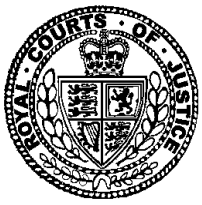

Neutral Citation Number: [2020] EWHC 1240 (Ch)

Case No: BL-2019-001906

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 22/05/2020

Before:

MRS JUSTICE FALK

- -

Between:

HOPE COMMUNITY CHURCH (WYMONDHAM) **Claimant**

- and -

(1) NICHOLAS BRENDAN PHELAN
(2) DAVID ANTHONY PHELAN
(3) ANDREW KEVIN PHELAN
(AS TRUSTEES OF
THE PHELAN GROUP LIMITED RETIREMENT
BENEFITS SCHEME)

Defendants

Philip Rainey QC (instructed by **Hatch Brenner LLP**) for the **Claimant**
Guy Fetherstonhaugh QC and Tricia Hemans (instructed by **Birketts LLP**) for the **Defendants**

Hearing date: 5 May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.00 am on Friday 22 May 2020.

MRS JUSTICE FALK

Mrs Justice Falk:

1. This is a Part 8 claim by Hope Community Church (Wymondham) (the "Church"). It seeks a declaration that it has the right to enfranchise its church premises in Wymondham, Norfolk (the "Premises"), pursuant to s 1 of the Places of Worship (Enfranchisement) Act 1920, as amended (the "1920 Act").

2. The one-day hearing of the claim, which I heard remotely, did not involve any live evidence. I would like to thank the parties and their legal representatives for their cooperation in ensuring that the hearing could go ahead within the planned trial window, and Counsel for their clear and helpful submissions.

The relevant facts

3. The Church is a private company limited by guarantee, incorporated on 6 October 2008. It is also a registered charity. The Defendants are brothers. They act in their capacity as trustees of the Phelan Group Limited Retirement Benefits Scheme, which is the pension fund related to their family business, Phelan Plant Hire ("PPH").

4. The Premises had previously been used as a workshop by PPH. The property was first occupied by PPH in 1983, and the freehold was purchased from the council in 1988. The Premises were rented out when the business operations of PPH were moved to Snetterton, and title was transferred to the pension fund in the 1990s. A witness statement from Andrew Phelan describes the Premises as the "bedrock" of the pension fund, and explains that the family have a "strong emotional attachment" to the building. The family does not wish to part with it.

5. On 18 March 2015 the Church entered into a 30 year lease of the Premises (the "Lease") from the Defendants.

6. The prescribed particulars of the Lease at LR5 provide:

> "The property demised will, as a result of this lease be held by (or in trust for) Hope Community Church (Wymondham) a non-exempt charity, and the restrictions on disposition imposed by sections 11 to 121 of the Charities 2011 will apply to the land (subject to section 117(3) of that Act)."

(LR5 is required for leases in favour of a charity. It reflects s 122(8) Charities Act 2011, which requires a disposition of land in favour of a charity to state whether the land will be held by or in trust for a charity, whether the charity is exempt and, where it is not, to confirm that the restrictions on disposition imposed by ss 117 to 121 of that Act will apply[1]. The reference to s 11 rather than s 117 in the Lease is obviously a slip.)

7. The permitted use of the Premises, set out in the Lease, is defined as follows:

> ""Authorised Use" means as a church and community centre with ancillary offices, including as a place of worship, concert hall, indoor/outdoor sports, restaurant/coffee shop, non residential education and training, business use and storage or for any other purpose within Use Classes B1, D1 or D2 subject

[1] The precise form of words is set out in rule 179 of The Land Registration Rules 2003.

> to obtaining the prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed);".

8. It is not disputed that the Church is a Christian church, that the Premises are and have at all material times been used as a church, and that religious services are open to the public. The Premises are also used as a local community centre, providing outreach activities for local residents.

9. Paragraph 16.2.2 of Schedule 3 to the Lease is also relevant to the dispute. Schedule 3 sets out the covenants given by the Church as tenant. Paragraph 16 is headed "Alienation", and relevantly provides:

> "16.2 Except to the extent allowed by this paragraph 16 not to:
>
> 16.2.1 …
>
> 16.2.2 hold the whole or any part of the Premises as trustee or agent or otherwise for the benefit of any other person."

10. A witness statement from one of the director/trustees, Mark Bullen, explained that the Church has incurred around £850,000 of expenditure on the Premises, including around £100,000 on a new roof. Mr Bullen also commented on Andrew Phelan's reference to emotional attachment, stating that to him the building was his place of worship, where he expressed his faith, and was the centre of the Church's ministry. He added that the claim was being brought to protect the long-term security of the Church and church community.

The issue in dispute

11. As already indicated, the parties are in dispute over whether the Church is entitled to exercise the right of enfranchisement under the 1920 Act. In essence, the dispute turns on whether the Defendants are right to maintain that the legislation only applies where the Premises are held on what amounts to a trust in strict legal terms, or whether the Church's status as an incorporated charity is such that it can meet the requirements of the legislation without such a trust. A subsidiary point is that the Defendants maintain that any such trust that did exist, or was now created, would breach paragraph 16.2.2 of Schedule 3 to the Lease, because that prohibits the Premises from being held on trust.

The 1920 Act

12. It is fair to say that the 1920 Act is a little encountered piece of legislation, with just one known contested High Court case, *Stradling v Higgins* [1932] Ch 143. It comprises only six sections.

13. The undisputed background to the legislation is a Select Committee report on "Town Holdings" dating from 1889 (the "Town Holdings Report"). The relevant recommendation in the report reads as follows:

> "There has been a considerable amount of evidence given from some parts of the country of the difficulty experienced by Nonconformist bodies in obtaining a secure tenure of their places of worship, and schools connected with them, and of this being

> frequently felt to be a great hardship. The Committee think that it is most desirable on public grounds that all religious bodies should be enabled to obtain a secure tenure of such places of worship and schools, and they consider that the freeholder who has granted land for such purpose has no good reason to object to its being held in perpetuity, on his receiving the value of his interest. They therefore recommend that all religious bodies to whom land has been granted on lease by the freeholder for the erection of their places of worship and schools, should be empowered to purchase the fee, subject to the payment of fair compensation."

14. A number of attempts were made to introduce legislation reflecting this recommendation, including in the early 1890s and again between 1910 and 1912. All failed for broader political reasons affecting the Government of the day. The Great War then of course intervened, and draft legislation was only reintroduced in 1920.

15. The long title of the 1920 Act describes it as:

> "An Act to authorise the Enfranchisement of the Sites of Places of Worship held under Lease."

16. Section 1(1) of the 1920 Act (as amended) provides:

> "(1) Where premises held under a lease to which this Act applies are held upon trust to be used for the purposes of a place of worship [or, in connexion with a place of worship, for the purpose of a minister's house][2], whether in conjunction with other purposes or not, and the premises are being used in accordance with the terms of the trust, the trustees, notwithstanding any agreement to the contrary (not being an agreement against the enlargement of the leasehold interest into a freehold contained in a lease granted or made before the passing of this Act), shall have the right as incident to their leasehold interest to enlarge that interest into a fee simple, and for that purpose to acquire the freehold and all intermediate reversions…"

17. Section 1(2) describes the leases to which the Act applies, in summary leases granted for life or for at least 21 years.

18. Section 2 deals with procedure. It effectively incorporates provisions governing compulsory purchase, including as to the consideration to be paid. This means that the starting point is, essentially, market value. Some adjustments are made, in particular the value of any buildings erected or improvements made by the trustees has to be excluded, and no allowance is made on account of the acquisition being compulsory. This is explained in *Hague on Leasehold Enfranchisement* (6th ed) at 19-08 as simply excluding the 10% addition that at the time it had become customary to add on

[2] The text in square brackets was not part of the original legislation.

compulsory purchases. Disputes over the amount of the compensation are now determined by the Upper Tribunal (Lands Chamber).

19. Section 3 provides:

> "The estate in fee simple acquired by the trustees shall be held by them upon the same trusts as those upon which the leasehold interest would have been held by them if it had not been enlarged into a fee simple, and shall be subject to the same covenants and provisions relating to user and enjoyment and to all the same obligations of every kind other than the payment of rent as those to which the leasehold interest would have been subject if it had not been so enlarged…"

20. Section 3 goes on to provide that such covenants, provisions and obligations are to be enforceable against the trustees and their successors in title, and to provide for some exclusions relevant to such matters as fire insurance and repairs. As described in *Hague on Leasehold Enfranchisement* at 19-13, s 3 is a somewhat unusual provision, and the position as regards enforceability has not been judicially determined.

21. Section 4 was repealed by the Leasehold Reform Act 1967, but I set it out because it was relied on by the Church and is potentially relevant to the issues that I need to decide:

> "If the person who was entitled to the freehold reversion in the lands at the time when the interest of the trustees in the lands was enlarged into a fee simple, or the successor in title of that person, proves to the satisfaction of the Charity Commissioners that any premises the estate in fee simple in which has been acquired by the trustees under this Act, or any part thereof, are let or are habitually used for any purpose or purposes other than those specified in the trusts upon which the estate in fee simple is held the Commissioners shall, unless it appears to them that such use was due to inadvertence and will be discontinued, by order determine such letting or user, and for this purpose may declare void any contract for, and may prohibit by injunction the continuance of, any such letting or user, or may order that the premises or that part thereof shall be sold, and any order so made shall be enforceable by the same means and be subject to the same provisions as are applicable under the Charitable Trusts Acts, 1853 to 1894, to any orders made thereunder."

22. Section 5 contains definitions which apply "unless the context otherwise requires". Two are particularly relevant:

> "The expression "place of worship" means any church, chapel, or other building used for public religious worship, and includes a burial ground, Sunday or Sabbath school or caretaker's house attached to or used in connexion with and held upon the same trusts as a place of worship;
>
> …

> The expression "trustees" means the persons in whom the leasehold premises are for the time being vested for the purposes of a place of worship or minister's house under any trust whether express or implied and includes their predecessors in title."

23. Section 6 provides for the short title and that the Act does not extend to Scotland or Northern Ireland.

24. As already mentioned, there is only one known High Court authority on the legislation. There have however been some Upper Tribunal cases dealing with compensation, of which three unreported but published ones were referred to by Mr Rainey, Counsel for the Church. These are *Re Union of Welsh Independents Incorporated* ACQ/64/2006, *The Trustees of the K&M Wholesale Suppliers Ltd Retirement Benefit Scheme v Meadowhead Christian Fellowship* [2016] UKUT 31 (LC) and *Re Friends Trusts Limited* [2017] UKUT 109 (LC). Mr Rainey referred to these because they each involved enfranchisement under the 1920 Act by companies limited by guarantee, being companies that were incorporated in 1921, 2003 and 1923 respectively. However, I note that in *Friends Trusts* the entity in fact itself acted in a trustee capacity, holding land for the benefit of the Quakers: see the decision in that case at [1].

The constitution of the Church

25. The Memorandum of Association of the Church states its objects as follows at clause 3:

> "3.1 The objects of the Church are, for the benefit of the public-
>
> 3.1.1 to advance the Christian faith in accordance with the Statement of Beliefs[3] in such ways and in such parts of the United Kingdom or the world as the Trustees[4] from time to time may think fit,
>
> 3.1.2 to relieve sickness and financial hardship and to promote and preserve good health by the provision of funds, goods or services of any kind, including through the provision of counselling and support in such parts of the United Kingdom or the world as the Trustees from time to time may think fit, and
>
> 3.1.3 to advance education in such ways and in such parts of the United Kingdom or the world as the Trustees from time to time may thank fit,
>
> 3.2 The Trustees must use the income and may use the capital of the Church in promoting the Objects."

26. Clause 4 provides for a broad range of powers, which it states "may be exercised only in promoting the Objects". Clause 5.1 provides (subject to irrelevant exceptions):

[3] Set out in Article 11, referred to below.
[4] See [28] below.

> "The property and funds of the Church must be used only for promoting the Objects and do not belong to the Members[5]…"

27. Clause 8 (which is also incorporated by reference into the Articles of Association) deals with dissolution. It states that, after provision for liabilities, any assets remaining:

> "…must be applied in one or more of the following ways-
>
> 8.1.1 by transfer to one or more other bodies established for exclusively charitable purposes within, the same as or similar to the Objects,
>
> 8.1.2 directly for the Objects or charitable purposes within or similar to the Objects, and
>
> 8.1.3 in such other manner consistent with charitable status as the Commission[6] approve in writing in advance."

28. Article 1.1 of the Articles of Association set out definitions that apply both in the Memorandum and the Articles, including the following:

> ""Beneficiaries" means those persons who may benefit from the charitable activities of the Church
>
> …
>
> "Member" and "Membership" refer to membership of the Church
>
> …
>
> "the Objects" means the Objects of the Church as defined in clause 3 of the Memorandum
>
> …
>
> "Trustee" means a director of the Church and "Trustees" means of [sic] the directors".

29. Article 4.1 provides:

> "The Trustees are responsible for the management and administration of the Church's property and funds in accordance with the Memorandum and the Articles."

30. Article 11 contains a statement of Christian beliefs of Members.

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[5] See [28] below.
[6] Defined as the Charity Commission for England and Wales.

The parties' submissions in outline

31. Mr Rainey submitted that in the context of the 1920 Act references to "trust" and cognate expressions should not be construed as limited to trusts in the strict legal sense of a charitable trust constituted by a trust deed (a trust in the "strict sense"), but instead as encompassing charitable corporations who, in a "broad sense", hold property upon trust to be used for the purposes of public worship. His primary submission was based on the wording of the 1920 Act, which he submitted should be interpreted purposively, and the relevant context, in particular the Town Holdings Report. But he also submitted that, if necessary, reference could be made to Hansard debates which he said supported the Church's position, under the principle established by *Pepper v Hart* [1993] AC 593. He also submitted that the point raised about paragraph 16.2.2 of Schedule 3 to the Lease was a bad one, because a trust was expressly contemplated by LR5, and in any event paragraph 16 was concerned with alienation rather than with the original grant.

32. Mr Fetherstonhaugh, for the Defendants, submitted that the 1920 Act requires a trust in the strict sense, and no such trust exists. The statute is an expropriatory one that should not be given a liberal interpretation, and there should be no resort to Hansard under *Pepper v Hart* principles. In oral submissions he developed his argument by reference to the specific provisions of the Church's Memorandum and Articles and the terms of the Lease, submitting that even if the court concluded that a trust in a "broad sense" could fall within the 1920 Act, there was nothing in those documents that provided for the Premises to be "held upon trust to be used for the purposes of a place of worship", as required by s 1. Any attempt to introduce such a provision now would fall foul of paragraph 16.2.2.

Approach to statutory construction

33. There was no dispute about the relevant principles of statutory construction, or about the fact that it is appropriate to have regard to the Town Holdings Report. Support for the latter can be found in the judgment of Lord Nicholls in *Wilson v First County Trust (No.2)* [2004] 1 AC 816 at [56] (as part of a discussion about *Pepper v Hart*):

> "…When a court is carrying out its constitutional task of interpreting legislation it is seeking to identify the intention of Parliament expressed in the language used. This is an objective concept. In this context the intention of Parliament is the intention the court reasonably imputes to Parliament in respect of the language used. In seeking this intention the courts have recourse to recognised principles of interpretation and also a variety of aids, some internal, found within the statute itself, some external, found outside the statute. External aids include the background to the legislation, because no legislation is enacted in a vacuum. It has long been established that the courts may look outside a statute in order to identify the "mischief" Parliament was seeking to remedy. Lord Simon of Glaisdale noted it is "rare indeed" that a statute can be properly interpreted without knowing the legislative object: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 647. Reports of the Law Commission or advisory committees, and government white papers, are

> everyday examples of background material which may assist in understanding the purpose and scope of legislation."

34. As far as the correct approach to statutory construction is concerned, Mr Rainey relied on the now well accepted modern approach to statutory construction, that is "to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose": *Pollen Estate Trustee Co Ltd v Revenue & Customs Commissioners* [2013] 1 WLR 3785 at [24], per Lewison LJ. Mr Rainey also relied on an elaboration of that approach in the context of another enfranchisement statute, Part 1 of the Landlord and Tenant Act 1987, in *York House (Chelsea) v Thompson* [2020] Ch 1 from [32].

35. In *Pollen Estate* the Court of Appeal construed an exemption from stamp duty land tax which provided "a land transaction is exempt from charge…if the purchaser is a charity" as if the word "if" were replaced with the phrase "to the extent that", accepting that it would be anomalous for no duty to be payable if the sole purchaser was a charity but for it to be payable on the whole consideration if the purchasers included both a charity and a non-charity. In reaching that conclusion, Lewison LJ referred to the following statement by Lord Reid in *Luke v Inland Revenue Comrs* [1963] AC 557 at p577:

> "To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."

36. In *York House* Zacaroli J referred to *Pollen Estate* and also to another Court of Appeal case referred to in *Pollen Estate, Potsos v Theodotou* (1991) 23 HLR 356, where Parker LJ said at p359:

> "… if the construction of the section put forward … would lead to unreasonable results or results which the legislature are unlikely to have intended, we are, in my view, permitted so to construe the section that those unreasonable results are avoided if that can legitimately be done without doing violence to clear language."

37. In *Potsos* joint landlords sought possession on the statutory ground that the property was reasonably required by the landlord for occupation as a residence for himself "or any son or daughter of his". It was held that this should be interpreted as saying "any son or daughter of theirs, or either of them".

38. Specifically in the context of enfranchisement, there is case law authority about the correct approach in the context of the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993. The general approach to

interpretation of the 1993 Act was explained by Millett LJ in *Cadogan v McGirk* [1996] 4 All ER 643 at p648b:

> "It would, in my opinion, be wrong to disregard the fact that, while the 1993 Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy."

39. In *Hosebay v Day* [2012] 1 WLR 2884 at [6], Lord Carnwath added the following comment:

> "By the same token, the court should avoid as far as possible an interpretation which has the effect of conferring rights going beyond those which Parliament intended."

40. Millett LJ's comment in *Cadogan v McGirk* was referred to in the recent Court of Appeal decision in *LM Homes Ltd v Queen Court Freehold Co Ltd* [2020] EWCA Civ 371, where Lewison LJ also referred at [22] to the following comment of Lord Millett in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209 at [116]:

> "The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless."

Incorporated charities and charitable trusts

41. Charities incorporated as companies limited by guarantee, such as the Church, are not a new concept. Two of the companies referred to at [24] above, The Union of Welsh Independents and Friends Trusts Limited, were incorporated as companies limited by guarantee in the early 1920s. The charity considered in *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch 193 ("*Liverpool Hospital*"), a decision of Slade J considered below, was also a company limited by guarantee. Slade J noted at p197 that it was incorporated as such under the Companies Acts 1908 to 1917. There is a similar reference to the Companies Acts 1908 to 1917 in the incorporation documents of Friends Trusts Limited. It seems clear therefore that charitable companies limited by guarantee must have been a known concept by 1920.

42. Incorporated charities of other kinds also exist, and have done for many years. For example, the charity considered in *In Re the French Protestant Hospital* ("*French Protestant*") [1951] Ch 567 was an incorporated body created by a Royal Charter granted in 1718. *Soldiers', Sailors and Airmen's Families Association v Attorney General* [1968] WLR 313 ("*SSA Families*") related to a charity created as an unincorporated association in 1885, which was incorporated by a Royal Charter granted in 1926.

43. It is also worth noting that s 66 Charitable Trusts Act 1853 (the earliest of the modern charities legislation) defined "Charity" to mean:

> "every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purvieu, or interpretation of the Statute of the forty-third year of Queen Elizabeth, Chapter Four, or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction;"

and defined "Trustee" of any Charity to:

> "…mean and include every person and corporation seised or possessed of or entitled to any real or personal estate, or any interest therein, in trust for or for the benefit of such Charity, or all or any of the objects or purposes thereof…"

It is relatively clear from this that charitable corporations were contemplated. Furthermore, the concept of "Trustee" included a corporation holding assets not only on trust for or for the benefit of a charity, but also a corporation holding assets "in trust…for the objects or purposes" of the charity. However, it is fair to say that the concept of "Trustee" was probably assumed to apply to persons other than the charity itself.

44. Given that incorporated charities clearly existed, I do not think I need to consider (and was not addressed on) the question whether the correct interpretation of the 1920 Act is affected by the principle of "updating construction" described in Chapter 14 of *Bennion on Statutory Interpretation*, 7th ed. The legislature can be taken to have been aware that charities could exist in incorporated form.

45. Mr Rainey submitted that, before the decision in *Liverpool Hospital*, there was no recognised distinction between a charitable trust in the strict sense and a charitable corporation. He relied on *French Protestant* and *SSA Families*.

46. *French Protestant* decided that the directors of the corporation in question were, although not technically trustees, in the same fiduciary position as trustees in respect of the corporation's affairs, and were therefore within the scope of a rule of law which debarred trustees from receiving payment for their services. Danckwerts J said the following at the start of his judgment, at p570:

> "It is said by [Counsel for the directors] that it is the corporation which is trustee of the property in question, and that the governor and directors are not trustees. Technically that may be so. The property of the charity is, of course, vested in and held by the corporation."

47. This statement rather suggests that Danckwerts J may have considered that the corporation held the property on trust. He also used language elsewhere in the judgment which appears to have assumed the existence of a trust. He said further down the page at p570 that it would be illegal if the directors used the property for their own purposes "and not for the purposes of the charitable trust for which the property is held", and he also referred at p572 to it being a "great change" if it were thought proper for a provision enabling remuneration to be charged "to be inserted in a document regulating a

charitable trust". He repeated references to a "charitable trust" and "trusts" in the final paragraph of the judgment.

48. *SSA Families* concerned whether the association in question had an unrestricted power of investment. Cross J held that it was in the position of a trustee, saying the following at p317:

> "One starts with this, that this chartered corporation is a charitable corporation and accordingly it is in the position of a trustee with regard to its funds. That was submitted by counsel for the Attorney-General and conceded by counsel for the association. Prima facie, therefore, the funds of the association can only be invested, as trust funds can be invested, under the Trustee Investments Act, 1961."

It is important to note that Cross J proceeded on the basis of a concession, so I am not persuaded that this case provides significant support for Mr Rainey's submission. However, the fact that a concession was made provides some indication of views held at the time.

49. Mr Rainey also relied on *In Re Lands Allotment Company* [1894] 1 Ch 616, where company directors were treated as falling within the meaning of "trustee" in the Trustee Act 1888 on the basis that the definition included a trustee "whose trust arises by construction or implication of law", and were therefore able to take advantage of a limitation period applicable to trustees. I do not find this case to be of particular assistance. The case concerned company assets that had been misapplied. The basis of the claim against the directors was that, although directors are not normally trustees, they are treated as trustees of misapplied assets. Effectively, therefore, the claim was one for breach of trust, yet it was being said that the directors could not benefit from the limitation period available to trustees. Unsurprisingly, the Court of Appeal had no difficulty in concluding that in those circumstances the directors fell within the definition of "trustee", such that the limitation period applied.

50. *Liverpool Hospital* is the leading modern case on the question (Counsel being, interestingly, latterly Lady Arden and Mummery LJ, for the association and the Attorney General respectively). The case concerned the distribution of surplus assets of a charitable company which was in winding up, and the question whether or not s 257 et seq. Companies Act 1948 applied, including s 265 which made provision for the distribution of surplus assets to members. Slade J held that s 265 did apply because there was no trust in a strict sense, although on the facts that result was overridden by the company's constitution. However, Slade J ordered a cy-près scheme on the basis that the jurisdiction to do that was not limited to a case where there was a strict trust, and applied on the facts because the association's constitution obliged the assets to be held for charitable purposes. In effect, Slade J applied a broader meaning of trust for the purposes of determining that a cy-près scheme could be ordered, but a narrower meaning for the purposes of the Companies Act provisions.

51. In rejecting Mr Mummery's submission that charitable companies hold their assets as trustees (in the strict sense), Slade J undertook a helpful review of earlier authorities, including not only *French Protestant* and *SSA Families* but also the Court of Appeal decision in *Construction Industry Training Board v Attorney-General* [1973] Ch 173,

where Buckley LJ expressed the view at p187 that the funds held by the board were held "upon a statutory trust for exclusively charitable purposes", and *Von Ernst & Cie. S.A. v. Inland Revenue Commissioners* [1980] 1 WLR. 468. In *Von Ernst* Buckley LJ returned to the subject at p479, commenting that earlier authorities to which the court was referred "give support to the view that a company incorporated for exclusively charitable purposes is in the position of a trustee of its funds or at least in an analogous position", and that in *French Protestant* and *SSA Families* "it was assumed, rather than decided, that a corporate charity was in the position of a trustee of its funds".

52. In *Liverpool Hospital* Slade J said this at p209:

> "The expressions "trust" and "trust property" may be, and indeed have been, used by the court in rather different senses in different contexts. Examples of cases where the court has used the expression otherwise than in their strict traditional sense are to be found in Lord Diplock's review of certain earlier authorities in *Ayerst v C. & K. (Construction) Ltd*. [1976] AC 167, 179-180[7]. In a broad sense a corporate body may no doubt aptly be said to hold its assets as a "trustee" for charitable purposes in any case where the terms of its constitution place a legally binding restriction upon it which obliges it to apply its assets for exclusively charitable purposes. In a broad sense it may even be said, in such a case, that the company is not the "beneficial owner" of its assets. In my judgment, however, none of the authorities on which Mr Mummery has relied, including the decision in *Construction Industry Training Board v Attorney-General* [1973] Ch 173 , establish that a company formed under the Companies Act 1948 for charitable purposes is a trustee in the strict sense of its corporate assets, so that on a winding up these assets do not fall to be dealt with in accordance with the provisions of section 257 et seq. of that Act. They do, in my opinion, clearly establish that such a company is in a position *analogous to that of a trustee* in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs; but that is quite a different matter."

53. It is certainly the case that *Liverpool Hospital* articulated the distinction between the different senses in which the concept of charitable trust has been used. However, I think it goes too far to say that the distinction between a charitable trust in the strict sense and a charitable corporation dates only from that case, if what is being said is that before then charitable companies were regarded as trustees of their property as a matter of law.

54. I do accept that Danckwerts J appears to have assumed there was a trust in *French Protestant*. *SAS Families* proceeded on the basis of a concession. Buckley LJ also stated there was a trust in *Construction Industry Training Board,* although he slightly qualified that in *Von Ernst.*

[7] This case concerned the status of a company's ownership of assets once it is in winding up.

55. In contrast, however, in the much earlier case of *Bowman v Secular Society Ltd* [1917] AC 406 (predating the 1920 Act) the House of Lords accepted that a gift "upon trust" for the society, a non-charitable company limited by guarantee, was an absolute gift to the legal entity. Lord Parker said the following at pp440-441:

> "The fact that a donor has certain objects in view in making a gift does not, whether he gives them expression or otherwise, make the donee a trustee for those objects. If I give property to a limited company to be applied at its discretion for any of the purposes authorized by its memorandum and articles, the company takes the gift as absolutely as would a natural person to whom I gave a gift to be applied by him at his discretion for any lawful purpose. The case of *Attorney-General v Haberdashers' Co* (1834) 1 Myl. & K. 420 is an express authority on this point… If a gift to a corporation expressed to be made for its corporate purposes is nevertheless an absolute gift to the corporation, it would be quite illogical to hold that any implication as to the donor's objects in making a gift to the corporation could create a trust. The argument, in fact, involves the proposition that no limited company can take a gift otherwise than as trustee. I am of opinion, therefore, that the society, being capable of acquiring property by gift, takes what has been given to it in the present case, and takes it as absolute beneficial owner and not as trustee."

56. Lord Buckmaster said at p478:

> "It is a mistake to treat the company as a trustee, for it has no beneficiaries, and there is no difference between the capacity in which it receives a gift and that in which it obtains payment of a debt. In either case the money can only be used for the purposes of the company, and in neither case is the money held on trust."

57. Cases decided since *Liverpool Hospital* have also recognised that incorporated charities do not strictly hold their assets on trust, for example *Latimer v The Commissioner of Inland Revenue* [2004] UKPC 13 at [30] and *Re Wedgwood Museum Trust Ltd (In Administration)* [2011] EWHC 3782 (Ch) at [16] and [17].

58. However, it is worth noting that the term "trust" is still used in connection with charities in a broad sense. For example, s 353 Charities Act 2011 contains the following definition:

> ""trusts"—
>
> (a) in relation to a charity, means the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not, and
>
> (b) in relation to other institutions has a corresponding meaning."

59. The reality is that whether a "trust" in the strict or a broad sense is being referred to will depend on the statutory context. For example, in *Von Ernst* the view was expressed that for the purposes of the statutory provision being considered an incorporated charity could not be treated as "beneficially entitled" to property, in a similar way to the trustees of an unincorporated charity.

Is a trust in the strict sense required?

60. It is not disputed that the Church does not hold its assets on trust in the strict sense. It is the beneficial owner of its assets. Furthermore, the terms of the Lease do not alter this. So, for example, any capital value that reflects the Church's interest in the Premises would be reflected in its statutory accounts (to the extent required or permitted by applicable accounting principles), and any income it generates from the Premises would also be reflected in those accounts. That income would accrue for the benefit of the Church and would not be held by it on trust in a strict legal sense.

61. The Church is, however, required to comply with its charitable objects, as set out in clause 3 of its Memorandum of Association. Members do not have rights to the Church's assets or funds, either while the Church exists or on dissolution (clauses 5 and 8). Powers may only be exercised in, and property may only be used for, promoting the objects (clauses 4 and 5). Provisions of this nature are, I believe, standard for charities incorporated as companies limited by guarantee. It was the requirement to apply the company's assets exclusively for charitable purposes that allowed Slade J to order a cy-près scheme in *Liverpool Hospital*, on the basis that it was in a position "analogous to that of a trustee for charitable purposes" (at p214F).

62. Mr Fetherstonhaugh relied on the repeated references to "trust" and "trustees" in the 1920 Act. Although the directors of the Church are labelled as "Trustees", it is accepted that they are not trustees in a legal sense. Instead, in order to take advantage of the legislation the Church must establish that it can be regarded as "the trustee" for the purposes of the legislation[8].

63. The key text in s 1(1) of the 1920 Act refers to "premises…held upon trust to be used for the purposes of a place of worship". The focus is on the purpose of the use of the premises. The language does not say "on trust for [a religious body]". What is contemplated is some form of purpose trust, rather than a trust for a *cestui que trust*.

64. It is trite that non-charitable purpose trusts are not recognised under English law. Bearing in mind that the definition of place of worship in s 5 restricts its scope to use for public religious worship, what the legislation clearly has in mind is something in the nature of a charitable trust. The reference to the Charity Commissioners in the (now repealed) s 4 is consistent with this.

65. The Town Holdings Report recommended a measure to allow enfranchisement by "all religious bodies". When the legislation was introduced, as well as now, incorporated charities were a known feature. There is no indication that a policy choice was made to exclude religious bodies simply because they had adopted an incorporated form, with their charitable purposes set out in a constitution rather than in a trust deed. Such an approach would not appear to allow the mischief identified by the Town Holdings

[8] I bear in mind that, under s 6 Interpretation Act 1978, the plural includes the singular.

Report to be properly addressed, because it would deny enfranchisement in all cases where leases had been granted to incorporated charities (including prior to the enactment of the legislation) without some form of strict trust.

66. Although there was case law before 1920 to the effect that limited companies generally hold their assets absolutely (in particular *Bowman v Secular Society*, see above), as Slade J found in *Liverpool Hospital* there have also been cases since 1920 that have assumed that charitable companies are in the position of a trustee, and that at least in some contexts a trust, or something analogous to it, should be treated as existing.

67. I accept that the Town Holdings Report also appears to contemplate enfranchisement of leases granted for the erection of places of worship, that is building leases rather than other leases. The legislation as enacted contains no such restriction, and in this case of course the Church did not erect the building (albeit that it has spent a significant sum on it). However, I do not think the fact that Parliament clearly chose not to restrict the legislation to building leases means that no weight can be placed on the Town Holdings Report. The absence from the legislation of any reference to leases of land for building, or similar, is clear. In contrast, the word "trust" and its related expression "trustees" do not clearly limit the scope of the legislation.

68. It seems to me that interpreting the 1920 Act as limited to trusts in the strict sense would not be interpreting it in a way that best gives effect to its purpose as discerned from the legislation (and taking account of the Town Holdings Report). The words used are capable of a construction which extends not only to trusts in the strict sense, but the broad sense considered in *Liverpool Hospital*, that is where the terms of an incorporated charity's constitution place binding restrictions upon it, requiring it to apply its assets exclusively for charitable purposes. The definition of "trustees" in s 5, referring to "any trust whether express or implied", is also sufficiently broad to permit this.

69. This approach avoids what would otherwise be an unreasonable result, in which there would be an apparently irrational distinction between religious bodies that have chosen to incorporate, such that the incorporated entity can (and typically will) hold the charity's assets, and those that have not chosen to incorporate and instead rely on a trust structure. It is also consistent with the approach to interpretation adopted in the enfranchisement cases referred to at [38] to [40] above. Whilst the 1920 Act might be regarded as expropriatory, it was clearly passed for the benefit of religious bodies. It also provides for proper compensation. The interpretation I am adopting does not, in my view, confer rights going beyond what Parliament intended.

70. An interpretation which restricted the application of the legislation to a trust in the strict sense would have anomalous results, which the court should be slow to conclude that Parliament intended. If the Defendants' approach were correct the legislation could potentially apply to an unincorporated religious body where the relevant lease was held by trustees. The legislation might also be available to an incorporated charity if the lease was held by separate trustees on trust for the benefit of the charity's objects. However, if the lease was granted to the charity itself then enfranchisement would not be possible unless the charity somehow constituted itself as a trustee of the lease for the benefit of the relevant charitable object, even though by holding the lease itself it would still be required to advance that object under the terms of its constitution. That would seem somewhat pointless and (given that the landlord would typically be concerned about

the quality of the tenant's covenant, and therefore potentially disinclined to grant a lease to an entity acting solely as trustee) potentially unrealistic.

71. It is important to bear in mind that the legislation does not simply require actual use of premises as a place of worship. There must be a "trust" as contemplated by the legislation, whether express or implied, which provides for use as a place of worship. It is not the case that the interpretation I have adopted renders the requirement for a trust meaningless. That interpretation is based on the restrictions applicable to a charitable company which require it to apply its assets exclusively for charitable purposes, such that the entity may be treated as holding assets as a "trustee" in the broad sense referred to in *Liverpool Hospital*. The requirement in s 1(1) of the 1920 Act for the trust to provide for use of the premises as a place of worship also restricts the scope to circumstances where the charity has objects which encompass public religious worship.

72. Furthermore, the property in question must in fact be held on terms that it is "to be used" for public religious worship, whether or not other uses are also permitted. So, for example, a charity with both religious and educational objects would not be able to avail itself of the legislation in respect of property held on lease for use only as a school[9], whatever its actual use. The focus is on the purposes for which the property in question is held. I consider this further below.

Is there a "trust" within the terms of the legislation on the facts?

73. I now turn to the question whether, on the facts, the Church has established that it holds the Premises on "trust" as required by the terms of the legislation.

74. As already mentioned, Mr Fetherstonhaugh submitted that even if a trust in the broad sense could in principle fall within the 1920 Act, there was nothing in the Church's constitution or the Lease that satisfied the requirement for the Premises to be "held upon trust to be used for the purposes of a place of worship" within s 1(1).

75. I do not agree with this. The first point to make is that the legislation specifically contemplates that use as a place of worship may not be the sole use: the legislation provides that the Premises must be "…held upon trust to be used for the purposes of a place of worship … whether in conjunction with other purposes or not…" (emphasis supplied).

76. It is true that there is nothing in the Church's Memorandum or Articles expressly relating to the Premises or their use. However, the Church's objects clearly include the advancement of the Christian faith, its assets must only be used to promote the objects (clause 5.1 of the Memorandum), and the Trustees must manage the Church's property in accordance with the Memorandum and Articles (clause 4.1 of the Articles).

77. Turning to the Lease, the definition of Authorised Use is set out at [7] above but I repeat it here for ease of reference, and with subdivisions suggested by Mr Rainey included in square brackets:

[9] Not being a Sunday school within the definition of place of worship in s 5 of the 1920 Act.

> ""Authorised Use" means [(a)] as a church and community centre with ancillary offices, including [(b)] as a place of worship, concert hall, indoor/outdoor sports, restaurant/coffee shop, non residential education and training, business use and storage or [(c)] for any other purpose within Use Classes B1, D1 or D2 subject to obtaining the prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed);".

78. Both Counsel agreed that the closing words requiring the consent of the Landlord only qualify the text commencing "for any other purpose". I also agree. A comma should have been inserted after the word "storage", and the definition should be read on the basis. However, Counsel disagreed in another respect. Mr Rainey submitted that the text should be divided into the three parts indicated, and based on that it was clear that the intended and principal use was "as a church and community centre with ancillary offices" (that is, part (a)). The list of uses that follows (part (b)) was all consistent with use as a church and community centre. Mr Fetherstonhaugh submitted that this was not the case, and the Church was not obliged to use the Premises as a place of worship. It could for example use the Premises as a sports hall, for training or for other business use.

79. I prefer Mr Rainey's interpretation, although I think the text more naturally divides into two rather than three parts, namely (a) and (c). The existence of part (c) provides a strong indication that the "purpose" which the landlord has authorised is use "as a church and community centre with ancillary offices". Any other "purpose" requires the landlord's consent. The text shown as part (b) comprises words of inclusion, clarifying what use as a "church and community centre" can be taken to allow. It lists activities that can typically take place in such a building (a church may for example have a café, gift stall or shop, or put on craft fairs or similar, as well as conducting education and training). If the clause were interpreted as allowing, for example, education or business use without qualification, then it is hard to see what would be left to be achieved by part (c).

80. It follows from this that the Premises must, under the terms of the Lease, be used as a "church and community centre with ancillary offices". They cannot be used for other purposes without the landlord's consent. Although uses within part (b) are permitted, I do not consider that they are permitted to the exclusion of use as a church and community centre. The Premises are in my view therefore required to be used as a church, although other uses are permitted "in conjunction" with that, as contemplated by s 1 of the 1920 Act.

81. *Stradling v Higgins*, the one known earlier High Court case on the legislation, provides some support for a relatively flexible approach. The case concerned a lease of two buildings used by the Salvation Army, one of which was used for services open to the public, with part of the other being used for education. The lease was originally granted to William Booth but was subsequently assigned by the then General of the Salvation Army to the defendants on trust to permit the buildings to be:

> "used as and occupied for the purposes of a place of worship by and in accordance with the practice and doctrines of the Salvation Army and for such other purposes of the Salvation

> Army, not inconsistent with that use and occupation, as the General of the Salvation Army should from time to time determine".

82. Maugham J concluded that the terms of the trust allowed the lease to be enfranchised under the 1920 Act, on the basis that use for public religious worship was a "main object" of the deed. The rooms used for teaching were either within the definition of "place of worship" if used as a Sunday school, or if not did not prevent the premises qualifying, because:

> "…premises are held upon trust to be used for the purposes of public religious worship none the less because some of the minor or less important parts of those premises are not used for public worship" (p152).

Maugham J referred to other examples, such as the library at St Paul's Cathedral, caretakers' rooms, chapter houses and so on.

83. It is not disputed that the Premises in this case are in fact used as a church as well as a community centre, and there is no suggestion that any parts that are not so used are material.

84. Reading together the Memorandum and Articles of the Church and the Authorised Use under the terms of the Lease, I consider that the requirements of s 1(1) of the 1920 Act are met. The Premises are required to be used as a church under the terms of the Lease. The Church is a charity, required to use its assets for its charitable objects, which include "to advance the Christian faith". There is no dispute that (consistent with that object) services are open to the public. The Church's constitution provides a "trust" of a kind contemplated by the legislation, and the Premises are in fact being used in accordance with the terms of that trust, as required by s 1(1).

85. I consider that it is appropriate to rely on a combination of the terms of the Lease and the Church's constitution in the way just outlined. The focus of s 1(1) is on the premises in question, and whether they are held (expressly or impliedly) on the requisite purpose trust. The natural starting point is the Lease. The requirement to use the Premises as a church is clear from the terms of the Lease, and use for those purposes was obviously what the Church was seeking to obtain when it entered into the Lease. It holds the Lease as one of its assets, and as a charitable company it is in a position analogous to a trustee in respect of those assets.

86. An additional point that I have considered is whether the words "*to be used* for the purposes of a place of worship" in s 1(1) limit its scope to "trusts" that *require* use as a place of worship (whether or not in conjunction with other uses). I can certainly see an argument that property held on terms which simply permits use as a place of worship, but also allows use for other purposes to the exclusion of use as a place of worship, would not fall within s 1(1), although given the terms of the Lease in this case that point does not arise for decision. However, I do not think it correct to say that the terms of the trust must compel (active) use as a place of worship. Rather, what is required is that the property is held on terms that, if it is used, it is (or, possibly, at least can be) used as a place of worship. If it is not so used in fact, then the second part of the test in s 1(1), which requires use in accordance with the terms of the trust, would not be satisfied.

Pepper v Hart

87. I have reached the conclusion that the concept of "trust" in the 1920 Act should be read in the broad sense without any need to resort to Hansard. I should however record that I was referred by Mr Rainey to Parliamentary debates when what became the 1920 Act was debated in November 1920, and to debates in 1891 at the time of the first attempt to enact the recommendation made by the Town Holdings Report. Mr Fetherstonhaugh also referred to the latter.

88. The *Pepper v Hart* criteria permit resort to Parliamentary materials where:

> "(a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear" (per Lord Browne-Wilkinson at p640).

89. Mr Rainey relied on a statement made by the Lord Chancellor, Lord Birkenhead, on 18 November 1920 when moving the 1920 Bill on its second reading. Lord Birkenhead quoted from the section of the Town Holdings Report already referred to, including references to "all religious bodies". I can see that the statement is relatively clear and that it meets the requirement that the statement is made by the Minister or other promoter. However, bearing in mind that it is appropriate to have regard to the Town Holdings Report irrespective of *Pepper v Hart*, I do not think that there is sufficient ambiguity to require reference to Hansard, or indeed that reference to it really adds to the Town Holdings Report.

90. Furthermore, I do not think it is appropriate to refer to the debates in 1891, which of course did not lead to legislation.

Clause 16.2.2

91. I can deal with clause 16.2.2 of the Lease more briefly. I agree with Mr Rainey that it cannot sensibly be interpreted in a way that would put the Church in breach of it as from the date of grant. There is more than one way of reaching that conclusion. One is that, on its terms, the clause contemplates the tenant holding the Premises for the benefit of another person (see the reference to "as trustee or agent or otherwise for the benefit of any other person"). That would also be consistent with the clause forming part of the alienation provisions, although I do not necessarily agree that it would only catch transactions after the Lease was granted.

92. In any event, however, the parties would have been well aware that the Lease was being granted to an incorporated charity. In those circumstances, and construing the words in their factual context[10], a construction of clause 16.2.2 which catches trusts in the broad sense discussed in this decision, as well as trusts in the strict sense, cannot be regarded as consistent with what the parties are to be taken as having intended.

[10] See for example *Arnold v Britton* [2015] AC 1619 at [15]. That case concerned leases.

93. I am somewhat less persuaded by Mr Rainey's argument that the prescribed particulars at LR5, which form part of the lease, specifically contemplated the lease being held by "or in trust for" the Church. The form of words used simply follows that required by rule 179 of the Land Registration Rules 2003, without the deletion of the alternative wording that the draftsman of those Rules appears to have had in mind[11]. Nonetheless, there is some force in the point that some form of trust was expressly contemplated by the terms of the original grant.

Conclusion

94. In conclusion, the Church is entitled to a declaration that it has the right to acquire the freehold of the Premises pursuant to the 1920 Act.

[11] The text in the Rules reads: "The land transferred (*or as the case may be*) will, as a result of this transfer (*or as the case may be*) be held by (*or* in trust for) (*charity*)…".