

Neutral Citation No [2019] ECC Yor 8

In the Diocese of York

In the Consistory Court

The Parish of Filey

The Church of St Oswald

Re St Oswald Filey Closed Churchyard

1. On the 10th December 2014, by an Order in Council, the churchyard at St Oswald's Filey was closed. It was one of seven churchyards closed by that Order.
2. The Order provided that

“burials shall be discontinued forthwith subject to the following exceptions:-

- (a) in any existing earthen grave in the churchyard, the burial may be allowed of the body of any member of the family of the person or persons previously buried in that grave, but no part of the coffin containing the body shall be less than 1 metre below the level of the surface of the ground adjoining the grave;
 - (b) ... *(this exception does not apply to St Oswald's but in some other churches covered by the Order)* in any grave space in which no interment has previously taken place, the burial may be allowed of any person for whom, or any member of the family for which that grave space has been reserved and appropriated with the exclusive right of burial there
 - (c) in any vault or walled grave in the churchyard, burial may be allowed but every coffin in such vault or grave must be separately enclosed by stonework or brickwork properly cemented.”
3. On the 12th October 2018 the Vicar, the Reverend Nigel Chapman (NC), returned to the parish having been away on a course for some days to find that following the funeral of James (Jim) Haxby (JH1) his remains had been interred in the churchyard of St Oswald's. He says that he was very surprised because on the 4th October he had been approached by the Funeral Director, Mr Vic Bowes (VB), who enquired whether following a funeral to be held in the Methodist church on the 10th October, it would be possible for such an interment to take place notwithstanding that the churchyard was closed. NC says that he informed VB that it would only be possible to bury ashes or to bury in an existing grave of a member of the family. He told VB that he was willing to go and explain matters to the family himself and he went to see the deceased's widow that afternoon and explained the situation to her. He had heard no more about this matter before leaving town to go on his course.

4. As a result of learning of the interment, NC immediately contacted the Registrar on the 12th October by email to enquire what should be done. He also reported the matter to the Archdeacon of the East Riding. The Archdeacon sent him a questionnaire asking a number of questions about what had happened. He replied to the Archdeacon with his account of what he understood had taken place. That is a very relevant document as it is the closest contemporary record of the events by anyone concerned in them.
5. In his reply, in response to the request for a 'timeline of events', NC recorded, and I cite directly from the email document [original typos included (*sic*)]:

"On Thursday 4th October at around 10am Mr Vic Bowes, one of Filey's local and long-standing funeral directors came to the parish office to discuss a "problem". He went on to state that the family of the late Jim Haxby wanted him buried in St Oswald's church yard. In his own words he said this was a tricky situation. Indeed he went on to say that Jim had instructed the family that he wanted to be buried and that even if he had to be buried upright or left in his box in the grave yard, he wanted to be in St Oswald's church yard. They all knew the Church Yard is closed. My response was that we could only bury ashes, as the churchyard is 'Closed' and no such burial could take place. I did however say that if there was a family grave deep enough to accommodate him, then we could look into it but as far as I was aware we would need a faculty for this. Given that this would take a fair amount of time I said that there was not enough time to resolve this matter before the funeral. I offered to go and see Mrs Val Haxby the widow to explain the situation. Mr Bowes was grateful for this and left.

I visited Mrs Bowes (*sic*) on the afternoon of 4th October and while sympathetic to her situation explained that the graveyard had been closed by Queens order in an act of parliament and that no burial could take place except –

that there may be provision for burial in a relatives grave where there is space available for surviving relatives, or those who have reserved a grave space under a faculty. As they did not have such a faculty we could only really offer an Interment of Ashes either in the designated area, or in a family grave.

Mrs Haxby cited that the Cappleman family had done a burial only a couple of years ago. My comment was that I doubted this very much and upon further investigation found that they had a burial before the church yard was closed.

Mrs Haxby said she would have to speak to her children. I invited her to let them know they could come and talk to me if they wished for any clarification. No such deputation happened. I left having reiterated that it was most unlikely that we could bury Mr Haxby unless a deep enough family grave was available.

There was no further contact or discussion with either the family or Mr Bowes to clarify anything. The burial took place without my knowledge or permission."

6. In answer to the request for 'details of any further conversations that have occurred with the Funeral Director/Family/Methodist Minister since the event', he recorded

"I have had no conversation with FD, or the family at this stage.

FD came into the office to pay the fees of a normal burial and told the Administrator that they had found space next to Mr Haxby's brother, had rodded it and decided it was fine. (May I reiterate this is not in a family plot but adjacent (*sic*) to it, and no clarification was sought before the funeral took place, without our knowledge or permission. The grave has been slotted in-between two graves, and regarded as a "Family Plot" It is clearly not the case nor marked as such on the church yard plans."

7. The Registrar forwarded to me the email from NC. I gave directions on the 26th October that enquiries should be made of the Methodist Minister, the Reverend Dr

Kevin Ridd (KR) and of VB as to how it had come about that this burial took place in the closed churchyard. I also indicated that it should be made clear to all concerned that this was a serious matter, that this burial was not only unlawful but also appeared to amount to the commission of a criminal offence contrary to s.3 of the Burial Act 1853, which provides:

“It shall not be lawful, after the time mentioned in any such Order in Council for the discontinuance of burials, to bury the dead in any church, chapel, churchyard, or burial place, or elsewhere, within the parts to which such Order extends, or in the burial grounds or places of burial (as the case may be) in which burials have by any such Order been ordered to be discontinued, except as in this Act or in such Order excepted; and every person who shall, after such time as aforesaid, bury any body, or in anywise act or assist in the burial of any body contrary to this enactment, shall be guilty of a misdemeanor.”

8. In due course I was informed of their responses.
9. VB, in a letter dated 5th December 2018, said that he was led to believe by the family of the deceased that the plot where JH1 was buried was a Family Plot and that it was agreed that he would be buried next to his brother. He says it was a very sad time for the family and they were most insistent that he be buried next to his brother.
10. KR, in a letter dated the 2nd December 2018, said that he had visited the family on the 3rd October. The churchyard being closed, he had anticipated that the burial would be at the Lawns Cemetery. The family however were adamant that it should be in the churchyard. He explained to the family that the churchyard was closed. He then had a discussion with VB about this issue and VB told him that he would contact him before the funeral to say where the burial would take place. He also understood that the vicar would be speaking to the family. The day before the funeral, which took place on the 10th October 2018, KR contacted VB and was told by him that the burial would take place immediately after the funeral and would be in the churchyard. When he asked VB how this had been achieved, he was told that VB had visited the Parish Office and over a cup of tea with the vicar they sorted everything out. KR said that he had no reason to doubt that and so proceeded to conduct the funeral and burial accordingly.
11. By then, the family had learned that what had happened was now the subject of enquiry. A letter was set to the Registrar dated 6th December 2018 which stated :

“We are lead (*sic*) to believe that our local undertaker and vicar are in trouble for the burial of our late father, ‘James (Jim) Haxby’.

We would like to apologise for any inconvenience caused but as a family we always knew that our Dad would be buried in Filey Cemetery next to his brother. It was always close to Dad’s heart and that was where he was going. He always said that was his place and it was sorted with a vicar years ago. All his late family are buried there and that was where he would go to be with them. We had no question that he would go anywhere else.

We are truly sorry if this has caused any problems”.

It was signed by “James Haxby (Son) and Mandy Gage (Daughter)”

12. I then directed that these accounts should be passed to NC for him to comment on. He responded in an email dated the 21st December 2018 in which he said that

indeed VB did come to see him in the parish office. They did not have a cup of tea. Mrs Elizabeth Goodwill, the Parish Administrator, was also present. He made it clear that unless there was enough room in a family grave no such burial was possible. Further, even if there was room in the family grave an application (*I presume he meant for a faculty as he had indicated in his response to the Archdeacon*) would have to be made and that would take time. VB told him the family were adamant that the burial will take place and if it could not then the deceased's wishes were that he should be "left on top". He had offered to go and visit the family, and did so that same afternoon, the 4th October. He visited the widow. He explained to her that the graveyard had been closed by an order of the Queen and that no burial could take place unless there was space in an existing grave or a space had been reserved by a faculty. As there was no faculty all he could offer was interment of ashes. When Mrs Haxby said that a member of the Chapman family had been buried in the churchyard only a couple of years before, he said he doubted that. Subsequent enquiry disclosed that that burial was before the churchyard was closed. He left with Mrs Haxby saying she would need to speak with her children. He offered to speak to them also, but he heard no more."

13. In my subsequent directions I was concerned about two things. First it seemed to me to be necessary to give VB a chance to comment on the accounts of his conversations with the 2 clerics as recorded by them. I was also concerned as to what powers I might have, if any, to regularise the situation. In directions I gave on the 15th January 2019 I said at para 16:

16. Presently, I am unclear as to what if anything can be done in that respect (*the PCC had expressed a wish "to see if there is some way of allowing the body to remain where it is buried"*). I am not aware of any procedure by which the Secretary of State for Justice is able to grant retrospective exception or permission. I consider it may be arguable that the Chancellor can grant a faculty. What was s.3 of the Church of England (Miscellaneous Provisions) Measure 1992 but is now s.88(3) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, provides that a faculty can be granted to permit the burial of cremated remains in a closed churchyard. It could therefore perhaps be argued that what is permitted for ashes by way of faculty could also be permitted for a body in a coffin. However the contrary argument would be that ashes are an exception and allowed because of their small volume and that to argue for permission to bury a body in a coffin from that would be opposed to both logic and common sense. However that is a matter upon which I have not yet reached a final conclusion.

14. I therefore asked the Registrar to make contact with the Ministry of Justice (MOJ) and to seek their views and in particular: whether they were aware of previous similar unlawful burials? Whether they were aware of any provision for regularising the position through action on their part? And whether they had any views about the power of a Chancellor to grant a confirmatory faculty in these circumstances.
15. I then anticipated that when all these enquiries had been made I would be in a position to convene a Consistory Court hearing at which I would be able to determine what had happened, who if anyone was to blame for the unlawful action and what orders if any I should make.

16. VB responded by letter stating "I am writing to let you know that I agree with the reports submitted by the Reverend Dr Kevin Ridd and the Reverend Nigel Chapman apart from I did not mention discussing things over a cup of tea. I did not realise at any time that I was committing a criminal offence otherwise needless to say I would not have continued. I trusted the family when they said arrangements were in place to bury Mr Haxby with his brother. As there were no means of checking this was the case I took the family of Mr Haxby's word that it was agreed, which I now realise was the wrong thing to do."

17. The MOJ did not respond until May 2019, apologising for the delay, saying "your queries have needed careful consideration". The author of the letter went on to say:

Q1. Are the MoJ aware of previous similar unlawful burials?

We are not aware of any similar unlawful burials previously.

Q2. Do they [the MoJ] have any views about whether a Chancellor is able to grant a confirmatory faculty in these circumstances?

This isn't a matter for the MoJ so we cannot comment. Faculties are subject to ecclesiastical law.

Q.3 Are they [the MoJ] aware of any provision for regularising the position through action on their part? Can the MoJ regularise the position?

There is no clear provision by which the MoJ could regularise the position.

Under section 1 of the Burial Act 1853 an Order in Council may vary a previous Order in Council even if the time for discontinuance of burials has passed. However, there is no case law to indicate whether this could be done retrospectively. It would be a time consuming, lengthy and expensive process and no grounds have been advanced as to why this step ought to be taken.

While the information provided by the Chancellor suggests that a possible criminal offence has been committed in opening of a new grave in a cemetery closed under an Order in Council, there is no continuing offence once the burial has been committed (considerations of ecclesiastical law aside).

Once the burial has taken place, there does not appear to be anything in the relevant legislation that requires any sort of rectification to take place (e.g exhumation) or states that there is an offence for the body to remain in situ.

We note from the Chancellor's note that the full facts of what happened have not been confirmed and that the Chancellor will be carrying out further investigations.

Dependent on the outcome of these investigations the Chancellor may wish to consider referring the matter to the police.

We would be grateful if he could keep the MoJ apprised of the outcome of his investigations.

18. I gave further directions with a view to holding a Consistory Court. The hearing was eventually fixed for the 7th October 2019 at St Oswald's Church. I am grateful to the Church for the practical arrangements they made in relation to that hearing.

19. VB was represented at the hearing by Mr Kevin Blount (solicitor). Others present and who gave evidence were KR, NC and James Haxby, the son of the deceased (JH2).

20. I heard first from KR. He confirmed the contents of his letter dated the 2nd December 2018. He told me that the Haxby family had long links with the Methodist church and

when JH1 died he was asked to conduct the funeral. The family told him that there might be a problem as the churchyard was closed, but the family wanted him buried in the churchyard. He spoke with VB who said he didn't know what would happen as the churchyard was closed but there might be some things to be done to allow the burial to take place in the churchyard or it might be at the Lawns Cemetery. VB said he would contact him nearer the time. When he hadn't heard anything more by the day before the funeral he telephoned VB to find out how things were proceeding. VB told him that the burial would be at St Oswald's immediately after the service. When asked if he expressed any surprise on hearing that, he replied "I know there is some dispute about the cup of tea but he told me he had met the vicar in the parish office and sorted it all out". When asked if he did remember reference to "a cup of tea", he replied "that is certainly what sticks in my mind, the phrase 'cup of tea' suggests that it was a relaxed meeting". He also said "I was surprised, but I have known Vic for some time and had no reason to doubt what he said. Nigel was away on a course at the time and I could not contact him." He went on to say that he was assured by Vic that he had the paperwork. He did not ask to see the form as he had no reason to doubt him and whenever he had conducted a funeral in a church before he had not asked to see the paperwork. When he arrived at the churchyard he said "everything seemed prepared and above board". He said that the first he knew there was a problem was when NC sent him an email on his return.

21. Mr Blount asked KR whether the family had told him that Jim had told them (before he died) that it was sorted that he would be buried in the churchyard. He replied that they had said it was his wish. He said that VB "thought there may be a way with a family grave". When asked why he didn't try to contact NC by email or contact the parish centre he replied that he was in touch with the funeral director.
22. I asked JH2 if he wished to ask KR any questions and he said "He's just said it as it was."
23. NC gave evidence next. He also confirmed the truth and accuracy of his account to the Archdeacon and of his email to the Registry dated the 21st December 2018. In that email he had said:

"When Mr Bowes came to the office we spoke, not over a cup of tea, but he had a discussion with me and with Mrs Elizabeth Goodwill the Parish Administrator present. I made it quite clear that this could not go ahead unless there was enough room in a family grave and even then there would need to be an application made and this would take some time. Mr Bowes told us that the family were adamant that the burial will take place and if not the deceased's wishes were that he should be left on top! While I expressed sympathy, I at no time said it could take place only that we would have to investigate further. Indeed I was explicit in saying it could not happen. Mr Bowes did not want to go back to the family, so I offered to go round and see them and to explain that the burial could not take time (*sic*), and certainly not in the timeframe they had in mind. This I did on the same afternoon as Mr Bowes had come into the office. After visiting the widow I offered to go round again to meet with her son and daughter. No other contact was made after however. The next I heard was after the burial had taken place and was shocked to hear it had, and this was when I contacted the Archdeacon and the Registrar's Office."

24. In evidence he told me that alongside the grave of the deceased's brother there was a space but it was a very narrow space and not a full grave space width. The space was not marked on the churchyard plan. There was no indication that that space has been reserved by faculty.
25. He said that his discussions with VB when he came into the church office were very congenial, very professional and that they discussed around the problem and agreed even if there were space it would take time to get permission.
26. He said that when he visited the widow he more or less repeated the conversation he had had with VB. He said it could not really be done and that the only thing they could do was to go to the Lawns or offer the burial of ashes or if there was a family grave that was deep enough. He said that she was very disappointed and that she would have to talk to her family.
27. In cross-examination he said that he would say that what was being described as a space next to the grave of Richard Haxby wasn't a space, "it is smaller than other spaces". He said there are no other grave spaces in the churchyard. "Jim Haxby is now buried adjacent to the grave of his brother, but not in his grave." He said that as far as he was aware any conversation VB had with the church administrator was after the event. He agreed that when he contacted the Archdeacon his primary concern was about any precedent having been set. When I asked him about the attitude of the PCC and whether that was their primary concern he responded that "there are a lot of people who say that they have a new plot here; they have no paperwork to back that up and we have no faculty documents; I can think of two people who think that they have space in the graveyard." In answer to Mr Blount he said that he did not recall a second conversation with VB, but in his only conversation, VB said that the family were set on having the burial in the churchyard.
28. Mr Haxby had no questions for NC.
29. VB gave evidence next. He said that he had been approached by the family in relation to the funeral and that when he visited them they were very adamant that he should be buried in the churchyard, saying that he was a Filey lad, and a fisherman. He mentioned to them that the churchyard was closed. He said they told him that Jim had spoken to the vicars over the years and said he wanted to be buried in the churchyard. He spoke to KR about conducting the funeral because the family were Methodists and he spoke to NC to discuss the burial and the difficulties that were incorporated with the burial. He said he spoke to him a couple of times. He said he knew that the churchyard was closed but just what difficulties that came to he did not know. He did not realise it was as serious as it has turned out to be. He said NC told him that it could be resolved if there was room in a family grave. When he next spoke to the family they said that NC had been to see them and told them there would be difficulties. They said there was space in the family plot next to his brother. He said that he then went with James to see the brother's grave. He rodded it to see if there was anything there and as far as he could determine there was

space there for the burial. When asked whether he discussed this with anyone at the church he said "No. I did mention it to Liz, the parish administrator, to say I had rodded the space and that there was room for a burial next to Mr Haxby's brother." Mr Blount said to him "NC thinks you had that conversation after the funeral." To which he replied "No, not after the funeral I went to the office to say that I had rodded the grave, that was before the grave was dug." He also said that as far as he was concerned it was the family space and that was sufficient. Asked about paperwork he said "there is no paperwork sent from the church until the vicar fills in the burial book after the burial is completed." He said the grave had been dug by two men the day before the burial.

30. In answer to questions from me, he agreed he had been told the burial could not take place without paperwork. He said he could not recall the words Liz had used after he told her he had rodded the grave, but he thought she had said she would report back to the Reverend Chapman. He agreed she did not tell him it was all right to go ahead.
31. When asked whether he had any questions, JH2 said that they had not referred to a "family plot" when speaking to VB although he has said he knew there was a space there. In response VB said that as far as he recalled it was said there was a family plot, but it was now 12 months ago and it was difficult to remember the exact words.
32. Mr James Haxby (JH2) gave evidence. He said "Vic came to see us. Who's been a family friend. Because I feel really awkward as I don't want to put him in trouble. His father and my father were friends and I think that he's gone that extra mile because of that. On the day when he came to see us we said we want him over in the churchyard. Vic shook his head and said I don't think we can do that as it's closed. My sister said well if that's the case you'll have to keep him". I asked what he understood by that. "She said you'll have to keep him 'on top' then. We all laughed about it. Vic said he would do what he could for us. We came over here and walked around all the family graves. I said the only place I knew he could go was next to his brother if it could be arranged. We came over a couple of days later and Vic rodded it and we thought it was clear. We left it at that and the next thing I knew, it was all sorted. I was so excited and pleased. I feel sorry for Vic." I asked him what he understood had been said by NC to his mother. He said "we were told it was shut, but we were told by Vic it was okay, so what do you do?"
33. In answer to questions from Mr Blount he said "I did not know there was a space there until after my dad died and my cousin Richard told me there was a space there because it was next to his dad. He said it had been rodded at the time. He told me there was space there if anything could be done with it."
34. My first reason for holding this hearing was to enable me to determine what the course of events was which led to the interment of JH1 in the closed churchyard at St Oswald's. I have now had the benefit of hearing from those involved. I am greatly helped by the fact that NC reported this matter immediately and in answer to the

Archdeacon's questions, set down in writing his recollection of the events within days of their happening.

35. It is now clear to me that matters happened in the following way. When James Haxby died his widow and children were conscious that he had always wished to be buried in the churchyard at St Oswald's. They believed that he had discussed this during his life with previous incumbents. It was not suggested that he had ever had a discussion with NC. Neither they nor the parish had any paperwork suggesting there had been a promise made that such a burial would be able take place, even when the churchyard was open for burials. When it was open, he would of course have been entitled to be buried there as a parishioner so it was probably felt that nothing needed to be done to secure that outcome. Certainly there was no suggestion that any particular space had ever been allocated to him for his burial. Of course, even if discussions had taken place and promises were made, they would have had no effect unless a faculty had been granted reserving a grave space. If there had been such a faculty, granted before the Order in Council was made, then burial in the reserved space would still have been possible.
36. I return to the events. After the death, the family contacted VB about making arrangements for the funeral and burial and also KR about the funeral in particular. JH2 says that at the first meeting with VB, VB told them that he did not think that it would be possible for him to be buried in the churchyard as it was closed. There was then some discussion, which according to JH2 was light-hearted, to the effect that in that case he would have to be 'left on top'. VB said he would go away and see what he could do. He then had a discussion with NC which took place in the church office with the administrator present. I am satisfied that throughout that conversation VB was aware of the fact that the churchyard was closed. I will accept that when the conversation started he may not have been aware of all the niceties involved in a closure. However it is clear to me that NC explained to him that there was now no possibility for the burial of a body in the churchyard unless it were to be put into an existing grave of a family member. He spoke about it needing to be 'deep enough to accommodate him'. I am satisfied that he had made clear to VB that it was a family grave rather than a family plot which would be needed if he were to be buried therein. I am also quite satisfied that he told VB that as far as he, NC, understood matters, if there were such a grave identified they would need to obtain a faculty for the burial to take place and that that would take a fair amount of time.
37. That conversation took place on the morning of the 4th October, and that same afternoon NC visited the widow of the deceased and explained the position to her. He told her about the closure order, telling her that it was "by Queen's order in an act of Parliament" which in my judgement must have made clear to her that this was not just some local decision or rule. He told her that the only exceptions were (i) burial in a relative's grave, (ii) burial in a space reserved under a faculty or (iii) interment of ashes in the area for cremated remains or in a family grave.
38. There was then a subsequent discussion between VB and family members. His recollection is that he had previously told them that it will be possible for burial to

take place "in a family grave", and that in the next conversation they told him that there was "space in the family plot next to his brother". JH2 says that the phrase 'family plot' was not used. JH2 says that he had discussed the matter with his cousin who told him that there was space next to his own father, the deceased's brother. He reported that to VB and they subsequently went together to the churchyard where VB rodded the space and decided that it was clear of any previous burial and that it would be possible to bury Jim Haxby there. VB says that as far as he was concerned it was a family space and that was sufficient.

39. I am satisfied even if VB has now persuaded himself that a family plot would provide an exemption from the Order in Council, he cannot have believed that at the time. He must have been aware from what NC had told him that any burial needed to be in the same grave and on top of any earlier burial; further that if that were to happen it would not be able to be done immediately and there would be a delay before the burial could take place whilst a faculty was obtained.
40. I am prepared to accept and do accept that at this stage the family were putting themselves in the hands of the funeral director who they were entitled to accept knew the rules.
41. VB says that prior to the funeral he had seen the church administrator, Elizabeth Goodwill, and that prior to the digging of the grave he informed her that he had rodded it. He says that she said she would pass on the information. Having considered all the material before me, I reject his account that this conversation took place prior to the digging of the grave or the funeral. She had been present at the initial meeting between VB and NC and I am satisfied that if he had said anything of that sort to her she would have registered a protest and or would have communicated with either NC or the Archdeacon. On the 15th January 2019 I directed that VB should be supplied with a summary of the events taken from the written accounts provided by NC and KR. The material sent to VB included NC's record that the funeral director came into the office to pay the fees of a normal burial and told the administrator that they had found space next to Mr Haxby's brother, had rodded it and decided it was fine. When VB was asked whether he accepted the accounts, he replied in writing that he agreed with the reports "apart from I did not mention discussing things over a cup of tea". He did not say anything about the record of his conversation with the administrator which was said to have been after the funeral. It was in the course of this hearing that for the first time VB suggested that this conversation took place prior to the digging of the grave. I am for the reasons I have stated satisfied it took place when he went to pay fees after the funeral had taken place.
42. That brings me to the discussion that VB had with KR when KR queried the day before the funeral how it was going to be possible for the burial to take place in the churchyard immediately following the funeral. I thought it significant that in his evidence in chief KR, who was aware that VB was denying that he had referred to a cup of tea, downplayed the reference to a cup of tea when he first answered a question about what was said. However when pressed as to whether he

remembered the phrase being used, he was clear that it stuck in his mind because it created the impression of a relaxed meeting.

43. In my judgement the playing down of the alleged sharing of a cup of tea, which is of course denied by NC, rather backfires on VB. It doesn't help him when he reports what was said as opposed to what was done. In short wherever I have compared and contrasted what VB said with what KR or NC said and when I have borne in mind the almost contemporaneous written account of NC I am driven to conclude that where there is any divergence between what VB says and what NC or KR say, I prefer the evidence of NC and KR.
44. In short my conclusions are that throughout the course of these matters VB knew, as in fact did everyone else, that the churchyard was closed; that any lack of clarity he had as to the meaning and effect of closure was resolved by his discussion with NC on the 4th October 2018; that when in the course of discussions with the family he learned of a space next to the grave of the brother of the deceased, he decided to take a chance and inter the body there; which is what he did. He was challenged by KR, when he told him that they could go ahead with a burial in the churchyard, and he chose to lie to him saying that it all been sorted out with the vicar. Since then he has sought to claim that the family told him it was family plot, when they did not, and that he implicitly got approval from the administrator when she said she would pass on what he told her about having rodded the family plot and it was fine.
45. It may be that all this came about either because of his friendship with the deceased and a desire to fulfil what he knew to be his wishes, or because he found it difficult to handle the grieving family who clearly had a strong desire to honour the deceased's wishes. But I cannot escape the conclusion that in this difficult situation he was the professional. Families are entitled to rely on him to know the rules, and if in doubt to discover what they are. He also has a responsibility to obey the laws himself. Also he has a responsibility to explain the rules to others and to ensure that they also comply with the rules.
46. In each of these respects it seems to me that VB failed and so fell well below the standard of what is to be expected of a funeral director. He has failed the clergy who trusted him, but more importantly he has let down the family who employed him. As a result of his conduct they have been left with questions about what happens now hanging over them for over 12 months. They want to bring matters to a conclusion and in particular to be able to erect a memorial to the deceased. That has not been possible, because of the circumstances which have been brought about entirely by him.
47. The question that then arises is what, if anything, I should do about it.
48. I note that the PCC are not asking for anything other than that findings as to what happened should be made and anyone at fault should be censured. That I have done. The family are anxious to be able to bring matters to a conclusion, as I have set out above.

49. So what is the legal position?

50. The churchyard was closed by an Order in Council on the 10th December 2014. Until recently there was very little public awareness of what an Order in Council is. Recent proceedings in the Supreme Court – *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent); Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* 2019 UKSC 41 have brought awareness of Orders made by the Privy Council to a much wider audience than previously.

51. An Order in Council is an Order that has been approved personally by the Queen at a meeting of the Privy Council. Some orders are made under the Crown's prerogative powers (ie inherent powers of the Crown to act on matters for which Parliament has not legislated). The one that came before the Supreme Court and is referred to in the previous paragraph was such. Others are made under specific statutory powers as this one was, having been made under s.1 Burial Act 1853.

52. I have set out in paragraph 2 above the precise terms of the order made. The Order provides for the exceptions when a burial in a closed churchyard may be permitted.

53. Any burial in breach of that order is therefore both unlawful, in that it has been carried out without any lawful authority, and by s.3 of the Act it is also made a criminal offence. In all the circumstances I have decided it is not necessary for me to invite the authorities to investigate the commission of an offence in this instance. However, I want to make it clear that if any similar activity took place in the future, I would not hesitate to make such a formal complaint.

54. I want to thank the MOJ for their assistance in relation to this matter. It is clear from their researches that they are not aware of any previous similar occurrence. It is also clear that they do not consider it possible to make what was unlawful lawful by any retrospective activity on their part.

55. That leaves the question I posed in my directions on the 15th January 2019, namely whether a faculty (whether prospective or retrospective) could be granted by this court for the burial of a body in a closed churchyard, other than when it falls within a specific exception to the Order.

56. I invited Mr Blount to address this point. His argument was to seek to persuade me that a family grave can be expanded to include the space next to it. I am afraid that simply is not possible given the way the Order is worded in relation to a family grave – the words existing family grave and the reference to the amount of space that must remain between the top of the coffin and the surface of the ground militate against such an interpretation.

57. I have also considered if it might be possible, as I queried in my January directions, whether the fact that what is now s.88(2) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, which provides that the right of burial in the churchyard

includes the right to burial of cremated remains, can be said to infer the opposite in s.88(3) which states that the s.88(2) right does not apply in a churchyard where burials have been discontinued by an Order in Council, except in accordance with a faculty authorising the burial or in an area set aside for the burial of cremated remains generally. In other words as ss.2 infers the general right to inter ashes from the right to be buried, can the granting of a faculty to authorise such interment of ashes imply that there must be a power to grant a faculty for the interment of a body in a closed churchyard?

58. There is sparse authority on this subject. However, a case in the Court of Arches, *Re St Michael & All Angels, Tettenhall, Wolverhampton*, decided on the 26th October 1995 is of some assistance. This was an appeal from decision of Shand Ch in which the principal issue was whether a proposed building could be considered to be “for the purpose of enlarging the church” and therefore permissible notwithstanding s.3 Disused Burial Ground Act 1844. One of the matters discussed in the case was where human remains might be exhumed on the ground of necessity, e.g. for road widening purposes, could they be reinterred elsewhere in the closed burial ground. The court said that it agreed with the reasoning in *Re St Mary’s Barnes [1982] 1 W.L.R. 531* that “the prohibition placed on burials in closed burial grounds by s.3 of the 1853 Act does not apply to the replacement of human remains already interred in the same burial ground. Therefore, if a Faculty had been granted in the present case, any human remains disturbed pursuant thereto could have been reinterred elsewhere in the burial ground, subject only to such conditions as the Faculty itself might have imposed.” At first instance Shand Ch provided a little more background about views of that time. He said “Disturbing remains is to be avoided if at all possible, since the remains of the deceased and consecrated ground are under the Court’s protection. However, as has happened in such cases as *St Anne’s Kew*, or *St Mary’s Barnes*, if such removal is really necessary, it can, lawfully be allowed, provided that such remains are reburied reverently by the incumbent in another part of the churchyard or in consecrated ground elsewhere under arrangements sanctioned by the Court. I understand the view has been expressed by the Department of the Environment that closure by Orders in Council precludes such burial. That is wrong. It unfortunately led to the cremation before reburial of the remains disturbed in the Archaeological investigations 1994. I would draw attention to the decision of Chancellor Garth Moore in *St Mary’s Barnes [1982] 2 All ER 456* which makes it clear that the prohibition of burials under the 1853 Act does not preclude reinterment of human remains already in the ground which it has been necessary to disturb. The Act itself is directed only to first-time burials in the interests of public health.”

59. It seems to me that the principles that lie behind what was said both at first instance and on appeal in that case rule out any way of interpreting ss.88(2)&(3) so as to give the court any power to authorise the interment of a body in a first-time burial in a closed churchyard. If it had been considered possible that a faculty could be granted to authorise a burial in a closed churchyard then it would have been quite unnecessary to put such stress on how the reinterment of exhumed remains was permitted without more.

60. I am then left with the position that the body has been buried unlawfully; and that unlawful position cannot be made lawful by any subsequent action of the Privy Council nor by any faculty granted by this court.
61. However, as I indicated in my introductory remarks when opening the court there is no proposal that the body may not be allowed now to remain where it lies. And so it shall.
62. As for any memorial, that is a matter that can now be progressed. Any application for a memorial will have to be by a petition for a faculty. It seems to me that there may be particular sensitivities as to size given that the space in which the burial took place is said to have been particularly narrow. The vicar and PCC will need to be consulted about the usual matters – material and inscription and I will need the DAC to advise me on the question of size. I am sure that the Secretary to the DAC and/or the Church Buildings Officer will be willing to offer advice to the family at an early stage in relation to any proposed memorial.
63. I hope that it will now be clear to everyone hereafter that there is no possibility of the burial of a body in a coffin in a closed churchyard without a faculty. That might be a faculty which had reserved a grave space prior to the Closure Order. Or it might be a faculty to allow a burial within the same grave in which a family member is buried, but that earlier burial must be deep enough to permit a second coffin to be placed above it and for there to be a metre of earth between the upper coffin and the ground surface. Ashes of course can be buried in an area set aside for the burial of cremated remains, and it would usually be possible to obtain a faculty to inter ashes in the grave of a family member.
64. If there were to be any activity in the future similar to what happened here, then it is likely that I would feel obliged to report the matter to the police with a view to prosecution. Further, I cannot guarantee that any future burial would be allowed to remain in situ.
65. Finally I turn to the question of costs. I gave Mr Blount the opportunity to address me about costs. His argument as to why I should not make an order against VB was based on my accepting his evidence that he had reported to the parish office what he proposed to do and was not stopped. I have rejected that evidence and I have found that it was VB's unlawful actions that caused this enquiry and resulted in this court hearing. In the course of the hearing VB has presented and maintained a position about the events which I have rejected in its material particulars.
66. In all those circumstances I can see no reason why I should not order VB to pay the costs of these proceedings. I so order. They will be taxed and a bill submitted through his solicitors.
67. There will be liberty to apply.

His Honour Canon Peter Collier QC
Chancellor of the Diocese of York.

28th October 2019
Simon and Jude, Apostles

