



Trinity Term
[2024] UKPC 23
Privy Council Appeal No 0114 of 2021

JUDGMENT

All Saints Spring Park Parochial Church Council v Church Commissioners

Under the Mission and Pastoral Measure 2011

before

**Lord Hodge
Lord Sales
Lord Hamblen
Lord Leggatt
Lord Richards**

**JUDGMENT GIVEN ON
30 July 2024**

Heard on 27 and 28 February 2024

Appellant

Leslie Thomas KC
(Instructed by Leigh Day (London))

Respondent

Victoria Wakefield KC
Richard Howell
(Instructed by Herbert Smith Freehills LLP (London))

LORD HODGE:

1. This is an appeal by the Parochial Church Council (“the ASSP PCC”) of the parish of All Saints Spring Park (“ASSP”) and its incumbent, the Reverend Yvonne Clarke (“the Rev Yvonne Clarke”), against a decision of the Church Commissioners for England (“the Commissioners”) dated 28 September 2021 that the draft pastoral scheme involving the dissolution of the parish of ASSP in the Diocese of Southwark should proceed, notwithstanding the representations against it.

2. The principal legal question, which is a question of general public importance, raised in this appeal is whether the Commissioners are a public authority which is subject to the Human Rights Act 1998 (“the HRA”). The Board granted permission to appeal on 14 July 2022. But the Commissioners have belatedly raised a question as to whether the Board has jurisdiction to hear this appeal. Therefore, after setting out the background facts and the principal arguments advanced on the merits, the Board must consider the procedures which are set out in the Mission and Pastoral Measure 2011 (“the 2011 Measure”) in order to determine the jurisdictional challenge.

1. The development of proposals and the draft pastoral scheme

3. The draft pastoral scheme affects three contiguous parishes in Croydon: ASSP, St John Shirley and St George Shirley. The draft pastoral scheme would dissolve the benefice and parish of ASSP and divide the area of its parish between St John Shirley and St George Shirley. The church of ASSP would cease to be a parish church but would remain open for public worship as a chapel of ease. A consequence of the draft scheme would be that the incumbent of ASSP, the Rev Yvonne Clarke, who was the first black woman to be ordained as a deacon in the Church of England (the “Church”) and one of the first women to be ordained a priest, would be required to vacate her office.

4. Each of the churches in the three parishes is of the liberal Catholic tradition. The parishes are predominantly residential, with suburban detached and semi-detached houses and, in the parish of ASSP, a large housing estate built by Croydon London Borough Council called the Shrublands estate. Each of the parishes is demographically diverse, with the majority of the population being of white ethnicity, and (in 2021) the UK minority ethnic population of the parishes ranged from approximately 40% to approximately 44%. The Shrublands estate, with a population of about 3,000, had a higher ratio of UK minority ethnic people, namely 66 per cent. Each church has an ethnically diverse congregation, with ASSP having the highest proportion of UK minority ethnic members of its congregation.

5. The church at ASSP has since 2010 had the lowest attendance of the three churches by a considerable margin. It has also suffered from significant financial difficulties. It has fallen into significant arrears in making its contribution towards diocesan costs; and its reserves, which stood at £173,000 in 2005, were exhausted by 2015. In that year it failed to pay for its gas supplies and as a result bailiffs visited the church premises, cut off the gas supply and removed the gas meters. In 2016 there was an episcopal visitation to the parish to enquire into the situation in the parish, review its finances and administration, and consider its strategy for future mission and development. By an Inhibition which was a part or consequence of the visitation, the Rev Yvonne Clarke was inhibited from carrying out her ministerial duties. The interim visitation report of February 2017 by the commissaries to the Bishop of Southwark concluded that the parish was not financially viable and was unable to meet its current debts. The report recorded failings to keep proper financial records and stated that neither the Rev Yvonne Clarke nor the parish officers had provided evidence of realistic ways in which the financial affairs and wider life of the parish could be turned around. The congregation was small with around 12 to 16 congregants and the buildings were in a state of disrepair.

6. The Rev Yvonne Clarke returned to her ministry in April 2017 after the Inhibition was lifted. An interim report by the Archdeacon of Croydon to the Bishop of Southwark on 16 December 2017 painted a similar picture of the parish to that of the visitation report and a final report by the Archdeacon of Croydon on 31 October 2018 stated that there was no evidence that the parish had the capacity to address the lack of financial viability and administrative capacity or to set sustainable financial and missional goals.

7. The Bishop of Croydon and the Archdeacon of Reigate, who was then also Assistant Archdeacon of Croydon, met the Rev Yvonne Clarke and two parish representatives on 21 January 2019 to discuss the financial viability and capacity of the parish for mission and pastoral care. In February 2019, the Archdeacon of Reigate drew up a paper entitled “The Future of the Church of England in Shirley” which described the lack of organisation and financial robustness in the parish and its inability to serve the parish in mission and contrasted that with the neighbouring parishes which had significantly larger congregations and were financially robust. Her paper was discussed at a meeting of the Croydon Archdeaconry Mission and Pastoral Committee (“AMPC”). Thereafter, the Archdeacon of Reigate met the PCCs of the three parishes between May and July 2019.

8. The Archdeacon of Reigate prepared a report for the meeting of the AMPC which took place on 4 September 2019 attended by the incumbent, at least one churchwarden and representatives of the PCC of each parish. The report set out five options ranging from maintaining the status quo, which would not address the viability of ASSP, to rearranging the parish boundaries so that there were two benefices and parishes in the Shirley area. The AMPC, having heard representations from the

representatives of the parishes, unanimously supported the fifth option, involving the dissolution of the parish of ASSP and the division of the parish between St John's Shirley and St George's Shirley.

9. The Diocesan Mission and Pastoral Committee ("DMPC"), having received the AMPC's recommendation, met on 12 October 2019. The minutes of that meeting disclose that the DMPC considered the financial position of ASSP PCC, and the viability of the parish given the poor attendance at church each week, and recognised the fractious nature of the AMPC's recommendation, giving rise to the need for pastoral care for the congregation. The DMPC unanimously decided to initiate a statutory consultation on the AMPC's recommendation. On 8 January 2020, in accordance with section 6 of the 2011 Measure, the DMPC informed interested parties, including the Rev Yvonne Clarke and the ASSP PCC, that it was considering recommending a pastoral scheme to the Bishop of Southwark, the effect of which is described in para 3 above, and invited representations in response.

10. On 21 February 2020, Lee Bolton Monier-Williams, solicitors, acting on behalf of the Rev Yvonne Clarke and ASSP PCC made representations opposing the proposals. The representations contended that the parish offered a service to the local population, particularly the Rev Yvonne Clarke's spiritual leadership to the UK minority ethnic community and the parish's targeted mission to the Shrublands estate, which would be lost if it ceased to be a parish. The representations asserted that the proposed coupling with the other two parishes would not work well and expressed concern that the proposals would remove the Rev Yvonne Clarke from office.

11. The DMPC met on 27 February 2020. The ASSP PCC and the Rev Yvonne Clarke made both written and oral representations through their solicitor. The minutes of the meeting record the DMPC's decision. It was not persuaded by the representations that the ASSP PCC had the capacity to meet its financial obligations and considered that the mission to the Shrublands estate did not of itself justify the continuation of the parish bearing in mind the need to serve the remainder of the parish. The DMPC did not regard the ASSP PCC's proposed development plans as realistic both because of planning difficulties and because the ASSP PCC did not own the parsonage house and land.

12. The DMPC submitted the proposals to the Bishop of Southwark who approved them and who on 10 June 2020 submitted them to the Commissioners for the preparation of a draft scheme. The Commissioners considered whether the procedures in section 6 of the 2011 Measure governing the formulation and submission of the draft proposals had been followed and decided that they had. Having done so, they prepared a draft scheme as required by section 7 of the 2011 Measure.

13. On 21 July 2020 the Commissioners served a copy of the draft scheme on interested parties, including the Rev Yvonne Clarke and the ASSP PCC, and published a notice on the internet as required by section 9 of the 2011 Measure. The Commissioners gave notice that the deadline for submission of written representations on the draft scheme was midnight on 7 September 2020. No extension of that deadline was ever granted.

14. By that date the Commissioners had received 45 written representations against the draft scheme and 12 in favour. Among the representations opposing the draft scheme were representations from the Rev Yvonne Clarke and from her son, James Clarke, who was also the Secretary of the ASSP PCC. As the Board explains below, no written representations were received by midnight on 7 September 2020 from the ASSP PCC: see paras [55]–[59] below.

15. On 30 October 2020 the Commissioners sent the representations relating to the draft scheme to the Bishop of Southwark and a summary of the representations for and against the draft scheme. The Commissioners sought the Bishop's views on 19 detailed questions relating to how the draft scheme provided for the better cure of souls in the three parishes, furthered the mission of the Church and met the needs, traditions and characteristics of the three worshipping communities. The questions also addressed the extent to which the Rev Yvonne Clarke's ministry had attracted marginalised ethnic and minority groups and invited the Bishop to address allegations that the proposals were motivated by discrimination.

16. The Bishop of Southwark responded on 17 November 2020, expressing the view that the parish had become unviable, and that the ASSP PCC had not been able to advance the Church's mission in the community. The ASSP had the largest population of the three parishes but had the lowest attendance. He observed that each of the three parishes was both inclusive and ethnically diverse and that the Diocese was inclusive and committed to diversity.

17. The Commissioners then on 19 November sent an email to representors and statutory interested parties, attaching the correspondence with the Bishop of Southwark. They gave the addressees the opportunity to make any further comment or to withdraw their representation by 30 November 2020. The email stated: "If you had not previously made a representation within the stipulated time then please treat this as for information purposes only as the Commissioners will not be able to consider your views."

18. The Commissioners received eight written comments against the draft scheme and four in its favour within the period set by the email. Among the comments against the draft scheme were comments from the Rev Yvonne Clarke and Mr James Clarke personally. The Commissioners also received written representations in relation to the

draft scheme from ASSP PCC on 25 November 2020, which were submitted on its behalf by Mr James Clarke. As the Board discusses more fully below, the Commissioners contend that the written representations of the ASSP PCC were not “duly made” for the purposes of sections 9 and 12 of the 2011 Measure.

19. On 17 December 2020, the Commissioners sent the written comments to the Bishop of Southwark to seek his views. The Bishop of Southwark responded reiterating his concerns about the non-viability of ASSP and stating, in summary, that the draft scheme, if made, would affirm parish-based ministry, where it was viable, and would provide for the continuance of public worship and the possibility of growth in ASSP as a chapel of ease through the appointment of a pioneer minister.

20. The Commissioners decided to hold an oral hearing on the draft scheme which was delayed by the coronavirus pandemic until 7 September 2021. Leigh Day, solicitors, were permitted to make representations on behalf of the ASSP PCC and the Rev Yvonne Clarke, who also spoke, as did members of the ASSP PCC and their supporters. As recorded in the Commissioners’ Statement of Reasons, the oral evidence included arguments that having a black minister was of particular benefit for black worshippers and that the draft scheme was motivated by racism. There were also representations at the hearing in favour of the draft scheme, which the Board finds it unnecessary to summarise.

21. On 28 September 2021 the Commissioners decided that the draft scheme should be made without amendment. They served on all persons who had made timely written representations (ie, by the 7 September 2020 deadline) notice of their decision in relation to the representations together with a detailed statement of reasons for their decision. They gave notice that any person, who had duly made written representations about the draft scheme, had the right, on obtaining leave of the Board, to appeal to Her Majesty in Council. The Commissioners, in that notice, specified 7 November 2021 as the date on or before which notice of intention to apply for such leave had to be given. They also served a copy of the notice on interested parties and those whom they thought interested in the matter.

22. In the statement of reasons the Commissioners concluded that the consultation on the draft scheme had complied with the provisions of the 2011 Measure. They concluded that the parish of ASSP was not financially viable and that the subsidy which it had received from the Diocese had an adverse effect on resources for mission elsewhere in the Diocese. The parish was failing in its governance and was unable effectively to provide for the cure of souls or to advance the Church’s mission. The Commissioners discussed the ASSP PCC’s proposal for the development of the church hall but doubted whether it was financially robust and observed that it was based on incorrect assumptions as to land ownership. The status quo was not sustainable. The draft scheme would produce two stable parishes and the church of ASSP as a chapel of

ease; and the engagement of a pioneer minister would maintain ministerial provision in the Shirley area, including the Shrublands estate. The Commissioners addressed and rejected the allegation that the main purpose of the draft scheme was to punish the Rev Yvonne Clarke; they also considered the allegations of racism and sexism, observing that no specific evidence had been produced to support them. They noted that the Archdeacon of Croydon, who was a black woman, supported the draft scheme. They addressed arguments based on the HRA and under section 149(2) of the Equality Act 2010 (“EA 2010”) (the public sector equality duty) without conceding that the legislation applied to them. The Commissioners concluded that the draft scheme should be made, notwithstanding the representations made against it.

2. The steps leading to the appeal to the Board

23. On 28 October 2021, Leigh Day, solicitors, sent an email to the Registry of the Board enquiring about the correct format for applying for leave to appeal to the Board. The email attached the Commissioners’ notice of 28 September 2021 but did not disclose the identity of Leigh Day’s client and was not copied to the Commissioners. The email revealed that Leigh Day were aware of the time limit of 7 November 2021. It was not, and was not intended to be, a notice of intention to apply for leave to appeal under para 1 of Schedule 2 to the 2011 Measure. There followed thereafter a series of procedural mishaps.

24. First, on the following day the Board’s Registrar wrote a letter to Leigh Day purportedly to acknowledge receipt of written notice of intention to apply for leave to appeal. The letter was also sent to the Commissioners. This letter was not a valid exercise of the Registrar’s power under para 3 of Schedule 2 to the 2011 Measure as, without knowing the identity of the proposed appellant, she could not have been satisfied that the notice had been given by or on behalf of a person who had duly made written representations with respect to the draft scheme.

25. Secondly, on 5 November 2021 Leigh Day attempted to give notice under para 1 of Schedule 2 to the 2011 Measure by email to the Board’s Registrar, which was copied to the Commissioners. Leigh Day did not identify on whose behalf the purported notice was given or on whose behalf they were acting. No other document purporting to be notice of an intention to apply for leave to appeal to the Board was given to the Registrar before the deadline of 7 November 2021.

26. Thirdly, the Board’s Registry responded on 9 November 2021 by inviting Leigh Day to complete and return a Form 1 and pay the relevant fee. After discussion with a member of staff of the Board’s Registry, who had informed them that the Registrar was on sick leave, Leigh Day emailed a case manager in the Board’s Registry on 22 November 2021 to ask whether their notice dated 5 November 2021 had been accepted.

The Registry responded on the same day inviting them to file the application in the usual way and informing them that the office would inform them if the Registrar required an application for an extension of time. This email correspondence was not copied to the Commissioners, but on the same day Leigh Day forwarded this exchange with the Registry to the Commissioners and requested them to advise as to the date for submission for the application of leave to appeal that the Commissioners would be happy with. Leigh Day asked for clarification of whether the Commissioners were happy that the requisite notice was provided on 5 November 2021 and expressed an intention to lodge grounds of appeal by 3 December 2021. The Commissioners responded on the same day stating that they could not agree a correct date but were in the court's hands and would not object if the court decided that 3 December was the correct date for the appellant to lodge "her" grounds.

27. Fourthly, on 3 December 2021 Leigh Day lodged an application for leave to appeal in the Board's Registry. The accompanying email and the Board's Form 1 named only the ASSP PCC as the appellant. The Form 1 stated that there were no additional parties to the appeal. Nonetheless, the grounds of appeal identified both the ASSP PCC and the Rev Yvonne Clarke as appellants.

28. On 9 December 2021 the Board's Registry wrote an email to Leigh Day and the Commissioners informing them that the application for leave to appeal had been issued. The Commissioners on 19 January 2022 filed a Notice of Objection and a statement of reasons why the permission to appeal should be refused.

29. On 14 July 2022 a panel of the Board (Lord Hodge, Lord Sales and Lady Rose) gave permission to appeal on three of the four grounds advanced, rejecting the ground that the true purpose of the draft scheme was to penalise the Rev Yvonne Clarke. The petition of appeal was lodged and served on 15 February 2023.

30. On 19 April 2023 solicitors for the Commissioners wrote to Leigh Day raising jurisdictional issues which the Board discusses in section 4 below, expressing regret that the issues had come to their attention at a late stage when preparing the answer to the petition of appeal, and that they felt bound to raise those issues. The parties thereafter agreed that the jurisdictional issues would be heard at a single hearing together with the merits of the appeal and on 14 August 2023 the Board's Registry confirmed this arrangement.

3. The substantive challenges and the Commissioners' answers

31. The ASSP PCC and the Rev Yvonne Clarke seek to argue, first, that the draft scheme, if made, would breach section 6 of the HRA by infringing their Convention rights in the HRA under article 14 read with articles 8 and/or 9 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”). The first of several hurdles which the appellants would have to surmount to establish this proposition is that the Commissioners acted as a public authority within the meaning of section 6 of the HRA in forming an opinion that the draft scheme should be made. Secondly, the appellants argue that the Bishop of Southwark and/or the Commissioners breached the public sector equality duty under section 149(2) of the EA 2010. A threshold consideration in this challenge is whether the Commissioners were subject to such a duty when exercising their functions under the 2011 Measure. Thirdly, it is argued that the Commissioners made a material error of judgement in failing to conclude that ASSP, as a UK minority ethnic-led church with primarily UK minority ethnic congregation membership provided an irreplaceable mission to UK minority ethnic people in the Spring Park/Shirley area. This challenge raises a question as to the practice of the Board when considering a challenge to the merits of a draft scheme.

32. The Board summarises only briefly the parties’ arguments on these substantive matters and the threshold issues which arise because, as explained below, the Board considers that the appeal is to be determined on the issue of jurisdiction.

33. Mr Leslie Thomas KC, for the appellants, submits that the Commissioners are a public authority under section 6 of the HRA. He points out that the Commissioners are a statutory corporation established by the Church Commissioners Measure 1947, that a number of public officeholders are ex officio members of the Commissioners, and the Commissioners are required to lay an annual report and accounts before Parliament. He also argues that the Commissioners perform public functions, exercising statutory powers under the 2011 Measure, and are democratically accountable to Parliament through the Second Church Estates Commissioner, who is a Member of Parliament. The Commissioners deal with the Church’s property and address financial matters which are administrative rather than religious functions. Mr Thomas asserts that the draft scheme was within the ambit of articles 8 and 9 of the ECHR and that the abolition of ASSP as a parish was a breach of article 14 of the ECHR through indirect discrimination against minority ethnic people. Mr Thomas also argues that the Commissioners and the DMPC, when exercising statutory functions under the 2011 Measure, are exercising public functions under section 149(2) of the EA 2010, and that there had been inadequate consideration of the public sector equality duty under that statutory provision. Thirdly, he observes that the appeal is an appeal on the merits of the decision (*Hargreaves v Church Comrs* [1983] 2 AC 457 (“*Hargreaves*”)), and submits that the Commissioners did not have adequate regard to the unique and successful mission of ASSP to the UK minority ethnic community and the discriminatory effect of the draft scheme on minority ethnic congregants and residents.

34. Ms Victoria Wakefield KC, for the Commissioners, submits that the Commissioners are not a public authority under section 6 of the HRA, and that neither the Commissioners nor the DMPC are subject to the public sector equality duty under section 149(2) of the EA 2010. It is common ground that that duty would apply only to

persons who are public authorities for the purposes of section 6(1) of the HRA. The Commissioners hold Church property for the maintenance of the clergy and the cure of souls and perform other functions in managing Church property, including making decisions in relation to pastoral reorganisation under Part 3 of the 2011 Measure. She argues that the purpose of section 6(1) of the HRA is that persons for whom the United Kingdom is answerable before the Strasbourg Court should be subject to a duty in domestic law not to act incompatibly with Convention rights: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546 (“*Aston Cantlow*”). The Commissioners are not a body which is governmental in nature and do not fall within that definition.

35. Further, if the Commissioners were a governmental body, they could not be a victim under the jurisprudence of the Strasbourg Court. Yet the Strasbourg Court and the Commission have recognised the standing of religious bodies which are public law corporations or have strong links to the state to assert their rights under the ECHR: see *Holy Monasteries v Greece* (1994) 20 EHRR 1; *Hautanemi v Sweden* (1996) 22 EHRR CD 155; *Schiith v Germany* (2010) 52 EHRR 32; and *Siebenhaar v Germany* (Application No 18136/02; Decision: 3 February 2011). The Commissioners therefore are not a “core” public authority in the sense which the House of Lords discussed in *Aston Cantlow*, ie a body all of whose functions are of a public nature.

36. Nor, she submits, are the Commissioners a “hybrid public authority” under section 6(3) of the HRA, ie persons certain of whose functions are functions of a public nature. Regard must be had to the specific function in question, which here is the making of a pastoral scheme. The role of a pastoral scheme is to provide for the creation, alteration or dissolution of benefices and parishes and the designation of houses as parsonage houses: sections 31 and 45(1) of the 2011 Measure. These are measures relating to the better provision for the cure of souls and not governmental functions.

37. In any event, the Commissioners did not act in a discriminatory manner, and neither the Commissioners nor the DMPC failed to have due regard to the impact of the abolition of the parish of ASSP on the UK minority ethnic population in the community, including the Shrublands estate. Ms Wakefield also addresses the merits of the Commissioners’ judgment: there was an overwhelming need for a pastoral scheme because ASSP was not a sustainable church, its mission to parishioners was inadequate as attested by low church attendance, limited services and disproportionately low donations from parishioners; the neighbouring parishes were ethnically diverse; they were capable of furthering the Church’s mission; there would be no reduction in ministerial provision; and the church at ASSP would remain open. There is, she submits, no serious alternative to the draft scheme and the appellants’ proposals to develop the church hall would not solve the problem of the parish’s lack of viability.

4. The question of jurisdiction

38. It is unfortunate that the question of the Board's jurisdiction has emerged as an issue so late in the preparation of this appeal. It is nonetheless a prior question to the merits of the appeal, and it turns on the statutory procedures set out in the 2011 Measure which lead up to the making of a scheme and appeals to the Board.

(a) The questions relating to jurisdiction

39. Before discussing the procedures in the 2011 Measure by which a scheme is made, the Board summarises the questions raised by the jurisdictional challenges which the Commissioners now advance. The questions are: (i) Does the ASSP PCC have standing to appeal to the Board? (ii) Were the statutory requirements of giving notice of an intention to seek leave to appeal to the Board satisfied by (a) the ASSP PCC and/or (b) by the Rev Yvonne Clarke? (iii) Was the application for leave to appeal to the Board made in time, and, if not, can the Board grant an extension of time? and (iv) Is the Rev Yvonne Clarke an appellant; in particular, was the application for leave to appeal made only by the ASSP PCC or by the ASSP PCC and the Rev Yvonne Clarke jointly?

(b) The procedures and the Board's jurisdiction under the 2011 Measure

40. Since the English Reformation of the 16th century the Church has had a close relationship with the state. The monarch is the Supreme Governor of the Church, and 26 bishops sit in the House of Lords. Parliament has legislated to enable the Church to govern itself through ecclesiastical legislation, but its legislation is reported to Parliament and is subject to Royal Assent.

41. The Church of England Assembly (Powers) Act 1919 provides that the Ecclesiastical Committee, comprising Members of both Houses of Parliament, considers a legislative measure of the Church and presents a report on it to Parliament. When that committee has done so, and Parliament resolves to present the measure to His Majesty, the measure has the force and effect of an Act of Parliament: section 4. The 2011 Measure, with which this appeal is concerned, on Royal Assent has effect as an Act of Parliament. The task of the Board, therefore, is one of statutory interpretation. In the discussion which follows in this part of the judgment the references to sections are to sections of the 2011 Measure.

42. Section 1 imposes on all persons and bodies carrying out functions under the 2011 Measure a duty to have due regard to the furtherance of the mission of the Church.

43. Section 3 sets out the functions of mission and pastoral committees (“MPCs”). Subsection (1) requires an MPC in carrying out its functions to have regard to worship, mission and community as central to the life and work of the Church. Subsection (2) lists other matters to which an MPC must have regard, including the financial implications for the diocese and the Church as a whole, the need to allocate appropriate spheres of work to those holding office in the diocese and the traditions, needs and characteristics of particular parishes. Section 3(3) sets out the duties of an MPC which include:

“(a) to make or assist in making better provision for the cure of souls in the diocese as a whole and, to the extent that the committee thinks appropriate, in particular parts of the diocese or in particular parishes. ...

(f) where it considers it desirable, to make recommendations to the bishop in accordance with section 6 or 21 for any of the matters for which provision may be made under this Measure (other than section 50) by a pastoral scheme or order. ...”

44. Section 6 sets out a scheme of consultation of interested parties when the MPC formulates draft proposals for submission to the bishop. Section 6(1) provides:

“Before deciding to make any recommendations to the bishop, the mission and pastoral committee shall so far as may be practicable ascertain the views of the interested parties or invite them to express their views –

(a) on the recommendations the committee proposes to make, or

(b) if the committee has yet to formulate recommendations, on the issues which the committee considers need to be addressed.”

45. Interested parties include the incumbents of benefices which would be affected by the implementation of the recommendations and the PCCs of churches which would be so affected: section 6(2). Subsections (5) and (6) impose on the MPC the obligation to afford to the affected incumbents and the PCCs the opportunity to meet the committee or a sub-committee or a representative of the committee, and where the recommendation involves the dissolution of a benefice, the incumbent is to be afforded the opportunity of meeting the committee itself.

46. If, following this consultation, the MPC decides to make recommendations, it formulates them into draft proposals and submits them together with a statement of the views of the interested parties to the bishop, who may amend the draft proposals: section 6(7) and (8). It is only after the bishop approves the draft proposals, with or without amendments, that the bishop sends those proposals to either the MPC or the Commissioners for the preparation of a draft scheme: section 7(1). If the proposals are, as in this case, sent to the Commissioners, their first task is to consider whether the procedures in section 6 have been properly applied: section 7(4). This is an important safeguard as a serious failure to comply with the consultation requirements of that section would be a ground of legal challenge to the Board. If the Commissioners are satisfied that the section 6 procedures have been properly applied, they are required then to prepare a draft scheme: section 7(5).

47. Section 9(1A) requires the Commissioners to serve a copy of the draft scheme which they have prepared on each of the interested parties together with a notice stating that:

“written representations with respect thereto may be made to the Commissioners not later than a date specified in the notice, being a date not less than twenty-eight days after the service of the notice.”

The words “with respect thereto” are a reference to the draft scheme. Section 9(1B) requires the Commissioners to publish online the draft scheme together with a notice stating the objects of the draft scheme and stating the date by which written representations may be made as in subsection (1A). Section 9(3) provides that the Commissioners shall send copies of the notice to the secretary of the PCC of each parish affected by the draft scheme requiring him or her to publicise the contents of the notice to the congregation in the ways specified in that subsection. Section 9(4) and (5) provide:

“(4) The Commissioners shall consider any *written representations duly made* with respect to any draft scheme or order and may, if they think fit, afford an opportunity to any person, whether he or she has made written representations or not, to make oral representations with respect to the draft scheme or order.

(5) The Commissioners may, before or after the end of the period within which written representations may be made under this section, extend that period, and *any representations*

made within the period so extended shall be deemed to be duly made.” (Emphasis added.)

48. In the Board’s view, those provisions in section 9 make it clear (i) that the written representations to which the section applies are those relating to the draft scheme and (ii) that to be “duly made” those written representations must be made within the time limit specified in the notice, unless the Commissioners grant an extension of time under subsection (5), in which case the representations received within the extended period are “deemed to be duly made.”

49. Section 11 provides for the making of the scheme. Subsection (1) provides that if no representations in respect of the draft scheme have been duly made and the Commissioners are of the opinion that the scheme should be made, they are required to submit the scheme to the bishop for his or her consent, and when that consent has been given, “they shall seal a copy of the draft scheme and so make the scheme.”

50. Section 11(2) provides that where representations in respect of the scheme *have been duly made* and the Commissioners, having considered those representations, consider that the scheme should be made, they shall so far as practicable:

“(a) serve on the persons who *duly made written representations with respect to the draft scheme* notice of the Commissioners’ decision with respect to the representations together with a statement in writing of the reasons therefor; and

(b) serve on any other persons, being interested parties, a copy of the notice.” (Emphasis added.)

51. Section 11(3) is another important provision in relation to the question of the Board’s jurisdiction. It provides:

“A notice under subsection (2) shall inform persons *who have duly made written representations with respect to the draft scheme* of their rights, on obtaining the leave of the Judicial Committee of the Privy Council, to appeal to Her Majesty in Council and shall specify the date, being a date not less than twenty-eight days after the service of the notice, on or before

which notice of intention to apply for such leave must be given.” (Emphasis added.)

52. It is clear from this provision that the 2011 Measure envisages that only those who have “duly made”, ie made by the deadline set out in the notice under section 9(1A) (see paras 47 and 48 above), written representations with respect to the draft scheme will have a right to appeal to the Board. This limitation is made express in section 12 which deals with appeals to the Board. Section 12, which is of critical importance to the question of the Board’s jurisdiction, so far as relevant provides:

“(1) Any person who has *duly made written representations with respect to the draft scheme* may appeal to Her Majesty in Council against the scheme or any provisions thereof, but only with the leave of the Judicial Committee of the Privy Council.

(2) Schedule 2 shall apply to applications for leave to appeal, and to appeals to Her Majesty in Council, under this section.

(3) If –

(a) no notice of intention to apply for leave to appeal is given on or before the date specified in the notice served under section 11(2), or

(b) no application for such leave is made within the period prescribed by paragraph 4 of Schedule 2, ...

the Commissioners *shall* seal a copy of the draft scheme and so make the scheme.” (Emphasis added.)

53. Schedule 2 to the 2011 Measure provides so far as relevant:

“(1) Any person who intends to apply for leave to appeal to Her Majesty in Council under section 12 shall on or before the date specified in the notice served on him or her under section 11(2) send written notice of his or her intention to the Registrar of the Privy Council. The notice shall be sent by registered post or recorded delivery service and a copy shall be sent to the Commissioners by the applicant. ...

(3) If the Registrar of the Privy Council is satisfied that a notice has been given by a person who has duly made representations with respect to the scheme in question he or she shall so notify the applicant and the Commissioners. If he or she is not so satisfied he or she shall inform the applicant and the Commissioners that the applicant is not entitled to proceed with his application.

(4) Within the period of 28 days beginning with the date on which an applicant for leave to appeal under section 12 receives a notification under paragraph 3 from the Registrar he or she shall lodge in the registry of the Privy Council five copies of his or her application for leave ...” (Emphasis added.)

54. The procedure set out in the 2011 Measure, so far as relevant may be summarised as follows:

- (i) The MPC prepares recommendations having regard to the furtherance of the mission of the Church (section 3);
- (ii) The MPC ascertains the views of interested parties on its proposed recommendations before deciding whether to make recommendations (section 6);
- (iii) After the consultation is completed, the MPC formulates draft proposals and submits them and a statement of the views of interested parties to the bishop who may approve the draft proposals with or without amendment (section 6(7) and (8));
- (iv) The bishop, if he or she approves, then sends the proposals to the Commissioners to prepare a draft scheme (section 7(1));
- (v) The Commissioners check to make sure that the consultation process under section 6 has been carried out and then prepare a draft scheme (section 7(4) and (5));
- (vi) The Commissioners then carry out a fresh consultation exercise with respect to the draft scheme, and written representations on that draft scheme must be made within the time limits set in the notice unless the Commissioners extend that time limit (section 9(1), (1A), (1B), (4) and (5));

(vii) The Commissioners are obliged to make the scheme if they receive no timely representations and are satisfied that the scheme should be made (section 11(1));

(viii) If after receiving representations, the Commissioners decide that the scheme should be made, they must give notice of their decision and a statement in writing of their reasons. The notice of a right to appeal to the Board is given to those who have made timely written representations in relation to the draft scheme (section 11(2) and (3));

(ix) The right to appeal to the Board is limited to those who have made timely written representations with respect to the draft scheme (section 12(1));

(x) The Commissioners are bound to make the scheme if there is no timely notice by those entitled to appeal of their intention to apply for leave to appeal to the Board (section 12(3)); and

(xi) The Registrar of the Privy Council is given the task of checking that an applicant for leave to appeal is a person who has made timely representations in respect of the draft scheme in question and is therefore entitled to proceed with the application to the Board (Schedule 2, para 3).

(c) Whether the Board has jurisdiction on this appeal

55. The first question posed by the parties is whether the ASSP PCC has standing to pursue this appeal. The answer is that it does not. The Board has considered each of the steps which, on the appellants' submission, gave the ASSP PCC standing and is satisfied that none of them meets the requirements of the 2011 Measure to support an appeal to the Board.

56. First, the written expressions of view which were made by solicitors on behalf of the ASSP PCC and the Rev Yvonne Clarke on 21 February 2020 (para 10 above) were representations relating to the DMPC's proposed recommendations to the bishop, before the DMPC sent its draft proposals to the bishop under section 6(7) of the 2011 Measure and before the bishop instructed the Commissioners to prepare a draft scheme. Such expressions of view are not "written representations with respect to the draft scheme" which did not exist when those representations were made. It would in any event be impracticable to treat such expressions of views as written representations in relation to the draft scheme. The Commissioners need to know to whom to send out notices under section 11, and the 2011 Measure provides a clear rule that they are to send the notices to those who had made written representations to them in respect of the scheme.

57. Secondly, the representations which the ASSP PCC made to the Commissioners on 25 November 2020 (para 18 above) were made long after the time limit of 7 September 2020 which the Commissioners had set in their notice of 21 July 2020 under section 9(1), (1A) and (1B) of the 2011 Measure. The Commissioners were not asked to and did not extend the time in which the written representations could be made under section 9(5). As a result, those representations were not “duly made” so as to give the ASSP PCC standing under section 12(1).

58. Thirdly, the representations by James Clarke in a letter dated 4 September 2020 (para 14 above) were submitted in a timely manner but they were representations made in a personal capacity. Mr Clarke designated himself at the end of the letter as “James Clarke, Son of Rev Yvonne Clarke” and the text of the letter contained no suggestion that he was acting on behalf of the ASSP PCC. While James Clarke was the secretary of the ASSP PCC and used his ASSP PCC email address to send the representation, the reasonable reader of his representation would conclude that he was writing in a personal capacity. This representation was therefore not made on behalf of the ASSP PCC.

59. As a result, the ASSP PCC does not have standing to appeal to the Board under section 12 of the 2011 Measure because its written representations were not “duly made”.

60. The second question is whether either or both the ASSP PCC and the Rev Yvonne Clarke gave timely notice to the Board of an intention to apply for leave to appeal. It will be recalled (para 21 above) that on 28 September 2021 the Commissioners decided that the draft scheme should be made and in their notice under section 11(2) of the 2011 Measure fixed 7 November 2021 as the day by which notice of an intention to seek leave to appeal to the Board must be given by sending the notice to the Registrar of the Board and the Commissioners.

61. It is common ground that Leigh Day’s initial enquiry by email on 28 October 2021 was not such a notice but an enquiry as to the correct form of an application for leave to appeal. The Registrar’s mistaken acknowledgement of that enquiry as a notice of intention to appeal cannot alter the nature of the initial enquiry. Leigh Day’s further email of 5 November 2021 did not disclose the party or parties who intended to apply for leave to appeal. This further email is clearly defective as a notice as the Registrar would not be able to perform her task under para 3 of Schedule 2 to the 2011 Measure of ascertaining whether an applicant was entitled to appeal under section 12(1). Contrary to the appellants’ submission, there was no duty on the Registrar to ask Leigh Day to identify their clients; it was the obligation of the solicitors to identify for whom they were acting. Nor was the Registrar deemed to know of the procedure which had preceded Leigh Day’s correspondence with the Board. Para 1 of Schedule 2 requires that the applicant copy his or her notice to the Commissioners. The Registrar is thereby in a position to ascertain by contacting the Commissioners whether the applicant is

entitled to appeal to the Board. There is no basis and no need for the Registrar to be deemed to know what she does not know.

62. The 2011 Measure states the consequence of there being no valid notice; absent the giving of any valid notice of intention to apply for leave to appeal, section 12(3) requires the Commissioners to seal a copy of the draft scheme and so make the scheme. The Measure leaves no doubt as to the consequence of there being no valid notice of such an application.

63. Counsel referred to several authorities in the course of their submissions on how the courts have addressed the consequences of failures to comply with statutory procedural requirements in different contexts. Among the authorities referred to were *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340; *R (Trail Riders Fellowship) v Dorset County Council* [2015] UKSC 18; [2015] 1 WLR 1406; *Shahid v Scottish Ministers* [2015] UKSC 58; [2016] AC 429; and *R v Layden (Stuart)* [2023] EWCA Crim 1207; [2024] 1 Cr App R 6. The Board sees no need to discuss those authorities as it is not disputed that the effect of a failure to comply with a statutory procedural requirement will depend upon the terms of the particular statute and the purpose of the statutory requirement. Counsel were agreed that in interpreting a notice the court considers how a reasonable recipient of the notice would interpret it, reading it in its statutory or contractual context. See *Newbold v Coal Authority* [2013] EWCA Civ 584; [2014] 1 WLR 1288; *Pease v Carter* [2020] EWCA Civ 175; [2020] 1 WLR 1459.

64. Mr Thomas submitted that the procedures in the 2011 Measure, including procedures initiating an appeal, were designed to be operated by ordinary parishioners. That may be so in many cases. But the 2011 Measure addresses that circumstance by making detailed provision for the ascertainment of the views of interested parties and for the giving of notices which inform the recipients of the procedural steps which they are required to undertake if they wish to seek leave to appeal. In this case Leigh Day knew of the deadline of 7 November 2021 but failed in their notice of 5 November 2021 to state who or which of several potential objectors were giving notice of their intention to appeal. As a result, neither the Registrar nor the Commissioners would have been able to ascertain from the notice who the applicant or applicants were, with the consequence that the Registrar would not have been able to perform the task allocated to her of checking to see if the applicant was entitled to seek to appeal to the Board. Mr Thomas rightly did not dispute that the notice of 5 November 2021 was defective. The consequence of that defect is that the notice was invalid under section 12 of and Schedule 2 to the 2011 Measure and the Commissioners are required to make the scheme.

65. The Commissioners' challenge to the jurisdiction of the Board therefore succeeds. The Board has no jurisdiction in the appeals by the Rev Yvonne Clarke and the ASSP PCC respectively and must therefore dismiss those appeals. In the result

neither the third nor the fourth issues in para 39 above arise, and the Board records that Ms Wakefield did not press the fourth issue.

5. The substantive appeal

66. Because the Board has concluded that it does not have jurisdiction to hear this appeal, anything which it says on the merits of the appeal cannot create a binding precedent. But, because the objection on the ground of jurisdiction was raised so late and as a courtesy to the congregants who listened so patiently and courteously to the legal debate in the appeal, the Board records briefly its views on the merits of the appeal.

67. First, in relation to the claim that the Commissioners are a public authority under section 6 of the HRA, the Board was satisfied, essentially for the reasons advanced by Ms Wakefield, that the Commissioners are not. The House of Lords in *Aston Cantlow*, and particularly in the speeches of Lord Hope of Craighead and Lord Rodger of Earlsferry, set out the correct approach to ascertain whether a body within the Church is a public authority under section 6(1) of the HRA.

68. As Lord Hope stated (para 61) the relationship between the state and the Church is one of recognition and not the devolution to it of governmental powers or functions. The Church as a whole has no legal status or personality but comprises a number of bodies which perform specific roles. The Church Commissioners are one such body which by the Church Commissioners Measure 1947 has been constituted by the Church and not by the state. The question in this case, as in *Aston Cantlow*, is whether a body is a public authority in the sense that it carries out, either generally or on the relevant occasion, the kind of public function of government which would engage the responsibility of the United Kingdom before the Strasbourg court: Lord Rodger at para 163.

69. Following that approach, and having regard to the authorities to which Ms Wakefield referred, the Board is satisfied that the Commissioners are not a core public authority exercising functions which are broadly governmental and thus functions of a public nature. Nor are the Commissioners a hybrid public authority, some of whose functions are of a public nature. The relevant function is the making of the scheme which involves the reorganisation of parishes to make provision for the cure of souls and in furtherance of the mission of the Church. That is an ecclesiastical function and not a function of a public nature in terms of section 6(3) of the HRA. It follows that the obligation in section 6 of the HRA to act in a way which is compatible with a Convention right does not apply to the Commissioners.

70. In any event, the Board is satisfied that the decision to make the scheme did not involve unlawful discrimination or any failure to take into account the needs of minority ethnic communities, including in the Shrublands estate. The Board refers to the discussion of the provision of ministry and mission in para 128 and following in the Commissioners' statement of reasons and their consideration of allegations of racism in para 135 and following.

71. Secondly, because the Commissioners are not a public authority, the public sector equality duty under section 149(2) of the EA 2010 does not apply to it. In any event, both the DMPC and the Commissioners considered the impact of the proposals and the scheme on the UK minority ethnic community in the Shirley area, including the Shrublands estate.

72. Thirdly, while parties who have made written representations in relation to a scheme have a right to apply for permission to appeal to the Board on the merits of the scheme, the Board's jurisprudence over the years has set out the boundaries of such an appeal. The Board attaches weight to the role of the DMPC and the role of the bishop in considering the options for the future of a parish and in approving a scheme. It also recognises the knowledge and expertise which the Commissioners bring to their role. Having regard to the fact that a scheme has the support of responsible bodies within the Church, it has been the practice of the Board to intervene in relatively limited circumstances. Such circumstances include where there has been a significant procedural irregularity or excess of jurisdiction, where there has been an error in principle in the decision or otherwise the decision-maker has clearly gone wrong, and, what is really another way of saying the same thing, where there are cogent reasons for dissenting from the recommendations of the bodies charged with making the decisions. The Board has repeated its support for this approach in several cases: *Little Leigh Parochial Church Council v Church Comrs* [1960] 1 WLR 567, 568; *Elphick v Church Comrs* [1974] AC 562, 566-567; *Hargreaves*, at pp 460-461; and *Cheesman v Church Comrs* [2000] 1 AC 19, 25.

73. The principal reason why the Board is slow to intervene is because the 2011 Measure contains an elaborate process of obtaining the views of interested parties, review by the DMPC, approval of the DMPC's proposals by the bishop, and then a decision by the Commissioners to draft a scheme, and, after consideration of representations made to them in respect of a draft scheme, to make the scheme. As the Board stated in *Hargreaves* (p 460):

“By the time a scheme is brought to the attention of the Judicial Committee on appeal it will represent, unless there has been some irregularity or departure from the statutory process, the fully considered view of those charged by law with providing for the cure of souls in the diocese and with

protecting, so far as practicable, the traditions, needs and characteristics of individual parishes...”

74. Another ground on which the Board may intervene is where there has been a change of circumstances or the emergence of fresh evidence since the Commissioners’ decision (*Rogers v Church Comrs* (unreported) February 11, 1980; *Hargreaves*) but the circumstances of the parish of ASSP have not improved in this case.

75. The Board is of the view that the Commissioners’ statement of reasons makes a compelling case in support of the scheme having regard to the financial predicament of and governance problems within the parish of ASSP, and the ability of the parishes of St John Shirley and St George Shirley with the assistance of a pioneer minister to serve the community of Shirley, including the UK minority ethnic community. If it had had jurisdiction, the Board would not have allowed the appeal.

6. Conclusion

76. The Board will humbly advise His Majesty that the appeal should be dismissed for want of jurisdiction. In those circumstances, unless the parties submit otherwise within 21 days of the issue of this judgment, the Board is minded that each party should bear its own costs on this appeal.