catering, so I will not dwell on that).

288. It appears from the June trustee minutes, Mr Vracas (I think from somewhat unclear minutes) wishes that the Friends' views should be taken to the PCC. Again I note the over-arching assumption that the views of the small number of trustees present at that meeting expressed the views of the majority of the Friends. The minutes of the trustees reflect a rather formless debate thereafter. They refer to a letter from the PCC, which is not before me, of 18th May 2011 about which said that: ***"this development will enhance the ministry of the church***" **(1197).** Ms Whaite considered that that letter ***"indicated confusion and conflation of different kinds of things".*** The Rector appeared to demur saying (I think with regards to the objections; the minutes are terse) the "***experts were expressing their personal opinions*****".**

289. Ms Whaite is reported in the Minutes to have replied that *"**expert advice was about educated opinion - in this case it was about architecture and context**".* (**1197)** That, indeed, was her view, and I see little thought then or

thereafter on her part about what the building, which FoCCS had saved, was actually trying to do, and to assist in the work of its church school.

290. There then followed a somewhat disjointed discussion about the size of the garden, the positioning of the new school. Mr Woodward said: *"**it was not our (FoCCS) job to decide the alternative scheme".***

291. I remain puzzled by this. At first the trustees appear to be claiming a legal duty to be involved, yet at the end of this meeting they are not even trying to provide any alternative suggestions. Now I accept that minutes can be badly taken and reflect only a snap shot of the discussions of any meeting, but it is clear that the situation was becoming very difficult for the Rector and the Churchwarden /PCC representative to work with the Friends Trustees. I note that even following this meeting the Trustees did not set out to take the temperature of the water by holding a meeting for their supporters to discuss the proposals or even to vote. Relationships had by now become fractious.

292. On 23rd June 2011 the LBTH planners held an overview meeting about a number of items including a very brief report about the Christ Church scheme and the s106 money **(1201**). On 28th June the Head of Care of Churches wrote to the Rector and others **(1203-4))** to report the DAC discussions, they being broadly in agreement with the PCC. He put his finger on the difficulties saying: ***"we are very aware that you are juggling a range of different consultees in this project and certain issues are really going to have to be decided as part of the planning permission***". He went on to discuss the facing material of the new building and, even now, its site line.

293. I am left re-reading these documents with an overwhelming sense of a number of different individual organisations all developing their own part of the road map, but with the difficulty that more and more disparate groups were promoting their own agenda: overall to get the old building demolished and a new

school/community building built and to thereby increase/improve the garden space, or to object to this. More and more problems arose by 28th June 2011. English Heritage had become involved by reason of the effect the new building might have on the grave yard following the Historic Environment Assessment prepared by the Museum of London, and the engineering reports on the proposed structure. English Heritage were positive about what was being planned: ***"This approach is sensitive to the buried historic environment, particularly in regards to the new nursery and community building, where the proposed raft foundation are [sic] intended to cause as little damage as possible (1205-10).*** Apart from recommending the usual archaeological conditions and potential watching brief, in archaeological terms (which was their brief) there were no further comments.

294. By now everything was coming together from a variety of sources, so that on 5th August 2011 the Council produced their information brief **(1207-1210),** the architects having made the formal application for planning permission, and it having been registered on 28thMarch 2011. Apart from being concerned that some elements of the highway at the Commercial Street end appear to have been included in the garden design proposals, it was considered acceptable. It is quite clear from that document that the officers of LBTH considered the land use for the London schools programme, the enhancement of the site by the removal of the old building, and that the design of the new buildings would be acceptable and would not harm the significance of the designated heritage assets in accordance with PPS5 and other development plans. It stated that: "**the proposal results in the loss of 75 sq. metres of open space, this space is not publically accessible and is currently in an unusable state. The landscaping and design of the building would make more efficient use of site and would allow for increased public access and usability of the site".** Various standard

form conditions were recommended which were neither unusual nor onerous (**1207-1210).**

295. Further proposals were also in train for the use of the s106 money **(1215-1227)** for community use. This project Initiation Document did state that: "***an equality impact assessment has not been carried out specifically for this project. However, it will bring significant benefits to communities and businesses of BAME origin. Tower Hamlets is ethnically diverse and home to the largest Bangladeshi community in the country which makes up 32% of the population …the location where the benefit of the project will be most felt have high concentrations of BAME communities as well as businesses owned or operated by member so these communities who will therefore be primary beneficiaries of this project."***

296. Complaint was made in evidence that the *Equality Act* aspect of this whole scheme had not been addressed. This document shows how obvious it was, so obvious that it needed little further work, and had been more than taken into account. In passing I note that the voice of the Muslim community, whose children formed over 90% of the school, has been silent in the arguments so far, save in the letters of support for the whole project.

297. On 29th June 2011 the Bishops Square Board committee members met and reported that local opinion had become divided over the spending of s106 money **(1231).**

298. On 30th June 2011 Mr Andrew Hargreaves of English Heritage wrote to the officer who had been collating the views on this planning application **(1237-39)** for the Council, to agree with the overall view that the original old building was of **"no architectural merit".** He was supportive of the overall new building design: ***"the proposed building, while incorporating a pitched roof is kept low to***

the ground in order to limit its impact on views of the church and gardens looking east from Commercial Street. The glazed centre of the building is intended to allow views through it along the axis of the former graveyard and the building is kept away from the southern boundary of the gardens to ensure that views remain through the rear of the site from Commercial Street ." He complains about the existing security fence, "***which crudely and intrusively separates Christ Church gardens from the community gardens to the east. The removal of the fence would open up a wider area of improved garden space for everyday public use …"*** He considers the ***"passionate debate*** "…"***There is a strong and arguably understandable desire to open up views of the south side of the church and reunite the subdivided spaces which formed part of the original graveyard. <u>However English Heritage feels that, compared to the present situation, the current proposals, particularly if coupled with the present landscape scheme, has the potential to improve the setting of this part of the Brick Lane /Fournier Street conservation area".</u>*** *(my underlining).*

299. In the light of what happened later, Mr Hargreaves was to bear the heat and burden of the day for that supportive letter. However, I find it to be a sensible and sensitive analysis of the aesthetic and architectural problems which might have been of interest to the supporters of FoCCS before they considered writing their "cut and paste" letters of objections.

300. During all of this plans for the building on the school premises were going on apace.

301. On 13th July 2011 the minutes of the building resources group of the church show (**1256-1257)** that they had met to discuss a variety of matters, and to prepare their approach to the imminent council meeting where the planning application

for the gardens was to go to Council on 27th July 2011 ***"Tensions with the friends was acknowledged and need our prayers***".

302. On 16th July 2011 the PCC resolved to apply for a Faculty for the new building site **(1258).**

303. Meanwhile the objectors had also been busy lobbying for support. They had apparently written to Simon Thurley and received a reply from him on 11th July 2011 (neither letter is before me), but they had seen the letter from English Heritage of 30th June 2011. A letter (unsigned before me but annotated in manuscript as being from Ms Whaite on behalf of "I and my fellow trustees") dated 19th July was apparently sent to Baroness Andrew, Chair of English Heritage, complaining about a number of factors. She complains of EH's failure to consider various factors. She raises the alternative school extension proposals (I assume to be Mr Dysons' failed scheme) for infill rather than building south of the church. Again, I can find no formal motion by even a majority of the 9 FoCCS Trustees authorising this letter. This letter now raises alternative schemes for the school which had, as I said, been proposed by a local architect Mr Dyson which would not mean any new building on the old building site. His proposed scheme had been turned down in favour of the current architects. The letter also complained about the "***undisclosed agreement***" involving Tower Hamlets and the Diocese of September 2009 concerning use of the churchyard. ***"There was no public consultation whatsoever about this agreement. This cannot be right" (1259).*** (I take it that this refers to the licence agreement referred to above). She complains about Simon Thurley's view (not produced by the objectors for me to consider) in respect of the planning position, and complains that he has not taken into account PPS5 , now in force subsequent to the original building on the site. She rehearses the arguments I have already set out. The letters of objection, including from ***"England's most distinguished Hawksmoor scholar"*** (I assume Professor Downes), she claims to be in "hundreds". Actually, they had by

then risen from 120 to about 180 at that time, and she claims, rather breathtakingly, given the history I have set out above: ***"The community have [sic] not been consulted by either the church or Tower Hamlets***".

304. I have already set out the presentation and her own attendance at DAC site views (The opportunity to object to the Faculty was still to come). The planning consultations were in train.

305. She raises the other potential community space, and how vital "***the green space is to health and wellbeing"*** of children in particular (not a view shared by many of the objectors who appear to have wanted the children to play somewhere else). She complains that EH should reconsider their stance. No mention is made of the letters in support of the proposal or of the deafening silence from the current architectural authors in this field.

306. I consider that from this letter onward the stance of the objectors' moves from proper democratic expressions of their views to a more aggressive and threatening attitude, which did and does their cause a disservice.

307. Again, I am concerned that this agreement, which envisaged a future off loading of the whole old building site, on the Rector's freehold for the use of the church school is regarded with such horror by objectors. The open space use could, it was subsequently accepted by the Counsel for the Open Spaces Parties, have been brought to an end by agreement of both Parties or by the church (or indeed the local authority giving notice or compulsorily purchasing it). It need not be a designated open space for eternity. I found this letter to be, if not misleading then somewhat strident, perhaps because Ms Whaite realised that the loss of support from English Heritage weakened the objectors' aesthetic case.

308. The final planning meeting was held on 27th July 2011, and the councillors present had a lengthy and detailed analysis of the application **(1261-1279).** The

arguments for and against, which I have summarised above, were set out, and the existence of opposition to the project. I find that report to have been a fair and accurate one and where there is any conflict on figures I prefer the Council's analysis. By the time of this meeting the Council officers had received obtained 556 responses, 315 objecting and 242 in favour. However, of the objectors 252 came from outside the Borough, and only 48 from residents inside the Borough, and 15 with no address. Of those supporting the application, 57 were from outside the Borough, 176 from residents in the Borough and 9 with no address. Of course I make it clear that this kind of decision is not decided on a show of hands or even, as I have said in other judgments, by signed petitions when the whole background is not before the signatories. Such objections are of note, but here again, I bear in mind the efforts made by Ms Whaite to encourage the FoCCS supporters to object. Overwhelmingly LBTH residents, among whom I have no doubt were some parishioners, were in favour of the proposal. The Officers' report point by point succinctly answered the objections raised and dealt with the school's needs. This document bears a reading by those who may have been misled into objecting. It fairly set out the situation, and considers noise, trees and a variety of other matters. The Officers recommended approval.

309. The Development Control officer introduced the report at the meeting on 27th July 2011. There were oral objections from a Ms Dewick **(**sic thus **1285)** on behalf of the Spitalfields Society. She had a variety of objections. She said that there would be loss of open space, but that the community gardens had been made inaccessible. She accepted they could be returned to community use through better management. She acknowledged the OFSTED report about the school's needs, but doubted if what was being proposed would fully address it. The plan (I think what is meant is the building) was too large for the site; she requested other options to be investigated. In answer to questions from Councillors, she said

"The design is too contemporary and therefore out of keeping with the churchyard".

310. A Mr Brynmor Thomas addressed the Committee on behalf of FoCCS saying that the church was a Grade 1 listed building which attracted a lot of public interest and the churchyard was a separate asset, and the setting itself listed. He said that the report failed to recognise these points. He raised the PPO5 guideline **(1285)**, and said that the 2009 agreement was only an agreement to agree, nothing more. The school only had a licence for the play area, and nothing more. Therefore it should not be paid attention to. He urged that the impact of the redevelopment of the Fruit and Wool Exchange (then a coming possibility) should be taken into account. He considered the traffic assessment to have been inadequate. In the papers before me I have the advantage of reading his speaking note for the meeting. I found this to be of interest, given the arguments that had been raised about very young children being taught at various other venues in the area.

311. On behalf of the school, Mr Woolf from the LDBS and Mr Wasserfall, a school parent and a school trustee, spoke in favour, as did the planning applications' manager for the Council. The Councillors asked a number of pertinent questions, which were answered by the officers. The Committee approved the application by with 4 to nil with one abstention.

312. I have set this debate out in detail as I wish to consider in the exercise of my discretion whether there was anything which the objectors could now re-use and re-open, and I was somewhat surprised at the arguments raised at this meeting given the tenor of the objections before hand. Planning permission for the new building was therefore granted, save that there were to be conditions to be arrived at via delegation to the officers **(1281-87).** These came later and need not detain me as they were all fairly standard. Conservation Area consent was also granted

(1297). I note that all these applications were being processed via the commissioned architect SCABAL. On **5th August 2011** LBTH accordingly granted conditional planning permission to the Rector and Churchwardens to **"demolish the existing youth centre and build a new nursery and community building in its place".**

ACTIVITIES POST PLANNING PERMISSION

313. The next step was to obtain a Faculty for this project, planning permission having been obtained. However, before dealing with that, I turn to consider the activities of the objectors after this planning permission was granted. Given that the FoCCS raised the points alleging PPS5 being ignored, and the 2009 agreement, one might have though that the remedy of objectors was to challenge the decision of the Council there and then in July 2011 by judicial review. They did not. Given their subsequent complaints against the whole procedure of the granting of this planning permission, had they wanted to challenge it, that was the time and method properly so to do.

314. On 22nd August 2011 the Church property team decided to apply for a faculty **(1301-02)**. *Inter alia,* the church wanted use of the new building all day on Sunday and up seven hours in total in any week outside of school hours, and for extended hours. The problems of getting all the paper work completed in order together with the availability of the money was exercising Mr. Woolf of LDBS, who, somewhat gnomically, e-mails the head of Planning Development on 18th September 2011, mentioning that the objectors might want the Chancellor to hold an enquiry, and: "***There is also a risk of judicial review but as time goes by, this risk reduces. Once we get to November, the risk is zero."*** This mirrors church requirements for shared use of the school premises as has been seen in the earlier agreements. Contracts for the work were being prepared, and there was a meeting between the DAC and SCABAL on 4th October 2011 about signage, gates and other incidentals. A meeting of the Trustees of FoCCS

and the Restoration Trust took place on 5th October 2011, when the previous minutes were amended to say (now correctly): ***"SCABAL presented draft detailed plans ... to some of the trustees",*** although they were still complaining that they had not been involved at a strategic stage, or consulted later. The organ restoration appears to have been a major item on the agenda. As far as the churchyard was concerned, the Rector reported that there was a garden subcommittee on which the FoCCS treasurer, Mr Vracas, was a representative of the FoCCS. That committee would be discussing how the s106 money was to be spent.

315. The need for a Faculty was raised, and Mr Vracas stressed that the FoCCS: ***" had a responsibility to the thousands of donors who had given millions of ponds and that the [FoCCS] need to be seen to be protecting the designated Heritage asset to our utmost…… although it was painful, he was proposing to table a motion to propose writing an objection from the Friends to the Registrar".*** Christopher Woodward seconded that. The trustees present voted 5:2 in favour (I take it that the Rector and Mr Stride, the son of the previous Rector, voted against). It was agreed that the other Trustees would be notified that this motion had been passed and that they would be asked for their opinions on this matter" **(1312-1315).** At last, the trustees had begun to put their views as a body on a formal footing. It would also seem that they were aware of the Faculty procedure, as their attention was drawn by Ms Whaite to the fact that, although planning permission had been granted, "***the proposals did not yet have a Faculty".*** That was not surprising as none had yet been applied for.

316. I do not know what if any response was forthcoming from the other trustees, but on 19th October 2011, Ms Whaite wrote a letter of objection to the Diocesan Registrar **(1316-1320).** She raised a number of matters:-

- the role of FoCCS as principal donors, their exclusion from the early strategic stage of the scheme

- she complains that the way these matters have been handled has "**served increasingly to alienate many long standing opinion formers in this community" (**That I find to be in itself an interesting concept)
- whether the present proposal is in the long term interests of the people of this parish. She complains that very significant and irreversible changes …..to communities whilst they may be of minimal interest to he Diocese at a high level will endure over decades and generations
- she goes on to say ***"the trustees who have de facto responsibilities for the fabric of the grade 1 listed building feel very badly let down by the planning process, by Tower Hamlets, by the ecclesiastical community and its supporters, by those who supposedly stand as guardians and custodians of local interests - including English Heritage and the government's heritage adviser - and by the public sector educational bodies who represent schools in this neighbourhood"*** .

She then goes on to amplify these various headings

- the petition was not properly advertised
- the 2009 agreement which she alleges was "negotiated, concluded and entered into behind closed doors without any public visibility, awareness or consideration"
- a conflict of interest between the church and the school
- Tower Hamlets "faulty planning decision"
- she complains that they are having to battle against the poor quality 1970s planning decision
- the disputed measurements (In this letter the churchyard was described as being at least 3000sq metres)
- the failure to establish educational need
- the importance of green open spaces.

She exhorted the Diocesan Registrar as follows: ***"we think that you as the Faculty decision maker ought to apply great care examining whether what is in our view a faulty planning decision should automatically and thoughtlessly drive a Faculty consent".*** Having opened the case this high, putting aside her mistakes as to just who the faculty "decision maker" is, she then went on to conclude :- ***"If you endorse and give unqualified approval to the faculty, if the need case is capable of being made out so as to persuade decision makers with onerous public law responsibilities to proceed to give a green light for it; if the funds can be raised to build this school extension; and if you are persuaded in the context of your duties as a decision maker to give this project permission, we call upon you to explain in detail why you believe this is the right thing to do, given all of the uncertainties we have explained above"***. She exhorts the Registrar to consider: ***"the task of the ecclesiastical courts in exercising the faculty jurisdiction is to ensure that the sacred uses are protected, that the parishioners are duly consulted and that the wider aesthetic interests of the public are considered, but remembering always that the church is a place for worship and mission, not a museum".***

She concludes by saying: **" *we do not believe that the parishioners around Christ Church and the broader Spitalfields community have been duly consulted. We do not believe that the interests of the public have been properly taken into account - indeed they have been very largely ignored; we know full well that the church is a place of worship and mission not a museum, but we think that precedence has been given to an aspirational educational project, and that almost everyone has been ill served by the actions taken, which we are very sad to say do not reflect well on those promoting this idea".*** She doubts that the school's aspirational aims' need to be met by building on the graveyard gardens.

317. Everyone is thus out of step, save for FoCCS. One cannot but ask, reading this broadside, why Ms Whaite herself was not the person chosen by the FoCCS trustees to address the planning meeting. When I come to considering the arguments and evidence before me, I will deal with the points she raised above. However, I have found it necessary to set out above the extensive consultations, discussions and meetings, which resulted in this whole scheme being formulated, and the proper operation of the planning system.

318. The Diocesan Registrar replied on 11th October 2011, in a polite but bemused manner. As yet the formal Faculty application had not reached his desk; but the Public Notices had been displayed between the 16th July-12th August 2011 **and no objections to the proposals had been received (1321).** He said that he would, draw Ms Whaite's comments to the Chancellor. He acknowledges that the papers in respect of the 2009 agreement will be retrieved and placed before the Chancellor in the light of Ms Whaite's comments.

THE FACULTY

319. It is with some gloom that I now must turn to the history of the 2011 faculty itself, or rather faculties. On 8th November 2011 the Rector and Churchwardens applied for a Faculty to demolish the old building and build the new building. I will return to that Faculty application below as it too was riddled with errors (not just typographical mistakes). At (**1304)** is the formal public notice issued on behalf of the Rector and Church Wardens, dated 13th September 2011, setting out the proposed demolition and rebuilding works, the restrictions for church use, the proposed management licence together with the 2009 agreement. Readers are informed that copies of the plans and documents can be inspected at the church office in the basement of the Rectory. Pausing there, in the course of a site visit held during this hearing, I was shown by the objectors where the Public Notices were displayed on the outside of the church. I am fully satisfied that they were clear and available to public inspection, and properly displayed. I am puzzled

by the dates for notification given by the Registrar to Ms Whaite in his letter of 10th October as being 16th July/12th August, but the formal certificate of publication certifies that the notice was published between 13th September - 11th October 2011. Those are the dates I must rely on. In any event, I find that the notice was properly published on a notice board inside the church and outside the church.

320. On 13th October 2011 the Rector, having been apprised (properly as she was clearly going to be an objector) of Ms Whaite's letter of 10th October 2011 to the Registrar, wrote directly to the Chancellor, answering many of the points raised by Ms Whaite. That letter (**1324-1325**) is supported and countersigned by two trustees of FoCCS, one of whom was a Churchwarden and the other an ex-churchwarden. He deals with various factual points, but the Rector goes on to state:-***"This is key- the Board of the Friends did not vote on whether or not to oppose the planning application, neither did we vote to seek objection letters from members - many of whom were very confused by the aggressive campaigning stance of the Friends' Chair and office who were not entirely transparent about the plans and those who were behind them . …"we" here is not unanimous. Indeed the Bishop of London as Patron of the Friends has chosen not to object to the planning application despite overtures from the Chair [Ms Whaite]".*** He goes on to deal with some of the other substantive arguments.

321. Now many of these points, for instance that only late in the day did the Trustees vote to oppose the proposals (see above), could well and properly have been raised at a later stage when any Chancellor would have asked the conflicting parties for their respective comments, so that all views could be considered in a orderly and comprehensive fashion.

322. What concerns me here is that a petitioner for a Faculty is writing to the Chancellor in this way, heading his letter "Dear Nigel". In the course of his evidence the Rector willingly accepted that this was inappropriate. It gives the wrong impression. In the small ecclesiastical world, people cannot help but know each other, but I have to stress that Chancellors are formal judges, not just of the Church, but also of the State. My concern about the style of this chummy letter does not stem from some grandiose or pompous regard for the office and function of a Diocesan Chancellor. There is a proper and sensible reason for my concern. Diocesan Chancellors are judges, approved by the Lord Chancellor, and as such we must be seen to be carrying out judicial functions at arms length from litigants. <u>All</u> litigants, as in any court in the land, must be able to feel that that their case or their objections will be heard in a fair, open and even- handed way, and that any Judge hearing their case has not been "nobbled" or lobbied under the counter. It may be difficult for the outside world to appreciate that such inappropriate chumminess of address might serve rather to irritate a Chancellor rather than ingratiate the sender (and indeed may immediately result in a Chancellor recusing himself from that particular case). There is a time and place for arguments to be formally replied to, so that all objections and replies are interchanged between the Parties, and all placed before the Chancellor. This kind of letter from the Rector was not appropriate.

323. The earliest Faculty petition before me is dated **8th November 2011 (1341-1352)** and appears to post date the public notice dates. I am puzzled by this as (though I accept that different dioceses may have differing practices) Normally, I would have expected the Registry to have received the Faculty Petition, checked it over, alerted the DAC, then sent out the forms for public notice, then collated the preliminary objections as they came in for the Chancellor's attention. The Chancellor could then have raised his own questions for the Parties to answer, and then decided a way forward, either by written objections, a Consistory Court, or by

granting the Faculty with or without conditions. That does not seem to be what happened here. Again, this November 2011 Faculty Petition was accompanied by another "Dear Nigel" letter to the Chancellor of the Diocese of London from the Rector. **(1340).** In this letter the Rector writes: "***as of 5th October 2011 the primary school fell under the governance of an interim executive board. They assure me that they will maintain the school's Church of England status. It would be my request that any Faculty embeds the current licence and the development site within the freehold of the incumbent, so that the benefit and use of the buildings and land by the church are enshrined legally".*** Much trouble could have been averted at this early stage. The Petitioners were the Rector and two Churchwardens. The standard Faculty application form is not helpfully designed for this kind of application for churchyard development, but the boxes are clear enough, though the information inserted does not really give a full description of what had gone on before this application, mainly because the form does not encourage that. However, the main mistake here was that the form was not filled up correctly. Had the Registry seen this earlier, before public notice, then the objectors would have been deprived of some of their objections, especially those relating to the alleged "bad faith" by the Rector. It is fair to say that that imputation by the objectors that the mistakes on the Faculty Petition were, in some way, an underhand attempt by the Rector to obtain a Faculty was withdrawn in the course of the evidence, but they are some indication as to how high emotions were running.

324. In answer to the questions asked in paragraph 33 of the Petition, the Rector and his co- signatories answer "no" to the question "is the land consecrated", and then "partial" to the question "if the churchyard is no longer in use, has it been closed by Order – In - Council". Both of those statements were just plainly wrong. Similarly, to the question "would any graves, reserved grave spaces …be interfered with?" the Petitioners answered "No".

325. The purpose of that last question would be to put the Chancellor on notice as to how much interference with graves the building works might result in, so that reburial conditions could be imposed, should they be necessary. In the event there was always going to be a risk and the Chancellor should have been put on notice of the archaeological work which had proceed this petition and the care that was bring taken.

326. Any Chancellor recognises that virtually any building work proposed in a grave yard there will almost inevitably be disturbance, if not with graves themselves, then by disturbance of stray bones. Any Chancellor does not lightly authorise such disturbance, but it may well be necessary if a church is, for example, going to lay a water pipe for a lavatory, or build a church hall or a car park, or for any of the multiple reasons where grave yard disturbance is necessary. Great thought has to be given to justify such a disturbance, but it has to happen. Perhaps Chancellors are less squeamish than the public in authorising such disturbance (subject to detailed terms to cover re-burial, advertising etc.) having seen what natural devastation burrowing animals can do to a graveyard, certainly in badger areas of the country.

327. However, a Chancellor is entitled to be informed that such disturbance may occur. Here, he was not so informed. Most concerningly, he was given the wrong information about the legal status of the grave yard. It was still consecrated, yet building was being proposed on it.

328. These Faculty forms have a purpose, and are not just legal gobbledygook. When they are incorrectly filled up, the Petitioners cannot be surprised if, once spotted, objectors make hay out of these mistakes. It was clear, reading all the earlier documents, that the Registry knew it was a disused, but still consecrated graveyard. I do not understand why this was not acted on at this stage, if not earlier. Any Rector and PCC are entitled to receive proper advice and guidance

from their Registry. That is why, *inter alia*, they pay their quota. Had the DAC been less concerned with signage and facia boards, and more alert to where and on what the new building was proposed to be built, alarm bells should have rung. However, the DAC certificate approved the application on 11th November 2011, having considered that the statutory objectors had been already consulted (**1353-4).**

329. The petition appears then to have been sent to the Chancellor. On 17th November 2011 the Diocesan Registrar wrote to Ms Waite **(1361-1362)** informing her that the formal Faculty petition had been received, and giving her information as to how to become a formal or informal objector. This was a clear and unambiguous letter, ending with the exhortation: ***"Please do not hesitate to contact my office if you are uncertain about any aspect of the process".*** I note how I have been told by the objectors of their financial and organisational acumen. I reject their complaint that they did not understand the faculty process and that it was opaque and complicated.

330. On 5th December 2011**(1380)** Ms Whaite again wrote to the Diocesan Registrar to ensure that the FoCCS objections set out in their letter of 10th October 2011 would be going to the Chancellor (which appears, in any event, to already to have happened). She repeats the FoCCS' s vote to oppose the scheme, to which I have already referred to. Interestingly she states as follows:- ***"….the trustees' letter of objection dated 10th October was drafted by the trustees together with their solicitors Herbert Smith. All legal, planning and architectural advice (and even the photocopying) regarding the churchyard gardens has been given pro bono by those who strongly believe that Christ Church Spitalfields and its setting are important"***. She adds that she believes that the new interim governing body of the school: ***"is concentrating on raising academic standards and that the proposed new building in the churchyard is no longer a priority"***. It is unclear from what source she draws this view.

Certainly that situation is not reflected in the school governors' minutes I have read, save that the school is going through a bad patch, and to survive extra space is necessary to build up numbers.

331. She now complains, rightly, that she understands the Rector has written to the Registrar (this I take it refers to his "Dear Nigel" letter to the Chancellor), which she did not see until disclosure.

332. Again I stress that, normally, a Chancellor would request that petitioners and objectors each see the letters of support/objection for a Faculty petition, and are given time to present their respective replies to him. There should be no secret channels.

333. This letter from Ms White is important. The Trustees were now obtaining legal advice. Properly, I know not what the legal or other advisers were told, but I am of the view that the legal arguments raised now five years and more later were as available to analyse then as now. In the event, the Diocesan Registrar (**1381)** sent Ms Whaite's letter of 10th October 2011 on behalf of FoCCS to the Petitioners for their formal response, and indicated that all correspondence would be forwarded to the Chancellor. I see no indication that the "Dear Nigel" letter was then sent to the objectors. It should have been.

334. Notwithstanding all this correspondence, when push came to shove, the Registrar informed the Petitioners on 7th December 2011(**1382)** that the objectors did not want to become formal parties to the proceedings, but were content to have their original letter of objection taken into account. In other words, they chose to be informal objectors. Given how the objectors had been conducting their campaign of objecting so far, I find it inexplicable that they, or at least one of them, did not feel so strongly as to become an objector, even in person. They were then receiving *pro bono* (i.e. free) legal advice. One person raising this before the

Chancellor might have been able to cause all this to pause, as the Chancellor's attention would have been drawn to the potential problems in, perhaps a more immediate way than the reading of "cut and paste" emails of objection. It is to be regretted that the objectors did not have the courage of their convictions. Even if they were worried about cost, those would have been a tiny, tiny fraction of what they have subsequently been charged by their current legal advisers. They would not even have had to be legally represented in the Consistory Court, a jurisdiction in which Chancellors are well used to objectors in person, and hesitant to order costs against a party unless the objections are really contumacious. They might have been able to stop the development then and there, and even been awarded their costs against the Petitioners. Their ideas of bringing Judicial Review, not having been pursued, might have been more fashionable, but by not becoming formal objectors at this early stage before Consistory Court, the objectors missed their best opportunity to stop the development before it even got started. However, for what ever reason, they did not choose this path.

335. In his letter of 17th November 2011 the Registrar had clearly set out to Ms Whaite just what the course she had adopted of only becoming an informal objector would mean; no risk of costs if one were to be an informal objector, but no right to be heard at any later Consistory Court, such informal objections on paper going to the Chancellor for his consideration. It is right to note that this letter did not spell out in terms that an informal objector has no right to appeal, though that might have been inferred from the information that they would have no right to appear at any later Consistory Court which might be brought by formal objectors. The Rector, as invited, responded on 12th December 2011, setting out the support he had received from the Bishop of Stepney and the Archdeacon of Hackney, as well as the other bodies referred to above **(1383).** He also reported that the past and present Chief Executives of the Spitalfields Festival expressed personal support for the scheme, and negated the suggestion by Ms Whaite that

the school board are not committed to the development; he had received an e-mail from the Board ***"The IEB*** (i.e. the then acting school governors) ***remain committed to this development."***

336. By now it would seem that local gossip and tittle tattle were resulting in inaccurate allegations being raised.

337. A PCC meeting was held on 12th December 2011**(1384-5)** at which it was reported: ***"regarding the school development in gardens, those against the project have decided to allow decision on faculty to be decided by the Chancellor, rather than going to court. This is great news".***

338. Little did those present at that meeting realise that another five years of litigation stretched ahead. It is noticeable in passing that at an earlier PCC meeting on 21st November 2011 the Rector raised for the first time: "***he would like the PCC to discuss our relationship with the Friends in maybe 18 months time, when the organ works are complete***"(**1365).**

339. The Registry did, apparently, pick up an inconsistency in the original Faculty Petition, as the PCC resolutions on the last page of the petition had not been recorded, but left blank. So the Rector sent a revised copy of the last page setting out the PCC's unanimous approval **(1407-8)**, which may explain the difference in the dates. Again, this careless lapse is indicative of a bored lack of attention to a document which appears to have been regarded as the fag end of a lot of paperwork, and to which it appears not worth paying any great attention. The problem about building on the churchyard was not picked up. Perhaps because all were misled by the fact that there was already a building there. The Rector wanted to know when they might hear from the Chancellor and was assured by the Diocesan administrator: "***it is difficult to say when we will hear from the Chancellor on this, particularly if there is an objection. However, if***

you should find yourself with deadlines approaching, do let us know and we will e-mail the Chancellor to enquire how his deliberations are progressing …"**(1409).**

340. During all this time, further discussions were taking place in respect of the school funding. It was being hoped that work on the school (all paper work being completed) could start in early 2012 and finish within the year at an estimated cost of £1.10 million.

341. On 24th January 2012 there was the AGM of the Restoration Trust **(1515-1518)** with 12 people in attendance. This AGM was immediately followed by a meeting of the Trustees of FoCCS and the Restoration Trust. Again the same 12 people attended. Much time was taken up over the organ restoration project. Ms de Quincey was concerned that the organ was going to look "***too new***" when finished but as it was going to be restored to its original 1735 specification, it would be hard to specify how 'aged' it should look. The Rector provided information in respect of the crypt restoration. He told the Trustees: "... ***They were looking at a business model which would sit behind a redevelopment. In other words they wouldn't simply be refurbishing the space for a parish church or a concert hall, but they would have a business partnership behind it".*** This refers to the plan to have a commercial business partner to run the café in the restored crypt. He also gave positive news about the garden committee's work and the bid for s106 money. The building project was not discussed. More interest was expressed about the loss of the club licence for the former public lavatory which sat (and sits) immediately adjacent to the church on Commercial Street. Its operation as a club had, apparently, been causing significant nuisance to the church and the community. The Trustees and/Directors resolved that funds could be moved between the FoCCS and the Restoration Fund by fax.

THE CHANCELLOR'S DECISION

342. By 31st January 2012 the Chairman of the Interim School Board wrote to the Chancellor, who had been in France, asking about when a decision might be expected from him. The school was at risk of losing a LCVAP grant if approval is not forthcoming because the contractors were due to start in February **(1519**). The Registrar acknowledged that letter, saying he had forwarded it to the Chancellor, and the Chancellor indicated that he would deal with the matter over the following weekend (**1521**). The Rector wrote to the Registrar on 2nd February 2012 (the Chancellor's decision being imminent): ***"I trust you will be in touch with me ahead of being in touch with third parties and in such a way as you are assured that I have heard before others start hearing the outcome". (1523)***. Again, I have concerns about this attitude to a judicial decision, not the least by the Registrar's reply the same day: "***we're being chased by quite a few people on this one, not least by the LDBS… I'll make sure that you're the first to know as soon as there is any news" (1524).*** I can understand that various bodies here had an interest in the date for the outcome of the Faculty and were chasing it, and that the Rector had, properly, told them to make their enquiries through him as the lead petitioner. I am more concerned about the suggestion that he should know the outcome in advance. In the overall scale of this case it is a more minor matter, but it is a lesson as to how apparently innocuous e-mails can be read and commented on in later proceedings. Perception of fairness is all. I could have understood it, if in the case of an important church which might attract media interest, the Diocesan communications' officer had been put on alert about the outcome as a preliminary point, but not beyond that. I am unhappy about how it was proposed to notify people. It is safer and fairer to notify the Petitioners and objectors together, if possible, of the final decision. (Sometimes an unrepresented Party may not be on email, so there might be a delay in contacting them). A final decision should be fairly distributed to Petitioner and Objectors' legal advisers together, and available immediately, and, after any final argument as to the form of a final order and/or costs, on the website of the parish

Church and Diocese for all those interested to read straightaway. The Faculty is a public document. What any people might consider to be a run of the mill civil interchange between persons acquainted with each other can seem, and become alleged to be, highly suspicious to Parties in litigation. Care should be taken in these kind of "off the cuff" emails. Equally, letters and emails dashed off in the heat of the moment may read and sound petulant and self opinionated in the cold light of legal analysis in a later Court case. Those indulging in potential litigation might consider before firing off a missive just how it will read and sound when its production is demanded and obtained by a later Court order for disclosure. In this case, the suspicion of the objectors gave rise to their request for the eight files of correspondence and e-mails. Even more documents were produced during the hearing before me. Reading these, however, I have been able to piece together more accurately what has happened, and see the activities of all the Parties as individuals in their conduct of the case. Many people, peripherally involved, may now be somewhat disconcerted that their views have been made public by the objectors' (perfectly legal) requests for disclosure, and form part of the narrative in this matter.

343. On 13th February 2012 the Registrar informed the Rector by e-mail **(1533)** that the Chancellor had contacted him to say: ***"I have considered the objections but I do not consider that they constitute a reason for not allowing the petition in all the circumstances of the case and a Faculty may issue …As soon as the Chancellor returns the petition to the Registry we will be able to issue the formal papers to you".***

344. At (**1543)** the Registrar wrote to Ms Whaite as the Chair of FoCCS on 17th February 2012, who had been the only informal objector, informing her of the Chancellor's decision. He quoted to her the Chancellor's reasons handed down on 14th February 2012:-***"I have given most careful consideration to this proposal and to the objection to it from Christine Whaite the Chair of the***

Friends of Christ Church Spitalfields in a case where the works need both planning permission and a Faculty before they can be carried out. I take the view that the Consistory Court deals with the ecclesiastical aspect and the local planning authority deals with the neighbourhood/amenity aspect. This Petition has the unanimous support of the PCC, it is recommended by the DAC, and, in addition, has the support of the Archdeacon of Hackney and the Bishop of Stepney. Whilst the objectors may have the support of the majority of Trustees of FoCCS, it does not have the support of the President [of the FoCCS] (Bishop of London) or the Rector who is one of the Petitioners but also a trustee, or two other trustees who are past or present churchwardens. The objection is mainly based on "neighbourhood/amenity" grounds and effectively requests me to overrule the planning decision of the London Borough of Tower Hamlets. There are no ecclesiastical reasons for refusing this Faculty and the neighbourhood considerations have been fully examined by the Borough who has granted planning permission. It would be wrong in principle and perverse in the circumstances if I were not to grant a Faculty in this case."

345. The Registrar sent a letter in similar terms to the Rector (**1544-46**) enclosing the granted faculty with standard conditions attached, of which a 12 month completion date was the most pressing. Such time conditions can always be extended for good reason. Anyone who has ever employed a builder will know that frost, snow, rain, floods, drought, strikes, archaeological finds, and a myriad of unexpected problems, such as was to happen here over the bodies, will occur. It is an imperfect world and nowhere can that more clearly be seen than on any church building site. As I set out at the beginning of this judgment, even Mr Hawksmoor himself had to put up with just such delays in getting the church built. Sensibly, on 23rd February 2012, the Rector specifically put the architect on notice of the 12 month condition (**1553).**

346. Because of the way the Faculty Petition form was mistakenly filled up, the Chancellor was not put on notice that this was a consecrated graveyard with all the problems which that gave rise to, nor that there might be bone disturbance which would have necessitated the standard form directions as to reburial, advertisement etc. Much of the subsequent trench warfare between the Parties in this case arose from the careless way in which the 2011 Faculty was presented.

SUBSEQUENT EVENTS

347. Ms Whaite on behalf of the majority of the Trustees of FoCCS wrote to the Registrar on 2nd March 2012 a 5 page letter of complaint. **(1558-1562).** Although the Registrar had only conveyed the Chancellor's views he was the recipient of a tirade. She re-iterated her old objections, but added to these more detailed complaints:-

- to amplify the effect of the 2009 agreement
- to contemplate the defacing of the churchyard during the 350th anniversary of Hawksmoor's birth, itself an event to be celebrated by the Royal Academy (The Royal Academy made no objection to this Faculty)
- she says that: ***"the Trustees took a conscious decision not to take Tower Hamlets to judicial review, (precisely because this local Authority had not properly considered the case) but rather to allow the Church of England to set its own house in order".*** (I find this to be an interesting concept).
- she demanded that the matter should be referred back to English Heritage and the DAC, alleging both bodies were ignorant of the full facts when they made their recommendations
- she denied that there had been any round table discussions at all involving stakeholders, or attempt to discuss with us the need for a building on this site
- she alleged that the Bishop of London neither supports not objected to the proposals and that the Archdeacon of Hackney and the Bishop of Stepney are

"***new to their posts and it is unlikely that they know the full story… the rector owns the freehold of the entire site as the current incumbent"***

- she re-iterated her complaints in respect of the giving of formal notice, the 2009 agreement
- she complains that English Heritage had ignored "several hundred letters written to them objecting to the school's proposals"
- she re-iterates the history of the 1969 objections to the 1970 building
- she re-iterates the by now well rehearsed objections in respect of size, loss of green space, the £10 million spent on the church, and the "obscure 2009 agreement"
- she berated LBTH for relying on the advice of English Heritage, for failing to establish educational needs, for failure to consider the impact of the need for green open spaces, and claims that there is an oversupply of community facilities
- she alleged that there had been confusion over facts at the July 2011 planning meeting, including, it is fair to say, admitting that the FoCCS had been mistaken in telling the Planning Committee that the school did not have a right to occupy the old building, which she now accepts it did
- she describes the Councillors who took the LBTH planning decision as being "***preoccupied"***
- she plugs the adoption of another earlier proposed design (which I take to be that of Mr Dyson)
- she advocates the purchase (no figures given) of a former building next door to the church to provide extra space (In the event, that contention (which were it to have been possible might have made practical and financial sense) was swiftly disposed of in evidence as the owner was selling it for development so that it was not available).
- she appeared to consider that the Chancellor's decision should be referred back to English Heritage and/or to the DAC.

348. I can understand a lay person not appreciating that a Diocesan Registrar is, in effect, the solicitor to the Diocese. He does not decide Faculty matters. Chancellors do. However, given that the FoCCS had, apparently received *pro bono* advice from the well known city solicitors, Herbert Smith, and had considered the complexities of bringing judicial review proceedings against the Council, I am puzzled as to why Ms Whaite considers that the Faculty should be referred back to English Heritage and the DAC, neither of these bodies having any legal powers than that of providing advice to a Chancellor, and certainly having no appellate jurisdiction.

349 The church and school pressed on with the redevelopment.

350 On 19th March 2012 Ms Whaite again wrote to the Registrar (**1583)**, complaining they had had no reply to their letter of 2nd March 2012 and re-iterating the FoCCS's case, and demanding that ***"conscientious consideration must be applied at the appropriate level to reviewing this ill-considered initiative."*** On behalf of the FoCCS she says: ***"the trustees would like as a matter of urgency [a reply] since presumably it is time sensitive to understand the appeal process".***

351 Although the Registrar's letter to Ms Whaite had clearly set out the difference between being a formal objector from that of being an informal objector, he had not, in terms set out, the restriction on any attempt to appeal by an informal objector, as I have set out above. That might have been put more clearly, as he later did. The Registrar (**1585)** replied on 19th March 2012 to remedy that, informing Ms Whaite that: ***" in accordance with the Faculty Jurisdiction Rules, only those objectors who have elected to become formal parties opponent to proceedings are entitled to appeal Faculties granted by the***

Chancellor. As the Friends of Christ Church did not choose this option, the route of appeal is therefore not available to you."

352 Ms Whaite and the majority of the FoCCS Trustees could well have chosen to be formal objectors, they could have appeared in person at no cost to themselves (as they had done before the Planning meetings and in discussions). That route was open to them, but for whatever reason, they chose not to take it.

353 The Registrar went on to say that he was forwarding this letter to the Chancellor, and would let her have any comments from the Chancellor, but warning her that: "***the Chancellor does not normally enter into correspondence once a Faculty has been granted by him"***. As it happened **(1586)**, the Chancellor did comment and a member of the Registry staff forwarded his comments on to Ms Waite on 20th March 2012. The Chancellor had said: ***"The Trustees of the Friends had their views taken into account and given such weight as they merited, bearing in mind that these views were not unanimous and not supported by the Bishop of London. The Trustees did not become a Party opponent [i.e. A formal objector], and therefore are not entitled to appeal and there is no legal process open to them".***

354 Undeterred, Ms Whaite emails back on the same day **(1587)** two hours after receipt of the last email from the Registry (so I doubt if she had time to obtain the views of her fellow Trustees). She repeats the position that the Trustees objections were in a majority of 10: 3. She alleges that: "***the PCC clearly does not have full knowledge or understanding of the facts. The Bishop of London neither supports nor objects…Tower Hamlets received hundreds of letters of objection to this particular process".*** She asks: **"*is not the lack of proper public notices- which the church admits*** [I ask myself where her justification for this allegation comes from; it is wrong] ***– a simple fact of an***

irregularity in procedure that needs to be addressed? This is not a matter for appeal but of simple correction."

355 The Registry replies on the same day (**1588)** to state that the Chancellor had been satisfied that the public notices had been displayed in accordance with the rules, and had not directed re-advertisement, which he would have done if the certified notices had been in any way defective, and he had had Ms Whaite's original letter on that point drawn to his attention.

356 The trustees could have run their objections more competently by becoming a formal Party opponent, but it is a free country and they were fully entitled to run such arguments how and as they saw fit. However, I remind myself (which is why I have set out in great detail above all the hoops which the Petitioners have had to go through), the planning procedure, the involvement of the DAC, English Heritage and the Amenity Societies etc., and the Chancellor's decision, that this was not a decision lightly come to. Many of the loyal supporters who cannibalised the suggested objection letter may now be in a better position to take a more balanced and rational view of the pros and cons of this whole situation, having read the above. Ms Whaite, whose letters of objection are by now becoming more and more forceful, alas is still missing the most obvious point, namely the building on a disused churchyard.

357 Others, too, became sucked in to a campaign to put pressure on people unconnected with the Faculty procedure.

358 The three council leaders **(1589)** of the Tower Hamlets labour, conservative and liberal democrat groups on the Council wrote to the Archdeacon (of Hackney). At this time the political makeup of LBTH was as follows; Labour seats (41), Conservative (8), LibDems (1) Respect (1). It was clearly open to the above majority leader, had he wanted to, to raise the matter, unless his view was not shared by his 40 other members. Unfortunately, the terms and wording of this

letter repeated the script that many objectors had been given to use. They wished "***discuss this further***" with the Archdeacon. Other than a political gesture towards their voters, I wonder what this was supposed to achieve. Such was their knowledge of or involvement with the church in this area that the three of them wrote to "Mr Archdeacon", apparently unaware that there had been a female archdeacon in place since the previous year. It is to be regretted that Ms Whaite did not get them to join her before the Chancellor. If you are going to object to a Faculty petition, you have to do it competently if you are sensible. Many informal objectors, are able competently to bring their objections to the attention of the Chancellor, and to the Petitioners who have the opportunity of responding to them. A Chancellor may be greatly assisted by this interchange of opposing views. It may be too late to muster support <u>after</u> a decision is made to try to appeal uphill, the more so as you have placed yourself by you own choice in a situation where you cannot appeal if you elect to remain an informal objector. Their letter, however, did not suggest that there had been any material irregularity in the planning procedure, as has been suggested by the objectors, such as would support an application for judicial review.

359 Ms Whaite and other objectors now began what I can only describe as an organised campaign to try to put pressure on the decision which had been reached. On 24th April 2012, apparently following a face to face meeting with the Bishop of Stepney, she wrote: ***" …you seemed to feel that due process has been observed".*** Ms Whaite disagreed. She goes on to say: "***we were advised (pro bono) that these would stand the test of judicial review ….. we chose not to take this action with the Local Authority because we felt it was for the church to address its own issues in the less public forum of the Faculty process, as it had in previous cases. To be told by the Chancellor that the churchyard is not an ecclesiastical matter is bizarre! …longstanding parishioners have objected to the proposals, and the PCC's support for the***

proposals is most likely based on ignorance … people have been in thrall to perceived authorities (who have manifestly failed in their due diligence) or to political correctness .. there has been no proper consultation apart from a box-ticking exercise by the school's architects .. the church could or would not field a candidate to speak for the proposals at a public meeting called on March 2011" (1597). She goes on: " ***in addition one of my fellow Trustees met the English Heritage case officer in a separate professional context at around the same time and reported that he was in a whirl of confusion about what precisely was the proposal at Spitalfields***".

360 Given Ms Whaite's complaints about secrecy, it is right that all involved should now be able to read what was being alleged about them.

361 I consider what Ms Whaite, apparently on behalf of her follow trustees, is alleging and how far it is accurate and fair:-

- nowhere in the documents setting out the Chancellor's reasoning (as I have set out above) does he say that the church yard is not an ecclesiastical matter. He comments on the planning role of the local authority, about which the Court of Arches has already commented.
- her reasons for not continuing with judicial review, which would have been and is the proper forum for challenging local authority planning decisions, conflicts with later evidence. I was told in terms at a Directions' hearing that the only reason that the objectors had adjourned their judicial review application was that it was a device to get the Petitioners to negotiate.
- bullying by way of litigation is an unattractive method of conducting an argument, and here, the Petitioners stood out against it, so that the Objectors may have fallen between two stools by delaying their Judicial Review application, so that it may be now out of time. That was their choice.

- the Faculty procedure is a public procedure analogous to state planning procedure with its judgments published and available, not some semi private 'hole in the corner' procedure. To assert that a Consistory Court would be a "less public forum" than the planning process showed Ms Whaite's total failure to grasp that she and her co-objectors were applying to a formal English Court, open to the public (albeit one which is slightly different in its approach to matters brought before it). It is to counter the allegations which I have read that I have set out *in extenso* what has happened, and who has said and argued what so that all interested may read the evidence which was before me.

362 I also have to comment on Ms Whaite's behaviour in the course of the hearing before me. Although formally represented by Mr Seymour of Counsel, who very properly thereafter spoke to his client, she herself pushed her way into the judicial robing room to insist on producing to me two volumes of background information. I forthwith informed all Parties of this, and the volumes which, in fairness, were of useful interest, thereafter available to all Parties during the hearing. Most litigants in Britain, however limited their experience of Court procedure might be, would not have behaved in such a way, nor tried to speak to a Judge during a hearing like this. The Consistory Court is not a world where "a quiet word" or the old pals' act has any place.

363 Further, in respect of Ms Whaite: no Trustee gave evidence or made a statement in respect of what she says about the competence or otherwise of an employee of English Heritage, nor was that raised by the FoCCS spokesman when he addressed the planning inquiry.

364 It is for the outside world and the parishioners of Spitalfields to judge the strength or otherwise of her views that the PCC's views were: ***"most likely based on ignorance …..in thrall to perceived authorities or political correctness***".

365 I find that that statement goes beyond rational analysis of the activities of the PCC over the preceding years.

366 Counsel for SOS (the organisation formed of some of the FoCCS trustees), was at times during the hearing before me clearly intellectually embarrassed by some of the arguments which his clients instructed him to run, and was more comfortable with the strictly legal submissions.

367 I find that Ms Whaite's statement that in some way the church **"*might address its own issues in the less public forum of the faculty process*"** to show a deeply flawed understanding of the fully public nature of the Consistory Courts as Courts of the land; if this were to be an attempt to pressurise the ecclesiastical authorities into surrendering to the wishes of the objectors to avoid publicity, it failed utterly and completely. What ever merits (legal argument aside) the views of the Objectors might have been able to raise, Ms Whaite seemed to be unable to realise that her presentation of these arguments on behalf of others was becoming so stridently extreme that it was doing her arguments, and those of other objectors, harm.

368 As I make clear in this judgment, the actions of all the Parties in this case will be set out in full, so that their respective arguments and how they have each chosen to conduct them can be openly presented.

369 It is because of such half truths or exaggerations, apparently being peddled to a wider public, that I have felt it necessary to set out above in such total detail (much of it in unnecessary detail for the basis of this judgment) just what has been taking place so that any interested observer, local resident or a supporter of FoCCS is not led astray by the views of someone whom, I find, had by now become just overwhelmed with her own vision, shared by the late Mr Vracas, for this churchyard. The tragedy is that the more she grandstanded

on the points she thought to be of importance, the really crucial point in her Counsel's argument before me was going by ignored by all including herself.

370 Ms Whaite sent a copy of her letter to the Bishop of Stepney on to the Bishop of London on 25th April 2012 (**1598),** but this time she put out a different slant on her argument (a factor I have noticed in reading her different letters to different people and her statements).

SOS

371 In the Bundle before me (**1599),** with a hand written date of May 2012, is an article headed "**SOS Spitalfields Open Space SOS".** The objectors now began a more public campaign. This body "SOS" encourages people to sign an online petition to save the open space of the graveyard. It shows a small and unclear map of the site. It claims that the church and Tower Hamlets ***"are actively reducing public open space in the churchyard at Christ Church Spitalfields by more that 60%"***. The document goes on to state: **" *the Church and the local authority proposed this development. The Church and the local authority approved it. The Church and the local authority can stop it at any moment*".** It reprints the letter from the three local councillors (who appear to have done nothing thereafter in their own Council (nor did any of them give any evidence before me). This article states: ***" SOS has cross- party political support and is created by trustees of the Friends of Christ Church Spitalfields who together have served this church <u>for more than 150 years</u>".*** [sic] This is a classic example of how the objectors have presented their case: "facts" just not quite right. As I have said, the proper constraints on charitable bodies running campaigns may have resulted in the setting up of SOS, but **"created by trustees of FoCCS"** implies a degree of sheltering by SOS under the cloak of respectability, and what appears to be the use of a clear device to try to get round potential charity law restraints. Again, leaving aside the gross and inaccurate claim that the FoCCS

have been in play for 150 years, having been founded in 1976, this document presents an inaccurate picture. If that were a typing error that was unfortunate in not being corrected. It does not set out the plans for an improved open space, nor the needs of the school nor the local support. The smear, as I find it as such, that this is some local government/church stitch up is such an exaggeration, and is misleading, although those bodies may have been incompetent and careless for sure.

372 I turn to see what the Trustees of the FoCCS and the Restoration Trust actually agreed and why. At their meeting on 2nd May 2012 (**1600-1604)** those present dealt with a variety of restoration matters, the organ etc., and the development of the events catering business in the crypt. Ms Whaite complained about the display of the Faculty notices, alleging that these had been defectively displayed. A Trustee, Mr Brown complained that the Registrar had declined to consider their letter of objection in October 2011. I have already set out the replies of the Registrar confirming that the letter of objection on behalf of FoCCS had been placed before the Chancellor. From the FoCCS minutes, it is not clear if that reply was drawn to the Trustees' attention. It is clear that a somewhat ill-tempered debate then took place about access, and the long term future of the school. Perhaps late in the day, given the Trustees' earlier decision, there was discussion as to whether alternatives could be put forward. The 1969 debate was re-visited. It was proposed that the trustees should commission a strategic analysis of the way the churchyard might be used. Once a ***"respectable surveyor/architectural/urban planner"*** had been identified and the scope of the proposal costed, ***"the Trustees would vote on whether to go further."*** That was agreed. It is a tragedy for these earnest Trustees that this preliminary constructive way proposal had not been considered the year before when their attitude was then that it was **"*not for them to come up with solutions*"**. Ms Whaite noted that: "***although the***

school is currently connected with the church that with shifting demographics that might not always be the case". She raised the hope that the church might give up control of the school. The reality was that time had moved on, everyone else, having got their requisite planning and faculty approvals, was working to a tight time scale.

373 I see nothing in the minutes, described as draft, before me of any discussion or vote being taken by the Trustees to "create" SOS as claimed in the article which appeared, apparently in May 2012.

374 On 7th June 2012 Ms Whaite and the FoCCS treasurer Mr Vracas had a meeting with the then Archdeacon of Hackney, who wrote to confirm their views by letter of 18th June 2012 (**1623-24).** Confirming what she had been told in that meeting, the Archdeacon re-iterated the by now well rehearsed complaints of FoCCS. The Archdeacon wrote: "***You raised the point that someone in Tower Hamlets Council has indicated to you that they might have made an error of judgment in granting planning permission. I can only re-iterate what I said when we met: if that is the view of the Council then they need to take responsibility for that. It is a separate and entirely different process from the DAC and Faculty process. Due process has been followed and the Chancellor has granted a Faculty and given you his response. For the reasons you explained, you chose not to become a party opponent***". She noted that: ***"you are angry and frustrated that processes and decisions have resulted in something to which you are opposed. Sadly that is often the case in places of conflicting views***". She made clear that the church, the gardens and the school could reside side by side.

375 Once again I note here the views of Ms Whaite and Mr Vracas about anonymous persons apparently saying things which supported their own views. Nothing further was produced to identify or give details of this anonymous

council source. If he existed, and had said what they allege, all the more reason for them to have gone on with their judicial review of LBTH.

376 Having got no satisfaction from the Archdeacon, Ms Whaite involved their local MP, who wrote to the Chief Executive **(1626)** on 19th June 2012 to raise the matter on her behalf as a constituent and on behalf of the FoCCS. In that letter she repeated, again the partial version of events that she had, presumably been given, namely more than 400 people had signed an on line petition in opposition to the scheme. She does not appear to have been provided with the numbers of supporters of the scheme. The letter made no mention of the wider dimensions of this. I am surprised that the FoCCS had not involved their local MP, Ms Rushanara Ali MP, at an earlier stage of this whole matter. In my experience, many pressure groups find a local MP to be a first port of call. The evident local support the scheme had generated and the political make up of the local Council may give that reason. I know not.

377 In any event, the SOS efforts to get an online new petition started were beginning to bear fruit, as it was reported on 26th June 2012 (**1627-8)** to the church's Standing Committee that: "***Some of the FoCCS have now got 570 signatures on their own (on)line petition against the development in the gardens, the petition is going to the Bishop of London, Chancellor and LBTH. It is based on erroneous information e.g. suggesting that the public garden is decreasing when actually its increasing substantially. Looking at the FoCCS constitution it could be said that they are breaching it".***

378 That meeting agreed that a statement agreed with the Diocesan PR people should be placed on the church web site and the Rector was to provide a clear indication of the square metre size of the garden, and a letter was to be drafted to be sent to the FoCCS before their next meeting.

379 I have not been shown the results of that on-line petition. I do not know who signed it, nor where they came from, nor what their individual link was with or knowledge of this site, nor indeed the veracity of people who sign on line (nor indeed their sobriety when they did so). As I have stated in other judgments, such petitions, unless very carefully vetted as to what has been shown or told to any signatory before they sign, let alone the identity of any individual signatory, have got to be scrutinised with great care. Sometimes, people will sign anything for peace and quiet, because what they have been told sounds cuddly. Letters of objections may be signed by the same people who subscribe to on line petitions. There may be doubling in numbers, not evidence when the actual signatures are scrutinised.

380 Up to now, albeit somewhat incompetently, the FoCCS had been trying to mount a campaign of objections. Initially, they appeared to be relying on their position and connection with the church itself. They then began to realise that everyone had passed them by, and was less interested in their architectural views but more interested in a different scenario. Once they had lost the planning and the Faculty application, it appears that they considered that they had to increase pressure.

381 Hereafter the objectors began what I find to be a campaign to try to circumvent planning process that had been taken and faculty which had been granted. Had they continued with their Judicial Review plans against the Council or to have become a formal opponent in the Faculty procedure (when they could have at least appealed the Chancellor's decision) they would have had a proper forum open to them to pursue and challenge matters. Instead, they began to lobby personages whom they regarded as being of importance. I am puzzled how they thought these people would be able to (let alone even consider trying to do so) interfere with a planning decision that had been

granted or an un-appealed grant of a Faculty. (I put aside whatever the views of these people themselves may have been as to the merits or otherwise of the scheme). At this point in the history, such views, if expressed at all, might have been described as wasting their sweetness on the desert air.

ATTEMPTS AT PRESSURE

382 On 5th July 2012 Ms Whaite wrote to HRH The Prince of Wales, who had visited Christ Church some seven years previously (and, indeed, I note more recently). She writes: **(1629)** "***If it is at all possible I need Your Royal Highness's help to stop development right next to Christ Church in the Churc*hyard**". She sets out the already stated objections, but goes on citing the number of objectors, ***"..in spite of 350 letters of objection, an online petition (Change.org) signed by almost 600, a pile of correspondence with English Heritage, who seem tragically to have addressed the wrong brief, and an appeal to the church by leading Councillors of Tower Hamlets …who recognise their mistake".*** In the papers before me is an e-mail dated 27th June 2012. This is a note signed by the three political council leaders of LBTH (to which I refer to above), Cllr. Pech, leader of the Labour Group, Cllr. Golds, leader of the Conservative group and Cllr. Eaton, leader of the Liberal Democrat group; all they wrote, in eight lines, was to reflect the importance of the church as part of the: ***"rich architectural heritage but also a crucial part of our social history While we fully understand the need for nursery provision in the area we believe that the current plans are not appropriate and ignore better options we are concerned that this development will seriously damage the heritage of the Church, undermine the large sums of public and private money that have been spent restoring it for the benefit of the local community and result in a significant loss of green space".*** There was no mention of planning mistakes, or misfeasance nor any suggestion that the decision of their Council could or would be changed. It gave the impression of political group leaders

providing their voters with some notional support for what their voters sought. I may do them wrong, but none of thee councillors gave evidence before me, or provided formal statements. I return to Ms Whaite's letter in which she deals with the 1969 campaign and the 1970s building. She urges: ***"anything Your Royal Highness can do to rescue Christ Church***".

383 I note two things from this letter. Ms Whaite writes from her own address, but describes herself as "**Spitalfields Open Spaces and Chair the Friends of Christ Church Spitalfields"** and the mention of the Councillors appears to refer to their political letter of support, apparently attached to this letter, but appears to be conflated with the anonymous council official mentioned above. Surprisingly, any reply to this letter has not been produced by the objectors in spite of the requirements they themselves requested for complete disclosure.

384 The Interim Executive Board of the school was told on 9th July 2012 that the new building had been proceeding well until the discovery of some bodies which had necessitated the involvement of the Museum of London. The school was going through a really bad time. Six members of staff had resigned, there had been fraudulent drawing on the school bank account and there was an outbreak of chickenpox among the pupils **(1630- 1635).**

385 On 11th July 2012 (**1636-38**) Ms Whaite again described as Spitalfields Open Space Chairman, and chair of the FoCCS raises, via a written question to the Council, the issue of the loss open space, asking: "***what IMMEDIATE [sic] action is the mayor taking to stop the terrible and unnecessary loss of 2,500 sq.ms. public open space, the setting of Hawksmoor's finest work Christ Church Spitalfields in the most densely populated area of his borough ?"***

386 This question is answered by Councillor Shared Ali, cabinet member for the environment, who stressed the need for a community building and a nursery in the borough. He stressed the 176 letters of support from borough residents as against the 48 borough residents who objected, and denied there would be a loss of 2,550 sq.ms. as the new building would only be 7 sq.m. larger than the existing (old) building. (There seems to be a discrepancy with Ms Whaite's claimed figures above) He stressed: ***"Christ Church gardens itself remains exactly the same size - 960sqm. Most immediately there is a separate agreement between Christ Church and the Council's Parks Department to open up the community gardens, up to the line of the new school buildings which would increase the public open space by and additional 970 sq.ms. There is £50,000 of s106 funding from the Bishop's Square development to undertake these works and there is the intention to open up the gardens and re-landscape them".***

387 In her supplemental question, Ms Whaite was dissatisfied and considered the statistics to be misleading. She said there would be a public meeting. She said that: "***it has become clear that English Heritage and the Council's planning department had addressed the wrong brief and were unaware of the lack of underlying legal permissions***". She urged a solution for everyone's needs, and asked if the Council would invite the Diocese to come to the table to find a better solution. Councillor Ali gave what might be described as a soft answer to turn away wrath, saying that they would: " ***welcome further discussion anyone who has concerns that they feel have not been addressed and I invite you to raise these with me".***

388 That was formally confirmed to Ms Whaite by a letter from the Council on 18th July 2012 **(1645-47).**

389 It is surprising that if, as she had been alleging, there had been material irregularities such as would justify judicial review of the Council's action as the objectors had, apparently been advised was the case, that the concerns were not raised with the Council itself there and then.

390 All this was somewhat gloomily reported on 16th July 2012 to the PCC (**1639-1643).** The Rector reported that the Chair of FoCCS (Ms Whaite) had lobbied LBTH planning. The minutes go on: "***have written an open letter to the Bishop"***. It is not clear if that was by him or Ms Whaite in any event; he goes on to report: ***"Diocese has PR company helping us to develop statement. Advice is that we initially keep quiet and then if appropriate get a third party to respond to the article in East London Advertiser. Although the petition ...is based on false information and is misleading, it is important to have a statement to combat financial /reputational damage. {A PCC member} suggested we have a sign posted that highlights facts and statistics. PCC agree***".

391 Matters had gone quiet over the summer, but a problem emerged in July of the discovery of some bones (in already previously broken open brick tombs). The Rector wrote to the architects (**1644)** confirming their planned reburial with the advice of the Museum of London, and setting out his plans for reburial being marked by a plaque He told the SCABAL architect that he was informing the DAC adviser and the Registry.

392 I have already commented on the need for the faculty petition to specify the possibility of disturbance of remains, and what should be done with them. Not surprisingly several locals complained and expressed horror. Their concerns were courteously replied to on behalf of the architects (**1648**). It is fair to say from the photographs **(1650-1655)** the grave yard with diggers and all the preliminary materials of a building site does look a little rough. However, the

Rector properly reported what had been found in an illustrated report prepared with the help of the Museum of London, whose experience in such matters proved to be invaluable. A proper service of reburial of the loose bones was conducted by the Rector in the presence of representatives of the church, the Construction company and the Museum of London. The plans for just such an eventuality were in place as the PCC had already prepared a reburial policy the previous year **(1662-1666).** A memorial steel plaque was placed over the remains. I have read a copy of the service used for the reburial, and, with some sensitivity, the readings were from the Authorised Version of the Bible, which would have been the one used at the original burials of the deceased. However, it is to be regretted that this potential problem was not referred to in the original faculty petition when proper directions could have been given.

393 There is a note **(1667)** from the late Mr Vracas prepared on 4th September 2012 noting that he had taken photographs of the site from the roof of the high building seen on **(1651)** complaining of what he saw, and what was happening during September. It is a pity that he did not raise those concerns directly with the Rector. Had he done so, he might have been able, as representing FoCCS, to have attended the reburial service. I remind myself of the of the fairly wholesale removal carried out by the old Stepney Council many years before of many tomb stones, of which I have seen a plan.

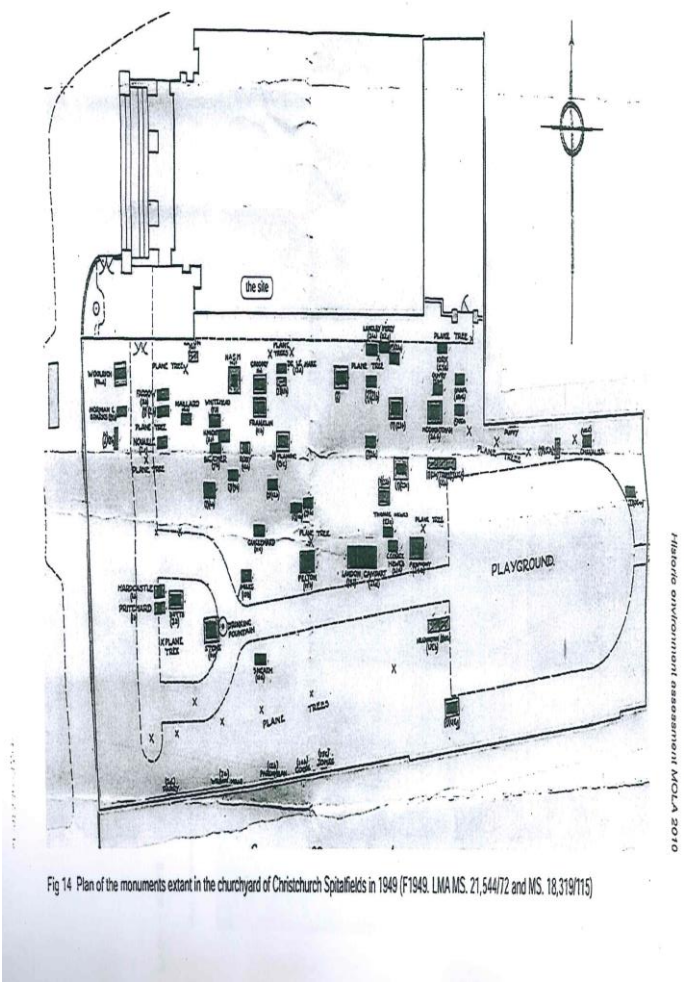


Fig 14 Plan of the monuments extant in the churchyard of Christchurch Spitalfields in 1949 (F1949. LMA MS. 21,544/72 and MS. 18,319/115)

347. Hostilities resumed again on 14th September 2012 with a joint letter **(1670-1672)** from Ms Whaite and a Ms McKoen, both trustees of FoCCS, and the Chair of the Spitalfields Trust and the Chair of the Spitalfields Society to the Diocesan Chancellor and the Diocesan Registrar and to the Interim Chief Executive of LBTH. Doubtless on advice, the signatories are very careful to set out that they are writing as interested parties and local residents but that, although actively involved in the relevant local groups, they make it clear that they are writing in their personal capacity **"though speaking on behalf of many".**

394 I have already commented on the lack of public accountability though the lack of a membership structure of the FoCCS. I am not in a position to comment

on the structure of the other two societies, nor as to whether their members expressed their views as a result of a voted decision taken at one of their respective meetings. Neither of these two societies appeared in the case before me nor sent in any objections in this current litigation. No representative from them gave evidence. It may well be that some, if not all, of the individual objectors on this current case are individual members also of these other bodies, but beyond that I cannot say.

395 This letter which has, at last, the air of being drafted in the light of professional advice, raised for the first time properly the problem about burial in a disused graveyard, the problems as to whether the school building to which the public could only have limited access could be an exemption under the *Greater London Parks and Open Spaces Act* 1967. The writers raise, if it does fall within the exemption, the lack of any faculty for reburial of human remains under the *Disused Burial Ground Amendment Act* 1981. They set out the history of Council involvement with the graveyard, which I have already set out above. They raise the problem about the legal effect of the 2009 agreement. These signatories wanted: ***"the immediate cessation of current activities and an agreement not to resume any activity until this complex situation has been fully resolved",*** and wished for the Chancellor and the Council ***"to enter into immediate discussions with us regarding the best way forward. As you will be aware it would be unwise to deny us a full opportunity to participate in this matter, given the keen public interest and legal issues involved".***

396 Various matters arise from this some what "heavy" letter. I note the absence of any mention of the 'empty graveyard Hawksmoor vision'; the objectors had realised, or been advised, that there might be more effective ways to choke a cat than pouring cream down its throat i.e. by using legal argument rather than aesthetic rhetoric, and, secondly the Diocesan Registry and the Chancellor were being put on notice of these potential matters which would have to be considered.

I suppose it might have been possible for the Chancellor to issue a stay on the Faculty at this stage pending further enquiries, but this was not done, possibly because the building work had started. Copies of this letter was also sent to the Rector and Churchwardens, the school Governors, LDBS, the Bishops of London and Stepney and the Archdeacon of Hackney.

397 That letter does not seem to have arrived with some of the recipients by the time of the PCC meeting on 27th September **(1674- 1676**), when reports of the continuing discussion as to the garden design were discussed. The Rector was to write to Ms Whaite to arrange a meeting before the next trustees meeting, which he did the next day **(1677).**

398 **At this point it should be remembered that the building work on the new building was going on apace. No injunction was sought by any of the objectors to halt the work. They could have done this, as it would have been a fresh application unconnected with their "informal objectors" status but they did not.**

399 Others became involved with a view, it would seem, to lobby and pressurise. Professor Kerry Downes, a hero of FoCCS **(1678)** wrote from York to the Archdeacon of London on 18th September 2012: "***I am writing to you not only in your official capacity but also as a fellow Antiquary with an informed interest in church architecture. Although the national press has remained silent……*** He rehashes the objectors' objections, which I have already set out. He summarises his own academic knowledge of the 1969 history of objections, but he appears to have been relying on current information from the objectors. He says "***since*** [the granting of planning permission] ***then some of the Council have recognised that this was a serious mistake"*** …. ***"most of the negotiations over the past three years have been behind closed doors without the participants doing their homework".*** He states that: ***"the***

applicants' architects have put it about that the church was not intended to be seen from the south east". (I am unsure where that allegation that comes from). He urges the Archdeacon to get in touch with Ms Whaite. Apart for the solecism of inviting, on the 'old pals act', the Archdeacon to interfere (and how, professionally, he was supposed to do that, I do not know) as Spitalfields was in another Archdeacon's patch, it would have been both more helpful had Prof. Downes (whose views he is, of course entitled to express about a church and architect which made his name, and must be very dear to him) checked more widely about what he was being told had happened. No reply to that letter to the Archdeacon of London is before me.

400 On 24th September 2012 Professor Downes wrote to the Bishop of London (**1685)**, reminding him that they had met in 1998, and again he exhorts the Bishop of London: ***" as a fellow antiquary"*** about Christ Church ***"because of the secrecy and misinformation that surrounds [recent events], you may not realise how complex, grave and urgent is the situation".*** He repeats the familiar objections and the canaille of the line that: "***some of the Council have recognised that (the planning permission) was a serious mistake"***. He relies (presumably having been told this by others) on their being ***" a wealth of alternative accommodation*** " for school use. He goes on, in a thinly veiled attack on the Rector to his Bishop: "***The Rector and most of the PCC are hostile both to the Friends and to all other Friends (world wide) of Christ Church who, he says, are all middle or upper class – hardly a Christian judgment even for a layman, and indeed untrue, irrelevant and ludicrous".***

401 I pause there to try to understand from where or from whom Professor Downes, living in York, could have got this idea. Nothing in any document I have seen suggests this, and I have no doubt but one would have been produced by the objectors. Indeed, given the events of the previous year one might have expected the objectors to have produced hard information of that. This particular allegation

was not put to the Rector in cross examination by any objector, so he did not have the opportunity to respond. When any witness goes beyond his own expertise and personal knowledge, it might be advisable for him always to check his references: advice I have no doubt Professor Downes must often have given his students. Now the late Mr Vracas aside, it may be that the churchmanship, music and the kind of youthful worshippers attracted to Christ Church does not entirely accord with the views of some of the objectors. This line begins to show how high passions were beginning to run, and how, perhaps calmer views were being lost. It does reflect the objectors' tendency to slightly twist and exaggerate their views, which lose nothing in their repetition. "Secrecy"? I think not. Professor Downes goes on to tell the Bishop of London: " ***if this ill conceived project proceeds further, the ensuing illegalities will create a scandal which I imagine the Diocese , let alone the Church of England , could well do without."***

402 Well, it is a point of view. I find it reads as a threat with the imputation of "do what we the objectors want or else". However, as the late President Nixon's tapes showed the world, people do write or say in anger or emotion words which, with hindsight, could have been put more felicitously. Professor Downes was free to express his views. Others were equally free to have their own different views.

403 Sadly, in this case, the parents of the overwhelming number of Muslim children at this church school may not, as yet, be members of the Society of Antiquaries and so are not able to place their views before what are, apparently, thought to be influential members of a learned Society. Though what this lobbying served at that stage of this matter, I am not at all sure. Had these great and good been persuaded, encouraged or moved to give evidence before the planning committee or called as witnesses at the Consistory Court earlier, that would have been the proper time to express their views openly and available to be challenged. They did not, neither then nor before me.

404 The democratic processes of the public planning application, and the objectors' (chosen) informal objections to the Chancellor having been gone through, I am puzzled as to what the objectors were seeking to do by their "old pals" letters, given their own objections to secrecy (allegations which I specifically reject).

405 By now, the reburied bones made a reappearance, at least in letters of complaint from Ms McKoen, a trustee of FoCCS, who wrote to the LBTH Planning Officer on 18th September 2012 (**1686-89)** enclosing the note of Mr Vracas (to which I have already referred), who had had to go abroad. The photographs I have referred to may have been taken by Mr Dyson a local architect. It is not clear. It goes on to say that the burial vaults in a listed building had been destroyed. "***It is also my belief that this fact has/was been covered up by church employees when Mr Vracas started investigations***". She wanted the Council to investigate straightaway: *"**My instinct is that work is proceeding very quickly in order to cover evidence and also to ensure that the 'clock cannot be turned back' if the overall development is indeed found to be unlawful."***

406 It seems to have passed some objectors by that the graveyard had been tinkered with over the years, grave stones laid flat or turned up right against a wall or, indeed, apparently removed. This was not at this point in time a graveyard untouched since it was closed in 1857. The objectors did not, apparently, consider injunction proceedings at this time when one of their members ***"peeped through a hole in the site fence today".*** The Council planning officer's internal memo in respect of this complaint states: ***"please open a new case and send out acknowledgments etc.***" (**1686-1688).** On his return from abroad Mr Vracas **(1690**), writing on 26th September 2012 as "***the Hon Treasurer of the Christ Church Spitalfields Restoration Trust and the Hon Treasurer of the***

Spitalfields Society", urged them to stop their work: ***"as it would be unwise to continue these works given the several legal issues involved***."

407 On 1st October 2012 Professor Downes returns to the fray **(1691),** this time with a letter to Sir Simon Jenkins on the Christ Church issue. He writes: "***I am writing to you as a fellow Antiquary on a matter of which I am sure you are aware, but which seems to be subject not so much to a conspiracy of silence as to a consensus of muteness…even some significant persons within Tower Hamlets Council now accept that this insult to this part of their heritage that figures in their own publicity and their logo was a terrible mistake, but there seems to be no corporate will to rescind or alter the permission. The senior clergy of the Diocese are un-cooperative and ignore my personal letters. English Heritage appear to have nothing to say. I understand that some members of the Fourth Estate have expressed an interest but this has not resulted in anything in print".*** He repeats the by now well rehearsed objections, now expanded: "***The Rector and most of his PCC are hostile both to the Friends and to all other Friends (world wide) of Christ Church who, he says, all went to posh schools, - ludicrous, patently untrue - and not at all appropriate to his Cloth".*** He goes on to say that: "***the architects claim that Hawksmoor did not intend the church to be seen from the south east. This is demonstrably untrue, ignorant and insensitive, and it will, I am sure, amaze you as much as me that any member of the profession could make such an assertion".*** He asks Sir Simon: **"*Is it possible for you to say anything about this new, albeit smaller, carbuncle?"***

408 It would appear that these personal letters were not copied to the building parties so that they could at least have the opportunity of putting their side of the argument. These allegations of class bias and architectural incompetence were not aired in evidence before me, when the objectors did not choose to cross-examine on them, but at this early stage peddled as smears and gossip. In respect of much

of which was being said, no evidence was provided to me in the evidence. The objectors seemed content to talk up and repeat all these allegations among themselves until they themselves believed what they each were claiming. They wanted matters to be tested legally, but failed to provide any sufficient evidence of what they were telling the outside world. They could have applied to subpoena even an unwilling witness to support their assertions of bad faith, incompetence and worse. I have no doubt that all sides here said and thought things about the others which, with hindsight, were less than charitable. If those assertions are to be relied on they are to be strictly proved to the civil burden of proof. The allegations of anonymous persons, apparently, known, and relied on and identifiable to the objectors should have been called to give evidence before me.

409 I remind myself that it was the desire for full disclosure of documents by the objectors that has resulted in all this correspondence coming out. It has provided interesting reading. Given the complaints of "secrecy" in the planning process made by many of the objectors, their own enthusiasm to try to go behind the clear and democratic planning mechanism in this country by what can only be described as trying to influence those they think of as being "important" by private letters would be described in racing circles as "nobbling", and it is about as unacceptable. If these people, these experts, whose influence is relied on, really wish publically to express their own views and have those views tested in public, the machinery is there for them to do so. I note the complete and deafening silence from all these persons and bodies who could have given evidence in the recent hearing before me, without even becoming a Party (so having no risk of costs, save perhaps the costs of a taxi to the church to give evidence at the Consistory Court, should they have felt so deeply about this whole matter). In passing, I note that none of the potential architectural objectors have now, four years on and the new building having been built, chosen to give evidence in respect of its effect, its merits or demerits, or as to whether, especially given the

imminent development of the Wool Exchange across the road from the church, or as to whether their aesthetic fears have actually been borne out. Silence. I note, however, that the architectural critic of the Guardian described the new building as "an innocuous" building" in a recent article.

410 On 4th October 2012 the Head of Planning and Building Control at LBTH replied to Mr Vracas' letter of complaint **(1693-1694)** in which he re-iterated the planning history and the fact that only 48 objections came from residents of LBTH. He set out the school needs, the improvements on the graveyard space that the new development would bring and the benefits to the wider community. He saw no hindrance to the development continuing and: ***"From a planning perspective, I see no hindrance to the development continuing and am not able to secure the cessation of works as you suggest".***

411 During October 2012 correspondence continued about the graveyard vaults between the Council, who were investigating, and some of the objectors. A representative of MOLA had to confirm on 10th October: " ***I confirm that we are proceeding in general accordance with the approved written scheme and that both English Heritage and the Diocese have been kept informed with regard to the process of the works and the archaeological issues arising". (1698).*** Earlier on 8th October 2012 the Senior Contract Manager, Mr Dennis of Museum of London Archaeology had written **(1698-99)** in answer to the perfectly proper enquiries from the LBTH planning officer, to repeat that his team had provided back in August 2012 replies to these concerns: " ***a key point regarding the tombs and monuments is that they had already been partially demolished in earlier times. The above ground structures and memorials in the grave yard were cleared in the last century and we have encountered broken pieces in the modern topsoil…similarly there have been previous buildings with associated service trenches constructed in the graveyard …from previous works ...the brick crowns of the three tombs encountered***

…had already been broken …the development design has been configured to avoid further damage and there has been an archaeological presence on site to monitor the ground works. We can say that no burial vaults or the in situ burials within them have been destroyed by machine …" That had already been confirmed by the consulting architect on 28th August 2012 (**1699-1700)**. The architect added (**1700):** "***The design was carefully configured to avoid encountering in situ burials and the re-deposited bones in the topsoil have been collected for re-burial at which the Rector officiated. The tops of three brick tombs were exposed at about 300mm above the new formation level but these had already been broken open previously and were filled with modern rubble and concrete. We are fairly sure that the two re-deposited memorial slabs encountered nearby had been dragged off these tombs at that time."***

412 A representative of the Museum of London wrote to confirm: ***"that no burial vaults (or the in situ burials within them) have been destroyed by machine … removal of the damaged brickwork provided a very appropriate opportunity to re-inter the collected bone within the tomb, which was then resealed with one of the large memorial slabs and a new plaque added at the request of the Rector. All that had taken place before the machine spread the aggregate over the re-sealed vault as shown in the photo".***

413 As I set out below this was not presented in a fair or accurate way by SOS in their later email efforts to whip up objections. Lest there be any doubt, I formally reject the imputations made by Ms McKoen and others in respect of the broken vaults. I accept what was written by MOLA (Museum of London Archaeology), an archaeological presence having been on site, and the architect. I find that this allegation served no purpose, save as to be yet another complaint by the objectors, and was not substantiated. Tombs and monuments had been

partially demolished many years before this work. Such minor disturbance as did occur was, I find, properly and reverently dealt with, notwithstanding the failure to provide for that possibility in the original Faculty. It is right to say that in the Faculty conditions should have been attached in respect of reburial of any disturbed remains, but on the advice of the very experienced Museum of London Archaeology (MOLA) this work was conducted properly and reverently. In any event, the planning permission had the necessary condition attached to it to cover this eventuality of disturbance and reburial.

414 On 10th October 2012 the Trustee Directors of FoCCS and the Restoration Trust had their next meeting (**1702-1705).** Apart from the conduct of other, unconnected business, it appears to have been a somewhat tetchy meeting; the legality of the building works, now well under way, was debated, and the church's burial policy, and the access agreement. By now the tensions between the FoCCS trustees and the Rector/PCC representatives/trustees were becoming acute. The minutes record that it was the Trustees' opinion that [the Rector] and Mr Wasserfall (a churchwarden) had not shared with the PCC what had been going on and that this was not a good state of affairs. It is not clear to me just how much of the *pro bono* advice which at least some of the Trustees were receiving was being shared with all the Trustees. If it were being provided to the Trustees as a body, it should have been. Ms Whaite is minuted as saying: "***Richard Wasserfall had misrepresented the school development to Tower Hamlets planning committee in the name of the Rector and the PCC. It was strongly felt that the Friends' views had not been properly represented to the PCC".*** She complained that her offers to go and speak to then PCC had not been taken up. The legality of the builders' actions and what had been described by the Rector as a **"*tiresome and misleading*"** campaign of the objectors was debated. It was not a happy or constructive meeting. Mr Woodward a Trustee thought ***'no good would come of sitting down and discuss it now'*** **(1705).**

THE NEXT LEGAL CHALLENGE

415 On 15th October 2012 Mr Richard Buxton wrote formally on behalf of Ms Whaite for herself "***and on behalf of other local residents***". He wrote an open letter to the Interim Chief Executive of LBTH, to the Chancellor and the Registrar requesting answers to the points raised in his clients' letter of 14th September 2012, in the absence of which ***"legal proceedings are likely to be instituted in respect of the breaches that have occurred and an injunction sought to prevent works continuing absent lawful authority and indeed to restore the site"*** In particular he was concerned with "***disturbance of buried remains and/or the burial vaults and tombs…ceases immediately".*** He raised a variety of legal points, which I will return to later in this judgment, and appears to consider that matters could be dealt with by "***a mediation meeting involving representatives of the LBTH, the Diocese, the church, the school and our clients chaired by an independent facilitator"*** **(1707-1708).**

416 The objectors appeared to be trying to force re-negotiations to get what they wanted when they had (at least at that point) run out of legal options. The mere fact that planning permission has been granted does not mean that a building must be built, so I can but assume that pressure was sought to be put on the other parties.

417 I have set out above how strongly feelings ran and how set positions had become. I find it incomprehensible that (with the new building well in course of construction) how any form of mediation would have been possible unless there was a complete climb-down by one side or the other. The difficulties of trying to negotiate a legal position which was being claimed as being illegal were not apparently considered in that letter.

418 The Diocesan Registrar replied to that letter **(1709)** on 16th October 2012. He wrote: "***as Registrar of the Consistory Court***" *[my emphasis added]*. I will return below to the effect of that. He confirmed that the Chancellor was aware of the objectors letter of 14th September 2012: "***but it would be wholly inappropriate for the Court to enter into correspondence with litigants or potential litigants in the way in which you appear to seek***". Mr Buxton is informed that: ***" If your client, acting on your advice, considers that an order of the Court has been breached or that there has been unlawful action on land subject to the Court's jurisdiction, then the appropriate Court procedures should be followed."*** He refers Mr Buxton to the *Faculty Jurisdiction (Injunctions and Restoration Orders) Rules* ***1992. "You may know that disobedience of a Consistory Court injunction or other remedial order is contempt of Court, punishable as contempt of the High Court. You will no doubt also advise your client as to the Court's jurisdiction in the matter of costs".*** Again, I note that the objectors could have taken steps at that point, when costs would have been minimal (or none it they relied on their legal advice). The site was being cleared. There would have been time to seek an injunction.

419 A polite and sensible letter also followed from LBTH on 19th October 2012 (**1716-17)** which dealt with the alleged damage to the graveyard, and reminded the lawyer for the complainants that the grant of planning permission of 5th August 2011 had attached a condition in respect of archaeological matters (English Heritage having advised that) works, which condition had been discharged on 21st May 2012 when a written scheme of investigation for an archaeologycal watching brief was submitted by the Museum of London Archaeological Service. I have already dealt with their comments above and these comments were incorporated in this letter.

420 I have read the accompanying case note of the investigation carried out by the Council, and I fully agree with the Council's then conclusion on 18th October

2012: " ***Complaints were advised by {a council employee] in a meeting that the issues raised had been investigated and that there was no evidence of a breach or any harm or wrong doing to justify taking any further action with this case. Case closed*****" (1718).** That response may explain why the objectors, their threat of litigation notwithstanding, did not proceed with injunction proceedings. Given this outcome, I do not think it is necessary to set out *in extenso* the various e-mails and letters of complaint received by the Council from Ms McKoen, Mr Vracas and others in advance of this decision, save as I have done above. From "peeping from behind the site fence", these objectors I find made and continued to make erroneous allegations as to what they saw. I reject the allegations made by Ms McKeon that: "***burial vaults have been destroyed in Christ Church gardens {***sic: not churchyard***}, and that in my belief that this fact was covered up by church employees when Mr Vracas stared his investigations".*** Where there is conflict in the evidence, I accept without hesitation the statement of MOLA, a more than reputable and experienced excavating body. Indeed, much later in this case on behalf of SOS, Mr Seymour on behalf of his clients conceded that this complaint was withdrawn, after all the above complaints. No other individual objector continued with this objection.

421 On 25th October 2012 **(1729)** the Rector wrote to Ms Whaite and Ms Fuest ***"to invite you and members of the Friends"*** to a consultation about the proposed garden design scheme. It was to be open to a variety of community groups on two days in November 2012. I am unsure as to whether this invitation was taken up. However Ms Whaite did reply on 2nd November 2012, again repeating the objection to the building development in the churchyard, and stressing that the Friends are not a party to the crypt refurbishment nor to the appointment of the garden designer. One asks why should they be? **(1732)** She received a courteous reply from the Rector.

422 On 25th October 2012 the Bishop of London replies to Professor Downes (**1730)**. In it he said: "***you (and the authors of many other letters I have received) overestimate the power of a Diocesan Bishop in this age of Charity law, building procedures, common tenure and planning regulations. As you might imagine, there are a number of disputed building projects going on in the Diocese of London, so densely populated as it is with churches and church schools*****".*** He stressed the role of a Bishop to have to continue to minister to all sides in a dispute after a decision is made, but told Professor Downes**: " *I know you will be disappointed that I cannot respond to your rallying call…"***

423 Professor Downes was not so easily put off. He replied on 13th November 2012 to the Bishop of London, taking issue with his letter, in a way of which I do not share, in his reading of the paragraph I have set out above. Prof Downes complains that, on his reading of what I have set out above: ***"It amounts to saying that so many potential (and certainly some actual) infringements of law, civil, ecclesiastical or charitable are going on in London that we must accept the situation and you must stand by quite impartially."***

424 Many people might struggle to read that interpretation into the Bishop's letter, but Professor Downes goes on: ***"In my life I have not risen above running a university department and serving for thirteen years on a Royal Commission. In cases of complaint, dissent or irregularity it was my duty, either myself or by appointing an appropriate officer, to investigate the circumstances, including misinformation, affecting it, and, where necessary, take or authorise appropriate action".*** He informs the Bishop that LBTH and the Diocesan Chancellor have now received solicitor's letters **(1734**).

425 The Bishop replies on 11th December 2012 (**1745-46)** to Prof Downes with a fairly "heavy" letter, setting out what consultations have taken place at diocesan

level, but stressing that the actions have been taken***: "in good faith and with all due regard to the law and in the light of the needs of the local community".***

426 The anonymous, but well known author, Piloti, of *Nooks and Crannies* in *Private Eye* writes on 16th November 2012 attacking the project, clearly having been briefed by the objectors, quoting from Professor Downes' letter to he Bishop to which I have already referred. The architectural comments are perfectly acceptable, made in the course of public debate, but Piloti goes on: " ***…the Evangelical tradition in Spitalfields is often inimical to fine architecture and art, and the previous rector had to be cajoled into supporting the restoration of his abandoned church. The present Rector, the Rev. Andy Rider, also seems to share his predecessor's resentment of middle class people coming into Spitalfields and doing things".*** Given what I have read of the early harmonious relations between FoCCS and the previous Rector, whose son indeed was then still serving as a trustee of FoCCS, this did seem to me that a somewhat self serving version of events had been fed to what Professor Downes would doubtless call "the Fourth Estate" for the purposes of stimulating debate. The Bishop is urged by Piloti to intervene: **" *A petition to the Bishop of London is being drawn up and Mark Girouard, our greatest living architectural historian, has also written to {the Bishop] to protest*" (1735).** A fortnight later the *Church Times* picks up the story **(1739-1740).**

427 In December 2012 the Bishop's Square Programme Board minutes state hat the £300,000 from the development of the Fruit and Wool Exchange had now been paid over to the Diocese, as part of the s106 money, following a design competition. It was reported that work had begun on the site although there is still some local opposition against the proposal **(1741-43).**

428 Following intervention by the local MP, Ms Ali, who had, apparently, raised the matter with Baroness Andrews of English Heritage, although the initial letter

of the Baroness is not in the papers before me, Ms Whaite writes a letter of complaint to English Heritage. Apart from the matters which have been rehearsed above, Ms Whaite complains **(1747-8)** of the reception she received when speaking to the relevant case officer earlier in the year:

- "**his attitude was that he had formed his opinion and that he was both unwilling and unable to reconsider This is not what I would call contact, nor would I describe it as intelligent engagement with relevant issues"**
- she complains that EH has effectively been **"ignoring the expert advice such as that of Professor Kerry Downes, acknowledged as Britain's most respected Hawksmoor scholar, and the several hundred other letters written to them"** objecting to the school's proposals
- **she notes that the same EH case officer (unnamed) became the Borough conservation officer at Tower Hamlets, the local authority, which participates in proposing and approving what we are advised is an unlawful development scheme at Spitalfields.**

429 This hovers on being a serious allegation in respect of a former employee of English Heritage. I do not see here that being substantiated, and, were evidence to hand and such was capable of being proven, the judicial review proceedings might have been apposite. This allegation, a serious one to make in respect of the effect it might have on someone's professional career, was not put to any of the witnesses for the Petitioners in the course of the hearing, so that an answer could have been sought. It was not relied on. The smear was left in the air. I find this to be a symptomatic example of how Ms Whaite was trying to puff up her objections without having such examples put to proof. It was part of a campaign of smear and innuendo. Everyone was out of step but them. They appeared to be prepared to strike but not to wound.

430 Professor Downes added his ha'pence worth to this correspondence on 12th December 2012 in a letter to Baroness Andrews (***1749).*** He says: "***My experience of the State's attitude to historic buildings and places now extends for 65 years, that is from the days when it was in charge of the Ministry of Works. I have taught Officers of English Heritage and watched with some concern as they became conditioned by the departmental tick-box philosophy that your organisation inherited from the M[instry of} of W[orks]".*** He refers to her answers to Ms Ali M.P, a letter not before me, as being, in effect a tick box exercise. ***"It seems in this case that the boxes were ticked, everyone went by the book and nobody did anything wrong. Nobody broke the law. Whether anyone exercised intelligence or prudence is another matter".*** He urges the Baroness to listen to Ms Whaite on matters of laws having been broken "***through ignorance, misinformation and indifference***".

431 A detailed response to this was sent to Prof. Downes on 19th December 2012 by Dr Nigel Baker, the head of development management at EH on behalf of the Chairman of EH, Baroness Andrews (**1751-52).** In it is set out the involvement of EH in these proposals from as early as 2010. The matter was placed before both their senior architect and a landscape architect. It sets out their serious concerns and how "***we, exceptionally, also provided detailed advice on the design proposed for the "new" space in order to ensure that the earlier character of an historical burial ground was appropriately revealed.***" He sets out their earlier thoughts as to building or not on the site, but acknowledged the DAC view. He stated that Ms Whaite's representations had been considered, and that they were aware she had attended the DAC meeting. The view of EH was that: "***we have, therefore, sought to ensure that if a building is to go on that site, its design responds to the significance of the main listed building and that opportunities to improve the quality of the open space and access to it are taken …. The process of reaching that***

judgment has not been undertaken indifferently or ignorantly, a view that Baroness Andrews wants you to know that she shares." The Chairman, Baroness Andrews, on 20th December 2012 refused to meet Ms Whaite, saying ***'as chair I am not involved in detailed management of casework.. a further meeting to discuss English Heritage advice now that the decision has been taken is not appropriate " (*1753).**

432 Other letters followed, one from a neighbour of Ms Whaite in Elder Street, asking the planning director of English Heritage to explain what factors he took into account in respect of the effect on Christ Church of the development **(1750).**

433 News Years Day 2013 brought another letter from Professor Downes to Dr Baker at EH. He complains, *inter alia*, that the EH officer who met Ms Whaite was **"brusque and dismissive".** As I understand it, Professor Downes was not himself at that meeting. He is repeating what he has been told. He complains that Baroness Andrews took four months **"*because of an administrative error*"** to reply to Ms Ali MP, and claims those four months **"*may have been crucial since within them irreversible violence has been done to the site.*"** He takes objection to many of the answers given by EH. He wanted his letter to be brought to the attention of the chairman, **"*whose abrogation of responsibility in respect of a building whose preservation has involved millions of money both private and public, is regrettable to say the least*" (1760).** In the bundle before me is an unsigned letter of 13th January 2013 to the Chair of EH. From its contents it appears to be from Ms Whaite and deals with matters raised by the Baroness in her earlier letter **(1761-1762)**.

434 Separately to all of this, there were additional extra costs for the half finished building due to delays, which had become necessary in the course of the project, so that the 12 month deadline set as an original condition to the Faculty

could not be met. (It now looked as if the new building would not be finished before May 2013). An extension had to be sought on 20th December 2012, and the Registry informed the Rector on 8th January 2013 that the Chancellor would be agreeable to granting this **(1764);** again in unsuitable Christian name terms. Building delays led, inevitably, to increase in costs so that in excess of a quarter of a million extra pounds had to be obtained from the Education Funding Agency in mid January 2013 **(1825-1826)**.

435 In the New Year 2013 Dan Cruickshank, the architectural writer, (who had been peripherally involved the previous August when complaints were made about the broken vaults) had become involved, raising in early January, **(1765)** with EH: "***a new wave of outrage has hit the area with the revelation that head stones and parts of table tombs are now lying dispersed around the building site and are apparently being damaged or at least trodden on and disregarded by the contractors".*** He was puzzled as to where these stones had come from, having walked the site some months before with the Rector who he had then advised to keep an eye open for stones or bones. He admitted that recently he: ***"had not yet been to the site but had been shown photographs***". He went on to say: "***as of this evening the local amenity groups are baying for blood".*** Sensibly, he urged EH to try to get things sorted out.

436 The Rector confirmed that MOLA were in attendance but that a grave stone had "***appeared recently***" **(1780),** which I find accords with the photographs sent to EH and complained of by a member of the Spitalfields Trust. I am afraid to say that, as must have been expected in a graveyard which had so many burials, bones and gravestones were going to be found if there was to be any excavation. I refer to the original Faculty Petition. Had this been properly filled in then conditions as to reburial of remains, even of advertisement for the relatives to be made aware of recognised legible tombs stones would have, I have no doubt, been made part of the conditions to the original faculty (although the

planning permission dealt with that). From reading the incorrect petition for a Faculty, the Chancellor was under the impression that there would be no disturbance of graves. Had the proper information been given, it is inconceivable that any Chancellor would have refused a Faculty (provided it were being sought for good reason) just because of such a risk of disturbance of burials, but would have made the conditions about reburial etc. which would have covered the Rector and given clear directions as to archaeological conditions, though here MOLA acted, as I would have expected, in a punctilious fashion, and gave the kind of advice as to reburial etc. as would have been covered by a Chancellor's normal condition.

437 Even in open graveyards, there are going to be occasions when disturbance is necessary: for examples, water/gas/ electric installations for lavatories etc., improved lighting, new paths, a car park, a church hall, tree planting, tree removal, laying flat dangerous gravestones (forgotten or ignored by relatives), huts for oil storage or a motor mower; this list is not exhaustive. If the need for such disturbance is proved (because such disruption is not done lightly), then a Faculty will issue. Such work must be shown to advance the mission of the Church before a Chancellor will authorise disturbance of a burial ground. Often many of the above items require only shallow foundations and graves are not disturbed, but many newly appointed Chancellors may wish that they had an HND in plumbing when dealing, for the first time, with the requirements of, say, trench arch drainage for a lavatory installation. The existence of graves does not in itself impede proper ecclesiastical development. The more recent amendments to the 1884 Act make this clear. No one can be guaranteed eternal rest in a grave yard, even reserved graves only in general provide for 75-100 years (and that too might have to be revisited). Indeed, the current pressure on grave spaces (at least in urban areas) and the 70%- 75% ratio of cremations to burials shows how this trend is moving. To wax eloquent about quiet country churchyards is often a romantic delusion,

what with the sound of motor mowers cutting grass, trees being lopped, asphalt paths being laid, gutter and roof maintenance being carried out with scaffolding, and lavatories and kitchen extensions being built. Quiet Churches and their churchyards may often be on the way to becoming failed churches. It might be argued that previous parishioners (and their often also deceased or disappeared grieving relatives) would not want the their old church to be inconvenienced, and might be glad that it is still in use serving current parishioners, rather than being selfish in death.

438 On 10th January 2013 the architects provided a detailed reply (**1791-92**) dealing with the post- August discoveries in the churchyard: ***"The key point to make on our reply to the complaint is that no tombs or memorials have been smashed or vandalised .. everything has been done carefully and in consultation with the Church in order to avoid damage. Its actually quite a good example of archaeological conservation in practice (and of decency too I think".*** He dealt with the re-stacking of older headstones as appeared in the photograph. "***They are recognisable by being rather green and mouldy - i.e. they have been there for many years".*** The reality is that older workings in the graveyard had already disturbed and broken two large table top tombs slabs which had already been disturbed when this new work uncovered them. Mr Vracas had written on 7th January 2013 on behalf of FoCCS to MOLA asking if the gravestones had been transcribed and their sites identified "***before they are further damaged"*** and enclosed photographs**(1793-1800).**

439 As was proper, these complaints were taken seriously. A Conservation Officer visited the site as well as the LBTH Enforcement Officer, who formally visited the site together with the architect, the site manager and a representative from MOLA. The MOLA representative said that: "***no damage had been done to any (***various tombstones or burial vaults***) since they have had a presence on site from last year and based on his records from last year any damage was***

most likely from earlier times. They also indicated that they were aware of the sensitivities of the site and are taking appropriate care and attention when dealing with vaults and tombstones". The Enforcement Officer found no breaches of the relevant planning conditions had occurred and the complaint case was closed **(1802).** At the end of all this, the relevant complainants were written to, including a member of the Spitalfields Trust, to set out the conclusions of LBTH's investigations.

440 Somewhat late in the day, the DAC's archaeological advisor recommended an amendment to the existing Faculty, as it had become clear that a necessary cable trench might cause additional disturbance **(1827-29).** Following this advice, the Rector applied to the Registry on 21st January 2013 for the necessary Faculty amendment **(1830).** The Registry agreed to forward this request to the Chancellor. On 23rd January 2013 Ms Whaite brought a petition from herself and the Spitalfields Open Space group to the Council **(1838**). Her previous arguments were repeated, but this time she also stressed: "***Spitalfields is the most densely populated area of London. Public green space here is already very scarce indeed. Scientific research demonstrates that the lack of green space adversely affects the physical and mental health and wellbeing of children and adults alike. Green space is vital in balancing the effect of climate change in the inner city where temperature average 6 degrees higher than the outside".*** She ended with a ringing rallying cry: " **Help save this precious green space NOW or lose it forever."**

441 In the case before me little scientific evidence was adduced from any witness in which I might have had some trust as to what is said above, nor as to what difference, if any, the change in the churchyard could make, given how small it was to begin with. The one witness purporting to deal with this presented me with his own views on the subject, which, like the above, bore all the hall marks of a Google search. I prefer the letter of support for this project from the local GP

who one might have thought had hands on experience dealing with the local population both adults and children and their physical and mental needs. I quote from that letter later.

442 Mr Vracas also petitioned the Council **(1839),** but his petition was based on the legal interface of planning, trust and church law. He raised complaints as to the conduct of council officials, which he alleged had **"bamboozled"** the Council. He said that the Council, had been misled, and that that had given rise to a miscarriage of justice, and he wanted the Council **"*to issue a stop notice on any further construction of the building".***

443 Up to this point the objectors had really shown a degree of incompetence as to how they had objected. Private letters to those they considered to be "great and good", and that had got them nowhere. They had not become formal objectors before the Chancellor, which would have brought their real case to his notice. They had not even gone through all the usual photo opportunities, much beloved by some eco warriors objectors of lying down in front of the builders' machines for an Evening Standard article. I am here not being facetious. Any objections have to be made early publically and firmly. I am afraid to say that any old age pensioner or ***Gillick*** competent child acting on his own could have injuncted or applied to the Consistory Court at a very early stage at virtually no cost, so that the Chancellor would have been put on notice, and matters fully considered. In the meantime, everyone else was getting on with building the school extension, the old youth club having been demolished. I should say that had the objectors spent as much time organising and presenting the objections which the objectors endeavoured to marshal **after** the planning permission was granted before the planning decision was granted, their case would have been better served.

444 On 30th January 2013 the Restoration Trust Trustees held their AGM **(1844-45**). Eight people were in attendance. The normal business of the accounts being adopted and the auditors being re-appointed was carried out and the longest standing directors were re-appointed. The minutes record that: ***"there was a long discussion*** about the current and future legal status the churchyard. There then followed a lengthy discussion involving the advice the lawyers Herbert Smith had given the Friends. This appears to be the first time that that advice is discussed among the trustees. If that was done earlier it was not minuted in earlier minutes. It is recorded that: ***"No resolutions were proposed, no votes taken and no motions carried"*** in respect of this problem, save that after the meeting it is recorded that the Rector agreed to write to the Diocesan legal department about these issues. The Rector complained that in his personal view the Friends had acted outside their remit and handed a letter **(1849-1850)** to Ms Whaite the Chairmen with these concerns. It is of note that that the interaction of the FoCCS and the Restoration Trust is so intertwined as, again, one AGM appears to merge into the other (**1844-1848**). In the event, the Rector complained that the minutes were inaccurate and unfair to state that he and Mr Wasserfall had misrepresented the views of the Friends to the PCC. As well he circulated photographs of the gravestones to deal with what he said were misleading and dishonest captions which had been already circulated.

445 The FoCCS Trustees were also refusing to contribute to the church's quinquennial maintenance. Ms Whaite having e-mailed, 12th October 2012, previously: "***we are unable to commit large amounts to other projects until the organ is finished***". **(1847).** This may have been so, but one is left with the suspicion that the graveyard disagreement between the Parties had something to do with this; can it be said that there is any point planning to restore the organ if repairs and maintenance are required under the Quinquennial inspection cannot be funded? I find that the reality is that by this point, relations between the

Trustees of FoCCS & the Restoration Trust and the PCC had become really fractious, to say the least, so that their much vaunted fund help for the church was potentially being put at risk.

446 I turn now to the complaints made by the Rector as to the conduct of the FoCCS in this matter. These complaints are of importance when it comes to looking at the specific role of the objectors and who they ultimately are. (In this, I specifically exclude current individual objectors acting in their right and on behalf of themselves before me). The Rector complains as follows:-

- statements opposing the Rector and Christ Church in the media and letters to members of the FoCCS data base were initiated without a trustee decision being taken before hand
- an online petition identified as having FoCCS support was set up without a trustee decision being taken to be involved in such a campaign. I note that in the Trustees meeting on 5th October 2011 **(1312-1315)** a motion was passed 5:2 for the Trustees to write to the Registrar opposing the then proposed new building. The absent Trustees were to be notified of this vote and asked for their views, which I cannot see as being subsequently minuted. Certainly nothing is reported about any response from these absent trustees at the next meeting on 24th January 2012 (**1514-1518)**. I have read the trustees' minute of both the FoCCS and the Restoration Trust with care, and find these complaints to have, at least on the present documentation before me, substance. I can see no resolution formal or otherwise, save as above, to cover the allegations that the FoCCS Trustees and or the Restoration Trustees were speaking on this matter. This is the risk when a small group assume that they can speak for a charitable organisation without obtaining formal and proper authorisation to so. I cannot speak as to whether or not there was a breach in the use of the FoCCS data base of members being contacted without formal approval of the trustees. I was told in evidence that there was no such data base, but their magazine/newsletter "Columns" was clearly sent to their

supporters/subscribers so there must have been a distribution list, hand written or digital. I would be surprised, from a group who prided themselves on their organisational competence and financial ability, if such a list of members was made up manually. I make no finding about the potential unauthorised use of a data base, having insufficient evidence before me. That may be a matter for others such as the Charity Commission and the Data Commissioner to consider

- the Rector also complained that that petition was aimed at the Bishop of London, a patron of FoCCS, without first forewarning his office. That may have been a lapse in common politeness on behalf of the FoCCS objectors, but does not fall to me to comment on
- the FoCCS approached and pressurised individual PCC members instead of writing to the secretary or seeking a meeting with the Chair. Well, given how all of these people knew each other, that might have been technically the case but in the greater scheme of things did not take the matter further
- unhelpful correspondence was received by the two bishops and the archdeacon without the trustees' knowledge and without the Rector being copied in (as asked to be). Again the problem arises when an enthusiastic objector or objectors conflate their role as an individual objector with the more formal role of a trustees for a group. I have not been privy, for example, to the committee decisions of other local bodies who expressed a view. I make it clear that if a body of supporters for what ever cause wishes to express views which carry weight, proper care has to be taken to ensure that these objections have been passed by the governing committee on behalf of members, and are not just the enthusiasms of particular committee member(s). The wisdom of having supporters being paid up members of any such group allows discussion of actions taken during their term in office by trustees, and, perhaps, some rein being put on them or some encouragement being formally given to the trustees. It may well be that had those things all been in place both a majority of

supporters or trustees would have voted in support of Ms Whaite's actions. Maybe they would not. Who knows?

- legal advice was sought which was not requested by a meeting of the Board.

Again, I can see no pre-authorisation of this. Luckily for the trustees, this advice appears to have been given *pro bono* so that no FoCCS money was expended without authorisation, but I do not know what information was provided before such advice was obtained, and the then legal advisers might have been assisted had the Rector/PCC been involved in the briefings. The Spitalfields Society appears to have funded an initial legal conference with Counsel with £3.000 in February 2013, but SOS was not incorporated until March 2013 , with individual Directors. Initially the sum of £30,000 had been earmarked by FoCCS but it is unclear to me who or what was paid for what from that, as it was being said at this point that the legal advice was being given *pro bono* by Herbert Smith. (T429) Ms Whaite when asked about the flyer sent out to rally objectors said :-

> ***"That was again the Friends trustees ... sorry that is not true really …no we were not acting as trustees at that point ..*** (When asked by me if they were acting as individuals: "she replied: "***yes at that point. I am getting confused about the timing because at that point it was Spitalfields Open Space which is an association of people---" (T424-425)***
>
> I found her evidence on this to be both evasive and muddled, and I received no answer as to whether the data base of FoCCS had been used for SOS, nor could I see any vote being taken by the Trustees for that.

447 I remind myself that this fund raising body prides itself (rightly) on its professionalism in fund raising and its contractual expertise in organising very large and expensive projects (albeit the majority completed by 2004). We are not dealing here with a committee of two men and a dog in a tiny country parish. On

27th March 2013 the FoCCS reply formally to these complaints which they only partially address (**1902-3**), save setting out what FoCCS have obtained from the *pro bono* legal advice on and on which their legal arguments are based. Their letter reads somewhat oddly: "***Legal advice was offered*** *pro bono****, reflecting the widespread concern about this development"*** [the gist of their advice is then set out***] "much of the action taken had to be done as fast as possible and there was always good telephone and email consultation with trustees over particular actions."*** In my experience lawyers do not just come in out of the rain to give even *pro bono* advice. They have to be provided with background details. This problem had been years in gestation, and had been within the objectors knowledge. Here it appears that the FoCCS trustees/Restoration Trust trustees were able to obtain advice, which was then advanced, for whatever reason under the cloak of SOS (or else it used the advice provided to the Trusts as litigants on their own). I have not seen notes of these " good telephone and email consultations" referred to I know not if all the trustees were privy to these. I find as a fact that the FoCCS/Restoration Trust trustees, individual objectors and SOS (when formed) found it difficult to distinguish just what their individual roles, legal and personal, actually were. Many of them were so involved with running their objectors case that they gave no real thought to just who was doing (or paying for) what. Interestingly, the letter goes on to set out ***" Correspondence is discussed between the trustees , usually drafted by several of us … Rector and PCC are copied in as appropriate."*** **(1903)** Pausing there, the phrase used later of the FoCCS being run by a "kitchen cabinet" appears to be accurate, and this group of Trustees appears to have forgotten that the Rector is one of them, and not just someone who can be "copied in as appropriate". In spite of these very real complaints, the Rector hoped that the PCC and the FoCCS could still work collaboratively in the future. I will refer to that again when I consider the evidence of Mr Dyson.

448 The time amendment to the Faculty was sent to the Rector on 4th February 2013 (**1853-54)**, giving a further 12 months for the works to be completed.

449 **GROWING OPPOSITION: SOS**

Possibly as a result of the Rector's complaints and the recognition (on proper legal advice?) of the stringency of the law governing charities, on 1st March 2013 the Spitalfields Open Space group was incorporated as a private limited company **(1868**). The initial subscribing members to the Articles of Association were Ms Whaite, Mr Vracas and Mr Dyson, a local architect whose offices are very close to a wine bar in which Mr Vracas had interests, both within yards of the church's western front. S.O.S (Spitalfields Open Spaces) is the standard £1 'off the shelf company', thus the liabilities of its prospective members are legally limited to £1 (paragraph 2 of its articles of association); this perfectly legal device was later commented on in the Court of the Arches' judgment. The quorum for Directors meetings was to be at least two persons. It was now under this Spitalfields Open Space ("SOS") that matters have been carried on, together with other individual objectors. SOS has been the lead, and been the legally represented, objector.

450 The Rector had promised the Trustees of FoCCS that he would bring their concerns about the legality of the whole scheme to the attention of the Chancellor, which he did by another " Dear Nigel" letter on 5th March 2013 (**1863)** in which he (apparently) enclosed copies of legal advice letters which Ms Whaite had wanted him to raise, save unless they may have been copies of legal letters I have referred to above, I know not what they were, as they (if they are different) are not attached to his letter in the file before me. The Rector asks the Chancellor for guidance and an estimate of what the costs to the Trustees might be: ***"were they to explore this further".***

451 I am afraid to say that the beginnings of potential conflict between the Chancellor in a judicial role and that of senior lawyer of the Diocese, were

beginning to be evident. It does appear that the legal arguments now raised before me in in this case were put before the Chancellor at that time for his comments.

452 By letter of 6th March 2013 (**1864-65**) Ms. Whaite writes to the Rector, Churchwardens and PCC what might be described in lay terms as being a "letter before action" on behalf of themselves, "**who are members of the Spitalfields Society, Trustees of the Friends, Directors of Spitalfields Open Space**", setting out the legal advice they had received. (It still appears that none of the above other bodies were formally involved, even though some of their individual members were. The letter is headed on SOS notepaper and signed by the three Directors of SOS They, and by this I assume it to be the Directors of SOS, had taken legal advice as to alleged building on the graveyard giving rise to a criminal offence. I have heard no evidence about the involvement of the Spitalfields Society at this point as they are not formally joined in this letter. They gave notice that as follows:-

- ***"as advised by Counsel, we intend to apply for orders against LBTH and the school requiring the mandatory demolition of the {new} building and re-instatement of the churchyard***
- ***an order pursuant to s10 of the [Open Spaces Act] 1906 and the 1949 Deed that the site cannot be used for any purpose other than an open space***
- ***and orders requiring the School Governors to give up vacant possession of the playground land at the rear which forms part of the site and cannot lawfully be released to the school"***

The letter goes on to state: "…. ***Quite apart from the breach of trust, it is considered that there is a criminal offence under s3 of the DGBA 1884 in the erection of the new building, and serious breaches of law insofar as tombstones have been removed and damaged without statutory procedure having been carried out".*** I note they make no suggestion as to

the costs which even at that point, would have to be paid if their demands were met. The SOS directors sought a meeting *inter alia* to ***"explain why the new building is unlawful, must be demolished and the public open space re-instated***". How their potential suggestion as to mediation in respect of a criminal offence was supposed to work I am not sure, as one cannot settle or negotiate a criminal offence. In the course of the argument at a Direction hearing, it was said on behalf of the objectors: ***" we just wanted them[the buildings parties] to negotiate."***

453 The references to "negotiation" are wholly disingenuous, whilst at the same time alleging that a criminal offence had been committed and inviting the Attorney General to prosecute. The two courses are simply incompatible. Those adopting this stance had simply not thought through the consequences or how they would address them. Quite apart from any issue of whether any agreement made would be unenforceable for illegality, those involved in negotiations in such circumstances would *prima facie* be exposing themselves to charges of committing acts tending to pervert the course of public justice by agreeing or trying to agree to the stifling of a prosecution which they themselves were seeking to have initiated and promoted. The offence of committing an act tending to pervert the course of public justice is <u>not</u> limited to matters directly concerning proceedings already in being; nor need proceedings of some kind in a court or judicial tribunal be imminent; nor is it necessary that investigations which could result in proceedings are in progress. Provided that there is the requisite tendency and the requisite intention, the offence can be committed after the perpetration of a crime but before investigations into it have begun: *R v Rafique* [1993] QB 843; see Halsbury *Laws* vol 25 para 795 n6.

454 The using of the threat of either civil or criminal proceedings to get what you want is, I find, deeply unattractive as conduct by potential litigants. Having

failed to influence, by personal letters, people they regarded as important, the next step was to threaten the building parties with litigation. Ironically, the earlier they had got on with this litigation, the matters might have been sorted out at a fraction of the present costs. In any event, from the tone of the objectors' letters, there was not much scope for any negotiations unless it led to the complete triumphing of the SOS's aims. It should be remembered that all this time, the new building was steadily being completed. They wanted an open space now, or, at worst the guaranteed and paid for permanent removal of the new building in a limited number of years to obtain an open space.

EVENTS FROM MARCH 2013-2014

455 The Council on 7th March 2013 again replied to Mr Buxton's letter of 15th October 2012 (**1866-1867)** and he formally replied by way of **"pre-action protocol letter of 8th March 2013 (1888-1892),** in effect not accepting the allegations nor the legal basis for them raised by objectors. The LBTH specifically put the objectors on notice that the agreement between the Rector and the Council can be, and has been, altered by a subsequent agreement. They stressed that the Council neither owned the land nor, itself was developing it. Mr Buxton had formally claimed that a Faculty could not authorise breaches of statute citing *Re St Luke's Chelsea* [1976] Fam 295. On 8th March 2013 **(1893-1894).** Mr Buxton wrote formally to the Charity Commissioners, asking them to obtain the assistance of the Attorney General to protect a charity and to obtain injunctive relief in respect of breaches of the criminal law and/or to authorise SOS to protect the land and to protect the public interest. He suggested that the Charity Commission might authorise SOS to bring these proposed proceedings as Charity proceedings, and/or for the Attorney General to take action as protector of the Charity and to prevent the criminal breaches of s 3 of the *Disused Burial Act* 1884. This letter was copied to a number of interested bodies from the church itself, the Diocese, the architects, the school, EH and the Georgian Group. Mr Buxton

acting on behalf of SOS issued his pre- action protocol letter on 8th March 2013 to LBTH and the School (with notice to other potentially interested parties), summarising their perceived legal position. On behalf of SOS, he gave notice that they would be seeking a mandatory order of the demolition of the new building together with an order to secure re-instatement as an open space, with the possibility of also seeking injunction proceedings to stop further work being carried out. He sought that the School trustees give up vacant possession, and that there be accounts and enquiries as to Tower Hamlets' breaches of trust, and he raises concerns about the 2012 faculty.

456 On 19th March 2013 the Rector **(1899)** wrote to the three SOS directors agreeing in principle to a joint meeting but stating clearly that: **" if the purpose of the meeting was to contest the status of the church land or to get agreement on the demolition of the new school ….these are matters that can only be pursued by lawyers".**

457 However, the solicitors acting for the Governing Body of the Christ Church primary school wrote raising the position of the LDBS (**1900-1901).** The school are represented by Winckworth Sherwood, the same firm who are the Diocesan Registrars. Winckworth Sherwood were also acting for the Rector and the Churchwardens, as well as providing the Registrar to the Chancellor and for the Consistory Court. No one at this stage appeared to query this extraordinary situation.

458 On 20th March 2013 the school's solicitors, Winckworth Sherwood, wrote a preliminary letter to Mr Buxton **(1900-1901)**. Here we find the beginnings of the extraordinary set-up becoming obvious. These solicitors are in the same firm and in the same office as the solicitors acting as the Diocesan Registrar, when it has become clear from the letters I have set out above that litigation on a number of fronts is being contemplated. However, the objectors still do not

apply to injunct. Huff and puff, but nothing is done. Thereafter there is a plethora of interparty correspondence, the gist of which is subsequently repeated in the Parties respective legal arguments and counter arguments before me.

459 All Parties wanted more time to consider matters, so things go quiet for a time. However, on 1st April 2013 Prof. Downes again writes to the Chair of EH, Baroness Andrews, who had apparently provided him with what he wanted, namely the courtesy of a personal letter (not before me as not produced by the objectors): ***"as a Royal Commissioner for eleven years and the person who in the estimation of others has done most to restore Hawksmoor to his proper status***". He deals with matters apparently raised in that letter as to the operation of EH and their activities in other developments. He wrote that he never suggested that Dr Barker had acted improperly in doing what he had been taught to do, but that he was complaining of what he perceived to be, on Dr Barker's part, a formulaic attitude to his duty. Prof. Downes continued his argument with Baroness Andrews in respect of her own behaviour to him and of the operation of EH and, indeed, its predecessor, during which the history of the relocation of Temple Bar made a walk on appearance**. (1911).** This satellite row can be left for the purposes of this case. The difficulty facing Prof. Downes is that, however formulaic EH approach may be he says, at least it is evenly applied, so that the outside world have a fair playing field of views rather than just the personal choice of one officer about a particular matter about which he may have personal views **(1911).**

460 Mr Buxton again writes to the Charity Commission on 8th April 2013 enclosing Counsel's advice (properly not before me) saying that they appear to "***accept that a trust arising under s10 is likely to be a charitable trust".*** As every lawyer present in this Consistory Court knows, possibly, from bitter personal experience, one can only advise a client on the "facts" which one's

client provides. Often not until there has been full disclosure, can the full picture become clear when the original advice may have to be reconsidered. On what Mr Buxton mentions, this advice appears to be somewhat chary. Mr Buxton is still endeavouring to deal with the Attorney General's Office **(1912-1913).** The LBTH raise a series of questions of the Objectors on 18th April 2013 (**1914- 1918**). Mr. Buxton writes (**1912-1913)** that: "***our clients had at their own expense to seek legal advice."*** The advice from Herbert Smiths had been said to have been provided *pro bono*. I take it that what he is now explaining is in respect of his own and Counsel's fees. He seeks a meeting with the Charity Commissioner and the Attorney General's office. It is clear that the restraint on charity funds being frittered away on litigation which may not be in the Charity's best interest without prior consent of the Charity Commissioners is, very properly, at the forefront of the solicitor now acting (but for just whom is, at this point, unclear). It would seem that if FoCCS and or the Restoration Trust could get Charity Commission approval to litigate, it might be for them to litigate, otherwise it might have to be for SOS. However, as will become clear later, at this point, it is the Spitalfields Society who have put the money up front to pay for this initial legal advice. The detailed letters from the other parties in reply to the pre action protocol letters I need not rehearse here, save that they demand further clarification of the allegations, and of the legal status of SOS and deny any liability.

461 By April 2013 the contractors discover an unexpected low wall to the east of the church, which will have to be bored. The archaeologists do not envisage any problems **(1920),** but the DAC put the Registry/Chancellor on notice , as a result of which the original faculty was further amended to deal with this (**1933-34)**. There were more potential digging problems, identified by the Trench Formation Service in April 2013, and the architects had to collate a list of required documents to answer matters now raised by the objectors, and

formally requested by them. By April 2013 the work on the new building was drawing to a close both in respect of state planning and faculty terms. A blank certificate of completion for the (amended) faculty works was sent on 26th April 2013 from the Diocesan Registry to the Rector **(1930-1934).**

462 Mr Buxton engages in detailed correspondent with various Parties from late April onwards, at this point concentrating more on the civil actions rather than any Consistory Court application (**1959).**

463 A meeting of the FoCCS/Restoration Trust Trustees was held on 1st May 2013 **(1960-63).** Apart from formal business to deal with receipt of the s106 money, the Rector demanded a correction to the draft minutes which had read (**1963)**: ***"he would be willing to put into the proposed licence provisions regarding costs and responsibility of churchyard reinstatements for when the licence to the school is revoked or expires".*** It is worth re-reading the recorded minutes of their last FoCCS meeting. The Rector said in his email that he had not agreed to put anything into the current licence provisions Having read the Rector's last letter to the Chairman about what was the aim of a joint meeting and his need for lawyers to be present, I find that the FoCCS were, bluntly, "trying to pull a fast one" on the Rector by trying to minute a view not expressed by him at the last committee meeting nor in his last email letter. All they would accept as an amendment was that the Rector ***"would be willing to explore…."*.** He agreed to write to the Diocesan legal department (Winckworth Sherwood) about all this. After various business discussions, the meeting turned to the churchyard. They were told that it had been the Spitalfields Society which had initiated a legal conference to know where everyone stood on the churchyard. They had been told that the churchyard was still a trust for public open space and that the DGBA 1884 had been breached. It is not clear to me if any FoCCS trustee had been present at that meeting or whether any authorised note of the Advice given there was before the FoCCS Trustees at

that meeting, or whether they were just given someone's lay view of what was said. Ms Whaite (who may well have been present) as reported in the minues said that: ***"the Attorney General (the Government's chief legal officer) is looking into the matter as it is in the public interest to do so)***". Well, he had been written to, and after many more months, we will see his reply. "… ***Derek Stride wondered if anyone thought that realistically, given the size and spend of the project, the building would be pulled down. Philip Vracas replied that there could be a number of remedies, but it would be very hard for any judge to let a criminal offence exist. He believed the size of the building would make no difference".*** There were discussions as to the setting up of a fighting fund, Ms Whaite reported: "***that the lawyers had recommended litigation from SOS, which better reflected the wider community and had a remit to challenge developments".*** (Well, I venture to surmise that they were given more pithy advice as to why SOS should/could be used, and the PR advantage of looking as if a wider community was being represented than might have been the situation up to then as they had been seeing it in their own Hawksmoorian terms). It was reported that: ***"The Spitalfields Society, the Spitalfields Historic Buildings Trust and individuals such as Prof. Downes had put resources into SOS***". Notwithstanding that the earlier documents had spoken of *pro bono* legal advice, it then transpired from the minutes, that the Spitalfields Society had paid £5,000 and another £5,000 had come from other people. The FoCCS discussed the possibility of putting up £30,000 towards what was happening. Ms Whaite said the lawyers had agreed to work for half fees because of the importance of the project (It transpired later that "the trade" were interested in the legal argument as to the protection of open space land). Another stressed the "***Friends' Duty to protect Christ Church".*** As I have mentioned already, their only legal duty is to spend the money they collect in accordance with the terms of their

charitable trust, and not to be in breach of the lottery fund award to which they were signatories.

464 I am unable to make any finding one way or the other on this point, but it is of importance in any charitable fundraising body (especially as here given the very small number of trustees operating without the control of voting members) that moneys are strictly spent in accordance with the aims and objects of any society, and not spent on wider purposes, without approval of the Charity Commission, however worthy those purposes might seem at any given time to the trustees. Individual trustees should take great care that individually they are not compromised as it might very well be a costly mistake for each of them. Put simply, people don't subscribe moneys for the running of a donkey sanctuary, if the money is also spent on bowls for goldfish (unless the terms of the Charitable trust are sufficiently widely drawn to permit this). Clearly, in efforts to get either the Charity Commission and /or the Attorney General to act for them the FoCCS had come to realise these potential legal difficulties; hence the SOS cover.

465 With some care, the Trustees of FoCCS/Restoration Trust at this May 2013 meeting voted 7:1 in favour of the FoCCS allocating £30,000 ***"into a churchyard fund for the purpose of bringing the churchyard back in to public open space".*** The clear understanding of this motion, I find, was that this fund was to go to litigation, notwithstanding the somewhat careful wording. It made no sense to vote money for a future project which the s106 money might very well cover. It is a matter for supporters to make up their own minds if this is what they wished or thought their money was going to be spent on. I remind myself that SOS as an "off the shelf company", which was designed to limit the legal liability of its members to £1 each. They were about to engage in expensive litigation There then followed discussion as to how and from where monies could be raised, as litigation had to be funded, notwithstanding that the

lawyers were going to work for half fees because of the importance of the project (and doubtless because of the publicity it might receive). I have seen, as yet, no conditional fee agreement or the like, so I have to work on the assumption that some moneys had to be paid up front.

466 It is not for me, having heard no argument on the point, to comment on whether or not this is a proper use of moneys subscribed for the restoration of Spitalfields Church. That may be a matter for the Charity Commission. I make no finding in respect of what I read in the documents before me in respect of matters not within the ambit of the Consistory Court.

467 By mid May 2013, the Interim Executive Board of the school was discussing a name for the new building **(1964-1970)** which was due to completed in about June 2013. Of the 220 children on the school roll, 58 were SEN profiled that is a quarter of the school had special educational needs.

468 In May 2013 there is a further service of reburial of the recently disturbed remains of March 2013. MOLA then presented their watching brief as to progress to date in a report **(1904-1906**) in March 2013 that satisfies me that there was not breach of the planning conditions, and that the remains were dealt with reverently as would have been ordered under a Faculty condition.

469 On 28th May 2013, a further service of reburial took place for the disarticulated human remains which had surfaces in the course of the work (**1973-1976)**, following the same form of service as before and with the remains being re-interred in one of the previously discovered brick vaults in the presence of and under the guidance of MOLA.

470 Correspondence followed between the Parties all of whom were taking legal advice. There were complaints from the objectors about legal delays as the school building was going on apace. I am mystified why, given the advice they

had, at least injunction proceedings were not commenced either then or even earlier so that, if they were right , building work could have been stopped or at least the opportunity to consider legally just what was going on.

471 On 14th June 2013 SOS circulated an e-mail flyer, announcing that: ***"Chancery Counsel advises that the erection and use of the new building is in breach of trust and… the matter is being reviewed by the Charity Commission and the Attorney General… . to build in a churchyard in the face of statutory prohibition is a criminal offence…***" Signatories for their online Petition were solicited, and a request for £50,000 to fund litigation. Mr Buxton's (Environmental & Public law) email address was given as the contact.

Ironically, most people who think that they see a crime being committed (the disturbance of bodies in a grave yard) would, in a simple-minded way, have telephoned the Police, rather than write to the Attorney General's Office, who took 4 months to reply to say they were not getting involved. All Chancellors and Archdeacons and Diocesan Registrars have probably had the tedious experience of having to sort out this kind of event; that, if there is one thing that causes the Police to react within hours, is the report of the discovery of bodies in a churchyard, and rightly so. Where better to hide a murder victim? Only when they are reassured that they are old bones and not fresh ones, will the Police go away. Had the objectors here reacted in a less grand, less useless and more normal fashion, and telephoned the Police, rather than writing to the Attorney General's Office, much of what has been complained about could have been sorted out. Ordinary people in Britain, if witnessing what they conceive to be a crime, telephone the Police. They do not pen a missive to the Attorney General.

472 I was told during this hearing that such enquiries of the Attorney General are usual in this kind of law. To obtain protection for Charities engaged in

litigation may be the case, but I find that this was also used to puff up the flyers to impress potential objections. At a direction hearing one of the objectors, when I queried these actions said: **" *we only wanted to get them to talk and get them to agree"***. I find in this case that unless the objectors got, by whatever means, what they wanted, the word negotiation was meaningless.

473 The use of either civil or criminal law is not a weapon; it is not a device to make one's name in reported cases; it is not to be used as a big stick to threaten those opponents, nor to make one's own publicity appear more weighty than it might otherwise seem. Like marriage, in the words of the Prayer Book, any litigation is " not to be enterprised, nor taken in hand, unadvisedly, lightly, or wantonly .... but reverently, discreetly, advisedly, soberly". It is not to be a front for PR gestureism. Either you litigate or you do not.

474 On 3rd July 2013, Mr Buxton wrote to the Attorney General's office urging action, and complaining (not unreasonably) of a four month delay (**1990-1993**), and for the Attorney General (with a copy for the Charity Commission) "***to fulfil his responsibilities as guardian of the public interest".*** In respect of what he describes as **"*serious violations of Acts of Parliament".*** He indicated that undertakings had been requested from the Church and LBTH not to occupy the new buildings, other than for the benefit of the public, under s10 of the *Open Space Act* 1906, at least until 30th September 2013, during which time "negotiations" could take place, failing that they would be applying for an injunction, though perhaps with some realism Mr Buxton writes: "***it is unrealistic to expect that the LBTH and the school will be amenable to any sensible discussions or negotiation unless legal proceedings are commenced claiming the relief sought in the draft Particulars of Claim".***

475 He wishes for the for permission to be given to bring "charity proceedings" ***"on the basis that there is a charitable trust to protect,"*** as he alleges that

the LBTH are trustees of an open space which falls it on the ambit of "charity proceedings". He accepts that whether any claim against the School or under the DBGA would be also authorised would have to be considered

476 Now what to non- lawyers does all this mean? It is clear that the lawyers, acting on half fees saw, and see, this as an extraordinarily interesting legal problem (as, indeed, I was told at Court). Their enthusiasm in respect of the legal argument involving open space law ran parallel to but (save as it might mean they could win) had not initially been at the forefront of the objectors' reasons for objections, which were aesthetic until, I rather fancy, they had the legal situation pointed out to them. That is not an unusual position for many litigants, it is fair to say. In his closing paragraph, Mr Buxton informs the Charity Commissioners and the Attorney's Department: ***"we are more that happy…if need be, to identify the identity and status of any claimant or claimants apart from our own client SOS***".

477 Given how matters were moving, on 3rd July 2013 the Directorate of Finance at LBTH reported (**1994-2007: "*The cost of the new building erected on the land has been funded by contributions provided by the Council of £1.17 million and s106 of £300.000. In the event of a court order to demolish the building, this will have both financial and reputational implications for the Council given the level of investment identified ".*** Not only would those costs be in jeopardy but the service budget would have to make provision for the legal costs (grossly underestimated at £25,000) of fighting off the legal challenge of the objectors. Legal advice had been taken which advised that the council covered its legal back by taking a formal decision (within its powers) to: ***"provide the new building for the purposes intended and to set aside or enclose part of the open space and restrict access to it…. And to grant to the school the right of exercising the powers conferred on the Council ".*** The Council was advised to record a

formal decision in theses terms, namely that ***"it is exercising its powers under the 1967 Order and that it is satisfied that the building can be maintained without unfairly restricting the space available for public recreation in the open space, and that part of the open space can continue to be enclosed … but the risk of challenge should be noted".*** This belt and braces decision comes late in the day, and shows that LBTH had also taken their eye off the ball at an early stage of their decision making process. Had this decision been taken in the early stages of this matter it would have been more difficult to challenge. Pausing there, the good community tax payers of LBTH are from now on being faced with potentially somewhat hefty legal and demolition costs by reason of the actions of the objectors and their £1- a- head- liability company if the objectors are correct. This report specifically considered the *Equality Act* 2010 (**2004-2006)** ***"... on balance any impact in terms of fostering relations and advancing equality with regard to age, race, religion and belief in terms of the school itself would be justified, given the type of school it is, the need for additional school places within the borough and the particular constraints of the school site".*** This document also stresses the importance of securing by way of an agreement to a community use of the building by the inclusion of a toy library, a family learning centre which provides advice for parents, language classes for those for whom English is not their first language. The building would be accessible to the disabled, and the end result would produce an additional area of open space, greater than that available to the public at present. A letter in response to the objectors was prepared on behalf of the Council **(2008-2011),** which is before me only in draft.

478 I find as a fact that the LBTH did at all material times consider the ethnicity issue in coming to their decision, which is reflected in Council minutes and inter section notes. Their decision in respect of that aspect was not challenged by the

local councillors for the ward, nor the local MP nor any elected Muslim, nor any of the parents of Muslim children at the school. All wanted local education for their children, and the expansion of its building was a good idea.

479 In the light of all this and on behalf of the school Winckworth Sherwood wrote on 5th July 2013 to confirm that the school would not enter into any agreement to use or occupy the new school site until 30th September 2013 nor to occupy it save for the ***"purposes of the trust for the benefit of the public arising under s10 of the Open Spaces Act 1906***" **(2016)**. I am surprised at the brevity of this letter, which does not seek to protect the school's legal position by making it clear that all this is totally without any admissions being made as to the legal challenge being mounted against it. In passing, I would have expected such an undertaking given on behalf of the school to be hedged about with caveats that this was without making any concessions as to the validity or otherwise of the claim but it was not. More sensibly, the LBTH on 9th July 2013 noted the position of the school and indicated that the LBTH from the Mayor downwards was still considering their response**. (2019-2020).**

480 Mr Buxton wrote again to the Attorney General's office on 12th July 2013 **(2021-2023**). In that letter the potential claim for injunctions and breach in respect of the tombstones is dropped, as it had to be accepted that tombstones at surface level had been largely or wholly cleared in the 1970s. Sensibly, as on the documentation I have referred to above from the site architects and MOLA any such claim just could not be justified. I see no documentation before me that showed that SOS was dropping their claims in respect of their allegations as to criminal activity of the Rector. I suppose that in PR terms it was regarded by them as an eye catching headline. There were indications that he was also rowing back from the land being held under a charitable trust, as distinct from a species of statutory trust for public purposes. In respect of the other matters complained of, he continued to urge the involvement of the Attorney General,

urging his (the Attorney General's Department to speak to the SOS's Counsel. Given the complaints the objectors now make about secrecy and non-disclosure, the outside world might be somewhat surprised at their suggestions. It might have been fairer if that suggestion had included the legal advisers of the LBTH and the School. I remind myself that at this time the school was being built in accordance with a legally unchallenged planning permission and a faculty. Reading this correspondence, it is as if the objectors considered themselves existing in a parallel universe in which un-appealed decisions could just be ignored, or "negotiated" away, preferably with the help of influential persons or using what they perceived as being the hoped for muscle of the Attorney General.

481 On 17th July 2013 the property team **(2032-2033)** at the church received a report that the s106 money was "on hold" because of this potential litigation. I note with some concern that moneys which could have been spent improving the western open end of the gardens for all the general public and, indeed the wilderness adjacent end, have, apparently had to remain unused pending the outcome of this litigation (save for the efforts to obtain a new design for the gardens). The effect of all this has been that the wider public of LBTH have been unable to benefit for over two years by seeing any improvements to the gardens. The money was there, the design team identified, but the litigation, now starting with SOS threatening to bring judicial review proceedings prevented, and prevents, these improvements taking place.

482 The draft reply from the Council had as I have said been set out at **(2008-2011)** maintained that the intended claim by the objectors is unjustified and would be resisted. On 19th July 2013 the LBTH formally replied to the SOS lawyers, saying their claim was ill founded and would be resisted **(2034-2038).** On 26th July 2013 a licence [for occupation by the school] was granted to the school's new building under the 1967 Act. This led to a judicial review

application by the objectors, which was stayed by agreement. The objectors had (at last) begun proceedings. The judicial review proceedings were the proper ones at that time on their own arguments to be brought to Court. They appear to have been claiming (at least on the correspondence I have referred to above) misfeasance by someone who left EH to become an officer of the Council, improper decision making by the Council etc. They said they had the (I assume) evidential support of certain councillors, they were making allegations against the decision making processes of EH, the Council planning department. Judicial review proceedings were issued by them, but not pursued. They were (and remain) adjourned. I find as a fact that the objectors made that choice, having found that neither the church nor the Council would be bullied into doing what they wanted, and that the issue of these judicial review proceedings was being used by them as a device to force "negotiation". On these matters judicial review in the Administrative Court to challenge the actions of a council or other public body was the proper forum for litigation, although late as the building was up and in use. The objectors did not go follow through with their application, and their excuse for not so doing was that they considered the Consistory Court to be, *inter alia*, a (cheaper) alternative. I reject that completely, given the expenses which have been incurred since 2013. Nor does that hold water even in legal terms. They had, they claimed, legal advice supporting their stance and the £30,000 fund to litigate then. They chose not to continue with their judicial review litigation, but continued to try to put pressure on the other parties which has led to delay, mounting costs and a situation which by their very delay has allowed the legal basis of their claim to change by the 2015 amendment to the *Disused Burial Grounds Act* 1884. I find as a fact that their conduct of this litigation has shown that they were prepared to strike but not to wound. Their campaign by way of e-mails and flyers has not advanced their cause, but rather meant that all the other Parties involved in this case have been subject to demands, allegations and inaccurate statements

which have, in my opinion, amounted not merely to the (proper) robust conduct of litigation, but to conduct falling just short of harassment, and certainly amounting to smearing behaviour. As I understand it the Court of Arches did not have before it the full files of correspondence, emails etc., which I have had the advantage of pursuing. I bear in mind that much of the activity up to this point had been conducted by lay people and not their lawyers, but unbridled enthusiasm for however worthy or arguable a cause should not have resulted in the kind of correspondence I have read. Given this behaviour, I have thought it right for the Parties' own words and actions to be publically set out above so that no allegation of secrecy or misinformation can be made. This is how the Parties acted as set out in their own documents. It may be that their demands for full disclosure have resulted in the presentation of many of the Parties in this matter in a less than constructive light. I have some doubts if a majority of the admirable subscribers to the restoration of Spitalfields would support the spending of £30,000 of their moneys on urging a legal case for the Attorney General to prosecute the Rector in the criminal Courts. That is what they wanted, among other things, the Attorney General to do. When the Attorney General would not so act, for some reason, the objectors did not bring their own private prosecution which they could well have done. Again, they make public allegations without carrying out their threats. That, of course, may have been that they were given legal advice as to the technical difficulties of making a criminal case stand up; there is a difference between successfully prosecuting some mad followers of a sect who have dug up graves, and a Rector carrying out authorised building works which disturb stray bones. It may be that the objectors (as do many litigants) heard what they wanted to hear in a technical sense but decided to use to use that bare statement in blood curdling PR flyers to advance their cause. I know not, but for whatever reason they did not bring even a private prosecution. I bear in mind that this case of disturbance of bones is not the usual one of the deliberate grave disturber or

black magic practitioner. The Rector here applied (however, inaccurately) for a Faculty and reverently reburied such disturbed bones as were found. The burial disturbance objection was later dropped by the objectors, who concentrated their firepower, rightly, on the building in the churchyard.

483 In the light of the objectors' demands, the school through Winckworth Sherwood agreed, as I have set out above, to an undertaking not to use the school until 30th September 2013. So the objectors had now managed to block the finished building for the use of local pre-school children, but also to delay the implementation of the restored gardens with the s106 money for the local public. I am not surprised that some local societies appear to have backed out of objecting from this point onwards. Local objectors live in their own community, and would have had to explain and justify their actions to their neighbours.

484 On 22nd July 2013 at a PCC meeting the Rector reported that he had had a **"*couple of nasty e-mails* [**about this matter] **but that these had stopped".** There had not been a meeting between himself, Ms Whaite and the Archdeacon **(2039-2042).** The Rector was concerned: ***"that monies collected for the restoration of the church are being spent on things opposed to the church and would like to see a copy of their legal advice".*** As he was not a trustee of the Spitalfields Trust, which had paid for the initial legal advice, he would not have been entitled to that, but, if there were a legal advice given to and paid for the FoCCS trustees, as a trustee he would have been entitled to that. However, if paid for and funded by SOS, he would not have been so entitled (unless the moneys were actually from FoCCS but "laundered" through SOS).

485 On 23rd July 2013 Mr Buxton wrote on behalf of SOS in relation to the proposed amendments to the bike store on the school site, and arrangements

which the Council were proposing, as it happened still on consecrated land **(2072-2075**) and which involved the highways department **(2044-45),** opposing an s73 the Town & Country Planning act 1990 amendment application.

486 In 26th July 2013 Mr Buxton wrote to the Rector **(2046**) requesting copies of all PCC minutes relating to the 2009 documentation, and the application for the 2012 faculty and the proposals for the new building, (I note that the courtesy of offering to pay copying charges was not mentioned) and informing him of the intention of the objectors to issue judicial review proceedings. "***No doubt you will now take appropriate advice".*** He also demanded a raft of documents to be produced. He went on to write: "***Please also note our proposal for immediate negotiations to resolve this matter without the need for court proceedings, but you should be under no illusions as to our client's intention to proceed if LBTH, the School Governors and the Rector do not now come to the table to agree a sensible resolution of the matter without further delay".*** It is not clear from this letter just who were the objectors whom Mr Buxton was representing, and he has written other letters in which his specific clients were not formally identified, all of which might cause certain difficulties in any later costs' assessments.

487 On the same day, Mr Buxton wrote a detailed reply described as a **"(in part) Judicial Review pre-action letter**" to the LBTH's view of the situation (**(2049-2060).** He argued that the LBTH had: **"*ignored its legal responsibilities to the public at large as trustee under the open spaces trust… and wrongfully prioritised its own concerns as a local authority and the interests of the school over the interests of the public as beneficiaries under the open spaces trust".***

488 The bike store amendment was not of interest to EH, but word had got about in respect of this "illegality" argument, so that over the summer of 2013

various objectors were using this to object to the "bikes" amendment of the planning permission, but was opposed by a resident on Elder Street Spitalfields, who wrote (**2061)** on 27th July to say: "I ***am told that the original permission was illegal. If this is right, then I do not consider public time and money should be spent on considering this requested amendment***". What this objector was to think of the waste of money on the objectors' proposed demolition for the school, which had cost £1.17 million, partly funded by his council tax in part, let alone these litigation costs, is not before me (but it is a reason that I have set out in such detail the history of this matter, so that not only the Parties but the community tax payers of LBTH can fully appreciate what has been happening and what the objectors want their Council to pay for). It is only right that the community tax payers of LBTH are apprised of what has been going on. Anyway, more objections followed to the re-siting of bins and a bicycle rack on the school site which was of course, still, built on the disused churchyard. The late Mr Vracas objected on 29th July 2013, setting out the legal objections which from now on were taking centre stage, as against the "Hawksmoor ideal" argument (**2062-2063).** He urged the council members to desist from "***sheepishly …following the eccentricities of the Legal Department***". There appeared to be a subplot in this letter involving the potential sale by the LBTH of a Henry Moore statue, "Old Flo". Happily, I was not troubled by any of the Parties about this matter. On 24th July an objection from a Mr Whaite of Ezra Street E2 is sent to the Council. I know not if this is a relation of Ms Whaite (who herself objected (**2066)**. In any event, he too was fully entitled to express his views which are in accord with other objectors. He wanted the Council to apply: ***"a fresh and open minded approach"*** (**2064-2066).** Mr Whaite complains that (in respect of a loss of open space of either 365 sq. metres or 75 sq. metres or more if the bins are also removed): *"**The report ignored the effect of the conservation area consent to demolish and instead sought to rely on the fact that the 1969***

permissions did not require removal of the temporary building after a certain period. But to rely on this original omission – made in a wholly different social and cultural context - is to take a blinkered and unimaginative approach, and it perpetuates earlier mistakes. Some 40 years on, the context was wholly different, and it calls for an open-minded approach. The Church having been brilliantly restored and brought back to full use, there is the opportunity - and indeed the requirement - to examine whether a building should be on the burial ground at all" **(2064-2065).**

489 On 26th July 2013 a letter in similar terms, but requiring production of different documents was sent to Winckworth Sherwood, the school's solicitor **(2047-2048**); it was the view of the objectors that :-

"***It appears that you have been working closely with the Council which would attempt to find a solution which would somehow retrospectively validate the unlawful use made of the site and unlawful works carried out. We have been strongly advised by our Counsel that the 1967 Act and the 1967 Order was wholly incapable of authorising LBTH's actions or decisions or the school's works or proposed use of the land; that the new building was erected unlawfully not under the 1967 Order and that the new building and proposed use of the land cannot now be validated or authorised as proposed by reference to licences or lettings on terms as yet unidentified by reference to Articles 7 and 8 of the 1967 Order".***

490 As against the LBTH this letter is the nub of their argument. However, much as that might have assisted the objectors in judicial review proceedings in 2013, how does that effect this Consistory Court's decision now, when its main concern must be the illegality of building on a still consecrated graveyard at that time and the current legal position?

491 The Council replied to Ms Whaite on 31st July, as she had apparently e-mailed them with replies to matters raised by her solicitor (**2017-18**). Neither English Heritage **(2017)** nor the London & Middlesex Archaeological Society (**2069)** objected to the bike and bin store amendment. The Council granted this amendment on 1st August 2013 (**2070-2071).**

492 Given the intransigent stance to date of the objectors who wanted an open space, full stop, and the alleged criminal breaches being pursued by them (at least publically), it is difficult to see just how any negotiations could take place (especially as the objectors had to date said nothing about the costs of the building, were it to be demolished; costs which the local council tax payers had already paid up for the new building). The main objectors were an off the shelf asset-less company, each SOS director secure in the protection of their £1 each guarantee limit. As I have said, I do acknowledge here that some objectors do not appear to be such shareholders, and had the financial courage of their own convictions to put some moneys towards this litigation.

493 Over the summer 2013 matters plodded on. The school year was approaching and the undertaking period not to occupy the school was coming to an end, as was the three month period within which Judicial Review proceedings had to be commenced (running from 18th July 2013). The Diocesan Registrar was suggesting mediation, but complained: "**The *old building was unusable being in a state of decay and containing asbestos. The surrounding area contained lots of drug needles etc. in the undergrowth. The Church and the School consulted widely with Spitalfields conservation groups and with the Council in submitting the planning application. The Faculty process, of course, included consultation with all relevant amenities and societies and in particular English Heritage who approved the new building. NO significant objections were received during the whole***

consultation and petition process and it is most unfortunate that the arguments raised by your clients were made well into the construction of the new building… the Old Building was authorised under the 1967 Order and the school Governors always assumed that this authority continued given that the Council approved of and consented to each step taken by the school" (2086-2087).

494 Well, that might be regarded as a slightly sanitised version of the history I have set out above. I am also concerned, given how the objectors' arguments had now developed so that there might appear to be the obvious beginnings of a difficulty between the legal position of the school (let alone that of LDBS) and the Council that greater care was not taken as to just who would be representing whom. This situation continued until the first hearing before me when Winckworth Sherwood were representing not only the Diocese in the running of this Court, but also two of the three building Parties, who might, potentially have been (or be) in dispute with each other as to the legal responsibility as to how this situation had arisen. The excuse of saving money and convenience is a risky stance to take in litigation.

495 At last, out of the depths of Whitehall, prodded by another e-mail from Mr Buxton, the Treasury Solicitor's Department replied on 9th August 2013 **(2088-2090)** Their view was as follows:-

" Prior to the 18th July resolution [of LBTH] [a belt and braces attempt to cover their back by a post hoc resolution] ***(1) there were probably breaches of s3 of the Disused Burial Grounds Act 1884 and (2) it was reasonable to argue that there had been breaches of the s10 Open Spaces Act 1906 trust which applied to the use of the site …. The Attorney General's current view is that, although the contrary is strongly and reasonably arguable, there were not breaches of s10 Open Spaces Act 1906 trust because the Rector and Tower Hamlets could and did terminate or vary the 1949 Deed and the***

terms or scope of the trust which arose under s10 of the Open Spaces Act 1906 by reason of it, without the prior approval of the Court or the Charity Commission. If the 18th July resolution is valid, then its effect is to ratify the use of the Site". Given that the Attorney General considers that the resolution is valid then: ***"the result would be that there were no future breaches against which to seek an injunction, and that it would not be in the public interest for the Attorney General to take or authorise steps to be taken either by way of criminal proceedings or (if that were possible and proportionate) by way of civil proceedings in respect of possible or probable past breaches of s3 of the Disused Burial Grounds Act 1884 or s 10 of the Open Spaces Act 1906 Trust".*** The Attorney General went on that it is understood that the objectors are intending to take judicial review proceedings: **"*which will almost certainly involve the determination of any issues as to the validity and effect of the 18th July resolution. Pending that determination it would not be appropriate for separate proceedings to be taken, and accordingly, at least for the time being, the Attorney General does not propose to take nor to authorise proceedings to be taken in his name in respect of the churchyard or its use and he does not grant your client permission to bring relator proceedings …"*** The Attorney General goes on to state: "***it is not clear that s3 of the 1884 Act creates a criminal offence. There is no statutory provision for the consequences of breach of the prohibition in s3 of the 1884 Act and whether a breach of the prohibition constitutes an indictable offence is a matter of construction of the statute. The presumption in a modern statute is that without clear language, a criminal offence will not be created:*** R *v Horseferry Road Justices ex p IBA* [1987] QB 54". The letter goes on to say that the case of R *v Kenyon* (1901) 65 JP Reports 730, in which persons pleaded guilty to the disturbance of bodies, of whom one received a sentence of imprisonment of two months, that that that authority was not argued on the lack of statutory provision for a breach, or whether it is an offence open on indictment. The *Kenyon* case was

a brief authority reported on sentence alone. Thus, the objectors on 9th August 2013 were receiving no support from the Attorney General to prosecute the Rector. Indeed, they are told in terms that procedure by way of indictment (were that to be what the 1884 statute had resulted in) for breach of a statutory duty **"is never used today".** Even in 1976, wrote the Attorney General, the Law Commission described the doctrine "**as obsolete but not dead"**. As I understand it, that letter did not surface for public scrutiny until the disclosure of documents in the spring of 2016.

496 Had the objectors mounted a private prosecution of the Rector, it would have been an interesting legal case for lawyers, but what good it would have served is doubtful. There is all the difference between the activities of body snatchers or greedy developers, and that of a Rector allowing a building on his graveyard for which he has thinks he has received a permissive Faculty. However, such a warning shot did not impede the objectors' presentation of what they (as distinct from the Attorney General) considered the law to be. The Attorney General went on to recognise that the objectors dispute that the LBTH resolution is valid, and want to argue the point. The Attorney General considered that the 1949 agreement brought into operation a charitable or public trust, but that the *Open Spaces Act* did not create a trust over the freehold of the land which remained vested in the Rector and that the terms of this contract could be varied by agreement at any time between the Rector and LBTH (**2092):-**

"The terms of the contract between the Rector and Stepney Council created by the 1949 Deed and consequently the terms of the trust created by s. 10 Open Spaces Act could be varied by agreement between the Rector from time to time and Tower Hamlets. This on the basis that

1. The contract was a bilateral agreement which prima facie might be varied by its parties (or their successors).

2. Tower Hamlets would have power to agree such a variation as a matter of necessary implication under ss 6, 9 and 10 Open Spaces Act 1906 and/or under s.111 Local Government Act 1972.

3. That right in Tower Hamlets to agree a variation of the contract does not arise under the terms of the contract, but outside it; accordingly it is not a right which is subject to the trust created by s.10 Open Spaces Act 1906, with the consequence that it can be exercised so as to cause the terms of the trust to be varied without regard to the fact that Tower Hamlets in its capacity as trustee of trust [sic] could not properly have done so. As mentioned above, it is recognised that the contrary is strongly and reasonably arguable on this point." It is not clear to me whether the Attorney General's Department were told subsequently that the objectors had chosen to adjourn their Judicial Review proceedings, where this argument could properly have been made.

497 Nor is it clear to me just who were then the clients taking this approach: the FOCCS Trustees, SOS, Ms Whaite and/or other individuals? The letters from Mr Buxton to other Parties at this point do not make this clear.

498 Indeed by letter of 6th September 2013 **(2093-2095)** to the Council Mr Buxton indicates that: ***" we have been preparing court papers to lodge if only on a protective measure to preserve the judicial review time limit… we are also likely to lodge a separate application for judicial review of the recent decision following the s73 application on the planning permission".***

He goes on to state the objectors' position:-

"…we believe your, the school's and the Church's respective position to be untenable. So <u>in a nutshell the building must in due course come down and the whole area restored to open space.</u> This includes the area both occupied by the new building and the area behind which includes

the playground, the site of the extension built onto the playground in 1987and the entire area currently fenced off". He goes on to set out a wish list of the legal necessities to achieve this aim:

" 1) ***A further/ lawful faculty covering the new building (while it is extant) bones, bodies, burial vaults and fencing)***

2) the terms of any lease needed, including the amount of rent (including the play areas) the length of the lease and contracting out of the Landlord and Tenant Act* 1954*)

3) the need for review and amendment /replacement of existing documents (for example the 2009 agreement)

4) clarification of the public's rights of access to all parts of the area of the school

5) the fate of the £25,000 paid by the school for the intended licence

6) the lawfulness of monies variously paid/secured for the construction of the new building

Our clients expect their legal costs to be paid …. <u>So far as our clients are concerned it is non-negotiable</u> that <u>the building should come down and the open space restored</u> …".

The carrot of ***"many permutations as to how this is to be achieved"*** is dangled before the LBTH.

The underlinings in this open letter are mine.

Truly, the original desires of the FoCCS and the Restoration Trust for the restoration of the "Hawksmoor vision" had grown into serious proposed litigation.

499 On that same day, 6th September 2013, there was a meeting of the Trustees of FoCCS and the Restoration Trustees, 5 of them present including the Rector together with three others including the secretary and an organ consultant in attendance. There were substantial and detailed discussions as to the organ

restoration, cash flow problems and the method of invoicing All perfectly proper, but nothing (at least in the document produced before me) deals with the bubbling litigation being organised by Mr Buxton. Perhaps I have not been provided with the full document. It stops at page **2097,** or perhaps they were distancing themselves from the litigation activities of the SOS; although I remind myself that these FoCCS trustees had authorised £30,000 as a fighting fund. It is not clear to me where how/when that was spent.

500 In the event, the judicial review application was issued on behalf of Spitalfields Open Space (SOS) on 9th September 2013 (just within the three month period within which judicial review proceeding should be commenced). These were brought against the LBTH and the trustees of the school and against the Rector (**2098-2105).** The reasons stated that: **"this claim is lodged on a time protective basis with application for a stay".** They were out of time in respect of the original planning application granted in 2011 which the objectors accept was not challenged at that time, so that this application for judicial review was tacked onto the later and far more minor recent planning decision in respect of the bins (**2104-2105**), but the argument is intended to cover the past history.

501 The School Governors met by chance that same day under their new head, Mr Morant (**2106-2113)**.The roll had fallen, but increases were expected. Half the pupils were in receipt of free school meals, 55 children were on the special educational needs list, though this was expected to decrease. One gets the impression from these minutes of a new head and a new broom, who had the aim that "***100% of the teaching and learning must be good or better***". He had met with staff and was clear as to the implementation of behaviour and expectations within the school. In respect of the litigation problems the proposed meeting between the parties was discussed. It was hoped that there might be an agreed outcome from the "mediation", but it was recognised that

"***position had become entrenched***". It was reported that: "***some members of the Parents' Association who have considered going to the press about the impasse and need to be kept informed and assured that the IEB is working in the interests of the pupils and the school".***

502 The autumn of 2013 saw various bodies considering the situation. A mediation meeting between the Parties took place between the Parties on 19th September 2013, and another meeting was scheduled later in the month On behalf of SOS Mr Buxton had asked for the release of PCC minutes about the decision behind the whole decision making process in respect of the school.

503 A note was prepared by the Rector for the PCC on 10th September 2013 (**2114).** It set out what had been happening, but in that note I read: " ***It should be noted that a large amount of intimidating and very inappropriate behaviour, e-mails and phone calls had been targeted at the Rector and various members of PCC and staff – often suggesting but not reflecting the true legal process. Derek Richards and I [the Rector] (FoCCS trustees) continue to be concerned that FoCCS money and support is being used inappropriately to support the SOS campaign. The new head teacher and many parents are very upset that the use of such a building is being hindered by SOS".***

That was also the day on which there had been a meeting between all the Parties to see if something could be achieved by way of settlement. All that was agreed was that a further meeting was to be held on 26th September 2013.

504 I have not seen any accounts of how FoCCS has spent their £30,000. That may or may not be a possible future matter for the Charity Commission. I make no finding in respect of this. However, it is clear that by now the whole situation was turning unpleasant and difficult.

505 On 11th September 2013 the FoCCS and the Restoration Trust met **(2115-2117)**; 8 people present. There were perfectly proper discussions about the organ funding contractors. By now the growing conflict of interest between the Rector and the FoCCS had reached the point when he could not attend their meeting. He did, however, send an e-mail dealing with aspects of church maintenance, but went on to add:- "(***He) wished to see the written legal advice upon which the trustees at the last meeting (1 May 2013) resolved to allocate up to £30,000 in to a churchyard fund for the purpose of bringing the churchyard back in to an open space".*** It was agreed that this should be forwarded to him. As a trustee of FoCCS he was fully entitled to see this document, and it is of some concern that other trustees (a small enough number as there were) were prepared to authorise this money to be thus earmarked without at least obtaining the views of other (absent) trustees about the propose of this expenditure. I have no doubt they assumed he would object, but this is an example of the FoCCS/ Restoration Trust just acting without giving full and proper consideration of the carrying out of their duties as trustees in authorising the expenditure of moneys subscribed for the restoration of the church. This may be considered by the Charity Commissioners at a later date. I do not know. However, I find it symptomatic of the Trustees' keenness to get involved with the objections to this new building when those objections were being fronted by their own co-trustees (Mr Dyson apart; as a local architect he was involved with SOS but was not a trustee of FoCCS).

506 The minutes go on to record that the Rector: "***referred to 'intimidating behaviour and scurrilous emails that…could have only come from FoCCS sources'. The trustees were unsure as to what he was referring to, but as the Rector was not present they could only deplore any malicious and anonymous emails. His unhappiness with regard to Spitalfields Open Space could not be addressed, as he was not present".*** Derek Stride

(son of the Rev'd. Edgar Stride who had been the Rector when the restoration project had got under way) told the Trustees: ***"that he believed that many people were insulated from the social issues of the area. He said that schools were a beacon and infant and junior schools were the only chance that many children would get in life. The trustees reiterated that they shared these aims and were extremely sympathetic; however, there remained the question of how best these aims were to be met".*** This from a body who had minuted earlier that it was not for them to solve the school's problems, and was actively supporting the demolition of the school building.

507 I note here the closeness between the FoCCS trustees and SOS in personnel. They did not minute that SOS was nothing to do with the intimidating behaviour although 2 out of the 4 SOS directors were present at that meeting. It was agreed that a meeting should be arranged to discuss these expressed difficulties, and indeed Ms Whaite wrote to the Rector on the following day **(2118).** In that somewhat disingenuous letter she denies that any of these anonymous e-mails came from the Friends Office or any of the Trustees (although the minutes did not state this in terms, it may well be that that was said at their meeting). She adds for what ever reason: ***" I would be grateful if you would confirm that you equally deplore such rumours".*** It may well be that local feelings causing the polarisation of the Parties was becoming public knowledge. Her letter continues: ***"...new development appears to entail the breaches of two Acts of Parliament (one of these potentially a criminal matter) and breaches of the trust for public open space, it simply is not a matter which a responsible body of trustees could turn a blind eye and acquiesce in."*** (I remind myself here of the terms of the Attorney General's letter of the previous month which, I assume, she and the other Trustee objectors had been shown). She comments on the activity of SOS and their solicitors in the proposed judicial review proceedings against LBTH and the School, and the "without prejudice" meeting. This is really

ludicrous correspondence. She is one of the four SOS Directors with a co-FoCCS trustee Mr Vracas, who was also at that last FoCCS Trustees meeting It would have been more sensible to have had another trustee write this letter to show some degree of distancing between FoCCS and SOS. It is indicative of this whole incestuous arrangement that this could not be said to be at arms length.

508 Again, here it is clear the involvement of SOS, if not as a front for the Trustees of the FoCCS, was at least a device to conduct litigation without risking personal costs, or involving FoCCS in any potential difficulties with the Charity Commission spending money on litigation. I was not shown any response from the Charity Commission in respect of FoCCS's enquiries about this situation.

509 I still ask where and how was the FoCCS £30,000 spent? If it has not yet been spent, is it in an account saved for assisting to fund the garden improvements as and when these begin? If it has moved from FoCCS funds, where has it gone? Who are the signatories on the bank of other savings account where it is held? If it has been spent, on what? When? Many supporters of FoCCS who subscribed and subscribe to the restoration of the Church may want to know, and are entitled to know. So may the Charity Commission. I raise these questions which, in the litigation before me might not have surfaced save from a reading of the totality of the trustees' minutes which I called for, having seen only some produced which were relevant to the matter before me.

510 I return to the FoCCS trustees meeting on 11th September 2016 Derek Stride, son of a former rector of Christ Church, reminded the trustees, and I repeat

" …that he believed that many people were insulated from the social issues of the area . ..that schools were a beacon and infant and junior schools were the only chance that many children would get in life'. The trustees

reiterated that they shared these aims and were extremely sympathetic , however there remained the question of how these aims were to be met ".

511 I remind myself that, not days before, the solicitor acting on behalf of SOS had written to say that it was **"non-negotiable but that the building should come down and the open space restored".**

512 The late Mr Vracas said he had attended the mediation meeting on 10th September but he could not give the trustees any details of what had passed as it had been "without prejudice". An interesting scenario. Correct if the FoCCS were not, like SOS, a Party to the mediation procedure (which itself costs money) but why then were they paying (if they did) £30,000 for legal advice? This just reflects the hazy line between who are Parties, and the duties of the FoCCS trustees under charity law. On 14th October 2014 there was a PCC meeting **(2119-2120)** when there was an argument about disclosing the PCC minutes requested by SOS, as the PCC was not a Defendant in the judicial review case.

513 On 29th September 2013 **(2123-2164)** SOS formally applied to stay their judicial review application ***"with liberty to apply on 7 days notice to enable the Parties to attempt to resolve this matter".***

514 There then followed, during the Autumn 2013, an interchange of various documents in reply to the Judicial Review application and the responses of the Building Parties. I need not rehearse these here as the arguments re-occurred in the substantive matter before me, saved to note that the solicitors formally on the record as acing for both the school and LBTH were Winckworth Sherwood, the Diocesan solicitors. (**2194)** However, all Parties named in the Judicial Review signed a Consent Order on 16th October 2013 to stay the Judicial review proceedings **(2199-2202)** save that "Should the matter be restored the Interested Party will submit summary grounds" **(2200)**

515 On 16th October 2013 there was an AGM of the Restoration Trust, 8 people present. The minutes (one page) reflect nothing but the re-election of Directors, the Auditors and the approval of accounts **(2212).** Given what was going on at this time, I find it inconceivable that, as is recorded under any other business: ***"There was none"***. Am I to conclude it was thought prudent to minute nothing? Am I to believe the Restoration Trustees dispersed in silence? During the autumn the school was preparing, via transitional arrangements, to move back to a board of governors, and escape from the oversight of the IEB.

516 Things appear to have gone quiet during the autumn of 2013, save for the for an extraordinary document, dated 13th November 2013, **(2220-2031)**, stated to be ***"not written or reviewed by lawyers but by lay people***". An unidentified hand written note states that it was delivered to the rectory on 13th November 2013. Headed:-

"**Without prejudice**

Privileged and confidential only to be seen by the Rector, church wardens and PCC of Christ Church Spitalfields and Directors of CCCV for 14 days after delivery to the Rector

Draft masterplan

Christ Church Spitalfields disused burial ground and open space"

This document, unclear as to by whom it was drafted, save that it appears to emanate from those who wish to restore the open space round the church, seeks to set out "proposals " to achieve their aims. They want the open space (including now a demand to include the public toilets outside the relevant envelope of land) to be "managed by its user community", and its ownership transferred to a new charitable company which should be under community control. It stated that to generate sufficient funding for long tern use it would have to share its facilities with the Hanbury Hall development (the church's

own hall). It demanded that the open space (i.e. the Rector's freehold graveyard) be transferred to a new charitable community trust .... under community control. In passing it stated that the "***church's burial policy should be updated so as to fully accord with Ecclesiastical and Canon Law".*** It demanded full disclosure of all documents financial and otherwise by everybody, the school, the Department of Education, LBTH etc.**.** The document demanded that the new buildings should be demolished after its 20 year life span from 2009, that the school should pay rent for the building to use it until then. It envisaged: ***"the possibility of joint management of the Open Space, the crypt, church activates and the new church hall",*** and " ***A joint charitable company to acquire the freehold or long term interest of the open space".*** Such a company would manage the open space ***"including the enforcement of, and the landscaping after the demolition of the new building"*** . This new body would provide separate forms of lease or licence to the school, church and other users of the new building and the open space generally and to regularise the occupation of all separate areas within the open space ***"without having to revert to the Consistory Court at every turn"***. The demands made in this document as to what the other parties would have to do, include such as providing a £500,000 guarantee to secure demolition costs at the end of 20 years from 2009, a demand for revenue sharing with the crypt café, and the demands go on. It demands to know about the possibility of the development of rival facilities at Hanbury Hall by the church and the PCC. It demands that the Church obtain a retrospective Faculty for the building on the graveyard, and for the disturbance of human remains. On it goes; one useful point this document makes is that neither Stepney nor the LBTH never made any by-laws for this open space. The document ends with a demand that "***The structures should be such that CCG [***Christ Church Gardens; a more marketable term used by some objectors later in these proceedings rather than 'graveyard'***] and its functions could be taken over***

by an elected secular Spitalfields parish council armed with local revenue raising powers under the Localism Act….Although a threat , it should be remembered that all these objectives are capable of being realised without agreement as a result of current legislation…current and proposed Planning and ecclesiastical Law and education law relating to academies with, if necessary, recourse to judicial review and the Consistory Court"

This document's final flourish demanded ***"SOS's reasonable costs must be provided for".***

517 SOS, as it later became apparent was the source of this document produced by Mr. Vracas. SOS's demands in this extraordinary document are a far cry from the earlier genteel views of the Hawksmoor lovers. I venture to think that once their own lawyers (whom the writer or writers did not, apparently, even do the courtesy of letting them seeing before it was sent) must have had a fit of the vapours on reading it. If this was how SOS considered settlement negotiations could be conducted (never mind its wilder demands) but on terms to be kept from the other Parties such as the school and LBTH, but only to be seen by the church representatives, the whole basis of their case had become in this document so utterly fanciful and demanding that it can only serve as a terrible warning to churches with groups of "Friends". Even the LBTH was not spared in this demand: they were to transfer their legal interest in the public lavatory on Commercial Street to this new body.

518 I found that this document to be extreme and threatening:

519 On 26th November 2013 FoCCS had a meeting with 8 people present (**2232-2234).** Apart from ordinary business, they discussed the raising of money for the trust's endowment fund ***"for the next 300 years".*** I note in passing that

there is a mailing list for members, used for their Christmas card marketing, as I would have expected **(2234).** Nothing is recorded about the on-going open space dispute, at least in the minutes.

520 On 28th November 2013 the Rector emailed the late Mr Vracas from whom the "without prejudice masterplan document" set out above had, apparently emanated in respect of the graveyard and the ***"newly developed Garden building which is still sadly awaiting use".*** He raises a number of pertinent questions, like ***" the church, school and gardens holding together as a piece of Christian ministry***", which, like the grandiose plans for the church and Diocese to give up the ownership of the land or the SOS's envisaged company sharing the church's venue company, overall he considered unwanted by many of the Parties, and not legally achievable in years, and made it clear that the lawyers and the other parties should be copied in on this letter **(2235)**.

521 As often happens with lay people, they become somewhat legalistic, so that when Mr Vracas replied to the Rector on 19th December 2013 **(2244-2246)** it is marked "without prejudice" (but I stress that all these documents have been produced for me to consider). He re-iterates his perception of the legal situation and raises concerns (as will be seen later) over the church's proposed café use of the area outside the south steps, which he considers that the church's use of its own freehold must be subordinate to the beneficiaries of the open space trust. He continues to be "gung ho" about his plan. "***And we are sure that when the lawyers get round to it, they will insist on us thinking about things we've never even thought of such as the Equalities Act, the Localism Acts and the duties of the council to get best value. There can be no comfortable and secret deals any more, we have to keep up with the times and stay in the open".***

522 I remind myself of the demands not a month before from SOS as to the distribution of their "without prejudice masterplan" marked "privileged and confidential" only to be seen by a very few, but now he rails against ***"comfortable and secret deals"***. Mr Vracas goes on plugging his views **(2244-2246**). Meanwhile SCABAL was writing to discharge the final planning conditions **(2236)**. On 5th December 2013 the Rector reported to the interim school Board of Governors that he had received the draft licence for the occupation of the new building by the school. It would have to be read by him and signed off by the LBTH. "***If agreed, the campaigners would be informed by the LDBS lawyers that the school will be moving into the new buildings and that it would be available for the community. The possibility of a judicial review remained, which would decide whether the planning process has been flawed. The Assistant Head said that parents were increasingly asking when the new building would be available"*** **(2242).**

523 I do note here that none of these parents were expressing any religious or cultural objection to use a building built on a disused churchyard; nor have any parents troubled this court with any evidence at all in support of that proposition. Given the lawyers were still, it would seem, trying to negotiate a way forward between the school, the objectors and LBTH, it did not help that at least some of their lay clients were conducting their own proposals with the church. At a PCC meeting on 18th December 2013 (**2247**) the Rector was reporting that another meeting was imminent between these other bodies which would allow the school to be demolished in 20 years (though how or in what ground he considered that the other Parties would go along with that, given the costs involved, I am unclear). These discussions to deal with the litigation was just becoming out of control. In the papers before me is part of a document prepared by a firm of landscape architects for FoCCS in December 2013. I have only been provided with a fragment, so I know not the purpose of such a document **(2249-2250).**

524 In the meantime the Education Funding Agency for voluntary aided schools (capital team) confirmed on 14th January 2014 that the school would receive some £562,649 out of a tender price of £2,088,870 **(2300-2302**) subject to various terms and conditions. LBTH had to ensure that various time phasings had to be completed to ensure the moneys being available within the relevant financial year **(2304-05).** During January 2014 various negotiations were being, apparently, carried on in respect of the use of the building by others and a hiring charge. A partner, Owen Carew-Jones, in Winckworth Sherwood, wrote to the Rector on 28th January 2014 commenting on certain ideas which were being **(2307)** discussed (not all this is before me, so much is unclear) save that he advises the Rector: ***" we must tread a fine line here between the use by the church and use by the School /community. Please show these drafts to SOS and the Friends, but do emphasise that you have commissioned these drafts and that they are not yet agreed with LBTH…"*** There appears to have been various inter-party emails, the gist of which were not before me, save that on 17th February 2014 Mr Inigo Woolf (LDBS) informs LBTH that he had declined to give Mr Carew Jones any instructions pending him having a meeting with the objectors' lawyers, whose concern appears to have been to ensure that the new building would be demolished within 20 years **(2309-2310);** he goes on to say :-

> ***" It turns out that the High Court has been chasing Richard Buxton to make up his mind whether to pursue the High Court proceedings [judicial review] or withdraw. It would seem that they are worried that a Judge will throw out the case. It also appears that Philip Vracas is making a lot of unreasonable demands, and that [the lawyers] want to move on to other projects. One of the unreasonable demands is that the Rector gives up his freehold in favour of the community, but this is not something that will ever happen whilst there are bodies buried in the Churchyard".***

525 I take it this was a reference to the over the top "Without prejudice" management agreement sent by Mr Vracas to the Rector; it was, as I have said, the kind of document which must have caused the SOS lawyers concerns when they read it. At this point their enthusiasm for running the SOS case might well have waned a little. However, it appears that those became the instruction of their SOS lay clients and had to be acted on at that time. Mr Woolf raised the need for the Rector to obtain a revised licence and management agreement to which, if they want, SOS could object.

526 On 28th January 2014 the FoCCS held a meeting; 7 people were present **(2311-2313)**. Business in respect of the organ was dealt with, there being a potential disagreement as to the contractual arrangements, which the Rector wanted to clarify; the Restoration Trust was financing the contract as client but it was the PCC as owners who were authorising the work. Ms Whaite's response was that she ***"would if necessary find a lawyer to look at those matters".***

527 Again I draw the attention of other churches to this kind of muddle as to the role which "Friends" groups have. They may raise the money but the work is to be authorised by the PCC. There should have been no need "**to find a lawyer"** in respect of this or other similar matters **(2311-2313**). This just shows the confusion between these bodies. Who is doing what? Who is legally responsible for what if something were to go wrong? I really do draw attention to any church being financially assisted by "Friends" <u>never</u> to get into this kind of contractual mess. Chains of command and responsibility must be clear from the outset.

528 Such "negotiations" between the Parties as there may have been appear to have run into the sands so that at a PCC meeting on 17th February 2014, the Rector reported that: ***" Garden Building: LBTH are working with LDBS on a revised licence and we may have to go for a new faculty".*** The Rector was to circulate this. A motion was carried by the PCC. I should say in passing that each

PCC minutes records the growth of a busy and flourishing church, for example in this minute **(2314-2315)** the installation of four new bells was approved subject to the finance being raised. It was reported that the local police had walked the graveyard with the Rector, and raised some security concerns which could lead to anti-social behaviour, though this had been better since the (youth) club was closed.

529 On 12th March 2014 there was a meeting of the School IEB Governors **(2316- 2322).** They were brought up to speed on the state of play concerning the new building **(2320-2321).** "***The diocese and council had demolished a dilapidated 1970s building at the back of the school and had built a low-rise, architect designed nursery and community building in its place. This had raised complaints at every turn from the Friends of Christ Church who saw the new building as an affront to the architectural heritage of the existing Christ Church. The position had become so acrimonious that the Friends had lodged an application for Judicial Review to challenge the legality of the planning decision with the High Court; this application is currently dormant but could be activated by SOS at any time. Should their J (udicial)R(eview) application be successful it could involve the demolition of a new building. While this was in motion lawyers had advised that the new building should not be brought in to use, which was an unpopular course of action with parents. Legal opinion was divided on the prospect of using the building but as it was judged that the Friends had a legal case that would be considered by the Courts so there was a risk in occupying it. Negotiations were at a very delicate stage and the prospect of Judicial Review could not be taken lightly as it would be time consuming and costly to enter into this process which would in any case block use of the building. This was a very complicated situation and other ramifications were stemming from it, such as concern over the payment of legal fees. Concern was expressed that parents did not know what was happening and wanted***

to know what they could do [to] help resolve the situation. It was commented that a Tower Hamlets councillor had emailed to say that a senior manager in the school had reported that non-occupation of the new build [sic] was not detrimental to the school. This was denied in its entirety. The Chair said that she would follow up the councillor's email. The Head told the meeting that parents had invited councillors to the school in two days time to gain support for the use of the new building. The Chair was very concerned that the planned meeting would be detrimental to the negotiations and she thought it more appropriate to take a group of parents to meet the councillors at the Town Hall. The political situation was complicated by the proximity of local council elections and the fact that for the Council, the issue of the new build was not a top a priority. The parent governor stated that she felt that governors appeared remote and not involved enough with the school. Other governors refuted this statement and supported it with examples of the involvement the G[overning]B[ody] had had with the school…..".

530 On 17th March 2014 there was a PCC meeting **(2323-2325)** but two pages are missing from the minutes, but it appears that the PCC agree to an application for a Faculty for the use of the Garden Building when it is necessary.

531 On 9th April 2014 Ms Whaite writes on FoCCS note paper to the Rector, and PCC, copying in the Bishop of London, the Bishop of Stepney and the Archdeacon of Hackney, giving her views on the legal position as she perceives it. **(2326)**. She opens with an unusual and sweeping statement. ***"The protection of the churchyard as an open space for the benefit of the public has been the obligation of the Rector and Church wardens for 300 years".*** No, rather it was a churchyard for the burial for some 66,000 persons. She also raises what she perceives to be potential problems in respect of the management and corporate structure for the venue business in the crypt, saying that ***"the relationship***

between the crypt and the churchyard public open space is, of course, a significant component of any business plan". She states that she wishes to attend the next PCC meeting with another Trustee and purports to settle an agenda for discussion and rehearses the by now well known arguments. Again I note that this is written on FoCCS headed notepaper, notwithstanding that it is SOS who, ostensibly, are involved in the judicial review litigation. I see nothing in the Minutes of FoCCS to ratify such a letter on their behalf. It must now have become very difficult for the legal advisers of SOS to conduct their negotiations when the individual Directors of SOS were firing off broadsides without (or so it would seem) taking advice from those who they were paying to represent them.

532 In the papers before me there is what appears to be this discussion agenda, **(2327-2332)** prepared by objectors for this proposed meeting. It argues, *inter alia*, that the Rector and Churchwardens cannot remain as trustees of the school and as principal members of the Church. It argues that, in effect, once their idealised "**Open Spaces Newco [sic["** was set up, the Rector and church wardens could no longer remain involved as they would be "**commercial rivals".**

533 On 25th April 2014 (**2333- 2340)** Ms Whaite and Mr Vracas wrote a long and detailed letter to the Rector and copy in the Bishop of London, the Bishop of Stepney and the Archdeacon of Hackney. It rehearses the legal position as seen by the writers of the letters, but makes a swingeing attack on the competence of the Rector, both as a school governor and in allowing/encouraging the school to expand by becoming involved in its design and funding. Apart from alleging improper actions as a rector, a school governor, a trustees of FoCCS , the writers go on to state that the erection and occupation of the new school building is unlawful, and that ***"These approvals were obtained because neither the planning committee of LBTH nor the Chancellor were properly or fully informed of the matters that have made its construction unlawful and were therefore misled in to approving the construction as being both lawful and***

generally approved. It follows that not surprisingly you have been unable to fulfil properly your roles of Rector, Trustee of several trusts and your further role as a Trustee of the Open Space Trusts…….We should point out that an overall solution which is the only workable solution will require the agreement and support of large number of bodies including the Bishops of London and Stepney, the Archdeacon, the Chancellor in approving the necessary wide-ranging faculty or faculties, The LDBS, LBTH as education authority, as the Open Spaces Manager and as the Planning Authority as well as its general functions as Local Authority for the area, the Charity Commission, the Department of Education (as the providers of the grant), the Attorney-General (who has overall responsibility for the lawful undertaking of charitable trusts) as well as you and the PCC, the present interim school board and the new board of governors, the present and new foundation trustees of the school and SOS and each of its supporting groups".

534 They remained adamant that, at best, the school might be allowed to occupy the building for say five years before its guaranteed demolition takes place otherwise it will have to be demolished in the near future and the grant and section 106 monies repaid. Given the tone and demands of that letter, again written on FoCCS notepaper, it is not surprising that any hope of compromise (even were it to have been possible) disappeared.

535 I note that this kind of correspondence appears to have been fired off by the individuals concerned, and not sent by the representing solicitor. Those views now appeared to be his clients' (SOS) instructions which Mr Buxton had, very properly, subsequently to act on. It is all very unclear. Just who was responsible for arguing what was just an emotional muddle. Legal points, good, bad and indifferent were jumbled up into outrageous demands by Ms Whaite and the late Mr Vracas. I find that these two persons had just allowed their intense vision of

what they wanted to cloud their recognition of reality, and they had become indifferent to the needs and views of others, let alone the financial consequences. There were legal problems which they had instructed their own lawyers to deal with, yet these demanding, indeed hysterical, letters helped no one in this matter, let alone their own case. With hindsight it cannot now be of surprise that their method of trench warfare did their cause far more harm than good by alienating others. Such good legal points as they could properly pray in aid disappeared in this welter of, bluntly, self-opinionated demands. Their conduct of, at least the later stage, this case alienated others who might have paid more attention to a more reasonable and balanced presentation of views; or, what would have served these objectors more usefully, if they had just got on with Judicial Review when they had threatened to do so.

536 On 1st May 2014 the Interim School Governors board met, and reported, *inter alia*, that: "***the new building remains unoccupied. Inigo Woolf, Chief Executive LDBS is in negotiations and a barrister for the [LBTH] is looking at the case; slow progress is being made. Christine Whaite, trustee of the Friends of Christ Church will be visiting the school" …. "it is hoped through negotiation to secure an agreement for the building to be used by the school for two years and during that period further discussions would be held about the length of the life of the building …the school cannot legally move into the building, and it was noticed that the children would not be covered by insurance. The Chair advised that contact with the local authority…should be made after the local elections on 22nd May as there would be no action in the interim.." (2348)***.

537 On 19th May 2014 it was reported to the PCC that plans for the garden and the use of the crypt were progressing, in the course of which a Victorian reredos had reappeared, having been stored off site for many years. This ghost of

Christmas past in the form of this reredos continued to meander through various later minutes. (**2350-2352).**

538 On 1st July 2014 Mr Buxton wrote to the Council (**2359-2360)** about a gas pipe which had been introduced from Commercial Street, asking why his clients (not identified in the letter) had not been informed and asking if there had been a Faculty for this work. He wanted to know why there had not been more discussion about his clients' "Masterplan". It may well have been that so florid were the demands in this "Masterplan", the other Parties could see little basis for any meaningful discussion.

539 On 9th July 2014, the FoCCS trustees had a meeting **(2361-2363),** six people present**.** At that meeting, apart from ordinary business discussions as to work in hand on the organ, it was "***proposed that the Friends approve the transfer of £30,000 to the Churchyard fund to protect the setting of Christ Church integral to Hawksmoor's masterpiece and towards the restoration of the burial ground. It had been hoped that together with LBTH, LDBS, the school and the church a way to protect the churchyard open space would be found but so far this had not been the case".***

540 The minutes went on: ***"In the opinion of Prof. Mark Hill QC an application for a churchyard restoration order should illuminate and address the outstanding issues".*** This was carried unanimously by the 6 people present, none of whom were church representatives. This motion shows just how intertwined the FoCCS were with the front organisation, SOS. It may be a matter for the Charity Commission to consider the use of this £30,000 as the existence of "a churchyard fund" appears to have been a new development. Most paying litigants like to be told their percentage chances of success in before indulging in potential litigation; few, save masochistic purists, are really concerned about <u>their</u> case clarifying English ecclesiastical or civil law. In passing the Minutes

note that there had been a fraudulent attempt to remove money from two of the FoCCS's bank accounts.

541 On 14th July 2014 the Interim School Governors received a report that, although further discussion were going take place, it looked like SOS were going to seek an injunction, and that their Counsel's advice was: "the case is evenly matched should there be a judicial review", but they were also told: ***"The local authority has £359K Section 106 money to upgrade the church grounds. Another development is that the Church of England is approaching Parliament for a change in the law, which would enable building on ancient burial ground but this is not likely before the end of the year "*** **(2365-2372).** That, indeed was then the case, but the timing of when that might be law and come into force was uncertain. These minutes reflected that the number of statemented children had dropped and the school was progressing. The Parents and Friends Association of the school had won a national award for the best new PFA. It was agreed that the school parents should be told of the situation. There was a completed but unused, empty building awaiting pupils and community use, which could not be used because of the legal objections raised by SOS and their supporters. The fenced off wasteland open space was also just also lying derelict there, with no public access.

542 On 21st July 2014 there was a PCC meeting **(2373-2376).** Among the usual business items was raised that the FoCCS wanted to restore the pulpit, but the on-going dispute over the school building made this difficult. (Throughout the minutes of both PCC and FOCCS I read of problems of interruptions and difficulties in church use caused by works being carried out for FoCCS with workmen and their tools). The Victorian reredos lurking in the crypt was going to be the subject of a place of safety order. It was reported that there, indeed, had been a meeting between Ms Whaite, Mr Vracas and a Mr Gerald Bland, who, I understand, was the solicitor advising them *pro bono.* This meeting was facilitated

by the Archdeacon of Hackney. It was described as a "listening exercise". What they had heard was reported as follows: "***In summary the SOS reps said: that if the children move into the building, they will go to Court."*** The PCC were awaiting the views of the LBTH on this impasse, but agreed to support the Council if the latter agreed for the children to go in.

543 That was not long forthcoming. On 1st August 2014 LBTH gave the objectors' solicitors notice **(2377-2378)** to the following effect:- They had no knowledge of any gas pipe being installed, a rather stale complaint by the objectors, but: "***It is the Council's intention to grant the school a temporary licence to occupy the building with effect from the start of September 2014. The temporary licence will provide for the licence to be brought to an end should we be successful in reaching a settlement in this claim and negotiate the terms of a longer licence or should a decision of the Court require that the building be vacated by the school to be demolished. We understand that you may, in the circumstances, wish to apply to lift the stay of the proceedings and we would support such an application".*** LBTH made it clear that it was still prepared to negotiate, but LBTH realised that it seemed that everyone had come to "put up or shut up" time, and that an application for an injunction preventing occupation of the empty but ready building by the children might be imminently expected. It came but not, perhaps, in the way expected.

544 On 5th August 2014 Mr Buxton wrote to LBTH (**2382-2384**), setting out his complaint as to how he saw the way that negotiations had or had not been conducted. He wrote: "***over the past 4 months since February you and you colleagues have conspicuously avoided engaging with SOS about the Masterplan or indeed with ourselves".*** He objected to the late approval by the Council of the management plan. He reprised the objectors' legal arguments and gave notice that the objectors would be making an application to the Consistory Court for a Restoration Order under s13 of the *Care of Churches Measure 1991* (but

they were also still considering than application to lift the stay on judicial review proceedings). By objectors here, although unidentified, I take it he is acting on behalf of SOS, who, at least at this point, are the legally represented objectors. Holidays intervened at the Diocesan Registry, so that the objectors' solicitors wrote to the LBTH on 12th August 2014 asking for an undertaking that the school would not be licenced by the Council for occupation, as least pending further notice, until 1st October (**2386-2387)**, and, if not, they would be making an application to the Administrative Court and to apply to lift the stay. In that letter the SOS solicitors appear to be rowing back in respect of the Master Plan up to a point: " ***if it is too difficult to contemplate the issues raised in the Master Plan (and we respect that reaction) then by far the cleaner course is to recognise, now, that there is no justification for the building remaining or being occupied, and secure its immediate removal."*** Three days later the Planning Department wrote back **(2388-2389),** now saying that they took the view that the original faculty permitting the building of the new building and the grant of a licence to the school to use it was sufficient, and a further faculty was not needed. Indeed, that the terms of this Faculty envisaged the subsequent granting of a licence to occupy. A later LBTH letter of 18th August 2014 **(2391-2399)**) dealt with the Master Plan negotiations. It is marked "without prejudice" but has been placed and indexed in the agreed bundle before me. As it happens this sets out a helpful summary of how LBTH saw their role, and the difficulties which implementation of the objectors' Master Plan would encounter, *inter alia* that the church would be unlikely to want to de-consecrate the churchyard or dispose of the land under a pastoral scheme. LBTH was, understandably, hesitant about Mr Vracas' idea of a transfer to local "trustees". ***"In our (LBTH) experience trustees come and go, and priorities in their own lives move on. … we have had experience of open space land that is not being managed properly by trustees, there are complaints … and the Council are powerless to take over".*** They make the point more than clear that the Rector owns the

land, and that the Council only manage it: ***"we see the biggest barrier as being the willingness of the Church to deconsecrate and dispose of this land".***

545 Those subscribers to FoCCS who thought that what they were going to do was to restore a church architecturally might now wonder just what and how their "cut and paste" objections to the new building were now aimed at achieving and at what cost. Objectors were now demanding (there is no other word for it) "negotiations" on a far wider plane to achieve what **they** want: an empty church yard now (or, at best, in a short number of years). The historic ecclesiastical land belonging to a church and its churchyard to be, apparently, separated, the church yard deconsecrated and run by secular community trustees. The demand for half a million pounds to be ring-fenced to fund their requirement of demolition after 20 years of the new building and the restoration of the churchyard. All to achieve their concept of the "Hawksmoor vision". I note that these demands had not been proposed in any public flyer or on a petition web site.

546 Now various things strike me about this document (many ably queried and refuted by LBTH in the above letters): was this what those initial objector subscribers of FoCCS, with their "cut and paste" emails, would have wanted? They, it would seem, were never told of Ms Whaite and Mr Vracas' jeu d'esprit of the new Master Plan (a document totally distinct from the 1995 document written to obtain funding). I struggle to find this new document considered, let alone voted on, by the trustees of the FoCCS. Interestingly, the co-authors of this new Master plan, with their concept of community based new trustees who are to manage /run the land under the Master Plan, do not seem to have given any thought to the possibility that they, too, might be in their turn out voted by other local trustees who might like, use and want the new building and might be keen for it to stay. As many political movements have found out, democracy can develop into forms not originally considered. There might (in future under this

Master Plan scheme) be more local champions for children's swings than for fashionable gardening features and architectural vistas.

LITIGATION

547 In the event, the endgame had now begun. Mr Buxton wrote to the Building Parties on 19th August 2014, **(2400**) asking that they obtain a Faculty for this full management licence. Judicial Review was now on the back burner as Mr Buxton writes: ***" … It does strike us as completely wrong for the High Court to be involved in this complex legal process at short notice".*** Given the earlier correspondence, those receiving this letter must have been a bit of a surprise, but litigants have a freedom to conduct their litigation as they want, though, in fairness, I (and most lawyers) would have thought that the Administrative Court would have been more than up to the intellectual struggle of dealing with this matter then and there. Bluntly, that is what the Judges in Judicial Review proceedings do, in a jurisdiction with reasonably strict time limits. It would be unfair to consider that the objectors were indulging in "forum shopping". Indeed, as I will set out below, their proper course should always have been to apply to the Consistory Court, once the they had missed the time limits for bringing Judicial Review proceedings, which would have been, earlier an alternative remedy.

548 In the event, (**2401-2402)** the Diocesan Registry solicitors for the Building Parties informed Mr Buxton on 19th August 2014 (wrongly dated 2013) that they were acting for the school, the LDBS and the Rector, and that the LBTH's response to the Masterplan document reflects the views of the other building parties. They suggested a further short time for negotiations before the objectors apply to the Consistory Court. They deny that a further faculty is need, but they agree that they will refer this point to the Chancellor by e-mail as he is on holiday. The Chancellor replies immediately, saying that he does need to approve the

licence, so the building parties agree not to sign the licence until it has been approved by the Chancellor **(2403).** The objectors write to request a copy of the proposed licence **(2404).**

549 On 21st August 2014 the SOS petition the Consistory Court of the Diocese of London for a restoration order, under which they seek that the School, the Rector and the Churchwardens demolish and remove the new building, and pay the costs **(2410-2412).** This application is supported by an application for an injunction to prevent the school building from being occupied. These documents were supported by a Skeleton Argument **(2416-2430).** I pause there to consider just what they were seeking; in effect the demolition of the new and finished building, the use of which they wanted to have forbidden to local children, a building which the objectors themselves said had been "substantially completed by the summer of 2013". I have set out above in detail the "negotiations" between the Parties. Either these negotiations were in themselves a waste of time if the building was inherently illegally built (as was the objectors' basic case) or else the negotiations were being conducted around a potentially illegal agreement between a number of Parties: the only real question was the new building to be demolished now or in a few years time. Also in support was Ms Whaite's first statement **(2431-2436)** of 21st August 2014, which I have considered together with her later statements. She set out that she, together with her three other Directors, Mr Vracas, Mr Dyson and Mr Gledhill (who makes no statement now or later), is petitioning for a Restoration Order on behalf of SOS. These other Directors are individually committee members of the Spitalfields Society, the Spitalfields Historic Buildings Trust, the Spitalfields Community group and the Spitalfields Neighbourhood Planning Forum. They may well be, but none of these bodies in their formal capacity gave evidence before me, nor appeared as formal objectors. Individuals are fully entitled to express their views and their interests, but their mere membership of any organisation does not mean that that organisation (absent a produced duly authorised vote of members) is supportive of their

individual views. Anyone could join these bodies, pay a subscription and announce that their individual views are supported by or reflective of the particular society. It is not as if they are even announcing that they have some recognised qualification. They could also have been members of train spotting societies or canary breeding clubs for all I know. Just being a member of a group or body does not give you the right to say that that group or body supports your individual views. Ms Whaite sets out the background to the formation of SOS. Again, members of a variety of local societies may support the aims of SOS. I have no doubt that some members of these listed societies do support SOS, but I have no evidence before me of any formal involvement by any of these societies in SOS. For example Ms Whaite says that its: **"incorporation was supported by the trustees of FoCCS".** Well not all of them. I find this description of SOS to be overblown and self opinionated. I have not seen any minutes from SOS approving any of the above documents which I have set out in detail. The late Mr Vracas and Ms Whaite seem to have been "running the show". She set out the history, which I have already set out above, and asks for disclosure of a number of Diocesan Registry files on this matter. The late Mr Vracas also files a statement in support **(2437-2440)** 21st August 2014, dealing with "without prejudice" but now, apparently open negotiations in respect of the licence to occupy the school. He stresses that the children have been ***"modated [sic]"*** in the existing school promises so there is no rush to let them in to use the unoccupied building. Holidays among the Parties legal advisers delayed matters.

550 There then follows the somewhat ridiculous interchange between one partner in Winckworth Sherwood acting for the Building Parties informing another partner in the same firm, who is the Diocesan Registrar, of their intention of submitting the licence for occupation for the Chancellor's approval **(2443-2444)**.

551 I propose to take the next chapter in this litigation briskly as it ended in the Court of Arches. On 1st September 2014 Ms Whaite on behalf of SOS, now on their notepaper, writes directly to the Diocesan Registry, requesting an urgent hearing in respect of the approval of an occupation licence by the Chancellor. She also raised the situation of the two partners of Winckworth Sherwood representing litigants as well as the Registry (**2445-2448).** That same day the Winckworth Sherwood a Partner, acting for the Building Parties, writes to the Registry in the same firm applying formally for the Chancellor to grant the occupation licences, subject to any later order the High Court or the Consistory Court might make later. **(2453-2453).** That same day the draft licences are pushed through, somewhat precipitately, **(2449)** to be delivered to the LBTH Town Hall for the Council to sign a.s.a.p. " ***in case the Chancellor does approve occupation, which is certainly a possibility".*** On 2nd September 2014 the Chancellor approved the licences, but subsequently that day reviewed what I take to be Ms Whaite's letter of 1st September 2014. It did not change his view. SOS were informed that the Chancellor would not grant an interim injunction preventing occupation of the new building before an inter parties hearing with written responses and arguments. He did, however, acknowledge that the Building Parties would vacate, were a court to order that subsequently (**2455).** Accordingly the Diocesan Registry informed the Building Parties that, were it to be practical, the school new building would be ready for occupation from 3rd September 2014 (2450), though in fact it took another few days for LBTH paperwork to catch up.

552 On 2nd September 2014 the Chancellor approved by Faculty the Building Parties' draft licence for the occupation of the school, and declined to grant a restraining injunction to use of the new building as sought by the objectors. That licence **(2459-2469)** approved by the Chancellor:-

- was to stand as "the full management licence" referred to in the 2009 agreement

- the management of the churchyard gardens was to remain the responsibility of LBTH under the Open Spaces Acts
- the church's uses of the new buildings was defined to all day every Sunday and for 7 hours during the week
- the occupation of the new building was to be governed by an annexed licence
- under this licence the LBTH and other others duly authorised were to be entitled to use the new building for community purposes, in accordance with another annexed document
- the Parties were to meet not less than once every three months to manage arrangements set out in this agreement
- in default any disputes shall be referred to the Chancellor.

553 The Diocesan Registrar informed Ms Whaite on 2nd September 2014 **(2470)** of the Chancellor's decision, as she had written, apparently as an individual, asking for an interim injunction. Within two hours of receipt of this information she replied to both partners of Winckworth Sherwood **(2471-2478),** re-iterating history although it was by now more than well known among the litigants and their legal advisers. She stressed her perception that the school needed to own its land, or, she concedes, hold it on a very long lease before it was entitled to get money from the capital funding for voluntary aided schools in England programme, then in force. She contended that the school had not been entitled to this money, and requested the production of a number of documents in respect of this. The Registrar confirmed that that letter had been forwarded to the Chancellor **(2479).** That made the second direct letter from Ms Whaite in the course of the morning of 2nd September 2014. It is difficult to conduct any rational litigation when litigants are legally represented by solicitors (and Counsel) but insist on conducting their own individual case but I suppose the reason here may be peoples' absences on holiday. (It also becomes more complicated when Ms

Whaite and Mr Vracas become individual objectors as well as being the two of the Directors of SOS). They raise concerns about the terms of the original faculty not being complied within and the need for approval of the licence agreement.

554 However, in response to these emails, the Chancellor, through his Registrar, on 5th September 2014 **(2481-2482)** informed the Parties that he wanted to hold a hearing in respect of the preliminary issues as to jurisdiction and abuse of process. There was the usual haggle over the convenience of dates, and the SOS wanted to know what the response of the Building Parties would be. **(2483)** In their letter of 9th September **(2484)** to the Parties, the Diocesan Registrar explained, *inter alia*, that the old registry papers had only just arrived from the Diocesan archives, having been requested by SOS, but that the late Mr Vracas had already been to the Registrar's Office, wanting to inspect them, notwithstanding that the papers would have to be sorted to exclude unrelated or privileged matters. A later date was given to him for this inspection. On 10th September 2014 **(2485-2586)** the Registrar set out the Chancellor's own views that he considered himself *functus officio*, and that these matters now complained of should have been brought initially to the Consistory Court (which Ms Whaite had chosen not to become a Party to in 2011, and so she could not appeal now against he decision of that Court because she was an informal paper objector) or in High Court proceedings (the threatened Judicial Review). He considered that the Judicial Review proceedings should have been renewed, and that the situation complained of did not confer revived jurisdiction on the Consistory Court. In effect, had the matters now complained of been argued in the Consistory Court at the outset, they could have been appealed to the Court of Arches. The Chancellor indicated that the Parties should have the opportunity of persuading him that he had jurisdiction or otherwise at a preliminary hearing, and the Parties should produce skeleton arguments That hearing was fixed for 26th September 2014, the Registrar gave directions for the

filing of documents, and all the Parties filed their skeleton arguments for the Chancellor's consideration.

555 On 10th September 2014 the Restoration Trust held their AGM, 6 persons and the secretary present. There was a problem in respect of the auditors signing off the accounts (**2489-2490)** by reason of a perceived problem in respect of where the contractual liability for the organ should appear in the accounts. There was the usual musical chairs in respect of election from among the usual small number of people. It was reported that: ***" there was a new fund, Churchyard fund, currently being used for legal expenses; however, it is hoped that at some stage to use this to make the churchyard a fitting setting for the church and completion of the exterior and interior decoration This stands at £15,000 at the years' end".***

556 Now, given the current costs of the objectors (albeit I assume divided in whatever way has been agreed between SOS and the individual objectors) are in excess of half a million pounds, the £15,000 remaining from the initially subscribed £30,000 for this fund will not go far, and will leave nothing available for the garden. I have seen the Attorney General's letter of the previous year where he did not authorise action by FoCCS. I have not seen any correspondence as to FoCCS's proposed use of £30,000, half of which had, apparently, been spent. On what? Legal costs? If so, whose? Authorised by the trustees? If so, were <u>all</u> the trustees aware of what was being advised? Did the trustees ask the Charity Commission to approve the movement of funds into this Churchyard fund for legal expenses?

557 On the same day, it is not clear whether before or after the Restoration Trust AGM, six of the Trustees/Directors held a meeting of the Restoration Trust and of the FoCCS **(2492-2493).** This is labelled "draft". Tribute is paid to a deceased member, and long time supporter, who had left FoCCS £15,000 in her

will. It was stated that her support had been invaluable at a time when ***"None dreamt that Spitalfields would become like it is today".*** Various business was effected, and Mr Vracas reported that he had now inspected the Registry files, and found inaccuracies in the Faculty papers (as I have referred to in the above narrative). The make up of SOS was discussed, the identity of the four named individuals who were the Directors of SOS, who had applied for the Restoration Order, and their individual links to the various local bodies I have already set out. At no point in the evidence was I told (were this to have been the case) that any of these four directors was formally mandated to represent various bodies of which they were members. Even if they each were, those other bodies are not before this Court. I consider SOS's activities and actions alone. The FoCCS trustees present voted unanimously, all 6 of them, to continue to support the SOS initiative and the principle that the churchyard was a public open space. A vote taken somewhat late in the day, given all that had happened.

558 On 15th September 2014 there was a PCC meeting **(2494-2406)** and the imminent Consistory Court hearing, following the grant of the occupation licence for the school, was minuted.

559 On 23rd September 2014 SOS filed a Skeleton Argument in respect of the matters as to jurisdiction raised by the Chancellor **((2497-2501). Given the decision of the Court of Arches to direct the hearing before me** I do not deal in detail with the abuse of process argument save in respect of the history and make up of SOS. Insofar as any of these arguments are still relevant in the light of the Court of Arches judgment, I will consider them below. It was argued on behalf of SOS that even in Judicial Review proceedings, the Administrative Court, whatever view it took on the actions of a public authority such as LBTH, could not adjudicate on ecclesiastical law nor could it afford statutory relief under the *Care of Churches & Ecclesiastical Jurisdiction Measure* 1991 to compel the demolition of the building. In that, as I have said above, at some point or other in this saga the

Objectors would have had to come to the Consistory Court. An argument raised on behalf of SOS was that under s13(5) of the *Care of Churches & Ecclesiastical Jurisdiction Measure* 1991 restoration meant restoring the position as far as possible to that which existed immediately before the current building was erected. It was sought to be argued on behalf of SOS that as the old building had been knocked down and there was an empty space before the new building was built, it was to that empty space that the restoration should return.

560 This argument I did find startling on first blush and it is not without problems. To many, "restoration" might seem to mean a putting back of what was there before. If a church tower is knocked down and something built wrongly in its place, should not the earlier tower be rebuilt under a restoration order? There may have been an empty space after it was knocked down, pending a new building being erected, but can one/should one say that the site should be restored to the empty space? I discuss this point at more length below.

561 Skeleton arguments were filed in behalf of the school **(2504-2509),** saying *inter alia*, that the Administrative Court could, if they thought it right, quash the planning permission and, more interestingly, that the application of SOS is more like a setting aside application than a restoration application. On 23rd September 2014 the LBTH filed their Skeleton Argument **(2510-2521).** The real problem is grasped at the outset, namely the *Disused Burial Grounds Act* 1884 prohibition does not apply if what is being built can be contemplated under the Schedule to the *Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act* 1967. Mr Mynors grasped the nettle that the new building was not covered by any of the Article 7 exceptions and so the prohibition on building in a disused churchyard as set out in *St Luke's Chelsea* [1976] Fam 295 might appear to bite, when even a building authorised under the 1967 Act would still required a Faculty. Mr Mynors prayed in aid the expected amendment to the

1991 Measure to cover his clients' situation. His difficulty was uncertainty, especially as a general election might delay its passage through Parliament. There was no certainty of when it might become law. He then argued that a school was an "organisation" as might come within Article 7 (a)(vi), while accepting that, even if it did, a Faculty would have to be obtained. He argued that, were the Measure to be amended (as indeed it subsequently was) even if the SOS were successful, the Buildings Parties could just bring another application for the same thing after demolition and rebuilding costs had been incurred. True up to a point, but it would re-open all the planning application points, and allow the objectors another bite of the cherry, and for a variety of reasons, a later chancellor may not be willing to sanction it for any number of potential reasons.

562 I reject the issue estoppel argument in accordance with the guidance given by the Court of Arches. There were no earlier proceedings in which these points were argued as there were no formal opponents. Had Ms Whaite appeared to oppose then, it is likely that she would have raised the "Hawksmoor vision" argument, and not the s3 DBGA argument which only emerged much, much later. In any event, the Court of Arches has dealt with this.

563 The objectors raised on 25th September 2014 the point to the Diocesan Registrar that the Chancellor ought to recuse himself **(2252).**

564 The hearing took place at the Offices of the Diocesan Registrar on 26th September 2014, which was in the nature of a preliminary direction hearing. Other partners of that firm, Winckworth Sherwood, were the solicitors acting for the Rector, Church and LDBS. As for the first Interested Party (the LBTH) had their own in-house legal department). The Building Parties endeavoured to have the matter fully heard on that day, which was not an approach shared by the Chancellor, as he wanted to give the Parties a full opportunity of both raising and

answering their respective arguments. The Chancellor wished to consider at this preliminary case management directions' hearing the following points-

- had the Consistory Court jurisdiction to deal with this application
- was the Consistory Court the appropriate forum for the issues raised?
- was the application in any event an abuse of process?
- were a restoration order 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?

565 It appears that all Parties agreed to these matters being further argued by way of written representations so that further directions were given by the Chancellor on that day for the filing of additional arguments by the Parties, but he did indicate, very properly, that following any procedural Directions, he would recuse himself from dealing with the substantive matters and that these should be heard by his own Deputy Chancellor. In the event, matters never came to that. The Autumn of 2014 was taken up with the Parties filing their required documents and the objectors applied for substantial disclosure of documents in respect of the building project and the terms of its funding.

566 SOS filed on 16th October 2014 **(2524-2539)** a further substantial Skeleton Argument dealing with the matters raised by the Chancellor. In that argument is set out, *inter alia,* that there are four Director of SOS, Ms Whaite, Mr Vracas and Mr Dyson, and Mr. Gledhill, Treasurer of the Spitalfields Neighbourhood Planning Forum recently established under the *Localism Act* 2011. On 17th October 2014 on behalf of SOS Mr Buxton wrote **(2540-2542)** requesting more documentation in respect of the school funding, the powers of the Governors to allow the school premises to be used for church services or worship, let alone other outside community bodies, under their powers under the Education Acts, and, given the effect of the 1919 deed (I remind myself that that was only

produced in draft form), he required more documents such as the statutory and extra statutory regulations or memorandum or articles that govern the appointment and powers of interim and statutory Boards of Governors.

567 On 20th October 2014 the now beleaguered Board of Interim Governors met **(2543-2550).** They note, among paragraphs of school business, that:- ***"British values and community cohesion are promoted at Christ Church. The curriculum is broad, the SRE policy is firmly in place and there is a strong approach to Christian and collective worship".*** It was hoped that the transition back to a normal governing body could be begun by early 2015 which would have the rector *ex officio,* already in place, and two representatives from the Deanery among others. The new buildings had been in use since September 2014. It was reported that:- ***"the nursery and reception children are using the building very effectively…it was noted the difference the space had made to the learning environment and experience. Children, staff and parents have responded very well to the building. It is being used for violin lessons, for Stay and Play sessions, staff training and the Church is using it on Sundays for a children's' group feedback from parents is very positive and there is no doubt that the building has already had a significant impact, and is providing high quality opportunity for children to develop educationally"*** **(2549).** I quote that passage *in extenso.* It is in a disclosed document which has been in the hands of the objectors in this case well before the matter came before me. Many objectors might have thought hard about holding to their own positions, having (if they did) read it. Maybe some to the individual objectors who did not show up before me, either on paper or in person, did do just that. I do not know.

568 On 4th November 2014 the Department of Communities and Local Government reported **(2551-2552)** on their inspection of LBTH's (a troubled local authority at this time after the findings of the Local Government Election

Commissioner had resulted in the Council, being put in Commission) compliance with their "best value" duties (a point raised on behalf of SOS. That report "***concluded that the evidence did not lead to a conclusion that the authority was failing to comply with its value duty***…" but it did propose an action plan to ensure that any potential failures should not occur.

569 Further skeleton arguments were filed on behalf of the Building Parties on 6th November 2014 (**2560-2565)** and on behalf of LBTH (**2566-2569).**

570 Mr Vracas, having applied under the *Freedom of Information Act* 2000, for financial information as to the funding of the school, received his answer from the Department of Education on 20th November 2014 **(2570-2571).** This, of course, covered not just the new building but refurbishment of part of the existing school building. The first project in 20110/2011 was initial work preparatory to obtaining planning permission, totalled £600.456, which was paid as to:-

£120, 179 from the LBTH

£60,051 from the school governors

£378,203 capital grant to the LDBS

That left 10% which as a voluntary aided school would have to be paid from somewhere The DofE did not know where it had come from, but assumed it was from the Governing Body.

The second project (2011/2012) cost in all £2, 088, 670 paid as to:-

£1,528, 221 from LBTH

£506,384 from capital grant, paid to the LDBS

£56,256 being the 10% contribution from, I assume the Governors

Now I stress that not all these sums were spent on the new building, but the majority appear to have been. As far as the government was concerned the LDBS, who were the stakeholders, filled in forms stating that it held the freehold of this school. That was all the information which the government

funding body needed or requested. That return made by the LDBS to get their share of the money was not correct. The only freehold owner of the land on which the school stood was the Rector.

571 On 26th November 2014 there was a Trustees Meeting of FoCCS, 7 people in attendance plus the secretary **(2573-2576);** in the course of normal business, it was reported that the Victorian reredos has now moved under a place of safety order. The Rector reported that as soon as the crypt site huts are moved (these being necessary to enable the work on the crypt to be done): "***Tower Hamlets were keen to release the s106 money for the redevelopment of the garden".*** The Rector then left the meeting, and Ms Whaite went on to report what had happened at the Directions hearing of the Consistory Court on the previous week. The other Trustees were informed of the legal advice which they had been given and were told that the court papers were available if any Trustee would like to read them. It might have been expected that all Trustees would have wanted to do so at every stage of this litigation, given their joint and several legal liabilities. The fact was that SOS and not FoCCS were the actual litigants at this stage, but their legal advice was being cheerfully shared with the FoCCS trustees shows the paper thin wall between these groups. However, all this request for litigation did uncover one matter which directly affected the FoCCS and its trustees: Ms Whaite: ***"reminded the trustees that the legal team had advised that the new building in the churchyard constituted a breach of the HLF contract, which means the possibility of the grant having to be repaid. As trustees they need to be mindful of their position on that".*** Given the size of that grant and the personal liability of the contracting trustees of the Restoration Trust for part of that money, one might have expected notes of a more detailed discussion of that risk and a demand to know just on what basis this claim could be justified. The above is all that was minuted on this. Otherwise, the son of the late rector, Mr Stride, complained that a recent obituary of a deceased supporter of FoCCS had

been negative and unbalanced in its comments about the support that the late Rector, his father, had given the restoration scheme from the beginning, when commentating on the work of FoCCS. This is indicative of the "Them and Us" split between the FoCCS and the church which had developed, and that the history of the early work was being forgotten by those currently involved.

572 On 27th November 2014 the Interim School Governors had their last regular meeting **(2577-2585).** It was stressed, in discussion, that in marketing the "brand personality" of the school: "***The fact that it is a Church of England school was a significant positive".*** Although there were difficulties, the school being in the highest percentile for free school meals, English as an additional language, SEN and deprivation, there were improvements. Indeed, nationally the school was in the top 12% for the progress made by its children. The really uphill problems this school has had to cope with in its intake having educational needs, language difficulties can only be appreciated from a reading of the regular reports from the Governors' meetings, and the steady progress of the children as they move through the school can be seen. The Governors received a report about the legal proceedings: ***"The Synod had recently passed a law, which if subsequently passed by Parliament, would remove the issue that the objection to the building is based on. The case is due to be heard on the December 2014 when a decision will be taken on whether or not there is a case for a Consistory Court hearing. There will be a right of appeal if that is refused".*** This was the last formal meeting of the Interim Executive Board of Governors, and it was now to revert to "ordinary" control.

573 On 15th December 2014 the Chancellor decided, in a short judgment, **(2586-2589)** that the application was an abuse of process and granted a permanent stay. He ordered costs against the objectors. On 2nd January 2015 the objectors applied for a certificate and for leave to appeal **(2592 - 2602),** together with an

accompanying statement. On 9th January 2015, the Chancellor issued the requisite Certificate, confirming that "the cause does not involve a question of doctrine, ritual or ceremonial", but refused leave to appeal, saying: **"that having decided that these proceedings are an abuse of process, an appeal would be the same"**.

574 On 4th February 2015 there is a meeting of the trustees of FoCCS, with 8 members present. **(2626-2629).** Usual business was conducted including the receiving of a report as to the proposed catering contact then being negotiated. The Rector reported that the Churchyard gardens were on hold pending the sorting out of funding by LBTH. The Chairman, Ms Whaite, reported on the legal developments, and informed the Trustees that an appeal had been lodged, the grounds for that appeal being annexed to these minutes. Again the Victorian reredos, now safely placed in St James the Less Bethnal Green, makes its almost statutory re-appearance, but under the HLF grant condition it should be displayed in the church. This was merely noted.

575 On 22nd April 2015 there was the next Restoration Trust meeting when *inter alia* there was discussion about the catering contract. There was discussion about this, but these Trustees had not seen it. Yet again the peripatetic reredos appears in the minutes, the trustees seeking its return to be in accordance with the HLF conditions as meeting **(2630-2634).** There had been some accountancy difficulties, now being sorted out, six people present. It was reported that SOS had applied for leave to appeal against the Chancellor's judgment, and the mistakes which had been noticed in the inspected documents (which I have referred to above) were referred to as "serious inaccuracies". It is minuted that **"the Trustees unanimously voted…..to continue their commitment to the legal action being undertaken to secure the long term future of Christ Church Spitalfields in furtherance of the FoCCS Masterplan".**

576 This I find to be a somewhat inexact motion. This cannot be the more recent SOS "Masterplan", but the earlier one on 1995. The Trustees then vote unanimously a ***"further £30,000"*** to defray the costs of the Appeal. I am puzzled by this. If the Trustees of FoCCS are funding the appeal, why is there any need for the SOS "front" organisation? Finally the Trustees complained that the Rector's recent newsletter had drawn public attention to the fact that the FoCCS had some £250,000, whereas the Church's own Foundation Fund (to be used for further maintenance and financial security) was just over £30,000. The Trustees were worried that this might adversely affect their fundraising as it gave the impression that they "***have more money than they know what to do with".*** The FoCCS trustees voted to continue their commitment to the legal action, and it was noted that the lawyers remain on a half fee basis, and SOS remains committed to recovering its costs as far as the Courts allow.

577 Various directions followed as to the hearing before the Court of Arches and the legal make up of SOS, which is a limited company, and not a Charity. I need not rehearse here the arguments and counter arguments which were before the Court of Arches.

578 On 15th March 2015 the Dean of the Arches gave the Appellant objectors leave to appeal on certain conditions **(2644-2646),** namely that there should be relatively small, some £7,500, payment as security for costs of the appeal together with a payment towards costs already occurred (just under £1,500 for costs already incurred). There were further other administrative directions. The grounds of leave being granted were:-

a) the abuse of process point

b) the Chancellor's finding that he had jurisdiction to impose a stay for abuse of process at the interlocutory stage

c) the Chancellor's alternative finding that he had jurisdiction at an interlocutory stage to make a final order under s13(5) of the CCEJM 1991

d) The Dean was concerned about the delay in bringing this matter to the Court and the use of a company locus ("SOS"). The Dean made it clear that should the Appeal succeed, the objectors would not recover any costs of the appeal from the Building Parties, but that the matter would be remitted to a Consistory Court of first instance for a full hearing. He did not consider that there was any real prospect of showing that the Chancellor's decision was flawed by reason of bias and/or the 1949 Deed, and refused leave to appeal in respect of those two points.

579 The following evening there was a PCC meeting **(2647-2650).** Now it was reported that the DAC had involved the Victorian Society in the saga of the reredos. The PCC voted unanimously in favour of proceedings about appointing Graysons as the caterers for the Crypt, and agreed that they would apply for a faculty for this catering contract. The church's solicitors, Winckworth Sherwood, advised the PCC by email, in the light of the proposed appeal, to: " ***in the light of the new legislation apply for a confirmatory faculty to authorise the continuation of the new community building in the churchyard".*** This was agreed to by the PCC. As usual there was a large attendance of PCC members.

580 **On 1st April 2015, having received royal assent the** *Care of Churches & Ecclesiastical Jurisdiction Measure* 2015 **which inserted the new s18(A) in** *Care of Churches & Ecclesiastical Jurisdiction Measure* 1991, **came into force, too late for the on-going litigation hitherto.**

581 The objectors were unhappy about getting leave to appeal but with the costs conditions (**2651-2652),** without the Dean having heard any oral argument on this, and wrote to the Registrar of the Arches Court about this on 2nd April 2015. On the same days they also wrote to the Building Parties' solicitor asking him to agree to set aside the Dean's order, and to have the whole dispute remitted

to be heard by a deputy Chancellor **(2653).** In the papers before me there is no response to that letter.

582 On 21st April 2015 the Provincial Registrar issued Directions for the substantive appeal **(2654-2655).**

583 During May 2015 LBTH had prepared a project initiation document for the gardens (**2714- 2739**) which also set out the funding history and difficulties. It was clear that the Council did intend to take back in hand the waste strip in the churchyard. This document recognised the on-going legal case. The LBTH wanted to provide: " ***a site for quiet contemplation, a site for children with play elements … a site for nature, a site that feels safe for all potential park users… a site that is the hub for the local community… a site that works in harmony with the adjacent school and the church itself***". For this aim they have been working for some 18 months with a working party. This is a very full and useful document, which clearly set out the variety of problems, proposed solution and in terms considers the *Equality Act* 2010 provisions.

584 On 18th May 2015 there was a PCC meeting **(2656- 2658)**. The Rector reported that the garden design had gone out to competition as a result of which a landscape gardener had been appointed. It was hoped that the gardens might be finished by Easter 2016, but LBTH had had to pause the funding for the work because of the "***legal issues with the garden building".*** The Rector explained about the imminent appeal to the Court of Arches, and rather inaccurately, what might then happen. There are 4 pages missing from these minutes. The good news was that the crypt was finished, and there were going to be open days for the public.

585 The respective Parties submitted Skeleton Arguments to the Court of Arches.

586 On 10th June 2015 the FoCCS had a trustees' meeting, 6 persons present **(22706-2709).** It was reported that the catering contract was on the point of being signed and save for a few loose ends, but that the outsourcing would help with the marketing of events. The trustees still wanted to see that contract. The return of the reredos was discussed. That question was now in the hands of the DAC. In respect of the catering contract the late Mr Vracas stressed the importance of the catering contract with Graysons providing enough revenue for a proper sinking fund as well as providing for routine maintenance. He objected that there was no set amount to be placed into a fund to ensure a proper sinking fund as well as providing for routine maintenance.

587 The Court of Arches sat to hear submissions in resect of the appeal on 22nd May 2015, (when Ms Whaite and Mr Vracas were joined as individual Parties, as they were parishioners with an unarguable right to be an objector), and delivered a reserved judgment on 24th July 2015.

588 On 19th June 2015, while judgment was awaited, there was a sad and heartfelt letter from one of the FoCCS trustees, Derek Stride, who had been involved with Christ Church and its restoration since its earliest days, when his father had been the Rector. He set out the absolute need for the church building to be supported, as it had been, by a group of Friends, distinct from the church congregation. He accepted SOS as an organisation were fully entitled to litigate with LBTH and with the Diocese, but could not support an action against the Rector and Church wardens: ***"it became personal. I felt this to be cynical and abysmal behaviour - were SOS to be successful, it could financially ruin these individuals (including a young family). The PCC would also have been severely affected as our resources are very limited. This was compounded when Christine [Whaite] and Philip [Vracas] had themselves named as appellants at the recent hearing at the Court of Arches. I don't have an issue with litigation between two organisations, but making it***

personal is appalling. As this personal action was started by the leading officers of the FoCCS against the leading officers of the church, we have now a situation which cannot continue". He stresses the need for an organisation such as FoCCS, but that the PCC ***" cannot with integrity have a functioning relationship with individuals who are taking personal legal action against their leading officials There is a direct conflict of interest…".*** He urges either SOS to cease their action or for Ms Whaite and Mr Vracas to resign from FoCCS. Only in that way can the church and FoCCS resume workable relationships. Now leaving aside his doomsday scenario, this letter shows the not surprising complete breakdown of any viable working relationship between the Church and FoCCS **(2710-2712).** It should also be said that the joining of Ms Whaite and Mr Vracas as parties was a belt and braces step to provide formal objectors in case SOS as a creature created for the purposes of litigation was disqualified.

589 This letter was replied to by another Trustee, a Mr Barr. He wrote that, having raised large sums of public and grant making bodies, the Trustees considered that they would be "conniving" in breaching the objectives of the Friends. ***" We would risk breaking their trust and being liable to repay their moneys"*** … "***Moreover we were advised early on that the proceedings of this scheme would constitute an illegal, indeed criminal act, against which we felt duty bound to warn"***. He set out history of their objections. However, as I have set out above, the aesthetic objections were by far the earliest, and supported the legal action to stop what ***"the majority of the trustees"*** disliked. I find, reading the extensive documents before me that this letter sought to put the cart before the horse. FoCCS had no inkling of any illegality until late in these proceedings. Their objections initially were aesthetic. Mr Barr goes on to claim: ***"all these objections and caveats were ignored and with faculties and planning consents if somehow obtained construction proceeded to***

completion." I remind myself how FoCCS or any individual member of its trustees did not choose to become a formal objector to the original faculty application. There were planning hearings, which again I have set out in details which their views were expressed. The ***"if 'somehow obtained' "*** implied some underhand or improper action on the part of the planning body then they could have applied forthwith for Judicial Review. Mr Barr endeavoured to pour oil on the personality issue, correctly saying the addition of the two named person (Whaite and Vracas) was "***purely procedural***'. He goes on to say: **"Only faced with denial and obduracy have we reluctantly followed the legal process and all it entails".**

590 I reject that. Having read the documents before me I find as a fact that the FoCCS led by Ms Whaite and Mr Vracas and encouraged by others, having failed under planning law and in the faculty jurisdiction, pursued their objections by what ever means they could; letter writing to anyone whom they thought had "influence", pressurising where they could, and then, having at last sought advice, having learned of the *Disused Burial Grounds Act* 1884 argument, set off into litigation with the wind in their sails. Only the refusal of the Building Parties, as the objectors saw it, "to negotiate" forced them onward to achieve their aims.

591 The Court of Arches judgment was handed down on 24th July 2015 **(2740-2762).** In that the history of this matter is succinctly set out. The Court of Arches identified the following matters to be resolved at a full evidential later hearing:-

- was the prohibition of building in a disused burial ground effective. Or was that prohibition displaced by reason of the MHLGA
- Was there delay in the SOS making their application
- Was Ms Whaite and SOS the "same person"
- To what degree, if at all, did the MHLGA affect matters

The Court of Arches found that there was there had been no formal objector to the original faculty, as Ms Whaite was not a party opponent then, so there was no party to previous proceedings to which SOS could be privy. The Court of Arches considered that: "***on the limited facts so far established, neither we nor the chancellor could be satisfied that the Company ("SOS") bringing the restoration proceedings was doing so as agent for or on account of Ms Whaite".***

592 I need not now concern myself with the arguments as to striking out, issue estoppel and abuse of process as these have been comprehensively dealt with by this judgment. As the Court of Arches commented adversely on the inclusion in the Parties' respective skeleton arguments of the assertions of facts which were not admissible, I have, above, endeavoured to analyse factual events from the documents before me, together with such evidence as witnesses gave orally and/or in their witness statements. The objectors succeeded on their appeal and in matter of costs in respect of the appeal. That was confirmed following later argument in a second judgment on 24 September 2015.

593 The Rector wrote formally on 13th October 2015 to the Chancellor to present the Confirmatory Faculty Petition (**2767-2768).** The accompanying Faculty Petition **(2769-2775)** is still not dated. Given the history of this matter it just beggars belief that a simple detail such as a date is not filled in. This is accompanied by a detailed statement of need (**2778-2779**), which interestingly notes the drop in Bengali children in the school from some 95% to some 90%, and the playground language also changing to English, This document sets out the needs of the school and the community. The aim for this building was said to have been:

- to provide a much less overlooked and safe children's play area between the two school buildings

- to allow easier out of hours community access to the new building through the Fournier street entrance
- to be closer to the church for church overspill usage
- to make the school visible to the city….as a way of attracting a more diverse school population
- the new building is built further away from the church , giving greater sense of space around the church than had been the case for decades
- to design a light weight looking building which would maximise sight lines and not compete with Hawksmoor's masterpiece.

594 Even before the public notice time had ended, objections were being received. In passing I remain concerned that the parish had advertised their Petition (as they, of course had to) before they had submitted it to the Diocesan Registry (**2781**). I just find this procedure to be a recipe for potential disaster. What is the point of advertising by way of public notice a parish's intent to do something before a Diocesan Registry can advise or warn a parish about what they intend to, or correct the Petition, which should have been available during the public notice period to be seen on request, as stressed by the Court of Arches.

595 **MORE FORMAL OBJECTIONS TO THE PETITION FOR A CONFIRMATORY FACULTY**

The autumn of 2015 brought a stream of letters, rehearsing, sometimes accurately sometimes not, the by now well known objections, virtually all filed a day or so before the closing date for objections to be made; presumably having been put on notice to do this. I have considered these individual letters, and note that many of them repeat, virtually verbatim, what appears to be a script. I make it clear that in not identifying each of these objections in this judgment, I have read and considered each of them. There were objections, and I have considered these with care. For example, one from a Mr Dugald Barr, writing as a Trustee of FoCCS, a

Director of the Restoration Trust and as a supporter of SOS. His objections repeat the by now well known ones , but he says that he was only made aware of the Confirmatory Faculty Notice by which any objection should be made by 13th October 2015. He attended many FOCCS meetings and would, presumably, have had copied of all their Minutes. Happily, his was made on 12th October 2015 However, as I have set out above, all those labels can be applied to a very small number of people, less than a dozen. However, I comment on a specific objection made by a Ms De Wick **(2796**), who having set out the standard form words used by many of these most recent objectors as: "***This application should never have been made. What a tremendous waste of money and time, and what a disrespect to the lives and afterlives of those who live in Spitalfields and those who are buried there. Please remove this building and return the land to its proper use."*** I pause here to reconsider the wholesale removal from the crypt of nearly 1000 bodies to provide a space for conference rooms and the café for which the Restoration Trust and the church happily applied and got WMF money. It seems that disturbance of the dead can be prayed in aid only when thought to be useful. Another supporter/adviser Mr Bland, a retired solicitor also wrote to object, complaining that he had been told that the plans and documents in respect of this faculty: "***cannot be made available to me before Monday 12th October***" so he has to object in advance of seeing these.

596 It is unsatisfactory that even at this late stage there appears to have been no full display of what was now being proposed. I now make a point for all Petitioners for a Faculty. Petitioners really must present their proposed faculty plans openly to the public. Here, at Spitalfields, at least the public could see the actual building itself, the subject of the Confirmatory Faculty, so that it could be measured, observed, commented on in reality. That said, this cavalier attitude to public notice just gives another opportunity for (justifiable) complaints. Such a notice says that the relevant documents can be inspected at a particular address. They therefore

must be available. In an ideal world, they should be displayed in the open church itself; that is not always possible so that the plans/drawings etc. must be available in normal office hours at a convenient location in the parish. It is not enough to say, as I have seen tried elsewhere, that the plans are available on application to, for example, a churchwarden. The outside world may not know such a person from Adam. People used to think that they do not want "to make trouble" or cannot be bothered. If the church seeks to communicate with its local parochial residents, such faculty proposals could, actually, be used for mission. If a church has a web site, why not post the faculty application documents on that? Fear of publicity or adverse objections should be dealt with as early as possible, which in itself might save later expense. A petitioning church should not be fearful of justifying their plans, and can explain to potential objectors (and to the man in the pub who will sign any objection petition put before him on a Saturday night for a quiet life) what they are proposing and why. Publicity may well cause ignorant, emotional objections to evaporate, and more thoughtful objections may present a church with another solution they had not thought about. If the ecclesiastical exemption is to continue to function, those using it should not consider themselves to be outside the ordinary requirements of just letting the outside world know just what Petitioners are proposing. It is no justification for a church to continue to consider that what they do with their building should be of no interest or concern to non-church goers. Any parish should be able to explain and justify their plans as well, if not better, than any other developer of a building site. A proper Christian sense of obligation to one's neighbour ought to ensure that. This argument is the more important in churches of historic and/or architectural interest where a Church should be able to demonstrate why their proposals are to achieve sensible and necessary improvements.

597 As it had become clear that the Rector and PCC were going to petition for a Confirmatory Faculty, Professor Downes wrote on 12th October 2015 to object

(**2766)**, saying that: "***An application was made for planning permission four and a half years ago, and since then I have consistently expressed my objections to every official or body concerned, ecclesiastical or secular, and no argument presented to me by those that bothered to reply has done anything to change my attitude".*** He re-iterates the argument of the replacement of a 40 year old "temporary" building "***but blind eyes have been turned by those responsible, and matters of law have been trivialised as matters of 'opinion' ".*** His substantive objections I will deal with below.

598 Another objection came from Mr Frankom, Secretary of the Spitalfields Neighbourhood Planning Forum. He states that it has been brought to his attention: ***"from persons who have been in contact with the rectory on this matter*** [the public notice information] ***that no plans or documents will be available for inspection until next week".*** He does not, as it happens interestingly, object himself, but merely relays the concerns of persons who have been in touch with him, and repeats some of the historic background. Mr Dugald Barr complains *inter alia* about: ***"the breach of several statutes governing the uses of consecrated land and public open spaces, and supported by representations which are demonstrably false in matters such as ownership, status and purpose, used both to secure the original Faculty and to procure funds from public entities" (2784).***

599 Truly, it beggars belief after the pounding the Court of Arches gave the Petitioners in respect of the incomplete and inaccurate original Faculty petition, and knowing that the objectors were poised as a howling mob to take any point, good, bad or indifferent, that the Petitioners could not get their tackle in impeccable order. Not to have the relevant documents available for inspection but only promising to make them available a week after the three week period of notice expired was just insane in the circumstances of this case. The basis of the notice period is analogous to the state planning system. Our system has to work properly

and fairly, and be seen to do so. It is not just a gesture, otherwise the whole ecclesiastical exemption system falls into disrepute.

600 Another objector, Mr Shapiro (**2828),** who was connected with the committee who closed down of the youth club, wrote: "***I am glad to say that the activities of that committee were wholly legal and correct".*** He repeats the current belief now obviously doing the rounds of the Spitalfields locally that the building is illegal. ***"Thus the objective of the proposal is retrospectively to legalise an illegal building. In my opinion it would be totally immoral for the Church authorities retrospectively to legalise an illegal act … I do hope the Church of England would not countenance such an immoral procedure."***

601 The change to the *Disused Burial Grounds Act* 1884 which became law in April 2015 appears to have gone unnoticed by many.

602 On 11th October 2015 a letter of objection came (with a CC to Mr Vracas) from His Honour A. Thornton QC, a retired senior circuit Judge of the Technology & Construction Court, living in Bath. He raised, as one might expect, **(2834-2839)** a more thoughtful analysis of potential problems, less emotional than many objectors, but pitches the argument somewhat high :-

> ***" The open nature of the open space is also preserved by conditions of HLF grants to the church, and by the terms of the innumerable bequests provided by trust funds and private individuals and by the Friends of Christ Church Spitalfields 'management plan' which the Rector has agreed to and was implementing prior to his undisclosed involvement in the unlawful construction of a new Church Building masquerading as a school building, which in turn is masquerading as a "a school and community building".***

As I have set out at length above, the current Rector was unaware of the 1995 management plan until this litigation. I struggle with the concept of the Rector's

"undisclosed involvement" with the construction of the new school building. Again, as I have set out above, the 1995 Master Plan for the churchyard said virtually nothing about the graveyard. It was the fabric of the church which was of importance. He raises the objection to the use of moneys by the school: ***"pursuant to planning consent obtained on the basis of a misrepresentation provided by the Rector to the LBTH that the school had been granted a 50 year lease by the church when no such lease was in existence or had ever been granted***' In the event that point was subsequently dealt with by Mr Woolf on behalf of the LDBS. He alleged also that, apart from the burial of he ashes of Sir James Stirling, contrary to what the Rector was saying ***"several burials had in recent years taken place as is recorded in the Register of Burials".*** No evidence of such recent Burial records were produced nor was the rector cross-examined on that point.

His Honour A. Thornton QC raised in his letter of objection many of the points subsequently raised in the legal argument before me, and some additional points; for instance, that the church should not use the new building for worship, as that is specifically prohibited under the Open Spaces legislation, nor, he said can the school obtain a licence for its use as that would exclude the public from access to the building. He rightly stressed the incompetent and inaccurate filling up of the original Faculty Petition as to the "ownership" of the land, stating that as the school did not own the site, the £500,000 which they had received from government funding should not have been received and should be repayable. He further alleged that £1.1 million received from LBTH ***"had been kept secret and has never been identified as having been granted nor appears to have been lawfully authorised its being granted***." This last allegation was not pursued on behalf of other objectors, and His Honour A Thornton QC, although I understand to have been present on and off during the final hearing, did not, in the event, choose to give evidence, and hence was not cross examined, nor addressed the Court in a final speech.

He asserted that a confirmatory faculty may not be applied for where the work in question is the subject of an existing faculty. I do not agree. Any Faculty, properly granted can be altered, changed or subsumed by a later Faculty for other works; the more so if, on the objectors case, the original Faculty should not have been granted.

603 Taking an overall view of these objections, few, if any, objectors refer to the wider need of the community, but concentrate on the open space, the 1995 Master Plan and the moneys spent on the restoration project. Complaints are made about the plans for this building not being available. Now it is fair to say that one had only got to go into the churchyard to look at it and see the new building as it had been built, but again, in despair, I ask why the Public Notice did not ensure that these plans were available for the requisite time. They may have had to come out of the Diocesan archive, but this was a not insuperable task. Mr Dyson and his wife write to oppose, saying, *inter alia,* that they understand that the relevant documents and plans have been unavailable for inspection at the relevant advertised address. It is interesting here to note that many of the local objectors rely on third parties for this information as to non exhibited documents, and do not seem to actually go round themselves to the Rectory to try to view the documents.

604 Many of the objections come from far beyond the parish, Cornwall, Hemel Hempstead and Outer London, Woking, the USA and Ireland, as well as from local residents, in one instance 5 separate letters of objection from the same family, all bar one from the same address, that of the secretary of the FoCCS, and repeating the same objections word for word. Of course, every individual who can claim to be an interested party (and local residents clearly are) are entitled to object. I should say that many of these objectors would not have had rights to be objectors as not being "persons with sufficient interest" as set out by the Court of

Arches. Notwithstanding I have read all these letters, and have summarised their main points here. It is to be regretted that many of these objectors did not so bestir themselves in 2011 when the original planning and faculty were being passed. An objector from Fournier Street objects: "***This is not an honourable way to proceed on the part of the church as the building has been deemed illegal. Due rigour should be pursued in up holding the rule of law by a public institution such as the church"***. Well, it's a sweeping statement to say that ***"it has been deemed illegal"***. Among the letters of objection **(2821)** is one from the architect designer of the old youth club buildings. She urges that: "***the churchyard must now be returned to its essential historic role as public open space and setting for Grade 1 listed Christ Church Spitalfields."***

605 John Nicholson, an SNP M.P elected in May 2015, living opposite the church writes to object on 12th October 2015 **(2824).** After setting out the usual grounds he goes on to say: ***" The Church Authorities pressed ahead with the current building knowing they were on flimsy legal ground. Their tactic seems to have been to 'create facts on the ground' in the hope that local residents would not have the resources to resist and would therefore have to tolerate a retrospective application without objection …allowing that would create a precedent for other developers".*** Having read the documents in this case, I reject this as being a too ingenious debating point without substance. The failure of the church, its legal advisers, LBTH and LDBS to recognise or grapple with what tuned out to be the real problem, I find not to be the result of a Machiavellian plan to get what they wanted, but rather a hopeless failure to realise or remember that they were planning to build on a churchyard. Not a conspiracy, but the result of careless incompetence. A risky and foolish approach when faced with determined and, apparently, well-heeled, professionally advised objectors.

606 I was shown on a site view where the Public Notices had been exhibited, on the outside of the church. I make it clear that I am satisfied that they were

displayed in a sufficiently public place for the requisite time, and I reject the arguments that this was not properly done. I was told that they had been advertised in the "normal place", and I accept this. They were noticed, and people hastened to object within the relevant time (albeit with insufficient opportunity to inspect the documents). Had this been a new, fresh Petition for an un-built building I would have been very concerned, and required re-advertisement, but the building in question was before the eyes of the objectors, and had been since completed in about 2013. The arguments against it were not new, but had, properly to be made to me in respect of the confirmatory petition.

607 The matter which does interest me is that there appears to be a complete absence of current objections from the amenity societies or other potentially interested bodies. I would have expected to have heard their views on this building from an aesthetic point of view, as distinct from the legal arguments before me, now that it actually before their eyes as a built structure and not just as envisaged on an idealised architect's plan.

608 At least one objector **(2853)** complained: "***The Church and the Churchyard do not belong to the resident priest. They are not his private property. They belong to the whole of Spitalfields, and it is SHAMEFUL that this project was allowed to be pursued with such wilful disregard for due process and the consideration of others".*** One of the difficulties facing objectors is the legal reality of the situation that the Rector is the owner of the churchyard, which has been misunderstood. As such, as I set out below, he has legally really quite a lot of freedom about what he can do with his freehold land. "Others" may not agree with this objector, but be rather pleased with the building. It is to these "others" that I now turn.

609 To balance the recent letters of objection to this confirmatory Petition, there were letters in support. Again, I refer to but a selection from School

parents, often being both local residents and members of local community societies. ***" The garden buildings allows stimulating and safe free flow for the children…. It is particularly vital for our local children who have to put up with increasingly busy and unsafe streets, and adult antisocial behaviour… it is rare in central London that children can access such a stimulating, spacious, safe and untiring learning environment and it is vital for our children and local community – in an already deprived borough…" (2856)***

610 This view is repeated by other parents. Another local resident writes: ***" The design and execution of the building seems pleasant and unobtrusive - for a modern building it beds (sic) in rather well into a historic setting … It does not cause aesthetic harm to its surroundings in any way. I remember the ugly concrete bunker (or "youth centre") it replaces. This new building is a big improvement". (2858)***

611 A Mrs Patel writes: **(2859)** ***"The extra hall and parents room in the new building are regularly used for Stay and Play sessions for local parents, ballet lessons"*** (to which her child goes), "***gardening club, parent exercise classes, extra space for parents to share books with their children in the morning."***

612 A resident of Brick Lane, Mr Denyer writes **(2860):--*****"The rear-guard action in opposition to a building which attracted widespread support at all levels, especially an action mounted through the vehicle of a limited liability company (i.e. the opposers' personal assets are not at risk, whereas the schools' and others are put at risk) has been cowardly, divisive to the local community the opposers claim to represent, and a down right abuse of process…. the area had always been a cauldron, a melting pot of peoples and purposes. Attempting to freeze a part of the area in aspic is not***

conservation or preservation; it seeks to create an attractive backyard for those whose property interests are great, yet whose children (if they have them) seem to me unlikely to attend anywhere as prosaic as the local primary school. The school was created with the aid of, at the behest of the church, on church land, having been moved by the church. The church supports the building. The local community has had ample opportunity through the proper planning channels to express their feelings. Local tax payers' funds have been used to build it. The children of local people want and need the building".

613 In this view he is supported by Ms Denyer **(2861)**. She raises the following points :--"***Some of those objecting are established residents who are well off, live in large properties nearby and would have us believe their concerns are to do with either the architectural or religious heritage. Others who are more honest and admit that their concerns are that the existence of a community centre in beautiful Fournier Street might potentially lead to groups of people coming in or going out who might spoil their peaceful existence, or contribute to the already high levels of anti social behaviour in the area. Either way they are convinced that their NIMBYism trumps any other consideration in the matter, no matter how much need the school and community have of the building in question".*** She stresses the enthusiasm of parents and pupils for the school: ***"For each wealthy resident of Fournier, Princelet and Wilkes Street there are many more far poorer residents living in crowded social housing just a couple of hundred yards away ….prices {are now] raised to the point where they are unaffordable to all but the wealthy few. Destroying this building would send a clear message to these kids and their families that they are not welcome in Spitalfields".***

614 Given the evidence from one objector witness in the course of the hearing as to his views on the need for the building to be demolished to provide more open space, I was particularly struck by a letter in support of the new building from a Dr Louise Vaughan, a GP in Bethnal Green, a regular worshipper at Christ Church, and a resident with her child at the Christ Church school. **(2870)** She writes:-***" I am not an expert in the law or in architecture, but I have seen the struggles that a school like Christ Church faces, unimaginable to schools in more affluent parts of the country, to accommodate and resource children from contexts involving mental health issues, severe disability, language barriers and housing inadequacies. I have also seen this building used to build parental relationships which foster empowerment and confidence, cross demographic and ethnic and religious barriers and open its doors to a community more polarised and disconnected than most … I am unable to comprehend how the value of heritage and the letter of the law, both clearly immensely valuable, eclipse human need".*** This local GP did not mention in her letter that a few more square yards of open space in itself would make the kind of appreciable difference to the lives or health of the local children as claimed by the objectors.

615 Many supporters stressed the effect of the school building, which now it was in use could actually be appreciated. The City Farm at Spitalfields supported the new building. Mr Derek Stride, a trustee of FoCCS, wrote to support the building. His father had been the Rector there in the 1950s and he himself lived in Hanbury Street. Given his long involvement with FoCCS, he wrote on 12th October 2015 **(2868): "*Spitalfields is more than a gentrified minority, most of who are not involved in the church, and none send their children to the local school. There is a very large, poor community on the other side of Brick Lane that the school serves. The school is light in their lives and a ladder out of poverty. The original youth club …. again there was some***

opposition to it being built, by people with little social awareness of the local issues. They would not have considered living in Spitalfields in those grim days ….opposition to this building comes from wealthy, educated and influential people, whereas the building serves a group who are underprivileged, vulnerable and voiceless. Christ Church is not a museum; the church is part of a living community supporting a whole range of social problems. The school is part of this…. There has been rather a large amount of misinformation from people who should know better… There is a lot more to this than a well co-ordinated campaign driven by very committed, very able people. There are considerable moral and matters of conscience to consider. Not all the Friends' Trustees support the action, though that is the impression that is given".

616 Now I have quoted from a variety of letters both for and against the new building to give a flavour of the effect this litigation was having on the local community of Spitalfields. I have selected the important main themes running through each group, as views are often repeated. I can see that feelings are running high, but that (many of) these writers have not been cross examined to justify their individual views. They are personal views, but I must consider them and give them such weight as I see fit. People write letters from different perspectives, from different political and personal view points, but such views are all part of the mix which represents the current (and probably the historic) Spitalfields. It is right that anyone interested in this dispute should be able to read these views. However, in this Consistory Court I am able to take into account the pastoral aspect of what is being proposed. Unlike the Administrative Court where the objectors, had they sought Judicial Review, might have been able to rely on a purely legal argument, I am able, in the Consistory Court, if I to see fit to do so for pastoral reasons, to allow wider matters to weigh in the balancing exercise. It is concerning that this matter has so polarised a community which is changing

financially and socially. (I notice in a recent Governors' report two children at the school sat the entrance exams for London highly selective schools; a thing unremarkable for many London primary schools, but for this school unimaginable a few years ago).

617 On 14th October 2015 the Trustees of the Restoration Trust held their AGM. 7 members were present and the secretary. Those minutes before me are labelled "draft" **(2876).** The existing Directors were reappointed. There was no other business. The same seven people went on to hold a joint meeting of the FoCCS and the restoration trustees. Mr Vracas said that he had seen***, "enough to object to the rest of the Faculty, but he had been invited to meet {the Rector} to see the rest and discuss the objection".*** The meeting dealt with necessary business. A decision as taken to transfer £200,000 into the churchyard garden restoration fund, although the estimate on replacing the church's roof was estimated at being £150,000. The thinking behind this is not very clear **(2878)**. There were problems that the FoCCS had only: "***tangentially been consulted on the organ's protocol of use. The trustees were disappointed by this and by the fact that the consultants, for whom the Friends were paying, were being consulted directly by the PCC.***" I have already commented on the need for clarity as to contractual obligations. The Rector who was not present had raised three matters. One of these was in respect of a sum (presumably in the accounts of FoCCS, not before me) of £97,000 on churchyard preservation work. Mr Vracas reported to the meeting that this figure covered: "***legal fees with some photocopying and printing".*** Now this is really concerning At no stage, other than a generalised motion to support SOS do I read in the minutes before me that the FoCCS trustees voted to approve such expenditure. I can only take it that this £97,000 was spent to enable SOS conduct their campaign of litigation. It would seem that the SOS litigation is being funded from the FoCCS funds. SOS had informed the Court of Arches that they were a body with no assets. The FoCCS

trustees were apprised of the outcome of the Court of Arches decision. The Trustees were told that the cost ordered by the Court of Arches was to be paid by 19th November, and that: "***in the previous judicial review proceedings of November 2013, Tower Hamlets had offered to pay costs but that these had not been forthcoming and a settlement had not been reached".*** The Trustees voted to ***"follow up"*** on costs. It was recorded that ***"the legal fee costs reported on the accounts and queried by the Rector in his email (the £97,000) would be reimbursed as far as was possible when the decision on costs is honoured."***

618 Now just let us consider what has been happening. A registered Charity, without minuted, detailed approval has spent £97,000 backing an off the shelf company to front litigation. The Court of Arches was not told that. SOS were said to be a company without assets. Had SOS lost in the Court of Arches, £97,000 would have been lost to FoCCS, unrecoverable from an asset-less company. It appears that for what ever reason the Trustees of FoCCS felt themselves unable to act themselves, but spent their money funding SOS's litigation costs. I look in vain in the minutes of FoCCS to find these moves formally approved, let alone the risks to the money subscribed by many of their subscribers. It is the silence in the minutes about this which causes me, and, possibly may cause the Charity Commission concern. Subscribers may also wonder if they had anticipated so great a proportion of their moneys to be hazarded in this way, FoCCS could just have waited for SOS to litigate, with or without other individuals who wanted to join in, and taken the benefit of successful litigation without the risk of losing their £97,000. I am left with the strong impression that FoCCS had become to be run and dominated by a small group who regarded this as a clever way of doing things. At this meeting, Mr Stride spoke up, to point out to his fellow trustees the inconvenient fact that: "***the legal appeal (i.e. the Court of Arches' judgment)***

did not say that the new building was illegal". As I have already noticed that rumour was circulating around Spitalfields.

619 At the close of this meeting there was a discussion as to the future of FoCCS. A "think tank" was to be set up as to its future and the possible changing of the definitions of the Charity's objects. The trustees accepted that there was a dysfunctional relationship between this body and the Rector, but "***the trustees did not accept any responsibility for this***" and they considered that the building in the Churchyard was contrary to the charity's aims**. [2882)** Mr Vracas objects in the Graysons contract to using the open space, and as to the potential liability for business rates, alleging that to avoid rates would "***be unpopular locally"*** presumably among wine bar owners, restaurants and the like.

620 Just for the sake of completeness, I turn to consider again, the draft minutes of the next FoCCS meeting held on 27th January 2016 (**(2934-2939) ,** 10 trustees are recorded as in attendance. For what ever reason there is a redraft of the last minutes on this litigation. Apart from the normal business, however, there was now a discussion arising from their "think tank" proposals raised at an earlier meeting. For the first time, it would seem serious thought was being given about the future of FoCCS. It was discussed should they dissolve? Should they "***widen their brief to include other Hawksmoor buildings".*** One trustee wondered what was the position of other Hawksmoor trusts and, I quote from the minutes**,** ***"what would they think of the Friends potentially muscling in".*** Some in that potential situation may feel their blood run cold on reading this. The Trustees did realise (somewhat late in the day) that: "***once the Friends had got through the present legal jungle….if the Trust were to continue, its remit needed detailed thought, on what its funding remit would be and what the relationship with the church was***". Not before time there was a discussion led by the Rector as to the necessity under the HLF terms of the heritage /education and outreach side of Christ Church, which, in effect the church is. The Church

had been taking the lead with tours, school groups and the like. FoCCS had put up interpretative panels, but the church had been responsible for the rest. It was noted that the trust deed of FoCCS set out that: "***the trustees should have the power to foster, promote and organize such civic cultural and educational and musical activities..***" As I have said above until this point I had seen little sign of the Trustees being as active and keen on this side of their charitable duty (save insofar as music and tours for FoCCS supporters are concerned) as they have been on the 'Hawksmoor vision' side. What they have done about this since that discussion appears non-existent. However now the music aspect is run separately and successfully by the Spitalfields Music Festival, and by the church being available for concerts, recitals and the like. At this meeting Ms De Quincey spoke with passion about the restoration of the building: ***"Thus in the long term the Friends were advocates for the building vigilant for its heritage and culture. The only remaining thing to be done from the original agreement was the churchyard, apart from the north steps".*** There were discussions as to whether the FoCCS would/should be involved in funding long term maintenance. The reality seems to me to be that at this point the FoCCS trustees were being forced to go have a long look at themselves (and, indeed, their role in the Spitalfields' community). This litigation cannot have helped their image (and hence fund raising ability). They appeared reluctant to see their role in "their" Christ Church project coming to an end, but the preliminary discussions as to using, to quote Mr Vracas, ***"their library and intellectual property",*** with a view to the setting up of a Hawksmoor centre. A Mr Chitham, who appears as a Trustee, set out useful guidelines. The FoCCS had lost the use of their office premises which a company had hitherto provided for them, and had had to move into Ms Whaite's house, but it was accepted that this could not continue indefinitely. The minutes specifically note that "***the current churchyard issue has not formed part of this discussion".*** I just note this from these minutes. The FoCCS re-iterated their concern about the costs order being met (as well they might as £97,000 was to be

repaid to their coffers. The actual amount to be repaid under this costs order is not set out in the minutes, so I do not know if it is more or less than the£97,000. Again, the FoCCS trustees would not "***have had to get through this legal jungle***" unless they considered themselves as involved in it. Others, SOS and individuals were conducting the litigation, at least on the surface so, one might ask, why could FoCCS not just await the outcome of any Court hearing, if any of their individual members (as some did) wanted to give evidence, that need not have been of concern or financial risk to FoCCS?

621 At this meeting the Trustees present also carried unanimously a motion that: "***the Friends were prepared to contribute a further £50,000 to the action".*** I remind myself that the FoCCS had written to the Charity Commission in the early days of this litigation. I have seen no letter from the Charity Commission in response. There is no discussion minuted as to any discussion among the trustees as to what happens if the litigation is lost and no money is repaid to them (say under the original order). There is no discussion as to the risks each trustees bears individually, nor how any order for costs which might be made against SOS and the individual directors is to be paid. The FoCCS trustees seem to have approached this without any proper analysis or proper consideration. How were they to get any of their money back from SOS which was an asset less company? Had any individual guaranteed the charity the repayment of their monies? Short of betting the funds subscribed by many, many supporters for the restoration of the church may be now considering that their money was being hazarded, in racing terms, on a 2.30 late season selling plate at Chepstow; as trustees of a charity, they could not have indulged on a more risky, speculative financial venture, but that was what these trustees had done, £97,000 earlier and now a further £50.000. Individuals have a freedom to spend their own money as they see fit; charity trustees have not.

622 I return to the events of the Autumn of 2015. Following the substantive judgment of the Court of Arches, the Rector and Churchwardens, following the earlier unanimous PCC resolution, applied for a Confirmatory faculty on (it is said) 19th October 2015 in respect of the new building, and for a construction management plan for the use of this building by both church and public and for licenced access between the Rector, the school and LBTH. This petition (my copy is not dated) refers to the earlier faculty application filed in 2011, granted on 14th February 2012, the works being completed, after there had been a time extension to the Faculty in October 2013. This new Petition was supported by a formal letter from the Rector to the Chancellor, **(2767-68)** setting out his reliance on the advice of the DAC, English Heritage and the local planning authority in respect of the earlier erection of the new building. The Rector believed that he had been acting under the full legal authority of a Faculty and with local authority planning approval. However, for the avoidance of doubt he now applied for a confirmatory faculty under the new s18A of the *Care of Churches & Ecclesiastical Jurisdiction Measure*1991. He set out his expectations that they might disturb human remains, that he has had a burial policy prepared and lodged with the DAC and Registry, and how they had worked with the Museum of London throughout. All this just makes it inexplicable how the Section 3 of the *Disused Burial Grounds Act* 1884 prohibition was initially missed.

623 In the light of the successful appeal to the Court of Arches, and the matter having been remitted to the Consistory Court for a fresh hearing, the Chancellor of the Diocese of London recused himself from that hearing, as, indeed, he had already indicated that he would do. In normal circumstances it would have fallen to the Deputy Chancellor of the Diocese of London to hear the case. However, he, too, wished to recuse himself as he knew the Rector personally. On behalf of the Bishop of London, a Deputy Chancellor had to be brought in to hear this matter; a situation envisaged in the judgment of the Court of Arches judgment

itself. From the out set, when approached to act as Deputy Chancellor in this matter, I made it clear that, over the summer of 2015 the former Archdeacon of Hackney (who had been peripherally involved in the above history) had become Bishop of my own Diocese of Gloucester. She was until then unknown to me. I had met her for a short business meeting, (at which we discussed purely Gloucester Diocesan matters which were of more pressing interest to me than, if I can express it in this way, matters involving the litigation problems of a church in London), formally at her porrection and her enthronement; neither of which occasions providing any opportunity for any discussion about anything, much less Spitalfields. At the outset, I made my limited connection to their former Archdeacon thus far clear, and insisted that all Parties knew them. If any Party had taken objection I would, of course, have absolutely refused to act. The Registrar informed the Parties, and there were no objections. I raised this matter again at the first Directions hearing in this matter in November 2015. No Party, represented nor in person, made any objections to my acting, either then or at any later hearing. Since I was appointed by the Bishop of London to preside over this Consistory Court I have not spoken to, seen nor communicated in any way with the former Archdeacon of Hackney save briefly when meeting recently and formally at the consecration and installation of the Bishop of Tewkesbury (at, I may say, no little personal inconvenience as Chancellor in her Diocese). I clarify this now for the record, as at various stages of this long history, allegations of bad faith and criticism of various persons involved formally in these matters have been made. It is with some sadness that I feel that I have had to do this, but given the evidence before me as to how various Parties have chosen to conduct their respective cases, and in the light of the allegations being made, I do this to ensure that no such imputation of personal connection or influence is now raised.

624 A preliminary Directions hearing was arranged to be held at Christ Church on 18th November 2015. I expected that was to be by way of a run of the mill

legal housekeeping hearing, to clarify Parties, documents, and timing and to make such necessary directions as to Parties, documents and disclosure as might be necessary. In ordinary circumstances, this is the kind of hearing which would have been conducted by my Registrar It appears that actually very little of the voluminous documents now before me in this case were before the Court of Arches, where the appeal was argued on very narrow points. As I read such documents which arrived before me in preparation for the first Directions Hearing I noted that all the three main Parties in favour of the new building were going to be represented by, initially two, but subsequently one, barrister. Nothing is unusual in that. The LBTH own solicitors were representing the Council, but there was to be joint instructions of their Counsel, Mr Mynors, on behalf of all the Building Parties. However, I discovered that an extraordinary situation had developed. It appeared to me that Winckworth Sherwood were the lead solicitors for the Building Parties. Again, nothing in that; a sensible saving of costs being, no doubt, the reason, so as long as no conflict developed between any of those Parties. However, what was not conventional, but actually startlingly unconventional, was the fact that the firm of solicitors acting for the School (LDBS), the Rector and the churchwardens were Winckworth Sherwood, while at the same time Winckworth Sherwood were and are the solicitors to the Diocese of London, and one of their partners acts as Registrar to the Consistory Court. That a partner of Winckworth Sherwood is the Registrar of the Diocese and was acting as such in the earlier phase of this litigation, and partners in the same firm were now intending to appear in a case over which he was to act as Registrar, simply cannot be right. The Diocesan Registrar, a solicitor, acts not just as the legal officer/advisor to the diocese but when a Consistory Court takes place he is the clerk to the Court. Indeed, in preliminary Court hearings relating to procedural issues, he as the Registrar, acting judicially, will make directions for the Parties to comply with before a main hearing, Further, he may assess the costs afterwards in the event of an award. How could a party, who has had an award of costs made

against it payable to another party, perceive as fair, an assessment of costs made by a partner of the same firm as the party's solicitor benefitting from the costs order? The roles of Chancellor and Registrar are closely analogous to that of Circuit Judge and District Judge in the County Court. No one attending a County Court hearing expects to have the District Judge of the Court to be a partner in the same firm of solicitors as a solicitor representing one or more Parties appearing before him. This is a common place and well understood issue for Deputy District Judges in particular, who are usually solicitors in private practice also. Deputy District Judges avoid sitting in courts before which their partners regularly practise, and are punctilious in recusing themselves from sitting on any case where a partner of has represented or represents a party.

625 To heap Pelion on Ossa, as the documents arrived in before the first Directions hearing, I was invited "because of their bulk" to go to the office of Winckworth Sherwood to read the papers, and learn of the background. I refused, and the papers were forwarded to me; in the event, these were very small in comparison with what turned into the final bundles.

626 I understand that the difficulty may arise when individuals or parishes ask for (and get) legal advice from their own Diocesan Registrar who is paid from their quota share, but once the matter becomes contentious the Registrar may find himself (from an early stage in potential proceedings) in conflict between his advisory role to a potential party and that of being an officer of the Consistory Court. However, often in Consistory Courts the situation does not arise as the objectors (who may or may not be legally represented) are facing Petitioners who may, again very often be representing themselves, or have their own solicitors, so the Registrar is not directly involved but performs his normal at arms length role. That was not the case here.

627 The situation I discovered that I was faced with in November was that one partner of Winckworth Sherwood was representing some of the Building Parties, when another partner of the same firm was the Court Registrar. It was made more serious because of the objectors' allegations that the church/Rector/School had been given no (or wrong) advice as to the conduct of the matter before the earlier Consistory Courts, for example that the "building on a disused graveyard" point had apparently not been spotted, a situation which had exercised the Court of Arches. Accordingly, I required the Registrar to step aside, and a Deputy Registrar be appointed to act thereafter in these proceedings.

628 Having become aware of this debacle, I was not surprised to be alerted to the fact that the objectors were going to raise this as a preliminary point. They had no need to do so. I was not prepared to have, as my Registrar for this hearing, a partner in a firm who was acting for the major building Parties, and to allow such an extraordinary arrangement to continue. At the first Direction hearing I made this clear, and appointed my own Diocesan Registrar (equally previously uninvolved with the affairs of Spitalfields and based at a distance in Bristol) to so act. I notified the Bishop of London of this action, this being his Consistory Court, and made it clear that I would not act further in this matter, were this situation to continue. This Deputy Registrar appointment had to be, and was, immediately approved by the Bishop.

629 At that first Directions' hearing in November 2015, I gave directions as to time-tabling and the production of the very voluminous documents which had been requested by the objectors (and went on being requested by them). It also became clear that individuals had given notice to be formal objectors; some of whom turned up at this first hearing. In the light of the strictures of the Court of the Arches in respect of admissible evidence, I was prepared to allow before me witnesses a degree of latitude as to their evidence. There was failure to comply with any time tabling, notwithstanding that the Parties wanted a lot of time to

prepare their full cases. It was as if people came in out of the rain to give evidence. I allowed them to give their evidence in whatever order was convenient for them, as people had holidays, hospital appointments and the like to attend. Nevertheless, the failure of some individual objectors to reply to helpful correspondence from the Deputy Registrar as to timing, the filing of statements etc. did not assist the smooth running of the Court. I made it clear at the outset that, subject to all Parties having proper notice of what witness was next going to be called, I would take people out of order I understand, and am well used, to litigants acting in person. One does not expect them to be lawyers. What one does expect is the common courtesy of replies as to their dates of availability etc. A number of these litigants in person filed no documents, merely signed up. That was, of course, their choice, but the courtesy of an indication as to what they were or were not going to do, would not have been beyond the dreams of avarice. Even during the hearing some of the objectors appeared uncertain as to just what they wanted to do, and I had to chivvy them to find out if they wanted to ask questions of witnesses, as was their right, or take a more active role. Some objectors, on the other hand, filed statements but, for whatever reason, did not attend to be cross-examined on them or to cross-examine others. I appreciate that when some objectors are legally represented there is a tendency for other objectors to sit back and do little, as the points they wanted to be made have been made, but objectors who take that road must realise that by becoming formal objectors they have a right to express their views, and a concomitant duty to face (shared) liability for potential costs. To become a silent formal objector seems to be the worst of all worlds. There was a failure to understand that they were engaging in a formal legal process, not just addressing a public meeting, notwithstanding the clear directions in that respect I gave to all present on the opening day of the hearing. It appeared to come as a surprise to some objectors that their dearly held views might be the subject of cross examination. I opened this Court by making it clear just what was going to happen.

630 At the first Directions' hearing Mr Vracas sought to apply for injunction proceedings to restrict the proposed contract with Graysons from being implemented, to the point of appearing with a draft order. I refused to hear that application on that day, saying that if it was to be pursued, it would have to be done on notice with any Party applying to be ready to give security in respect of costs and damages, were the injunction to fall after the main suit was heard. All parties wanted time to get the totality of their cases in order, and to digest the large volume of documents which were appearing as a result of requests for disclosure.

631 Happily, the next Directions Hearing in May 2016 was more straightforward, and the matter was set down for a 5 day hearing in late June 2016 As always with a multitude of Parties, holidays, hospital appointments, previous engagements, professional bookings etc. meant that it took time to come to trial In the event, Counsels' estimate of a 5 day trial was woefully inadequate. I make no criticism in saying that, time estimates with a lot of litigants in person are notoriously difficult to gauge and the matter took twice as long. I made it clear that, because the trial was longer than had been anticipated that I would hear witness who were inconvenienced by holiday or hospital bookings, out of order, so long as all Parties had proper notice of when such witnesses might attend.

632 Other than housekeeping orders at this Directions hearing, a somewhat extraordinary application was made. Very sadly, one of the main objectors and member of both SOS and FoCCS, Mr Philip Vracas, had died a few days before this hearing. Thinking that many objectors were friends of the deceased, and not knowing the date of his funeral, I indicated that if they wanted an adjournment of this hearing that would, of course, be granted. However all wanted to go on with the hearing on the appointed day. The satellite litigation against Graysons (who were to run the café in the crypt) had been brought by the late Mr Vracas, who

had an interest in a wine bar called "Blessings", a few yards from the western entrance to the church. He raised the matter of the tax position of the church in this commercial enterprise, and the use of the open space. Now this plan had been in gestation for a long time. The proper forum, at last initially, was to have raised it at the annual meeting of the parishioners and/or the annual parochial church meeting (as indeed would have been the proper forum for the initial objections against the substantive new building). As I have said, many of the objectors chose to ignore or by pass this proper and democratic way forward to have their views expressed. Had they done so, maybe many parishioners would have agreed with them and the matter could have been discussed in the annual church meeting. Who knows? It was not, for whatever reason, a path chosen by the objectors. However, at this Directions hearing, the problem was raised over the litigation begun by the late Mr Vracas alone. It had earlier been agreed that any decision as to that application by him would fall to this Consistory Court to be decided, as it formed part of the wider picture. Normally (unless there might be a financial benefit to the estate of the deceased, such as in personal injury litigation arising from the death of the deceased), the deceased's claim would fall on his death unless his executors applied to be substituted for the deceased. Here, at this Direction hearing, Ms Whaite (whom I understand must have been very upset at the very recent death of her objector-in-arms, Mr Vracas) applied to be substituted in his behalf in the Graysons case. However, it transpired that neither the potential beneficiaries to his will nor even his solicitor executors had been put on notice of this application being made by Ms Whaite. Now many beneficiaries, awaiting such benefits which they might receive under a will (including possible charities who are particularly hard-nosed in this situation) would be very surprised if they discovered that a third party had just taken over what might be potentially expensive litigation, which might, if lost, waste the estate of the deceased. The potential beneficiaries, whoever these might be, had, I ascertained, been neither informed nor invited for their views on this litigation. They might well have said that not a

further penny piece should be wasted on something to which they were indifferent, and which would not provide any money for the estate or themselves. They might have wanted to conduct the litigation themselves for all anyone knew. I was not prepared to substitute Ms Whaite as she requested in the place of the late Mr Vracas. I directed that the solicitors for the represented Parties inform the solicitors for his estate of this litigation, so that they were put on specific notice that the estate was potentially at risk of a costs order to cover the expenses of that litigation (if it ultimately went against the late Mr Vracas, and, hence would have to be paid out of his estate) to this point, so that sufficient money should be earmarked by the estate solicitor to meet such a contingency if it occurred. I was prepared to accede to the request of Ms Whaite for her to carry on this Vracas/Grayson litigation in her own name from then on, she understanding that she (if she lost) might be liable for the costs of this litigation from that point then on. I did indicate that, having read the papers on the Graysons matter that I was surprised that (at least at that point) there appeared to be no analysis of the potential problem from a tax/business rates accountant, which I would have considered essential expert evidence to be able to sustain the allegation of the late Mr Vracas and now Ms Whaite. In the event Ms Whaite filed no supporting statement nor additional documents in respect of this thereafter. I expected to hear argument on that matter at the conclusion of the main proceedings, but, in the event, I was later told that negotiations were taking place and that that matter would be adjourned. I deal briefly with the catering contract application now. I have read such documents as are before me in respect of the point taken by Mr Vracas. They are unsupported by any specialist accounting evidence nor by any letters of concern from the relevant tax authorities. LBTH confirmed that they did not consider the café in the crypt to be a change of use. I understand that the Petition for this catering licence, if approved, would allow the church to continue to run in the crypt the café which I have seen operate successfully for members of the general public, and which forms part of the public access conditions of the

HLF grant. Given that I am now told that Ms Whaite has withdrawn her opposition (on what ever terms as between the Parties which does not concern me), I see no reason not to confirm the licence. I would just add a condition that the church's insurers must be informed of the kitchen facilities in use for the heating of food, and any terms in the church's insurance to reflect this use must be complied with. Were this to necessitate a further licence from LBTH (which appears not to required but I heard no argument on that) such a licence should be approved by the Chancellor of the Diocese of London.

THE CONSISTORY COURT HEARING

633 This Consistory Court hearing began on 13th June 2016. The first two days, and part of the third day were initially taken up with legal argument, as were the last two and a half days, which I deal with later in this judgment. On the second day the Parties took me on an instructive and full site view of the graveyard, the school and the surrounding streets. This was not completed by reason of monsoon conditions, which truncated this viewing opportunity, which was resumed on another day. We re-visited the school itself, and climbed (somewhat dangerously) on to the roof of an adjacent building which was being renovated by builders. This last was of use. It being summer, it became very clear to me that the view of the south flank of the church was actually obscured (both on high and at ground level as I later took an opportunity to observe) by the trees. New building or not, the trees themselves actually blocked the view of the church. However, these trees are themselves the subject of tree preservation orders, and so cannot be removed. The desire of the objectors for an open vista (forgetting the new building) is unobtainable. These trees post date their idealised 1750 position, but are protected. Ironically, the trees, viewed from ground level shelter the new building and add an extra dimension to the graveyard.

634 I turn now to the Parties and witnesses who gave evidence slightly out of order, but for their convenience. I should say that much which many of them said or deposed to in their statements forms part of what I have set out above and has gone to form the historic narrative of events which I have set out above, so I do not repeat their views or evidence, but I do now comment on parts of their evidence which I found to be of note.

635 I heard first from **Mr William Frazer** Chairman of the Metropolitan Public Gardens Association, called on behalf of the objectors. His statement is at (**2956-2963)** and his evidence at **(T322-326)** I have already referred to the gist of his evidence above. Much of his statement repeated what he says he has been told by the Open Spaces Parties legal advisers as to the subsequent history of the graveyard, and is not within his own direct knowledge. The involvement of this body in the history of this matter was so little in dispute that Mr Mynors did not find it necessary cross examine him at any length. Mr Frazer agreed that after the garden had been laid out, the Metropolitan Gardens Association's involvement was limited to dealing with applications for grants from time to time. It would seem that during the time of this agreement, once Lord Meath and his garden designer had completed their lay out, the gardens were left to their own devices, which would, of course, explain the state they were in by the late 1890s. In answer to my questions, he said that the archives of his association could not really help. He was unclear just what the Association had done during their involvement with the graveyard, certainly not any day to day maintenance, whatever they may have done on similar sites elsewhere. He thought that: "***maybe Lord Meath might have paid the Victorian garden designer Fanny Wilkinson to have made arrangement for maintenance work to be carried out on the garden at that time"***, but the reality of his evidence was that this organisation had no records of any help whatever in the matter before me All he could depose to was the grant of some garden tools to the school and the garden in the last few years. He could not add to his statement. In his evidence he said that the Spitalfields

agreement was between the Rector and Lord Meath in 1891on behalf of the Metropolitan Gardens Association then apparently in existence, but the Metropolitan Gardens Association only became a charity in 1892. **(8-9; 3351-3352)** The only clear matter shown by his evidence was that the agreement between his Association and the Rector via Lord Meath was time limited and not extended. He had no evidence as to whether or not the Metropolitan Gardens Association or Lord Meath personally had paid for the upkeep of the gardens during that period. It shows clearly that this first plan to provide for the management of the graveyard as an open space was not, when it clearly just failed (as the descriptions of the graveyard in the 1890s which I have quoted above clearly shows), written in stone. The Rector and the church were, in effect, back to square one. What had seemed a good idea at the time obviously failed completely. It also seems that no Faculty was obtained nor needed for this arrangement to begin or end. That was not surprising. The land formed the Rector's freehold, over which he had a great freedom. He would not have need a Faculty to authorise him, for example, letting sheep graze in the graveyard, anymore than he needed a Faculty to allow the Metropolitan Gardens Association to manage it. It was his choice. This witness's evidence assisted me on this. The Open Space management agreement between the Rector and Lord Meath/the Metropolitan Gardens Association was finite. It was for a five year term, and came to an end. It seems that this was a worthy idea, initially organised by Lord Meath. The Association seems to have done little or anything thereafter and their involvement, such as it was, came to an end.

636 The next witness for the objectors was **Ms Eleanor Michell,** formerly of Michell and Partners architects, who had been the architect of the old building, Adventure Playground Association (CCGAPA), the youth club in 1970. Her statement is at (**2945- 2955)** and her evidence at **(T328-335)**

637 Initially, she spoke to making this statement on behalf of the Open Space Parties, but it turns out that she was more than a witness, but had found herself to be also a formal objector. She spoke about the optimistic early days of the adventure playground movement, and the plans for children to play in a supervised space but also have indoor facilities for shelter. She agreed that, although the site in the churchyard next to Hawksmoor's church **"was not ideal"**, but "***the needs of the children of the Borough were paramount".*** The scheme had wide civic and ecclesiastical support within the Borough. That as far as their plan was concerned, the gardens ran from Commercial Street to the school playground beyond a "ball game area". "***The whole green (grass and trees) area was under the care and management of the borough council as a public open space. As such the open space was easily large enough to accommodate the public garden, the children's garden, the building with the under-fives play area and the ball game area (agreed to be shared with the school children) (****my underlining****). The public garden, with direct access from Commercial Street was fenced off from the rest of the recreation area for the safety of the children."*** She went on***:- " It is factually correct that the churchyard was an established and relatively quiet amenity area of open space affording a retreat from Commercial Street and Spitalfields market, and it is also right to acknowledge that there was a paucity of areas of recognised open space in the vicinity. But in fact the public could not enjoy the public open space owing to the meths drinkers who frequented the churchyard gardens, known locally as 'Itchy Park', and, in effect, excluded people, especially the vulnerable, from being able to enjoy the open space at all."*** She accepted the difficulties that the existence of the trees posed when trying to site her building, for which in 1969 an initial recommendation made by the Planning subcommittee to approve this scheme for an initial five years so that redevelopment of the site could be considered but if that has not been undertaken within that period ***"it is likely that favourable consideration would be given***

for an application for renewal of temporary planning permission". (However, that was not subsequently reflected in the planning permission that was granted). She stressed the then reality that restoration of the Church seemed unimaginably unlikely. It was this Playground building whose use turned into the "youth club" which remained on the site until 2011. I remind myself that the debates and concerns then expressed by, for example, the Fine Art Commission, were in respect of the old building in a slightly different site within the graveyard. She spoke, in her evidence, of her, somewhat distant, memory of a path round the church to the entrance yard between the church and the Rectory which her building did not disrupt. She stressed that single line on the plan before her **(329/6-7**): "***.. that was a fence ..because the public garden was not considered very safe for the children …there is no direct way through [to Commercial Street]. ..".*** She was questioned on her statement in which she said: ***" It would not have been possible, in my opinion, to re-site the building due to the existence of the trees, which made an important contribution to the visual amenity of the area, nor was it possible to reduce the size and height of the building, which I designed to be as unobtrusive as possible".*** She had a memory of the Fine Arts Commission or the planning authorities of the time thinking that it might be a good idea to put her building on a different place on the site, and that she was hoping that her building impinged: ***"as little as possible on the church itself " … "the trees are getting bigger and bigger…we were very keen , because adventure playgrounds were very untidy and messy looking places and we did not want that to be the first thing that was seen in relation to the church from Commercial Street. The building serves the purpose of screening the adventure area … I could not find a better place for it" (T329-330).***

638 She was asked to amplify her statements, and she said the following in respect of the new building: ***"I think it extremely ugly and quite out of scale.***

***It badly detracts from the view of the church itself. I did not say that in my statement because it is irrelevant, because even if it had been a beautiful building, what I would actually would like to see is no building there.*"** In her statement she would prefer no building to be there at all: **"a building of any kind would be an intrusion".**

639 She tried to justify her current view from her enthusiastic proposals many years previously when her architects firm were justifying their pitch to obtain the commission for the old building, by saying: ***"the whole position then was completely different… the church was derelict .. it was not a great issue as to whether the church could be restored, it was not thought that such a thing could possibly happen. ...it was not really considered ."*** Her evidence made it plain that, so unlikely did any restoration of the Church seem, what would happen to the playground, were that ever to happen, was not really considered. One sad part of her evidence showed that the original children's' playground had been very successful ***"packed with children***" so that one warden had to be increased to three, but the money to fund this just ran out. She was not involved in the subsequent failed youth club which used her children's building. She agreed that she had written to oppose the planning application for the new building, and to support the demolition of her own building **(906-07).** She went on to say**: "*I was not in the habit of pleading for my own buildings to be demolished ... I did wish for it to be demolished then ... it was not being used for the purpose it was built for. The only reason it was, was no other site could be found and the need was so important. I have always been devoted to any measures for enabling children who did not have gardens or places to play childrens' play, that appeared to me to be more important at the time it was first built than anything else".***

640 Her very obvious and genuine concern for the needs of the local children in 1970, I find overcame her feelings as an architect, when it came to the necessity

of providing somewhere for children where ***"no other site could be found and the need was so important***" went beyond mere employment.

641 Ms Michell went on to say that it had been Ms Whaite who had contacted her, and encouraged her to write to the council in the early stages of the planning application. The objectors claim that even the original architect wants the new building to be demolished, but I find that goes too far. Ms Michell's aesthetic views were tempered in 1970 by the needs of the children (and, like any architect, to carry out a commission she had obtained). Her concern more recently was that the youth club was not fulfilling her expected aim, and therefore it should be demolished **(T331).**

642 I have to consider have the needs of the current children changed? Are there any other places locally where those needs could be met? Has the situation changed from 1970?

643 When I read her presentational literature provided when this building was being built by her practice, it was dis-spiriting to hear her evidence now.

644 She was cross-examined as to the surfaces of the site. Grass? Hard standing? After such a period of time, some 46 years it is not surprising that Ms Mitchell's memory of the site was hazy now, and she was not assisted by the fact that her own memory did not fully accord with the site plans put before her. Indeed, the plan put before her she had not seen until the day she gave evidence, so whose plan, idealised or real, it was, I know not. In respect of the rest of the site, the open western area, she did remember: " ***there was something like a circle and these marks on the ground must have been then remains of some formal arrangement that had been laid out".*** As far as her memory of the park's uses when she became involved, she said: " ***it was used by the meths drinkers mostly; they sat out here on benches, and so it was a bit***

intimidating for others …we realised when we fenced this off ([i.e. the old building) ***that they would still be doing that – well why not. It was not up to us to turn them away. I think they were being looked after in the crypt, to a certain degree as well. It did not enhance the garden, if you wanted to go and sit on a bench. Everyone knows it had a reputation, it was called "Itchy Park".*** This witness was helpful in her description as to how those people such as herself, "***devoted to the idea that this open space should be playground, should be established because there were two different occasions the Fine Arts Commission and the planners sent us away to see if we could find somewhere else …but no one other [site] was found."***

645 What ever Ms Michell's views on the removal of a derelict youth club to provide an open space, I find that her passionate views as to the children's needs to be met in 1970 *might* well chime with children's needs being met now. Her "support" for demolition I found to be partial, and restricted to the widespread disdain for the failed youth club. True she, in a perfect world, might subscribe to the "Hawksmoor vision", but the reality was she designed in that space a building, which now no one liked, though probably because of its failed use rather than the building itself. Having looked at the photographs and designs of the old demolished building, I really have no hesitation in saying that the new building appears better, and, actually, more interesting; certainly more aesthetically pleasing.

646 **Mr Dyson**, his oral evidence being at **(T410-420**) and **(T 992-1000)** a local resident and architect, whose practice was but a stone's throw from the church, and who was a founder Director of SOS, gave evidence. Some time in his evidence was taken up with his measurements of the various parts of the site which I have already commented on. He has been an unsuccessful competitor against the successful architects SCABAL for the planned new building, which was to be completed within a budget of £1.5 million. (I should say that the figures differ in various documents, as other works are included or excluded, but for

working purposes that figure is an average). Notwithstanding his interesting and well thought out proposal, which involved internal use of the existing school buildings, his plan did not gain support and the contract went else where. I make it clear that I do not consider that Mr Dyson's involvement in this case arose from "sour grapes". He was a professional architect with professional experience of properties in his area, and a concerned local resident. His "statement of facts" is at (**2995- 23005**), and his witness statement is at ((**3006-3016)**. I was not greatly assisted by his figures which changed over the course of his evidence, especially in the light of additional clarification I asked him to make. For instance he put in a note at (**3346**) saying that the 2009 licenced land was 53.6% of the 1949 Trust Deed land, but that is not the same as seeing it as part of the wider graveyard, of which one third has disappeared beneath the school. Even on his figures the new building and associated land amounted to no more than 15.4% of the 1949 Trust Deed land. The former provides computer generated measurements taken from various documents of the graveyard at varying times of its development together with photographs of the site at various times He seeks to set out that on his figures the overall dimensions of the graveyard have reduced from an initial 5265sqm to its present 971sqm. As I saw, in his documents the figures were protean. However, the reality, which he set out is that with the building of the school in 1874, 31% of the graveyard (1643sqm) disappeared under the school, and does not form a part of this argument. That leaves 69% of the graveyard to be the subject of the 1949 licence. The 1970 licence for the children's' playground takes up 19% of the graveyard, whereas the 2009 licence (the new building) covers 39% of the graveyard. He claims that the current position (namely the very front public area) is now only 19% of the overall space. Of course, that is not right as with proper maintenance and the recovery of the waste space that public area should be, even as its stands, on Mr Dyson's figures, some 30% of the open space. So the real argument is between 30% open space and 31% school, giving a total of 61% as it stands, and 39% in dispute. However, the Building Parties dispute these

figures. Even on their case, the redesigned new building affords more open area that the objectors concede. I was concerned that having seen **(3004)** one of his photographs of the new building take from an adjacent roof, it gives a rather skewed image of what the vast majority of garden users see on the ground. The roof of the new building appears in that rather slanted photograph to be obtrusive, showing the whole of the roof. However, at ground level, which is where the vast majority of the public see it, the building is appears much more light and airy.

647 In his statement Mr Dyson, not only a director of SOS but also as an objector in his own right, set out his qualification as an architect with his own practice in Spitalfields and in Bath. He has been resident in Spitalfields for many years, and is a member of various local groups. He dealt with his professional involvement with earlier planning developments within the school itself. He, very honestly, deposed to the fact that when he was engaged on these matters, he was unaware of the 1949 Deed. He then set up his own professional history in respect competing for the new building. He set out the description of the relevant land as provided in the initial brief available for all competing architect designers. Yet again, the inaccurate legal descriptions which appears on these documents is of concern:- " ***The London Diocesan Board of Schools have recently acquired an interest in the land adjoining to the school site currently being used as a youth club and in the grounds of a community gardens adjacent to and the ownership of Christ Church Spitalfields …the Board have also purchased an interest in adjoining land to the rear of the school so that the buildings and playground might be extended….the Board acquiring purchasing rights over adjacent school land ... to benefit the school with a larger plot***."

648 That was not right. Whatever may have been in mind as to re-utilising the youth club land, the LDBS had certainly no legal interest in the churchyard or the school land. This document stresses the possibility of the access becoming

available from Fournier Street, and not just Brick Lane. At present that access lane is fenced off, and this was, as I understand it, a factor which certain residents of Fournier Street found disquieting. At present, either people entered via the school itself, or used the gardens from entering from Commercial Street. It is not surprising that a third entrance from Fournier Street might be opposed by its residents, who might see it as an invitation for more tramps to come in. The trouble with open space (especially if it is increased) is that people (of all kinds and conditions) might use it. It seems almost tedious at this point in this judgment for me to continue to complain about inaccurate documents, but they do give rise to real difficulties to justify, and opportunities to question people's *bona fides*..

649 Mr Dyson gave evidence that he had played tennis reasonably regularly on the tennis courts between the school and the new building, but they had gained access to these courts through the Spitalfields Society and agreement with the school. Given the desire to have as much open access as possible I am puzzled how, if this be right, the Spitalfields Society, came to, apparently, jointly control access to tennis courts which were either on school land or church land. The entrance was via Fournier Street, but, of course, if access was restricted then the general public were excluded. Puzzling. Open Space not open to all or school space with restrictive access? For how long this went on I know not. The school certainly got rent from letting out the tennis courts to firms and individuals out of school hours. Anyway, no one then objected to this arrangement. The tramps did presumably not play tennis, and were on the other side of the fence.

650 Mr Dyson reached the second stage of the design competition, at which point he understood that the land in question had been acquired under a 25 year lease (and other references made to that were, of course, accepted to be incorrect.) Mr Dyson assumed that the land of the former youth club would only be available for 25 years, a point he himself, very properly as a professional architect, queried, both because of the cost (£1.5 million), and, if this was to come from central

government grant funding, as he would have expected a 60 year life span for the building. Subsequently, he and SOS were apprised of the reality of the land ownership. Mr Dyson regrets the loss of open space which the new building took up, and opines that the new building pays little attention to the Hawksmoor church.

651 In his evidence, he had accepted that there would have to be some decanting of the children into temporary classrooms were his plans for internal extensions to the school to be adopted and some time was taken up with a history of his proposed plans for the school which, in a nutshell would not have necessitated building in the gardens. It is right to note that there have been additional building and extensions made to the school over the years, notwithstanding that it was still a disused burial ground. No one appears to have objected. He spoke of the alternatives for accommodating the children, and as to how in his opinion the school could have been further adapted without the necessity of building outside its parameters. In purely architectural terms I found his proposed designs (putting aside the legal problems of building on the site) to have been ingenious and attractive; in the same way had the Localism enthusiasts had been able to implement their right of first refusal in respect of the proposed sale of the public house next to the school which could have been incorporated into school use. However, neither of these possibilities were implemented or implementable.

652 I had been initially provided in the papers with an estimate for demolition of this £1.5 million building of some £14,000. I had queried this, as I had found it totally outwith my experience of such costs. In the course of his evidence Mr Dyson produced another estimate of £93,000, an estimate which had been prepared by his firm's quantity surveyor (I am a little surprised given Ms Whaite's later evidence that the FoCCS had among their number ***'very experienced quantity surveyors",*** why one of them was not used to provide possibly more

experienced answers to the question of demolition costs which the objectors have to factor in to their argument.) Mr Dyson accepted that his firm did not do any demolition work: "***we don't like demolition***". When pressed as to how this figure of £93,000 was arrived at he said that: **"The element of his brief was to dis-assemble the existing building and reuse all the materials where possible …the reinforced concrete slab could not be re-used but would have to be broken up".** He agreed to assist the court on a later day with more fleshed out figures. Given that SOS' aim was to demolish and empty the site, I was not sure where these carefully to be re-used hand made bricks were going to go, but Mr Seymour asked his witness that question: "**Where are you reusing materials and where are they going ?"** With devastating honesty, Mr Dyson replied: "***That is a good question. I am not trying to answer that in this exercise. I was just really piling up the materials on site" (T418).*** It also transpired in his evidence that part of the work giving rise to these costs was that it included a measure of levelling the land and re-using the salvaged bricks to make a wall between the playground and the public open space. Save for a slight question on his measurements from Mr Mynors, he was not cross-examined by any party.

653 The next witness was **Ms Whaite** Her statement is at **(3013- 3028)** but must be read in conjunction with her earlier statement of 21st August 2014, **(2431-2436)** to which I have already referred. She also filed a third statement on 13th May 2015 (**3142-3144),** and I have reviewed her e-mails and letters above in detail**.** I consider each of these statements together with her oral evidence**,** which is found at **(T420-440).** Much in her statements I have referred to above when setting out the detailed history of events. In setting out the above history of this matter *in extenso* above, it must appear that Ms Whaite and the late Mr Vracas are the more than prime movers in this enterprise. That is certainly the impression I have formed from the documents before me, in which other participants are barely mentioned at all. I accept, however, that both these people were receiving support

from others such as the majority of the FoCCS Trustees and others. However, to what degree these other supporters would have so tenaciously pursued this litigation, had it not been for these two people, I am not sure. I certainly find that they were the movers and shakers in the conduct of this litigation. Much of Ms Whaite's evidence in chief dealt with the history of FoCCS, which I have dealt with above in some detail. She had been a trustee of FoCCS since the 1980s, and became its Chairman in 2002, a position she currently holds. She set out in her most recent statement, the receipt of £5.9 million from the HLF together with other substantial grants and awards won. This has allowed the church to be restored back into use. The nave was restored between 2002-2004, the monuments by 2006. The crypt was completed in October 2015, and the organ by February 2016. Ms Whaite stressed the remaining issue, the churchyard, to complete its setting. Now having read the 1995 Master Plan, I do find that this was a very minor item lacking any detail. The architectural problems of restoration were foremost in the minds of those raising money for the church's restoration; even the restoration of the south steps took precedence. At best, all Ms Whaite can pray in aid **(3019)** is a paragraph from the HLF: ***"It may also be helpful for you to know that if at some time in the future, the opportunity arises to remove the 1960s building … Trustees have indicated that they would be willing to discuss these proposals further".*** I do not read this as a ringing endorsement or absolute requirement that the HLF grant is dependant on the churchyard being restored. Ms Whaite is silent as to the proper management by the Council of the graveyard as being another necessary requirement of HLF money. She concentrates on the "proper management" of the business plan so that the church's venue projects would provide revenue for capital and renewals. Her statement set out the history of matters as she sees it, and I have already set these out above in detail. She rehearses her (and others') complaints that they had not been consulted. She complains that there were: "***quite extensive behind the scenes discussions between the school's architects, LDBS, the DAC and the***

Diocesan Director of Property" (**3022).** I find this to be an overblown complaint. All the bodies she mentioned were just getting on with their discussions. It is ludicrous to complain that a Trustees of FoCCS should be present or informed of every meeting and discussion preparatory to proposals being firmed up. She also complains that the then E(nglish)H(eritage) case officer with whom she and another trustee Mr Woodward, had had an unsatisfactory meeting, seemingly so described because the English Heritage Officers would not change their minds. She re-iterated her complaint that that Case Officer subsequently became Tower Hamlets' conservation officer. Again I ask, if she is alleging misfeasance by this person? That allegation was not pursued in her evidence **(3022)**. I am afraid to say that many of her reminiscences of conversations 6 or 7 years before are overblown, possibly with somewhat optimistic hindsight. For example, she said: ***"at the DAC meeting which both she and the Rector attended in November 2010",*** she objects that there was no recognition of **"the public having any interests or rights."** I remind myself of the concerns to the DAC as to the objections being raised. She set out her own history of involvement, attending meetings, addressing the planning committee and other meetings etc., and of the FoCCS trustees writing a letter of objection to the granting of the 2011 faculty. She is silent as to why she, as an individual or FoCCS of which she was Chairman, did not then become formal objectors. Her objections having failed in the normal channels for planning/faculty decisions, Ms Whaite pursued her objections. She rightly complains **(3026)** that the various Building Parties seemed to be in disagreement as to whether the new building was legally built on an open space under the 1967 Act, or whether it was not built on an open space. She deposes that if there is a need for the new building, at least as far as the Church is concerned, the Sunday school could use: "***the back of the nave, the galleries within the church, the old vestry room, the crypt lounge and the ground floor of the rectory***". All I would say to this, given the steepness of the galleries and their relatively low edges, inspected on one of the

Court's site views, I would be terrified for a Sunday school to be held there because, unless guarded one adult to one child, it would be just frighteningly dangerous for young children. She set out various other venues available locally, the unsuitableness of which I have already dealt with. She wanted the FoCCS and the PCC to meet to discuss matters at the St Ethelburga's Centre for Reconciliation and Peace, though given what each side wanted it is hard to see any negotiation working at all. This did not impress me as proposals to show reasonableness, rather it smacked of gestureism to try to force others into a situation where they just could not agree to the objectors' proposals because of reasons of cost and need. Given the tone and open content of some of the earlier correspondence which I have set out in detail above, I found this proposal to be just another device to try to enlist other third parties to try to pressurise the Building Parties to climb down, so that SOS and their supporters could "win". Her own statement goes on to set out every avenue of pressure on various bodies, groups and individuals she and her supporters tried. The objectors wanted demolition now, or at very worst in a reducing number of years, The Building Parties wanted a building with a future for the community. I have already dealt with the efforts made at this time by Ms Whaite and FoCCS to lobby those whom they thought might have had, influence. None of these persons appeared to want to agree with them, nor weigh in (however that could be done) on the side of the objectors. None of them gave any support before this Consistory Court. Ms Whaite provided a third statement on 13th May 2016 **(3142-3144).** In that she comments with her hindsight on various entries on the Trustees minutes for both FoCCS and the Restoration Trust from 23rd January 2008-27th January 2016 which had been produced. I have read all these, and take it that there are no extra ones not yet produced. I note what is said (and not said) in them and the corrections to the minutes which were made when necessary at some following meetings. In passing, I note yet another documentary mistake. Ms Whaite states that the design brief for the garden stated that "**the land was un-consecrated**". As it seems

impossible for any accuracy to be achieved in these documents, is it surprising that the ground is laid for objections to be taken.

654 Ms Whaite I found to be an emotional witness. She had invested many years and much effort on this project, but found it to be, it seemed to me, a highly stressful experience which she, with hindsight, may have felt that she did not give of her best. Indeed, so overcome was she at one point, I had to ask her if she wanted a short break to recover. Her oral evidence is at **(T420-440).** In answer to her own Counsel, she said that she did not know what the assets were when the FoCCS took over from the Hawksmoor Committee, but in fairness she was not even living in Spitalfields at that time. She explained how she had become involved with FoCCS through knowing Friends locally, once she had moved in in 1983. ***" Spitalfields is quite good for parties so greeting (***is this a misprint in the transcript for 'meeting'?) ***like-minded people who had moved into the area, because when we first moved in it was quite rough".*** She spoke of how the original "local residents" make-up of the FoCCS had declined over the years, now being only herself, Ms de Quincey and Mr Brown, the treasurer. She explained how the Trustees are selected (though perhaps self selected might have been a better term) and for what qualities. She said that: "***The trustees came together because of their professional expertise. We have people who are very experienced quantity surveyors, conservation architects, financial management, professional accountants, yes, everyone falls into one of these categories I think."*** She said they did have an AGM, but, as I have set out above, that is not a members' AGM as one would normally understand it, but is an annual meeting of the Trustees alone**.** I asked her as to what was her own category. She replied: ***"My background was in corporate finance originally. I was invited because I knew how to organise teams and large projects in the city sense, and obviously this required the bringing together of different areas of expertise."*** She explained that unlike other Friends' organisations with

which she has been involved, such as St Giles Cripplegate, of which she was also as a trustee, she accepted that other such organisations might have been set up by the PCC with a Rector as chairman, and then they would bring other people in to assist /advise them. ***"Here the [FoCCS] are set up specifically to restore this building, to protect and restore this building".*** She explained how the FoCCS obtained the analysis of the properties held by Christ Church, prepared by a friend of hers, Geoffrey Russell of Linklaters, who had just retired, and volunteered *pro bono* to help to sort out (missing documents notwithstanding) just what the church owned. She went on to deal with the history of the restoration, again I have set this out above. She explained how, albeit before her time, the FoCCS had "**provided a bit of funding and project management**" for the crypt clearance. She stressed that the FoCCS had considered the landscaping of the church yard, albeit as a ***"long term strategy".*** She was asked in terms by her Counsel was there ever a discussion among the Friends at this period, down to 1995, about whether it was appropriate for the Friends to be involved in the churchyard. Ms Whaite's answer was ***" No …we always assumed that the churchyard was part of the project"*** in their 1995 development plan. It was clear from her evidence (and understandably so) that the major works which had taken place over the years had taken the foremost position in the minds of the Trustees of FoCCS. They "***had just assumed that the churchyard was part of the project. It was really only very recently, when we were obviously agonizing about how on earth we could deal with what was happening that we discussed, well, shall we look the other way".*** The £5.9 million which the FoCCS received from the HLF was explained by Ms Whaite as follows:- **"*Simon Sainsbury*** (a major Donor to the restoration) ***was very involved with the Friends and actually he was our patron later, or formally was our patron later on. He was a core part of our team for the restoration and he remained so until he died. I think he was … I am not sure if this is right, I think he was a trustee of the National Heritage Memorial Fund He was well connected with the Trustees. A***

neighbour was also on the DAC at this time". It was concerning that that was her perception as to how the system worked. Ms Whaite stressed that during the period 2009-2011 the graveyard was discussed in very general terms by the Trustees "***but of course the youth centre and the adventure playground were still in operation. Obviously we wanted to be supportive of that. The Friends take a very long term view ... we really wanted to be helpful".***

655 Having read the Minutes, I am not persuaded that until the current dispute surfaced, the churchyard had been of any particular concern to the Trustees, as there were, architecturally, more pressing matters to fund and discuss.

656 She explained that the exterior of the church (I surmise after the roof) was the first major work to be done, funded extensively by English Heritage (and others). Pausing there, had the church in its setting been of such importance for EH one might have expected some or any vociferous objections about the graveyard setting from them but there was none. EH did not, ultimately, oppose the new building, nor, under their new name, appear as a witness nor amenity Society objector. The south steps were restored in 1999, and Ms Whaite said that "***the old building was so close to these steps that the old building had to have its corner shaved off, because the south steps made it almost impossible to get round the old building between the south steps and the old building".*** Ms Whaite went on to set out the various restoration works which were carried out under FoCCS. Somewhat surprisingly, she said that the FoCCS had done "**extensive work to project manage and help with the re-jigging of the youth centre building**"… "**There are faculties to be applied for, estimates to be got from quantity surveyors"….. "we would have paid for the cost of finding estimates and so on". (T427)** Bluntly, her evidence on this both as to timing and what if anything the FoCCS had to do with the youth club was unclear, and I had the distinct impression that in her enthusiasm to demonstrate how helpful the FoCCS were being in respect of that, she was over

egging the pudding. When pressed by me as to just what she meant with **"project managing**" she really did not know just what, if anything FoCCS had done or funded. When the old youth centre building was being built, the FoCCS had not even been founded. When I compare her oral evidence on this with the correspondence and activities of FoCCS later, I find it hard to marry the two pictures with which I am presented. I find the documentary evidence more persuasive. Also, I was surprised by this evidence. Why, if their avowed aim was the Hawksmoor vision, would the FoCCS have been "project managing" the youth club which was filling up the graveyard they wanted to be an open space? What was the difference to building a youth club then, but not to want a new building further away from the church now?

657 Her Counsel, sensibly, sought to move her forward to 2012 when the SOS was formed, initially as an unincorporated association. In 2012 Ms Whaite was not very clear about giving answers as to the specific question as to the initial funding of SOS, as she was finding answering all this a strain. I never received an answer to my question as to whether individual local societies were formally members of SOS or contributed financially to it, either before or after it was incorporated. Individual members of other groups plainly were, but that is not the same as being formally mandated to represent on SOS these other individual groups. On this Ms Whaite's evidence was muddled and unclear. She said that in 2012 Spitalfields Open Space was formed as an unincorporated members association. ***"It was a gathering of people under an umbrella ... because of what was happening … as local residents and people we did not know what was going on, and the planning process had been very opaque".*** Now given the initial *pro bono* then formal legal advice their were receiving, the professionals involved in FoCCS and Ms Whaite's own extensive activities at planning committees and attending the DAC site meeting etc., I just cannot accept that statement from her. She hesitated frequently in the papers and evidence before

me, notwithstanding the vaunted professionalism of the Trustees members of FoCCS including herself. She told me that her expertise on the FOCCS was her experience in "corporate finance". To claim that she and others did not know what was going on or did not understand the planning process just beggars belief. These objectors are not two old age pensioners on zimmer frames in the back of beyond who had no experience of this kind of thing. These are people who pride themselves on managing successfully multi-million pound contracts, and attracting the funding for them. I again asked how other outside bodies in Spitalfields were connected to SOS as formal bodies, as distinct from individuals who just might belong to them. I never received an answer to that question, Ms Whaite saying that she was "blanking out". In the event, with the *pro bono* advice of lawyers, Geoffrey Russell of Linklaters, the FoCCS trustees wrote to object.

658 Mr Seymour took his client to the March 2013 situation when SOS became a limited company. What happened during 2012 I was left unsure about, save that the Spitalfields Society funded, as I see from earlier documents, the "***meeting with the lawyers actually to discuss what was going on, and what we should do***". That I understand it cost £3,000, which the Spitalfields Society paid. When asked about the identities of the SOS Directors, she listed the four directors of SOS, as being Mr Dyson (a representative of the Spitalfields Society), Charles Gledhill (a trustee of the Spitalfields Historic Building Trust), and the late Mr Vracas (FoCCS). Again it was not clear if the first two were there as formally delegated members of their respective Societies, or just two people who happened to be members of those respective societies. There is a difference. Before mentioning herself, she was somewhat overcome. Having been asked if she wanted a break, she wanted to go on. I was still left with no information as to whether these respective societies had passed motions mandating one of their number to serve on SOS, or whether these people had become Directors in their individual capacities. Ms Whaite spoke of her objections to the original Faculty,

although she complains about not seeing the advertised notice for the 2011 Petition on the outside of the church, the reality is that she did see it, but could not remember how: ***" I was visiting or going for a service or something".*** Her second statement stated that "***in August 2011 the Trustees learned that a faculty was required for the proposed works".*** Of course, I remind myself that she had attended the DAC meeting earlier than the public notice went up, so she was aware of what was going on. That said, her complaint about non- disclosed documents is, as I have said, of concern.

659 Cross examined economically by Mr Mynors, she had to admit that in the 1995 Master Plan prepared to get an HLF grant, in the section " Curtilage and graveyard", the items referred to are specific ones like railings, gate piers, a pyramid monument, the letter box, and had nothing to do with the landscaping of the church. That was only mentioned at the very end of the Master Plan as ***"Landscaping of churchyard, long term strategy for use and management under development".*** I find it difficult to accept that, at least in so far as a possible future dream of restoring the church yard was so important, as set out in these two lines, that £5.9 million HLF money hung on it. The restoration of the church itself was then the most pressing matter. She had to accept that these were the only two references to the churchyard in the 1995 Master plan. Although she could point to no other reference to the churchyard, she found it impossible to accept that the Master Plan was only concerned with the restoration of the church, especially as the 1995 Master Plan did state that: ***"it is essential that the restoration of Christ Church is planned from an understanding of the whole of the building and its setting as an indivisible entity."***

660 In re-examination, Mr Seymour put to his witness a document prepared for the FoCCS in December 2012 by Dominic Cole Landscape architects, the designers of the Eden project **(2249).** I am not told how much this cost the

FoCCS, nor why they commissioned it as the Church and the LBTH and others had run a garden design competition , and money for such a designed was to come out of a wholly different fund. Why did FoCCS chose to spend money on heir own scheme from a fashionable designer, which appears to have sunk without trace? It is right that FoCCS appears to have had a substantial capital sum available to spend (properly). This, of course, post-dated all earlier events and plans. Ms Whaite said that the trustees had commissioned it to understand the costings of the restoration of the churchyard **(T431).** Given that their case is that the graveyard is open space to be managed by LBTH who would, presumably be expected to pay for, aided by s106 money, any improvements in the graveyard, I fail to see why the FoCCS commissioned this work. (Indeed, in her own second statement Ms Whaite makes much of the fact that "***LBTH has recently allocated £574,000 for the restoration of the churchyard public open space. This is sufficient to carry out the plan designed and costed by Dominic Cole, who is best known as the designer of the Eden project".*** Again I ask why is FoCCS commissioning a garden design when that is to be paid for by the LBTH? It is, I find another example of FoCCS going off on a frolic of their own which they appear to wish to push on everyone else. I do not see how this is essential for the carrying out of the HLF grant.

661 In answer to questions from me, Ms Whaite set out how the FoCCS and the Restoration Trust Trustees are interrelated and organise themselves (I have set that out above); that the FoCCS trustees are the same people as the Restoration Trust trustees. Ms Whaite was clear, and agreed to that. She stressed that both the FoCCS and the Restoration Trust did not have members as such, just "supporters". She agreed that the FoCCS and the Restoration Trust were, in effect, a facilitating body to obtain large sums of money from the Heritage Lottery Fund or other bodies. She noted that the FoCCS has some 2,000 supporters. I note that if this were correct, relatively few of them had chosen to object. I asked

her who had been responsible for the flyer sent round by SOS asking people to object. Her answer was: "**the Trustees of the Friends as individuals".** I asked if the trustees of the friends had taken a vote. Her reply was of interest: **"We did, of course, after we had taken legal advice….** She then returned to the **"we just did not understand the procedure"** argument**.** I persisted in asking who had been responsible for the flyers sent out to organise support. Her reply was of interest. Initially, she agreed that **"it was the Friends Trustees……sorry that was not right".** I pressed her whether the Trustees had taken a formal vote to do that, the Trustees acting as trustees. Her reply: **"No we were not acting as Trustees at that point ...we were acting as individuals".** I am afraid that I found her evidence on this to be muddled at best, evasive at worst. It showed me that the reality was that these dozen or so Trustees, usually fewer, however honestly they spent the subscribed money on church restoration, ran their little groups as a private fiefdom without any thought to their Trustees' duties until, very properly, they were legally advised to try to put their house in order by passing somewhat late motions to justify their actions. Ms Whaite's excuse was: ***" I am getting confused about the timing because at that point it was Spitalfields Open Space".*** There is really no excuse for this muddle. The Minutes of the FoCCS Trustees should have been clear and unambiguous as to when and why they were voting supporters' money for what. They were (or should have been) a separate organisation from SOS.

662 However, it gets worse. Ms Whaite, again in answer to my questions said that SOS had an association of 1300 supporters. I asked how much each supporter paid. Her reply was: ***" we did not ask for donations. Several people contributed to legal fees I think about ... there were a dozen people, but the money went directly to the lawyers, because we did not want to get into the complications of bank accounts and so on, because at that point we were just an unincorporated association."*** I bear in mind the reply given in the Court

of Arches that SOS was "***without assets***". Technically correct, but not the full picture She said that the Spitalfields Society whose committee took a formal vote and funded the first legal meeting, the Spitalfields Historic Building Trust and Spitalfields Trust, then FoCCS and individuals like Dan Cruickshank had helped to fund this.

663 In her evidence she supported the argument adduced by His Honour A Thornton QC as to the *Equality Act* issue. **"Yes",** she said, **"that is very important".** That was not a view later shared by her own Counsel, or perhaps she gave that answer as an individual objector and not as a director of SOS. I asked her if this *Equality Act* argument, namely that the Council had not taken into consideration the religious observances of parents not to have their children educated in a building built over the dead, had been raised in the last five-six years with the parents or the Parent -Teacher Association? Her reply was: "***No, of course we did not want to..{ a pause} we wanted to deal with that in a positive way" .*** I asked Ms Whaite, in terms, whether any public meetings had been held to learn of learn of the parents' views of this. I asked her had there been any petition from the parents to say: "we cannot use the school because of our religious or ethnic beliefs". Her answer was **"no".** She then tried to scrabble an answer together, saying that she thought she remembered something in correspondence about the burial of the ashes of Sir James Stirling and the Bangladeshi community not wanting to come to church because of burials. Again I pressed her as to whether she and her friends had gone to these very groups to assist their case to try and get someone to say: "we cannot or would not use this building". She agreed that she had not. I find that even the most intense supporters of SOS had not taken that very obvious step to bolster their case, if it was *bona fide* a part of their case. Mr Seymour, hearing this, endeavoured to run before the wind. He objected to these questions saying that the *Equality Act* question was not and never had been part of his clients' case. It was Mr Thornton's case. That rather flew in the face of Ms Whaite's answer, not 5

minutes before **(T 435)** :***"we are supporting the arguments about the Equality Act. Yes, it is very important"***. The reality is that SOS would have supported any argument advanced by anyone if it got them what they wanted. The complete and total lack of any objections from the Bangladeshi community, their continued and current use of new building (never mind the existing school also built over the graveyard) and the community use of the school, and the social use of the graveyard by teenage Muslims (as I have seen) as a meeting point between boys and girls just makes a mockery of this argument.

664 Not content with that argument, Ms Whaite went on to try to justify why they had considered judicial review proceedings of the planning decision which she considered "***flawed";*** she went on to say ***"planning matters tend to go round in circles and we thought that a more decisive way would be to deal with the faculty, because it was kept within the church and would be dealt with within the church which really we would prefer to do".*** This from an objector who had not wanted to become a formal objector to the 2011 Faculty petition. She just flannelled in reply to questions as to why she, and others had tried to influence "the great and good", rather than invoke the state or ecclesiastical courts. She really found this very simple question difficult, or embarrassing, to answer, or her answers were presentational. For a woman whose background was, as she had said, in **"corporate finance**", even her own Counsel had to intervene to say that she was having difficulty in following dates and documents. I did not see that. I saw a witness who found it difficult to justify or to explain, publically, some of her (and others') actions, so that she would not or could not give answers to questions. My questions involved neither documents nor dates. I wanted to know why she had written to these people, having lost the planning decision. At last, she answered: "***I hoped they would look at what was actually going on because the planning process was completely flawed and the faculty process was completely opaque and would not address any***

of the Trustees' questions or my questions. Something was very seriously wrong but of course we did not necessarily know what exactly was wrong but something was very seriously wrong". She had no coherent answer to why she thought these people could interfere with the democratic state system or the legal system of remedies for her complaint. There is an open system to challenge publically flawed planning decisions, especially if she considered there had been "flaws". She and her fellow objectors did not do this. She (or, indeed, the Trustees of FoCCS) could have formally objected to the first Faculty. She choose only to write an informal letter of objection.

665 Her evidence gave me the strong impression that she lived in a world where "contacts" and "net-working" were considered to be how things worked. "People" could be approached to interfere, to make things all right, or to smooth the path of getting grants. Too bad, if other applicants had not "the right" contacts. The vulgarity of litigation was not really considered until they had to. Again, when pressed to justify the unjustifiable, she appeared to be under pressure, and her Counsel sought and got for her another short adjournment. In the event, he had no other matters to raise with her. I understand the emotional stress of having to give evidence, but it is only right and fair to all parties that it is tested, so that the Court and the outside world know exactly what has gone on or what people have tried to make go on, as there is no secrecy or behind the scenes discussions in this Court. That is why I have set out in such detail above the development of this history of this matter. I found her presentation of the past history in her oral evidence did not accord with the reality of her own actions in her written letters and emails. Ironically, what she thought of as "wrong" in the early stages was that the objectors did not like losing. The real problem was the *Disused Burial Grounds Act* 1884 point, which did not surface until much later. I did not find her own evidence of any great assistance when I came to consider the real problems in this case. Indeed, I found her inability to answer straightforward

questions, the answers to which were well within her own knowledge, both inexplicable and presented in an unattractive way, trying to give the impression that she, as Chairman of FoCCS, was finding all this just too difficult to understand. I remind myself of both the *pro bono* and paid for legal advice she and her fellow supporters had had, and the vaunted professionalism of the Trustees. I re-read her own correspondence when much of her legal case is clearly set out by her, presumably from the legal advice she had been given, and apparently, clearly then understood. I think she realised the potential problems of the position of FoCCS Trustees funding the SOS front organisation. Indeed, I regret to say that her belligerent attitude over the early years as shown in her correspondence may well have done her case more harm than good, not so much from the points she was trying (with others) to make at various times, but in the way that she presented them, which may have embarrassed people as much as alienating them. No other objector wished to ask her any questions. Her evidence concluded the SOS case.

666 Because of the difficulties over holidays certain witness had to be taken out of order. The next witness called was **Julian Morant**, the head master of the Christ Church school, on behalf of the Building Parties. His statement was at **(2916-2924).** His oral evidence is at **(T440)**. Much of the background to his evidence I have already referred to in my analysis of the various Governors' Minutes. He explained that the school had moved out of the government of an Interim Executive Board imposed on the school in December 2014, but now a new Board of Governors was in operation, as the school had "***got back on track***". He was specifically asked if any concerns had been expressed to him or others that the building was on or next to a churchyard. His answer was emphatic: " ***No, absolutely not. Nothing has been reported. In fact on the contrary the parent body,*** (96% he described as being from minority ethnic groups)***, they are very, very, in favour of using the current building ... no***

reference to the churchyard at all. What for them is important is the quality of the provision that is on offer to their children".

667 That may well explain why any of the objectors did not seek to obtain a petition or the like from parents at the school (as they did from objectors) to support their contention on this point. The head master explained in clear detail the use of the school for early years' provision for 3-5 year olds, who can flow from indoors to outdoors in the building. He then set out the community use for the school with a weekly pre-school parents and toddlers group, and other classes for dance and ballet, which is organised by an outside body but caters for local children as well as those at the school. The building is used for a variety of other groups, health, housing and Social Services. It has been used by Spitalfields Music, skill fairs and community fairs, private lettings. In fact, all the usual uses one might expect in such a building. In the small community room there is a kitchen and crèche facilities, for parents, and other community groups. He regarded the building as making: "***holistic provision in terms of not just the educational needs of the children but supporting their social, emotional and physical development, but also working and engaging with families. The numbers are increasing at Christ Church particularly in the early years and a big part of that is because local residents and families are attracted to send their children to Christ Church because of the new building and the quality of the provision afforded by the facilities on offer".***

668 Mr Seymour sought to cross examine him on past history, but this headmaster only arrived in post in 2013, so this line of questioning was not very fruitful, save for one matter. The Headmaster, arriving in 2013, did not have the opportunity of having the new building in use for his first year. He saw the effect of the parents just looking at the unoccupied building, which the objectors had obtained the undertakings not to have it put in use. He spoke of his experience of

the building once it had come into use. He was cross examined as to the use of the space in the existing school premises, and of other possible halls or local buildings. The head master stressed the importance of parent of toddlers coming to the school for their community work, as it gave them a taster experience to the school: "***we use it as part of our improvement to enable us to reach out to the local familiarities".*** [I think in the transcript that is a mistake for 'families'] He also spoke of the work the school did with other schools in the Borough and said: ***"we are a Church of England school so we work closely with other church schools in Tower Hamlets"*** and he stressed that the school worked very closely with the LBTH.

669 I asked the headmaster, in terms, if any of the ward councillors had had any discussion with him about the suitability of the siting of the school or concerns about it being on the churchyard. He was emphatic in his answer: ***" No. Absolutely no discussion"*** notwithstanding that ***"the vast majority of the school is Muslim".*** He stressed: ***"we are a voluntary aided school".*** He stressed that primary schools in Tower Hamlets work in a particular way: ***"It is not [as if] the school and the community [are] as two separate entities. The school is part of the local community and the families that attend Christ Church school are local residents; they are the people who live and work in Brick Lane and Spitalfields. The school is the hub of ..the community" .*** He was also questioned on access points via Fournier Street (used for tennis lettings) and the school, but said that no formal decision had been taken yet. It might well be said, on reviewing the headmaster's evidence, 'well he would say all that wouldn't he, to keep the new building'. However, of any witness in this case I found him to be sensible, balanced and impressive. Having heard him give evidence, my impression of him as a headmaster, who was leading this school, was more than borne out when I was taken to see the school in action. Spitalfields is very fortunate to have its school under the guidance of its present headmaster.

670 The next witness, **Pat Watson**, was the only witness called on behalf of the LBTH, and that in respect of the funding of the school. I should say that I was surprised about this. Of course, the legal position of LBTH had been set out in their letters before action, to which I have referred and in the legal arguments put forward on their behalf as part of the Building Parties' case. However, I take the view that the legal department, who had much to answer for in this matter, had left one of their employees to hang out to dry in trying to deal with matters not within her own experience or knowledge. She dealt with those matters within her employment remit, but as someone who was not a lawyer but had worked her way up through the local council ranks to her present position. Her statement was at (**2925- 2933),** and she spoke to many of the exhibited documents in the case as were within her employment remit.

671 She has been Head of Building Development for LBTH since 2001. Part of her particular responsibility is for planning for school places, programmed capital investment, growth and considering the need for school places. That entailed, among other things, commissioning feasibility studies for individual school sites which might become bigger. She was not from the Parks and Open Spaces Department (or rather the now named Communities, Localities and Culture Department, again a Department whose evidence might have assisted the Court). In her witness statement she spoke of the accommodation deficiency at Christ Church school. The school governors had identified this, and were supported by LDBS. There were discussions from 2007-2009 which, as far as she understood it, resulted in the 2009 agreement. She understood that to mean that the Community Centre trustees were to surrender the use of their building so that this building and the surrounding open space could be ***"considered for improvement and to benefit both the school and the community" (2927).*** Her statement went on to detail the discussions which took place between the school project team LDBS

and the school governors. She explained how the Government had launched a Primary Capital Programme in 2008, being a programme for capital investment in primary schools. Put simply, local authorities had an early indication of the availability of such funding for 2010/2011. The Council had to produce a "Primary strategy for change" document to show how getting this money would both raise achievement and provide community benefit, and demonstrate the priorities for primary schools in the council area of LBTH. The Council cabinet approved this document in June 2008, and it was submitted to the relevant Government department. Christ Church school was one of a number included The relevant document had to be revised , but it was approved by the relevant Government department in March 2009, and LBTH received £15.489 million under this scheme. I have considered all the relevant document exhibited and referred to in this process.

672 Ms Watson explained that when the Council proposed to spend money on one of its own schools it procures the work. However, as Christ Church School was a voluntary aided school, the process was different **(2929)**. Once the Council allocates the school's share of the money and the school in question agrees to spend it on various projects, this is confirmed to the Department of Education, accompanied by project details. The relevant funds are then paid by the Department of Education out to the school governors who must pay 10% of the grant sum, and manage and implement getting it done. This is what happened at Christ Church School. Here Christ Church school governors were supported by Mr Woolf of LDBS. There were other additional sources of finance for the Christ Church school; there was money from a Locally Co-ordinated Voluntary Aided programme and some s106 money as well. Ms Watson was clear that the Council. In applying for and handing on this PCP money were satisfied the additional s106 money facilitated the extent of the improvements. She set out the documentation of the decision to utilise some of s106 moneys from the overall £8.5 million s106

moneys on Christ Church school as recommended by the Strategic Development Committee of LBTH in 2007, and authorised by members: ***"The intention was to improve the existing buildings to support the work of young people".*** Those discussions took place before the demise of the youth Club but in 2011 the Council's Planning Contributions Overview Panel authorised some £300,000 to be used towards the new building project. This meant the scheme could be more ambitious and provide extra facilities. £50,000 was also going to be available from the Bishops Square programme for improvements to the gardens (though this, was not within Ms Watson's own sphere of expertise); all she knew was that this work had not been begun She was aware that: ***"arising from the 2009 agreement and the development of the new building was to allow improvements to the open space to be carried out and for the additional area formerly fenced off by the youth centre to be incorporated into an open space. The new building as a community facility could then be accessed from Commercial Street as part of the open space improvements".***

673 She stated that there would be very difficult problems were this new building to be demolished, as it would mean a return to the former deficient space, which would adversely affect the children's education. The school governors would have to repay the money, but have insufficient funds to do so (and anyway the current governors are not the governors who took these decisions). Any repayment of school funds were the new building to be demolished to pay for the restoration of the churchyard would be at the expense of the education of the current, and, indeed future children at the school. The School Governors, were this to happen, would most probably, she considered, call on the Council to financially assist them. The Council would have other competing priorities to consider before doing this.

674 Ms Watson's statement went on to deal with her understanding of the powers which a Council might have to provide and maintain buildings on an open

space. I find that in this she went beyond her own working practice and was, plainly, not being assisted by the LBTH lawyers. I regret that the LBTH did not see fit to call a witness from that department who could, one might suppose, answer more directly many of the factual issues which raised legal questions in the hearing. Ms Watson's department however, did deal with schools and libraries, or rather with schools and "Idea Stalls" as libraries are, apparently referred to in LBTH, but she had been involved from the beginning with the Christ Church site.

675 In her oral evidence, Ms Watson manfully struggled to explain to us all the labyrinthine organisation of LBTH. To make it more complicated the early genesis of this proposal came about before "the elected mayor" period of the Council. She amplified her written evidence, explaining the preliminary discussion which took place between 2007-2009, but by 2009 discussion had reached the point that LBTH were having meetings with Mr Woolf of LDBS. This stemmed from the youth club's aging trustees wanting, to quote Ms Watson, ***" to exit with some dignity***" from the failed youth club, and to ***" look at how the use of the open space could be maximised and the amount of public open land increased".*** Not only was there some £300,000 of s 106 money potentially available, but there was the possibility of funding from the Primary Capital Programme ('PCP') for which a Local Authority had to show that change would improve achievement. In other words, a Council had to show 'if we can get our hands on additional funding, we can change and improve in whatever way'. I was forcefully reminded of the sharp elbows of the Greenwich church vestry in1710 to get hold of the coal tax money to repair their church. Christ Church School was among the priority schools to punt for this money, but, as it was a voluntary aided school, its governors would have to raise 10% of any moneys put in. This witness explained the criteria of priority among schools. Initially in 2008, they had been considering a refurbishment of Christ Church School (as the s106 money had not yet surfaced, nor the plans for the closure of the youth centre). In the event, once the Council got this government money, they had a free hand to refurbish and or rebuild. The

next stage was to obtain money from the Locally Co-ordinated Voluntary Aided Programme ('LCVAP'), a principal source of funding for governors of voluntary schools, but for various reasons, the two streams of money, LCVAP and PCP, were separate, but merged to obtain the work for Christ Church. The witness gave evidence as to how this was done, and said that where a voluntary school had land not owned by its governors, nor owned by the Council, but owned as here, by a third Party, the Rector, then as far as this witness was concerned, there would be an agreement or licence put into place to show that the school had a degree of security to justify financial investment but the witness did not think that there was any explicit requirement for that. The LBTH were in effect the facilitator in getting the PCP money which was then transmitted to LDBS for them to develop. This witness was in difficulties dealing with questions as to how legally this could be carried out when there was a third party owner, such as the Rector. The continuation of the youth club building, in whatever guise, seemed all rather fluid then. There is certainly some lack of clarity of just what was being discussed in 2009 between a number of Council departments. This witness said of the 2009 licence: ***"It was not granting a licence in that sort of property ownership sense but as an interim measure so that the youth centre could be used while the Parties concentrated on the best way forward …perhaps the school could use it without spending any money on it".*** Clearly all this was, as the witness said, "***talks about talks***". Many of these questions could much better have been answered by a LBTH representative from the legal department.

676 In cross examination, Ms Watson was pressed that the funding (from whatever source) was for a <u>school.</u> Much time was taken up in questioning the witness as to how the detailed forms setting out the particular needs or facilities of a school were compiled This line of questioning appeared to be intended to lay the ground for the question that the £1.5 million was for refurbishment of the existing school building. Ms Watson's replies were twofold: ***" well, certainly as***

I have indicated we have not got all the audit trail that backs this up. For all these schemes these were very preliminary costs. I cannot say how much technical advice was taken in each case, but ... once the budget was confirmed, you have to do what you can with that budget". She agreed that there was in these documents no reference to extra land or an additional site. The witness did have a memory that the land in question was in the ownership of the Rector. Her understanding was that the 2009 agreement was ***"some way to facilitate the development***". The witness was pressed about a variety of matters which were really not within her remit, as LBTH had been dealing with these matters, including their then lead property lawyer. Indeed, this witness had not been in attendance at many of the relevant meetings, though, presumably, she had had the minutes. She was cross examined as to the granting of the 25 year licence, and asked is it not remarkable and odd that the council should be granting a 25 year licence, when it does not have an interest in the land? Her solid answer was: "***I did not write the agreement, a lawyer wrote the agreement".*** She was pressed time and again on to who actually owned the site, and had there been payment for the use of the land; nor was she involved with the SCABAL design and the building, nor was she directly involved in events in 2011.

677 The following day, Mr Seymour resumed his cross-examination of Ms Watson on the basis that LBTH's initial documents to get state money did not envisage a new site or a new building for this school as being necessary to deal with the school's deficiencies. She agreed. However, I accept her earlier evidence that these documents were prepared at an early stage for a scheme in gestation. It was put to her that the scheme for the school to come into occupation of the youth club was a plan "being pushed forward ... for some project or other". I really could not see the point of that question. These were people on the spot. They knew the school needs. They were fully entitled to put forward a suggestion as to future use for the Council consideration. The situation had moved forward

as the youth club was going (or had gone). If it was being suggested that this was some "plot" by the Rector and Mr Woolf and the school, I find that preposterous and reject it. Ordinary discussion took place between a number of bodies and individuals to improve known problems; the state of the graveyard and the needs of the school. She was pressed about the legal nature of the land in question. This was totally beyond her remit. Someone in Parks and Open Spaces would have dealt with that, she said. Similarly the string of questions about the planning procedure and the faculty procedure, as she said the implementation of the scheme was for the LDBS, so she that considered that they would have to deal with all the necessary consents for the scheme to be implemented. The point of Mr Seymour's questions went to whether the Council could/should have merged s106 moneys with school funding money to provide for community purposes. Efforts were made to get this witness to give her own views in respect of the alleged reduction of open space arising from a Council minute. Time and again she was asked legal points as to the legality of the new building, which were not within her professional experience.

678 In re-examination she was adamant that the (then) District Auditor raised no question about any of the way the Council had spent their money in respect to the youth club, the school or the site or anything pertaining to the whole scheme. In answer to my question, she had never heard of any complaint from a parent about not wanting to attend a school built over a churchyard, nor had this ever been raised by any Councillor.

679 As a witness, Ms Watson dealt admirably with questions within her own remit, but the wider legal arguments which were put to her as to the legality of the land holding and the correctness of how the Council spent their money were not for her to answer for, as she said, she was not a lawyer. There were others within LBTH who could/should have been available to deal with that. She was the only live witness from LBTH. I am more than a little surprised that no one from the

legal department of LBTH appeared in person or on paper to deal with their position in respect of the potential legal problems raised by the objectors. One might have though that these arguments (whatever their strengths or weaknesses) deserved the courtesy of a reply though I accept that they have been fully dealt with in the legal submissions made on behalf of the LBTH. However, no-one from the LBTH's legal department was called to give evidence or be cross-examined.

680 In the documents before me there was a statement from **Ms Beth Eite (2920-2924)** together with substantial exhibited documents. She works within the Directorate of Development and renewal as West Area Team Leader in the development management Section. She had been the Planning Officer for Development Management for some 10years and had been the Planning Office who assessed the planning application for the new building . I have already set out above the correspondence between her and various participants in these proceedings. I must say that many of the questions asked of Ms Watson on behalf of the represented objectors would have been much better put to Ms Eite, had she been called. However, Ms Eite's statement was of assistance (and unchallenged by any cross examination) on the procedure for the obtaining of the planning permission for the new building. She deposed as follows:-

- The report on the planning application went to the development committee, together with an update
- It was advertised by way of a site notice and a press notice
- Letters were sent to 137 neighbouring properties
- The Council received a total of 557 letters about this proposal, 315 in objection and 242 in support.
- Six local and national groups made representations: The Spitalfields Trust, FoCCS, the Spitalfields Society, the Ancient Monuments Society, the Georgian group, and English Heritage. (I have referred to these all above).

The planning application was determined by the Council's development Committee on 27th July 2011. She was adamant that the material planning considerations had been set out in the report to that Committee. In paragraph 8.1 it was stated that the land use included "expansion of the school". "provision of community activities", and " loss of open space". Some of the objections received did not deal specifically with these material considerations but were also considered. The Committee heard two speakers against the scheme and two for it. She dealt with the points raised by the two objectors (I have already set out the details of that meeting above, the minutes being at **(1281-1287**), together with Mr Thomas's speaking note (**1288-1289.)** As I have set out Ms De Wick addressed to meeting, opposing the proposal on behalf of the Spitalfields Society and Mt Thomas on behalf of FoCCS. Ms Eite dealt with their respective objections as follows:-

- She considered that the Council had considered alternative schemes but had discounted them. It was considered that the new building could mainly re-use the site of the old building, and reduce disturbance to burials, not harm the roots of the surrounding trees which were protected by tree preservation orders. If, Ms Eite went on, the new building were to be moved further nearer the school it would require re-designing the school playground, which would reduce the tennis court area Moving the new building towards the south might reveal more of the southern elevation of Christ Church, but would result in the loss of light and outlook from the windows of the buildings which front Fashion Street
- She went on to deal with the second objector as to the potential of increased footfall from Commercial Street It was thought, even when considering the fruit and wool exchange that the increased footfall would be negligible. I note in her statement she did not mention the concerns recorded in the Minutes as raised by Mr Thomas in respect of the Grade One listing of the church. However, I see that clearly reported in the Minutes and his argument

was therefore before the deciding Councillors and officers, as were his points as to the PP05 argument and the 2009 agreement

- Mr Woolf and Mr Wasserfall spoke in favour of the scheme
- The Planning Applications' manager made a detailed presentation of the report saying the scheme complied with planning policy with "no significant impacts", and were supported by the Council's Conservation team, and broadly supported by English Heritage"
- There followed questions as to how would the additional capacity this building bring the school meet the fall in pupil numbers, the need for materials to compliment the surrounding area, the involvement the children's school and families, the scope of the plan, was it just for nursery places. The out of borough representation and clarification of the lease agreement. These questions were answered satisfactorily by the Officers. The school expansion would allow and encourage more pupils, and was supported by the Borough's Children's services. Materials used would be submitted for later approval Objectors, regardless of where they lived, would be given equal weight , and the terms of the lease was clarified (but not detailed in the minutes)
- . The voting in favour of the scheme was 4:0 with 1 abstention.

No one in this case has tried to persuade me that the decision of Council was *Wednesbury* unreasonable. (That test is raised in correspondence by Mr Buxton but not pursed). No one sought to have this witness give oral evidence so that they might cross examine this witness as to any alleged misfeasance or impropriety in the planning process. No one sought to ask her about Ms Whaite's complaint about an employee of EH had been employed any LBTH. If there were any such allegations properly founded in evidence, then a application for Judicial Review could and should have been swiftly mounted at that time. I note that this witness was not called to be challenged on them. This witness went on to state that her understanding of the 2009 agreement was an interim measure to establish a position to work from as a result of older licences

and agreement having been lost over time. As a non lawyer, this was probably a fairly accurate analysis of an unsatisfactory situation, which a legal employee of LBTH should have been called to deal with. This witness considered that as far as she was concerned the correct licence was in place at the time the Council made its decision to grant planning permission. She considered the new building to be ***"a high quality, well designed single-story building which resulted in an enhanced setting for the Grade 1 listed Christ Church***.". She also deposed to the benefit to the school and the community, which, possibly goes beyond her immediate remit. Very importantly she deposed to the greater accessibility of the new building and the other re- landscaping would give to the Parks and Gardens staff in caring for the gardens (should, I suppose, this agreement continue). Her final and point was that "***whilst there was a minor loss in the quantity of open space*** (disputed by others), ***there is a significant gain in the quality".*** I am most surprised that no application was made that she should attend so that she might be challenged on all this by cross-examination.

681 The next witness was **Mr Woolf**, the Chief Executive of LDBS. His statement is at **(2910-2915)**, and his oral evidence at **(T579-729)** He had been the Chief Executive of LDBS since 2012, but had worked there since 2000. He explained the role the LDBS plays as being the London Diocesan Board of Education to the 158 voluntary aided school and academies in the Diocese of London. Their duty is to advise and assist these schools, and, in some cases, to act as their trustees. The LDBS has to be consulted by these schools in respect of all capital works the schools want to do, and to give approval before these works can be undertaken. These schools pool their devolved capital finances with LDBS who act as bankers for building projects. The LBDS also supplied a surveying service for these schools. In his statement he described the Christ Church School as being under-subscribed, with tired and inadequate premises. He had visited in

2008 and also found the youth club to be in a dilapidated state. An adviser in LBDS had mentioned to him that, if the youth club ever became available, it could provide additional school premises at a low cost. The Rector told Mr Woolf that the youth club was in such bad financial straits that he had refused to take on there any official role as an *ex officio* Trustee, fearing personal liability for its debts. Meetings followed between the LDBS, the Rector and a now deceased legal adviser of the Church to discuss the youth club position. Out of these discussion emerged the deal whereby the school obtained a licence to use the youth club buildings in return for paying off their liabilities. The school provided **"some £34, 000 from its devolved capital",** and obtained the licence to the premises. (This was the background to the £25,000 pay-off to the youth leader). However, at or about the same time LBTH had obtained the PCP government money, which Ms Watson had referred to, to improve the accommodation of schools in the borough, LBTH was prepared to fund another £100,000 from the extended schools programmes in the Borough. The school's 10% for this was to be some £130,000. Because of the existing outreach work the school was already doing for non-English speaking parents, the LBTH was willing to provide an additional £300,000 from its s106 money. In his statement he explained how the school invited bids from a number of architects, SCABAL being the successfully appointed one. He stated that: "***This vision was anchored in their [SCABAL's] belief that the design of the public gardens, community building and School site should be integrated into a cohesive whole, whereas ever since 1949 each element has been developed without regard to the others"***. The first phase of the improvements was internal work within the Victorian school. The next phase was to obtain a sensitively designed building which would be respectful ***"to adjoining properties –in particular the historic church and the public gardens".*** He deposed that the architect had consulted a number of local and national bodies, including FoCCS. All disliked the appearance of the old youth club building. Mr Woolf was aware that any new building was to

be constructed on a disused grave yard so that burial disturbance should be minimised. Under cross-examination he said "***I did not know whether the land had been deconsecrated" (T616.)*** A matter I would have thought to have been of importance to clarify. He continued ***"There was a strong desire to retain the nine plane trees remaining from the avenue that existed in the original churchyard. Four of these trees are within the area used by the school for play, which limited the options for siting the new building".*** Both younger and older children need a play area, and had to be safeguarded , a particular problem in this graveyard***.*** He went on: ***"Normally a voluntary school acquires a long term interest in land. In this instance it was recognised that the building exists primarily to benefit the community and it should be built on land which is easily accessible by the community; with this in mind the School has a licence limited to 25 years. The land on which the new building is built can be identified as land which is not part of school appropriated land.***"

682 Now pausing there, the reality is that the land on which the new building is built belongs to the Rector for the time being as part of his freehold. He or LBTH, or both of them together can end their agreement. Were the Council not to be the manager of the open space, it is a matter for the Rector to decide (subject to the need for a faculty for any new building) what should happen on "his" land. The school has the security of being a church school.

683 Mr Woolf went on to describe the enquiries his building manager had made, after the promptings of Ms Whaite, to see if the former Seven Stars public house adjacent to the school could be purchased instead for this project. That was not to be. The owner had his own development plans, and the use of any Localism legislation, now urged in this case by some objectors, was not or could not be utilised. Mr Woolf's statement, made on 14th January 2016, was made during the period when the objectors had obtained the non-occupation

undertakings, so he supplemented his evidence orally. In Court, he explained that the LDBS, a body which gives advice to trustees of Church of England voluntary aided schools, who may be considering maintenance or improvements, costing more than £2,000. He explained to the Court the history of this charity school and its later merger with the, also Church of England, National School, and the move to the current site being approved by faculty in 1869, leading to the building of the current school, which I have already set out above. He referred to the missing 1919 deed, but noted that there was still a Sunday School requirement to allow the Rector to use the school premises for this. He set out the effect of the school being a voluntary aided school, as distinct from a voluntary controlled school. In the case of the former, the Government can pay 90% of capital costs, but the Governors have to pay the rest. He set out in detail the financial and practical organisation of the school which I need not rehearse here, save to say better results mean more pupils, which means more money to spend on facilities. He explained most clearly how and why the Church of England schools in LBTH had come to realise that they could utilise and benefit from the "Policy for Change" document to which the last witness, Ms Watson, had referred. He stressed what he had observed of integration at Christ Church school in an empty room when it was undersubscribed, seeing: "***parents who could not speak any English sitting sewing up costumes for an end of term play. The point was to work with the parents. Help them to learn some English, help them integrate into society…a lot of mothers had not left Brick Lane…the school was helping the women to use the underground system and they took all the children to Kew Gardens and places like that".*** The witness dealt, in so far as he had been directly involved, with the totality of the land in question, including the licence in 1987 for the addition for the ball court which at certain times the school could use. It was of interest in the furthering of community activities that led to his early involvement with the Rector and the school, about

the very real problems with the failed youth club. His involvement went on from there.

684 He accepted that a preliminary document prepared, it would seem, by the school which stated that: ***" the LDBS have acquired an interest in the land adjoining the school site"*** was incorrect. The LDBS had never done so. I am afraid that yet another loose and inaccurate document went on to dog the history of this case. He went on to explain how a consultant to a school (architect, quantity surveyor etc.) would fill up the relevant form to get the LCVAP money which LDBS would submit on behalf of a school. This form would cover outline planning details up to a cost of £2,000,000. He explained the reason for the split planning application, the school could more easily get approval and money for internal refurbishment but the outside site would take longer. This application form was a mess. The LDBS was stated as being the school trustees, which it were not, nor was it right to say that the school trustees were the freeholders. These mistakes, made by the consultants, but not picked up, were to prove music to the objectors' ears. Mr Woolf openly admitted all this and that at the time, he had not fully understood the significance of the *Open Spaces Acts*. He was aware of the Rector's ownership and noted the words in the 1970 (unexecuted) agreement: *"come under the control of the council*". He thought somehow: "***lawyers would be able to transfer it".*** Much of the difficulty which follows flows from this. I just fail to understand why either the Council lawyers or the Diocesan lawyers did not pick up this conundrum at this early stage. I do not understand why questions were not asked earlier to clarify matters.

685 When I expressed surprise to Counsel for the Building Parties about all this, the missing 1949 deed and the 1970 one, all he was able to say was: *" **I agree, to put it no higher, surprising, which is perhaps an understatement***".

686 Not being a lawyer, all Mr Woolf knew was that from an early meeting with Council officials, LBTH wanted to get as large an increase as possible in the public garden area and to have it restored.

687 In lengthy and detailed cross-examination on behalf of the objectors, Mr Woolf was pressed time and again as to the legal duty, if any, upon the LBTH to provide any needed school space. Mr Woolf remained unshaken. The LBTH were not providing for the new building land, and that a 25 year licence was a sufficient interest against which a grant could be applied for. He was pressed about this; he said: "**My commercial judgment is, when you are dealing with a Rector of a parish that has been there for centuries, that the Rector is ... likely to keep and let the school carry on using the space in his churchyard".** He stressed that the Rector was both landowner and a trustee governor of the school. It seemed from the following questions that the objectors found it difficult to grasp the nature of a church school. It was there in the old bigger parish as a church school, as I have set out above, before the church itself; The Rector is the freeholder and can use the graveyard as he sees fit subject to the Faculty jurisdiction. Mr Seymour's questions became so legal that this witness readily accepted that he was not in a position to answer them as he was not a lawyer. (Again I note that many of these questions would have been more constructively put to a representative of the LBTH or indeed of the Diocesan Registry, but the latter, at least, would have been in professional difficulties as they were the solicitors representing two of the Building Parties).

688 Mr Woolf was cross-examined on the lay out of the school, that it was perfectly adequate for nursery provision. He disagreed. He dealt admirably with a series of questions as to the development of the plans, and the fact that the school had to work within what moneys they got. He was pressed on his observations of the school. He said he had 155 schools (158 in his statement), and so did not visit all of them regularly. There was a rather unresolved point as to the apparent fact

that the property department of the Diocese of London had registered the school land in the 1970s, but no one in Court was able to explain to me what they had registered and why, as, at best, the school had no interest save a bare licence to remain there. This was yet another example of sloppy paperwork which showed little liaison between the various interested bodies. Mr Seymour on behalf of the objectors pursued a line of questioning that: ***"it was an unusual situation of a building erected on church property with no interest whatsoever granted to it".*** I do not find anything in that point. Many, many church schools exist throughout the country on the parson's freehold, schools of which the parson, wearing a different hat, is the governor or even Chairman of the Board of Governors. It also appears that at this time Mr Woolf was thinking more of the LBTH's management of the gardens to the west of the youth club, and was thinking that the youth club was functioning under a separate agreement and that the 1987 games area was a separate agreement again for shared use between the youth club and the school. Similarly, much was made in cross examination about the Rector's "cathedral close vision". Again I am aware that many, many Rectors or PCCs have "visions" of what they would like, the majority of which evaporate in the cold light of financial consideration and parochial realities. Taking the evidence briskly at this point, Mr Woolf was trying to chivvy along LBTH and the church and the school, even to suggesting an 18 month licence just to get matters moving, and not lose the money which was going to fund the improvements.

689 More worrying was the evidence that this witness, as one would expect in this type of situation, consulted the Diocesan Solicitors, Winckworth Sherwood. Mr Woolf was aware that any new building would be being built on a disused graveyard, but thought as a building was already there (the old youth club) that permission would be forthcoming for any new building, especially as it would have both community and school use. He assumed once they had got the scheme, the Faculty would follow. Mr Woolf made it clear that the lawyers in LBTH were far

more involved than Ms Watson, who was dealing with the educational side. The LDBS was keen that the school should not close, but that the church was seen to be engaging with the community. Mr Woolf was clear about the difficulties posed by the missing documents, but remembered that such legal discussion as there had been appeared to consider that the 1949 Deed (such as it might have been) had run its course and that a new legal arrangement would have to be properly drawn up. Mr Woolf sensibly said: "***The whole thing was frankly a mess. We needed to have some agreements that everyone could understand and that reflected where we were going".*** It was clear to me from his answer that the church, the school and LDBS were discussing matters but they were all relying on the Diocesan lawyers and/or the LDBS lawyers to sort this out. LBTH also had their own in house lawyers. The Youth Club had their own lawyers (as this was still when discussions about buying off the youth club leader were concerned), and the church had a Mr Coates from Dawson Cornwell advising them, I think, *pro bono,* while the LDBS had Winckworth Sherwood's education department, but he was sure that the church would have spoken to Winckworth Sherwood's ecclesiastical department. Had legal advice been given by the lawyers involved at this early stage, the present situation might not have arisen.

690 It is very clear from Mr Woolf's evidence that everyone involved wanted a consistent approach, giving the school more space for their educational and community work, the gardens to be improved and for there to be a consistent overall strategy. I do not find that there was some underhand plot to reduce the open space. I find that everyone involved was doing their sensible best, but that they were all let down by the legal advisers, apart from the lawyers for the redundant caretaker who got his £25,000 and the trustees of the Youth Centre who surrendered their interest and disappeared without, it would seem, further financial loss. The difficulty in cross -examining these witnesses was that they can give evidence of their own actions and decisions, but they are not lawyers, and the

legal arguments before me are outwith their own experience or qualifications. They relied on their legal advisers and were let down, and, to make matters worse, the LDBS was not a Party to the agreement which was being brokered. LDBS just checked that this 25 year licence was not adverse to the school's interest. Again this witness was pressed as to why LBTH was involved. He said he thought it was because they had the control of the land and, said Mr Woolf, LBTH: "***never told me they could not enter into this agreement".*** However, Mr Woolf did take part in the landscaping interview process along with others from the school, the church and the Spitalfields Society. Mr Woolf explained how the School Governors had drafted the brief to the architects. Mr Seymour pursued his point about moneys being spent on a school which had no legal certainty of its continued existence and Mr Woolf just could not accept this, saying they had schools on a 99 year lease, but which had been there for up to 200 years. He re-iterated again and again that the school was on church freehold land which had been freehold land since the parish was created. It was not like a commercial development.

691 Mr Seymour pressed him on what he alleged was the strategy of spending s106 money on the school redevelopment in return for a community element. I do not need to deal with the witness's explanation as to how LDBS acted, in effect, as a banker for the building works, as that is not germane to the arguments before me. However, interestingly, he dealt with a meeting he had with Ms Whaite and others, where there had been discussions about what was being planned, but he said there had been no objection from any of those present in what he had regarded as "***just another consultation***" which SCABAL had advised him to have, save that it was clear that the moving of the new building further to the south of the old one had been raised, but the witness was clear that this was one of a number of ideas which were being tossed around. He regarded the possibility of grave disturbance to have fallen into the Rector's remit. Mr Woolf again and

again plodded through his explanation that this was not a commercial transaction which involved the purchase of land and its funding, but he accepted that the form, as one of 300 a year from LDBS to get the LCVAP money was incorrect. It had been filled up by a quantity surveyor and signed off by a buildings manager and was not legally right as it said that the trustees owned the site and that there was no additional site involved.

692 Having accepted all this, I asked him had the form been properly filled in, and not with these mistakes, would it have made a blind bit of difference to getting the money from the Government. His emphatic answer was "***No***". He agreed that snagging apart, the final figures came to just over £1.5million, £1. Million from a capital grant from the government of £506,000 and the governors' 10% being some £56,000. In the course of this case the figures differ slightly as between witness , but these appear to be a reasonably reliable ball park figure.

693 As said at the time, it is better than Mr Hawksmoor's delivery 10 year late and four times over budget on own initial estimates.

694 Mr Woolf was adamant that he could rely and was relying on the 25 year licence to get the money to develop the new building, and denied that this was a risky approach to obtaining state money. He, in effect, knew that it had all the security of being a church school on the Rector's freehold; indeed, he said that: "***with all his schools on church land they never had leases or licences, so that by having an agreement that we could occupy the site was putting the school on a safe foundation as with many of our other schools".*** He disagreed that there had been extensive grave disturbance, certainly not when compared to other church school sites with which he had been involved; 700 graves at St Johns, and 5,000 at Marylebone. He had had no hand in filling in the faculty petition, but thought that such figures that appeared in it must have come from the quantity surveyor. (I find that to be another example of sloppy form

filling). He was aware that the Seven Stars public house was coming up for sale but the cost was £2.5 million. (Interestingly with hindsight, I suppose under the *Localism Act* the locals could have demanded right of first refusal on that sale, but presumably there was not that kind of money or interest available to do this from the locals themselves.) I was left with the view that Mr Woolf was acting constructively and helpfully in this case, but he was not a lawyer, so many of the point being put to him he would have hoped would have been explained, sorted or otherwise dealt with by the lawyers acting for all the relevant Parties. This did not happen. He was entitled to think that it would. That was what the lawyers were being paid for.

695 The next witness for the Building Parties was the Rector, the **Rev'd. Andrew Rider**. He had made two witness statements **(2904-2909)** and at **(3056-3060)** and his oral evidence is at **(T731-873).** He had been the Rector of Christ Church since 2003. When he arrived, the congregation were worshipping in the crypt, as the nave was not finally restored until 2004, but even then the congregation had to camp there so that they even had to borrow a Communion table (I think the outside world may not be really fully aware of the years and years of building work disruption which this restoration entailed; they had to worship in the middle of a building site, a nightmare). The end result may be very fine but it was not easy for the parishioners, as part of the graveyard was a builders yard for a long time.) as the Rector said when being cross-examined, there were changes.

> **Q;** ***It was not exactly as Hawksmoor would have done it There were some changes, but largely the church was being put back?***
> **A;** ***Yes. I think there were a couple of comments that it was not quite the way Hawksmoor would have had it"***

As well as that**,** the dysfunctional youth club was going down hill. The Rector deposed that the youth club worker had shown him a collection of weapons which he had confiscated from users **"but"** said the Rector **"these were not kept by**

him {the youth club worker} in secure conditions". His first statement sets out the history of buying out the youth club, and the parish aim to assist their school. Both he and the PCC were very attracted to the potential proposal which Mr Woolf suggested as to the redevelopment of the youth club for the benefit of the school and the Spitalfields community. He describes initial discussion as to the siting of any new building, bearing in mind the Church and the school needs, and the accessibility of any such building from Fournier Street for community use. The architects, SCABAL, had advised them that to refurbish the old building would be disproportionate in costs to erecting a new building. Equally to have built nearer the school would be disproportionate ***"because of the measures which would have been required to accommodate protected trees".*** The Rector deposed that the design brief had therefore to be a balance. That was the advice provided to the Rector and PCC by their architects.

696 In his statement the Rector mentioned that, although the crypt had been emptied of bodies some years before, it had not been restored to its present state. When the works on the new building began in 2012, the church had only received a promise of funding from the Monument Trust for the crypt restoration. At this time LBTH had deemed Hanbury Hall unsafe so that it could not be used because of an enforcement order, so that the church had to give thought to the use of the new building for Sunday School use, and for use by the Bengali Christian community. I note that the introduction to the Christian faith of this group has to be developed in a welcoming environment where immediate exposure to "a Church building" might prove unnerving for someone just coming to the Christian faith. The Rector set out the other club uses for the new building as well as for the school. He was able to give evidence as to the results of these aims, now the new building was in use. In respect of the burials, he deposed that the original faculty had made the presence of a representative from the Museum of London to be on the site throughout the external construction phase, and that he and the

PCC had drawn up the reburial policy to which I have just referred above. I have set out what happened in respect of this above. He spoke of the 18th century plaster work in his study falling on his computer on 6th September 2013, destroying his records, and of the difficulties in facilitating the burial of the ashes of Sir James Stirling very close to the church. Like Mr Peck in the 18th century obtaining his (illegal) burial in the crypt (followed there by hundreds of dead parishioners), the legal closure of this graveyard in 1859 did not appear to restrain an architect who, presumably, wanted his remains to lie near this great Hawksmoor church. People appear, in this case to use law when it suits them, and ignore it when it does not.

697 In his second statement he dealt with various matters raised by the objectors which were amplified in the course of his cross examination. In respect of the incorrect answers in the original faculty, he stated in terms: "***Neither the Chancellor nor the Registry reverted to me for clarification of any of the answers to these questions in the petition and so presumably they read my answers in the way I intended" (3058)***. He also set out the reality of the Church obtaining directly from the Monument Trust for the necessary funding for the conversion of the crypt, correcting Ms Whaite's version of events. He spoke of his reaction upon being offered over the telephone by the Monument Trust a grant of a staggering amount for the crypt conversion. In respect of the suggestion of the children using the crypt for Sunday school, he explained that in 2011 it was still unclear if the renovation of the crypt was going to be a viable project as there had only been a initial feasibility study of the scheme. In his evidence, he said that when he was inducted as Rector in 2003 the service was in the crypt, he having been inducted in Spitalfields market itself, so that he had lived with the on-going restoration of the church over many years. For part of that time the graveyard was a builders' yard because of the work in progress, and as the builders gradually moved out, he arranged with the charity Crisis to train homeless men in

horticulture by tending the flower beds, for which they won a bronze medal at the Hampton Court Garden show in 2005, as LBTH did not seem to be doing anything . He said: "***I am afraid we did that without lots and lots of legislative bits of paper".*** It was his freehold, and his choice to use it as he wanted. He spoke of the access via Fournier Street while the youth club was functioning. He rehearsed the history of the land use, but said that he had not seen the 1995 Master Plan until it was produced for these present proceedings. This is one of the difficulties in long term projects. The personnel change, and past history is forgotten. It seems that this Master Plan was a collaborative work between FoCCS, the then Rector and the PCC. It certainly, I find, was not a document of such running importance that it had been referred to over the intervening years, and was not brought to the present Rector's attention since 2003 until these proceedings in 2016. Until then he had not been made aware of a term in the Master Plan **(126)** that the FoCCS had established an endowment fund for the maintenance and upkeep of the church, the interest from which was (albeit in 1995) producing £4000 p.a.. The Rector said that if he had known about that: "***I do not recall any money coming in that manner in the 13 years I have been here, which would equate to £52,000. If I had seen this, I would have been chasing it".***

698 Now, of course, much larger sums were being raised and expended on the church restoration during that time, but this was a separate fund arising from investment income (though I accept that the interest rates have sharply declined over the years), for which the FoCCS Trustees were responsible. It was in the Master Plan which is being relied on by the objectors. The Rector gave evidence about the difficulties with the youth club, which had become "**intimidating**" even to the Rector's son from 2007 onwards, and that even from that date the Rector was writing to complain to LBTH about the lack of management of the open space. HLF was also demanding that the church should be open as much as

possible. From these concerns appear to stem the genesis of all the later plans. The open garden space was an uncared for mess, the youth club was a failure, doing more harm than good. Something had to change.

699 The Rector dealt with the failures to complete both Faculty petitions correctly, both in the earlier one for the licence and the substantive later one. He was uncertain as to whether the graveyard remained consecrated after it stopped being in use. He could not remember if, having asked the Registry or the Archdeacon, whether he either did not get an answer or misunderstood the answer he got.

700 In cross-examination the Rector was pressed as to his knowledge of the extent of land managed by LBTH under the 1949 deed, and the problems of the Tennis courts used by the school as still being part of the graveyard. When asked about the complications of the legal documents and what was actually on the ground, the Rector said: "***everything I have done has been referred through legal advisers. I am a clergyman".*** Understandably earlier in these proceedings the differences between a licence and a lease, between the change from an adventure playground to a youth centre, had not been high on his list of priorities. Similarly, he had been puzzled about the incomplete 1919 deed. Did it mean the LDBS were the School owners? He was unsure. Care and management being his primary concerns in or about that time, rather than how or why certain buildings were there on the graveyard. It should be said that Christ Church was his first freehold. His previous cure, after his curacy, had been in a converted school, which was un-consecrated, so it was not subject to the Faculty jurisdiction. "***I am a confused clergyman…some of this was a bit of a learning curve for me".***

701 While understanding the Rector's confusion (and, as I said in Court, given the missing documents he would have had at that stage to have been clairvoyant to have understood the legal position) that in itself is no excuse. He had the advice

from the Diocesan Registry to hand. The tragedy here was that he was either not properly advised, or was allowed to continue with matters which should have been sorted out. Clerics have a parish or more to run; they might reasonably expect legal advice. It is something for which they pay their quota? Irrespective of any other legal arguments, the problem about building on a disused but still consecrated graveyard just was not addressed.

702 The Rector was also cross-examined as to the land registration carried out for the Diocese when initially the tennis court land was included as church property and then excluded. The Rector was not responsible for that as "***someone from the Diocese (a temporary employee) had done it".*** He had answered questions, but given the state of the legal documents, I cannot think that the conversations he had at the time with that person can have been very illuminating.

703 He was asked at length about "the Hawksmoor vision". He denied he had given any thought to the 1949 Deed "vision". As this Deed can now only be found in draft after enquiry, and he was only born in 1962, I was not greatly assisted by this line of questioning. The Rector was more realistic. He said that on Google he could have found many potential plans for Christ Church but his concern was for care and management: "***when I looked out my kitchen window on the first floor in the rectory I did not see [this vision] I saw two buildings; I saw a disused part of the gardens that were available only four days a week when they should have been open six; I saw a front garden that was full of people shooting up and having sex behind trees and defecating; I saw a major issue that needed to be changed. I didn't…say: Lord do you want me to turn the clock back 60 years or do you want me to do something about what is happening here."*** In cross-examination as to his use in an email about a "vision" of a cathedral close for Christ Church in its setting, it appeared to me that the objectors were taking this too literally as an ideal which Mr Rider,

inspired by a clergy away day in France, had written of. He was thinking it as being more of returning: ***"Christ Church to a community setting where bankers would sit next to women with burkas, … where youth and community facilities would build up and nourish some of the needy people in our country".*** When asked how he was going to achieve these thoughts, his answer was ***"Prayer".*** I had the distinct impression that that answer came as an unexpected surprise to some Parties listening in this Consistory Court.

704 He was pressed that what actually happened was that 70% of the open space was sealed off from the public. His answer was to reiterate what the "open space" had been like formerly, and what could now be done to it. I do find that the objectors placed too much reliance on what the Rector was tossing about by way of ideas. He might well have imagined the Hanging Gardens of Babylon for this graveyard. The reality was what was needed and what could be afforded, and what, legally, could be done.

705 The Rector was cross-examined at length about the negotiations he as a School Governor, along with other Governors would have had about their need for additional space and its funding as everyone involved appeared to be legally represented, even with additional *pro bono* help. He was cross-examined about the apparent lack of involvement of any PCC members at meetings, but he pointed out that his PCC was very young and busy during the day: ***"I even prayed for silver heads to join us".*** Mr Seymour reluctantly accepted that he could not challenge that all matters were properly reported back to PCC meetings.

706 As I said, at a time every year there is an annual meeting for the parish. Those who wish to influence the conduct of the affairs of the church can stand for election. Being on the PCC or being a Church Warden involves hard work and dedication. Many people, who whinge about what a church does, appear not to be ready to take on that burden and stand for election. Honourably, the late Mr

Vracas aside, who was deeply involved in the running of this church (and was so recognised by the PCC supporting him in becoming a member of the Worshipful Company of Parish Clerks), there was a dearth of others prepared to make their views felt at these meetings. Mr Rider was asked about the getting of advice, and relying on so much *pro bono* work when the church/school came to implementing their plans. His answer was instructive:- ***"One of the challenges of being a clergyman, indeed being a PCC of a Church of England premises, is to what extent the Registry of the Diocese is able to help you. They are great with advice. There obviously comes a point where actually you are asking them for more than their retainer allows them to give. So working with someone*** *pro bono* ***and making sure it is signed off by the Diocese felt like a very good fit. When we developed our church hall [Hanbury Hall] we did exactly he same ... a fairly large law firm did a huge amount of work for us*** *pro bono* ***and the Registry oversaw it".***

707 He was further cross-examined as to his understanding of the effect of the licence and the Faculty. The reality was that he was not a lawyer. That in itself is not a defence when signing and filling in documents correctly; he relied on the Registry: "***I remember the Registrar saying that within the legal world people do not tend to comment in great detail on each other's legal documents, but it would go into the Faculty bundle".*** He had not been advised not to sign the licence agreement. The reality of all this cross-examination was that the Rector, the school and others, all adults who could/should have asked questions, were relying on the legal advisers, paid or acting *pro bono* to advise. Similarly, the SCABAL- prepared inaccurate documents was not his direct responsibility; as the Rector said: ***"I trusted our agents to complete it".*** He stated that the "***tidying up***" of the interim 25 year extension licence all went on hold after the objectors' campaign began, while not in any way excusing these careless mistakes.

708 I was not particularly assisted by questions as to the school being under special measures, nor as to the funding of the church's restoration, save that the Rector's evidence was that in respect of the crypt he received a direct offer of £2.7 million by telephone straight from the Monument Trust who offered to be a sole donor to PCC. This did not come via FoCCS. The Rector said that many people who had given money for the restoration of the church had told him that they did not know why the FoCCS were opposing all this, exampling his own mother who subscribed to the restoration of Christ Church, but was concerned to receive a mailing from the FoCCS saying that they were trying to stop the church encroaching on the churchyard. He dealt with his views on the conduct of the FoCCS Trustees, whose views may not be those of all its supporters, the history of which I have covered above.

709 The Rector, fairly and openly, accepted the inappropriate overfamiliarity of his **"Dear Nigel**" letters sent to the Chancellor, and the mistakes in the Faculty petition. Much time was taken up in trying to get him to explain how/why he had ticked the wrong box in the Faculty petition and given the incorrect information as to whether the land was consecrated or not. He was honest about these mistakes, and about his ignorance of the *Care of Churches & Ecclesiastical Jurisdiction Measure*. He was also cross-examined on the disturbance of graves. He stressed that there were no obvious lines of graves on the surface of the graveyard. The builders had disturbed dislocated bones, which had delayed progress, but that he had been advised by the Registry to draw up a reburial policy and have it approved by the PCC, but that was done after the Faculty was granted. I have already set out the reburial procedure and the involvement of the Museum of London in all this.

710 The bottom line from the Rector's evidence was that he was a cleric totally inexperienced in the Faculty jurisdiction, who assumed that the Registry and the Chancellor would know best. I specifically do not find nor uphold that the

objectors' views that the Rector or others were acting in an underhand way or trying to "pull a fast one" in getting the new building. That would impute a much greater degree of competence and legal acumen than these witnesses demonstrated. This litigation has certainly changed that. They were non- lawyers who were acting as they saw best to improve the situation they were in. Their tragedy was that they were not assisted in going about this in a legally competent way. That did not excuse his carelessness in filling up the Faculty Petition. He could have flagged answers up with " I am unsure about this" or " I do not know" but he did not. In the event the DAC did flag the churchyard aspect up to the Chancellor. Having heard the Rector's evidence I am entirely convinced that his filling up the Faculty petition in the inaccurate way he did, was in no way meant to be devious or done to mislead the Chancellor. He made honest and incompetent mistakes, which ought to have been picked up elsewhere.

711 However, the weakness in this whole line of questioning was that just because there were/might have been bodies or stray bones in this graveyard, were there to have been proper legal rights and necessary parochial reasons, the existence of such bodies would not <u>in itself</u> have inhibited building. I heard from Mr Woolf of the removal of 5000 bodies from a school in Marylebone. The Church of England does not lightly disturb the dead, but it will and can. There has to be good reason, and reverent reburial thereafter. Any relatives must be given an opportunity to reclaim remains (though here in 1949 no one did, so it was unlikely another 60 years later that would have changed). The vast majority of individual graves could not even then be identified. No one claimed remains even beside the tombstones which were removed, nor, as I understand it in respect of the identified bodies removed from the crypt. Mr Seymour sought, from a planning point of view, to ask me to consider that a Consistory Court should or would take a different view from an un-consecrated commercial development where bodies were to be disturbed. I am afraid that I was utterly unconvinced by this argument.

If a parish had good (very good) reasons for a development of a churchyard, the mere existence of bodies will not stop it. Of course, there will be bells and whistles of conditions for reburials etc., and the cost of clearance will have to be factored into the development. Can a Parish afford wholesale removal would be a question I would ask. However, the argument of a quiet and sacred space which should and will never be disturbed is unrealistic. The reality here is that here in this graveyard were people taking drugs, drinking, urinating, having sexual intercourse. Rather than the romantic view of the contemplative graveyard raised by some objectors, and that disturbance of the dead is sacrilege, I find that flies in the face of just what the site was like. Given what was going on above their graves. It is just a fantasy as far as this particular graveyard was concerned. LBTH "management" seemed to have done nothing over the years to remedy this state of affairs. Even from the time it was all (school aside) an open space under the "management" of the Metropolitan Gardens Association this graveyard was not a quiet contemplative space, but as I have set out above, as described by Jack London, it became a foetid slum area for the saddest dregs of society, who had only there to go (and it says something that they were not evicted by the then Church authorities from the churchyard closed about 40 years earlier and so within the living memory of families whose relatives might be buried there, and who might have complained). At least they were able to doss down there. I bear in mind the on- going work of Christ Church for the current unfortunates in the parish, wrecked by drink, drugs and prostitution.

712 There is some force in the arguments by the objectors that because of the mistakes in the Faculty Petition, the Chancellor did not have his attention drawn to the realities of the situation, and that therefore the necessary directions as to reburial were not given, nor was the question properly weighed as to whether there could or should be building in the church yard, as there might be disruption to human remains. There are two points here. The *Disused Burial Grounds Act* 1884

I will discuss below, but, even if the Faculty had been for something then legal (a church extension, say, under the 1981 amendment to the Act), the Chancellor should have, *inter alia,* considered whether it was sufficiently necessary to merit disturbance of the dead. In making the MOLA condition for the museum to monitor the external works, I find that the 'disturbance point' was considered. I do find that the Rector here, with the advice of MOLA, dealt with the disarticulated bones very properly. I specifically reject the allegations that monuments in this graveyard were destroyed willy nilly by the new building, and that bodies were specifically disturbed. Indeed, it appears that many of the objectors were so imprecisely observant as to what had been cleared in 1949 by Stepney (removal works set out in a plan before me) that they exaggerated what they alleged to be damage. All one can say now is that all this should not have happened in this ill organised way. All of this could have been avoided had the Faculty been properly filled in. All of that does not lie at the Rector's door. There were others who should/could have raised warnings and blown whistles. He got his original Faculty and, in all good faith, got on with the job in hand. Complaints that this was not picked up when he sought an extension to the Faculty were answered by him, that having got his original faculty, his aim was to get on with things which had already been delayed by the time taken over the reburials and the weather and other matters. He refused to accept the suggestion that because he had found remains he ought to have stopped the works (for which he was not the client). He said either the Chancellor or LBTH could have told him to stop. In any event, at that time he was not aware of the mistakes in the original petition. The legal arguments as to what can/should be built on a disused graveyard are different and carry more weight as I consider below.

713 The Rector was also cross-examined on local open spaces and the availability, or rather non-availability of alternative venues. He stressed the popularity of a faith-based school for a Muslim parents, as distinct from the

secular school system, and added that from his own experience, it was Muslim concern about a recently dead body rather than about the long dead that had arisen in respect of the conversion of a local place of worship into a Mosque, but that no children had been removed from this school for that reason, nor had any Muslim councillor complained. (It may have been that episode of the relatively recent conversion to a local Mosque which gave the objectors the idea that this could be utilised as an argument, but I find that they produced no evidence from a parent or Iman, or anyone, in support of it, and I reject this argument). He spoke of the tensions between FoCCS and the church, for instance the FoCCS's desire to restore the organ which needs specific temperature conditions while the church wanted the building to be warm enough for human beings. The church was not really interested in the organ: "***It is not the way we worship Jesus***". It is little used save for concerts and, if requested, funeral or, possibly, wedding services, but they had managed to work together and get organ and crypt (a church project) finished within weeks of each other, notwithstanding HLF money going to the Olympics, and not Christ Church. I again remind myself that this congregation have been living on a building site for years. No sooner did the end of that disruption seem in sight but FoCCS wanted to disrupt the church further with scaffolding etc. for the organ restoration. In reading the Trustee Minutes I saw little or no concern or interest being raised about the effect of this next work which must have seemed never ending to the parishioners, scaffolding pipes removed, plastic sheeting flapping about but still the parish managed to grow and worship. It must have been like living with unending nightmare builders, however splendid the end result now is. The Trustees seemed completely fixated on the Restoration, and appeared to give little thought to the on going disruption it was causing. The organ is just now restored.

714 The Rector spoke frankly as to the need to have discussions and a rethink about the church's future relationships with the Friends. " ***Not long after I***

came, I asked where some of the grinding through of the detail happens with the Friends, and I was told there was a kitchen cabinet-I think that meant there was a small group within the Board… quite rightly so, you need two or three heads to promote things and push things through That was not a group I have ever been part of" Given there seem only to have been 3 or 4 FoCCS Trustees meeting *per annum* this analysis of how FoCCS worked is probably accurate, as the minutes are only sketchy in their records of how things were happening.

715 I asked him about the legal advice he had got and the faculty procedure. He found that ***"an awkward question to answer… I wish the Registry had written back to me and told me I had filled the form in wrong. That would have been better help than I feel I have had".*** He accepted his own mistakes as to the filling in of the form. However, he said that if he had been told at the beginning that he could not build on the graveyard: "***we would not have built there".***

716 As I have said witnesses had to be taken out of order to accommodate their availability, so that the next witness, this time for the objectors, was Miss De Quincey. As it happened, we were now able to move from the history of events and the legal arguments being put to people, to the consideration of the aesthetic arguments which had of course, formed much of the initial ground for objections. Miss De Quincey's' statement is at **(3145- 3155)** and her oral evidence at **(T875-885).** She had been added as a formal Party opponent following the Pre-trial hearing on 6th May 2016. She had lived very locally for some time, and still lived fairly close. Her evidence was of assistance when she dealt with her own experiences of passing and visiting the graveyard over the years. She is an architect accredited in conservation, and has been a trustee of FoCCS since 2005. She spoke of the restoration of the south steps of the church in 1999 opening a view over the church yard, as being the moment when there was a clearer focus to do something

about the Youth Centre building, which she describes as being then "virtually redundant". Now I pause there, as it would seem from the evidence before me that the youth club was not in 1999 as bad as it was going to get. It certainly became an eyesore later. But if Ms Whaite's evidence is right about FoCCS helping the youth club as to project management at a later date, I find it hard to accept that from 1999 onward FoCCS were making the restoration of the churchyard an immediate priority. Ms De Quincey complains that when the school expansion was being considered, the FoCCS "***were not consulted in any meaningful way, and they were effectively excluded from decisions made by the school, the Diocese and the local authority***." **(3146)** Again, I find this a surprising statement given the detailed history of FoCCS involvement, principally through Ms Whaite and the late Mr Vracas. I would be as puzzled if the school or Diocese had complained that they were not part of FoCCS trustee discussions. She refers to the Master Plan design. Her statement helpfully set out some photographs of the site over several years, and she rehearsed the history of the building of the youth club, and the then objections to it. She reiterates the views of Professor Downes and wishes that the opportunity of completely restoring the south front of the church and restoring the open space for public use had not been taken up. She adopted her statement in evidence, but appeared surprised that, as I had made clear on day one of this hearing, this was a Court of Law and not a public meeting, and as a formal objector giving evidence, that she might be questioned. As a witness she presented as thoughtful and concerned. The building and its surrounding clearly meant a great deal to her, which she rightly regarded as: "***a very beautiful place, which is of cultural value to us all that has been designated and appreciated ….[it had] fallen into disrepair, through a huge amount of effort and faith and money has been restored with an idea that this is a place made up of a church and a churchyard, that along the way the opportunity for that completeness has been ... marred for possibly good reasons".*** She said that the DAC had recognised in the late 1960s

that building in the churchyard would cause problems in the future. I asked her, given the history of the site and the views of the objecting bodies at the time, why they had not objected at the planning stage in 2011. Her view was that English Heritage (now Historic England) had been completely "taken in" by the idea that the building existed, previously developed. I find that hard to accept, as the very point of the latest proposals was that the old building was coming down, but should something else be built there or thereabouts. Reading the views of EH at this time, I do not find that they were just accepting the status quo that there had been a building there already. She appeared to accept the Building Parties' argument as to Muslim parents feeling comfortable in the school, but considered that they might not feel comfortable in a church itself. She thought the needs of the children could have been met within the confines of the current school, but accepted that she had not been present through all the hearing to hear all the evidence given as to community use of the building. She considered that there were other local community spaces which could be used, though she herself considered that the crypt of Christ Church itself was not suitable for children as it does not have windows; she, as an architect, considered this "fantastic" resource better for adults or families than purely children. She did not want to comment on the legal arguments adduced by others.

717 She was cross-examined by Mr Mynors as to the planting in the graveyard, and as to the frequency of gates being open from one part of the grave yard to the other after the youth centre closed. In answer to questions from Mr Seymour she stressed the growth of vegetation over the years. She complains as to the height of the new building, but conceded that it is further from the church. The hearing was then adjourned.

718 Although there had been a number of formal opponents in this matter, not all of them made a statement, fewer of them gave evidence, and some made statements but did not give evidence. I make it clear in this case that I have read

with care all the statements, and letters of objections from all objectors, formal and informal, both provided for the purposes of this litigation and provided at earlier times in the history of this matter. I have taken all these into account when coming to my decision.

719 I next heard from **Professor Kerry Downes**, Emeritus Professor at the University of Reading, not just as an expert and author on the work of Hawksmoor, but a formal objector in his own right. Unusually, he was not an expert called by a Party, or jointly instructed by the Parties in accordance with the *CPR* rules. I give him credit that he has had the courage of his convictions, helped to fund this litigation, and come from York to give evidence before me. I have already set out the many letters he had written in this matter to a variety of persons and bodies since the plans for the new building took shape, together with his formal objections in 2015 to the proposed Faculty. I do not repeat these again here. He is deeply and emotionally attached to this church, a church and an architect which have played an important part in his own career. Earlier in this judgment I have criticised him for writing and expressing views to a variety of persons in a way which might cause comment. However, I make it plain that in his intellectual analysis of the architectural importance of his church and its setting I do not underestimate or ignore the weight his views carry. He was, Goodhart Rendel apart, one of the earliest academic architectural writers to resurrect the importance of this strange and wayward architect. Indeed, the complaint raised against the Confirmatory Faculty, that the Petitioners had not consulted the amenity bodies, pales into insignificance given that, rather than any of them quoting Professor Downes, I have had the advantage of hearing from him myself. The objectors place great store by the weight of his views, and he in turn, living in York has had to rely to a degree on their analysis of the current situation in Spitalfields. The present Spitalfields is a very different one than it was when he wrote his first book on Hawksmoor in 1959, or even his second on the same

subject in 1969. The area now over almost 60 years on has changed out of all recognition.

720 His formal statements are at **(2940-2944) and his oral evidence at (T979-985) and at (T988-989**). He writes in support of SOS and in his own right as a formal objector. He set out his expertise as a writer and commentator on the works of Hawksmoor, and his involvement over the years with FoCCS, of which he is a Patron, and before that with the Hawksmoor Committee. Given the tests I have to apply, of any witness his evidence was of the greatest importance to be considered and analysed in detail.

721 I consider first his statement. He stated that: "***Christchurch and its churchyard are indivisible in terms of their importance to the appreciation and historical and architectural value of the site … it was designed to be seen in the round; but the southernmost aspect, incorporating the historic churchyard can legitimately be regarded as the most important aspect along with the view of the west façade which also incorporates a view of the churchyard."***

722 I pause here. The really striking aspect of this church I (and a number of architectural writers) find to be its west façade and steeple, as approached from Brushfield Street which when built before damage and alteration, would have been even more striking. That produced the requisite "shock and awe" element. I struggle with Professor Downes' view of the importance of the south façade. As can be seen from the maps I have set out in this judgment for much of the time without entering the churchyard it was not an open building, seen in the round, but a churchyard bounded by Red Lion Street in the west and its houses which ran right up the dominating west steps, Fashion Street in the south, the churchyard only visible from the backs of its houses and not open to the street, Brick Lane to the east, a small gap before altered by the Vestry, and the whole of the southern

flank of the church. The shattering view of the west front from the present Brushfield Street (formerly Union Street formerly Paternoster Row) shows the church directly placed on that axis so that anyone coming along that street gets closer and closer to the "shock and awe" of the west front. I thus struggle with Prof Downes view that "***the southernmost aspect, incorporating the historic churchyard can be legitimately regarded as the most important aspect"*** **(2941)** although he goes on to add "***along with the view of the western façade which also incorporates a view of the churchyard."*** That view, such as it is, from the west, only became possible after Red Lion Street was widened, and could not have been seen until the houses bordering the western church steps were demolished, save from inside the churchyard or from the back windows of the houses in Fashion Street, and from a very narrow gap on to Brick Lane. This was never a church sitting in isolated splendour sitting in the middle of its plot. Indeed, in his own evidence Professor Downes spoke of the developing design for the steeple, itself aligned then as now with Brushfield Street, so that the top half of the portico appeared over the (now demolished) houses in the former Red Lion Street. He stressed the effect of seeing the dominating west portico and spire from the little clearing by the steps.

723 He goes on to say that "**not only is the churchyard consecrated but it is laid out as an open space which is rare in this part of the east end of London".** By this I take it that the Professor means that <u>now</u> it is an open space. Clearly, Hawksmoor was having to provide for a graveyard.

724 He then set out the history of the various deeds etc. which are now familiar in the evidence in this case. He re-iterates the granting of the HLF money: **"on the basis of a Restoration Master Plan which contemplated that the churchyard was going to be restored to its state and condition as an open space, entailing the removal without replacement of the 1970 building".** Again I struggle with that sentence. I have already considered what the Master

Plan really dealt with, and I find that Professor Downes' reading of its terms goes far beyond the text itself as the FoCCS treasurer himself admitted in his evidence. The 1995 Master Plan gives some two lines in respect of the grave yard, and goes nowhere as far as is postulated by Professor Downes. I find that the Master Plan was, rightly and properly, concentrating on the building that was the church. Some improvements in the churchyard like surviving tombs and railings were covered, but there was no real thought as to the churchyard itself, full as it was with the youth club and the Victorian school. The whole effort was being (rightly and properly) put into the restoration of the church itself. In any event, the playground/youth club was still functioning in the mid 1990s, so was it reasonably foreseeable that it would just disappear? Could one then apply for an HLF grant on the assumption that that would happen and that it would not be rebuilt? I find not. Professor Downes relies on his letters of objection sent at the time of the 2011 application, which I have already considered. I make it clear, putting aside why and to whom they were written, I have given thought to the scholarly arguments he sets out in those letters, and considered his earlier objections.

725 He is actually one of the very few witnesses who comments on the look and appearance of the new building: (Ms de Quincey did so in passing but was more concerned with a desire for the graveyard to be open space). "***The effect of an alien building in the middle of the churchyard is not only (and obviously) to preclude the restoration of the site, following the removal of the old building, to its condition as publically available open space as had been contemplated in the restoration Master Plan…but also, in my judgment to damage irrevocably as long as the building stands this historic site and an appreciation of the church and churchyard which constitutes its historic setting ."*** At **(126)** the Master Plan speaks of the Adventure Playground as being in the graveyard under licence from the Council, its running costs being raised by its own charity. Indeed, the Master Plan stresses (**127)** that the restoration work on

various groups ... "***parish worship, the Playground*** …" . Indeed, one of its plans was **(130)** ***"to rebuild north west corner of Playground building to provide independent access and provide toilet facilities for public access***". I see nothing in the Master Plan which goes as far as Professor Downes claims for the Master Plan contemplating the restoration of a publically open space. Indeed, rather the contrary. The Master Plan appears to set out improvements which can be done on the site as it exists (Playgroup building and all). His evidence as to the need, once an opportunity arose for the removal of the youth club building is altogether different.

726 I have considered this new building, both at ground level and from as adjacent roof. I have seen how it is masked by the trees. In his evidence even Professor Downes notes **(T980)** that the vantage point for one of the photographs he exhibits which he took in 1977, had to be carefully chosen: "***I chose the point where the trees concealed as little as possible".*** Later in his evidence he agreed that in taking that photograph he had tried to stand back as far as he could to get in as much of the south and east elevation of the church as possible. After 40 more years there appears to be more tree cover. I can also see that if it was not there, one third of the site would still be taken up with the Victorian school, so that total restoration of an "open" site would be impossible. I do see that the present unkempt mess of vegetation, nettles, scrubby bushes and weeds masking the lines of this new building do it no favours.

727 That all said, I find the new building to be an innocuous building, really rather cleverly designed so that (if and once the vegetation is cleared) looking at it from either the open gardens to the west or the school itself from the east one would have a clear view though the glass centre. The users inside would have a view out to the gardens. Only the two supporting side rooms are "solid". As a building, and this I can only judge from the photographs of various witnesses before me, it appears much less blockish and crude than the 1970 building. If one

just wants an empty space, than any building there of whatever merit could be objected to. I found in his statement little helpful analysis that it is, in itself, a "bad" building. Certainly he complained of its dimensions, but it was accepted by all that it was placed further away from the church than the old building. Professor Downes found this a fault as it was then: ***"more central to its setting***", but other objectors had, as I understood them, accepted that the site of the new building further to the south of the church was an improvement, dimensions aside.

728 He objects to the building cutting right through the heart of a churchyard intended for an open space for recreation in the open air. Perhaps that argument falls to be dealt with as more of a legal one, and pre-supposes that an area once designated as an open space can remain so for ever. This graveyard lost one third of its area when the school was built in 1874, notwithstanding an intention (triggered, apparently, by the need to take in house from the Commissioners of Works the sliver of the former Red Lion Street in 1859) that once it had ceased to be a graveyard it would be an open space. There were local needs and the then Rector agreed that part of his freehold could host the Victorian school, so part of the1859 faculty was superseded. I have also considered Prof Downes' second statement of 10th July 2016 added later to the bundle of documents, made after he had had the opportunity of reading the transcripts of earlier evidence given to the Court.

729 Those were his statements what then did he say in evidence? He was firm that Hawksmoor would have thought very carefully about the building as a whole ***"because he placed it where you could see it from the west, the south west, the south the south east and the east, you could pretty well see it from …the eastern end ...before the school was built".*** I have considered that argument above. All of that causes me concern as to the "view of the church" argument. It was clear that development was planned and, indeed took place, surrounding the

church, and, as I have set out above, the view of the east and south side of the church could only have been clearly seen from within the churchyard itself, entering from the western steps entrance.

730 He talked about the design of the church and the use of the Palladian motif to the east window, and the use of it expanded to a colossal size for the tower. In answer to my questions as to the dates and plans for the domestic buildings in the surrounding streets, he agreed from the Lambeth Library plan that the land was being delineated as building plots.

731 I asked him then as to Hawksmoor the garden designer. He spoke of garden designs for Blenheim Palace (itself partly by Hawksmoor, mainly by Vanbrugh). He, very fairly, conceded that none of the garden/park designs were in Hawksmoor's hand, in contrast to the house designs. He stated that even the Vanbrugh/Hawksmoor Castle Howard gardens were most likely designed by other professional garden designers then called in, such as Henry Wise. He agreed that the Rocque Map of 1744/46 showed a functioning graveyard with mounds and was not laid out as a garden in any shape or form. I find that the argument that Hawksmoor was designing a garden in the Christ Church Spitalfields graveyard does not stand up. It was a working graveyard.

732 Professor Downes stressed, after some clarification from Mr Mynors, in cross examination, that each elevation of the church had two perspectives, though that on the north side would have been more truncated. However, I find that the building of the school by 1874 had also truncated the view of the south elevation from the east by a third.

733 He amended his second witness statement of 10th July 2016, in which he had submitted, after the adjournment of the hearing, having read the transcript of the earlier evidence and submissions. In that second statement he exhibited the original site plan (which I have already set out above). These appeared to have

altered his views as to the alleged importance of the southern elevation. Clearly, the Commissioners were restricted to building on the land they had bought from other owners. Professor Downes, although Fournier Street was as yet un-built (but anticipated) states that another purchaser had already built houses on the north east corner, as can be seen from this map. Later plans in unknown hands, according to Professor Downes, placed the church asymmetrically to the land available, so that the great, dominating west front and steeple aligned with Paternoster Row (now Brushfield Street) so that it keyed the vista down to the end of the street, as it still does. I remind myself of the Commissioners' aims of architecture as demonstrating ecclesiastical domination. As I have said above I consider this western elevation to be far and away the most important one.

734 Having looked at the plan and having heard Professor Downes' evidence, I am unconvinced. Had an "all round" vision of the church been of paramount importance, Hawksmoor could have placed it in the middle of the space available, so that people could have walked round it (or more relevantly, been buried all round it). However, given the aims of the original 50 Church Commissioners, I find the argument more compelling that the church was placed where it was so that anyone approaching it from Brushfield Street (formerly Union Street formerly Paternoster Row) would be impressed and overawed by the sight of the great west frontage. Indeed, (dislike of burials on the north side of a church apart) the view from Brushfield Street, if the church were not aligned on it, would have looked rather skewed as the church would not have been the controlling visual powerful show stopper that it was (and is). For this reason I find Professor Downes' evidence in his second statement of great help in that it convinces me that it was the western elevation which was the important one, the South/South East being hidden behind houses and visible only from inside the churchyard. Professor Downes states: "***…much of the west front would appear over little houses from far down Brushfield Street, and the whole from a stance on the west***

side of Red Lion Street, where all its bold detail and colossal scale matched a normal visual field of about 60 degrees."

735 The witness demurred from an assertion made earlier by Counsel for SOS as to the sides to be viewed from. I need not go into this as Professor Downes, now in this statement made his view perfectly clear. What is clear that there is no note, document, design or plan by Hawksmoor to confirm his alleged expectation or hope that the church had to be viewed primarily from the south/east aspect. Professor Downes stated that the building of the Victorian school did not significantly affect the visual enjoyment of the east and south facades. From my own observations I would not entirely go along with that proposition. It did not affect the view of the church, but it reduced it. He appeared to be making the best of a situation which (all agree) was not going to change. Professor Downes went on to say that: " ***The erection of the new building and enclosure of the land behind it means that there is now simply no view of the east façade along or together with the south façade from the open space …except by those who play tennis and view it subject to the very significant intrusion of the new building".*** Now I find that, by the erection of the old school by 1874, one third of southern facing graveyard had been built on, and what view there was, was restricted and remained so. I also find that the new building, which could, even with providing a safe enclosed environment for children, be opened up so that (as we all managed to do on a view, and I achieved on another occasion on my own when it was possible to push and wriggle through gates and fencing although it was clearly supposed to be closed) so that one could walk round the eastern end of the church, entering from Fournier Street and, potentially, with improved garden lay out walk right through to Commercial Road, seeing the whole south elevation of the church. The public cannot do that now. They could in the future.

736 Professor Downes added an interesting commentary about Hawksmoor's own views on the different architectural treatments of the north and south fronts in respect of Castle Howard, and the different functions of these two fronts in differing lights, accepting that both fronts could not be seen simultaneously. I was not convinced that this letter to a patron in respect of another building for a different purpose, some years after Christ Church was built, greatly assisted me. Indeed, Professor Downes deposed: "***Christ Church was almost exactly opposite. Except for the head on view, all prospects comprehend two fronts, one side and one end".*** I struggle with this, having walked the area several times. Really only at the corners or at present from the great building site where the Old Wool Exchange was, can one manage to get that view, not from the middle of any elevation. I am afraid that I remained unconvinced by this evidence, which appeared to me to be somewhat special pleading to endeavour to talk up the alleged importance of the view from the graveyard. Had Hawksmoor wanted these individual elevations to be seen, from their middle, from their corners, the church could have been built in the middle of the site, or even, I suppose, at a 45% angle in the site, but it was not. It was pushed to the north to provide the great dominating eye-catching conclusion to Brushfield Street.

737 Apart from all the four Directors of SOS (Whaite, Vracas, Dyson and Gledhill), of whom Ms Whaite and the late Mr Vracas also became objectors in person, there were other individual objectors; Ms Mitchell, Ms De Quincey, Professor Downes had already given evidence (Mr Fraser was solely called as a witness for the objectors).

738 The following also as objectors submitted witness statements: Ms Thompson, Ms McKoen, His Honour A Thornton QC (from Bath), and Ms Sloan (from Canada). The following registered as Parties Opponent to the confirmatory faculty but made no statements: Mr Lane (President of the Spitalfields Society), Mr Donoghue, Mr Williams, Mr Frankcom (secretary of the Neighbourhood

Planning Forum), Mr Bland (a former local solicitor), Donna De Wick. For what ever reason, many of these individual objectors did not file their own statements, giving their reasons for objections, or did not attend all or part of the proceedings or give evidence. Of course, many of these had already written letters of objection at various times in this matter, which I have referred to above. I have read and carefully considered all their written objections. Again, I note that those holding office or being members of various of the local organisations did not give evidence or depose that their respective organisations had voted to mandate them to speak for those organisations. They appeared as individuals. Again I was surprised, given the history of this matter that I was not presented with substantial formal objections from various local groups. Many individual members may have shared concerns, but that was all. Nor did the objectors present evidence from witnesses from the Georgian Group nor any other amenity group, nor in respect of criticism of the new building as a building in itself.

739 Some objectors just turned up to make a statement. I note that this is both unfair to Parties who have properly taken time to prepare their own cases (over six months from the first Directions hearing before me) to have to deal with objectors who just appear: "to come in out of the rain". They had all been written to by the Court Registrar (in so far as it was possible to obtain a clear indication of who these objectors were.) There was a notable lack of response. Happily, I was assisted by experienced Counsel, well able to deal with this situation. I make it clear for other potential objectors in other similar Consistory Court hearings that it is a Court of law not a public meeting where one can just turn up and make a speech. A proper, clear and timely statement of their objections is the least that will be expected. All these people who appeared in this way had prepared clear statements of their views and objections. I do not expect non- lawyers to grapple with legal arguments in detail (though many can and do), but if people wish to litigate in a Court of Law, they should be able to set out their view and objections

in good time to help the Court to understand just what they want to communicate, and to assist the other Parties who might, for all I know, be influenced by such views they may receive in advance and certainly should be afforded the opportunity to know what arguments they are going to have to meet. Objectors in this case complained earlier of secrecy (an allegation I do not find made out, given the number of meetings, exchange of correspondence and attendance at public hearings etc.), so that it ill lies with the objectors to be retentive about their own proposed evidence right up to a hearing, and not produce their own evidence until the very last minute. I do not think that this was done with a view to being devious, or to try to spring an advantage (indeed, this late evidence did not carry any particular weight as it happened); more I find it occurred out of thoughtlessness which I found surprising, given the professional employment and qualifications of these witnesses. However, it delayed proceedings for documents had to be copied for other Parties, as few of these witnesses having brought any copies for the use of others, and then for other Parties to take instructions on what was now being raised.

740 One such witness was Mr David Donoghue, who lives in Brick Lane, and was a long standing local resident. He had not attended the hearing before he gave evidence; his absolute choice. (**T985-989, 990-992**) He had prepared a 6 page statement dated 17th July 2016, but that he had not shared with anyone until he was asked, which he then delivered to the Court. He was Vice Chairman of the Spitalfields Society, and his working experience had been as a consultant in planning, regeneration and community projects in the Docklands Development Corporation, and was involved with a number of local groups. He was Chairman of the Spitalfields Neighbourhood Planning Forum. From the market research (not produced, so I know not what else was of concern or what questions were asked) which he said this group had carried out, he stressed that the wish for open space was a local key issue. He stressed the need for sunlight, the risk of many

local illness such as rickets and TB, and the high level of childhood obesity in the LBTH. I take judicial notice as to the causes of TB and rickets but he produced no medical evidence to support any particular growth or re-occurrence of rickets or TB in the LBTH, or as to whether it, if occurring, was seen in recent immigrants rather than in children born and bred in the borough. I bear in mind the letter of support for the new building from the local GP, who did not raise these matters, notwithstanding that, and I take judicial notice here, that many of these matters must have been directly within her own professional knowledge, yet she supported the new building, and its use as against the restoration of a really very small piece of open land. Again, I take judicial notice that even if an open space (of whatever size exists) children and young adults will not be able to obtain the necessary sunlight on their skin if veiled and swaddled in covering garments. As I understand it so little or weak British sunlight at certain times of the year that vitamin D supplements are necessary for certain sections of the child population wherever they may live. In any event, I was presented with no medical or scientific evidence that the very small size of this graveyard would make any difference to the (unknown) occurrence of rickets in LBTH. Mr Donoghue said he had been a Trustee of the Attlee centre, which he described: *"**as being underused at present which could provide all of the facilities of the nursery, crèche whether as it is or with modest conversion".*** The Court and Parties were put to the inconvenience of a short adjournment while copies of Mr Donoghue's statement were circulated so that other Parties could take instructions. I was surprised that given his professional background, this had to be necessary.

741 However, the opportunity was taken to recall Professor Downes, who was still present at Court, as I wished to explore with him why he had written the letters to which I have already referred to a variety of people. He said that he had written at least one at the request of Ms Whaite, but that he had written the others

the others to people who had publically expressed an interest in churches, conservation and the like. ***"Simon Jenkins of the National Trust, as he was a national journalist, I tried to….. I thought, what I wanted, hoped for was that he would write an article in one of his columns. His reply was that simply that he was more interested in old Spitalfields Market full stop. I wrote to the Bishop of London and the Venerable David Meara because they were both fellows of the Society of Antiquaries, as I am. They are both interested—David Mears [sic], one of his hobbies is church crawling. He simply replied that [as] it was not in his patch because he was the wrong archdeacon to approach… I approached him as a fellow antiquary***". I endeavoured to understand just what the purpose of writing these letters was after the planning decision had been taken. I could well understand the proper rousing objectors before potentially expensive decisions are taken. His reply was: "***two reasons (1) I was trying to arouse public interest and (2) because a planning decision had been made does not rule out people trying to get it changed. I therefore chose people who I thought would have an interest in this building, who might not be aware of what was going on…. I was trying to get the planning permission nullified.*** .." He gave me an example of his own similar intervention in his home town of York had raised interest and comment. He explained that he had written to his Fellow Antiquaries, whom he thought might not have thought adequately about the situation. Now, of course, planning permission is merely permissory for development to take place, or at least start, within a given period. It is not compulsory to have the development built, either because of a change of mind on the part of the developers/builders and/or because of an adverse financial downturn. However, here none of that applied, and there was a limited ground swell of public opinion from some people to stop the development of the new building. I can hardly think that Professor Downes' reasons can have applied to the Bishop of London who was already well aware of the situation at Christ Church from the complaints and lobbying he had

received asMs Whaite described. Professor Downes had written to English Heritage, as he had heard from Ms Whaite that she had been "***summarily dismissed***" when she approached them. He said that a Dr Baker there, dealing with this kind of business, had been one of his old students though he added, somewhat hastily I thought, ***"that is not material".*** He added that he was aware that people do ask for Judicial Review.

742 Mr Donoghue was then recalled to be cross-examined by Mr Mynors. He accepted that his own involvement with the Attlee centre was three years out of date. All he knew was hearsay about the centre's possible plans for development of nursery facilities. I found his evidence as to details of child security, or alternative and overlapping use by adults and children somewhat imprecise. He gave no details of costs of hire, available hours of use, whether the Attlee centre (if as underused as he claimed it to be) was a viable long term concern. It appeared to be yet another local address with a hall and some rooms. He also gave evidence that he was the Vice Chairman of the Spitalfields Society, another local group dedicated to improving and enhancing the environment of Spitalfields. He provided no evidence that this Society had passed any vote to support SOS's actions, nor did Counsel for the Objectors seek to adduce this from him. I had thus to infer that he appeared in his individual capacity.

743 The difficulty with a split hearing (which had been necessary as all the Parties had woefully underestimated the time this hearing needed) is that Parties and witnesses get a second wind, and want to reconsider and add to their original evidence. Again, I did not stop this, because of the serious public and parish concerns about this whole matter.

744 **Mr Dyson** was then recalled **(T992-1000)** with his further written views on the open space available in the locality. He wanted the church to resist '***commercial pressures'*** to develop its land given the costs involved in this

hearing and the purpose of the new building; not much chance of that, I find. In any event, I did not see where, in this case, 'commercial pressures' came from, save it appears to have crept into the objectors' mindset, but he accepted that a church had a duty to function for what it was built for. Ironically, had, even under the old exceptions, Christ Church petitioned to develop an enormous church hall attached to the main church to house an overflow congregation that would have had to be positively considered by any Chancellor; planning permission aside. He had to accept that Christ Church graveyard garden was <u>not</u> listed in Heritage England's list of historical gardens I find this of note. In all this litigation no one had thought fit to apply for listing, unlike in comparison with the some other listed open spaces and graveyards in the Borough. Mr Dyson drew my attention to a LBTH document compiled in respect, *inter alia,* of its open spaces, fewer of which are at the western Spitalfields end of the Borough. This document stresses the need to achieve a "green grid" in LBTH for the mental and physical health of its residents. I read that this document was written in 2009, and yet I see the unused failure of what publically managed open space there was at Spitalfields in this churchyard (although the planned for improvement have of course, been hampered by all this litigation). He stressed the idealised DCLA plan **(2013**) as being one way of achieving this, the public being able to walk from Commercial Road and the back of Fournier Street, and walk way right around the south side of the church. I take the view that, even with the new building, that is achievable.

745 Cross-examined, Mr Dyson accepted that what would be created in the future would be a modern garden, but he said that such a modern garden would be a "Re-creation". He was pressed as to of what it would be a re-creation, but was unsure of what it would be a re-creation, given Professor Downes' evidence that there was no garden plan for this church. He had to accept that this 2009 LBTH document would have been available to the Council when coming to their 2011 planning decision. He had to accept that the DCLA landscape plan had, it

would seem, been commissioned by FoCCS but he was unsure why. (In fairness, he was not a Trustee of FoCCS). It appeared to have been produced just to show an alternative idea of the area without the new building, but had no more weight than that. I find that this plan, which had been already referred to in Ms Whaite's evidence, was an FoCCS idea and carried no more weight than that. It was one of many garden plans before the Court, some implemented, some not. I found it difficult to see how Mr Dyson's evidence on this point helped me, the more so as this witness was not a "member" of FoCCS. It was put to this witness, in respect of this garden "plan", that in comparison to the old youth club building restricting use to the general public the following:-

> ***"Q; what is now proposed, obviously it has no faculty, no planning permission. We do not know what the detailed design is, there will be a single open space of some kind, some design or other that will go from the Commercial Street frontage, right through to the new building {just to the east of the South steps} That will represent an increase in the amount of effectively usable public open space used by the public space?***
>
> ***A: If it is genuinely approachable by all the public and there are no fences subdividing it, yes."*** **(T999)**.

746 He was asked about whether the presently unused, unopened nettle- filled open space to the immediate west of the new building, were that to be reopened to the public, would that not be an improvement? He accepted that, even though his own children had used at least part of that land as their adventure playground, grown ups could not have done so, at least from the mid 1970s. In re-examination, Mr Seymour endeavoured to salvage matters by referring to the Fanny Wilkinson garden design as forming a potential historic basis which could be possibly prayed in aid as forming the argument for an "historic" garden but might be said to be the basis for the FoCCS's plan he produced. I found this to be a stretched and

artificial argument. Any Victorian garden plan, the bare out line of the front of which is still visible, had not played any importance or particular interest in the minds of anyone until this case. Indeed, the garden competition and the detailed plans for Moguls (which I discover are kinds of grassy mounds in fashionable modern gardening terms) proposed by the Spitalfields Trust show that everyone was looking for a more modern and interesting garden design as what was there, which was stale, old fashioned, and really just past it. Finally, in his evidence, Mr Dyson, conceded that his own rejected design for the school infill would, in itself, have entailed building on a disused burial ground.

747 The next witness was a **Mr Brown**. **(T1000-1015)** His 'speaking note' was also added to the papers He did not appear on the initial note of formal objectors with which I was provided at the outset of the case (**3320-3324).** He was an informal objector. Here, there was a little more reason to allow him the right of audience, as following the death of the late Mr Vracas he had become a Director of SOS in his place. He wished to speak from his own prepared speaking note. There is nothing wrong with that course in the case of any witness, provided that notice been given, and copies helpfully provided for all others in the case. He had lived in Spitalfields between 1985 until 2003, since when he had moved out of London. He was a Trustee and currently Treasurer of FoCCS, and was now a director of SOS. It appeared that he had been invited to step in at very short notice following the death of Mr Vracas. He spoke of the background to the 1995 Master Plan, and said its primary objective, the restoration, was for the whole building and its setting, accepting that it was envisaged that any return to a 1750 setting did not envisage that the burial ground should become active again, but that it should be an open space. He stressed that, in Trustees meetings, these had continued to be their aims, but he was more vague as to when these views had actually been communicated to a world outside the Trustees: "**I do not remember the details. I believe shortly after that [2010 trustees meeting] the**

process of communicating who we considered to be relevant parties to have the discussion". One thing he was clear about: that at that meeting the Trustees of FoCCS were shown the plans for the proposed development of Christ Church primary school and the gardens which they wanted to consider.

748 I found that useful evidence, but it did not support Ms Whaite's complaints that she and FoCCS had been kept in the dark about what was happening. This meeting was a year before even the planning decision was taken. The witness moved on to what he considered the important trustee meeting of 18th January 2011 when Ms Whaite reported that she had had spoken at the LBTH planning meeting. The Trustees were told that the internal development of the school was one aspect of the planning application, but that any building on the churchyard would be the subject of another planning application. That was the aspect concerning the Trustees, not the changes to the school interior. I have already set out Ms Whaite's address to the Trustees on that. Mr Brown went on to deal with SOS and its genesis. In early 2012 it was considered that the Building Parties "**were resolved to ignore and rebuff"** the objectors. In fairness, with hindsight in the witness box, he wished to tone down these words. He objected to the absence of what he describes as a **"collaborative dialogue".**

749 In examination by Mr Mynors he agreed that the FoCCS were the agents of the Rector and the PCC under their original Deed of Trust (**125),** this being the Document which set up FoCCS and which binds the actions of the Trustees. However, the 1985 Master Plan is different; maybe more money and the expectation of works meant that the situation in 1995 was a very different one from when FoCCS was formed in the 1970s. He agreed that the Rector and PCC are charged by law to look after and promote the work of the church in their parish. That is their statutory function in law. Mr Brown agreed, therefore, that the principal concern of the FoCCS would have been to promote the effectiveness of the church building, of the churchyard and anything else as (parochial) assets

for the promotion of the Kingdom of God within the parish. Later in his evidence, this witness accepted that the Friends under the terms of their original deed could not do anything before it had been vetted by the Rector. I should say that from his demeanour in giving his honest and straight forward answers to these questions, I formed the view that he was not very familiar with this analysis, and that it had not often come to the forefront of his mind. Other FoCCS trustees may have been in the same position had they been asked to consider these points **(T1025)**

750 I have noticed a deafening silence about the work of the church in the Trustees minutes, save where matters are reported by the Rector. I am afraid that I was left with the strong feeling that the spiritual parochial work of the church was irrelevant to all but the few of the Trustees, who did take an active role in attending or being involved in the church. As more and more Trustees of FoCCS came from outside the parish, even this vestigial interest appears to have been on the wane. The clear aim of the objectives of the Friends according to its Deed is "**the restoration and future maintenance of the building";** that was the object of this charity, whatever extra work they had chose to do. Mr Seymour tried to deflect quasi-legal questions as to the meaning of the charitable deed, but I allowed this line of questioning to continue as this witness was the treasurer of FoCCS, and might be taken to be someone well attuned to authorising expenditure proposed to the carrying out of FoCCS' charitable purposes. He was adamant in his belief that in his mind "the building" included the church and its context, i.e. the graveyard, although he accepted that a longer document might have expressed matters more clearly. He was really unable to answer question as to, if 1750 was the aimed for date for the church restoration when the graveyard was an open graveyard, how a plan for "open space" was then considered relevant for restoration, as the graveyard could not be reopened as a working graveyard. The FoCCS appear just not, at least then, to have focused on all this. In fairness,

the witness accepted that if one does consider one aspect of the 1995 Master Plan in respect of the graveyard **(130)** there is provision to "**rebuild northwest corner of the playground building to provide independent access, provide toilet facilities for public users**" that does imply that the play ground was envisaged to be continuing there. When this is read with the other specific improvement to things in the graveyard, the monuments etc., there does seem no fundamental landscaping of the grave yard, just tidying up. The witness was firm that whatever the long term plan was, it was for a restored graveyard, even if the details were not at that time spelled out. He had to agree that equally long term plans for the adventure playground were also inchoate in this Master Plan. He had to agree that the 1995 Master Plan was silent about the future of the adventure playground building, but he was forced to accept that the words: "***works to the adventure playground"*** did not, as he had wished to assume in evidence, appear that it was going to be demolished. He was then taken to the HLF grant funding letter (**3422) w**hich all related to specific works to the church itself, except for the churchyard railings **(T 1022)**. The views of the HLF at **(3423)** ***" ... if at sometime the opportunity arises to remove it [the old building] the [HLF] trustees would be willing to discuss further."*** Mr Brown agreed that the removal of the old building was not a condition for the HLF grant **(T1012**) given the amount of work to be done on the church. Mr Brown agreed that thoughts about what was to happen to the old building were pretty peripheral at this time. This makes Ms Whaite's exhortations to her fellow Trustees about the HLF grant terms look much weaker that she herself supposed them to be. The graveyard restoration was not a binding requirement for the Trustees to be concerned about (save as they might later make another application for money to cover it if things changed). Mr Brown also agreed that at the time of the initial planning application, the FoCCS were not aware that the graveyard was a disused burial ground, nor that there would be any problems as to human remains. I must say for a body professing such intellectual and aesthetic interest in a building and it history ever

since 1966/76 when the support group was founded, I find this lack of knowledge amazing, or maybe not, as they were clearly absolutely focused on the church building itself. He accepted that many of their current arguments just had not surfaced at that

751 Mr Brown set out the make up of FoCCS, not having members but supporters, whom he described as "***people whose information we hold on our confidential database, supporters".*** I have somewhat gloomily to assume that it was the confidential data base to which the SOS directors had access to send out its flyers to obtain support. Mr Brown seemed uncertain whether any of the supporters could turn up to a Trustees AGM, but he admitted that no notices of any such AGM were sent out to "supporters" and none of them turned up (**T1016).** He did not think that there was any obligation to inform the supporters of any AGM. Given the make up of FoCCS in this he was, by chance, right. He explained that the Restoration Trust was a company limited by guarantee to contract for the restoration works. Its Board of Directors is the same as the FoCCS trustees. Notwithstanding the legal arrangements in the trust deed, the Rector and two church wardens serving with the FOCCS trustees could, he agreed, be outvoted if the FoCCS wanted to do something, and the Restoration Trust could be authorised to effect that. The witness agreed apart from that rather tenuous link via the Rector and one/two others from the church, the Friends Trustees did not give any formal advice or notice to the PCC about their proposals. The only information the PCC would have got was from the Rector and who ever else from the church was a trustee (both Church wardens should have been). The church members could thus be out-voted. I asked this witness, the treasurer of FoCCS what would happen if the trustees had the money, manpower, a contact to do a certain work, and had out voted the Rector and the two church wardens? What I asked would happen if the PCC had not wanted that work? His answer was revealing: ***" I am not sure what the position would be in terms of conflict between the PCC and the Charity in those circumstances"***

He agreed that the Trustees' concept of what ***"obligation"*** was on them to pursue a view that was contrary to the Rector and the PCC had not been put to their supporters. Mr Seymour did not re-examine this witness, whom I found to be helpful in giving a clear insight from his experience over the years into the thinking or lack of it, by the Trustees of FoCCS.

752 I am afraid here that I see a Charitable Trust (working and spending subscribed money however honestly and properly on restoration) just becoming out of control, and taking upon themselves (never mind what) a stance which may be well outwith their terms of reference. Their 3 or 4 Trustees meetings a year did not provide sufficient 'hands on' control. They may have given directions as to future works and to approve them (relying on the Restoration Trust) but the Rev'd Mr Rider's description of there being "a Kitchen cabinet" I find to be accurate. I find it very concerning that even the Treasurer seemed unaware of the terms of his trust. I suppose it had been forgotten since 1976, and new members did not think about it. They were just becoming trustees of a nice architectural body doing good to a distressed church, and basking in their own architectural and social judgment and good taste. I understand that at a later point in this matter the Trustees wrote to the Charity Commission together with the Attorney General. I have not been shown a reply from the Charity Commission. It might have been a sensible idea to have, from at least an abundance of caution, for the Trustees of the FoCCS to have check in advance with the Charity Commission if what they as a charity were proposing to do and fund was legally proper. Expressions of views, individual or on behalf of a Charity are one thing; expending money and backing litigation fronted by others may be another. Sensible trustees of any charity should act with care and check their positions before going down this route. Was their Deed just to be found in a dusty file, resurrected for the case? Any trustees of any Charity MUST ENSURE THAT HE/SHE HAS READ THE DEED OF TRUST OF THE CHARITY THEY

ARE JOINING and keep a copy to hand (and they can find a copy of the Deed, if it is a registered charity, on the Charity Commission's web site). If the Charity they are joining does not have a copy to give a new trustee, alarm bells should ring. A sensible Chairman should have a copy available at any meeting of the Trustees so that their terms of reference can be consulted if in doubt. Any Trustee who neither knows not nor complies with the terms of the trust of their particular charity is in breach of the law and may suffer direct personal financial penalties. I find here that the current Trustees of FoCCS, until this litigation, had given little thought to their origins nor to the terms of their founding Deed and acted as they wanted. They had become besotted with getting in money for what they wanted to (and did) achieve. The idea of advancing money to SOS without it being properly minuted, the terms of its return properly considered and voted on, I struggle to find in any sufficient or clear detail in their Minutes. I have seen absolutely no documentation as to how that repayment was to be legally guaranteed if that were even considered. Even one of the original Directors of SOS is dead. Did they check with the Charity Commission (if they were in doubt) whether they could or had legally to advance this money to fund litigation being carried out by such a flaky company? I rather think not. Happily this litigation may have, by chance, been able to identify something which should have surfaced long since, irrespective of the outcome of this case, namely a realisation of the existence of the Trust Deed of FoCCS. I note I have seen NO documents other than its Articles of Association from SOS confirming the receipt of money from this charity, nor acknowledgement as to how /when/if ever it is to be repaid. No paper work. No nothing, save the emails sent out of behalf of SOS

As I have said above, I have not been shown any reply from the Charity Commission in response to any enquiry they made as to pursuing this litigation.

I have seen the lack of support from the Attorney General who did not support their request to act. I have already commented on my concern as to how and when moneys were voted by FoCCS Trustees to assist this litigation, paid for not

into bank accounts but "**directly to lawyers"**. This may be ignorance, rather than turpitude on the part of the trustees. Some of the FoCCS trustees may have considered this an acceptable kind of financial conduct; some of the Trustees may have been blissfully unaware of how matters were being conducted. Many people might find it surprising for any charity, which has a duty to spend subscribers' money sensibly and legally, apparently to operate in this way. They may be able to show the Charity Commission otherwise, if required to. I hope so. That is not a matter for me.

753 After the evidence and submissions in this case had been concluded and I had reserved my judgment, I was informed that SOS had taken legal advice from Counsel specialising in Charity law. I was invited to see the Opinion received. Through my Registrar, I declined for the following reasons:-

- the Opinion had been the result of instruction from only one Party, SOS
- it is the conduct of FoCCS which would have interested me more
- the Building Parties who had concerns over the operation of FoCCS and SOS had, as I understood it, no input into the instructions, nor were to see this document
- any barrister will have had bitter experience of advising purely on what his own client tells him, only to find the situation a very different one in the cold light of day
- I know not whether the Opinion was on the financial aspect funding the litigation and/or the legal duty or otherwise of FoCCS to maintain they had a legal obligation to act as they have done
- I took the view that to try to produce a document in this way after oral evidence and argument had finished in the absence of all other Parties was a somewhat unusual way to proceed and one I was not going to adopt
- the operation of FoCCS as a charitable trust is a matter for the Charity Commission, not this Court. I have not heard all potentially available evidence

on that issue, nor seen such documents as may be available. I have seen the Trustee minutes, such as they are, from 2010. These, as this judgment has shown, gave me sufficient concern to raise the questions and comments I have made.

- some questions might well have to be asked as to the use of a confidential data base. I do not see any vote being passed by the Trustees in any of their meetings to authorise this. An expression of mere "support" for SOS may not be sufficient.
- the objectors rightly and properly wanted full disclosure of documents. Those documents, together with the oral evidence from some of the Trustees has caused this concern.

I am afraid this has left me with no alternative but to direct that a copy of this judgment be sent to the Charity Commission whose proper remit will be to make such finding as they may see fit (even to giving these Trustees advice as to their operation). All my concerns may flow from observing the results of over-enthusiastic incompetence on the part of the Trustees of FoCCS, rather than anything more. This is not just some legal nonsense, but a recognition that a registered charity must operate properly. FoCCS is not the private fiefdom of a dozen or so Trustees.

754 I make it clear that these concerns do not form part of my judgment in this Consistory Court matter, and I specifically ignore them, as I do the conduct of many, many of the individuals in this matter. However people on all sides have behaved in this matter, whatever they have said in the heat of the moment or out of enthusiasm, does not detract from their right to put their own cases, legal and factual, and does not affect, in any way, the far more important decision I must make.

755 I will just say this: I am very concerned that the adverse publicity in the heritage world about the events surrounding this church, and the effect and acrimony it has given rise to locally, may well deflect large grant making bodies from being so generous in the future to churches or other similar organisations. Why should something like this situation get very large amounts of money when they could go to harmless short term other things like sport? Many, many people involved over the years with this wonderfully worth-while project of the restoration of Christ Church Spitalfields would not, I think, want other architectural or heritage projects seeking outside help, as they have done, to be tarred with the same brush that it may be squandered in acrimonious disputes. I note, with some sadness, that the most recent FoCCS minutes I have for 2015/2016 show a 10% drop in subscriptions. I am not surprised (but of course some may have gone directly to the non- existent bank accounts to pay legal fees).

756 I return to the remaining evidence. Other potential witnesses did not appear to address the Court. In the cases of Mr Lane and Mr Williams no witness statements were put in. It was a matter for them to take such course as they wished. It may be that those who may have attended during this hearing felt that their points had already been sufficiently put. Ms McKoen, who did make a statement and hoped to give evidence, had to go into hospital, and was understandably unavailable, although I had indicated that she could have been taken at any earlier point in the proceedings.

757 I have read her statement which can be summarised as follows: Ms McKoen's statement, to which I have already referred, is at **(3102-3111)** as a long standing resident of Spitalfields she sought to shed light on the past history of events While praising the work done by past Rectors, she stated that she wished to cross examine Mr Rider. In the event, during the hearing she neither gave evidence herself nor did she ask any questions of the rector. Her statement set

out the history of the matter which I have dealt with above. In respect of the graveyard she wishes ***"a sacred site it should remain".*** Given what I have seen myself in that graveyard, I consider that in its present state it is a parody of a sacred site. It is a slum of an open space, disreputable and filthy. She expresses her concern on one issue which no-one from the Buildings Parties was cross-examined on:- ***"There is real concern locally that even more of the churchyard is under threat. The primary school has been threatened with closure several times in recent years. If that happens, the worry is that the church will retain just the new school buildings and sell the eastern part of the churchyard for development. That would be catastrophic for the community's health and well being and for the historic integrity of Fournier Street Conservation area".*** I reject that statement in its entirety. The whole rationale of the new building was to improve and keep the school open There was not one scintilla of evidence of any plan for selling the gardens for development. Indeed the legal difficulties of even thinking of doing so make this case pale into insignificance. I find this paragraph takes on the air of being an urban myth or saloon bar gossip, peddled to terrify house owners in Fournier and adjoining streets as to some evil development which might affect their house prices. I read of this "threat" being referred to in at least one letter of objection. Even allowing for Ms McKoen's unavoidable absence through illness, no other objector choose to run with that argument. Ms McKoen wished, were the church to have acted illegally, ***"then the Church has a duty to return the land to the people, decisively, fearlessly whatever the costs, whatever the consequences and without delay".*** As the legal owner of the land in question is and remains the Rector, that concept sounds more ringing than it is legally sound. Ms McKoen, and others, do state that in 2012 she and others warned the building parties of the legal difficulties. In this, they were right, and as I have said this nettle should have then been grasped by the Buildings Parties. It was not. She complains about the grave disturbance, which I have already dealt with, and

is particularly scathing about the present Rector, whose mistakes in form filling have laid him open to such criticisms. She complains at some length about the Rector being "***less than transparent***", citing his support for the redevelopment of the Fruit and Wool exchange; she wrote: "***I can personally confirm that the Rector had been promised s106 money when he spoke in favour of their redevelopment in October 2012".*** Unfortunately, I was not able to ask this witness whether she was alleging that the Rector personally had benefited. I have seen how the s106 money was going to be spent in this area, on the school and on the graveyard. If she were to have been making any personal aspersions against the Rector of this, I specifically reject them. She may not have liked his support for the Wool Exchange redevelopment, but she conflates two separate situations. I would have thought that any school, local amenity or charitable body in LBTH would have been making plans has to how they could get a share of this s.106 pot of gold for their own sectional interests. She complains, again without any supporting evidence, as to the ending of garden care by the homeless men under the auspices of the "Crisis" work formerly done by the church. She alleges the loss of gardening work by the homeless men led to the failed up keep of the churchyard. I remind myself that had LBTH been doing their maintenance duty the homeless would not have had to learn their gardening skills there. I am afraid that I took from her statement an almost irrational and un-substantiated dislike of anything the present Rector had done. I accept that had she been able to justify her views, or adduce in cross examination some evidence for them, it might have been otherwise. No other objector tried to do adopt this position.

758 I also bear in mind a letter of objection from a Ms Jessie Sloan, of Huguenot descent now living in Canada. She is a supporter of the restoration project, and concerned about grave disturbance especially in respect of her great grandparents seven times removed. Notwithstanding her concerns, were she to have been a supporter of FoCCS, she would have known over the years of the

removing from the vaults of identifiable bodies, and of the efforts in 1949 of Stepney Borough to trace descendants of the deceased, the majority in unmarked graves. She might be heartened to know of the links this Church has with the Huguenot Society and of the reverent reburial of un-identifiable disarticulated bones by the Rector.

759 A statement was produced from Ms Thompson, at (**2961-2994)** and was an objector. She gave evidence on behalf of SOS as a landscape gardener, having qualified in 2013. She accepts that that part of her statement in respect of the history of the graveyard has been provided for her by the SOS legal advisers From her own research she accepts that (what is agreed by all) Spitalfields is perilously short of green spaces, but she accepts that ***"the pressure on land is such that Spitalfields is unlikely ever to attain the minimum (6 acres of open space per 1,000 of population)***" estimated as necessary by the National Playing Fields Association. Well, unless Fournier Street and others were to be demolished, there is just no way that this idealised aim could ever be achieved. One is not starting here on a green field site. The articles she produces as to the emotional and physical health on young and old of open spaces, and the reduction of ambient temperature and so forth were not criticised by the Building Parties, probably because their aim was to effect a larger amount of open space in the churchyard with the new arrangement. I note, somewhat gloomily, the very small area of square metres in dispute here, and look in vain for any accurate measurement of what difference it would really make here in this graveyard. I accept, of course, that every square yard is precious, but here, if I were to accept, as I do, that there will be more land available (not much but a bit) for the public, then , in an imperfect world, what more can be done.

760 I turn finally to the more legally thoughtful statement **(3112-3141)** presented to the Court by HH Anthony Thornton QC, a resident in Bath, where Mr Dyson also has a practice, who had already provided a letter of objection. He states that

"***I have over the past years been closely involved in assisting and mentoring Christine Whaite, Philip Vracas and SOS … this led to my becoming a supporter of FoCCS…for the past four years I have assisted in the research and preparatory work"*** in what he perceives to be "***public interest litigation***" I note that that was not a view shared by the Attorney General. He went on to add: "***I have obtained a considerable knowledge about understanding of the matter. I feel it is only fair, right and just that I should be able to supplement the objecting parties' legal team work and bring to the attention of the Deputy Chancellor matters (not necessarily restricted to factual matters) which would or might otherwise not be brought to her attention".***

761 In the event. Mr Seymour of Counsel and his instructing solicitor had to soldier on without the assistance of Mr Thornton who, although, as I understand it, attending on some days, did not give any oral evidence, nor seek to cross examine any witness. Of course, he may have offered his services behind the scenes. In his statement he said: **"I wish to participate at trial with the right to cross-examine, where appropriate, and to make further detailed submissions"**. He did not do any of this. As I have already made clear, I was perfectly prepared to hear witnesses in such order as was convenient for them. I have no doubt the legal team of SOS were greatly assisted by his clear analysis of the varying roles of the Rector (who wears a number of different hats as do many Rectors), the PCC and the Churchwardens. He complains that: "***the PCC were not provided with any reports, analyses, statement of needs, risk assessment or legal opinions relating to the new building"*** which he claimed needed ***"an analysis of need".*** I bear in mind here the detailed records I have read from the School's acting Board of Governors over the years, and the need for space clearly demonstrated in Governors' minute after minute. The PCC and the Rector, who himself has seen the needs of the school first hand as have the other Governors. Mr Thornton complains that LBTH have: "***infringed relevant***

provisions of planning, education, local government and equality legislation." His analysis of how the school obtained government funding was set out more clearly to me by Mr Woolf in his evidence, who was well experienced in making these financial applications. Mr Thornton claims that the funding of the school was unlawful. I query why, if that was relied on, no application to the Audit Commission was made at an early or any stage. I am satisfied as to the stability of the school remaining on church land where it has been since 1782, and I am satisfied by Mr Woolf's evidence as to this point. I have already commented on the on his complaints that LBTH failed to take into consideration Equality Act considerations. He argues that for LBTH to build a school building on top of Christian human remains was discriminatory. He goes on to argue: "***This appears to be both directly and indirectly discriminatory against both the pupils and their families and against the families and relatives of those interred and Christian members of the congregation and Parish since it is contrary to Muslim religious principles to be taught in a school building which is located directly over any burial ground but particularly over one in which Christians are buried ….there is no evidence that the families of these pupils affected by this discrimination have ever been informed of these facts and invited to give their informed consent to their children being taught in such circumstances …"*** He considered that "***all four of the promoting organisations {LBTH, the Church, LDBS and the school} should have undertaken an Equality impact assessment and used that to conclude that the whole building was both directly discriminatory on the grounds of both religion and racial origin…".*** In passing, I note that daily I saw this graveyard being used by teenage Muslims of both sexes as an after school meeting point with no concern. Sometimes the reality of life does not wait for assessments, but local school governors, councillors and member of the PCC look around them and make decision informed from their own observation and experience rather than

commission a plethora of assessment about something they can see with their own eyes. No expert in Muslim law or theology, no Iman, no local Muslim councillor, and no representative parent was called to give evidence to give any credence to this argument. This school has a pervading Christian ethos, indeed a Church of England ethos. Muslim children have gone there for years, as Jewish children before them. I reject this argument, raised in May 2016, as inflammatory and unsubstantiated, and, as I find, as a clever little divisive suggestion, which was not in any shape or form substantiated. It should never have been even raised unless supported by a proper foundation in prima facie plausible evidence. If the late raising of this argument, just before this Consistory Court was intended to spark local publicity and generate some gesture of protest from the local Muslim population it failed, as there was a deafening silence in response. The Building Parties did not even need to waste time to gather evidence to rebut this argument, as I had offered them the opportunity to do so. The objectors who live locally knew better than to run it. Even SOS (Ms Whaite as an individual apart), even as part of its most florid objections, did not care to rely on this argument, Mr Seymour saying in terms it did not form part of their case.

762 Ms Whaite, I take it in her own role, as also being an individual objector enthusiastically adopted it. Was there a hope that this allegation would cause such an uproar that parents might withdraw their children and the school would have to close? I make no finding about that, but, were it to have been the aim, it fell flat on its face.

763 His Honour A Thornton QC, properly, makes much of the mistakes and inaccurate filling in of documents, which I have already referred to above. Of more weight were the legal arguments adduced by him to **"help and supplement"** the Objectors' legal team It will be more convenient to deal with these below when I consider the law.

764 I must also, for the sake of completeness, note the two witness statements of the late Mr Vracas, who played a leading role to advance the Objectors case, but, sadly, died just before the hearing. His statements are at **(2437- 2440)** and **(3030-3053)** and together with substantial exhibits. Much of his last statement I taken up with a resume of the history of this matter, which I have set out in some detail above and I have also read many letters and e-mails from him, and others, again set out above.

765 There is one further matter I comment on. On Day 9 of the hearing before me I raised questions as to what I had observed in the Churchyard as I had left the Court the previous afternoon. It was a sunny afternoon. The graveyard was full of mostly Muslim teenage school children, and the usual tramps. However, two table tennis tables had been set up and games were being energetically played by what appeared to be student age players. I have not seen ping pong being played in a consecrated graveyard before. If this was to provide me with a manic Potemkin-like scene of the Christ Church gardens open space, I was not impressed. The following day I asked who had been responsible for it. On behalf of the Building Parties, Mr Mynors said it had nothing to do with the church, who had told the players to remove themselves without further ado. He told me that they appeared at the instigation of a third party. The objectors cannot be held responsible for the activities of their friends, if such that be. Looking at them in Court, I formed the view that some objectors were more aware of this happening than others. But I make no finding at all about this, save to note that the demand of many objectors for a tranquil sacred space for religious or architectural contemplation does not accord with the use of the graveyard as a park for ping pong to be played. One cannot have it every way.

766 **THE LEGAL ISSUES**

In allowing the Appeal of the objectors, and remitting the case to a Deputy Chancellor to determine, the Court of Arches specifically left for decision by a later Consistory Court, *inter alia,* the following four matters:

- the interpretation of "unlawful under ecclesiastical law" in s13(5) of the *Care of Churches and Ecclesiastical Jurisdiction Measure* 1991 (the "CCEJM")

- The ambit of the phrase "restoring the position as far as possible to that which existed immediately before the act was committed"

- The construction of the *Ministry of Housing and Local Government (Provisional Confirmation Order) (Greater London Parks and Open Spaces) Act* 1967

- The interpretation of the (as then yet not in force) s18A (1) of the CCEJM in respect of the potential power to authorise the retention of an illegally erected building and any future application for a confirmatory faculty

I now turn to consider these issues and other legal issues arising.

767 BUILDING IN DISUSED CONSECRATED BURIAL GROUNDS: Consistory Court decisions before *The Disused Burial Grounds Act 1884*

The legal position as to consecrated burial grounds was summarised by Owen Stable QC, the deputy auditor of the Chancery Court of the Province of York, in *Morley Borough Council v St Mary the Virgin, Woodkirk (Vicar and Churchwardens)* ([1969] 3 All ER 952 at 955, [1969] 1 WLR 1867 at 1871) thus:

'The essential legal act of consecration is the signature by a bishop on what is called a sentence of consecration by which, in respect of a churchyard, he separates and sets apart the ground from all profane and common uses whatsoever; dedicates the ground to the service of Almighty God for the interment of the remains of the dead and consecrates the same for such purpose. The

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

Even before the 1884 Act, there appears to have been concern and conflicting decisions in the Consistory Courts as to whether faculties could or should be granted for the erection of secular buildings on consecrated ground. In *Campbell v Parishioners and Inhabitants of Paddington* (1852) 2 Rob Eccles 558, a faculty was sought to erect a vestry room by the parish supported by the patron, who was the diocesan bishop. Dr Lushington stated:

> "When ground is consecrated, no Judge has power to sanction the use of such ground for secular purposes".

But he was prepared to grant a faculty on the basis that a vestry-room is employed for ecclesiastical as well as secular uses.

In *Re Bettison* (1874) LR4 A &E 294, the Chancellor of Rochester refused a faculty to build a National School [i.e. a school in union with the "National Society for promoting the Education of the Poor in the Principles of the Established Church", the charity referred to in this case, and which continues but nowadays is more prosaically entitled the "National Society for the Promotion of Religious Education"] in part of a disused consecrated churchyard on the basis that he had by law no authority to grant such. The Court of Arches (Sir Robert Phillimore) granted the faculty: "…the erection of this school is much required". The report is short and the point of law relied upon at first instance does not appear discussed, rather the issue of the faculty

appears to have been taken to be within the powers of the Court and granted in accordance with in its discretion.

In *Hansard v Parishioners of St Matthew Bethnal Green* (1878) 4 PD 46, Dr Tristram granted a faculty for the erection of a mortuary on a disused consecrated burial ground, but refused to do so for those parts of the application seeking the erection of rooms for the holding of coroner's inquests and for living accommodation for the mortuary keeper.

768 Once the London graveyards were closed, the issue of what was to happen to them became acute: were they to be abandoned, used (as what?) or sold off? One solution was as open spaces. Since the burial ground closures of the 1850s there appears to have been growing concern about the lack of open spaces in the London area notwithstanding some 78 disused burial grounds, as many squares were private and not open to the public save by (limited) permission of their owners. I am reminded, as I have said, of the satisfaction expressed by the Benchers of Lincolns Inn who having opened Lincoln Inn Fields one summer for the children of the poor slums at Clare Market, who said that "not one flower was damaged". The first statute to make provision was the *Metropolitan Open Spaces Act* 1877.

769. DISUSED BURIAL GROUNDS BILL 1884

It was, however, one thing to use a disused burial ground as open space. It was another to build on it. It would seem that at least one railway company in London needed to purchase at least half a burying ground, which would have meant the removal of several thousand bodies, and that caused concern, so that it was not surprising that a specific Bill to cover disused Burial grounds was introduced to the House, receiving, as I have set out above its first reading in **February 1884.** On its second reading the object of the Bill was said to be: "**to**

prevent buildings being erected on disused burial grounds …the Metropolitan Board of Works…. could not interfere until building operations actually commenced and it was doubtful if they could even then interfere successfully," This bill aimed at prohibiting building on a disused burial ground. The questions of very old burial grounds, compensation to private owners, and the possible need to build vicarages on such disused burial grounds were raised. The Bill received its third reading in **August 1884**, and, again after arguments as to compensation, passed successfully to the Lords, where the need of the church was raised as an exception, and the need specifically according to the then Bishop of London, for the ability to build mortuary chapels. This became the *Disused Burial Grounds Act* 1884. It applies not only to disused Church of England burial grounds but to non-conformist disused burial grounds.

770 **DISUSED BURIAL GROUNDS ACT 1884**

The Act as now in force contains these provisions.

Section 2 provides:

"2. In this Act--

"building" includes any temporary or movable building;

"burial ground" includes any churchyard, cemetery or other ground, whether consecrated or not, which has been at any time set apart for the purpose of interment;

"disused burial ground" means any burial ground which is no longer used for interments, whether or not the ground has been partially or wholly closed for burials under the provisions of a statute of Order in Council"

Section 3 provides:

"3. 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."

Section 5 provides:

"5. Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament."

Thus, thereafter, unless otherwise justified by statute or measure, no building may be lawfully erected on a disused churchyard unless the proposed building could be brought under the exceptions set out in the Act, and, even if within the exceptions, in the case of a consecrated burial ground, it still required and requires the exercise of the jurisdiction of the Consistory Court as to whether to grant a faculty or not.

771 **CONSEQUENCES OF BREACHING Section 3 of the 1884 ACT?**

Section 3 of the *Disused Burial Grounds Act* 1884 creates a simple prohibition and specifies nothing as to what should be done in respect of breach or what are the consequences of breaching the prohibition. The traditional view, following Hawkins', *Pleas of the Crown,* is that "where a statute has declared any act …to be a misdemeanour, an indictment lies respect of such act", at least when no procedure is laid down in the statute to deal with breach, or the statute specifies no consequences for such breach. In *R v Horseferry Road Justices ex parte the Independent Broadcasting Authority* [1987] QB 54, the Divisional Court, consisting of Lloyd LJ (as he then was) and Skinner J, granted judicial review to stop Justices proceeding with committal on an information laid by Mr Norris McWhirter against the Independent Broadcasting Authority for breach of Section 4(3) of the *Broadcasting Act* 1981 ["It shall be the duty of the authority to satisfy themselves that the programmes broadcast by the authority do not include…any technical device

which, by using images of very brief duration…exploits the possibility of conveying a message to, otherwise influencing the minds of members of an audience without their being aware or fully aware of what has been done."] by inserting into an episode of *Spitting Image* a 24/100ths of a second image of Mr. McWhirter's face super-imposed on top of the body of a naked woman. The Divisional Court held that no indictment lay and granted judicial review. Lloyd LJ said at 65:

"There are several reasons why I cannot agree with Mr. Bennion's submission. In the first place, as I have already said, when Parliament intends to create an offence, then, nowadays, it almost always says so in terms. I do not find the doctrine of contempt of statute, which as I shall hope to show later is no more than a rule of construction, of much use in construing a modern statute. Secondly, to deny that section 4(3) creates an offence, is not to deprive it of all effect, or to make it brutum fulmen. If the applicants neglect or refuse to perform their duty under that subsection, it would be open to the Attorney-General or perhaps an individual, to apply for an order of mandamus, to compel them to do so. I say, "perhaps an individual," because the point was left open in *Reg. v. Independent Broadcasting Authority, Ex parte Whitehouse*. Thirdly, though the matter in respect of which the applicants have to satisfy themselves under section 4(3) is more precise than the value judgments which they have to make under section 4(1), nevertheless the standard is still a subjective one. As the Court of Appeal said in *Reg. v. Independent Broadcasting Authority, Ex parte Whitehouse:*

> "In using the phrase 'it shall be the duty of the authority to satisfy themselves' Parliament was creating what might be described qualitatively as a 'best endeavours' obligation..."

To my mind it is unlikely in the extreme that Parliament intended to create a criminal offence out of anything so subjective as whether the applicants have or have not used their best endeavours. I accept that the subject matter of section 4(3) is more certain and precise than the subject matter of section 4(1); but the standard is still the same, and the uncertainty is still as great. I therefore conclude, provisionally, that, on the true construction of section 4(3), no criminal offence is created. Whether there ought to be a criminal offence, and if so in what terms, are questions with which I am not, of course, concerned."

Lloyd LJ went on to analyse *in extenso* the history of the doctrine and the abundant case law. At 72:

"…the "rule" or "doctrine" never was more than a rule of construction. It is not a substantive rule of law. The only difference between today and 1716, when *Hawkins* was first published, is that it is easier to infer in the case of a modern statute that Parliament does not intend to create an offence unless it says so. There is no longer any presumption, if indeed there ever were, that a breach of duty imposed by statute is indictable. Nowadays the presumption, if any, is the other way: although I would prefer to say that it requires clear language, or a very clear inference, to create a crime."

Following Lloyd LJ's re-formulation of the principle, it is a question of construction of the particular statute, whether a criminal offence is created.

R v Horseferry Road Justices ex parte the Independent Broadcasting Authority deals with a very different type of statutory provision which was subjective.

Whether breach of Section 3 of the *Disused Burial Grounds Act* is indictable is an open question, and not one for me to decide, or one which it is necessary to decide. I note that there is only one instance that Counsel could cite to me of a criminal prosecution being brought for breaching the 1884 Act, namely, in *R v Kenyon and Others,* The Justice of the Peace, 730 November 16th 1901, before Phillimore J at Chester Assizes, a Cheshire builder, a rope maker and others were indicted for unlawfully, wilfully and indecently opening graves and removing the bodies in a Roman Catholic graveyard contrary to common law, and on a further indictment for erecting a warehouse and office on the disused graveyard closed by Order in Council, contrary to s3 of the *Disused Burial Grounds Act* 1884. They pleaded guilty. The graveyard ground had been bought by a local rope maker, who had then obtained Public Health Act approval (a fact relied on by the Defendants in mitigation) from the local Urban District Council to build a warehouse and offices on the site. It was in the course of the

building operations that the graves were somewhat unceremoniously disturbed, notwithstanding warnings which the Defendants disregarded. The principal offenders were imprisoned. It would seem from the short report that it was the disturbance of the bodies which was regarded as the greater offence. *R v Kenyon and Others* is a very short report on a plea of guilty with no argument on the legal issues apparent from the report. I note further that the Attorney-General in this present case was not minded to prosecute.

Breaching of Section 3 of the *Disused Burial Grounds Act* 1884 remains on any view unlawful, whether a criminal offence or not. I also for the avoidance of doubt, hold that proceedings for a breach of Section 3 of the *Disused Burial Grounds Act* 1884, whether by indictment or otherwise, are not a "criminal suit" within the meaning of Section 69 of the *Ecclesiastical Jurisdiction Measure* 1963. That provision relates to ecclesiastical criminal law, a distinct and separate code, and Section 69 limits ecclesiastical prosecutions of clergy for offences involving matters of doctrine, ritual or ceremonial.

770.**APPLYING THE 1884 ACT**

I note in passing that the case law on the Act has been substantial on the specific exceptions provided for in Section 3, namely on what amounts to an "enlarging" and what amounts to "building". I note that "building" is construed strictly: see e.g. *St. Peter in the East, Oxford* (19 September 2013 transcript), where the disused burial ground is now part of the gardens of St. Edmund Hall. The Court authorised cycle racks, screens and a store 2 metres in height with a footprint of 2 metres by 1.6 metres, described as a "borderline case", but refused, as caught by the 1884 Act, a greenhouse, a gardener's office and tool shed and a larger store.

771.**CONSECRATED BURIAL GROUNDS IN USE**

I also note that where the 1884 Act does NOT apply, such as consecrated churchyards in use as burial grounds, the modern approach of the Courts is summarised in Halsbury's *Laws* 5ed. Para 839:

"839. Use of consecrated ground for secular purposes.

When consecrated a church or churchyard ceases to be the property of the donor, who, by dedicating his property to God, voluntarily sacrifices it for the attainment of sacred objects. Thereafter, in strictness only the authority of an Act of Parliament or Measure of the Church Assembly or General Synod can divest it of its sacred character, and a faculty should not be granted for applying it to secular purposes. Deviations from the strict rule are, however, frequently allowed, and faculties may be granted for various purposes consonant with modern requirements. Thus, while there are limits upon the grant of faculties for the secular use of consecrated land, it may be possible to authorise by faculty the use of a portion of the consecrated ground for purposes which are advantageous to persons using the church, to the parishioners, or to the public." *[emphasis added]*

772. It should be note that the *Disused Burial Grounds (Amendment) Act* 1981 now has removed from the prohibition in the 1884 Act unconsecrated burial grounds:

> "1. (1) Notwithstanding section 3 of the principal Act (which prohibits the erection of buildings on disused burial grounds except in certain cases) but subject to section 2 of this Act a building may be erected on a disused burial ground or part thereof which is or has been owned by or on behalf of a church or other religious body provided that either—
>
> (a) no interments have ever taken place in such land, or
>
> (b) no personal representative or relative of any deceased person whose remains have been interred in such land during the period of fifty years immediately before the proposal to erect a building thereon has in accordance with subsection (2) of this section duly objected to the proposal or all such objections have been withdrawn.
>
> (2) Notice of any proposal to erect a building on land in which human remains are interred shall be given by or on behalf of the church or other religious body by whom or on whose behalf the land is held by—

(a) advertisement in two successive weeks in one or more newspapers circulating in the area where such land is situated, and

(b) notice displayed on or near such land

specifying the time (not being less than six weeks from the date of the first publication of the newspaper advertisement) within which and the manner in which objections thereto can be made."

Section 5 however provides:

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

The consequence of the 1981 Act was that non-conformist, Roman Catholic and other disused burial grounds were, subject to the safeguards set out in Section 1, removed from the prohibition of the 1884 Act. The Church of England alone was thereafter caught by the prohibition in Section 3 of the 1884 Act but only in the case of consecrated disused burial grounds.

The graveyard at Christ Church Spitalfields is a consecrated disused burial ground.

773. ***Was the new building erected contrary to the prohibition in the 1884 Act?***

It is thus, with the benefit of hindsight, glaringly obvious that when built, the new building must breach the 1884 Act unless some other independent statutory justification may be found for it, or a pastoral scheme.

774. ***Justification?***

The ONLY candidate relied on by the building parties to justify breach of the prohibition is said to be Para 7(1) (a) (vi) of the Schedule to the *Ministry of Housing and Local Government Confirmation (Greater London Parks and Open Spaces) Act* 1967 on the basis that:

"a local authority may in any open space (a) provide and maintain….. (vi) 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."

The objectors submitted there were multiple reasons why this did not apply and was misconceived, including that:

- the school was NOT an "organisation .. whose objects or activities are wholly or mainly of a ….. educational character" within the meaning of the Act
- LBTH in any event had exercised their powers qua local educational authority and not qua open spaces' trustee
- LBTH had expended moneys in breach of Government spending requirements by contributing to construction of a building on a site in which they had no interest
- the Rector and LBTH had acted in breach of the statutory trust imposed upon them under Section 10 of the *Open Spaces Trust Act* 1906
- alternatively, the Rector acted without lawful authority in terminating the previous arrangements with LBTH and was in a conflict of interest qua landowner and school governor.

There are serious difficulties to the Building Parties' submission that this school is an "organisation .. whose objects or activities are wholly or mainly of a ….. educational character" within the meaning of the Act, including:

- the new building was built for the benefit of the school and was intended to be primarily a school building with secondary community uses
- the school is a Church of England Voluntary Aided School

- the local authority's role in respect of voluntary aided school is primarily as a part funder, albeit by far the greater part

- the new building was funded in part as a school by the education authority, LBTH, acting under its statutory powers relating to education

- although a "voluntary aided school" is "an organisation wholly of an educational character", if Parliament had intended such a school to be within the scope of this provision, it would have used the word "school" or "schools and other organisations of a wholly or mainly educational character" if desirous of bringing within the provision wider bodies such as this school

- in other words, Parliament would have adopted more specific and apt language if this school had been intended to be included

- in traditional legal language, "organisations whose objects or activities are wholly or mainly of a ….. educational character" have to be construed *eiusdem generis* with clubs and societies. A school, even a voluntary aided church school, is not of the same *genus* or category, and it would stretch language to say it was included.

That finding is sufficient to dispose of this point. Accordingly, I find that the only statutory justification relied upon by the Building Parties does not apply and thus the new building was erected unlawfully.

775. ***If this had come before this Court prior to 1st April 2015, what would have been the consequences of breach of the 1884 Act?***

If this had come before me before the 1st April 2015, unless the Building Parties had meanwhile obtained a private Act of Parliament or a Pastoral Scheme to authorise this new building, there would have been no answer to the objectors' submission that this building had been unlawfully erected in breach of statute.

776. ***Does this Court have jurisdiction to make a restoration order?***

It is to be stressed that the power to make a restoration order was introduced by the *Care of Churches and Ecclesiastical Jurisdiction Measure* 1991. Section 13 provides:

"13 Orders against persons responsible for defaults

(1) Subject to subsection (7) below, if in any proceedings by any person for obtaining a faculty it appears to the court that any other person being a party to the proceedings was responsible wholly or in part for any act or default in consequence of which the proceedings were instituted the court may order the whole or any part of the costs and expenses of the proceedings or consequent thereon, including expenses incurred in carrying out any work authorised by the faculty (so far as such costs and expenses have been occasioned by that act or default), to be paid by the person responsible.

……

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

……

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

(9) Where proceedings for obtaining a faculty are instituted by an archdeacon or an application for a restoration order under subsection (5) above is made by an archdeacon and any fact relevant to the institution of such proceedings or the making of such an application has been deliberately concealed from him the period of six years mentioned in subsection (7) above or, as the case may be, subsection (8) above, shall not begin to run until the archdeacon has discovered the concealment or could with reasonable diligence have discovered it.

(10) For the purpose of subsection (9) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(11) Failure to comply without reasonable excuse with any requirement of a special citation or injunction issued, or a restoration order made, under this section by any court shall be a contempt of the court."

777. On behalf of the building parties, it was submitted that [1] a breach of Section 3 was not 'unlawful under ecclesiastical law", Section 3 being a provision of Public Health or Planning law in character rather than within the term "ecclesiastical law"; and, [2] *restitutio in integrum* is not possible or desired; the objectors want rather a cleared site and not the old building restored, and such is outside the scope of a restoration order.

778. **Construction of** "unlawful under ecclesiastical law"

The power in Section 13(5) applies to acts etc. "unlawful under ecclesiastical law" *[my emphasis added]*. A like provision applies to the power to grant injunctions under Section 13 (4).

Can "unlawful under ecclesiastical law" be construed so as to include within that term, a breach of statute such as Section 3 of the *Disused Burial Grounds Act*

1884? Or, are the words "under ecclesiastical law" apt to impose a limitation upon the word "unlawful", such as contended for by the Building Parties?

Halsbury, *Laws* (vol.34) 2011 at para 1 states:

"The term 'ecclesiastical law' may be used both in a general and in a technical sense. In its general sense it means the law relating to any matter concerning the Church of England administered and enforced in any court; in its technical sense it means the law administered by ecclesiastical courts and persons."

What is "ecclesiastical law" has a lot of learning attached to it; see, for example, the article in the *Law Quarterly Review* vol 60, 235 by AT Denning (as he then was). There are even situations where it has been necessary to define the term, where Parliament has not done so: see for example, Section 3(1) of the *Welsh Church Act* 1914 provided that "from the date of disestablishment ….the ecclesiastical law of the Church in Wales shall cease to have effect". The House of Lords held in *Representative Body of the Church in Wales & ors. v Plymouth Estates* [1944] AC 228 that, notwithstanding Section 3(1), the Commissioners of Church Temporalities in Wales continued to be liable as lay impropriators for chancel repairs.

In *A-G v Dean & Chapter of Ripon Cathedral, ex parte The Royal College of Organists* [1945] Ch 239, an action was brought for a declaration by the Attorney General at the relation of The Royal College of Organists complaining that the canticles were sung to chants and not to settings, in breach of the Cathedral statutes contained in a Scheme prepared and confirmed under the *Cathedrals Measure* 1931. Uthwatt J at 244 said:

"There is no doubt that the scheme has the effect of an Act of Parliament. It is part of the law of England and is part of the ecclesiastical law in the wide sense in regard that it relates to a matter concerning the Church of England. But it is in my view necessary to determine whether the provisions which it is sought to construe, and compliance with which the court was asked by the writ to enforce

by mandatory order, are part of the ecclesiastical law in the sense of law administered by ecclesiastical courts and persons and not by the temporal courts. A conclusion on that matter is necessary in considering the jurisdiction of this court to entertain the proceedings and the propriety of exercising that jurisdiction."

He goes on:-

It is beyond dispute that there is a body of law which is administered and enforced by ecclesiastical courts alone. Coke draws the distinction in *Caudrey's case* 5 Co. Rep 1b, where he says 8b : "And as in temporal causes, the King, by the mouth of the Judges in his Courts of Justice doth judge and determine the same by the temporal laws of England: so in causes ecclesiastical and spiritual, as namely, blasphemy, apostasy from Christianity, heresies, schisms, ordering admissions, institutions of clerks, celebration of divine service, rights of matrimony, divorces **....** (the conusance whereof belongs not to the common laws of England), the same are to be determined and decided by ecclesiastical Judges, according to the King's ecclesiastical laws of this realm."

Many of the topics included in Coke's list have passed out of the jurisdiction of the ecclesiastical courts to the jurisdiction of the temporal courts, but much still remains to the ecclesiastical courts. Included in the matters which so remain is the celebration of divine service.

This distinct meaning of ecclesiastical law - law enforced by ecclesiastical courts - (I propose hereafter to call that law "ecclesiastical law" and to refer to all law other than ecclesiastical law as "the general law") has been in terms recognized by the legislature. Section 3 of the *Welsh Church Act* 1914, provides that "As from the date of disestablishment, ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales shall cease to exist as law." Section 21 of the Irish Church Act, 1869, was to the same effect.

Apart from statutory provision the propriety of drawing a distinction in the law of this country as a whole by reference to the jurisdiction of the ecclesiastical courts and the jurisdiction of the temporal courts has the support of Lord Blackburn in *Mackonochie v. Lord Penzance* (1881) 6 App. Cas. 424, 446 and of the Lord Chancellor in *Representative Body of the Church in Wales v. Tithe Redemption*

Commission [1944] A. C. 228, 240. Ecclesiastical law is part of the law of the land: *Mackonochie v. Lord Penzance [supra].* The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts. Where a matter of general law arises incidentally for consideration in a case before an ecclesiastical court, that court is bound to ascertain the general law and order itself accordingly; and where a matter depending on ecclesiastical law finds a place in a cause properly before the temporal courts those courts similarly will ascertain for themselves the ecclesiastical law and apply it as part of the law they administer. Each court ascertains the law by reason and argument - not by evidence - see *Gould v. Gapper* (1804) 5 East 345; *Reg. v. Millis* (1844) 10 Cl & Fin 534; *Gore-Booth v. Bishop of Manchester* [1920] 2 KB 412. The unity and coherence of the law is not affected by the division of jurisdiction as to its enforcement. The distinction between ecclesiastical law and the general law is not merely a matter of jurisdiction. It has its practical consequences. The sanctions - and sanctions are all important in law - are different. For an offence the temporal courts punish by fine, imprisonment and other pains and penalties. In a civil cause damages may be awarded and injunctions (in some cases mandatory injunctions) disobedience to which is a contempt of court, may be granted. The remedies provided by ecclesiastical law are different. The ecclesiastical courts have no power to give damages or grant injunctions or, subject to certain minor exceptions, inflict any of the punishments open to the temporal courts.

There is, of course, a body of law concerning the Church of England which does not form part of ecclesiastical law in the sense in which I have defined it. For instance, the right of property to an advowson and the obligation of parishioners to repair a church (other than the chancel) were, and in the former case continue to be, enforced in the temporal courts (see *per* Blackburn J. in *Bishop of Exeter v. Marshall* 1868) L. R. 3 H. L. 17, 32, *Veley v. Burder* (1841) 12 A. & E. 265, 301). Subject matter is no certain test of ecclesiastical law.

Lastly, the temporal courts have a certain jurisdiction in relation to the ecclesiastical courts and, arising out of that jurisdiction, some concern with matters which come before those courts. If an ecclesiastical court decline to exercise jurisdiction vested in it, the temporal court may by mandamus compel

the ecclesiastical court to take the case into consideration *(Reg. v. Archbishop of Canterbury* (1841) 12 A. & E. 265, 301. If the ecclesiastical court exceeds its jurisdiction or powers by trying or deciding a matter not within its jurisdiction, the temporal court may by prohibition restrain the ecclesiastical court. It would also appear that a writ of prohibition may issue where the ecclesiastical court misconstrues an Act of Parliament, though the extent of this jurisdiction may be open to discussion. (See *Mackonochie v. Lord Penzance [supra]* and Phillimore's Ecclesiastical Law, 2nd ed., vol. II., p. 1116). The line of demarcation between what is properly only a matter for appeal to a higher ecclesiastical court, and matter for prohibition by a temporal court is difficult to draw, but the temporal courts are not courts of appeal from the ecclesiastical courts. Within their jurisdiction the temporal courts are supreme, and that supremacy is marked by the fact that a temporal court is not on a matter of ecclesiastical law bound by the decisions of the highest ecclesiastical courts.

That is a general picture of the relation between the ecclesiastical law and the general law. The distinction between the ecclesiastical law and the general law is a marked distinction that has obtained throughout the ages.

The National Assembly of the Church of England may legislate in regard to any matter concerning the Church of England. Their Measures, like Acts of Parliament, may form part of the ecclesiastical law or the general law. In other words, jurisdiction in respect of the ascertainment of the meaning of a Measure and the enforcement of the Measure may be conferred by the National Assembly on the temporal courts or the ecclesiastical courts or it may be on both sets of courts, or, as is provided by the Benefices (Ecclesiastical Duties) Measure, 1929, on a new court freshly set up. The question to whom the jurisdiction is given in respect of any Measure or any provision in a Measure, can, in the absence of any express enactment, be determined only by a consideration of the subject to which the Measure is addressed, viewed in connexion with the existing jurisdiction on the same topic or on connected or related topics." *[emphasis added]*

Thus, although there is a well known and long established narrow usage of the term "ecclesiastical law", it follows, as Uthwatt J said above, from the wording of Section 3(6) of the *Church Assemble Powers Act* 1919, which provides:

"3(6) A measure may relate to any matter concerning the Church of England and may extend to the amendment or repeal in whole or part of any Act of Parliament…"" *[my emphasis added]*

that a Measure may include alteration of the general law applicable to all citizens whether Anglican or not, as well as of ecclesiastical law in the narrow sense. Further, that is the purpose of the procedural safeguards in Section 3(3) of *Church of England Assembly (Powers) Act* 1919 "with relation to the constitutional rights of all His Majesty's subjects", which is there to protect the interests of all citizens from changes in the general law by Measure, such as burial rights etc.

What I conclude from the foregoing is that the term "ecclesiastical law" may have a narrow or a wide meaning dependent on context, including in a Measure, and the issue before me is indeed the construction of the term in a Measure, namely in Section 13 of the *Care of Churches and Ecclesiastical Jurisdiction Measure* 1991.

In my judgment, the term here is to be applied in a wide sense and not a narrow one.

The context here is crucial. In place of listed building consent and the regulatory and enforcement régime thereunder, the Church of England has the privilege of the Ecclesiastical Exemption. The policy foundation for that under the legislation is that the Church has in its own procedures an equivalent system, at least as effective in protecting the built heritage as the listed building consent régime. Per George QC, Dean, in *Re St Alkmund Duffield* [2013] 2 WLR 854 at [37]:

"…the Church of England does not have the faculty jurisdiction in order to benefit from the ecclesiastical exemption; it only has the ecclesiastical exemption because the Government's understanding is that the faculty jurisdiction does, and will continue to, provide a system of control that meets the criteria set out in guidance issued by the relevant department of state in relation to the

ecclesiastical exemption. That exemption is of importance to the Church as it permits it to retain control of any alteration that may affect its worship and liturgy."

Shortly after the 1991 Measure, Parliament legislated to remove the Ecclesiastical Exemption from primary legislation, and place it in secondary legislation only, where it may be withdrawn on a denomination by denomination basis by statutory instrument if an ecclesiastical body's own scheme of protection falls short. The purpose of Section 13 of the *Care of Churches and Ecclesiastical Jurisdiction Measure* 1991 was to strengthen the powers of the Consistory Court to police and enforce against breaches. The express power to make a restoration order was new and reforming. It would introduce a largely arbitrary distinction of no policy purpose, if some unlawful acts could not be subject to restoration orders if such were not unlawful under ecclesiastical law in a narrow sense.

If I am wrong about that, I hold alternatively that, as a faculty cannot authorise what is unlawful by the general law, such a breach of the general law, including a breach of Section 3 of the *Disused Burial Grounds Act* 1884 as here, is also unlawful under ecclesiastical law.

Accordingly I hold that a breach of Section 3 of the *Disused Burial Grounds Act* 1884 as here is "unlawful under ecclesiastical law" within the meaning of Section 13 of the *Care of Churches and Ecclesiastical Jurisdiction Measure* 1991.

779. ***Does the order sought by the Objectors fall within the meaning of a restoration order?***

The objectors' second point was that *restitutio in integrum* is not possible or desired; the objectors want rather a cleared site and not the old building

restored, and such was not within the scope of a restoration order, as what was being sought was not restoration of the *status quo ante.*

Section 13(5) of the *Care of Churches and Ecclesiastical Jurisdiction Measure* 1991 provides:

"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".

It was submitted on behalf of the objectors that as the old building had been knocked down and there was an empty space before the new building was built, it was to that empty space that the restoration should return. Indeed, Mr. Seymour stated that no objection was taken to the demolition of the old building, simply to the erection of the new. The restoration order sought is limited to demolition of the new building. In other words, what is sought is to a supposed intermediate stage, the *scintilla temporis,* after the demolition but before construction. I found this proposition startling and unattractive at first blush, and pretty artificial on any basis.

Do the words: "so far as possible to that which existed immediately before the act was committed" go so far as to include the situation contended for by the objectors? It would obviously be *possible* physically to re-build the old building, although no-one wants to do so, and it would plainly be absurd to order that the old building be rebuilt. Does "so far as possible" extend to what is reasonably or sensibly possible?

I bear in mind that breaches of faculty control may and do take a very wide variety of forms, some of which would involve a breach of listed building control but for the Ecclesiastical Exemption, and others which would not. At one extreme is the very simple case if chattels are introduced into a church

unlawfully; restoration of the previous position is simple: order the removal of chattels. In contrast, destruction of part of a building might be much more complex to remedy by a restoration order, such as when a mediaeval structure is unlawfully demolished; any loss of historic or architectural value may *arguably* be irremediable as the original is lost for ever, depending upon what if anything remains and what is recorded as to the historic structure. It may be physically possible to rebuild but what would be rebuilt would not be what was there before, but would be a fake. In such circumstances, the Court has to make a judgment on the specific facts, which may include what, if anything, replaces the destroyed part, and whether it is practicable and wise in policy terms to build a replica, or an alternative modern structure, if a party sought a Faculty to do the latter. Clearly what may be preferred could well fall because of the limitation excluding improvements.

There is further issue as to a limitation as to improvements, whether such are within what may be ordered under Section 13(5). The better view, which I follow, is that improvements cannot be ordered as part of a restoration order. But, I note that, although carrying very great persuasive weight, the observation by Sheila Cameron QC, Dean, in the Court of Arches in the toppled memorials case of *Re Welford Road Cemetery, Leicester* [2007]1 Fam 15, is strictly *obiter,* as the Court held that the municipal cemetery in that case was not "a church or churchyard" to which the wording of Section 13(5) expressly limits its application. She said at [55]:

> "We do not agree that there is any flexibility allowing a court to direct improvement. "So far as possible" merely recognises that subsequent events may have rendered only partial or incomplete restoration possible. Those words cannot trump the plain requirement of the section that restoration must be to "that which existed immediately before the act was committed." *[my emphasis added]*

This statement was made in the context of submissions made by Counsel at [53]:

> "Mr. Sharland's next ground was that section 13(5) of the 1991 Measure does not allow an order to be made which requires improvement of memorials rather than simply returning them to the position they were in before they were laid down. Mr. Best argued that Behrens Ch was right to order the council to reinstate and make safe his clients' memorials, because it would be "a nonsense" to restore memorials to a potentially dangerous state."

I have quoted that passage because, just as it would be "nonsense" to restore memorials as they were in but to a still potentially dangerous state, so it is said on the present facts to be a nonsense to order the rebuilding of the old building.

The objectors here however rely upon an intermediate state after the demolition of the old building but before the construction of the new to "be to that which existed immediately before the act was committed." That may appear at first sight to be artificial and unrealistic on the facts here, which was certainly my initial impression, but I do not hold that such is necessarily without the scope of a restoration order or such as to constitute an improvement.

These are all decisions to be made on very specific facts. I note also that by consent improvement may, of course, be authorized and carried out by a further but related faculty. In practice, I suspect that some of the difficulties in defining improvement are avoided by agreement in that way, simply because with goodwill in some contexts it is obviously sensible and practicable to do so, or those who have blundered are prepared in making amends to offer more than that which is strictly capable of being ordered against them.

Subject to the limitation excepting improvement, it would not further the purposes of Section 13 the *Care of Churches and Ecclesiastical Jurisdiction Measure*

1991 to construe "so far as possible to that which existed immediately before the act was committed" in a narrow or technical matter.

I decline to do so, or to construe it further than to hold on the facts here that the specific type of restoration order sought by the objectors is capable of being within what is open to me to order by way of a restoration order, if otherwise minded to so order.

780. ***If this had come before me prior to 1st April 2015, would the Court have issued a Restoration Order to require demolition of the new building?***

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

781. ***Is the Court required by reason of any Open Spaces legislation or trust or other analogous obligation to make a restoration order to demolish the new building to re-instate the previous situation?***

It is clear that LBTH (and Stepney) before only ever had some control over the land until the agreement was ended, and never had any interest in it. There is no evidence of the transfer of any interest in the land to LBTH or Stepney. The

ownership remained and remains in the Rector. Counsel for the Objectors conceded, rightly in my judgment, that the Rector could put an end to the arrangements with LBTH and the open space statutory trust under Section 10 of the *Open Spaces Act* 1906 terminated with it. This follows from the wording of the Act.

Section 6 of the *Open Spaces Act* 1906 provides:

"6 Transfer of disused burial grounds to local authority

The owner of any disused burial ground may convey the burial ground to, or grant any term of years or other limited interest therein to, or make any agreement with, any local authority for the purpose of giving the public access to the burial ground, and preserving the same as an open space accessible to the public and under the control of the local authority, and for the purpose of improving and laying out the same." *[my emphasis added]*

It appears from the words of Section 6 that the owner of a disused burial ground may either convey all his interest thereunder, or grant a term of years, or grant any other limited interest, or, as here, "make any agreement with, any local authority..." It follows from that wording that what the local authority gets may not endure indefinitely unless the whole legal estate has been conveyed to it. Anything less than that either terminates under the terms of its grant or may be terminated.

Section 10 of the *Open Spaces Act* 1906 provides:

"10 Maintenance of open spaces and burial grounds by local authority

A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired--

(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the

meaning of this Act and under proper control and regulation and for no other purpose; and

(b) maintain and keep the open space or burial ground in a good and decent state,

and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them."

It is common ground that Section 10 imposes a statutory trust, but that is subject to "any conditions under which the estate, interest, or control was so acquired", It follows that such trust comes to an end when the estate interest or control comes to an end.

782. It appears to have been a common misconception that Christ Church graveyard was somehow committed to being open space in perpetuity. As a matter of trust and property law, that is not the case. It was and remains the Rector's freehold.

783. ***Can the Rector act lawfully by terminating the open space arrangements without a faculty?***

In answering that question, it is helpful to consider the nature of a faculty and what by right of ownership of the freehold of the churchyard, the Rector might do notwithstanding consecration without a faculty.

Halsbury, *Laws,* (vol. 34) (2011) states:

"….a faculty…., as its name indicates, it confers liberty on a person to do something; it does not command him to do anything", quoting Dep. Chancellor Wigglesworth in *Re; St. Mary, Tyne Dock (no. 2)* P156, 166.

Although the churchyard is consecrated and is subject to the jurisdiction of the Ordinary, that does not exclude the Rector as freehold owner from rights arising from his ownership of the soil.

In *Greenslade v Darby* (1865) LR 3 QB 421 the dispute was between the tenant of the lay rector and the perpetual curate as to the herbage in the churchyard. Blackburn J at 429 said:

"..Originally the land was the property of some lay person, which, when the rectory was formed, was dedicated to the church and conveyed by him to the rector. Thus the freehold was vested in the rector and he was entitled to the land, including the grass, herbage, and everything else, as fully as the original owner had been; but as the land had been set apart by consecration for the church and churchyard, the right which the rector as the owner of the freehold had in the profits was proportionately diminished, because he could not desecrate it, or use it for any purpose which was inconsistent with the object of its consecration. Nevertheless, the enjoyment of the property, so far as it could be exercised by one holding a sacred office, belonged to the rector as owner of the freehold. Now, it was necessary for the preservation of the churchyard to remove trees in it which had been blown down, and also to cut, mow, and graze the herbage growing there; in each case there would be some profit to be made; but, notwithstanding the church was consecrated, the profit would belong to the rector as being owner of the freehold". *[emphasis added]*

In *Winstanley v North Manchester Overseers* [1910] AC 7, the House of Lords held that a parson in whom the freehold of a burial ground was vested and received burial fees and other charges for his own use was in beneficial occupation of the burial ground for rating. Lord Atkinson said at 15:

"The inhabitants of the parish have according to law a general right of sepulture in the churchyard, and that right, if denied, will be enforced by mandamus… but the right to select the place of interment is in the rector, and for the permission to be buried in any particular place or apparently in an unusual manner, such as an iron coffin, or in a vault, or with other unusual accompaniments, he can demand a

fee. Again, he can permit persons who neither lived nor died in his parish, and were not his parishioners in any sense, to be buried in the churchyard, and can exact a fee beyond the usual burial fee for the privilege: *Nevill v. Bridger*. LR 9 Ex 214 Yet these so-called strangers have no rights in the churchyard, no claims upon the services of the parson; he does not by virtue of his office owe them any duty, ecclesiastical or legal. It cannot, therefore, be that it is by virtue of his office he exacts these fees from them; and if not by virtue of his office, it can only be by virtue of his ownership and occupation of the soil. If he should permit these strangers to be buried in the churchyard in such numbers as to trench upon the general right of sepulture belonging to the inhabitants of the parish, he could be restrained by the Ordinary, but subject to that he may allow them to be buried there in such numbers as he may deem fit, and exact what fees he pleases. It seems to me impossible to hold that in these cases, at all events, the fees received are not incidental to the occupation of the soil of the graveyard. But though the position of the inhabitants of the parish is differentiated from that of the stranger by the fact that the former has a right of sepulture there and the latter has not, the rector, I think, selects the place of interment and exacts the fee by virtue of the same right and title in the one case as in the other."

I do not receive petitions for faculties from incumbents for permission to grant or terminate a grazing licence of a consecrated churchyard to a local farmer. Provided that the grazing beasts do not harm gravestones etc., this typical arrangement is simply come to locally and ended locally. I do not receive petitions for faculties from incumbents who want to permit the burial of a deceased person, who was neither a parishioner nor on the church electoral roll. Both those matters are for the incumbent to determine by reason of his freehold of the churchyard.

784. Whilst entering into arrangements with a local authority to hand the management of the churchyard over to local authority to manage as an open space requires a faculty as that is a positive change of status or burden imposed

on his property and hence requiring the permission of a faculty, in terminating it, a rector does no more than resume management of his own property. He is entitled to do so by right of his ownership and requires no permission by way of faculty to do so. Further, a rector does not have to have grounds, good or otherwise, to resume management of his own property. He is entitled in right of ownership to do so, provided the earlier arrangements are terminable.

785. ***After 1st April 2015: Section 4 of the Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure 2015***

On the 1st April 2015 came into effect Section 4 of the *Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure* 2015, which provides:

"4 Disused burial grounds

After section 18 of the 1991 Measure insert--

"18A Erection of buildings on disused burial grounds

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

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

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

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

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

Since 1st April 2015 the Consistory Court subject to the conditions being satisfied has the power to authorise the erection of a building on a disused consecrated Church of England burial ground for wider purposes than those specified in the 1884 Act. The conditions here are plainly satisfied. When Stepney advertised in the late 1940s no-one came forward. None has since.

786. ***Is Section 4 retrospective so as to require the making of a restoration order now?***

There was much discussion before me whether this new power was retrospective and it was submitted on behalf of the Open Space Parties that it could not be under conventional principles of statutory interpretation. I agree. But that submission misses the point: as a restoration order is discretionary, the fact that as of now this Court could authorise afresh the building of a structure such as the new building in these circumstances, *may be* relevant to the exercise of my discretion as to whether to make a restoration order now. In other words, if the original statutory policy has come to an end, why should a Court be under an obligation to order destruction of what, if now sought, *might* be granted permission? In other words, there is no legal basis for saying that this Court is required by law to make a restoration order. That is a matter to be determined on its merits which I go on below to do.

770. It is also well established that past breaches of faculty control may be rendered lawful for the future only by grant of a confirmatory faculty. In *St Mary, Balham* [1978] 1 All ER 993, parishioners had dismantled and in doing so

destroyed the integrity of a Hill organ without a faculty. Garth Moore Ch at 995j & 996 said:

> "There is no such thing as a retrospective faculty. Work done without the permission of a faculty is illegal and remains illegal for all time. If, however, a confirmatory faculty is granted, it means that from that point in time onwards the situation is legalised; but it does not retrospectively legalise what has already been done, and the perpetrators of the illegalities remains personally liable for any wrongs they have already committed, though for the future the confirmatory faculty brings them within the four walls of the law." *[emphasis added]*

He went on to warn them that they remained exposed to a prosecution under the *Criminal Damage Act* 1971.

787. It is to be stressed that a confirmatory faculty is thus not retrospective. It requires looking at the facts afresh as of the date of its granting. In other words, if I grant a confirmatory faculty *inter alia* to retain the new building, such makes it lawful from the date of grant only. As the Court now has power to grant a faculty to permit the erection of a building on a consecrated disused burial ground, it is open to me to grant a confirmatory faculty if I am so persuaded on the merits.

788. ***What is the test to be applied in determining whether to grant a restoration order or a confirmatory faculty?***

Any exercise of powers under the *Care of Churches & Ecclesiastical Jurisdiction Measure* 1991 as amended by the Consistory Court in respect of care and conservation is subject to the requirements of Section 1 of the Measure, which provides:

> "1. Any person or body carrying out functions of care and conservation under this Measure or under any other enactment or rule of law relating to churches

shall have due regard to the role of a church as a local centre of worship and mission".

In respect of listed buildings, two well known recent cases in the Court of Arches have spelled out the principles I have to apply. In *St Alkmund, Duffield* [2013], an appeal against refusal of a petition to relocate a chancel screen in a grade I listed church, the Court of Arches, disapproving the formulation in *n re St Helen's, Bishopsgate* (1993) 12 Consistory and Commissary Court Cases, case 23, held:

"(1) that, if and in so far as it might, a consistory court should strive to ensure that any decision it made in the exercise of its faculty jurisdiction both permitted the proper reflection of the doctrinal beliefs of the priest and congregation and did nothing which might limit the proper reflection of the doctrinal beliefs of a different priest and congregation within the confines of the same ecclesiastical building; and that the theological or doctrinal stance of a particular congregation, although not determinative of whether a faculty should issue, had to be taken into consideration in assessing the totality of the petitioners' case (post, paras *25*, *34*).

(2) That a consistory court should not be required to apply precisely the same approach to proposed alterations to listed buildings as was followed in the secular system, and there was no justification for applying to ecclesiastical buildings a stricter test than was applied in the secular system; that there was no test of "need" or "necessity" in listed building applications; that an unduly restrictive framework was not to be imposed on the balancing process to be undertaken on an application for a faculty for works to a listed church building; that a chancellor might begin by considering whether the proposals, if implemented, would result in harm to the significance of the church as a building of special architectural or historic interest; that, if he concluded that they would not, the ordinary presumption in faculty proceedings in favour of "things as they stand" was applicable and could be rebutted more or less readily depending on the particular nature of the proposals; that if he concluded that the proposals would result in such harm, he should next consider how serious the harm would be, how clear

and convincing was the justification for carrying out the proposals and, bearing in mind the strong presumption against proposals which would adversely affect the special character of a listed building, whether any resulting public benefit (including matters such as liturgical freedom, pastoral well being, opportunities for mission, and putting the church to viable uses consistent with its role as a place of worship and mission) would outweigh the harm; that the more serious the harm, the greater would be the level of benefit needed before the proposals should be permitted; and that, where the building was listed grade I or II*, serious harm should only exceptionally be allowed (post, paras *84*, *87*).

(3) Allowing the appeal and granting the faculty subject to conditions, that the chancellor had erred in his approach to the assessment of adverse impact on the listed building and his judgment would therefore be set aside on the basis that he had made an erroneous evaluation of the facts taken as a whole; that, since the court had before it all the submissions, evidence and other materials which had been or would be before the chancellor and had heard the appeal in the church building concerned, it would not be sensible or economical to remit the matter to the chancellor and the court would reach its own evaluation of how the balance should be struck and substitute its own determination for that of the chancellor; that while the proposals would not cause overall harm to the special architectural character of the church there would be some harm to the special historic interest of the building; that there was nevertheless a strong and convincing case for change on the theological, visual and practical grounds advanced by the petitioners; that, on a proper evaluation of all relevant matters, the petitioners had rebutted the strong presumption against changes adversely affecting the special character of a grade I listed building; and that, accordingly, the faculty would issue on the conditions that a prior photographic record be made and kept, a qualified architect supervise the relocation of the screen to ensure that there was no damage to either screen or to the fabric of the building and the relocation take place within six months of the grant of the faculty (post, paras *53*, *55*, *89*, *90*, *95*, *96*).

Per curiam. (i) In a statement of significance under rule 3(3)(a) of the Faculty Jurisdiction Rules 2000 mere description, including copying out the listing description, is insufficient and there should be some analysis of the character of the church: petitioners are encouraged to follow the guidance of the Church Buildings Council (post, para *16*).

George QC, Dean, stated:

"87 In our opinion chancellors should be freed from the constraints of the *Bishopsgate* questions. We have much sympathy for the view of McClean Ch in *In re Wadsley Parish Church* (2001) 20 Consistory and Commissary Court Cases, case 11, para 24 that there is a danger of imposing an unduly prescriptive framework on what is essentially a balancing process. *[my emphasis added]* For those chancellors who would be assisted by a new framework or guidelines, we suggest the following approach of asking:

(1) Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?

(2) If the answer to question (1) is "no", the ordinary presumption in faculty proceedings "in favour of things as they stand" is applicable, and can be rebutted more or less readily, depending on the particular nature of the proposals: see *Peek v Trower* (1881) 7 PD 21, 26-28, and the review of the case law by Bursell QC, Ch in *In re St Mary's Churchyard, White Waltham (No 2)* [2010] Fam 146, para 11. Questions 3, 4 and 5 do not arise.

(3) If the answer to question (1) is "yes", how serious would the harm be?

(4) How clear and convincing is the justification for carrying out the proposals?

(5) Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building (see *In re St Luke*

the Evangelist, Maidstone [1995] Fam 1, 8), will any resulting public benefit (including matters such as liturgical freedom, pastoral well being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm? In answering question (5), the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm is to a building which is listed grade I or II*, where serious harm should only exceptionally be allowed."

789. Thus, I have to consider would either a restoration order or a confirmatory faculty, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest.

790. ***Preliminary: assessing the relevant significance***

As the Court of Arches, consisting of George QC, Dean, & Wiggs & Turner QC, said in the subsequent case of *In re St John the Baptist, Penshurst* (9th March 2015) Transcript at Para 22 that first question in *St Alkmund, Duffield* [2013]:

> "..cannot be answered without the prior consideration of what is the special architectural and/historic interest in the listed church".

As I have repeatedly stressed, Christ Church Spitalfields is a grade I listed building and of exceptionally high architectural interest, even among grade I listed buildings and the background to the events I am dealing with is the strikingly successful and triumphant restoration from dereliction it has undergone, achieved substantially by the energies and enthusiasm of the parties involved, who have now very sadly fallen out over what is before me to decide. Christ Church Spitalfields is an immensely powerful building, intended by those commissioning and their architect to be an ultimate statement of the English baroque and of the glory of the Church of England. How much either intention has been accepted over the generations has varied, but it is beyond dispute that this building has throughout displayed and

continues to display an immense presence and to inspire a wide range of fascinations. In architectural interest, it is numbered among a very small group of outstanding buildings, even of Grade I. It is of world wide significance. The Court of Arches said at [13] in the appeal in the present case: "It is widely regarded as one of the major examples of the European baroque architecture". That if anything understates it: yes, it is a major example of European baroque architecture, but the modern scholarly fascination with Hawksmoor, and the puzzle as to his architectural sources is precisely because there is nothing quite like this elsewhere, anywhere.

However, neither a restoration order nor a confirmatory faculty would however in involve any alteration to the physical structure of the church building itself. What I have to assess is the effect of either upon the churchyard and the setting of Christ Church Spitalfields. Thus the preliminary question I have in this context to determine is what is the special [1] architectural interest, and [2] historic interest of Christ Church Spitalfields, both primarily in connection with the churchyard and setting.

791. **SPECIAL ARCHITECTURAL INTEREST**

A strand in the objectors' arguments, more prominent at earlier stages in this episode than before me, was that the new building frustrated Hawksmoor's vision for the setting of the church.

As I have indicated, I reject the argument that Hawksmoor's design included any element of landscape or gardening of the churchyard. The most contemporary historical evidence, Rocque's map, points to this being a working graveyard and the statistics show this was interment on what might properly described as an industrial scale. The churchyard was until closure very much a functional adjunct to the church. I am supported in those conclusions by Professor Downes.

Although the church itself has four polished facades, an indication in itself that all 4 facades were intended for contemplation, as well as entrances to the south and

north, as well as the west, I do not accept Professor's Downes' view that "Christchurch and its churchyard are indivisible in terms of their importance to the appreciation and historical and architectural value of the site … it was designed to be seen in the round; but the southernmost aspect, incorporating the historic churchyard can legitimately be regarded as the most important aspect along with the view of the west façade which also incorporates a view of the churchyard." The overwhelmingly most prominent façade is the west which keys the vista from Brushfield Street and the church I infer must have been placed where it is on its site for that purpose. The view from the graveyard is of lesser significance than the western façade and for most of its history has been hemmed in by buildings.

Although the special architectural interest of the setting cannot be properly put as either part of a Hawksmoor garden design or that the view from the south is the most important aspect along with the western façade, the setting of a building of this importance is manifestly of some significant special architectural interest.

792. **SPECIAL HISTORIC INTEREST**

I have recited a very great deal of history in this judgment, much more than usual for a judgment in a Consistory Court, but the historic interest in Christ Church Spitalfields is very considerable and reflects an unusually rich and wide tapestry. The churchyard is part of that history, not the happiest part but graphically showing hard social problems. The objectors stress the churchyard's part in the history of open spaces, but whilst this was an early pioneer of urban open spaces, "Itchy Park", and the continuing abuses of the presently open area, display more significance as continuing anti-social challenges, than matters of welcome positive historic interest. In contrast, where, for example, the National Trust restores 19th century back to back housing as of architectural and historic interest, as indeed it is, as is this churchyard, the National Trust invariably sanitises what it preserves. That cannot ever be said of the open space churchyard here.

793. In other words, the significance of the churchyard here, both in architectural and historic terms, is as a part of the setting of the church itself. Such is of obvious significance, but has to be put in context. From an early date after completion houses were built along the west, south and east of the churchyard enclosing it. Public lavatories were constructed to the west. The north steps went for the widening of Fournier Street. The view east along Brushfield Street is the most famous pre-eminent aspect where the west front and tower are inevitably shown in so many views and photographs. Notwithstanding even those changes, the building still is very much the dominant in its setting. The prospect of Christ Church Spitalfields from the churchyard for much of its history has been subsidiary, as it was enclosed by buildings until the houses in Red Lion Street came down for the creation of the Commercial Road. Of the four aspects, the west is the well known and pre-eminent, the north and east of less prominence, and the south the least actually seen, and that remains the case today. Views even from within the churchyard of the south aspect of Christ Church Spitalfields in summer at least are much obscured by large trees close to the building which are protected by tree preservation orders.

794. Having considered significance, I turn to the first question in *St Alkmund, Duffield* [2013], namely: would either a restoration order or a confirmatory faculty, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest? Here I have to consider a restoration order and a confirmatory faculty separately. Indeed, they are the reverse sides of the same coin. Leaving the new building in place would do harm and it is said that a restoration order would be beneficial to the architectural and historic interest. An un-built upon churchyard must here be at least neutral in terms of affecting the significance, whereas it is difficult to see how in view of the quality of Christ Church Spitalfields, that creating any new structure nearby must at least *prima facie* be capable of being harmful.

795. Thus the next question is: In the case of a confirmatory faculty how serious would the harm be?

Of course the position here is very different from most cases when in an application for a faculty for changes to a church of architectural or historical significance the Court is dealing with assessing the seriousness of harm from proposals of what is to be done. In the present case in contrast, the new building has been built and may be seen and assessed.

Any building in the graveyard would be different from the original open graveyard when it was in use. However, given the 1874 building the whole graveyard cannot be brought back to that time. One third of it has been legally built on over 140 years. It is a space enclosed from the east, and south sides and to the north by the Rectory and church itself. This part of the graveyard is not prominent and can only partially and selectively be seen or seen from. Judgment on the quality of the new building is bound to some degree to be subjective, and warning myself to be very cautious about subjectivity, I am driven to find that this new building is innocuous in itself and with some visual merits at the lowest. The new building does not impose its presence upon Christ Church or its setting. It might be argued that it has some effect on the graveyard, but how "serious" an effect? I find that to be at the lower end of that scale. The trees which for a large part of the year screen the south façade of Christ Church and which are subject to Tree Preservation Orders are a significant barrier to the new building being seen or Christ Church being seen from that area, as Professor Downes found when trying to photograph an uninterrupted view of Christ Church from the graveyard.

796. Would a restoration order if implemented result in harm to the significance of the church as a building of special architectural or historic interest? The answer to that question is obviously not, but I mention this expressly, because in my judgment, correspondingly the benefit to the setting of Christ Church by demolishing the new building would be relatively minor. The prospect of Christ

Church from the site of the new building is in part obscured by the trees and only partial from an enclosed area.

797. ***Special considerations in the case of a confirmatory faculty – precluding conduct***

If the Building Parties or any of them had gone ahead in the way they actually did maliciously and to establish "facts on the ground", in an attempt to manipulate the system to achieve what otherwise would not have been possible to achieve, then I would have had no hesitation in refusing a confirmatory faculty. Such cannot be expected to be granted to a maliciously contumacious applicant. I exonerate each of the Building Parties of conduct of that class. But the way the Building Parties did behave in this matter, as I have held above, means that they have variously been severely criticised. The question thus is what effect should the conduct of each of the Building Parties have upon my discretion to grant a confirmatory faculty? I need to consider the Building Parties separately.

798. ***Conduct – Rector & Churchwardens***

The Rector is not learned in the law. He is a clergyman. This was his first time in a post where he had to deal with the faculty system. He told me he would not have gone ahead if he had known. I accept that and he was contrite before me. But his carelessness in filling in forms was appalling, and, worse continuing. He did not need to say that the graveyard was not consecrated and he should never have so written without properly checking, or, if he did not know and could not conveniently find out, without stating on the petition that he did not know. If a clergyman does not know whether his graveyard is consecrated or not, the only safe and prudent course is to assume it is consecrated. There are exceptions, but they are most unusual in the case of historic churches, or are areas formerly for the burial of suicides deliberately outside the consecrated area. Errors continued and were repeated even after the judgment of the Court of Arches. The

Churchwardens are also not learned in the law and are valued volunteers. Rector and Churchwardens should have been more careful. But all should have reasonably expected even in the face of the error that the graveyard was not consecrated, that the Registry would have seen the mistake and prevented what then happened. The conduct of the Rector and Churchwardens remains a relevant element in my ultimate balancing exercise but not an especially weighty one.

799. ***Conduct – the School Governing Body***

They are also not learned in the law but can take professional advice. Such advice should have seen and alerted them to the legal issue. Their conduct remains a relevant element in my ultimate balancing exercise but not an especially weighty one.

800. ***Conduct – LDBS***

This body has unrivalled experience with voluntary aided and other Church of England Schools and has to operate within a complex legal framework. LDBS should have been aware of the issue of building on disused consecrated burial grounds or legal advice should have alerted LDBS. How this blunder occurred is a matter which in my view LDBS should for its own good investigate. Either legal advice was not sought when it should have been, or failed to alert to the legal problem, or reliance was also placed on the Diocesan Registry. The conduct of LDBS remains an element in my ultimate balancing exercise.

801. ***Conduct - LBTH***

Various and wide ranging allegations of misconduct have been made of LBTH. For the present purpose it is necessary to separate these out. It is alleged by the Open Space Parties and other objectors that LBTH: [1] breached the Open Space Trust by conniving with the Rector to close off the area of the new building from the public; [2] confused their roles as Open Spaces Trustees/Planning

Authority/Education Authority; [3] 'wrongly' granted planning permission; [4] connived in obtaining public moneys for a school in which LBTH had no interest in the site in breach of the requirements for such public funding; [5] failed to carry out a required assessment under the *Equality Act*. I would add for completeness that whilst this was not for obvious reasons advanced by the Open Space Parties, that LBTH had woefully neglected performance of any duties as open space trustees of the graveyard. I consider each of these. As to [1] as I have already held, the Rector could end the open space arrangements as he wished. It *may* be a breach of LBTH's duties as open space trustees to encourage the Rector to do so, if that was the case [the evidence is not so clear], but ultimately the decision was the Rector's. This allegation, even if made out, has thus no consequences. As to [2] it does appear LBTH did not direct themselves correctly. LBTH did attempt, *ex post facto,* to regularise this however. As to [3] the original planning permission was not challenged by way of judicial review within the time limit, it must stand *in rem*. The later adjourned judicial review is now far too late to resurrect. The further grant also stands *in rem*. Nevertheless, I accept that the factors relevant to the granting or refusal of the planning permission are still open to the objectors to raise now. Planning permission is a distinct and separate area of permission and so is a faculty. Without both in the case of a consecrated building you cannot carry out works. As to [4] I am unable to come to a determined view, but I note that the evidence of Mr. Woolf is firmly against this allegation and I am unaware that the Audit Commission has intervened. This would be a matter for them. I reject [5]. LBTH for very obvious reasons always had *Equality Act* considerations in the forefront of their mind. The really serious and substantial matter of conduct against LBTH is that LBTH having a legal department and all the necessary resources participated in the breach of the prohibition in the 1884 Act, when LBTH should have known better. That misconduct is compounded by the failure of LBTH to call a witness from their Legal Department to explain their conduct. That failure is the most serious misconduct of any of the Building Parties and the

closest to contumacious behaviour. I hold it just falls short of that. The conduct of LBTH is an element in my ultimate balancing exercise.

802. ***Confirmatory Faculty & consultations?***

The objectors submitted that the application for a confirmatory faculty was materially defective in that Part 4 of & Schedule 2 of the *Faculty Jurisdiction Rules* 2015 [in force since 1 January 2016] provide, and their predecessors in Part 3 & Schedule 1 of the *Faculty Jurisdiction Rules* 2013 provided for intending applicants for a faculty to make specific consultations of Historic England [formerly English Heritage] and any national amenity society which has an interest in the proposals, where works: "involve alteration to or the extension of a listed building to such an extent as would be likely to affect its character as a building of special architectural or historic interest" or "they involve demolition affecting the exterior of an unlisted building in a conservation area" and no such consultations had taken place, which is the case, even though the Petition states otherwise, I assume because consultation had happened in respect of the original faculty. Again, that was an irresponsible and lamentable error in filling out the Petition. Nevertheless, although *ex abundantia cautela,* such consultation afresh would have been extremely sensible in the very interests even of the Building Parties themselves, I find it was not mandatory, as the retention of the new building does not "involve alteration to or the extension of a listed building to such an extent as would be likely to affect its character as a building of special architectural or historic interest" or "… involve demolition affecting the exterior of an unlisted building in a conservation area". It remains nevertheless unfortunate because on the previous occasion those expert bodies were giving their expert advice in the context of the old building as opposed to the new building, whereas I am considering the demolition of the old building as opposed to the retention of the new building, which is materially different. Nevertheless, I have already noted the fairly muted comments made earlier by English Heritage, the Georgian Group and the Ancient Monuments Society. This case is very well known and beyond doubt that all those bodies are

very well aware. I have no doubt that the objectors would have been very likely to have encouraged those bodies to make further representations or to be called as their witnesses if the objectors had considered that there was anything significant to be added by them. Further, when it comes to expertise on Hawksmoor, I have had the help of the leading authority in Professor Downes.

803. The next question is how clear and convincing is the justification for the confirmatory faculty/the restoration order? Much was made by the objectors of a supposed conflict of interest between the school and the Rector. That was a misconception. The school is a Church of England School and part of the mission of the church. There was and is no conflict and the interest is the same. The evidence for the school's need for and use of the new building was convincing and entirely credible. I have summarised it herein and I accept it. The Headmaster, Mr. Julian Morant, in particular was a most impressive and persuasive witness, and I accept his evidence. In contrast there was a deafening silence on the part of the objectors as to the needs of the school, save for a wholly sloppy, ill-prepared set of suggestions of alternative premises which might be used instead, which fell apart upon the slightest scrutiny. Nor had the objectors made any effort to meet with, or discuss with the parents of the schoolchildren as to their views or needs. The new building also provides clear and convincing benefits for the parish and the local community. The Rector and all others involved faced a most difficult situation with failed youth club, which had to be got rid of. The open parts of the churchyard have been ever since the mid 19th century a very serious problem for successive Rectors. Management as open space has always failed and most unpleasantly so in the consequences for anyone trying to use the area. As an open space it has been a failed open space. If the area of the new building was returned to open space, there is no evidence to suggest that management would be any more successful, and overwhelming history to say that it would not. LBTH has simply ignored its responsibilities for management. LBTH in planning terms gives

priority to open space but did not when managing this open space. I hold that there is and was significant local support on the evidence for the new building and that the objectors, especially Ms. Whaite, have persistently overstated and exaggerated the support they purport to have. I have considered the history of the planning applications but there is nothing there to support the objectors' complaints or case. LBTH were entitled to make the decision they did. I hold the justification for retaining the new building is both clear and convincing to a very high degree, and the justification for returning the area of the new building to open space is marginal.

804. ***The balancing exercise.***

I bear in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building. I ask will any resulting public benefit (including matters such as liturgical freedom, pastoral well being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm? I bear in mind that the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm is to a building which is listed grade I, where serious harm should only exceptionally be allowed. I also take into account of the special factors including conduct which apply to a confirmatory faculty and those affecting the grant of a restoration order.

805. A restoration order would most certainly mark that the conduct of the Building Parties in this deeply unhappy history has been deplorable, even if short of contumacious, in a very public fashion. The purpose of the balancing exercise is not simply to punish those whose conduct has fallen short. A restoration order would involve expense, both in the form of moneys thrown away and the costs of demolition. The evidence for the latter is unsatisfactory but Mr. Dyson on the

basis of piling the material up on site, still put it at £93,000, and it is inconceivable that any faculty would permit demolition materials to be piled up on site save for immediate removal elsewhere. Cost and expense is a factor but not a major or determining one. A restoration order would so long as the area of the new building was returned to be open space simply restore a long standing and festering management nightmare. Yes, it would be a modest amount more of open space and some of some benefit to the setting of Christ Church but only marginally. As planning authority, LBTH designated open spaces for planning purposes and such must be presumed to be of some public benefit, but this under LBTH's own management was and is a slum.

805. On the other hand a confirmatory order would I hold result in substantial public benefit and benefit to Christ Church in that such would promote worship and mission. I consider all the detailed history and circumstances set out herein. I was particularly struck by a letter in support of the new building from a Dr Louise Vaughan, a GP in Bethnal Green, a regular worshipper at Christ Church, and a resident with her child at the Christ Church School. She writes, and I repeat her letter, :-***" I am not an expert in the law or in architecture, but I have seen the struggles that a school like Christ Church faces, unimaginable to schools in more affluent parts of the country, to accommodate and resource children from contexts involving mental health issues, severe disability, language barriers and housing inadequacies. I have also seen this building used to build parental relationships which foster empowerment and confidence, cross demographic and ethnic and religious barriers and open its doors to a community more polarised and disconnected than most … I am unable to comprehend how the value of heritage and the letter of the law , both clearly immensely valuable, eclipse human need".***–This local GP did not mention in her letter that a few more square yards of open space would make the kind of appreciable difference to the lives or health of the local children as claimed

by the objectors. Indeed, many of the objectors did not want a children's playground on the site.

806. The balance of benefit in my judgment is firmly towards granting a confirmatory faculty and not a restoration order, and so I order. I ask the represented parties to submit draft Minutes of Order within 14 days for my written approval. For the avoidance of doubt, the confirmatory faculty is to extend to the terminating of the earlier open space management arrangements as open space in respect of the area of the new building as well as for the retention of the new building and its use and occupation by the school.

807. I also grant the faculty in respect of Graysons, which I have already indicated I will do. The PCC wished to have its café run by a third Party on terms to be advantageous to the Parish. After a variety of enquiries and negotiations, the PCC made their choice of Graysons as their preferred caterer. The late Mr Vracas was a 50% shareholder in a wine bar " Blessings" in Commercial Street, very close to Christ Church itself. He was involved with the church. He objected in late 2015 to the granting of a Faculty for this catering facility at least until the legal position in respect to the graveyard was sorted out. He particularly objected to the use of the churchyard as an outdoor café by the PCC or its licensee. I remind myself how many parks and open spaces have this facility, and the reality that, even if food and drink is bought from a café in the Crypt, or even brought in from outside by way of purchase or a home made picnic, it will be almost impossible to stop people eating and drinking in the graveyard This argument expanded to raise the potential problem of the payment of business rates, charitable relief and the use of the nave Mr Vracas had to accept that the HLF grant always envisaged the provision of catering facilities in the church. In the event, although I have read the small bundle of documents in this matter, I was more than somewhat surprised that I had not received any professional evidence from specialist accountants in

this matter although that was Mr Vracas' own field. In the event, as I have set out above, following his sudden death, at the last Directions' hearing Ms Whaite wished to continue this litigation in her own name. I was then told that negotiations were proceeding and that during the substantive hearing I would not be troubled by hearing immediate evidence on this matter. Nothing was filed on behalf of Ms Whaite. During the autumn of 2016 I was informed that the Parties had reached agreement on this matter, and that opposition to it had been withdrawn. However it still falls to me to approve that Catering Faculty. I have read and considered all the papers I have received in respect of it. I do grant the Faculty in the terms as prayed, save that I will add the condition that the church's insurers are to be informed of the details of what is being proposed and that any risks associated with any items or appliances which the insurers require in respect of the heating, cooking or other electrical gadgets which they install into the church for the purposes of running their concern, should be covered specifically by insurance. It would be somewhat ironic if this restored church were to be burned to the ground when uninsured by an over-heating panini machine.

808. ***Locus of SOS***

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

809. Bearing in mind my numerous criticisms of both the principal parties, my provisional view is that there should be no *inter partes* orders for costs, but the Building Parties, whose errors created the requirement for this Consistory Court in

the first place, must meet the costs of the hearing to be divided into 3 equal parts, namely [1] Rector, Churchwardens and Governing Body of the School; [2] LDBS; and [3] LBTH, and I so order unless within 21 days hereof notice is given to be heard on costs. I make a costs' order *nisi* accordingly.

810. This Judgment and the consequent Order are to be displayed on the web site in full of Christ Church Spitalfields for 3 months and hard copies for the same period to be displayed and available in the church. I direct that a letter or an e-mail where an e-mail address is known, be sent to every party, witness, and person who has made representations or written in, notifying them of the Christ Church Spitalfields' web-site address and that this full final Judgment is displayed there and will be for 3 months. I request it be displayed also on the Diocesan website.

[Foregoing handed down 12th March 2017

Chancellor June Rodgers,
sitting as a Deputy Chancellor of the Diocese of London

811. Subsequent to the handed down Judgment, the Parties were unable to agree the form of order to be made. It became apparent that it may well be necessary for me to amplify certain of my findings, and make further findings. I heard further submissions on the 6th June 2017.

812. At the core of the parties' disagreement as to the terms of the order was the status of the 1949 Deed. Mr. Seymour submitted that the 1949 Deed remained in full force and effect; that it was not in issue in these proceedings; and he stressed that the Building Parties had relied upon it for the failed defence under the 1967 Order. Among the consequences, he argued, were that I had no jurisdiction to grant any faculty, even a confirmatory faculty, in respect of the land on which the school stood, because of an on-going breach of the statutory trust under the *Open Spaces Act* 1906.

813. Contrary to Mr. Seymour's submissions, I have thus far made no finding as to the status of the supposed 1949 Deed. Notwithstanding the submissions of the parties, I expressly rejected in Paragraph 118 hereinabove their invitation to accept their assertions. I bear in mind the observation herein of the Court of Arches at Para 67 of their Judgment: ***"There is an important difference between … submissions ... and … admissible evidence".*** **[2758]**. I set out my concerns about the state of the evidence as to the 1949 Deed hereinabove. I return to that below but I first I must deal with a development since the 6th June 2017 hearing.

814. After the luncheon adjournment on the 6th June 2017, Miss Morag Ellis QC, now appearing for the Building Parties in lieu of Mr. Mynors, who has recently retired from practice at the Bar, informed me **[T49]**: ***"… during the adjournment Mr. Woody of Tower Hamlets," [****her Instructing Solicitor****] "has initiated a search for the 2009 licence document in its original form with annex [sic] …. If I may just explain, it is archived at the moment. It is likely to take about 24 hours to surface from that…I believe it has gone to the other side at the stage when the bundles were being prepared and the annex was removed from it because of the desire to have the chronological bundle"***.

815. Dated the 7th June 2017 (the day after the last hearing) for the first time I received a copy, certified by Mr. Woody, a solicitor of LBTH, of a part the original of the Agreement of 7th September 2009 complete with authenticated annexures, readable coloured plans and executed by the Rector.

816. I had had no explanation why this had not been found or produced previously. Better it be found and produced now, than everyone had been misled, but, all the other parties are owed by an explanation and apology by LBTH for this late production, unless they received it well before I did. Whether late production of this affects my provisional views on costs may well turn upon: [1] whether a good and reasonable explanation for late production is provided by LBTH; and [2]

to what extent any other party may assert they have been prejudiced by the late production. At this stage, I make no findings on those aspects. Any such issues which do arise will be dealt with at the stage of dealing with costs.

817. But in view of the production of this certified copy part the original of the Agreement of 7th September 2009 complete with authenticated annexures and executed by the Rector subsequent to the hearing of the 7th June 2017 and its effect on my Judgment superabundantly apparent from my draft, I circulated this Supplemental Judgment in draft to the represented parties' legal advisers only and invited them to make any further submissions from the new material and issues arising as they saw fit and to indicate whether it was sought to deal with this on paper or by a further oral hearing. Mr. Seymour did submit further in writing, which I now consider below. The Building Parties made comments. As I also asked for an explanation from LBTH as to how this came about, I now have a witness statement from Mr. Woody dated 26th July 2017. It appears therefrom that he was first engaged by LBTH on 28th April 2015. I refrain at this stage from making any findings as to the history of the late production of this material, as the Open Space Parties have not yet had any opportunity to comment on Mr. Woody's witness statement and any issues may be dealt with if arising subsequently hereto at the stage of dealing with costs. But Mr. Woody's witness statement, although he was not with LBTH at the date of the original conveyancing, has cast light on the versions of the Agreement of 7th September 2009 and the conveyancing history.

818. Mr. Woody in Para 9 of his witness statement infers from what he describes as "the historic files" that the Agreement had been completed in counterparts; one sealed by LBTH, one executed by the Rector & the Governing Body of the School, and one by the trustees of the youth centre. That inference is plausible and appears correct and I so find.

819. In summary, I now have copies of these versions of the 7th September 2009 Agreement:

[1] what is in the existing Trial Bundles

[2] pages **[MW 7 – 62]**

[3] part executed by the Rector & the Governing Body of the School, supplied subsequent to the hearing on the 6th June 2017, and also now at **[MW 255 – 306]**

[4] part executed by Trustees of the youth centre, produced now for the first time as **[MW 199 – 252]**

820. At the principal hearing and the further hearing of 6th June 2017, I did NOT have copies of [2], [3] and [4]. I did not have any copy which appeared to have been executed in any authentic form. [1], [2], [3] & [4] have each been produced by LBTH. It would not necessarily be expected of LBTH that LBTH would have kept a copy of the part sealed by LBTH, which if the original exists must be with another party to the Agreement. Mr. Woody states in Para 11 of his witness statement that a Mr. Coates, a solicitor of Dawson Cornwell, retained the original sealed by LBTH. That has still not been found or produced, but at this stage, it may not matter. I consider each of the four versions now available.

Version [1] in the Trial Bundles

821. We had a copy of a version at **[574-593]**, a list of chattels per Agreement at **[594-593]** and Licence Agreement **[596-602].** That version is a copy and has in manuscript the date of 7th September 2009 inserted at **[574 & 576],** is not *ex facie* executed, save it appears the seal of LBTH has been affixed to the original with an undecipherable signature by an Authorised Officer on "09/2/9" [sic; namely the date of the faculty, and not of the Agreement. Any further wording is un-readable]. Plans A **[591]** and B **[592]** are not authenticated or signed and are un-coloured. We did and do have coloured up versions of these plans at **[3355]** and **[3356],** which correspond, and, again they have no signatures. We also did have and do

have a coloured copy of Plan C 2009, which again bears no signatures. The version at **[574-593]** is not satisfactory evidence of an executed lost original as the annexures are not *ex facie* identified therein. It true that the Rector agreed in evidence that he signed the original **[T812 at line 4]** but what precisely had he signed? Caution and doubt as to what exactly was attached to the 7th September Agreement was well justified by what has now emerged. I reject a submission by Mr. Seymour that "whilst it may be correct that formally no certified copy of the original of the 2009 Agreement has previously been produced, there has never in practice been any uncertainty or point previously taken as to the 2009 Agreement itself". What up to and including the last oral hearing we had was incomplete and inaccurate. I agree and much regret that the consequence of the failure to produce previously a copy of a complete and accurate executed part of the 7th September 2009 Agreement was that earlier argument was mis-focussed. That is why after the revelation of the certified copy dated the 7th June 2017 I invited the represented parties' legal advisers to make further submissions.

Version [2] at pages [MW7- 62]

822. This is another copy of the version in the Trial Bundles with these variations. Plan A at **[MW 24]** is coloured. Plan B at **[MW 25]** has vestigial colouring. Plan C at **[MW 26]** has no colouring in red which the version in the trial Bundles **[593]** has and some of the manuscript at the foot is illegible. The Plan at **MW 27]** *may* be simply a very poor photocopy with some blue colouring of the Plan at **[601]** but it is not placed in the same order. As in the Trial Bundles, none of the Plans have authenticating signatures. Mr Woody refers in Para 7 of his witness statement to what I assume was intended to be the same version as he now exhibits at **[MW7 – 62]** being "in a disaggregated form with the historic documents in the annexures separated out chronologically". He refers to being supplied with such by the solicitors acting for the Open Space Parties. I can

understand putting documents in chronological order and such was doubtless intended all round to assist the Court. But what has not helped anyone is that the annexures so disaggregated in the Trial Bundles are not identical either with what Mr. Woody now exhibits at **[MW7-62]** or with the annexures to the certified copy dated the 7th June 2017. The version now at **[MW 28]** has the additional words "Best 1949 Deed" [which now make sense reading the body of the 7th September 2009 Agreement] added in manuscript, which do not appear at **[28].** The draft 1970 licence now at **[MW 35]** is as in the Trial Bundle at **[85]** does not have the explanatory additional manuscript "Best 1970 Deed" which appears on the annexure to the certified copy dated the 7th June 2017. The Licence bearing the 1969 date now at **[MW 39]** is as in the Trial Bundle at **[72]** paged in order to fall in 1969. We now know from the certified copy dated the 7th June 2017 that this should bear the additional manuscript "Best 1970 Licence". Now at **[MW57 – 62]** is a copy of a draft unexecuted licence between LBTH and the Governing Body of Christ Church Primary School. It has in manuscript at **[MW57]** the words "New 2009 Interim Licence" and at **[MW61]** is a coloured plan. The version in the trial Bundles is at **[597-602]** and the Plan at **[601]**. The version in the Trial Bundles is *ex facie* a copy of a document executed by LBTH: see the photocopy of a seal at **[602]** and the insertion of the date of 7th September at **597]**. The Plan in the version in the Trial Bundles at **[601]** is uncoloured. In this instance the version annexed to the certified copy dated 7th June 2017 is of a draft only but has the most readable coloured version of the Plan, and although it bears the manuscript addition: "New 2009 Interim Licence", the layout of the writing is different from that at **[MW57]**.

Version [3] the copy certified dated 7th June 2017 and also now at **[MW 255 – 306]**

823. The certified copy dated the 7th June 2017 shows signatures of the Rector, and signatures on behalf of the Trustees of the Christchurch Gardens Youth and Community Centre and the Governing Body of Christchurch Primary School, but nothing by LBTH, which does suggest this is a copy of the part executed by the other parties and held by LBTH. Pages 1 to 16 of the Agreement are the same. Plans A & B are coloured and now readable. Plans A, B & C are authenticated by signatures. Whereas the version in the Trial Bundles at **[574-593]** refers in the text to various documents annexed thereto, which in the existing Bundles is not apparent, in contrast, the copy certified 7th June 2017 has its annexed documents with it and the Plans annexed are now authenticated by signatures. We have all seen all these before in some form or other, but that was not the same. Unlike the copies in the Bundles, in the annexed copies, it is made plain what is being annexed with additional descriptions added to the original in manuscript stating, for example: "Transcription of Best 1949 Deed". I referred in Para 136 above to a copy of the 1970 Licence not being before me, which was understandable as the document at **[72-77]** is dated 1969 and put in the Trial Bundle in order for a 1969 date, whereas it now appears annexed as entitled "Best 1970 Licence". The document at **[597 et seq.]** is annexed entitled "New 2009 Interim Licence" and the plan uncoloured at **[601]** is now coloured and readable.

Version [4] part executed by Trustees of the youth centre, produced now for the first time as [MW 199 – 252]

824. One *might* have assumed that apart from different signatures executing and authenticating the annexed Plans, this version would be identical to version [3] in every respect. There are differences which suggest careless conveyancing rather than anything material; see for examples, a portion of the "Best 1970 Licence" is duplicated – **[MW229-231]** repeated at **[MW235-237]** and the page order is varied.

825. This conveyancing history, the failure to preserve all the originals and its production for this litigation can hardly be described as felicitous. Who bears the responsibility for all that, I make no findings at this stage.

826. What is now apparent for the first time as a matter of admissible evidence, and I so find, is that the Agreement of 7th September 2009 was executed by the parties thereto and its terms are apparent and proven. We have in versions **[3]** and **[4]** copies of the same agreement in like material terms with authenticated annexures by 2 of the 3 parties thereto. We do not have an accurate copy of the part executed by LBTH, the original of which went to Dawson Cornwell and has not been found or produced, only defective copies apparently retained by LBTH, but it is reasonable to infer that LBTH executed the Agreement in the same terms as the other parties in all the circumstances. The conveyancing history has now gone from the realms of assertion by the parties to admissible evidence, upon which I can make conclusions.

827. The result is that it is now necessary to make findings about the Agreement of 7th September 2009 and its consequences and effects.

828. The Agreement of 7th September 2009 confronts the deficiencies in the conveyancing history and recites the various gaps. It makes various deeming provisions. Above all for present purposes, now we have coloured and signed annexed and authenticated copies of Plans A, B & C and the Plan to the "New 2009 Interim Licence", it is now clear that the Rector and LBTH have varied whatever was the plan to the previously supposed, now deemed, 1949 Deed **to exclude from the management of LBTH all the land now the site of the new building and school playground from the management of LBTH under the *Open Spaces Act* 1906**. A Faculty was issued in respect of this: **[572-573].**

829. This is achieved in a somewhat convoluted fashion thus. Among the parties to the Agreement of 7th September 2009 are both the Rector and LBTH. Among the material recitals are:

> By 8.3: "The Council wish to confirm for the avoidance of doubt that the New Playground Land was released from the Council's management control pursuant to the 1949 Deed with effect from the execution of the 1987 Licence."
>
> By 9.1: "Anomalous Land. When the playground area comprising the New Playground land was laid out and fenced in 1987 or thereabouts a further small triangular area of land was incorporated into the playground de facto…."
>
> By 9.5: "The Council now wish for the sake of good order and to reflect the reality of events to confirm the release of the Anomalous Land from the terms of the 1949 Management Agreement."
>
> By 13: "Contemporary Redesign of Gardens and playgrounds
>
> 13.1: The School the Council and the Rector wish to engage upon the project of redesigning the layout and structure of the gardens the school and school grounds to improve (i) the School's playground facilities (ii) the Gardens as a green space available to the public (iii) the security of the site to prevent or minimise anti-social behaviour in the Gardens and (iv) further provide for youth and community services."
>
> 13.2: "The School has agreed to take interim occupation of the buildings and gardens as shown within the area edged red on the licence plan marked Licence Plan 2009 also annexed hereto between the Rector and the School and to be responsible for

security, etc…" *[N.B. My emphasis added. This includes the New Playground Land, the Anomalous Land, the site of the new building and other land to the west being open space.]*.

By 15 "The parties are acting in accordance with a Faculty granted by the Consistory Court of the Diocese of London made on the 2nd day of September 2009"

The words of agreement are:

"NOW THE PARTIES AGREE as follows

IN CONSIDERATION OF THE MUTUAL PROMISES contained herein

THE RECTOR THE COUNCIL THE SCHOOL AND THE TRUSTEES HEREBY AGREE:

[A] that in the absence of the original or satisfactory copies of the executed 1946 *[sic]* Deed and the 1970 Licence … they treat the contents of the 1949 Deed the 1970 Licence the 1970 Deed of Agreement and the 1987 Licence Deed as annexed hereto described respectively as Best 1949 deed Best 1970 Deed of Agreement and Best 1970 Licence and Best 1987 Deed as binding until the date hereof" *[my emphasis added]* " as if the originals being the annexures marked (there being for the avoidance of doubt no plans thereto save in respect the 1987 Licence) AND treat the plans referred to as Plan A 2009 and Plan B 2009 annexed hereto as those that governed the previous" *[my emphasis added]* "obligations of the parties under the 1949 Deed the 1970 Deed of Agreement the 1970 Licence and the 1987 Licence as the case may be …

[B] that for the avoidance of doubt the parties have AGREED to deem:

[B][1] the area that was subject to the Council's management pursuant to the 1949 Deed to be that area on the plan marked B 2009 edged dark blue shown for the purposes of identification only

[B][2] the area that was removed from the management obligation in 1987 is that shown on the plan marked Plan B 2009 annexed hereto of the land coloured yellow (shown for the purposes of identification only together with the Anomalous Land (also shown for the purposes of identification only) hatched brown on Plan B 2009

[B3] that the area **now** managed" *[my emphasis added]* "by the Council under the Open Spaces Act 1906… pursuant to the 1949 Deed (and as formerly varied by the 1987 Licence) is (i) that shown hatched red on the plan entitled "Christ Church Gardens land to be added to Existing Public Open Space" marked "Plan C 2009" annexed hereto being part of that surrendered by the Trustee and the Association together with (ii) that currently so maintained as an open space shown hatched green also shown for the purposes of identification only on Plan C 2009 annexed hereto"…

The Rector and LBTH have **now** limited the operation of the management agreement under the *Open Spaces Act* 1906 to that land only, **which excludes the site of the new building and the playground.**

830. Among the significant consequences of the proving of the 7th September 2009 Agreement are:

[1] it remains unnecessary for me to make any finding as to the supposed existence of the 1949 Deed, or as to its terms, or as to the missing plan thereto, prior to the execution of 7th September 2009 Agreement, and, on the limited evidence, I decline to do so, when the parties to the 7th September 2009 Agreement, it is now established, therein themselves openly acknowledged "the absence of the original or satisfactory copies of the executed 1946 *[sic]* Deed and the 1970 Licence;

[2] in so far as any of the "metaphysical" missing conveyancing documents have any existence or legal force, such by the agreement of the parties is after and pursuant to the 7th September 2009 Agreement in the form of the deemed versions annexed thereto.

831. The 7th September 2009 Agreement, as Recital 15 records, was approved by faculty: see **[572-573]**. None of the Open Space Parties were parties' opponent to that faculty and no appeal could or did arise. That faculty stands *in rem* and is binding.

831. That disposes of any challenges along the lines of the Rector and LBTH were not entitled in law to agree to exclude from the operation of the management agreement under the *Open Spaces Act* 1906 the site of the new building and playground, or otherwise. Any submission along Mr Seymour's lines that the 1949 Deed has any continuing effect whatsoever over the site of the new building and playground must fail accordingly.

832. Mr Seymour in his further written submissions submits that the 7th September 2009 Agreement has to be read as a whole. Mr. Seymour submits that the operative provision **[B3]** in the Agreement has to be read together with the "New 2009 Interim Licence" annexed and envisaged, which was to be entered into by LBTH and the School and Mr. Seymour submits that LBTH in entering into such Licence were using powers available to it springing from the 1949 Deed and as manager of the open space to grant an Interim Licence to the School to use and

occupy the land for 25 years until 2034 subject to earlier surrender. The 7th September 2009 Agreement did not purport either (a) to release land from the scope of the 1949 Deed or (b) to transfer control and responsibility for its future management to the Rector.

833. The obstacles to the construction submitted to be correct by Mr. Seymour are these:

(1) in the operative words of the Agreement in **[A]** that the annexed versions of the 1946 [sic] Deed etc. be treated as binding until the date hereof and Plans A & B as annexed be treated as those that governed the previous obligations of the parties under the 1949 Deed the 1970 Deed of Agreement the 1970 Licence and the 1987 Licence as the case may be. Such language expressly refers to the past only.

(2) in the operative words of the Agreement in **[B]**, **[B1]** deems the past historic area of LBTH's management to that edged dark blue on Plan B 2009: that was subject to the Council's management pursuant to the 1949 Deed. The area referred to is now clear having the certified copy dated 7th June 2017 and includes the gardens to the west, the site of the new school, the playground and the triangle referred to as the anomalous land.

(3) in the operative words of the Agreement in **[B]**, **[B2]** the area **now** managed by the Council under the Open Spaces Act 1906… pursuant to the 1949 Deed (and as formerly varied by the 1987 Licence) is (i) that shown hatched red on the plan entitled "Christ Church Gardens land to be added to Existing Public Open Space" marked "Plan C 2009" annexed hereto being part of that surrendered by the Trustee and the Association together with (ii) that currently so maintained as an open space shown hatched green also shown for the purposes of identification only on Plan C 2009 annexed hereto. Again now having the certified copy dated the 7th June 2017, the area now managed by LBTH

includes the gardens to the west and the wilderness area just east of that, but not the site of the new building or the playground.

834. What the parties have agreed is thus to deem the past regime and define the new. There is no scope for reviving what went before unless according with the new.

835. But Mr. Seymour further submits: why if that be so is the New 2009 Interim Licence expressed to be between LBTH and the School and not the Rector? That he submits is inconsistent and indicates that the 1949 Deed still continues to bind the site of the new building and the playground. It is thus necessary to consider the terms of this in more detail.

Recital (5) provides:

"[the School] is preparing in consultation with [LBTH] and the Rector …. an application to obtain planning permission (together with the necessary other consents) to make alterations in the layout of that part of the Gardens that remain *[my emphasis added]* under the management of [LBTH] as set out in and pursuant to the Main Agreement and this Licence is made specifically in contemplation of such process and of a further Licence being granted on the achievement of successful planning consents and other necessary consents which the later Licence is intended to reflect the boundaries that will in future be agreed between [LBTH] and [the School] **and the specific requirements of the parties taking into account the nature of the new layout".**

Recital (6) provides:

"The Rector has consented to the grant of this Licence in the Main Agreement".

The operative words provide:

"1. In accordance with the provisions of the Faculty [LBTH] with the consent and approval of the Rector *[my emphasis added]* hereby grants licence to the [School] to use the land comprising part of the disused burial ground and buildings ('the Land') thereon shown edged red (for identification only) on the plan annexed hereto for the purposes [sic] a playground or play area (but not as a car park)….."

…

4. In the event of any differences arising in connection with the construction or effect of the provisions of this Licence such differences shall be referred to the Chancellor of the Diocese of London in the Consistory Court whose decision shall be final."

The key to construction of the New 2009 Interim Licence is the plan annexed which now from the certified copy dated 7th June 2017 we have in readable form. That plan shows edged in red part of the gardens to the west as well as the site of the new building and the playground. Recital (5) explains the parties and the Rector are envisaging alterations in that part of the gardens which remain, which is indicative that part of the gardens does not now remain. Further, Recital (5) is recording that the parties and Rector envisage future agreement to vary the boundary between the parcels of land involved. That future variation was then unknown and undefined. The Rector had consented as Recital (6) states and LBTH was a necessary party to the New Licence if consent was to be given for the School to use the part of the gardens to the west which remained subjected to LBTH's management. The New Licence further made provision regulating the use of all of the land for all concerned. I reject the submission that the terms of the New 2009 Interim Licence can displace the express wording of the operative words of the 7th September 2009 Agreement and, although yet again the drafting might have been more felicitous, it cannot support the weight of argument Mr. Seymour relies upon.

Also, no party has produced even a copy of the New 2009 Interim Licence as executed. It is yet another piece of "meta-physical conveyancing".

836. In deference to the submissions of Mr Seymour, notwithstanding that that is sufficient to dispose of his principal argument I shall say something about his other submissions made.

837. Mr. Seymour citing *Wandsworth LBC v Winder* [1985] A.C. 461 submitted that as the Building Parties were relying upon their own illegal actions, he was entitled to take public law points by way of defence. In principle, I do not dissent from that general point; whether and which and to what extent, any of the Building Parties were relying on their own illegal actions, and whether the public law points are material, and, if so, to what extent is another matter. *Wandsworth LBC v Winder [supra]* and its obverse, *O'Reilly v. Mackman* [1983] 2 A.C. 237, are procedural requirements following the introduction of *RSC Order* 53 and deal with the extent of the then new limitations on claiming public law remedies except by judicial review.

838. The Agreement of 7th September 2009 although in writing is not executed as a deed within Section 1 of the *Law Reform (Miscellaneous Provisions) Act* 1989. Mr. Seymour submitted that: " *A deed can only be varied by a deed. That is basic",* and LBTH had never been party to any **deed** *[my emphasis added]* taking that land out of its management **[T69].** Mr. Seymour's proposition is merely the demotic expression of the maxim of Lord Coke: "Nihil tam conveniens est naturali aequitati quam unumquodque dissolve eo ligamine quo ligatum est" [Coke, 2 *Institutes* 360]. See also Brooms' *Legal Maxims,* 9th ed. (1924) at 563. As long ago as 1899, Mr Seymour's current proposition was described by Wills J in *Steeds v Steeds* (1889) 22 QBD 537 at 539 as: "**a technicality absolutely devoid of any particle of merits or justice**, viz that a contract under seal cannot be got rid of except by performance or by a contract also under seal;

so that supposing it had really been the case that in satisfaction of an overdue bond for £1,000, the person liable had given property worth £2,000, which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his £1,000 without returning the property…". Lord Coke's maxim was the rule at law, but, since the *Judicature Acts,* equity now prevails, where the rule was and is different; see now Section 49(1) of the *Senior Courts Act* 1981. In the case of simple contracts, where no interest in land is transferred or involved, as is the case here, this proposition is no longer the law: see *Berry v Berry* [1929] 2 KB 316. The parties to a simple contract may discharge or vary or novate it in such fashion as they may agree. There are no formalities imposed by the *Open Spaces Act* 1906 for the creation of a management agreement thereunder or for discharging or varying a management agreement under Section 10. I reject Mr. Seymour's submission accordingly.

839. Mr. Seymour submitted that notwithstanding the 7th September 2009 Agreement, the Building Parties went back on it and asserted the continuing validity of the 1949 Deed for the defence under the 1967 Order, which I ruled against. The conduct of LBTH has indeed been extraordinary and inconsistent. In an email of 4th October 2012 **[1893-1694]** some years following the 7th September 2009 Agreement, LBTH asserted: ***"The site on which the [new building] is to be constructed is not however on public open space.",*** and, in a letter of 7th March 2013 **[1866]** to Mr. Buxton: ***"the land" [the open space land] … does not include the area of land where development is being carried out.".*** See also LBTH's reply to the Pre Action Protocol letter **[2034, at 2037]**. Those assertions I find to have been and are correct, but LBTH thereafter shortly did a complete *volte face*. This appears to have been the result of legal advice to LBTH at **[1996-2001]** in 2013 to the effect that Counsel had advised that "it ***was unlikely that it was open to the Parties to agree to release land from the trust created in 1949 in the way that the agreement attempted to do."*** See also at **[1996]:**

"*Whilst there is no case law on the point, Counsel's advice is that, on balance, that they do not think that the Council acting in its capacity as trustee of the public open space, were able to release land from the trust created under the 1906 Act…".* What such legal advice does not appear to have covered, or, at least is not apparent from the materials before me, was the position of the Rector and the fact that by the 7th September 2009 Agreement the Rector had restricted the area subject to open space with faculty approval.

840. After the 7th September 2009, for the Rector lawfully to re-impose a fresh burden on consecrated land, a further faculty was required, and none was sought and none granted authorising the re-imposition of the open space management arrangements on the land excluded therefrom by the 7th September 2009 Agreement.

841. The Rector did indeed subsequently throw in his lot with LBTH and joined in, asserting in these proceedings the failed 1967 Order defence which was predicated on all the land being currently subject to the open space arrangements. He was not entitled to do so. But there is no question in consistory courts of issue estoppel, and the parties even by their joint assertions or agreements cannot restrict or bind the exercise of the jurisdiction as Ordinary of this Court to protect consecrated land. Miss Morag Ellis QC referred me to the decision of the House of Lords in *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd.* [2002] UKHL 8, where Lord Hoffman said:

> "[33] In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury DC v Secretary of State for the Environment, Newbury DC v International Synthetic Rubber Co Ltd* [1980] 1 All ER 731 at 752, [1981] AC 578 at 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into 'the public law of planning control, which binds

everyone'. (See also Dyson J in *R v Leicester City Council, ex p Powergen UK Ltd* [1999] 4 PLR 91 at 100.)

[34] There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power (see *R v North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health intervening)* [2000] 3 All ER 850, [2001] QB 213). But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the *Human Rights Act* 1998..."

Faculty decisions bind *in rem* and the same principles apply.

842. Although it is not necessary to do so, for completeness and in response to Mr. Seymour's submissions, I add the following. My decision is as above: the Rector was himself entitled to terminate by right of his freehold in the land. The 1906 Act trust never bit upon his freehold. That is no longer material, as we now know the Rector terminated the open space arrangements over the site of the school and playground by the 7th September 2009 Agreement and that was authorised by faculty. Nevertheless, I heard further submissions on the cases cited above as to the Rector's powers arising from his freehold, and I was also referred to *Re consecrated land in Camomile Street* [1990] 3 AER 229, a decision of Chancellor GH Newsom QC. In the context of a decision as to the destination of large capital proceeds arising from the granting of facilities over consecrated land, he said at 233:

"… The life interest in a consecrated burial ground is held by the incumbent for the burial of the parishioners; but in this case fresh burials have long been prohibited. No doubt, if the place had grass useful to sheep the incumbent would be entitled to any grazing rents, and if the burial ground were to be open for burials there would theoretically be a benefit to the incumbent from burial fees. But that is academic nowadays because such rents and fees are

> deducted from the incumbent's diocesan minimum stipend. In the past both these sorts of benefit must sometimes have been of value; but that is no longer the case. In reality both consecrated and unconsecrated land and chattels are parish property held for the benefit of the parish church and its congregation."

And at 236:

> "It is argued that the money issues out of the land and that the land belongs to the incumbent: so the money should go to him. I do not think that the former proposition is right. For the consecrated status of the land puts it under the jurisdiction of the court and the money in court stems from the exercise by the court of its own jurisdiction when it grants the faculty. In the case of land the action of the court does not depend on the consent of the incumbent: see *Re St Andrew's, North Weald Bassett* [1987] 1 WLR 1503 at 1507. Again, **'The final control of the church and chancel and of the churchyard is vested in the chancellor, as ordinary for this purpose':** per the Chancellor, Dr Tristram QC, in *St Botolph without Aldgate (vicar and one of the churchwardens) v Parishioners* [1892] P 161 at 167. This pronouncement of Dr Tristram is in any event binding on me, sitting in the same court as that in which it was uttered. But I follow it without hesitation in view of the great respect in which Dr Tristram's authority is held."

My emphasis is added.

That case is a decision on the distribution of capital receipts which is a very different matter. The Chancellor's observation: "In reality both consecrated and unconsecrated land and chattels are parish property held for the benefit of the parish church and its congregation" is to be read in that context, and, in any event was *obiter*: the Chancellor, in the event, notwithstanding his own observation, diverted some of the capital proceeds to the diocese and a neighbouring parish.

843. Mr. Seymour also further submitted that my discretion had to be exercised to uphold the open space and that there was no power to grant a faculty in face of an on-going and continuing breach of statute. I now find there cannot be such, as the Agreement of 7th September 2009 terminated the open space management arrangements with faculty approval. In support of the first proposition he returned to *Re St Luke's, Chelsea* [1976] Fam. 295, but in that case the Rector had transferred his freehold to the local authority. It was held that there was no jurisdiction to grant a faculty for a monument having the character of a building in a consecrated

disused burial ground because of Section 3 of the *Disused Burial Grounds Act* 1884. Chancellor GH Newsom QC also stated *obiter* at 318: "For these reasons, if I had held that I had power to grant the petition, I should in the exercise of my discretion have refused it. The petition is therefore dismissed." That case is on this second point only an example of the exercise of the Court's discretion on particular facts. I accept, of course, that the public open space element must be a factor to be taken into consideration when the Court's discretion is being exercised. I did and do take that factor into consideration, together with the other matters I have referred to earlier in this judgment. It is not authority which establishes a general rule that the discretion must be exercised in a certain way, as submitted. For his second proposition he referred again to *In re West Norwood Cemetery* [1994] P 210 for the uncontentious proposition that a confirmatory faculty cannot authorise an on-going and continuing breach of statute, but, contrary to what was submitted, that is not the case here.

844. The Open Space parties directed their fire on the issue of illegality against LBTH, but any such illegality by LBTH was not the effective cause of the termination of the open space arrangements over the site of the new building and the playground. The effective cause of that was the Rector, but his action was authorised by faculty. I agree that illegalities by LBTH are part of the considerations I have to bear in mind when exercising my discretion, and I have done so; see especially, Paragraph 801 hereinabove, and also of the Rector and Churchwardens; see especially paragraph 798 hereinabove.

845. For the sake of completeness I should add that I have been told that subsequently to the hearing on the 6th June 2017, the Rector has now terminated the open space management arrangements with LBTH over such parts of the churchyard still subject thereto. I have only heard some evidence as to the western portion, which was not the subject of these proceedings. The site of the new building and the playground was, and I confine my determination to those areas.

846. If it had been necessary for me to determine whether I should now determine in respect of the area of the new building and the playground, the operation of the open space management arrangements, which in view of the termination thereof in the Agreement of 7th September 2009 is academic, in the exercise of my discretion and in the exercise of my jurisdiction to protect consecrated land, I would have done so for like reasons as set out hereinabove. The open space management arrangements had failed for many years and were failing.

847. The parties' disagreements as to the wording of the consequent order have been rendered more complex by conflicting desires to include on the face of the order various of the findings and rulings contained in this Judgment, even when no relief or order is consequent thereupon. It is the function of the Judgment to set out my findings, reasoning and rulings. It is the function of the order to contain what the court has as a result ordered. It is not the function of the order to headline some of the findings and reasoning.

[848. The incomplete Order; see now as completed below]

849. The Plan to be annexed will follow the Agreement of 7th September 2009. The parties were invited to submit a suitable draft in an appropriate scale, which should be ample enough to show a clear and defined line. I annex hereto as part of the order the plan now eventually submitted and at last agreed among the represented parties as consistent with this Judgment..

850. Any applications for costs or otherwise to clarify the order shall be indicated within 21 days after handing down. Any party making any such application or contesting any such sought shall further indicate whether it desires to limit the same to writing or whether an oral hearing is requested within 7 days thereafter.

851. This Judgment, incorporating the Judgment handed down earlier and the Supplementary Judgment, and the consequent Order including the Plan are to be displayed on the web site in full of Christ Church Spitalfields for 3 months and hard copies for the same period to be displayed and available in the church. The Judgment handed down earlier shall be removed from thre website and the church and this Judgment be in its place. I direct that a letter or an e-mail where an e-mail address is known, be sent to every party, witness, and person who has made representations or written in, notifying them of the Christ Church Spitalfields' web-site address and that this full final Judgment is displayed there and will be for 3 months. I request it be displayed also on the Diocesan website.

22nd November 2017

Chancellor June Rodgers,

sitting as a Deputy Chancellor of the Diocese of London

852. I invited the parties to make any further submissions on costs as so advised and to indicate whether an oral hearing was requested. I received no request for such. I summarise the writtem submissions as follows.

853. The Open Space Parties through their Solicitor by email of Mr. Buxton to the Registrar wrote:

> "…. to confirm that we have no submissions as to costs in addition to those already made (in summary that we agree the indication at paragraph 809 of the judgment that each party should bear its own costs, but that the costs of the hearing, which would be payable by the Building Parties, *[my emphasis added]* should include the costs of the transcript)."

The Building Parties through their Solicitor, Mr. Carew-Jones by email to the Registrar wrote:

> "… The Building Parties did not agree to contribute to the costs of a transcript, taking the view it was an unnecessary cost. Mr Buxton nevertheless commissioned a transcript. This may have been of assistance to the Court but we do not believe it should be considered as a Court cost or at least that the Building Parties should meet that cost, or a proportion thereof."

854. On the second day of the main hearing, Mr. Seymour stated [**2/T 144 at 18]:**

> "… The position is that we have had … the transcripts not by agreement in the sense that we have agreed them with the other side. We have produced them and discussed it. We have made them available….I have made it available to Mr. Mynors this morning. The intention is that a transcript should be available every day for all parties…."

And, indeed, throughout the hearings transcripts were available to all the parties and to myself. I am bound to say that the transcripts have been invaluable to myself and have shortened my task considerably. I do not agree that the costs of the transcripts was in any sense an unnecessary cost; indeed, quite to the contrary.

855. In the events that have happened, I order that the costs of the transcripts, to be assessed if not agreed, be paid as to one half by the Building Parties divided amongst themselves as the Order for the hearing, and one half by the Open Space Parties.

856. The Order thus will be in this form after the heading:

"UPON the hearing on 13, 14, 15, 16 and 17, 23 and 24 June, and 18 19 and 20 July 2016, and 6 June 2017, of the Petition of **THE RECTOR AND CHURCHWARDENS OF CHRIST CHURCH SPITALFIELDS** dated 13 October 2015 for a Confirmatory Faculty and upon the application for a Restoration Order made by **SPITALFIELDS**

OPEN SPACE and **MS CHRISTINE WHAITE and others** dated 21 August 2014 ("the Open Space Parties") against the Respondents thereto ("the Building Parties") , both in respect of the New Building erected in the churchyard of **CHRIST CHURCH SPITALFIELDS**

AND UPON hearing Counsel for the Open Space Parties and Counsel for the Building Parties

AND UPON hearing representations from parties opponent and from objectors

THE COURT ORDERS as follows:

1. A Confirmatory Faculty is granted to the Rector and Churchwardens as prayed to retain the New Building in the churchyard of Christ Church Spitalfields.

2. The application for a Restoration Order is dismissed.

3. It is declared that the area set out on the Plan annexed hereto has ceased to be subject to any arrangements for management by the London Borough of Tower Hamlets under the *Open Spaces Act* 1906 or otherwise.

4. A faculty is granted authorising the use and occupation of the New Building and the site thereof as set out on the said Plan annexed hereto by Christ Church Church of England Primary

School without limit of time. The detailed terms of such use and occupation as may be agreed between the Rector and the School shall be recorded in a memorandum of understanding to be submitted within 3 months hereof for approval or variation by the Chancellor of the Diocese of London as he shall see fit.

5. There be no order of costs inter partes. The Building Parties do pay the costs of the hearing to be divided into 3 equal parts: namely, [1] the Rector, Churchwardens and Governing Body of the School; [2] LDBS; and [3] LBTH.

6. Save that further, the costs of the transcripts, to be assessed if not agreed, be paid as to one half by the Building Parties divided amongst themselves as the Order for the hearing, and one half by the Open Space Parties.

857. In place of the earlier publication of this Judgment in 2 stages, which shall now be removed from the web-sites referred to, the provisions for the publication of the complete Judgment and Order set out in Para 851 shall now refer to and apply to this complete Judgment. Thus, this complete Judgment consisting of all three stages in which it has been handed down, and the Order including the Plan attached to the Order are to be displayed on the web site in full of Christ Church Spitalfields for 3 months and hard copies for the same period to be displayed and available in the church. I direct that a letter or an e-mail where an e-mail address is known, be sent to every party, witness, and person who has made representations or written in, notifying them of the Christ Church Spitalfields' web-site address and that this full Judgment plus the Order and Plan attached to the Order is displayed there and will be for 3 months. I request it be displayed also in the complete form plus Order and attached Plan on the Diocesan website.

858. This Judgment and Order shall take effect from the date of handing down below.

859. In respect of the 21 day time limit for any applications under Rule 23.1 of the *Faculty Jurisdiction Rules* 2015, as requested, in view of the Christmas holiday and Mr. Seymour's professional commitments overseas, I extend it to 4 pm, 4th February 2018.

17th December 2017

Chancellor June Rodgers

Sitting as a Deputy Chancellor of the Diocese of London