

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWELL AND NOTTINGHAM

Before: THE CHANCELLOR

RE St SAVIOUR'S CHURCH NOTTINGHAM

RE AN APPLICATION FOR AMENDMENT TO A FACULTY GRANTED ON 10 JANUARY 2018

I

INTRODUCTION

1. The Church of St Saviour, Nottingham, designed by R C Sutton of Nottingham, was built in 1863-4 and is listed Grade II. The parish profile presents a number of challenges to mission and social integration. The church has the enormous benefit of an enthusiastic congregation, led by visionary clergy and laypeople who, over the years, have devised and implemented ways to bring people into church, to raise money for the building and its mission, and to undertake that mission in part by social activities. The most striking effect of this work is that the nave of the church contains a large children's climbing frame, which, under normal conditions, is made available to families throughout the week at modest cost; there are associated café facilities as well as administration, kitchen and toilet facilities, all within the space formerly occupied only for worship. The enterprise runs under the name of 'The Eden Softplay Project'. The smaller worshipping community of today holds regular Sunday and other services in the chancel and in the eastern part of the nave.
2. On 5 May 2017 a Petition was presented for a faculty for further works of reordering. Various features of it (not least my interest in seeing the activities in the nave) led me to seek to visit the church, which I did, accompanied by the Registrar. We were welcomed by the incumbent and other key people and shown the church and what was proposed. The Petition had indicated that there were ample funds to pay for the work, and we were given to understand that the reason for that was, in part, the success of the Softplay enterprise. Those who met us were, however, rather vague about the authority for running it in the church and what the formal and financial arrangements were, although we were assured that such were in place. It seemed to me that it would be worth a simple check to ensure that they presented no problems, and so when on 4 January 2018 a Faculty was granted for stage 1 of the proposed work, I imposed conditions, one of which was as follows:

"1. Before the commencement of any work the parish must: (i) furnish the Registrar with such materials as to enable her to be reasonably satisfied that the present arrangements in relation to the Softplay activities in the church are not in breach of secular planning control in relation to the use of the building; (ii) furnish the Registrar with such materials as to enable her to be reasonably satisfied that the present arrangements with the providers of the Softplay facility are subject to suitable binding legal obligations and are authorised by Faculty or do not need to be so authorised; (iii) await the Registrar's written indication that she is satisfied in relation to both (i) and (ii)."
3. It became apparent that the parish could not satisfy condition1(ii). There was therefore a request for a modification substituting authority for the parish authorities to enter into an agreement with appropriate effect.

4. The present proceedings, and this judgment, are solely on the proposed amendment, supported by a draft of the proposed agreement. There was a hearing on 16 March 2020, at which the parish was represented by Mr Cain Ormondroyd, instructed by Lee Bolton Monier Williams; the Archdeacon of Nottingham, although not cited, also attended and addressed me. Almost immediately following the hearing, all activities in St Saviour's had to cease because of arrangements made to control the spread of the Covid-19 virus, and those arrangements also slowed down legal and administrative work in the Diocese and elsewhere. That mattered, because for reasons outlined below, perusal of the papers after the hearing raised a number of points of concern relevant to the outcome of the proceedings and affecting not specifically the Petitioners but KM Play Limited, the other party to the proposed agreement. It has not been possible to resolve all those concerns. Not surprisingly, the parish presses for a decision. Recent correspondence to the Registrar suggests that the applicants take a position on some of those points which, on the present state of the evidence they produced, it might be impossible to determine without a further hearing.
5. That, I think, would be disproportionate, but the concerns do not simply vanish. On the other hand, there is no good reason to suppose that any further delay would result in progress at any acceptable speed, and the parish cannot be expected to wait indefinitely for legal authority to run the softplay enterprise (although, as I explain below, the proceedings, and the need to apply for the amendment, have not in fact interfered with its continuation). It may be that, because of the particular facts and circumstances of this case, there is never going to be an ideal time to make a decision. It is, however, primarily the Petitioners' task to demonstrate that the proposed arrangement is a proper one, meeting any proper concerns by obtaining all relevant information, if necessary from the other party to the proposed agreement. These are the practical factors contributing to both the substantive decisions I make and to the specific terms of the amendment which will be granted in accordance with this judgment.
6. In Part II I set out what I believe to be the correct position on a number of matters of principle. The proposal involves a number of areas of law and the statements are necessarily brief and summary; they are set out baldly as a series of propositions on various topics, without citing authority. They are not intended to be a comprehensive guide, but to give the basis for what follows, in particular by referring to such parts of the general law as is raised by the various contributions to the debate in this case, not least in the Parish's recent letters to the Registrar. In Part III I set out such parts of the procedural and factual history as are necessary in order to enable this judgment to be read without reference to the copious documentation. Part IV discusses the application of the law to the facts. The final part contains the decision and sets out the way forward. When I do not need to draw any distinction I refer in general to the incumbent, the PCC, and the Churchwardens of St Saviour's, and their legal representatives as 'the Parish' and use a plural verb; I refer to KM Play Limited as 'the Company' with a singular verb; by 'St Saviour's' I mean the church building as distinct from its community; and by 'Softplay' I mean the whole of the enterprise, present and future, including its administration and ancillary activities.

## II

### LEGAL PRINCIPLES

7. The faculty jurisdiction applies to all Church of England churches and their contents, to their churchyards and (regardless of consecration) to property falling within the curtilage of a church that is within the faculty jurisdiction. A faculty is required for any works affecting a church building and its contents, including the fabric, ornaments, furniture or fixtures,

whether by way of addition, removal, alteration or repair, or moving within the church, unless the work comes within List A or List B attached to the Faculty Jurisdiction Rules 2015 (as amended). A faculty may also be required for certain activities or arrangements within Churches subject to the faculty jurisdiction. It is unlawful to undertake work or an activity for which a faculty is required and has not been actually obtained, and no member of the clergy, churchwarden or PCC ought to allow or take part in it. The grant of a faculty does not negate the requirement for any other permissions, for example planning consent; and the existence of such secular requirements does not affect the faculty jurisdiction; nor, in principle, does the grant of any required secular permission mean that a faculty should be granted.

8. The faculty jurisdiction is exercised in the Consistory Court of the Diocese by the Chancellor as Ordinary. Broadly speaking, the grant or refusal of a faculty is always a matter for the exercise of the Chancellor's judicial discretion. If the faculty is granted, the work or activity will be lawful, because the faculty renders lawful what would otherwise be unlawful. The grant of a faculty does not oblige the Petitioner to do what the faculty permits.
9. In exercising the faculty jurisdiction the court has an inquisitorial function in accordance with the Civilian legal heritage of the Canon law. It is not merely concerned with the wishes of the Petitioners, even if (as is usual) there is no formal opposition. There is no procedure similar to that in civil litigation where in the absence of opposition there may be summary judgment or an order by consent. The court always has the task of evaluating the proposal against a number of factors, including legality, compliance with the doctrine of the Church of England, the heritage significance of a listed building, and any other matters that may count in favour of, or against, the proposal. The court is always concerned to recognise that those who seek a present change are also in a sense trustees for their successors; and by its scrutiny of proposals seeks to ensure that if a faculty is granted as sought, it will not have undesirable effects. Proceedings for a faculty are brought to the court by the petitioners, and it is for the petitioners to make their case. The court never acts as an opponent, but is obliged to ensure that the church (in every sense) and its interests are protected and not endangered. The court does not, however, have any jurisdiction to decide how a parish spends money or what its financial priorities should be, although it should be concerned if a proposal seems likely to impose unexpected financial liabilities.
10. The church building itself is vested in the incumbent. Movables within the church belong to the churchwardens as a quasi-corporation. Neither of those propositions gives those concerned any right of dealing with their property as owner, because of the overarching control provided by the faculty jurisdiction and the trusts (whether or not in the technical sense) to which church property is subject. But nobody else can claim ownership. The one general exception is that of monuments to the dead.
11. A company formed under the Companies Acts is a legal person, separate from the individuals or organisations who may have formed it or who may own interests in it. Its constitution is contained in its Memorandum and Articles of Association, and it makes decisions in the ways set out there and in the Companies Acts, typically by its Board of Directors: those who own interests in the Company do not make its decisions and cannot speak for it or make commitments on its behalf. A company can enter into contracts, can sue and can be sued, although its obligations may be limited by its share capital or the terms of the members' guarantees.
12. What purposes are charitable has been the subject of much discussion and litigation over the ages. There are a number of recognisable 'heads of charity' now codified in s 3 of the Charities Act 2011, but a purpose cannot be charitable unless it is for the public benefit, a notion which itself is somewhat variable. A body or trust cannot be a charity unless all its purposes are exclusively charitable. Charities have some benefits in exemption for

certain taxes and other technical advantages connected with their constitution. But because a charity has purposes that are exclusively for the public benefit, they are subject to public supervision and control, and to that end are required, unless exempt, to be registered with the Charity Commission by virtue of provisions in Part 4 of the Charities Act.

### III

#### Procedural History

13. It is not necessary to go into great detail. What is past is past, and a number of those involved are no longer in post. The purpose of this decision is to ensure a sound basis for the future.
14. One complication, which has made the proceedings rather difficult for everybody, is the very existence of KM Play Limited, the Company. It is a company limited by guarantee. It was originally set up as a subsidiary of another company associated with the parish, but, the other company having ceased to exist, is now directly owned by the parish, and its Board of Directors has included a number of people intimately concerned with management of the parish, including at various times the incumbent, the incumbent's spouse, churchwardens, and other members of the PCC. The purpose of its existence is, however, to be separate from the parish for the purpose of running Softplay; and there is no doubt that it exists because the Parish had advice from the Diocese that that was the best way to proceed in order to be ready to undertake Softplay as a substantial commercial exercise and ensure that neither the Parish nor the Diocese were directly implicated in Softplay. It has operated throughout in this way, taking all responsibility for the financial and administrative arrangements and paying the profit (if any) to the PCC.
15. Its separate identity has to be recognised. It is artificial, but that is the intention; and the artifice must be maintained. The proposed Licence is an agreement between the Parish and the Company. In form that is the same sort of thing as a Licence granted by a parish to a utility company to lay a main. One would not expect the company to have to be a party to the proceedings; but one would also not expect the parish to purport itself to represent the company's views. In the present case the Parish obviously has access to the views of the Company. It is notable, however, that it has not sought to bring them very much to the attention of the Court. Instead, it has relied on its own assertions. I consider one of the effects of this further below. I also allude to another difficulty, which is the lack of real separation between the interests of the two parties who propose to enter into a legal relationship which has important and reciprocal obligations for them. The Court needs to be able to be confident, if only for the purpose of protecting the interests of the Parish, that the relations set up by that relationship will be in practice what the terms of the contract portray.
16. As I have already indicated, the Parish was unable to comply with the condition in the 2018 faculty. That immediately meant that what I had been assured was a mere formality of reference to existing documentation became a problem, and it meant that the works which are the subject of the 2018 faculty could not for the moment begin. I am unable to explain how it was that the parish thought that arrangements were already in place. There were various, not entirely consistent, attempts to deal with the matter. There was an assertion that no faculty was required. There was an assertion that the condition could be fulfilled by entering into a new arrangement as distinct from exhibiting the present arrangement. At one point I was shown what purported to be a very recent lease of part of St Saviour's to the Company. Fortunately that document was of no effect because it failed to have the essential characteristics of a lease: in any event a lease would not have been suitable, and would have required special authorisation.

17. Eventually it became clear to me, if not to the parish, that the use of the bulk of the church by the Company in order to run Softplay for many years had been wholly without the necessary authorisation. It also became clear that the Parish would require legal advice. At this point the Parish asserted that they ought not to have to pay for legal advice, but that instead the Diocese should pay. I indicated that matters would need to be explored at a hearing, but the Parish said that no hearing was necessary. I am told by the Registrar that she received an enormous number of emails and that the Parish took a disproportionate amount of her time. I saw some of the emails. There is a great deal of lengthy pleading, and a great deal of complaint that the 'Parish was being taken to court', but little in the way of evidence. The Registrar dealt with them as Registrar, reminding the Parish, frequently, that she was not able as an officer of the court to give legal advice to petitioners. I issued directions setting out the issues on which there would need to be evidence and argument (although these had in reality been apparent for a very long time), pointing out that the present procedure was exactly that which should have been gone through when the apparatus was first ready for use or at latest when the incumbent took office and should have checked that such things were in order, and requiring the Parish to supply a bundle of supporting documentary evidence for the hearing. Whatever the Parish may say, there can be little doubt that it has not been easy for the Court to secure reliable information on the basis of which decisions could be made, or evidence supporting the various assertions being made; and there is no doubt in my mind that much less energy was being spent on pursuing the matter expeditiously than on making complaints that in essence were complaints that the parish was being required to comply with the law.
18. This is not the place for recrimination of any sort, or for giving detailed examples. I have set out the above only in order to give context to what happened next, as it has been the subject of perhaps not entirely apposite reference in the Parish's recent letters to the Registrar. Throughout the period of time to which I refer, I had done my best to give the Parish the benefit of the doubt. Although the original assumption that the issue was a mere formality had been displaced, I continued to assume that in due course the matter would be sorted out readily on the basis of materials which the Parish would adduce. In particular, and acting on that assumption, I had indicated that the present arrangements could continue pending the determination of the application for the amendment. (That arrangement is still in operation.)
19. On 21 November 2019, and after consultation with the Parish, the hearing was set for 23 January 2020. On 14 January the Registrar was sent an email complaining that the Parish were (despite now being professionally advised) previously unaware that they were liable to pay the costs of the time the Registrar and the Court had to spend on their affairs, and that they had no prospect of being able to afford that, or of obtaining the amendment sought (I do not know whether this was the effect of some advice they had been given). There was a robust response, drafted by me, repeating much of what had already been said but perhaps not understood, observing that the Parish were, if they chose, at liberty to withdraw the application for an amendment and cease Softplay forthwith, and that the materials on which the parish relied to establish what they had previously indicated was a strong case, were no doubt almost fully prepared for the hearing a few days later.
20. On 16 January the Registrar received an email from the Parish in the following terms:

"We have been unable to find an Advocate who will represent us in time so I am writing to seek a postponement please? Our willing barrister does not have availability until February."

She passed that email to me, as she was bound to do. No explanations were given for the sudden difficulty, given the length of time since the hearing had been fixed. The documents had not been submitted. There was no indication of when they would be. On the other

hand the Parish had clearly indicated that they resisted the very idea of a hearing and perhaps even of submitting their application to the jurisdiction of the court, and had specifically said two days previously that they thought they would not obtain the amendment. In the circumstances it seemed to me appropriate to revisit my toleration in permitting Softplay to continue despite the absence of authorisation. I granted the adjournment requested, commenting that I regarded it as appropriate for the Parish to have the representation they preferred. I also decided that Softplay should cease until the Parish had made the proper arrangements for the determination of the issue. I therefore issued an injunction against Softplay taking place, to begin on 23 January, the date on which the hearing had been due to take place. I made it clear that the Court would take no further action on the application for amendment unless it received the hearing bundle and a list of available dates in a period I specified.

21. There were numerous further emails from the Parish. Amongst the most surprising assertions was that the email whose terms I have set out above was not a request for an adjournment and that I had no business understanding it as being one. In parallel, explanations were belatedly provided about why that email had been fully justified. Requests were made for copies of basic papers to enable the bundle to be assembled. But at last documents began to come in. The Parish wrote a substantial number of further emails asserting in substance that they should be allowed to continue with Softplay whether or not it was lawful; but one of them managed to hint that the hearing bundle was in fact ready. It was pointed out that all they needed to do was to send it to the Court with the available dates for a hearing: action of that sort, rather than complaints with no indication of progress, was likely to secure the lifting of the injunction. The bundle and a list of dates were sent in on 21 January and I immediately lifted the injunction, before it took effect. It had no effect on the operation of Softplay, but did cause the Parish to begin to understand its legal obligations. I have continued to apply de facto toleration of the existing arrangements since then. The hearing was duly re-fixed and took place, as I have said.
22. In case there should be any doubt about it, I must emphasise that I have never expressed, or indeed felt, any antipathy to the Softplay project. On the contrary, so far as I am able to do so, I share the Parish's enthusiasm for it. It is well-supported and well worked out; it fulfils a need in the community and has a real effect on mission. Nevertheless, the Parish, however laudable its intentions, does not thereby exempt itself from the faculty jurisdiction. The court needs to have the opportunity to apply the protective and supervisory principles to which I have referred in paragraph 9 above.

#### IV

##### Discussion

23. Three questions were identified for decision. The first is whether a faculty is needed for either the use of St Saviour's for Softplay or for the Parish to enter into a contract with the Company. The Parish's position had been that no Faculty was required, but by the time of the hearing Mr Omondroyd's position was as follows. No faculty is required for an activity which is incidental to the mission of the church and not inconsistent with it, alternatively, if a faculty is required, the Court will exercise its jurisdiction 'sparingly'. A Faculty is, however, required (and is now sought by the application for amendment) to allow the Parish to enter into the Licence agreement.
24. The authorities adduced in support of the first proposition are to my mind unpersuasive. I am not confident that use inconsistent with the mission of the church (as distinct from being merely secular) could be permitted in a consecrated space even by Faculty: see also below.

The authorities cited deal mostly with the question whether or not the activity in question can properly be allowed, rather than whether it needs a faculty. Mr Ormondroyd's second proposition is not easy to understand from the Parish's point of view, unless it derives from what would be a surprising misapprehension that the faculty jurisdiction is restrictive rather than facilitative: one would expect him to argue that the jurisdiction to grant a faculty should be exercised generously.

25. If there had been any authority directly on point and supportive of the Parish's stance I would no doubt have been referred to it. The Church Buildings Review Group set out what it regarded as the correct legal position in Appendix 3 to its Report of 2015, and the Church of England's Legal Advisory Commission has adopted parts of that Appendix as a statement of the law, to a different part of which Mr Ormondroyd did refer. I see no good reason for departing from it. The relevant paragraphs are as follows; I have added emphasis to the most significant parts:

"6. Although the incumbent (in his or her corporate capacity) will normally be the person who grants the licence or the lease, the incumbent cannot do so except under the authority of a faculty. That is for a number of reasons. First it is because although the property in the church and churchyard is vested in the incumbent in right of his or her office, it is subject to the control of the Ordinary (in the person of the chancellor as judge of the consistory court). Secondly, a consecrated church cannot lawfully be used for secular purposes except under the authority of a faculty. ...

7. That means that before a licence or a lease can be entered into, it is necessary to submit a petition to the consistory court and to obtain a faculty. The petition will normally be accompanied by a draft of the proposed licence or lease.

8. There are no special statutory provisions which govern the exercise of the faculty jurisdiction to authorise the grant of a licence. But the court cannot grant a faculty for a licence to use a church in a way which would be inconsistent with its status as a consecrated building as such use would be unlawful. Provided that the proposed use is consistent with the church's consecrated status, the court has a discretion whether to grant a faculty. The court will wish to be satisfied that if the licence is granted the building will continue to be a church and that the proposed use will not prevent its use as a church when it is required for that purpose – which will not merely be on Sundays but also, for example, for the occasional offices."

26. The answer to both parts of the question is therefore in the affirmative: both the use and the agreement require Faculty authorisation.
27. The second question is whether in principle a faculty ought to pass for Softplay. Mr Ormondroyd devoted a great deal of his skeleton argument to this, citing a number of examples of cases where a secular use has been permitted in a consecrated church, despite the possibility of physical intrusion into the spaces needed or used for worship, and despite the fact that the secular use would take a much greater part of the week than worship.
28. I am grateful for these submissions, but, to my mind, one of them is not only more powerful than the others: it is essentially determinative. The nave of St Saviour's contains a large apparatus erected following the grant of a faculty for the purpose, intended precisely for Softplay, and reasonably capable of no other use. The grant of Faculty 17422 in July 2013 necessarily imports the view that St Saviour's is suitably used for Softplay, by the use of the apparatus installed then or something similar. Nobody has suggested that that Faculty should be amended or that the permissions to build the structure and have it in the church should be revisited.

29. It follows that in principle the activity of Softplay is appropriate for St Saviour's and that in principle a faculty for that use could be granted. As indicated above I include the ancillary activity of the café in the term 'Softplay', because it is clear that the re-ordering Faculty 17422 authorised was from the first intended to provide premises for such ancillary services.
30. I should emphasise, however, that the resolution of this second question in favour of the parish does not affect the answer to the first. A Faculty was required for the activity itself (as distinct from the physical changes to St Saviour's), and for any arrangement for the activity to be provided by another body. Conducting, or allowing the Company to conduct, Softplay was unlawful in the absence of a faculty sought and obtained. No such faculty has previously even been sought.
31. The third question, and the most troublesome, is whether there should be a faculty authorising the Parish to enter into the proposed Licence agreement with the Company. The terms of the agreement have been the subject of professional drafting and redrafting in accordance with the Parish's needs and aspirations and I do not raise any questions about the terms, save in looking at the overall obligations. I have a few small reservations, mostly about dates, which I set out in the next Part.
32. The effect of the Licence would be very beneficial for the Parish. The Company undertakes to pay the Parish £500 per month, regardless of the profitability of Softplay, subject only to 'revision' at the instance of the parish. The Company undertakes a number of obligations in respect of the running of Softplay and the maintenance of the frame and the associated facilities, and will on request reimburse the Parish for its share of utility bills. The Company also undertakes to secure and maintain specified insurance cover, again regardless of profitability. The parish essentially loses nothing, because it can obtain the use of the nave and suspend Softplay even at short notice.
33. The cost to the Parish is a little more subtle. It would be regarded by all other authorities, including the Diocese, as having a guaranteed income from the Company. If there was nonpayment by the Company, the Parish could be expected to enforce the terms of the payment clause, if necessary by taking action against the Company. It could be expected not to reduce the income due to it by revision of the payments clause, but to increase them in line with inflation at least. Despite its closeness to the company, the Parish would need to be able to prioritise the financial rights of the Parish, for the benefit of all those currently involved and their successors, against the basically secular commercial interests of the Company. The Company's status as a Company Limited by Guarantee means that apart from its existing assets (including actual income) there would be no other funds from which the payments could be made. Further, although not a matter capable properly of being of interest to the Parish (because of the terms of the Licence under which such things are the responsibility of the Company), a similar concern about the availability of funds to pay liabilities would arise in the case of the Company's paid employees and its other contractual arrangements, including the payment of insurance premiums.
34. There are two issues here. The first relates to the question whether the Parish would in fact be capable of asserting its interests against the company, given the closeness, both structural and personal, of the Company to a number of those involved in the management of the Parish. I asked a number of questions about this at the hearing. In response I received assurances, but there was no real indication of any way in which distance had actually been maintained and conflict of interest avoided. (A Conflicts of Interest Policy was prepared in the Parish only after the hearing.) It would not obviously be right to allow a Licence to be executed that might cause the Parish to be persuaded, against its own financial interests, to assist the Company, or to be in a position where conflicts of interest might realistically put the Parish under great strain.



35. The second issue relates to the funds of the Company. The Company's accounts as presented over the previous years indicate that it has assets of substantial value. If that is right, it would do a great deal to reduce any concern about financial defaults. But nothing in the accounts showed what the assets might be. The only thing of potential value with which the Company has been concerned is the apparatus itself. In my view, however, for reasons set out below, the Company does not and cannot own the apparatus, and much of the other property in the church to which the Company may have a claim is likely to be of much reduced (or entirely unrealisable) financial value because it cannot be removed from the church except under authority of a faculty.
36. The Parish has responded to this concern by asserting (on behalf of the Parish, of course, not the Company) that the Company does own the apparatus. It is said that 'the softplay apparatus does belong to K M Play, and indeed all assets and liabilities of the softplay endeavour have been placed in K M Play'. The Parish does not give any indication of how that could have happened as regards any physical asset, in particular the apparatus. There was a substantial loan from the Diocese, but I have not seen anything to show that it was made to the Company rather than to the Parish. The largest payment in the PCC accounts for 'Softplay' is in the accounts for 2012, before the Company came into existence (and also before the faculty permitting the installation of the apparatus). But even if there was some device by which the materials for constructing the apparatus were obtained and installed by the Company rather than the Parish, the apparatus itself, being a fixture in the church, has (in the absence of any special arrangement, and there is none) passed into the same ownership as the building to which it is attached. And, as indicated above, even if the Company was able to establish any right of ownership (and it has not attempted to do so: I have not been shown anything on the matter from the Company) the valuation of that right would be subject to the consideration that it could not be removed from St Saviour's without a Faculty which, given that Softplay is considered desirable, might not be forthcoming if any other concern was able to offer Softplay there.
37. Those considerations may have been prompted by the fact that as I came to prepare this judgment it became clear that there would be no income from Softplay for some time, and that if the Licence had been executed at the time it was originally proposed, the difficulties to which I allude above would be very apparent. While trying to find my way through the various financial documents, however (which, as presented by the Parish, are apparently not all complete), two other concerns arose.
38. One relates to the governance and regulation of the Company. Its purposes clearly hint at the charitable, but that is standard form. More to the point, perhaps, in recent annual reports it has described itself as a charity. It is not, and never has been, registered as a charity. If it is a charity, as far as I can see, it ought to be registered, and the failure to register is of some importance for the reasons given at paragraph 12 above: it has failed in its obligation to subject itself to the public oversight required by law. The position of the Parish is now that the Company is not a charity, but I have nothing from the Company disclaiming its description of itself or explaining why it is not to be regarded as a charity. If it is not a charity, it ought not to describe itself as one, because that might mislead donors (for example charitable trusts that could by law contribute only to other charities). There may be a tax liability if the Company cannot claim exemption as a charity. I cannot reach a concluded view on this with the material available to me; but it would not obviously be right to allow the Parish to enter into contractual arrangements with an organisation that was failing to comply with the requirements of the law whether by inappropriate claim or failure to register.
39. The other concern relates to safeguarding. In relation to an enterprise chiefly serving families through their children, safeguarding is bound to be of the highest importance. It

seemed to me, on consideration, that the documents showing how the Company had actually been operating were not entirely consistent with either the rules it had itself imposed or with Diocesan guidelines. With the advantage of the lack of activity during lockdown, I asked the Diocesan Safeguarding Adviser to consider the position. He did so, and, I understand, had a long meeting with representatives of the Company. The outcome was as follows. The Company's operating practices required minor modifications to make them acceptable, but were inadequately documented. Diocesan consent for reopening following lockdown was given only on condition that the Safeguarding and Health & Safety documentation was satisfactorily revised. That was done only on 5 July 2021.

40. There is therefore no current concern about safeguarding, although that was not the position at the time of the hearing. I greatly welcome the removal of that concern. As with the financial issues, however, there is a subtler issue in relation to the Parish. The Parish remained responsible for all safeguarding matters in relation to activities within St Saviour's, whether Softplay or not. I do not doubt that they took them very seriously. As it appears, however, as well as minor ways in which the policy was unsatisfactory (of the sort, no doubt, which might happen in any organisation) the lack of documentation raises the question whether the Parish could properly have been in a position to assure itself that Softplay was not causing any safeguarding issues. It would not obviously be right to permit the Parish to enter into an arrangement which experience showed had, by apparent delegation, despite their best endeavours, allowed them to be less than alert in relation to their safeguarding duties.
41. All these concerns, some now relating directly only to the past but most having a continuing effect, caused and cause me to pause before being able to be satisfied that I should exercise my discretion in granting a faculty to permit the Parish to enter into the proposed Licence. Softplay is in principle acceptable and to be welcomed, but it looked and I am sorry to say still looks as though the Company, despite having been set up for specifically this purpose, is far from ideal as a contracting partner.

## V

### DECISION

42. On the other hand, it may be said, first, most of the problems identified have not in reality occurred despite the fact that the Company has been in existence for nearly ten years and has been operating Softplay for much of that time, albeit without lawful authority, and secondly that they may never happen and that it would be wrong to inhibit a potentially highly desirable project on the basis of unrealistic fears: the company may continue to flourish as it did before the pandemic, and make a comfortable profit from which it can make the payments due to the Parish. To a great extent I would agree with both those observations, but with reservations. The present proceedings are best thought of as an opportunity to get everything properly sorted out, and it therefore ought to be possible for all unanswered questions to be answered before any faculty is granted. Further, although much of the basis of the present application (including the very possibility of a contract between them) depends on the separation of the Parish from the Company, the Parish has almost always provided information on their own behalf and have obtained very little specifically and separately from the Company.
43. As I indicated at the beginning of this judgment and at other points within it, I do not consider that all the relevant questions can be properly answered on the material before me. It follows that some concerns remain. I have concluded, however, that the best solution is to allow the Licence to be entered into for a trial period long enough to test its working and to allow the Parish to assemble whatever information is necessary to dispel all concerns

(if possible) before the Licence is renewed. This will enable a structured approach to any remaining issues.

44. The draft Licence originally proposed was to be dated in 2018 and to last until 31 August 2024. It became apparent at the hearing that a number of minor amendments were necessary: they, and an amended draft, were submitted in April 2020. Because of the passage of time the proposed term of the Licence was modified to 31 August 2025, although for some reason the rights and obligations arising from the Licence were still to be treated as having arisen on the 'Commencement Date' of 10 January 2018. It will now be necessary to make further changes, particularly in respect of parties and dates. The Licence should not purport to regulate events before it is executed. It will no doubt be executed as soon as may be after the faculty passes the seal, and the appropriate length of the trial period is thirty months or so, during which both the PCC and the Company will have produced two sets of annual reports and accounts, and there will have been ample opportunity to test the operation of Softplay under this regime.
45. There will be an amendment to the 2018 faculty. It will authorise the Parish to enter into the Licence agreement in the form attached to the Parish's solicitor's email to the Registrar dated 3 April 2020, subject to the following further amendments: (i) the Commencement Date in clause 1.1 is to be the same as the date on which the Licence, having been executed by all parties, comes into force; (ii) Clause 7.1 is to be amended so as to read 'This License shall (subject to the other provisions of this clause) remain in force until 30 September 2024 and shall thereafter cease to have effect (save as regards rights and obligations already accrued) unless renewed in accordance with a faculty granted or amended by the Court' (iii) any necessary changes to the identity of the parties, and the dates in Clause 6.3.
46. If renewal of the Licence permitted by the present faculty is sought, the process will be by further amendment of this faculty, to which the following conditions apply and will be added by way of amendment. The application for amendment must be submitted to the Registrar so as to be received no later than 31 July 2024, accompanied by the following: (a) the PCC's accounts as approved at the APCMs in 2023 and 2024, showing the actual receipt by the parish of all the sums due under the licence and a full explanation of the reason for any downwards revision of the payment due and the procedure adopted in determining it; (b) the Company's independently approved accounts for its two previous accounting years, presented on the basis that it does not own or control anything belonging to the church, and that any other of its property that is subject to the faculty jurisdiction falls to be valued on the basis that it may not be able to be realised; (c) confirmation from the Charity Commissioners that they have inspected the Memorandum and Articles of Association of the company and are satisfied that it does not and did not require registration, and confirmation from HMRC that no tax is due from the Company; (d) confirmation no more than six months old from the Diocesan Safeguarding Adviser that there are no concerns about the operation of the enterprise; (e) a statement of truth by the churchwardens that there has been no work or activity in the church since the date of the 2018 faculty for which a faculty was by law required but was not obtained or was not at the time effective.
47. These requirements are not onerous. Their purpose is to demonstrate, in good time before the renewal date, that the expectations of the present proceedings have been fulfilled. There will be ample opportunity to have the documentation ready within the timescale set out. Indeed the arrangements to obtain that mentioned under (c) can (and indeed should) be begun straightaway.
48. If a renewal application is made in accordance with the above requirements, and if, as I hope, the operation is the success that this application and the draft Licence anticipate, there is unlikely to be any difficulty about renewal, probably for a further period of up to five years. If the requirements set out above are not complied with, there can be no expectation

of any renewal. If there is no renewal, the Softplay operation will cease to be lawful on 30 September 2024. If the Parish wish the activity to continue, they alone have the responsibility of ensuring that the materials to enable the Court to make the relevant decision in their favour are complete, and submitted in good time.

49. One other matter arose during the proceedings. The works authorised by the faculty in 2013 were not completed quite as authorised. This is a point that was raised by the Victorian Society, and although the Parish originally said there had been no variance, that does not appear to be correct. There is, however, in heritage terms, no significant difference between what was authorised and what was done. I shall therefore authorise, as sought, confirmatory amendments to that faculty in accordance with the draft also attached to the parish's solicitor's email to the Registrar dated 3 April 2020.

The Worshipful C M G Ockelton MA BD

Chancellor

17 February 2022

(minor amendments made under rule 20.3 on 28 February 2022)