Beauty or Utility?

Case Note on ***Spitalfields Open Space Limited and others (Appellants) v The Governing Body of Christ Church Primary School and others (Respondents) (No 2)*** [2019] EACC 1

By Tom Stafford and Lucile Taylor, Pupils at Hailsham Chambers

Introduction

The case of *Spitalfields Open Space Limited and others (Appellants) v The Governing Body of Christ Church Primary School and others (Respondents) (No 2)* [2019] EACC 1 was heard before the Arches Court of Canterbury in November 2018, sitting in St Mary-le-Bow Church. The Court of Arches is the appellate court of the Church of England for appeals from diocesan consistory courts. David Pittaway QC, Head of Hailsham Chambers, heard the case with two other panel members in his capacity as Chancellor of the diocese of Peterborough.

This was an appeal from the judgment of the acting deputy chancellor of the diocese of London ("the Deputy") in the consistory court. It concerned whether a churchyard should be restored to an open space or whether a nursery, unlawfully erected in the churchyard, should be allowed to remain.

Background

The subject of the appeal was a nursery and community building constructed in 2012/13 by the Governing Body of Christ Church Primary School (the First Respondent). The First Appellant in the case, Spitalfields Open Space Limited (**"SOS"**), was a newly formed company, set up by a group of local residents led by Mrs Christine Whaite (the Second Appellant). The nursery was built over part of the churchyard of Christ Church, Spitalfields.

The Church was designed by Nicholas Hawksmoor and consecrated in 1729. In 1873, the diocese sanctioned the erection of the first school buildings to the south east of the churchyard. The Rector of Christ Church retained title to the land upon which the school was built. Further development was carried out in the 20th century, including the erection of a children's recreation centre in the centre of the churchyard in the 1970s; a tennis court and a multi-games area, which became a youth and community centre in the 1990s, and had ceased to operate by 2008.

In 2010, discussions began for expanding the school, involving further development in the churchyard. The Rector and Church Wardens (the Second Respondent) applied for planning permission. This was granted by Tower Hamlets (the Fourth Respondent) on 5 August 2011. The permission allowed for the demolition of the former recreation centre and the erection of a new nursery and community building. Local residents had opposed the planning application. It was acknowledged by the planning officers that the construction would result in the loss of 75 square metres of open space.

The churchyard was, however, estimated to contain around 67,000 burials. Under s.3 of the Disused Burial Grounds Act 1884 (**"the 1884 Act"**), as amended by the Disused Burial Grounds (Amendment) Act 1981 (**"the 1981 Act"**), it is unlawful to erect any buildings upon consecrated disused burial grounds. This posed a clear problem for the potential development.

On 8 November 2011, the Respondents petitioned the chancellor for a faculty permitting them to proceed with the development. However, the petition was misleading. It falsely represented that (a) the land was not consecrated; and that (b) no graves would be interfered with.

On 17 February 2012, the chancellor issued a faculty for dismantling the existing buildings and for the development of the school and community building. In July 2012, construction work began. Very shortly after the work commenced, seventeen burial vaults were excavated, along with human bone fragments and the coffin of an infant; a 'Philip Ouvry'. The remains were placed into one of the brick vaults, and a ceremony was performed by the Rector.

Construction of the nursery was completed in October 2013. The residents opposed to the development had, meanwhile, realised that the land was consecrated and that the 1884 Act might apply. Mrs Whaite and other residents had written to the chancellor, registrar and Chief Executive of Tower Hamlets on 14 September 2012, raising the issue and requesting cessation of construction works.

The Appellants sent a pre-action letter on 8 March 2013. Negotiations between the parties did not result in a solution. On 21 August 2014, the Appellants applied to the chancellor for a 'Restoration Order' under s.13(5) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (**"the 1991 Measure"**), later replaced by s.72 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (**"the 2018 Measure"**). This provides that, where it appears to a consistory court that a person has committed an act in breach of ecclesiastical law, 'the court may make an order…requiring that person to take such steps as the court may consider

necessary…for the purpose of restoring the position so far as possible to that which existed immediately before the act was committed.' In short, a Restoration Order is a type of mandatory injunction; the effect of which, in this case, would be demolition of the nursery.

In the course of the dispute, on 1 April 2015, the Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure 2015 came into force which inserted s.18A into the 1991 Measure (**"s.18A"**), later replaced by s.64 of the 2018 Measure. S.18A(1) provided that notwithstanding s.3 of the 1884 Act, 'a court may grant a faculty permitting the erection of a building on a disused burial ground'. S.18A(2) provides that the conditions for the exercise of that power are either that (a) no interments have taken place in the land in question in the previous 50 years; or that (b) no personal relative of any person whose remains have been interred in the land during that period actively objects to the grant of the faculty.

The Rector and Church Wardens lodged a petition on 19 October 2015 for a confirmatory faculty under s.18A. This was heard by the Deputy who held that:

(1) SOS did not have a sufficient interest;

(2) the court had the necessary power to grant a confirmatory faculty; and

(3) accordingly, a confirmatory faculty should be granted and a Restoration Order be refused.

Judgment

(1) Was the Deputy wrong in respect of the insufficient interest of SOS?

The first issue of whether SOS had sufficient interest to seek a Restoration Order and to oppose the grant of a confirmatory faculty, was dealt with swiftly and unequivocally: they did. They were neither 'vexatious busy-bodies' nor a reproachable shell-company. [42; 48; 51]

Although the Respondents maintained a neutral stance in relation to this issue as a matter of only academic importance, despite having challenged the locus of SOS initially, the Court addressed the issue as matter of general significance for other cases within the faculty jurisdiction. [39]

In short, at first, when there was the question as to whether there had been a breach of the 1884 Act, and whether a Restoration Order was thereby called for, there was no one else 'prepared to seek to uphold the rule of law.' [49]

When the unprecedented petition for a confirmatory faculty was later made under the new s.18A, the

petition needed to be opposed, given that it was plainly arguable that s.18A had no application. [49]

SOS was thus born of the unusual circumstances of this case. Although the individuals concerned could have acted without the umbrella group, it was entirely reasonable to establish SOS and then to incorporate it. [49-50]

(2) Was the Deputy wrong to hold that there was power to make a confirmatory faculty?

The analysis of the second issue turned on the construction of the new s.18A: does s.18A permit not only the grant of a prospective faculty, but also the grant of a confirmatory faculty? [54] In other words, the question was whether s.18A was intended to empower the approval by confirmatory faculty of previously erected buildings, as opposed to only approval by prospective faculty of buildings awaiting erection. [58]

The Court firmly concluded that s.18A was purely prospective in character, derived from the natural meaning of the phrase 'faculty permitting the erection of a building' (s.18A(1)). This conclusion was reinforced by the express futurity of the wording of s.18A(2)(a) which reads, 'land on which the *building is to stand*' [emphasis added], together with the prospective language of various provisions the 1981 Act, which appeared to have influenced the wording of s.18A. [53; 56] The wording of s.18A therefore referred solely to the future erection of a building and was not expressed to authorise retention of a pre-existing building, in this case, the nursery. [61]

The mischief at which s.18A had been directed could be found in the case of *Re St Peter in the East*, noted at (2014) 166 Ecc LJ 248, judgment delivered on 19 September 2013. In that case, the prohibition imposed by s.3 of the 1884 Act precluded the (then) deputy chancellor of Oxford diocese from granting a faculty for the introduction of various useful buildings to a disused consecrated churchyard. The deputy chancellor had expressed his prescient dissatisfaction at the outcome, commenting at [67] that, 'it remains to be seen whether the 1884 Act will be modified by forthcoming legislation.' And it promptly was, through the introduction of s.18A. [57]

Given that *Re St Peter in the East* entirely concerned prospective buildings, and there was nothing in the legislative material to indicate otherwise, the Court concluded that s.18A had nothing to do with previously erected buildings. [58] The Deputy had erroneously assumed that as a result of the enactment of s.18A, there was a power to grant a confirmatory faculty without investigating the source of that power. The source of that power would have derived from s.18A which, properly interpreted, conferred no such power. [60]

(3) If not, should the Deputy's finding be changed as a result of Mr Ouvry's application to intervene?

The third issue concerned an objection under s.18A(2)(b) made by Mr Jonathan Ouvry, a distant relative of Philip Ouvry. In principle, this third issue fell away, since it was premised on the Deputy having been correct to conclude that she had a power to grant a confirmatory faculty. Given that the Court had decided that there had been no power to grant a confirmatory faculty, consideration of whether that non-existent power could be ousted by Mr Ouvry's application under s.18A(2)(b) was clearly not strictly necessary. It was nevertheless important to summarise their views of s.18A(2)(b), given that similar issues might arise in future, and the Court had had the benefit of detailed argument on the subject.

Thus in respect of the third issue, Mr Ouvry was granted permission to intervene. The question was whether, pursuant to s.18A(2)(b), Mr Ouvry's active objection to the grant of a confirmatory faculty in respect of the re-interment of his distant relative, Philip Ouvry, within the 50 year period prior to the date of the petition for the confirmatory faculty, would be capable of ousting any power to grant a confirmatory faculty.

The Court concluded that Mr Ouvry's application under s.18A(2)(b) would not have precluded the granting of a confirmatory faculty. [81] His relative's re-interment was not synonymous with interment for the purposes of s.18A(2)(b). [72] Interment had to be narrowly construed so as to exclude re-interments of bodies or human remains originally interred within the same burial ground. S.18A(2) could therefore not be interpreted as giving scope for objections to a confirmatory faculty based on the re-interment of the long-deceased Philip Ouvry. [79]

(4) If there is no power to make a confirmatory faculty, should a Restoration Order now be made?

This was the crux of the matter: should the nursery be demolished and the open space of the churchyard restored?

The jurisdiction to make a Restoration Order is discretionary under s.13(5) of the 1991 Measure (or s.72(3) of the 2018 Measure). The Appellants sought a Restoration Order with a maximum period of two years. The Respondents submitted that no order should be made, but if one was, it should be suspended until 2043. [120-121]

It was agreed that the erection of the nursery was an act in relation to a churchyard which was unlawful under ecclesiastical law. [87] The conduct of the Respondents had been reckless and flagrant, not least in terms of

the form filling, but also, having been notified that the building works which had not yet started were in breach of s.3 of the 1884 Act, had taken no steps whatsoever to obtain legal advice or seek to stop the start of the works. [94-97]

It was held that this deliberate, knowing defiance of the law, strengthened the Appellants' argument about the importance of the rule of law, although the Court doubted that, contrary to the Appellants' argument, a decision not to make a Restoration Order would in fact lead to a repetition of this form of unlawfulness. [98-99; 117]

The factors militating on both sides included the fact that the nursery had been erected at considerable public expense; conferred benefit to its users and would be expensive to demolish. [89; 106] On the other hand, the value of open space in urban areas, particularly for those of modest means, and the detrimental effect on the setting of the Grade I listed church of the nursery, which had been built close to it and was intrusive in some views of the church, were also taken into consideration. [110-114]

The Court struck a balance between these factors. Whilst granting the Restoration Order, it was held that realism and public interest demanded that restoration of the site would not need to be completed until 1 February 2029, unless use of the nursery ceased before then, in which case it must then be demolished forthwith. [117; 133] Deferral to 2043, however, would be far too long, sanctioning illegality and indirectly encouraging unlawful acts. [133] By January 2029, the nursery would have functioned for thirteen years, so that public money spent would not have been entirely wasted. [139]

Conclusion

This judgment came after a bitterly fought battle within the Spitalfields community spanning over several years. The Court welcomed what appeared during the appeal hearing 'to be the first, if very tentative, steps towards a rapprochement between the parties'. [145] It is hoped that the restoration of the churchyard to an open space will bring to fruition the words of Phillip Larkin's 'Church Going', invoked by the Appellant, and referred to in the judgment: [110]

A serious house on serious earth it is,
In whose blent air all our compulsions meet,
Are recognised, and robed as destinies.
And that much never can be obsolete,
Since someone will forever be surprising
A hunger in himself to be more serious,
And gravitating with it to this ground,
Which, he once heard, was proper to grow wise in,
If only that so many dead lie round.

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