

Neutral Citation Number: [2024] ECC Lon 2

IN THE MATTER OF CHRIST CHURCH, SPITALFIELDS

-and-

IN THE MATTER OF FACULTY 3736

FOR THE RECTOR AND PAROCHIAL CHURCH COUNCIL (“PCC”) TO ENTER INTO A MANAGEMENT AGREEMENT WITH THE LONDON BOROUGH OF TOWER HAMLETS (“TOWER HAMLETS”) UNDER SECTION 6 OF THE OPEN SPACES ACT 1906 RELATING TO MAINTENANCE OF THE CHURCHYARD AS PUBLIC OPEN SPACE

-and-

IN THE MATTER OF THE FURTHER AMENDED AND OPPOSED PETITION OF (1) THE REVEREND DARREN WOLF, RECTOR (2) PCC OF CHRIST CHURCH, SPITALFIELDS, (3) TOWER HAMLETS AND (4) THE GOVERNING BODY OF CHRIST CHURCH PRIMARY SCHOOL (“THE SCHOOL”) (PETITIONERS) AND SPITALFIELDS OPEN SPACES (“SOS”) & OTHERS (PARTIES OPPONENT)

**Judgment of the Chancellor
March 7, 2024**

Etherington Ch:

1. The Petitioners seek faculty permission to enter into a new management agreement under Section 6 of the Open Spaces Act 1906 with the London Borough of Tower Hamlets (“Tower Hamlets”) in respect of part of the closed churchyard of Christ Church Spitalfields which they have identified on a plan marked Areas A, B and C.
2. The original petition was dated December 2019 and was updated by an amended petition and management agreement in early 2022. It sought also to include areas D and E (the current playground of Christ Church [Church of England] Primary School – “the School” - and its curtilage) with a provision for Tower Hamlets to license them back to the School.
3. For the sake of completeness, there are two further areas identified on the plan as F and G which are G, the (legally) controversial Garden Building which has been ordered to be demolished by the Court of Arches by 2029, and F, its curtilage. When the Garden Building is demolished, it is proposed to join areas F and G to areas A, B and C. I am going to take the unusual step (in a judgment) of annexing the plan submitted by the Petitioners in 2019 to assist comprehension. It is the area map B316 in the Digital Bundle.

4. From left to right it shows in green area A and in blue area B. These are what to the eye appear at the moment (and without prejudice to anyone's submissions on what they should be) to be gardens. Above areas A, B, G, F, D and E lies area C (coloured in yellow). This is presently, at least to my eye at the viewing last year, an enclosed area that has no appearance of a garden, or part of a garden, as yet. Area G (not coloured) is the Garden Building, referred to sometimes as the New Building or the Nursery School. Area F, coloured both blue in one small section and brown in the main, is the curtilage of the Garden Building. Area D is what I consider to be the curtilage of the area known as the Tennis Court or School Playground which sits on the plan above area E, coloured pink, which is the playground or tennis court itself. To the right on the plan lies some space (not the subject of these proceedings) and the School itself. These proposals will not, in my judgment, affect the architectural or historical significance of the church (a Grade I listed Hawksmoor masterpiece).
5. If area E is used as the School's playground, open access to area D (its curtilage) would raise safeguarding issues during the School's terms.
6. The Petitioners now also seek to amend further their petition by withdrawing areas D and E from it and further amending the proposed management agreement between the Rector and Tower Hamlets.
7. The Schedule of Works and Proposals originally described what was being sought in this way: *For the Rector and PCC to enter into a management agreement with the London Borough of Tower Hamlets under section 6 of the Open Spaces Act 1906 relating to maintaining part of the churchyard as public open spaces, with provision for the London Borough of Tower Hamlets to licence back part of the land which is subject to a management agreement to the Governing Body of Christ Church Primary School as a playground for the School (being the School's current playground) the management agreement and licence to be substantially in the form submitted for approval by the Court.*
8. It may be helpful to note at this point sections of the Undertakings that were given to, and accepted by, the Court of Arches earlier in 2019: *Spitalfields Open Space Limited v. The Governing Body of Christ Church Primary School and Others* (No. 2) [Neutral Citation Number [2019] EACC 1]. The Court of Arches said at paragraph 127: "The first undertaking is to make areas A - C available for access to the public... the second undertaking is to make funding available for the garden work to Areas B and C... the first undertaking also states that the Rector and PCC would within the next year enter into a new management agreement under the Open Spaces Act 1906 with Tower Hamlets, covering areas A, B and C, subject to the grant of a faculty on completion of the landscaping work to areas B and C." This also forms part of the second undertaking. The detailed implementation was left to the chancellor of this court. There has been a considerable slippage of time in that implementation due to (a) Covid (b) efforts to reach agreement between the Petitioners and interested parties and (c) the proceedings necessarily involved between the Petitioners and the Parties Opponent as a result of failure to reach that agreement.

9. Paragraph 129 of the Court of Arches' judgment rehearsed the First Undertaking in respect of areas D and E in this way: "The first undertaking provides that, whilst there would be no general public access to Areas D and E, Area E would continue to be available for playing tennis out of school hours during term time and all day during the school holidays, through a booking system managed by the Church Office with access via Area D (with no separate use of Area D save for this access). Additionally, the public would henceforth be permitted by arrangement with the Church Office to view the church from areas D and E during the same hours as Area E could be used for tennis, and access to Area E would also be available for this purpose on two advertised open days each year."
10. In the Statement of Need the Petitioners said at paragraph 1: *...The School is situated at the east end of the churchyard and the main site of the School is not the subject of this petition; those parts of the current playground of the School marked D and E on the attached plan are, however, the subject of the proposed management agreement... together with the areas marked A, B and C.* In contrasting the position with the Undertakings given to the Court of Arches (which did not include areas D and E) the Statement of Need said at paragraph 8 that *the current petition, however, is being made in respect of areas D and E as well and is being made prior to the landscaping works for areas B and C.*
11. The rationale for this proposal was stated in paragraph 9: *The extension to include areas D and E follows discussion with the Advisory Group and Spitalfields Open Spaces and representations by them that areas D and E were historically part of the open space (within the original management agreement dated 1949) which is accepted by the Petitioners. The Court of Arches had accepted that the scope of the new management agreement should exclude areas D and E... but the Petitioners are content to accept that these areas should be included, subject to there being a licence back from LBTH to the School. As the Petitioners understand the position advanced by SOS, their concern is not to prevent the use of areas D and E by the School but rather to ensure that the land is returned to open space in the event that the School closes. The proposed licence therefore includes a provision that the licence will expire if the land ceases to be used by the School, at which point the land would return to open space under the management of LBTH on the same terms as the open space to the west of the Garden Building. Until such time, the Governing Body has undertaken at paragraphs 7 to 10 of the First Undertaking to provide limited access as set out in this paragraph: this will continue.*
12. It is clear that the purpose put forward by the Petitioners for including areas D and E in the petition was primarily to give comfort to SOS and others as to what would happen if the land ceased to be used by the School. In my judgment, whilst the School was using areas D and E, limited access by the public would be inevitable, whether the land was an open space or not. The other matter made clear in the Statement of Need was that the proposal put forward by the Petitioners was conditional upon the management of the area being by the School in a licence back arrangement. There is the clearest need for proper management of areas A, B and C because of the unfortunate general history of the churchyard described graphically in a previous judgment of Rogers Ch

sitting as an appointed Deputy of this court: *In the Matter of a Building in the Churchyard of Christ Church Spitalfields & In the Matter of an Application for a Restoration Order and a Petition for a Confirmatory Faculty* Neutral Citation No [2017] ECC LON 1.

13. In the proposed management agreement of 2019 at INTRODUCTION paragraph (D) it is stated that: "Part of the churchyard that will be open space is currently occupied by Christ Church Church of England Primary School (the "School") as playground and this will be licensed back to the Governing Body of the School for such time as the School remains open as a publicly funded school conducted under the Education Acts."
14. In the recital which follows, at clause 11 it is stated: "That part of the Churchyard marked D and E on the Plan which currently forms part of the School playground shall be licensed back by the Rector and the Council to the Governing Body of the School from the date of this Agreement but subject to the terms of clause 12 of this Agreement on the terms of the Licence attached at the Schedule to this Agreement to be used as a playground and ancillary uses for the School and for such community use as the Rector and the Governing Body of the School may agree from time to time."
15. Clause 12 states: "In the event that the School which occupies the east end of the Churchyard closes as a publicly funded school conducted under the Education Acts (whether as a maintained school as an academy or as any other category of publicly funded school) the land edged marked D and E on the Plan which currently forms part of the playground of the School shall be incorporated into and shall form part of the Open Space so that the care management and control of the said land shall be undertaken by the Council on the terms of this Agreement and here shall be unhindered public access to it."
16. The proposed licence between Tower Hamlets and the School reflected the above.
17. There were objections to the faculty petition by, inter alia, SOS which in due course took all the Parties Opponent under its umbrella.
18. After service of the petition there was a period of time in which the Registry was informed that the Petitioners and the (now) Parties Opponent were seeking to reach an agreed position with regard to the faculty petition. I became chancellor of this diocese during that period. It became clear that any hopes entertained by them that consensus might prevail were doomed to disappointment. An explanation of this was provided by the Petitioners in a note to the court with which contents the Parties Opponent may or may not agree.
19. On February 18, 2022 the Petitioners served an amended petition with an amended management agreement. The Parties Opponent objected to the amended petition and argued that a fresh petition should be served. The amendments were primarily of an updating nature. In the agreement, a new clause to the deed as amended was added, INTRODUCTION (E) which states "By a Restoration Order made by the Court of Arches dated March 25, 2019

the building currently standing on the part of the Churchyard and marked G (the "Garden Building") is to be demolished on or before 1 February 2029 (the "Restoration Date") after which the land marked G and its curtilage marked F will become incorporated and form part of the open space of which the Council shall undertake the care management and control under the terms of this Agreement". At clause 15 the deed, as amended, states that "The Powers of care management and control conferred on the Council by this Agreement shall replace those powers conferred in respect of the Churchyard by any prior agreements including in particular those management agreements dated June 5, 1949 and September 4, 2014 which it is acknowledged by the parties have been terminated and are no longer subsisting or of any effect." The amended management agreement reflected the amendments proposed to the Deed.

20. I did not require a fresh petition to be served.
21. The Parties Opponent have at various stages objected to the mechanism proposed by the Petitioners, namely Tower Hamlets licensing back areas D and E to the School.
22. In my Second Directions of March 29, 2022, I made clear that the final form of the management agreement would be determined as part of the determination of the amended petition as a whole. I had not concluded that these amendments made such a fundamental difference to the petition or the management agreement so as to require a fresh petition.
23. It was considered appropriate by both the Petitioners and the Parties Opponent (and indeed the court) that I should consider first in a preliminary legal judgment (*In the matter of Christ Church Spitalfields and in the matter of Faculty 3736 – Judgment on Preliminary Issues*: Neutral Citation No [2024] ECC LON 2) the question of whether the court had the jurisdiction to decide (and, in particular, grant) the petition sought by the Petitioners (a proposition that was disputed by the Parties Opponent) and also the status of the 1949 Deed in light of the faculty of 2009 where again the parties did not agree.
24. In the preliminary legal judgment I ruled that the court did have the jurisdiction to decide the petition and that I must follow the ruling of Rogers Ch in respect of the status of both the 1949 Deed and the 2009 faculty and management agreement following the hearing to decide by her whether a Restoration Order should issue for the demolition of the Garden Building and other associated matters and upon which an application for permission to appeal by the Parties Opponent had been refused by the Dean of Arches on the ground that it had no real prospect of success. There were other grounds of appeal on other matters which did succeed.
25. In the course of submissions pertinent to my preliminary legal ruling, the proposals in the amended faculty petition and management agreement in respect of areas D and E were the subject of objection and criticism by the Parties Opponent. The focus of these seemed to me to be that if areas D and E were within the open space governed by the Open Spaces Act 1906 then there would be an argument that Tower Hamlets would lack the necessary

interest in land to license back those areas to the School. Having considered the matter at length, I too entertained doubts about the lawfulness of such a transfer which I set out in the preliminary legal judgment at paragraph TT, iii (i) – (v) and TT iv – vii, pages 57 and 58.

26. I did not make any ruling as to whether the transfer proposed would or would not be lawful but the Petitioners have reflected on the point and now seek to remove that part of their amended petition and also to amend by way of further amendment the proposed management agreement to withdraw areas D and E from both. The proposed licence to the School falls away as a consequence.
27. Following my determination of the preliminary legal issues and their consideration of my remarks, the Petitioners and the Parties Opponent agreed in writing on September 27, 2023 that the Petitioners would be required to lodge at court and serve on the Parties Opponent an amended management agreement by October 20, 2023 and the Parties Opponent would draft detailed objections to, or representations on, the amended draft management agreement by November 3, 2023. I allowed some additional time (up to 14 days) for the Parties Opponent to serve their objections provided they gave written notice that they wished to avail themselves of the additional time. The Petitioners were given 21 days from receipt to respond to any objections if they wished. It was then agreed by the parties that I would determine the petition on consideration of all the relevant material before the court and give final written judgment.
28. The Petitioners (with permission) served their further amended management agreement on October 27, 2023. The Parties Opponent (with permission) responded on November 24, 2023. The Petitioners responded to the objections on December 15, 2023. The Parties Opponent sought to make further submissions, which application I allowed, and these were completed on December 22, 2023. The Petitioners gave a permitted final response on January 26, 2024.
29. The further amended management agreement removed from the original “INTRODUCTION (D)” the section which stated that: “part of the churchyard which will be open space is currently occupied by Christ Church of England Primary School (the “School”) as playground and this will be licensed back to the Governing Body of the School for such time as the School remains open as a publicly funded school conducted under the Education Acts.” That refers to areas D and E for the purposes of the Petitioners’ plans of the churchyard and the further amendment makes it clear that those areas will now fall outside of the proposed further amended management agreement.
30. The Parties Opponent object to the application by the Petitioners to further amend the petition by removing reference to areas D and E from the proposals. They submit that there should be a fresh petition or, if the court refuses that request, public notice of the further amended petition and further amended management agreement. They object to the grant of the faculty and the further amended management agreement, and they have asked me to consider some corrections to my preliminary legal judgment and, if I agree with them, to

consider whether it would have altered my preliminary legal ruling. I have considered those proposed corrections with which I will deal at the concluding part of this judgment and, indeed, I intend to correct certain errors that I missed during the proof-reading of the preliminary judgment, but which do not affect the sense of what is written.

The Application to Further Amend

31. The Parties Opponent in their submissions of November 24, 2023 make two preliminary points. First, they say that the removal of areas D and E from the petition is a fundamental change such that I should not permit an amendment to allow it or, in the alternative, I should allow a further period of public notice. They say that hitherto the petition had concerned the continued use of the churchyard as public open space whilst looking to address the closure or restriction of access to areas of historically open space and that it was thus dealing with areas A to C, whilst establishing a mechanism for dealing with areas D and E. The Parties Opponent say that I should be mindful of the fact when considering the issue of further public notice that I had ordered this when dealing with the previous amendments.
32. The Petitioners in response (December 15, 2023) to the preliminary submissions say that as early as February 18, 2022 in a note to the court they had mooted the possibility of excluding areas D and E from the scope of the management agreement and had reiterated the same in another response to the court dated June 22, 2022. The Petitioners also point out they had taken notice of my concern in doubts that I had expressed in my preliminary legal judgment about the licensing back mechanism in which I had suggested that they should consider amending the petition to remove that element of it if they shared the court's concerns.
33. The Petitioners say that the proposed amendments are not fundamental. They posit as an appropriate circumstance to deny an amendment and order a fresh petition one where the amendment proposed is such that that a person would reasonably conclude that they were completely different to what had been proposed and might, for this reason, wish to object in light of the proposed amendment when they had no objection to the original proposals. The Petitioners contend that the further amendments reduce the scope of the petition and it is not realistically possible to postulate the existence of a person who might object to the further amended petition on this basis. The Petitioners say that the position of a person who might wish to object could be protected by requiring the petition to be re-advertised, but suggest that this may not be necessary.
34. In response to the Petitioners' submissions the Parties Opponent (on December 22, 2023) repeated their contention that the Petitioners had previously envisaged a mechanism to return areas D and E to open space and that these amendments do represent a fundamental change. They say that there may be those who saw no reason to object to the petition and amended petition because there was a mechanism (provision) for returning areas D and

E to open space which is no longer included. The Petitioners had no further response on this issue.

The Decisions in respect of Amendment and Publicity

Amendment

35. The Petitioners are permitted to amend further their proposals as requested. The Petitioners had never hidden the possibility that they might withdraw their proposals in respect of Areas D and E. In their note to the court of February 18, 2022 (accompanying the amended petition, licence to occupy and management agreement) they say in terms: *If, however, this Court is not content to approve the Licence to Occupy for the School, the Petitioners request that the Licence be withdrawn and the Management Agreement be amended accordingly so that areas D and E are excluded from the Agreement...* There were objections from the Parties Opponent to the proposed arrangements in respect of areas D and E and, second, the very fact signalled by the Petitioners as being a potential obstacle to the inclusion of areas D and E in their proposals (the court not being content to approve the licence) was indicated by me to be a real possibility in the preliminary legal judgment.

36. I do not consider the amendment to be fundamental. The main part of the petition concerns areas A, B and C. Areas D and E, even in the proposals, were subject to restricted access. After the Parties Opponent's short submissions of December 15, 2023, I asked the Petitioners, for my information, whether arrangements will be in place for the public to have use of areas D-G when they are not being used by the School and, if so, on what terms. The reply by the Petitioners included this information: in respect of areas D - E, I was told that the parish had been in touch with The Spitalfields Society. It is apparently the only local organisation that has expressed any interest in using area E for tennis. Arrangements have been agreed whereby committee members will organise booking and access for any members who wish to use the area out of school hours. No requests have been received by the parish to view the church from areas D or E which were actioned at the time. There was a Bonfire Night event where access was possible to all of areas D - G and thus gave an opportunity to view the church from that vantage. I need not rehearse what the Petitioners said specifically in respect of areas G and F, but I was interested in and grateful for that information too.

37. I have considered carefully the Parties Opponent's view that the removal of Areas D and E from the further amended management agreement is of key concern to them as it leaves the issue of what is to happen with areas D and E unresolved. The consistory court's jurisdiction is the faculty jurisdiction. A faculty is a permissive right generally speaking to alter a church building, its contents or its immediate surroundings. I cannot compel the Petitioners to petition for something that they do not now wish to be granted.

38. If there is any argument to be made that the Petitioners should not be allowed to have the petition granted in respect of areas A, B and C if areas D and E are

not also incorporated within the proposal then that will be dealt with through the submissions of the Parties Opponent or of my own motion.

Public Notice

39. I have considered the question of public notice carefully. When the Petitioners sought to amend the petition in 2022, I did indeed order an additional period of 28 days public notice. This was primarily because the progress of the petition had been halted for a considerable period of time whilst the parties sought to achieve agreement. I took into account also that it was a contested petition.
40. In respect of the need for additional public notice for this further amended petition and agreement, I judge the situation to be different for a number of reasons. The petition is now at a much more advanced and final stage. The preliminary legal arguments have been determined in my first judgment. The amendment is to withdraw the proposed licence and clauses of the amended management agreement that relate to areas D and E. The proposals to incorporate areas D and E to the petition were conditional upon the proposed licensing back to the School in the way that the Petitioners had specified. As well as the Parties Opponent's opposition to the proposals (including those affecting areas D and E) on a number of grounds prior to the preliminary legal judgment, I also entertained doubts about the chosen method's lawfulness. The Petitioners now seek to withdraw this part of the proposal. I am not able to conceive realistically of a situation in which (a) a new Objector will now wish to raise an objection to areas D and E being withdrawn from the proposals or (b) that in the unlikely event any relevant objection from a new Objector did arise, it would not be being advanced already by the Parties Opponent who have the benefit of representation by counsel and have already advanced a variety of objections on many issues in respect of the proposals in general and have made submissions in writing on the merits of the present application to further amend.

The Issues in Respect of the Further Amended Petition

41. I now turn to the central question as to whether I should grant the faculty sought in respect of areas A, B and C.
42. The Parties Opponent object to my so doing and object to the further amended management agreement proposed by the Petitioners on October 27, 2023. The Parties Opponent wish me, in considering these, to remind myself of and act upon its objections in respect of the original management agreement as well as its subsequent submissions.
43. At the outset, it is important to realise that the court itself does not draft management agreements or act as a legal adviser to the contracting parties. It expects the contracting parties to have taken appropriate and independent legal advice. The court approves management agreements that are in draft

form, but these must be finalised substantially in the form that has been seen and approved by the court. The detailed drafting is for the contracting parties.

44. The preliminary legal judgment of late July 2023 arose in this way: at the time of the Second Directions I had made it clear that once Public Notice was completed, the next stage would be to find a date for a Directions' Hearing, as I had thought at that stage that the petition was going to be determined at a full oral hearing which would deal with all aspects of the case.
45. The proceedings, however, took a different turn. In the Third Directions of May 30, 2022, I noted that both the Petitioners and the Parties Opponent had agreed that I should consider and rule on some preliminary points of law. This had occurred to me as a sensible way forward. Following my initial directions (within the Third Directions) and with the assistance of the parties, the questions for me to determine as preliminary issues related to whether the court had the jurisdiction to grant the amended faculty petition at all and questions relating to the subsistence or otherwise of a statutory trust of 1949 relating to the churchyard. I approved further directions to enable this to take place.
46. I concluded in that judgment that this court did have the jurisdiction to grant the 2019 faculty as amended and that the status of the 1949 deed as against the 2009 faculty and management agreement had already been litigated before Rogers Ch sitting as a Deputy of the Consistory Court for London (preliminary legal judgment paragraph PP viii-xiv) who made an Order that a confirmatory faculty should be granted (subsequently quashed by the Court of Arches) that the application for a Restoration Order would be dismissed (a decision subsequently quashed by the Court of Arches), that a faculty should issue authorising the use and occupation of the "new building" (subsequently quashed by the Court of Arches) and declared by Order that the area set out on the plan annexed to her judgment had ceased to be subject to any arrangements for management by Tower Hamlets under the Open Spaces Act 1906 or otherwise (not disturbed by the Court of Arches).
47. I dealt with this issue at paragraph QQ i-xviii of the preliminary judgment. The Court of Arches had refused to consider further argument on the issue of the Deputy's Order which still stood because permission to appeal it had not been granted and thus it lay outside of the relatively narrow ambit of the appeal on the grounds for which permission had been given. The reason that permission to appeal had not been granted in respect of the Deputy's Order which still stood was because the Court of Arches considered that such a ground of appeal had no real prospect of succeeding.
48. The Court of Arches said further (paragraph 134) in their judgment of January 28, 2019 on the question of areas D and E that: "we understand the reluctance of the Respondents to make available for general public access Areas D and E, to the east of the Nursery, which are very much part of the present curtilage of the School, whether or not the Nursery remains in position. As pointed out in a letter from the Respondents' solicitor, the Deputy held [830-843] that the land on which the Nursery stands and the land to the east (Areas D and E) were excluded from the 1949 Management Agreement by the 2009 Management

Agreement and therefore no public rights have existed there since 2009; nor has there been any general access to those areas since then.”

The Parties Opponent: the original Objections

49. I am asked to take into account the original objections. I have re-read these in the digital bundle. I have confined myself here to using the summary that prefaced them. The detailed exposition intertwines with matters decided in the preliminary legal judgment and raises a number of issues that I judge to be irrelevant to what I have to decide here in the light of my preliminary legal judgment. The Parties Opponent have not edited or refined them based on my findings in the preliminary legal judgment and I have no intention of performing that task myself except in general terms. To attempt to do so in the course of this judgment would render it unwieldy, unhelpful and unnecessarily lengthy. I am also confident that counsel for the Parties Opponent has distilled the principal points on which he wishes to rely in his two sets of submissions. The original objections argued that granting the 2019 faculty would not achieve reasonable objectives that were said to be:

- a. The implementation of the Court of Arches' 2019 Restoration Order by a properly planned and financed removal of the Nursery School/Garden Building.
- b. The return and restoration of the entire open space to its lawful use for public outdoor recreational purposes.
- c. The satisfaction of the School's best interests by ensuring the Foundation Stage's orderly return to the existing school premises.
- d. The repayment to the School of over £2m of its funds that were mis-applied by the church (it was said) to erect the Garden Building for it to own and use for its purposes.
- e. The long-term, fully funded upkeep of the entire restored churchyard as public open space.
- f. Reasonable access by the public to areas D and E (the playground and curtilage).
- g. The establishment of a competent, community-based long term management agreement under the Open Spaces Act 2006.

50. Objection was also made:

- a. that the petition ignored the management agreement of 2014.
- b. that the petition would cause delay – possibly indefinite – to the implementation of the 2019 Restoration Order.
- c. that granting it would cause a drastic reduction in the size of the open space.
- d. that refusing the faculty would avoid the need to reimburse the School at least part of the £2 million that (it was said) was unlawfully taken from it in order to erect the Garden Building.

51. There are “Grounds in Detail” which are:

- a. Non-compliance with rule 5.4 (1) of the Faculty Jurisdiction Rules 2015 (as amended).

- b. a detailed objection relating to the lawfulness of the proposals and a repetition of the lack of any need for a new management agreement based on the existence of the 2014 management agreement.
 - c. a section (paragraph 8) dealing with the Open Spaces legislation, ownership of the Garden Building (paragraph 9) the 1859 charitable trust (section 3), the 2014 management agreement (section 4), the history of management agreements (paragraph 16) and further submissions on the 2014 management agreement (paragraph 21 [4]).
52. There are also submissions relating to the church's obligations if there is no management agreement which I will not rehearse in detail as it is irrelevant to the matters that I have to decide.
53. These objections were made early on in the timeline of this faculty application.
54. The objection summarised in paragraph 49 a. above is not relevant to these proceedings. This faculty petition is not concerned with the removal of the Garden Building.
55. The objection summarised in paragraph 49 b. above is now redundant. The petition is only concerned with areas A, B and C. This objection relates to matters that have been decided in the preliminary legal judgment which, of course, post-dated these objections.
56. The objection summarised in paragraph 49 c. above (even assuming that the proposition is accurate and that the Parties Opponent have sufficient *locus standi* to raise it as an objection) is not relevant to the consideration of the faculty before me.
57. The objection summarised in paragraph 49 d. above is irrelevant to the consideration of the faculty before me.
58. The objection summarised in paragraph 49 e. involves acceptance that the "entire restored churchyard public open space" includes areas D, E, F and G. The proposals now are in respect of areas A, B and C only. Areas D-G are not part of the faculty petition before me. Thus, the underlying point here involves matters that have been decided in the preliminary legal judgment.
59. The objection summarised in paragraph 49 f. above is now irrelevant to the consideration of the faculty before me which in its further amended form does not seek any faculty permission in respect of areas D and E.
60. The objection summarised in paragraph 49 g. above is irrelevant to the consideration of the faculty before me. The notion that such an outcome would in any event be achievable by agreement between all of the parties is, to put it at its lowest, fanciful on the evidence to date. The management of areas A, B and C is ultimately a matter for the contracting parties. It may be that the aspiration expressed is shared by all concerned but I very much doubt if the way of achieving it is.

61. The objections summarised at paragraph 50 a. mention the management agreement of 2014. I found in the preliminary legal judgment that the approval of the court for that management agreement was given under the 2012 faculty which was quashed by the Court of Arches, whereupon the court's approval of that agreement lapsed also (paragraph RR iii of the preliminary legal judgment).
62. The objections summarised at paragraph 50 b. that the petition will cause possibly indefinite delay to the implementation of the Restoration Order has no sensible evidential basis. I note, however, the Parties Opponent's concern to avoid delay. The petition of itself will not cause a delay to the implementation of the Restoration Order. I cannot judge what effect any further legal proceedings in respect of the petition may have: that is outside of this court's control, but the Restoration Order is at the point in time of this judgement in force, binding and clear in its terms.
63. The objections summarised at paragraph 50 c. that the granting of the petition will cause a dramatic reduction in the size of the open space is affected first by the preliminary legal judgment and, of course, could not take account then of the fact that the faculty application now is dealing only with areas A, B and C.
64. The objection summarised at paragraph 50 d. says that refusing the faculty will avoid the need to reimburse the School with £2 million which the Parties Opponent contend "is said" to have been "taken unlawfully from it in order to erect the Garden Building." I have some difficulty comprehending this objection but, even assuming it has force, it is a matter for the Petitioners to consider in deciding whether to seek the faculty in the first place and not a matter for me.
65. The objections summarised at paragraph 51 begin with the complaint at 51 a. that there has been non-compliance with rule 5.4 (1) of the Faculty Jurisdiction Rules 2015 (as amended). I am satisfied that the petition before me does not breach rule 5.4 (1). The objection at paragraph 51 b. deals with matters already decided by the preliminary legal judgment; likewise with paragraph 51 c.

The Parties Opponent. Objections to the Further Amended Management Agreement – Submissions of November 24, 2023

66. These are the submissions of November 24, 2023. Issues relating to further amendment and publicity have been addressed at paragraphs 35 to 40 of this final judgment.
67. The remaining submissions are as follows:
- a. At recital B: the churchyard should be identified by reference to all of the areas identified on the plan annexed to the proposed management agreement and contain wording to the effect that areas A - G comprise the churchyard.
 - b. Clause 2: the fourth line "confirmed" should be corrected to "conferred".
 - c. Clause 3: the clause should be amended to deal with the return of areas F - G to open space in due course.

- d. Clause 5: the clause should be amended to deal with areas D - G and be reworded so that it reads “The Council shall not erect or permit the erection of any building on the *existing and anticipated* Open Space in areas A - G...”
- e. Clause 9: it is said that the clause should be amended to include the words *existing and anticipated* open space areas (Areas A - G)...
- f. Clause 11: the term “community use” in the clause should be defined.
- g. Areas D - E: the Parties Opponent complain that the petition no longer addresses the question of the use of areas D and E as a playground for the exclusive use of the School “without seeking to grapple with the issue of the Petitioners’ acceptance in the original petition that these areas historically formed part of the open space.”
- h. It is submitted that the proposed management agreement should make provision for areas D and E to become incorporated into the open space in the event the School closes at the site.
- i. Additionally, the Parties Opponent seem to be suggesting that the rules of Public Notice were not followed properly.
- j. Finally, the Parties Opponent comment that the failure to register areas D and E as part of the incumbent’s freehold undermines the Parties Opponent’s faith in the Petitioners’ intention to observe any promises or agreements they make.

The Petitioners. Response of December 15, 2023 to the Parties Opponent’s Submissions of November 24, 2023

68. The Petitioners say that the nub of what the Parties Opponent want in respect of areas D and E is that the management agreement should provide for what is to happen if and when those areas cease to be used as the School’s playground. They observe that when I had expressed a hope in the preliminary legal judgment that a solution might in the future be found allowing the School to manage the day-to-day running of areas D and E by its incorporation within the open space (albeit one with restrictions) of areas A - C, I was talking of areas D and E as they are now (the School playground with restricted access) not of what they might become in the event that School usage ceased.
69. The Petitioners say that they cannot be asked to address now what might or might not happen at an unspecified date in the future. They remind the court that the undertakings to the Court of Arches did not include the proposals in respect of areas D and E, which were first to appear in the faculty application that was made later in the same year.
70. The Petitioners also say that it is not open to the court to require them to bring forward proposals in the management agreement in respect of areas F and G which are the subject of the Restoration Order and that, if there is in effect a bridge to be crossed at the time that the nursery school is demolished with regard to additional provision in the management agreement in respect of areas F and G, then the bridge should be crossed when or shortly before it is arrived at and not before.

71. On points of detail made by the Parties Opponent set out in paragraph 68 b. and 68 f. the Petitioners accept the helpful suggestion of the Parties Opponent that “confirmed” should be replaced with “conferred” in clause 2 at line 4 of the further amended management agreement.
72. The Petitioners do not accept, however, that in clause 11, the term “community use” should be further defined as they consider that the term as it stands is unlikely to cause any difficulty.
73. The Petitioners say in respect of the registration of areas D and E that it is not a matter of paramount importance, that there is no dispute that areas D and E form part of the land vested in the incumbent by virtue of his office which is what registration will acknowledge and that there is no sinister motive for not having registered this land yet. They observe that the land in any event remains subject to the faculty jurisdiction.

The Parties Opponent. Short Reply of December 22, 2023 to the Petitioners’ Response of December 15, 2023

74. The Parties Opponent state that in answer to the Petitioners’ argument summarised at paragraph 71 above it would be perfectly possible to produce an agreement/licence whereby areas D and E are open to the public outside school hours and in which if the School closes (which is a possibility) then areas D and E are returned to the open space to be managed by Tower Hamlets.
75. The Parties Opponent further state that there is no evidence of consultation or public notice (before 2009 or since) showing that the Petitioners intended to remove areas D - G from what they contend is the churchyard open space areas A - G.
76. The Parties Opponent argue that there is a need for sensible planning to bring areas F - G back to open space managed by Tower Hamlets.
77. The Parties Opponent reiterate points made in the submissions during the preliminary legal submissions as to why areas D and E have not yet been registered and submit that there may be a hidden motive, namely that the church intends to grant to the School ownership or other legal interest in areas D and E.
78. The Parties Opponent submit that the landscaping, in their opinion, needs to be designed and planned as a single area “with an eye on the fact that it will need to incorporate F and G at March 2029”. The Parties Opponent believe that it is likely that this will result in a single phase of landscaping, given the time it will allegedly take the Petitioners to deal with the issue. As an observation, they say that the comments they make which I have set out in this paragraph highlight why it was inappropriate to develop areas F and G in the first place.
79. The Parties Opponent submit that the petition should be determined by way of an oral hearing in light of those matters raised by the Petitioners’ response of

December 15, 2023 which the Parties Opponent have challenged in the Short Reply. They say this: "Whilst the Petitioners submit that the petition can now be determined on the papers, given the issues raised above, the Parties Opponent consider it is more suitable to determine the matter by way of an oral hearing."

The Petitioners. Response to the Short Reply of the Parties Opponent

80. The Petitioners had nothing further to add in respect of the question as to whether a fresh petition was required. They say it is for them to decide to which areas the petition relates and not the Parties Opponent.

81. The Petitioners oppose the application for an oral hearing. They comment that the costs already incurred in respect of the petition are entirely disproportionate to the simple issues arising and argue that an oral hearing would add to these costs. They add that the Parties Opponent had already agreed to the petition being decided on papers.

Decision in respect of the Application for an Oral Hearing

82. I refuse the application for an oral hearing.

83. My reasons for refusing it are that, first, the parties had all agreed to a final determination of this petition (see paragraph 27 above) to be decided on the written submissions and materials placed before me.

84. Further, this agreement was made after the preliminary legal submissions, the determination of which the parties also agreed should be decided upon written representations. These submissions covered a far wider, more complex and contentious set of arguments than those involved at this stage of the proceedings.

85. Additionally, the reason given for wanting an oral hearing is not particularised and says no more than that because of the issues raised in the Petitioners' submissions it would be more suitable to determine the matter by way of an oral hearing. It begs the unanswered question "why?"

86. Since an oral hearing at this stage would escalate costs considerably and cause inevitable delay and given that I do not find that any reasoned explanation as to why it would be "more suitable" has been given by the parties making the request, other than it is because of the issues raised by the Petitioners in their submissions, I decline to allow the Parties Opponent to move away from the agreement referred to in paragraph 27 above.

Decision in respect of the Further Amended Faculty Petition

87. I grant the faculty as prayed in the further amended petition.

88. The drafting matters raised by the Parties Opponent have been considered by the Petitioners and corrected where the Petitioners deemed appropriate. I do not consider that the suggested wording at Recital B is necessary. It is a matter for the Petitioners. There is no need for the petition to include any future intentions in respect of land not the subject of the petition and such inclusion or otherwise is a matter for the contracting parties to judge, not the court. Some may say that given the history of the events concerning this churchyard in the last 14 years that the wiser course is for the Petitioners to concern themselves with what they require from the court at this point in time rather than opining on events in the future, some of which may or may not even happen, such as the School ceasing to occupy areas D and E or even ceasing to exist. I, however, do not comment. It is a matter for the Petitioners.
89. The Parties Opponent ask for Clause 5 to be amended so that the prohibition in it will apply to both existing and anticipated open spaces and in areas A - G. This is a matter for the contracting parties. They have seen what the Parties Opponent request and they do not wish to alter their draft which presently relates to the open space of areas A - C. I understand the Petitioners' reasons for wanting to confine themselves to what they call the "here and now" without complicating matters by reference to the future inclusion of areas not the subject of this further amended petition. The same applies to Clause 9. The Parties Opponent's request for "community use" to be further defined is again a drafting matter for the contracting parties. Area G (the Garden Building) is in any event the subject of the Restoration Order which sets out its fate in clear terms.
90. The registration issue is irrelevant to the grant or the refusal of this faculty in light of the further amendments to the management agreement although I make the comment, *obiter*, that if the only reason for not registering areas D and E is finding the time, then registering it would allay one concern of the Parties Opponent even if it appears objectively to be rather far-fetched given the scenario that worries them would require faculty permission.
91. The petition no longer addresses the usage of areas D and E although the proposed use appears to be much the same as before and there is no requirement for the petitioners to grapple with anything. I was told in submissions during the preliminary legal arguments that the local authority had operated similar licence back provisions elsewhere. I am not sure whether any of these replicated the circumstances here and involved the Open Spaces Act 1906 or whether transferring the running of this area to the School under certain conditions relating to restricted access could be achieved without a licence. It may be impossible. It may also, even if possible, be the subject of objection.
92. I have considered whether, hypothetically, it would be possible to impose Conditions that related to areas D and E when granting a faculty for proposals in areas A, B and C. In other words, and put baldly, you will not get a faculty in respect of areas A, B, C if you do not follow Conditions 'x', 'y' and 'z' in respect of areas D and E. I consider that it would be possible legally, although very unattractive in practice. I would be allowing by the front door the further amendment to remove areas D and E from the proposals, whilst forcing the

Petitioners to continue with them by the back door on pain of losing the faculty altogether. I am not going to do this. I am sure on the evidence before me that the Petitioners have tried to introduce areas D and E into the proposals by the mechanism which they wanted and which they put forward in good faith, but, unfortunately, the court has felt obliged to draw to their attention a concern it had that the licensing back proposed might potentially be unlawful under the 1906 Act.

93. Finally (apart from Christine Whaite's proposed corrections to the preliminary legal judgment) I turn to whether the public notice given in the spring of 2022 was adequate, an issue which has emerged in the Parties Opponent's submissions of November 24, 2023. In my Initial Directions of January 27, 2022 I noted this at paragraph 2: *There are a number of Objectors, some of whom are Parties Opponent. Spitalfields Open Spaces (SOS) by its directors has objected to the whole of the proposals. Another opponent is Spitalfields Trust. Around 18 people have objected in their own right. There are 12 Parties Opponent of whom two (at least) are objectors in two capacities and I ruled that, given the lapse of time for negotiations already referred to, if the Petitioners wished to continue with the petition (which they did) that the Registry would endeavour to discover by March 7, 2022 whether all Parties Opponent wished to remain so. In my Second Directions of March 29, 2022 I said: Whilst I understand these submissions (the stated objections to the amended petition from Chris Dyson and Christine Whaite on behalf of SOS) reflect the views of other Parties Opponent, I am not sure that they speak on behalf of all Parties Opponent and, by April 30, 2022 the court wishes to know which of the Parties are content that SOS should represent their views and which would seek to represent themselves. The Registry should seek to discover the position definitively but any assistance given by SOS would be very helpful...*

94. The court was informed that all Parties Opponent wished to come under the umbrella, so to speak, of SOS. Whilst complaint is made now about the adequacy of public notice in 2022, a point which cannot affect the fairness of the proceedings as far as the Parties Opponent are concerned, no complaint has been made by any member of the public. Where public notice is said to be defective, the court has power, if informed timeously of what it considers to be a defect, to order a further period of public notice. I am not investigating the adequacy of the public notice ordered on March 29, 2022 nearly two years later in these circumstances.

Christine Whaite's Corrections

95. The first correction relates to paragraph PP ii, page 50, of the preliminary legal judgment where, in error, I stated that the dry space area, a space since 1987 which was the Adventure Playground/Youth Centre, had been shared with the School. Christine Whaite says that what in fact had been shared between the public and the School since 1987 was areas D and E. I apologise for error. I have made a correction in the preliminary legal advice at the point of the error. I am grateful to Christine Whaite for drawing it to my attention. It does not alter any of my decisions in that preliminary legal judgment.

96. I have read Mrs Whaite's second email to the Registry, which is her detailed explanation of the events surrounding the 2009 faculty. It is not, I am afraid, for me to decide the merits of those arguments. I was simply noting that the 2009 faculty still stands and has never been appealed in or out of the permitted time limits. The consequence of its existence has already been litigated before this court (Rogers Ch) and the Court of Arches in its decision on permission to appeal.
97. I will ask the Registry to publish this final judgment as regards the faculty petition. This will have annexed to it a plan. I have amended the title page of this judgment to reflect the fact that areas D and E no longer form part of the petition. At the same time, I will ask the Registry to publish the preliminary legal argument with some typographical corrections.
98. In conclusion, Areas A, B and C will be open space and hopefully much improved areas from that which they have been historically. Areas F and G will join those three areas when the demolition occurs. Areas D and E will remain as they are but will enjoy much the same restricted rights of public access that would have been granted to them had they been included in the proposals – at least while the School is using them. Even if there were to be future proposals in respect of these areas attempting to alter their present status, this would require faculty permission. Having granted the petition, I order that the faculty as prayed should pass the Seal and the management agreement is approved if it remains substantially in the form that appears in the further amended draft. Given that areas D and E have been removed from the petition, I do not impose Conditions in respect of access to those areas, although I note the arrangements for restricted access. I impose no other Conditions other than that a definitive copy of the management agreement is to be submitted to the court once it has been signed by all parties.
99. I have reflected very carefully on the matter of costs for the drafting of two judgements and a site visit. I have decided to make no orders as to costs. The question of correspondence costs will be decided by the Registrar of the diocese within 28 days from the date of this judgment and the parties notified if any order is contemplated.

ANNEX

Area Map from B316 in the original digital bundle

Plan of the gardens as attached to the management agreement:

