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5th February 2009

Dear Sirs,

**DEAN AND OTHERS -v- BURNE AND OTHERS (HC07C03109 - THE DIOCESE)
DEAN -v- BOWLBY AND OTHERS (HC07C03020 - THE PARISH)**

Thank you for your dated 27th January 2009.

The legal advice given to the Attorney General is privileged and confidential. However, on the footing that the Claimants will need to proceed with their applications in any event, and that the Attorney General's counsel will be making submissions and informing the court of the Attorney General's approach on the hearing of those applications, I set out in this letter a summary of the Attorney General's approach based on the advice which has been given to her.

1. The central issues in both sets of proceedings are whether in the events which have happened:

(a) The two charities ("the Diocesan Trust" and "the Parish Trust") should be controlled by the followers of the Moscow Patriarchate or those of the Ecumenical Patriarchate and whether the assets of the charities, and in particular the Cathedral in Knightsbridge which is held by the Parish Trust, should be applicable for the promotion (i) of the religious lives of the Moscow Diocesan and Parish communities, or (ii) of the religious lives of the Ecumenical Vicariate and Parish communities.

(b) The circumstances are such as (i) to raise the jurisdiction in the court to make a scheme which divides the assets into separate trusts for the competing sets of objects and putative controllers, and, if so, (ii) whether this is a case in which such jurisdiction should be exercised.

2. As a matter of construction of the Trust Deeds there were two sets of circumstances which both had to exist in order to trigger the possible operation of the procedure set out in the Trust Deeds for altering their objects, namely (1) that there was doubt as to the continuity

of the life of the Parish or Diocese and (2) that there was doubt as to the identity of the body community or congregation which should be entitled to the benefit of the trusts.

3. Bishop Osborne's evidence is fatal to a contention that the second condition was satisfied. In paragraph 3 of Bishop Osborne's statement dated 7th August 2008, effectively on behalf of the Ecumenical adherents of whom he is a central figure, he says:

"No-one disputes that the Diocese of Sourozh and the London Parish under the Moscow Patriarchate remain in existence as legal entities and canonical bodies after my removal as bishop and replacement by first Archbishop Innocentii and then by Bishop Elisey. What has happened, however, is that large-scale changes in the composition of the London community during the years leading up to the summer of 2006 led to radical changes in the life of the London parish and therefore of the Diocese."

It is plain that there were a substantial number of persons left in the Moscow Parish and Moscow Diocesan communities after Bishop Basil and the new Ecumenical adherents had left.

4. Leaving aside the possibility of a cy pres scheme, the analysis is then quite simple:

(a) The objects of the charities were the promotion of the religious lives of the Moscow Parish and Moscow Diocesan communities. A substantial number of the members of those communities chose to leave, and to join the Ecumenical (Constantinople) communities, but, absent any change in the objects of the Trusts, the Moscow Parish and Moscow Diocesan communities continued to exist, and the promotion of the religious lives of those communities remained the objects of the charities. This part of the analysis is analogous to that of a members' club: if you join you can use and enjoy its assets, when you leave, you leave, you do not take the club's assets with you.

(b) Whatever doubt there may have been about continuity of the life of the parish or diocese, on the basis of Bishop Osborne's statement quoted above, there was no doubt as to the identity of the body, community or congregation entitled to benefit under the trusts, and accordingly on the footing that the conditions were cumulative, not alternative, the possibility of altering the objects of the trusts under the procedures contained within the Trust Deeds did not arise.

(c) It follows that the disputed resolutions were ineffective and the objects of the Trusts remain unchanged.

5. Unless they are changed by the operation of a power contained in the constitution of a charity, the objects of an existing charitable trust can only be changed if the circumstances come within one or more of the heads listed in s.13 Charities Act 1993, as amended. The potentially relevant set of circumstances in the present case is that set out in s.13(1)(e)(iii) which provides:

"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,"

The "appropriate considerations" are defined as meaning the spirit of the gift and the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.

6. The Ecumenical adherents suggest that the "spirits of the gifts" were to benefit Russian Orthodox communities with particular features, specifically:

- (a) As to the practice and propriety of certain religious and practical activities which were approved of by the communities and by the local priests and bishops.
- (b) The communities were generally composed of long term UK residents and their families.
- (c) A relatively loose degree of control was imposed by the Moscow Patriarchate, principally because of the controls imposed by the former Soviet Union on religion and on the movement of individuals, money and information.

They say that things have changed in that:

- (a) Certain religious and practical activities have changed or been banned (e.g. having prayers said for non-members of the orthodox church).
- (b) The natures of the communities have changed in that (i) many of the older established members have left to join the Ecumenical communities; and (ii) large parts of the Moscow communities are now made up of recent immigrants from Russia.
- (c) The Moscow Patriarchate now imposes a far greater degree of control.

They say that by reason of these changes the Ecumenical communities and their religious activities now resemble the original Moscow Parish and Diocesan communities and their activities far more closely than do the current Moscow Parish and Diocesan communities. In consequence they imply that the application the charities' assets for the promotion of the religious lives of the Moscow Parish and Diocesan communities would not be within the spirits of the gifts.

7. The Attorney General's view, on advice, is that the spirits of the gifts were to promote the religious lives of the particular specified communities; with the possibility of changing the communities which were to benefit if doubts arose as to the continuity and identities of those communities. It was inherent in the gifts and in their spirits that the membership of the communities might change. It is accepted that the other changes identified by the Ecumenical adherents do represent some departure from the spirits of the gifts; but the main parts of the spirits as well as of the letters of the gifts were to benefit the specified communities, which part of the spirit can still be satisfied by applying the trusts' assets for the promotion of the religious lives of the Moscow Parish and Diocesan communities. The differences identified by the Ecumenical adherents are not so substantial as to cause any great departure from the spirits of the gifts.

8. The test under s.13(1)(e)(iii) Charities Act 1993 is not whether the application of the funds is within the spirit of the gift, but whether the specified purposes have ceased to provide a suitable and effective method of using the trust property "regard being had to the spirit of the gift and to the social and economic circumstances". Thus, even if the continued application of the charities' assets in accordance with the letter of the Trust Deeds caused there to be a major departure from the spirits of the gifts, the court or the Charity Commission would only be required to "have regard to" that in considering whether the application of the assets in accordance with the letter of the Trust Deeds had ceased to be a suitable and effective method of using the trust funds. The application of the assets in accordance with the letter of the Trust Deeds does not have to continue to be the most suitable and effective method of using the assets having regard to the spirit of the gift in order to prevent the cy pres jurisdiction from arising under s.13(1)(c)(iii), it has to have ceased to have been a suitable and effective use. The Attorney General's view, on advice, is that the application of the assets in accordance with the letter of the Trust Deeds would continue to be a suitable and effective method of using the assets, regard being had to the spirit of the gift. Accordingly in her view the jurisdiction to make a cy pres scheme has not arisen.

9. Even if the jurisdiction to make a cy pres scheme had arisen, the court or the Charity Commission would not be obliged to make a scheme; they would have a discretion as to whether to do so. Given the great practical difficulties in formulating the basis on which a division of the assets should be made and the likely difficulty and cost of effecting such a division (for example how would the Cathedral or its use be dealt with?), when balanced against the fact that, at most (and contrary to the Attorney General's view) the jurisdiction to make a scheme is marginal, and the continuation of the existing trusts would not prevent the effective use of the assets for charitable purpose, even if that use was not the most suitable; the Attorney General does not wish to ask the court or the Charity Commission to direct a scheme.

10. The present case is distinguishable from the leading case on the possible application of s.13 Charities Act 1993 where there is a split between two factions of a religious charity, namely Varsani v. Jesani [1999] Ch 199:

(a) In Varsani v. Jesani the Court of Appeal held, amongst other things, that it could not determine which of the competing group's sets of beliefs was the set of beliefs which the trust existed to promote. In contrast in the present case there is no issue as to whether a particular sets of beliefs is or is not the set of beliefs which the charities exist to promote. There is merely an issue as to whether the internal powers to change the objects of the charities had arisen or was properly exercised; as to which there is no need to make any finding as to which of any set of beliefs the trusts existed to promote.

(b) In Varsani v. Jesani the Court of Appeal held that the original purposes had ceased to provide a suitable and effective method of using the property, regard being had to the spirit of the gift, within section 13(1)(e)(iii), and that accordingly the court had jurisdiction to order a scheme. In the present case the original purposes continue to provide a suitable and effective use of the property, even if that is not the most effective use of the property.

(c) In the present case the communities which the trusts exist to benefit are defined in the Trust Deeds by reference to "the Parish" and "the Diocese", the communities as so defined remain identifiable and undivided. In contrast in Varsani v. Jesani the community whose religious purposes the court held was intended to promote was, by the time of the hearing, a divided community.

(d) In the present case the trusts are far more sophisticated than they were in Varsani v. Jesani and, importantly, there were already schisms and divisions in the Orthodox faith at the times when the trusts were created, with the consequence that, unlike in Varsani v. Jesani, the spirit of the gift was not to promote the religious lives of all members of the orthodox faith in the United Kingdom or in a particular area of it, but were to promote the religious lives of those who were members of the Parish or Diocese from time to time.

(e) In the present case, unlike in Varsani v. Jesani, the Trust Deeds themselves contemplated a possible schism or discontinuity and provided for what was to happen in that event when doubts arose as to the identities of the Parish and the Diocese.

(f) In Varsani v. Jesani it was practicable to divide the assets between the competing groups. Specifically the majority group obtained the temple, whilst the minority group were provided with cash with which to purchase and/or build a smaller, alternative temple. In the present case the appropriate basis for any division of the assets or the use or sharing the Cathedral is unclear.

Points (a) to (e) above are illustrated by comparing the facts of the present case with Chadwick LJ's analysis in Varsani v. Jesani at p.238B:

"... It is not, of course, the case that the property could not be used in accordance with the original purposes. Clearly it could be so used by the group who were found, on this

hypothesis, to be the followers of the true faith. But to appropriate the property to the sole use of one group, to the exclusion of the other, would not - in a case like the present - be a suitable and effective method of using that property, regard being had to the spirit of the gift.

“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 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. In the present case I have no doubt that the spirit in which property was given in 1967 was a desire to provide facilities for a small but united community of the followers of Muktaĳivandasĳi in and around Hendon to worship together in the faith of Swaminarayan. The original purposes specified in the declaration of trust - that is to say the promotion of the faith of Swaminarayan as practised in accordance with the teachings and tenets of Muktaĳivandasĳi - are no longer a suitable and effective method of using the property given in 1967, or added property held upon the same trusts, because the community is now divided and cannot worship together. Nothing that the court may decide will alter that. To hold that one group has adhered to the true faith and that the other group has not will not alter the beliefs of that other group. The position will remain that the community cannot worship together. To appropriate the use of the property to the one group to the exclusion of the other would be contrary to the spirit in which the gift was made.”

11. The Claimants represent the interests of the Moscow Patriarchate. The disputed resolutions appear to have been procured by the adherents to the Ecumenical communities. The Defendants (apart from the Attorney General) are adherents of the Ecumenical communities. Where there are issues between two established bodies or interests as to which of them or their adherents are entitled to benefit from a particular charitable trust, and those issues have to be determined by way of litigation, the court would expect the competing established bodies or their representatives to be parties (see Ware v. Cumberledge (1855) 20 Beav 503 at pp.510-512). The additional Defendants were specifically joined by Deputy Master Bartlett’s orders dated 14th April 2008 for the purpose of representing (respectively) the members of the Ecumenical Parish and Vicariate. Accordingly, although in form the proceedings are charity proceedings to which the Attorney General is a necessary party, in substance the issues lie between the adherents of the Moscow and the Ecumenical Patriarchates.

12. The persons who have been joined as representatives of the Ecumenical interests have indicated no desire to take an active role and say that they will rely on the Attorney General to advance appropriate arguments. However, large quantities of evidence have been filed on behalf of the Defendants (other than the Attorney General), the essential thrust of which has been to attempt to answer or contradict the Claimants’ cases in various respects.

13. The Attorney General’s duty is to protect the interests of charity. This does not extend to requiring her to advance arguments in favour of a particular charitable interest against those of another charitable interest in a case such as the present, in which she considers on advice that the arguments would fail. Even less so in a case where, as here representatives of the competing factions are parties to the proceedings. Indeed, at least prima facie, it would be a waste of charity money and public resources for her to do so. Nor does the Attorney General’s duty require her to apply for a cy pres scheme in circumstances where she considers that there is no such power and where, even if it existed, its exercise and the working out of its exercise would be difficult and expensive.

14. As regards the costs of the actions: I explained in my letter to you of 14th January 2009, that the Attorney General might well form the view that the Claimants’ and her costs should be paid by the trustees and/or the Ecumenical Parish and Ecumenical Vicariate without recourse to the Parish or Diocesan Trust Funds. The factors which give rise to the

possibility of the Attorney General forming that view are summarised in the next two paragraphs.

15. Generally where there is a dispute as to the construction and administration of a trust:

(a) The trustees should be neutral and if they act neutrally and reasonably they will get their costs paid either by one or other of the competing factions or out of the trust fund.

(b) As regards the parties representing the competing factions: depending on the nature and method of conduct of the dispute, either the loser will be ordered to pay the winner's and, possibly the trustees' and, in a charity case, the Attorney General's costs, or some or all of the costs may be ordered to be paid out of the trust fund, or some or all of the parties may be left to pay their own costs.

16. Before the litigation started the trustees appear to have formed the view that the purported transfer of control and objects to the Ecumenical Patriarchate was valid and effective. Further, they were deeply involved in setting up and implementing that purported transfer in that they called the meetings at which the resolutions purportedly effecting it were passed. They now profess neutrality; and maintain that the voluminous evidence filed by them was put in with a view to assisting the court and not from any particular standpoint. In reality that evidence appears to attempt to make a case against the Claimants and for the validity of the resolutions transferring the Trusts to the Ecumenical Patriarchate and/or for a scheme. The trustees called the meetings on the basis of professional advice. However:

(a) On the material at present before the Attorney General the precise nature of that advice is unclear. For example it is unclear whether the trustees were advised that it was their duty to call the meetings or whether they were merely advised that they had power to do so or whether they were advised that there were doubts as to or risks involved in the steps which they proposed to take and, in due course, took in that regard.

(b) There is no material at present before the Attorney General to indicate that the trustees obtained the advice or approval of the Charity Commission or the Court before calling the meetings and proceeding on the basis that the objects of the charities had been changed.

(c) The Ecumenical adherents initiated the dispute by purporting to pass resolutions transferring control of all the asset to themselves, and, until after the Moscow Patriarchate adherents sought to recover control of the assets, the Ecumenical adherents appear not to have suggested a division of them and appear to have been happy to have had the sole control of and benefit from them.

17. I explained in my letter to you dated 14th January 2009 that the Attorney General would be likely to be assisted in forming her view in relation to the possible liability of the trustees for costs if she knew what advice the trustees had been given in relation to the calling of the meetings and the implementation of the resolutions, and whether and why they had not sought the advice or approval of the Charity Commission or the court before acting. In particular whether the trustees were advised that it was their duty to call the meetings or whether they were merely advised that they had or might have power to do so or whether they were advised that there were doubts as to or risks involved in the steps which they proposed to take and, in due course, took in that regard.

I trust that you and your clients will find the above of assistance. Perhaps the key point is that made in paragraph 13 above: the Attorney General's duty does not extend to requiring her to advance arguments in favour of a particular charitable interest against those of another charitable interest in a case such as the present, in which she considers on advice that the arguments would fail. Even less so in a case where, as here, representatives of the competing factions are parties to the proceedings. Indeed, at least prima facie it would be a

waste of charity money and public resources for her to do so. Nor does the Attorney General's duty require her to apply for a cy pres scheme in circumstances where she considers that there is no such power and where, even if it existed, its exercise and the working out of its exercise would be difficult and expensive.

Yours faithfully

A handwritten signature in black ink, appearing to read "David Edmonds". The signature is written in a cursive style with a large initial "D" and a long, sweeping tail.

D B EDMONDS
for the Treasury Solicitor