Neutral Citation Number: [2020] EWHC 1189 (Ch)

Claim No: PT-2019-000482

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY TRUSTS AND PROBATE LIST (CHD)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 13 May 2020

Before:

MR ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

Between:

(1) MR STAMOS J FAFALIOS **(2) MR MICHAEL F LYKIARPOPULO** **(3) MR JOHN M LYRAS** **(4) MR MICHAEL C LEMOS** **(5) MR ANASTASSIS N FAFALIOS**	**Claimants**
- and -	
(1) MR COSTAS APODIACOS **(2) MR ANTHONY JOHN WOODWELL BURTON** **(3) MR VASSILIS ZARIFIS** **(4) MR MICHAEL LOS** **(5) MR NIKOLAOS SKINITIS** **(6) MR PANAYOTIS VOUDRIS** **(7) HER MAJESTY'S ATTORNEY GENERAL**	**Defendants**

Matthew Smith (instructed by **Withers LLP**) appeared for the **Claimants**
Joshua Winfield (instructed by **TLT LLP**) appeared for the **first-sixth Defendants**
The **seventh Defendant** did not appear and was not represented

Hearing date: 28-29 April 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.

MR ROBIN VOS

DEPUTY JUDGE MR ROBIN VOS:

Background

1. At the heart of this claim is a dispute as to who controls the substantial funds held by the first-sixth defendants in their capacity as trustees of the Greek Cathedral Cemetery Enclosures Trust, a charitable trust made in 1860 (I shall refer to this trust as the Cemetery Trust and the trustees as the Cemetery Trustees).

2. The claimants are the trustees of another charitable trust, The Greek Cathedral Trust established in 1888 (which I shall refer to as the Cathedral Trust and the trustees as the Cathedral Trustees).

3. Both of these charities are linked to the Greek Orthodox Cathedral of the Divine Wisdom in London (also known as Aghia Sophia or St Sophia).

4. The Cathedral Trustees ask for a declaration that any surplus funds of the Cemetery Trust are held by the Cemetery Trustees on trust for such charitable purposes as the assembly of the Cathedral may, by a two-thirds majority, resolve. In the alternative, they ask the court to make a cy-près scheme directing that any surplus funds are held on such terms.

5. The Cemetery Trustees say that the assembly has no right to tell them how the surplus funds of the Cemetery Trust should be dealt with. They accept that, on their case, a cy-près scheme is needed but only to clarify who is entitled to be buried in the cemeteries which they control and not, as the Cathedral Trustees suggest, to determine how any surplus funds which they hold should be used.

The Cemetery Trust

6. The purpose of the Cemetery Trust is to make provision for the burial of what is described in the trust deed as "Members of the Greek Community in London".

7. On 5 December 1860 a group of individuals were granted burial and associated rights in perpetuity in relation to part of what was then known as the South Metropolitan Cemetery (now known as West Norwood Cemetery). By a declaration of trust dated 31 December 1860 ("**the 1860 Declaration of Trust**"),

those individuals declared that they held all of the rights which had been granted to them:

> "IN TRUST only for the purposes of interment of Members of the "Greek Community in London" And that the same ground and privileges shall be henceforth held and enjoyed by them the said Trustees or other the Trustees for the time being of the said recited Indenture of the fifth day of December one thousand eight hundred and sixty (subject to the provisions terms and conditions as mentioned set forth or referred to in the said recited Indenture) UPON and for the purposes of interment but subject to such rules and regulations as the said Greek Community of London shall from time to time by order under their Seal direct."

8. The only other provision contained in the 1860 Declaration of Trust related to the appointment of new trustees by the existing trustees.

9. Surplus funds from the sale of burial rights were used to acquire further burial rights in 1872, 1889 and 1901 in relation to additional plots of land at the South Metropolitan Cemetery. On each occasion, these rights were granted to different groups of individuals although some of the individuals in each group overlapped.

10. It appears that the rights acquired in 1872 were held in trust but it is not clear whether this was on the terms of the 1860 Declaration of Trust. There is no evidence that there was any declaration of trust at the time the 1889 or 1901 rights were granted either to the effect that the rights were held on the terms of the 1860 Declaration of Trust or on any other terms.

11. However, in 1927 a new group of trustees were appointed as trustees of the rights which had been acquired on each of the four separate occasions. As far as the rights acquired in 1860 and 1872 are concerned, it appears that there were no surviving trustees as the appointment was made by the executor of the last surviving trustee. The deed of appointment of new trustees relating to the acquisition in 1872 recited that the rights were held in trust but did not set out the terms of the trust.

12. The deeds appointing the new trustees of the rights which were acquired in 1889 and 1901 were made by the three surviving trustees who held those rights. These deeds of appointment specifically stated that the rights were held on trust for the interment of Members of the Greek Community in London. It appears that, at least since then (if not before), the rights acquired on each of the four occasions have been treated as being held on the terms of the 1860 Declaration of Trust.

13. On 13 December 1935, the trustees who had been appointed in 1927 executed a declaration ("**the 1935 Declaration**") which is central to the current dispute. The declaration recited the terms of the 1860 Declaration of Trust, the four acquisitions of burial rights in 1860, 1872, 1889 and 1901 (referred to as the First Grant, the Second Grant, the Third Grant and the Fourth Grant respectively) and the changes of trustees which took place in 1927. The declaration also contained the following recitals:

> "2 The [1860 Declaration of Trust] contained no provisions with regard to any profits that might be made by the Original Trustees or the Trustees from time to time thereof but certain monies from time to time came into their hands by the sale of graves and vaults in the Cemetery and further purchases of similar rights of burial and interment and other privileges in the Cemetery belonging to the said South Metropolitan Cemetery Company were made from time to time by such Trustees.
>
> …
>
> 3. Various Resolutions have from time to time been passed by the said Greek Community with regard to such monies arising from the sales of graves and vaults the last being passed on the 13th June 1926 in accordance with which investments representing the funds of the Cemetery were transferred to the Trustees of the Funds of the Greek Church such Trustees placing the equivalent value of such investments to a special account at interest in the names of the Cemetery Trustees and the Cemetery Trustees hand over from time to time the balance of the proceeds of sale of the graves and interest less outgoings and such

> sums so handed over are placed to the credit of the said special account."

14. The operative part of the 1935 Declaration is as follows:

> "NOW therefore the present Trustees hereby declare that all monies which now are or which from time to time may come to their hands from whatsoever source as Trustees of the said First, Second, Third and Fourth Grants and the said declaration of trust dated 31st December 1860 shall be held by them Upon trust to apply them in accordance with any Resolution that may be passed at a General Meeting of the Greek Community in London convened for the purpose by a clear majority of two thirds of the members present at such meeting and voting on such resolution."

15. The final page of the 1935 Declaration bears the words:

> "re: the community or brotherhood of the Orthodox Greek Church"
>
> "declaration of trust in respect of the Cemetery Trust"

16. On 18 December 2002, the Charity Commission made an order under Section 26 Charities Act 1993 authorising the amendment of the administrative provisions of the 1860 Declaration of Trust by the trustees of the Cemetery Trust. This power was exercised on 26 June 2003 by amending the circumstances in which new trustees could be appointed.

The Land and Vicarage Trust

17. Although it is not directly relevant to the questions before the court, in order to understand the historical background, it is worth mentioning the existence of a third trust known as the Land and Vicarage Trust which was created in 1879. The Land and Vicarage Trust owns the Cathedral and clergy accommodation. The declaration of trust recites that the land was acquired and the buildings were erected with money provided by "a Society or Community of persons known as the Greek Community in London" and provides that the land and buildings are held:

> "IN TRUST for the Greek Community in London and to be disposed of as such Greek Community by its authorised officers shall from time to time direct."

The Cathedral Trust

18. The Cathedral Trust was created in 1888. The recitals to the trust deed contain the following:

> "Whereas at a meeting of the Greek Community resident in London held in accordance with the regulations in force for the time being of the Greek Orthodox Church in London on 23rd day of December 1882 a resolution was passed authorising the chairman of the said meeting to invest certain monies derived from the sale of the old church belonging to the Community… and whereas at a meeting of the said Community held in accordance with the said regulations on the 15th day of December 1883 a resolution was passed that the account of the monies derived from the sale aforesaid and from the account of the Cemetery should thenceforth be kept as if they were one account… under the title of the Greek Church Trust account and that such account should be kept as a separate account and whereas at a meeting of the said community held in accordance with the said regulations on the 18th day of December 1886 a resolution was passed that the monies belonging to the Cemetery should be transferred to the disposal of the Churchwardens for the time being and the said monies are therefore specially excluded from the Trust hereby created."

19. Under the terms of the Cathedral Trust, the trustees were to accumulate the income until the trust fund reached the value of £20,000 and, thereafter, to use the income for the maintenance of the Greek Church in London (ie the Cathedral – the church had not, at that time, become a cathedral).

20. The power of appointing new trustees is given to the existing trustees although, if a vacancy is not filled within three months, the churchwardens are given the power to elect a new trustee.

21. Clause 9 of the declaration of trust refers to the "Greek Church Confraternity" which is defined in Clause 11 as:

> "those of the Greek Community belonging to the Greek Orthodox Church in London who contribute towards the maintenance of the Greek Church and who as signatories of the articles of rules and regulations governing the constitution of the Greek Church of Aghia Sophia Moscow Road, London are entitled to vote at any meeting of the Greek Community resident in London."

The origin of the current dispute

22. It is clear that the Cemetery Trust, the Land and Vicarage Trust, the Cathedral Trust and the Cathedral are intimately connected. Certainly, at the time they were founded, a key connecting factor was the Greek Community of London.

23. It appears that, for well over 100 years, the arrangements between these organisations operated harmoniously in a spirit of co-operation and consensus.

24. However, at the annual general meeting of the assembly of the Cathedral in 2014, concerns were raised about the fact that the surplus funds held by the Cemetery Trustees were in cash and had not been invested. The assembly passed a resolution directing that £200,000 should be transferred by the Cemetery Trustees to the Cathedral Trustees for investment. This was followed up in December 2014 and by a formal direction under the seal of the Cathedral.

25. The Cemetery Trustees declined to comply with the direction. They did not consider themselves bound to do so, wished to retain control over their own funds and were concerned that, if they handed the funds over, they may be diverted for other purposes such as the upkeep of the Cathedral.

26. The principal reasons given by the Cemetery Trustees for saying that they are not obliged to comply with any direction made by the assembly are firstly that their predecessors did not have power to make the 1935 Declaration and secondly that, in any event, the assembly of the Cathedral is not the same as the body which is

referred to in the 1860 Declaration of Trust and the 1935 Declaration as being "Greek Community of London".

27. It is as a result of this second point that the Cemetery Trustees accept that a cy-près scheme is needed given that the purpose of the Cemetery Trust is to provide the burial of members of the Greek Community in London. The scheme would need to define the group of people who should benefit from the activities of the Cemetery Trust.

The issues for the court

28. Against this background, the issues which the court needs to determine in order to decide whether to grant the relief the claimants ask for are as follows:

    28.1 What is the meaning and effect of the 1860 Declaration of Trust.

    28.2 Are the Cemetery Trustees entitled to challenge the validity of the 1935 Declaration.

    28.3 If they are, is the 1935 Declaration valid.

    28.4 Is the assembly of the Cathedral the "Greek Community of London" or, if not, what is meant by that phrase.

    28.5 Is a cy-près scheme needed either in relation to the surplus funds of the Cemetery Trust or in relation to the identity of the group of people for whom the Cemetery Trust provides burial rights.

The 1860 Declaration of Trust

29. The logical starting point is an analysis of the true effect of the 1860 Declaration of Trust. It not only sets out the initial terms on which the assets of the Cemetery Trust are held but, as we shall see, also has a significant impact on the question as to whether the Cemetery Trustees' predecessors had power to make the 1935 Declaration.

Principles of interpretation

30. Both parties accept what is now the conventional view that the approach to interpreting a trust document is no different to interpreting a contract.

31. This was confirmed by the Supreme Court in relation to wills in *Marley v Rawlings* [2014] UKSC 2. Lord Neuberger said at [19-21] the following:

> "19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. In this connection, see *Prenn*, at pp 1384—1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as H E Hansen-Tangen)* [1976] 1 WLR 989, per Lord Wilberforce, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke of Stone-cum-Ebony JSC, at paras 21—30.
>
> 20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, 'No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.' To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, 1400 that 'courts will never construe words in a vacuum'.
>
> 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is

> an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned."

32. In *First National Trustco (UK) Limited v McQuitty* [2020] EWCA Civ 107, the Court of Appeal applied the same principles to the interpretation of a trust document. Although the trust in that case had a commercial context, I can see no good reason to apply any different principles to the interpretation of a charitable trust, particularly given the comments of the Supreme Court in *Marley* in relation to wills which are perhaps more analogous to charitable or family trusts. I note in passing that this Court has reached the same conclusion in other cases dealing with family trusts following *Marley* (see for example *Armstrong v Armstrong* [2019] EWHC 2259 (Ch)).

33. As far as the relative weight to be given to the words of the trust document and the surrounding circumstances, Peter Jackson LJ in *First National Trustco*, having considered the key authorities, concluded at [33] that:

> "When construing a document the court must determine objectively what the parties to the document meant at the time they made it. What they meant will generally appear from what they said, particularly if they said it after a careful process. The court will not look for reasons to depart from the apparently clear meaning of the words they used, but elements of the wider documentary, factual and commercial context will be taken into account to the extent that they assist in the search for a meaning. That wider survey may lead to a construction that departs from even the clearest wording if the wording does not reflect the objectively ascertained intention of the parties."

34. It is clear from the decision of the Supreme Court in *Marley* at [19] and from the previous cases on which the principles set out in that paragraph are based that it is only facts which were known or assumed at the time the document was entered into which can be taken into account. Subsequent events are irrelevant. Mr Smith however submits, on behalf of the claimants, that there is an exception to this

which allows subsequent practice to be taken into account as part of the matrix of facts where many years have passed since the execution of the relevant document. He bases this submission on the decision of the Lord Chancellor in *Attorney General v Sidney Sussex College* (1869) L.R. 4. Ch. 722.

35. In that case, the testator executed a will in 1641 which left half of his estate to each of Sidney Sussex College in Cambridge and Trinity College in Oxford to be used for the education of certain of his descendants. From time to time, some descendants claimed the benefit of the gift. However, where no descendants came forward, the colleges used the funds for the general purposes of the colleges or to fund scholarships or exhibitions. The question which arose in 1869 was whether they were entitled to do so.

36. The Lord Chancellor decided that, on a proper construction of the will they were so entitled but added at [732] that:

> "I think the appellants are entitled to apply that principle of the Court which says, that if there be an ambiguity, the course of construction and action upon the bequest may be called in aid, as inferring that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time. The reasons why the Court relies upon that rule with reference to charities, where there is anything doubtful in the construction of the will, is, that there have been persons alive who are competent to controvert any such conclusion, and it is not to be assumed that, where many persons were interested in controverting such conclusion, a course of action has been adopted which has been a plain and clear breach of trust."

37. Although Mr Smith acknowledges that the principle set out *Sidney Sussex* could be seen to be inconsistent with the modern approach to the construction of trusts, he submits that it remains good law. I accept that submission. I was not referred to any authorities which have expressly overruled the decision in *Sidney Sussex* and none of the more recent cases from which the principles set out in *Marley* and the *First National Trustco* are derived were cases where there was no longer

anybody alive who could have objected to a particular interpretation at the time the document came into effect.

38. As the Lord Chancellor explains in *Sidney Sussex*, the rule is especially relevant to charities. No doubt this is because a charity can exist in perpetuity and so it is not unusual for the governing document to have been executed long before the living memory of anybody in existence at the time the dispute is brought before the court.

39. Mr Winfield, on behalf of the first-sixth defendants accepts that *Sidney Sussex* remains good law. He does however quite correctly point out that the principle can only apply if there is some ambiguity in the terms of the trust. In *Sidney Sussex* itself, the Lord Chancellor did not have to rely on the principle as he was able to reach his decision based on the terms of the will itself. The Lord Chancellor also referred to the decision in *Attorney General v Corporation of Rochester* (1854) 5 De G.M. & G. 797 43 E.R. 1079 where Lord Justice Turner said:

> "Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument, the Court will lean to that construction of the instrument (provided it be doubtful) which will best correspond with the mode in which the funds have been for so long a period applied. But that is the case where the Court has not the trust before it, or at all events where the trust, if it is before the Court, is doubtful in its terms and interpretation. If the Court finds a clear trust expressed on a will, no length of time during which there has been a deviation from it can warrant this Court, as I apprehend, in making a decree in contradiction to such a trust."

40. Bearing these principles in mind, I turn now to the interpretation of the 1860 Declaration of Trust.

How should income be applied

41. Both parties agreed that the burial rights themselves are held for the purposes of interment of members of the Greek Community in London. I will return later in this decision to the meaning of that expression as it is of more general relevance.

42. The position is however different as far as the income which arises from the sale of those rights is concerned. Mr Smith submits that there is a lacuna in the 1860 Declaration of Trust given that it does not explicitly say how the trustees are to deal with any such income. He does not however suggest that there is any possibility of a resulting trust in favour of the donors of the funds which were used to acquire the burial rights on the basis that the income is not disposed of. Instead, as we will see, this lacuna is one of his justifications for the predecessors of the Cemetery Trustees executing the 1935 Declaration.

43. Mr Winfield does not accept that the 1860 Declaration of Trust makes inadequate provision for the use of the income from the burial rights. He submits that it is trite law that the trusts on which the property of the Cemetery Trust is held will apply to any profits derived from that property. In support of this, he relies on the decision in re *Adams* [1893] 1 Ch. 329 which simply confirms at [332] that a beneficiary who has a vested interest in capital is also entitled to the income.

44. Although I was not referred to any other authorities, I have no doubt that Mr Winfield is correct. In the absence of any suggestion that the donors intended to retain the income or that it should be used in some other way, it must be the case that the trustees are entitled to the income and are required to use it for the same purpose or purposes as they hold the trust capital.

45. The reason for this is that, in the absence of any provision to the contrary, a gift of property entitles the donee to any future income from that property (if any authority for that proposition is needed, it is confirmed by *Re Adams*). If trustees hold capital of a trust for a particular beneficiary and their interest is vested, that beneficiary will also be entitled to the income (again, this is confirmed by *Re Adams*).

46. I cannot see that trustees of a charitable trust who are required to use the trust assets for a particular purpose are in any different position. The use of the trust assets for that purpose is in substance the same as holding funds for a beneficiary with a vested interest. It follows that any income must also be applied for that same purpose. I did not understand Mr Smith to dispute this in his submissions. Indeed, he accepted during the hearing that, if the 1935 Declaration were invalid, the Cemetery Trustees would be required to apply the income of the Cemetery Trust for burial purposes.

47. There is limited evidence of the factual context in which the funds were provided in order to acquire the burial rights. However, there is nothing I have seen which would suggest any objective intention other than the provision of facilities for the burial of members of the Greek Community in London.

48. I will come on to the effect of the 1935 Declaration but, looking solely at the 1860 Declaration of Trust, it is clear that the trustees of the Cemetery Trust are required to apply whatever property they have, whether the original burial rights or any proceeds or any income from those burial rights, for the purposes of interment of members of the Greek Community in London.

Directions from the Greek Community

49. The 1860 Declaration of Trust requires the trustees to hold the assets "for the purposes of interment but subject to such rules and regulations as the said Greek Community of London shall from time to time by order under their Seal direct".

50. Again, I will deal with the meaning of the phrase "the Greek Community of London" later in this decision. The question which I will address here is the extent to which the Cemetery Trustees are required to act in accordance with the directions of the Greek Community.

51. Mr Smith submits that these words entitle the Greek Community to give directions to the Cemetery Trustees in respect of any matter relating to the Cemetery Trust including not only administrative matters but also how the trust assets (including, in particular, the surplus income) should be used. Whilst Mr Smith did not suggest that the Greek Community could direct the Cemetery Trustees to apply

the burial rights themselves for purposes other than the interment of members of the Greek Community in London, it is consistent with the case which he put forward on behalf of the Cathedral Trustees that the Greek Community could direct the Cemetery Trustees to use any surplus income for other charitable purposes.

52. Mr Smith accepts that it is possible to argue that the words "rules and regulations" could be interpreted as being confined to administrative matters. This, he says, brings the *Sidney Sussex* principle into play, allowing the Court to look at subsequent practice as well as the facts known in 1860 in deciding on the correct interpretation. Mr Winfield however submits that the natural and ordinary meaning of the words "rules and regulations" is clear and that they refer only to administrative matters. He accepts that this may cover the way in which the assets of the Cemetery Trust are invested which was of course the basis of the dispute in 2014 which led to these proceedings.

53. Before considering whether the principle in *Sidney Sussex* allowing subsequent practice to be taken into account is applicable, I will consider the meaning of the words using the conventional principles set out in *Marley* and in *First National Trustco*.

54. I will say at once that I cannot see any basis on which the words are wide enough to allow the Greek Community to direct the Cemetery Trustees to use the assets for any purpose other than the burial purposes set out in the 1860 Declaration of Trust. The opening words of the relevant clause provide that the trust assets are held by the trustees "in trust only for the purposes of interment…". The reference to interment is then repeated immediately before the provision which allows the Greek Community to make rules and regulations. As Mr Winfield submitted, it would be stretching the words of the Declaration of Trust too far to interpret the ability to give directions as permitting the Greek Community to ignore this overriding purpose. I examine below what evidence exists of the history before 1860. However, there is nothing in that history which might suggest that the ordinary and natural meaning of the words should, in this case, be displaced.

55. Turning to what is known of events leading up to the creation of the Cemetery Trust, both parties referred to a book entitled "The Greek Orthodox Church in London" written by Michael Constantinides in 1933 who, at the time, was the Dean of the Cathedral. The book was written to commemorate the Cathedral's 50th Anniversary.

56. The book is, to a large extent, based on the correspondence and official records of the general meetings of the Greek Community of London. Prior to 1860, the available records only covered the period from 1837-1849.

57. It is clear that the Greek Community was founded as a formal organisation in 1837. Constantinides confirms that the main purpose of founding the Greek Community was in turn the founding of a Greek Orthodox Church in London. The first church was established in 1837 in Finsbury Circus.

58. The first statutes of the Greek Community were adopted in 1839 and started with the words:

> "The Greeks resident in London, belonging to the Orthodox Faith of the Eastern Church, recognising the necessity of possessing a house of prayer in this city, in which they may congregate and attend divine service celebrated by a priest of their race, have held a meeting and decided to establish such a church under the name of 'The Church of Our Saviour' for the maintenance and management of which they have unanimously compiled the following rules …"

59. At the General Meeting of the Greek Community in 1841, a committee was established to find a suitable site for a Greek cemetery. By 1842, an arrangement had been reached with the South Metropolitan Cemetery Company. It appears from records held by Freshfields, who had for many years acted for the various trusts connected with the Cathedral, that the arrangement in 1842 was originally a lease and that this was converted into a perpetual grant in December 1860 resulting in the creation of the Cemetery Trust.

60. Mr Smith submits that, as the acquisition of the Cemetery was masterminded by a committee of the Greek Community it is only to be expected that the community would want to have ongoing control of all matters relating to the Cemetery Trust, including how any surplus funds were used.

61. Turning now to the precise words used, the key phrase is "such rules and regulations". To my mind, those words are more apt to describe not only how something should be done but what should be done. That this is the intended meaning is perhaps confirmed by the use of the verb "direct". That is a word which would more normally be used when telling somebody what they should do rather than (or as well as) how they should do it.

62. Given that little is known about the background facts, I do not consider that the historical context is a strong factor either way. However, as Mr Smith suggests, it would be consistent with the fact that the Greek Community arranged the establishment of the Cemetery Trust and provided the funding for the acquisition of the burial rights for them to want to be able to have the final say as to how those arrangements were operated in practice.

63. On this basis, I do not consider that there is any real ambiguity in the meaning of the words which have been used and it is not therefore necessary to engage the principle described in *Sidney Sussex* and to examine how the Cemetery Trust funds have been used in practice in order to determine the correct interpretation of the 1860 Declaration of Trust. However, in case I am wrong on this point, I briefly note the following points:

    63.1 The Cathedral Trust Deed recites that between 1883 and 1886, the Cemetery Trust funds and the proceeds of sale of the previous Church owned by the Greek Community were held in a single account.

    63.2 In 1886 the Cemetery Trust funds were transferred "to the disposal of the Church Wardens for the time being" (under the terms of the statutes of the Greek Community, the Church Wardens were effectively the representatives of the Greek Community in dealing with the day to day business of the Church).

63.3 The further burial rights acquired in 1872, 1889 and 1901 were funded out of the Cemetery Trust funds but the rights were held by groups of individuals who were not (as a group) the trustees of the Cemetery Trust.

63.4 At some point prior to 1927, the Cemetery Trust was left without any surviving trustees.

64. All of this indicates to me that, even before the 1935 Declaration, it was the Greek Community which was calling the shots in relation to the funds held by the Cemetery Trustees and that no great attention was paid to the role of the Cemetery Trustees as a separate body.

65. Although Mr Smith took me to various documents evidencing control exercised by the Cathedral assembly after 1935, I do not consider this to be relevant given that anything which took place after that date can be explained by reference to terms of the 1935 Declaration rather than shedding any light on what people may have thought was intended by the words of the 1860 Declaration of Trust. In any event, actions taken more than 75 years after the 1860 Declaration of Trust are unlikely to provide much assistance given that part of the explanation for the principle in *Sidney Sussex* of looking at subsequent practice is the lack of any objection from anybody who would have been in a position to object at the time the relevant instrument came into force.

66. My conclusions on the interpretation and effect of the 1860 Declaration of Trust can therefore be summarised as follows:

66.1 The Cemetery Trust funds may be used only for the purposes of the interment of members of the Greek Community in London.

66.2 Subject to that overriding purpose, the Greek Community of London (the meaning of which I shall return to) has the right to direct the Cemetery Trustees as to what the funds they hold should be used for and how they should be administered.

66.3 In the absence of any such direction, the Cemetery Trustees are free to deploy the funds they hold as they see fit, again within the confines of the overriding purpose of using the funds for burial for members of the Greek Community in London.

The 1935 Declaration

Can the Cemetery Trustees challenge the validity of the 1935 Declaration

67. Mr Smith submits that the Cemetery Trustees are precluded from challenging the validity of the provisions contained in the trust documents, including the 1935 Declaration. In support of this, he relies on the decision in *Attorney General v Mathieson* [1907] 2 Ch. 383 as explained by the Supreme Court in *Shergill v Khaira* [2015] AC 359.

68. As far as *Mathieson* is concerned, the Master of the Rolls simply commented at [394] that the trustees in that case:

> "cannot challenge the validity of the trust deed under which they are acting."

69. The Supreme Court, in a judgement delivered by Lord Neuberger of Abbotsbury, Lord Sumption and Lord Hodge, expanded on this in *Shergill*. In that case, trustees acquired a building to be used as a Sikh temple (Gurdwara) based on a memorandum made in September 1987 which, among other things, provided that the only person with the authority to change trustees was a specified individual who held the office of "holy saint". In 1991, the trustees executed a formal trust document setting out the terms on which the Gurdwara was held. This permitted the trustees to be changed not only by the holy saint but also by his successor. The trustees subsequently tried to argue that the provision relating to the change of trustees in the 1991 deed was invalid as it did not reflect the terms of the 1987 memorandum.

70. The Supreme Court explained [at 26] the principle to be derived from the *Mathieson* case as follows:

> "Thus, there were two strands to the decision in the *Mathieson* case. The first is that trustees who have been appointed under the terms of a trust deed cannot challenge the validity of the deed. That would presumably be justified on the ground that the only basis on which they have any title to involve themselves in the affairs of the trust is as trustees, and they cannot therefore impugn the very document under which they achieved that status. They would be almost tantamount to denying their own title."

71. The Supreme Court went on to conclude at [29] on the specific facts of the case that:

> "We would reject the contention that we should accept ground (i), at any rate at this interlocutory stage. It is questionable whether the defendants, or at least those who were appointed as Birmingham trustees, can get round the first strand of the decision in the *Mathieson* case [1907] 2 Ch. 383. It is true that they did not become trustees as a result of the 1991 deed, as they became trustees when they purchased the Birmingham Gurdwara. But if that prevents the first strand of the Mathieson applying, it would appear to mean that, in the Mathieson case itself, Mr Wilkinson could have impugned the 1885 deed which he prepared and executed, as he had become a trustee when the money was handed over to him in 1884. It seems to us questionable whether the Master of the Rolls would have envisaged that Mr Wilkinson was in a different position in this connection from the other trustees. Like Mr Wilkinson, the first, second and third defendants declared that they were trustees of the relevant trust, and set out the terms of that trust, in the relevant deed and signed it."

72. Mr Smith accepts that he is asking the court to go further than was the case in *Shergill* as, in this case, the 1935 Declaration is not the original trust deed and all of the provisions relating to the appointment of trustees are contained in the 1860

Declaration of Trust (as amended in 2003). He does however point out that, although the Charity Commission's order in 2002 only refers to the original 1860 Declaration of Trust, the exercise of the power to amend that declaration of trust in 2003 also refers to the 1935 Declaration, as do all of the documents appointing the Cemetery Trustees with the exception of the last document which was executed in 2017 after the dispute had arisen and after the Cemetery Trustees had questioned the validity of the 1935 Declaration.

73. Both *Mathieson* and *Shergill* were cases where funds had been given on relatively vague or uncertain terms and the trustees had subsequently executed formal declarations of trust confirming the terms on which they held the trust property. In *Mathieson*, the Master of the Rolls said at [394] that:

> "If the individual or the committee depart from the general object of the original donors, any deed of trust thus transgressing reasonable limits might be set aside by proper proceedings instituted by the Attorney General, or possibly by one of the donors."

74. Based on this, the Supreme Court commented at [31] in *Shergill* in relation to the challenge to the expanded provisions concerning changes of trustees that:

> "We have considerable doubts whether anyone other than the Attorney General (or, conceivably, any of the original donors) would be entitled to raise the point."

75. Mr Smith suggested that this provides further support for the proposition that the trustees cannot themselves challenge the validity of the 1935 Declaration.

76. It would not in my view be right to expand the principle explained in *Shergill* so as to prevent the Cemetery Trustees from challenging the validity of the 1935 Declaration. There is a fundamental difference between the situation in *Mathieson* and *Shergill* and the position in this case. In both *Mathieson* and *Shergill*, there was a single declaration of trust which embodied the terms of those trusts. In substance, those documents set out the original terms of the trust in each case. It is not surprising that, if it was thought that the initial declaration of trust did not reflect the intention of the donors, the Attorney General or the donors

could intervene but not the trustees, given that they were the people who had made the declaration in the first place, nor their successors whose only rights and obligations derived from the declaration of trust.

77. In the case of the Cemetery Trust however, the trustees in 1935 had executed a document purporting to fill a gap in the original 1860 Declaration of Trust but which, based on my conclusion set out above, in fact changed the terms of the original trust.

78. Whilst it is understandable that a trustee who accepts office based on the original terms of the trust should not be able to challenge those terms, it would not be right to prevent a trustee from questioning the validity of subsequent actions taken by previous trustees. If trustees were unable to do so, they would face significant difficulties in protecting themselves from liability if it turned out, for example that a purported change to the terms of the trust made by previous trustees was, for some reason, invalid.

79. In my view, the principle in *Mathieson* should therefore be confined to any challenge to the original terms of the trust (whether those terms have been established by the donor or (as in this case) by the trustees in circumstances where the donor did not themselves confirm the precise terms of the trust) and should not be extended so as to prevent trustees from questioning the validity of any subsequent changes to the terms of the trust made by their predecessors. On that basis, the Cemetery Trustees are entitled to question the validity of the 1935 Declaration.

80. Mr Smith submits that, despite the initial 1860 Declaration of Trust, the 1935 Declaration is in reality part of the definition of the original terms of the trust given that the 1860 Declaration of Trust did not deal specifically with how any income should be applied. However, I do not accept this. As set out above, the effect of the 1860 Declaration of Trust was that any income should be used for the same purposes as capital. The 1935 Declaration was therefore an attempt to change the way in which any surplus funds should be used and the Cemetery Trustees are entitled to know whether that change was validly made.

Is the 1935 declaration valid

81. As we have seen, the 1935 declaration recited that the original 1860 Declaration of Trust did not deal in terms with what should happen to any income from the burial rights. It purports to fill that gap by providing that any such income should be dealt with in accordance with any resolution passed by a two-thirds majority at a general meeting of the Greek Community in London.

82. In support of the validity of the 1935 Declaration, Mr Smith again relies on the decisions in *Mathieson* and *Shergill*.

83. In *Mathieson*, a Mr Wilkinson was carrying out charitable activities. In 1884, he was given a sum of money which he was told he could use in any way he liked. The money was used to purchase a property for the purposes of his charitable work. The following year, he executed a declaration of trust in order to formalise the existence of the charity. The particular question in that case was whether a property could be sold without the consent of the Attorney General. This would only be possible if the trustees were able to deal with the property in a way which was inconsistent with the trust deed. This in turn raised the question as to whether Mr Wilkinson was entitled to make the trust deed in the first place. The Master of the Rolls concluded at [394] that:

> "When money is given by charitable persons for somewhat indefinite purposes, a time comes when it is desirable, and indeed necessary, to prescribe accurately the terms of the charitable trust, and to prepare a scheme for that purpose. In the absence of evidence to the contrary, the individual or the committee entrusted with the money must be deemed to have implied authority for and on behalf of the donors to declare the trust to which the sums contributed are to be subject."

84. As described above, *Shergill* was a similar sort of case where the initial terms of the arrangement were set out in a memorandum and then subsequently formalised in a more detailed trust deed. The question was whether provisions relating to the changing of trustees in clause 5 of the 1991 trust deed were invalid on the basis that they went beyond those which were contained in the 1987 memorandum. The Supreme Court concluded at [30] that:

> "As to the second strand in the *Mathieson* case, the precise status of the 1987 memoranda is not entirely clear, but, even assuming in the defendant's favour that the 1987 memoranda do govern the terms of the trust as far as they go and that clause 5 goes further than those memoranda, it is not inconsistent with what is contained in them … certainly, there is nothing in clause 5 which is, at least on the face of it, inconsistent with any provisions of the 1987 memoranda, or which appears, in the words of Cozens–Hardy MR, to 'depart from the general objects of the original donors'."

85. Mr Smith submits that the trustees in 1935 were entitled to fill the perceived gap in the 1860 Declaration of Trust by executing the 1935 Declaration in order to set out the terms on which they held any surplus income. Even if it is right that, as a matter of law, the income is held on the same terms as the capital, he argues that *Shergill* provides authority for the proposition that trustees who are exercising the right to set out the detailed terms of a trust based on the principles explained in *Mathieson* are entitled to override and go beyond provisions implied by law.

86. In *Shergill*, the point was made that, once the trust came into existence in 1987, the statutory powers of appointing trustees would apply in the absence of any other provision in relation to the appointment of trustees. The Supreme Court however expressed the view at [33] that:

> "… where the principle in the *Mathieson* case applies, it seems to us that trustees must have the power to include new provisions in the trust deed which they would not normally have the power to impose in the case of a fully constituted trust. Accordingly, it is at least arguable that, where the terms of a trust are so sparse that the trustees have 'implied authority for and on behalf of the donors to declare the trusts to which the sums contributed are to be subject', that authority extends to including provisions such as clause 5 of the 1991 deed."

87. Mr Smith acknowledges that, on the face of it, the 1935 Declaration imposes no restrictions on how the funds of the Cemetery Trust can be applied. He submits however that there is an implied restriction that the funds should only be applied for charitable purposes on the basis that the Cathedral assembly is part of the administrative machinery of what is essentially a charity (being the Cathedral and the three associated charitable trusts).

88. Although this is of course much wider than the burial purposes contained in the 1860 Declaration of Trust, Mr Smith referred me to *In re Orphan Working School and Alexandra Orphanage's Contract* [1911] 2 Ch. 167 as demonstrating that the *Mathieson* principle can be used to declare trusts which are wider than the original purpose. In that case an existing charity sought donations to fund the building of a school. When the land was purchased it was conveyed to the trustees to hold on the general trusts of the charity. Parker J reached the following conclusion at [180]:

> "Now it appears to me that under those words the land is conveyed in effect for the general purposes of the society, and not for any specific purpose. The governing body of the society have complete control over the disposition and disposal of it; and I think that that conveyance, made under the direction of the committee who collected the subscriptions must, in default of evidence to the contrary, be taken to carry out the true intent and meaning of the subscribers who have money in the first instance to the building fund."

[He then referred to *Mathieson* and continued]

> "That was not quite the same case as this, because there the deed of trust limited the application of the fund to certain purposes, the subscriptions themselves appearing to be, in effect, general subscriptions for the general purposes. This is rather the converse case, for here we have subscriptions which, on one construction of what was done, may be said to have been subscribed for a special purpose, but the committee who received the subscriptions, acting no doubt with more information than we have after all these years have

> passed, had trusts declared which were in fact general trusts; but it seems to me that if the committee are the agents for declaring the trusts, and what they declare is prima facie to be considered as carrying out the intention of the donors in the one case, the same principle ought to apply in the other."

89. Finally, Mr Smith noted that his submission in effect allows the trustees of the Cemetery Trust to have two bites at the *Mathieson* cherry. The trustees acquired the burial rights on 5 December 1860 and then executed a declaration of trust setting out the terms on which they then held those rights on 31 December 1860. In 1935, having perceived a gap in the 1860 Declaration of Trust, they then executed a further declaration in order to fill that gap.

90. There is, in Mr Smith's view, no reason why they should not be able to do this if the initial declaration of trust did not contain all of the necessary provisions. In support of this, he referred to an unreported case which he has been unable to track down but which is referred to in *Shergill – In re Imperial Foods Limited Pension Scheme* (unreported) 27 January 1986. In that case, funds were already held on trust (presumably on the basis of an interim trust deed), and the trustees then went on to execute a final definitive trust deed.

91. Mr Winfield's principal submission in relation to the 1935 Declaration is that the 1860 Declaration of Trust dealt perfectly adequately with the income from the burial rights and that therefore there was no gap to fill. On that basis, the *Mathieson* principle is irrelevant. However, if Mr Smith is right that there is a gap in the 1860 Declaration of Trust, Mr Winfield submits that the correct course for the trustees would have been to apply for a cy-près scheme rather than to try and fill the gap themselves (see re *King* [1922] 1 Ch. 243).

92. In any event, argues Mr Winfield, it was not open to the trustees to change the purposes for which the funds were held. Again, they would have needed to apply for a scheme to enable them to do this. In support of this, Mr Winfield referred to the decision of the House of Lords in *Andrews v M'Guffog* (1886) 11 App Cas 313 where the Lord Chancellor, Lord Herschell said at [329]:

> "No doubt it may at the outset have been difficult to carry out the declared intention of the testator that the interest only should be expended upon management of the school, but I think that the trustees erred in making the expenditure they did. It was their duty to administer the trust according to the dispositions of the testator, not to make other dispositions which might seem to them better suited to carry out the main purpose which he had expressed in the founding of the school; and I think that if it appeared to them that the main purpose could not be efficiently accomplished without departing from the terms of the trust, then their proper course was to have come to the Court for a scheme to enable them to depart from the declared intention of the testator so far as was necessary for the purpose of carrying out that main object."

93. As far as the authorities referred to by Mr Smith are concerned, Mr Winfield seeks to distinguish these. He points out that both *Mathieson* and *Shergill* were cases where there was previously no formal declaration of trust setting out the detailed terms on which the assets were held. In this case there was already in existence the 1860 Declaration of Trust.

94. In relation to the *Orphan Working School* case Mr Winfield notes that this involved an existing charity which again had a formal trust document setting out the terms on which the charity's property was held. The reason the donations for the building of the school could be held on the wider terms of the charity was that the terms of the donations were not specifically stated.

95. Mr Winfield also puts forward another reason why the 1935 Declaration is invalid. This is that it is void for uncertainty as it allows the Greek Community to direct that the funds should be applied for any purpose, which could include non-charitable purposes. It is, he says, clear from the well-known case of *Chichester Diocesan Fund v Simpson* [1944] A.C. 341 that a gift for unspecified purposes which are not exclusively charitable will be void for uncertainty. Whilst Mr Smith suggests that a limitation can be implied so that directions can only be given for funds to be applied for charitable purposes, Mr Winfield dismisses this on the basis that the assembly of the cathedral is not itself part of any charity. The

only three charities in question are the Cemetery Trust, the Cathedral Trust and the Land and Vicarage Trust. The assembly, he argues, is not part of the structure of any of those charitable trusts.

96. Although I recognise that the 1935 Declaration has remained unchallenged for 85 years, I have come to the conclusion that the trustees of the Cemetery Trust in 1935 had no power to make the declaration and that it is therefore void.

97. There is clearly no power contained in the 1860 Declaration of Trust enabling the trustees of the Cemetery Trust to make the 1935 Declaration. Mr Smith did not suggest that there was. Therefore the only basis on which the 1935 Declaration could be made is an exercise of the principle derived from *Mathieson* which permits trustees to set out with precision the terms on which assets vested in them are held in circumstances where the donors either did not say on what terms the assets should be held or only did so in vague and uncertain terms.

98. In this case however, it is very clear what the purposes of the donors were in providing the funds to acquire the burial rights and those purposes were reflected in the 1860 Declaration of Trust.

99. For the reasons set out above, there is, in my view, no gap in the 1860 Declaration of Trust. Any income or profits are held on the same terms and for the same purposes as the burial rights themselves.

100. Although, in *Shergill*, the Supreme Court considered that there was nothing objectionable in making an explicit (and different) provision for the changing of trustees even though the law makes provision for changing trustees where the trust deed is silent, the *Mathieson* principle cannot be applied to introduce provisions which are inconsistent with or depart from the general objects of the original donors.

101. Looking at the terms of the 1860 Declaration of Trust and the surrounding circumstances, it is quite clear that the intention of the original donors was to provide for the burial of members of the Greek Community and not for any other purposes. Therefore, even if the *Mathieson* principle does allow the trustees to include provisions which override those which would otherwise be implied by

law, it does not, in my judgment, go as far as allowing the trustees to permit the funds to be applied in a way which is inconsistent with the purposes for which the trust was established.

102. Even if I am wrong and the 1860 Declaration of Trust does not adequately provide for the application of any income or profits which comes into the hands of the Cemetery trustees, neither *Mathieson* nor *Shergill* provide authority for the trustees to make a unilateral determination of the purposes for which such funds should be applied. Indeed, quite to the contrary, both of those cases make it clear that the purposes of the original donors must be respected.

103. Whilst the *Orphan Working School* case is an example of a situation where funds were given for a specific purpose but which the trustees were to allowed to apply for wider purposes, the circumstances there were very different. There was an existing trust which set out the purposes of the charity which collected the funds. There was therefore no objection to the land which was purchased using those funds being held for the wider purposes of the charity. This was not inconsistent with the purposes of the donors which, the Court was at pains to stress, still needed to be respected. However, what is being suggested in this case is that the income or profits from the burial rights should be capable of being used in ways which are clearly inconsistent with, and are much wider than, the purposes for which the Cemetery Trust was originally established.

104. I also accept Mr Winfield's submission that the 1935 Declaration is, in any event, void for uncertainty. The declaration contains no express limitation as to the purposes for which the Greek Community could require the funds to be applied. It might be possible to imply a restriction that the funds can only be used for burial purposes, consistent with the 1860 Declaration of Trust. However, Mr Smith did not suggest that this was the case and, it would not in any event add much to the power which the Greek Community already has under the terms of the 1860 Declaration of Trust to make rules and regulations directing the Cemetery trustees how to deal with the funds which they hold.

105. There is nothing in the wording of the 1935 Declaration or in the surrounding circumstances which would suggest any objective intention that the Greek Community should only be able to direct that the funds be used for charitable purposes. It might conceivably be possible to imply a restriction that the funds could only be used for purposes which are in some way connected with the Cathedral assuming it is right that the Greek Community was, by then, represented by the assembly of the Cathedral (as to which see below). However, it is possible to conceive of purposes connected with the Cathedral which would not necessarily be strictly charitable and so this would not render the 1935 declaration valid.

106. Mr Smith sought to rely on the decision of the Upper Tribunal in *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC) where the Upper Tribunal stated at [116] that:

> "We wish to say something about identification of the objects of an institution. The starting point must, of course, be the governing instrument which falls to be construed according to the ordinary cannons of construction, about which we need say nothing. In the context of objects which are potentially charitable, the court will often lean in favour of reading into general words – as was done in *Re Hetherington, dec'd* [1990] Ch. 1 – an implication that the object is qualified by words such as 'so far as charitable'."

107. Mr Smith suggested that this provided authority for implying into the 1935 Declaration a restriction that the funds should only be used for charitable purposes.

108. Mr Winfield however pointed out that the decision in *Re Hetherington* is rather narrower than this. In that case, funds were given for saying mass. A public mass was charitable but a private mass was not. The court decided that the gift was valid on the basis that it should only be used for saying a public mass.

109. The statement in the *Independent Schools Council* case was rather more general as it was not being applied to any specific purposes in any particular governing document. However, even in generic terms it is clear that what the court was discussing was an organisation which had the purpose of operating a school and

where the school could be operated in a way which was charitable or could be operated in a way which was not charitable. In those circumstances, it is easy to see why *Hetherington* might provide authority for interpreting the governing documents of the school as requiring that the purposes are carried out in a way which is charitable.

110. The situation here is of course very different. The 1935 Declaration itself does not contain any specific purposes and so it is not a case where there are purposes which can be carried out in a way which is charitable or in a way which is not charitable. Neither *Hetherington* nor *Independent Schools Council* in my view provide any authority for implying a limitation that any purposes should be charitable purposes where a document on the face of it permits funds to be applied for any purpose at all. Indeed, the Upper Tribunal in the *Independent Schools Council* case specifically stated that the starting point must be the governing instrument which falls to be construed according to the ordinary cannons of construction. Therefore if there is nothing in the words of the document or the surrounding circumstances which would suggest an objective intention to limit the purposes to those which are charitable, that is the end of the matter.

111. For all of these reasons, the 1935 Declaration is, in my judgment, void and of no effect.

The Greek Community in London

112. The Cathedral Trustees seek a declaration that the references to "the Greek Community in London" in the 1860 Declaration of Trust and in the 1935 Declaration are references to what is now the Assembly of the Greek Orthodox Cathedral of Divine Wisdom in London. The Cemetery Trustees say that the Greek Community in London was an organisation separate from the Church and which ceased to exist some time between 1933 and the end of the Second World War.

113. Given my conclusion that the 1935 Declaration is void, I will focus on the meaning of "the Greek Community in London" in the 1860 Declaration of Trust although it is fair to say that the answer to that question in relation to the 1860 Declaration of Trust is likely to be the same in relation to the 1935 Declaration.

114. The two competing arguments are relatively straightforward. Mr Winfield says that it is clear that an organisation known as the Greek Community in London (or the Greek Community of London) came into existence long before the Cathedral and so the Assembly of the Cathedral by definition cannot be the Greek Community in London.

115. Mr Smith on the other hand argues that the Greek Community of London is, in effect, synonymous with the Greek Church in London and, although the Greek Church has moved site on two occasions, the body associated with the Church, previously known as The Greek Community in London and now known as the Assembly has remained the same.

116. In support of their arguments, both parties refer extensively to the history of the Greek Church in London written by Michael Constantinides referred to above. I will refer to the book as Constantinides.

117. There is no doubt from Constantinides that a number of prominent Greek families living in London founded an organisation known as the Greek Community of London in 1837. There is equally little doubt that the reason for the formation of the Greek Community in London was to establish a Greek church. The Chapel of Our Saviour was founded in Finsbury Circus in 1837 by the Greek Community. Constantinides records (page 22) that:

> "From what has been said the reader will understand that the main, indeed, the only purpose of the formation of the Brotherhood was the establishment and maintenance of a church for the satisfaction of the religious needs of the Brothers. The history of the Brotherhood is consequently the history of its Church; and the narrative of the following pages, in dealing with the life and history of the Church, is dealing also with the life and history of the Brotherhood."

118. Constantinides confirms in a footnote (page 19) that:

> "Ever since the establishment of the Greek Community, it is regularly termed in the records and documents 'Brotherhood' or even 'Confraternity', and those forming the community 'Brothers' or

> 'Fellow-Brothers'. All the statutes of the Community, since their first issue, contains a note: 'wherever the term 'Community' is met with, the word 'Brotherhood' is to be understood'."

119. All of this is borne out by the first statutes (also known as canons) of the Greek Community which were adopted in 1839 and which are set out in full in Constantinides (pages 23-27). They deal exclusively with the membership and running of the Church.

120. Constantinides records (page 22) that:

> "In spite of all subsequent innovations and alterations, the general lines of these by-laws remain approximately the same in the statutes today in use."

121. In due course, the Greek Community outgrew the Chapel of Our Saviour as a result of which, the Community arranged for a new church to be constructed on London Wall known as the Church of Our Saviour. This opened in 1849.

122. In 1872, the General Assembly of the Greek Community appointed a committee to consider the construction of a larger church closer to where the members of the Greek Community then lived which was in west London. The annual meetings of the Greek Community appointed various committees to oversee all aspects of this endeavour. This included a committee which was instructed:

> "to compile new statutes and to prepare a scheme for the provision of the sum necessary to meet the expenses of the annual budget of the proposed Church."

123. The building of the new Church was completed in June 1879 and the new statutes were adopted the same year.

124. What emerges from all of this is that the Greek Community of London was established in order to found a Greek Church in London. It represents the membership of that Church. Although the Church moved to a new building on two occasions, this was organised and controlled by the Greek Community which

remained and continues to remain today as the same organisation as that which was founded in 1837.

125. The suggestion by the Cemetery Trustees that there was a separate, parallel organisation which ceased to exist sometime after 1933 (a date which Mr Winfield admitted was chosen because it was after the date when Constantinides was published) is fanciful to say the least. It is telling that the Cemetery Trustees have been unable to produce any evidence at all as to what became of this separate organisation and the circumstances in which it ceased to exist.

126. Mr Smith drew attention to one particular point which confirms the link between the Greek Community in London and what is referred to in the current statutes as the Assembly. This relates to a Resolution which was passed in 1926. The 1935 Declaration recites that this Resolution was passed by "the said Greek Community". Article 42 of the current Statutes of the Cathedral refers to the same Resolution as a "decision taken by the Assembly".

127. I should mention clause 11 of the 1888 Declaration of Trust relating to the Cathedral Trust. As mentioned above this defines the "Greek Church Confraternity" as:

> "those of the Greek Community belonging to the Greek Orthodox Church in London who contribute towards the maintenance of the Greek Church and who as signatories of the articles of rules and regulations governing the constitution of the Greek Church of Aghia Sophia Moscow Road, London are entitled to vote at any meeting of the Greek Community resident in London."

128. Mr Winfield submits that this demonstrates that the Greek Community is wider than the assembly of the Cathedral as the Confraternity (or Brotherhood) is a subset of the Greek Community. It is not easy to understand the interaction of these different terms (which Constantinides says are interchangeable). However, the explanation appears to me to be that the Greek Community of London comprises all of the members of the church who are entitled to attend an assembly (referred to in the current statutes as "Brothers" – see Article 8) and the

Confraternity is only those members who are entitled to vote (as a result of making certain contributions – see Article 9).

129. It is perhaps worth noting that, as mentioned above, the last page of the 1935 Declaration refers to "the community or brotherhood of the Orthodox Greek Church" which supports the conclusion that the Greek Community and the Brotherhood are indeed the same thing.

130. I am therefore satisfied that the reference to "the Greek Community in London" (or "the Greek Community of London") in the 1860 Declaration of Trust is a reference to what is now referred to as "the Brotherhood" in the current regulations of the Cathedral and which takes its decisions at what is referred to as the Assembly in accordance with those regulations.

131. In accordance with the 1860 Declaration of Trust, the Assembly is entitled to give directions to the Cemetery Trustees in relation to the way in which the assets of the Cemetery Trust are used and administered as long as those directions are in accordance with the overriding purpose of the burial of members of the Greek Community in London.

Cy-près

132. Should the Court find (as I have) that the 1935 Declaration is ineffective, the Claimants seek a cy-près scheme essentially in the same terms as the 1935 Declaration – i.e. that any surplus funds held by the Cemetery Trustees should be held for such charitable purposes as the Assembly of the Cathedral may, by a two-thirds majority, resolve.

133. The circumstances in which the Court may make a cy-près scheme are set out in Section 62 Charities Act 2011. The relevant parts read as follows:

> "**62 Occasions for applying property cy-près**
>
> (1) subject to sub-section (3), the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près are -

> (a) …
>
> (b) where the original purposes provide a use for part only of the property available by virtue of the gift,
>
> …
>
> (e) where the original purposes, in whole or in part, have, since they were laid down –
>
> …
>
> (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations.
>
> (2) In sub-section (1) "*the appropriate considerations*" means –
>
> (a) on the one hand the spirit of the gift concerned, and
>
> (b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes."

134. Mr Smith's submission is that the requirements of s 62(1)(e)(iii) are satisfied on the basis that, taking into account the spirit of the original gift, it is appropriate for the Assembly to have control over how any surplus funds should be spent.

135. As far as the phrase "the spirit of the gift" is concerned, Mr Smith referred me to the decision of Briggs J (as he then was) in *White v Williams* [2010] EWHC 940 (Ch) which he said at [20]:

> "is to be ascertained more broadly than by a slavish application of the language of the relevant Trust Deed. As Morritt LJ put it in *Varsani's* case, at p.234: 'the concept is clear enough, namely, the basic intention underlying the gift or the substance of the gift rather than the form of the words used to express it or conditions imposed to effect it'. As Chadwick LJ put it at p.238:

> 'The need to have regard to the spirit of the gift requires the Court to look beyond the original purposes as defined by the objects specified in the Declaration of Trust and to seek to identify the spirit in which the donors gave the property upon trust for those purposes. That can be done, as it seems to me, with the assistance of the document as a whole and any relevant evidence as to the circumstances in which the gift was made'."

136. In my view, there is nothing in the 1860 Declaration of Trust, nor in the circumstances surrounding the creation of the Cemetery Trust which would suggest that any of the funds held by the Cemetery Trustees should be used for anything other than the purposes of burial of members of the Greek Community in London and certainly nothing which would indicate that the Greek Community intended any such funds to be available for general charitable purposes.

137. I accept that the Greek Community did intend that what is now the Assembly should have the right, within the confines of the purposes of the 1860 Declaration of Trust, to direct the Cemetery Trustees how their assets should be dealt with, but that is provided for in the 1860 Declaration of Trust itself.

138. It should also be noted that s 67(1)(e) requires that the original purposes have ceased to provide a suitable and effective method of using the relevant property. This must mean that the original purposes initially did provide a suitable and effective method of using the property but, for some reason, have ceased to do so.

139. Mr Smith's submission is, in effect, that, if the 1935 Declaration is invalid, the 1860 Declaration of Trust never provided a suitable and effective method of using the surplus funds. If so, that does not fall within s 62(1)(e).

140. That perhaps brings us on to s 62(1)(b) which applies where the original purposes provide a use for part only of the property available by virtue of the gift. Mr Smith's submission is that the Cemetery Trustees are now holding very significant funds which are not needed for burial purposes.

141. At the end of 2013 (around the time this dispute first arose), the Cemetery Trustees were holding approximately £250,000. Since then, they have generated significant surpluses so that the amount of cash at the bank at the end of 2017 was almost £1.2 million. During this period, the expenses of the Cemetery Trust were between £23,000-£40,000 a year.

142. The response of the Cemetery Trustees is that the funds they are holding represent a prudent reserve given:

142.1 their past experience of the cost of repairs to the Chapel which forms part of the Cemetery and the perimeter wall (which they say was approximately £750,000 at today's prices although a significant portion of this was funded by grants);

142.2 the likely requirement to purchase further burial rights in the future given the size of the Greek Orthodox Community in London. In this respect, Mr Winfield drew attention to the fact that Enfield Borough Council is currently conducting a burial needs assessment which, he says, will provide vital information which will assist the Cemetery Trustees in developing their strategy for the future.

143. Mr Winfield submits that the Cemetery Trustees have discretion as to what reserves policy is appropriate and that the Court should be slow to interfere with that discretion. In this respect, he referred to the decision of the Court of Appeal in *Children's Investment Foundation Fund (UK) v Attorney General and others* [2018] EWCA Civ 1605 in which the Court expressed the view at [62] that:

> "Apart from its scheme-making powers, the Court has no wider jurisdiction to control the actions of fiduciaries in the context of charities than, say, private trusts. The Court cannot, accordingly, direct a fiduciary (including a member of CIFF) how to exercise his powers unless he is acting in breach of duty. Important though its role in relation to charities is, the Court is not entitled, absent a breach of duty, to substitute its view for that of the fiduciary."

144. In this case, says Mr Winfield, there is no suggestion that the Cemetery Trustees are in breach of any duty and so it is not therefore open to the Court to express a view as to whether the reserves held by the Cemetery Trustees are excessive.

145. It is of course important to note that the Court of Appeal in *Children's Investment Fund* specifically stated that the Court's scheme-making powers were an exception to the principle that the Court cannot substitute its own view for that of the trustees. What I am being invited to do of course is to exercise a scheme-making power.

146. Having said that, I am far from satisfied on the evidence before me that the funds currently held by the Cemetery Trustees will not in due course be needed for burial purposes. There is no evidence, for example, as to whether any other major repairs are likely to be needed in the foreseeable future and, if so, what grants might be available to help offset the cost of those repairs. In addition, there is no evidence as to the likelihood of the need for the Cemetery Trustees to acquire burial rights in relation to further plots of land, the extent of any such requirement and the likely cost of acquiring the necessary rights. I accept that the information available as a result of Enfield Borough Council's burial needs assessment will enable the Cemetery Trustees to form a better view as to what their requirements are likely to be.

147. I do however note that the funds held by the Cemetery Trustees are very significantly in excess of their annual maintenance requirements. I also note that the surpluses have been growing, being over £300,000 in each of 2016 and 2017. I would therefore expect the Cemetery Trustees to carry out a careful assessment of their likely income and expenditure for the foreseeable future once the burial needs assessment has been completed and would remind them of their duty to apply for a cy-près scheme should it become clear that they are holding funds which will not be needed to fulfil the purposes of the Cemetery Trust.

148. Brief submissions were made by both parties as to the nature of any cy-près scheme, should I decide that one was appropriate. Given my conclusion that, at least in relation to this particular aspect, the circumstances permitting a cy-près scheme to be made have not yet arisen, there is no need for me to address these

submissions. The only point I would make is that, as Mr Winfield suggests, given the purposes of the cy-près jurisdiction and the terms of s 67 Charities Act 2011, it is very difficult to see how a scheme could be made which would result in funds being held for general charitable purposes. Purposes which benefit the Greek Orthodox Community, including in particular the Cathedral, are likely to be much more in line with the spirit of the original gift.

149. This leaves the final question as to whether a cy-près scheme is needed in order to clarify who may be buried at the cemeteries controlled by the Cemetery Trust. This issue only arises if, contrary to my conclusions set out above, the Greek Community in London no longer exists.

150. It will be recalled that the 1860 Declaration of Trust refers to "interment of Members of the 'Greek Community in London'". This is slightly different from the wording allowing the Greek Community to give directions to the Cemetery Trustees as this refers to the "Greek Community of London".

151. It might therefore be possible to interpret the expression "Greek Community in London" as referring to anybody of the Greek Orthodox faith who lives in London whether they were a member of the Church (now the Cathedral) or not. However, it does appear that the expressions have been used interchangeably (see for example the wording of the 1935 Declaration which refers in the operative part to "a General Meeting of the Greek Community in London"). In addition, there is a strong inference from Constantinides that the original purpose in acquiring a cemetery was to provide for the burial of members of the Church.

152. I therefore find that the expression "Members of the Greek Community in London" in the 1860 Declaration of Trust refers to members of the Cathedral. As that body of persons still exists, there is no requirement for a cy-près scheme to describe a new class of persons in whose interests the Cemetery Trust should operate.

153. At the time of the 1860 Declaration of Trust there was only one Greek Orthodox Church in London. However, I understand that there are now others and that the cemeteries controlled by the Cemetery Trust are available for the burial of members of any of those churches.

154. This is a point which the Cemetery Trustees will need to take into account in their review and which may, of itself, make it appropriate for them to apply for a cy-près scheme.

Conclusions

155. It may be helpful if I summarise my conclusions:

155.1 The purposes set out in the 1860 Declaration of Trust apply to all of the assets held by the Cemetery Trustees including income, profits or proceeds from the sale of burial rights. The effect of this is that all of the funds of the Cemetery Trust must be used for the purposes of interment of members of the Greek Community in London ("**the Purposes**").

155.2 The Greek Community of London is entitled to direct the Cemetery Trustees how the funds held by them should be spent and administered in furtherance of the Purposes.

155.3 The Greek Community of London is now represented by the Assembly of the Cathedral.

155.4 In the absence of any direction from the Assembly, the Cemetery Trustees are free to make their own decisions as to how the funds held by them should be spent and administered in furtherance of the Purposes.

155.5 It has not been shown that the circumstances justifying the making of a cy-près scheme have yet arisen. However, the Cemetery Trustees should consider carefully whether an application for a cy-près scheme is required once they are in possession of all of the relevant facts.

156. Unless agreed by the parties, I will hear submissions from the parties as to the appropriate form of Order to reflect the decisions made in this Judgment and how the costs of this claim should be dealt with.