

**Neutral Citation Number: [2018] ECC Yor 4**

**IN THE CONSISTORY COURT OF YORK**

**PARISH OF THE MOST HOLY AND UNDIVIDED TRINITY, HULL**

**HULL MINSTER, THE CHURCH OF HOLY TRINITY, KINGSTON UPON HULL**

**IN THE MATTER OF TWO PETITIONS REQUESTING FACULTIES IN RELATION  
TO TRINITY BURIAL GROUND**

**Unopposed Petitions**

**(1) The Reverend Canon Dr Neal Barnes  
Robin Alden  
Highways England**

**Petitioners**

**(2) The Reverend Canon Dr Neal Barnes  
Robin Alden  
Sandie Forte-Gill**

**Petitioners**

**JUDGMENT**

**The Petitions**

1. I have before me two petitions in relation to the Disused Burial Ground of Holy Trinity Church Hull, now Hull Minster. The burial ground is generally referred to as Trinity Burial Ground
2. The first petition in which the petitioners are the Vicar the Revd Canon Dr Neal Barnes, Robin Alden a churchwarden, and Sandie Forte-Gill the Delivery Director for Highways England, was received in the Registry on 20 April 2018. This petition sought a faculty to “carry out archaeological excavation including the removal of burials and their safe storage pending reburial, the removal and safe storage of affected memorials, partial demolition and safe storage of the northern boundary wall and the subsequent re-interment of burials in the northern part of the burial ground to allow construction of a new slip road forming part of the A63 Castle Street Improvement Scheme, all as per the Trinity Burial Ground Clearance and Exhumation

Proposals Ref: HE514508-KKSJV-HER-S)\_RW\_WM-RP-ZH-000001  
Rev. 2.0 by Highways England dated 20<sup>th</sup> March 2018.”

3. The second petition in which the petitioners are the Vicar the Revd Canon Dr Neal Barnes, Robin Alden a churchwarden, and Highways England, was received in the Registry on 25 June 2018 and is for “works relating to the reinstatement of Trinity Burial Ground following archaeological excavation and the clearance of burials.”
4. I propose dealing with these two petitions together in the course of this one judgment.

### **Public Notice**

5. When I received the first petition amongst a number of others which had been recommended at the April 2018 meeting of the Diocesan Advisory Committee, I notified the Registrar that I was “holding back the one for Holy Trinity as it is a matter of some significance in various respects and provided that there are no objections I propose issuing a short judgment on the matter granting the faculty. I believe that 18.05.18 is the date when any objections must be filed by. So if you could let me know asap after 18th that there have been no objections I will be able to finalise the matter.” In fact the date when the period of notification expired was 22 May 2018.
6. I am told that both the Victorian Society and the Georgian Society of East Yorkshire have been provided with copies of all the documentation in relation to the proposal. I am further told that both Societies were spoken to by a representative of Mott MacDonald Sweco who are the agents acting on behalf of Highways England in relation to these petitions. No representations have been received on behalf of either Society. In all the circumstances I do not consider that any special notice should be given to them or to the national Georgian Group under Part 9 of the Faculty Jurisdiction Rules 2015.
7. On 19 May 2018 Miss G T Johnson wrote to the Registrar expressing her "strong objections to the exhumation and burial removal of my four times great-grandparents ... Francis Conyers (died 1842) and his wife, Elizabeth, née Hunter (died 1817)" whom she said were "resting in a grave in Castle Street cemetery, Kingston upon Hull, close to the entrance in Mytongate." I will set out further details of her objection in due course.
8. On 23 May 2018, in accordance with Rule 10.3 of the Faculty Jurisdiction Rules 2015, the Registrar wrote to Miss Johnson explaining the options facing her, namely either to formally object to the proposals by filing a Form 5 document, or to allow me to take her

letter of objection into account when coming to my decision, without her becoming a party to contested proceedings.

9. Miss Johnson has not responded to the Registrar's letter. I am of course therefore duty-bound by Rule 10.5(2) to take her original letter into account in coming to a final decision on this matter, and I shall do so.
10. I have considered whether it would be appropriate to deal with this matter by holding a hearing and having the benefit of legal submissions by an amicus. However, I am satisfied that the law on this matter is well established and uncontroversial, and that I would not be assisted in any significant way about the law by such a hearing. The factual material before me is in a report prepared by Oxford Archaeology North and Humber Field Archaeology dated November 2016 prepared for Balfour Beatty and Highways England, Balfour Beatty being the Principal Contractor for the proposed scheme. That report is extremely detailed and provides me with all the factual information that I consider necessary for reaching a decision on the issues in this case.
11. In all these circumstances I am satisfied that it is appropriate for me to deal with these matters by way of a written judgement based on the documentation before me.

### **The reason for the proposed works**

12. For several years Highways England has been planning improvement works to the A63 in the Castle Street area. The A63 is the main trunk road carrying traffic into Hull. The Mytongate junction restricts the flow of traffic along the A63, slowing journeys. The road has approximately 47,000 vehicles travelling along it each day. Delays at peak times cause problems for people and businesses.
13. The A63 at Castle Street also creates a barrier between the city centre to the north, and the tourist and recreational developments to the south.
14. The intention of the scheme is to improve access to the Port of Hull by widening some sections of the road, upgrading the Mytongate junction and building two new footbridges over the road. That work will involve widening the road to accommodate slip roads to the north and south of Castle Street. To accomplish that on the south side it will be necessary to excavate and use a part of the disused burial ground that belongs to Holy Trinity Church. The scheme also aims to help reduce the impact of the barrier effect of the road as referred to above.

## Trinity Burial Ground

15. This disused burial ground was the principal place of burial for the parish of Holy Trinity, Hull, which was of course the main parish of Hull, from 1783 until 1861, when it was closed by an Order in Council. The site, which lay outside the city boundaries, was identified in 1783 as a suitable site for the building of a new gaol and the creation of a burial ground for the parish of Holy Trinity, the existing graveyard around the church in Market Place being full. The Kingston upon Hull Improvement Act 1783 was said to be, amongst other things, "An Act for building a new Gaol for the Town and County of the Town of Kingston-upon-Hull; for purchasing an additional Burial Ground, for the use of the Parish of the Holy Trinity, in the said Town ....".
16. The Holy Trinity parish burial registers record the interment of some 44,041 individuals between 1783 and 1861, the latter date indicating the point when the additional burial ground had itself become full. It is likely that during that period the vast majority of those burials would have been in the new burial ground with some burials continuing to be made within the vaults and family plots of the original Holy Trinity graveyard in the Market Place.
17. The burial ground is now bounded to the north by the A63 road, to the east by the Holiday Inn and to the south by the Holiday Inn car park and to the west by the Mytongate roundabout and Commercial Road.
18. The Gaol was situated to the north east of the burial ground. Part of the work to be undertaken during the works to widen the road will include excavating what remains of the Gaol.

## Previous proceedings

19. I was first notified about this proposed development and its impact upon the churchyard in early 2014, when I was asked about whether I had any views to express about the options faced by the Highways Agency who wished to develop the road junction and in order to do so would need to excavate the disused burial ground of Holy Trinity Church. I then said:

"The most controversial part of this development is the route down which the Highways Agency will go to achieve their objects. By this I mean whether they will seek to do this by a Scheme under the Mission and Pastoral Measure 2011 or whether they will seek to achieve it by faculty.

They have expressed a desire to have the freehold of the land transferred to themselves. If that is the route down which they choose to go then they will have to do it by a Scheme. That is because s.68 of the Measure provides that:

"Subject to subsections (3) and (4), it shall not be lawful to sell, lease or otherwise dispose of any church or part of a church or the site or part of the site of any church or

any consecrated land belonging or annexed to a church except in pursuance of powers under this Part or section 44.”

s.44 provides wide powers:

- (1) Subject to the following provisions of this section, a pastoral scheme may provide for the appropriation of the whole or any part of—
  - (a) a churchyard or other land annexed or belonging to a church or to a parish church cathedral within the meaning of the Cathedrals Measure 1963 (1963 No. 2), or
  - (b) any burial ground vested in the incumbent of the benefice but not annexed or belonging to a church, or
  - (c) any other burial ground which is subject to the jurisdiction of the bishop of any diocese, to such use or uses as may be specified or generally described in the scheme, and the scheme may provide for the disposal of any such property for any such use or uses or without limitation of use.

Such a Scheme could provide for the necessary exhumations, cremation, reinterment of the human remains uncovered and also for conditions to secure appropriate development of the remaining churchyard.

On the other hand it would be possible to provide by faculty for what would effectively be a perpetual licence from Holy Trinity which would be able to provide not only for the exhumation and subsequent dealings with the human remains and the arrangements for all the necessary aspects of the development, whether the underground pumping chamber, the re-ordering of the churchyard that will remain and everything else that people expressed concerns about at the meeting. Of course the Highways Agency would not obtain the freehold of the land by this route, but they would have effective control in perpetuity and I would foresee no circumstances in which they would be at any disadvantage for what they wish to achieve.

One advantage of proceeding by way of faculty would be that the court would be able to deal with anything that arose during the course of the work that had not been foreseen in a speedy manner.

However the Highways Agency must ultimately make their own choice about the route they choose.”

20. In the event they have chosen to go down the faculty route coupled with the expectation of obtaining a Development Control Order for the transfer of the land to them in due course.
21. On 24.08.14 I granted a faculty to carry out 1. preliminary geotechnical investigations by invasive and non-invasive methods (including possible removal and safe storage of some memorials, and partial demolition and safe storage of the boundary wall) to establish underlying groundwater and soil conditions, and 2. archaeological evaluation and excavations of up to four sample trenches to establish the depth, extent and condition of burials, all in that part the burial ground likely to be affected by the new A63 Castle Street Improvement Scheme, and according to the ‘Method Statement for Archaeological Evaluation’ dated July 2014, the associated plan of proposed trenches, and memorandum 1168-10-201-ME-004-PD1 dated 7<sup>th</sup> July 2014.

## **The preliminary investigation**

22. The outcome of that preliminary investigation has informed the petition that I now have to deal with. A published summary of that outcome records that:

Complete burials were found between depths of 0.8m and 2m below ground level. The relatively shallow depth to which the graves were originally dug at the burial ground is likely to reflect the high water table so close to the river.

The trenches revealed that the graveyard had been used very intensively, and that numerous people had been buried within each grave. The findings varied between the trenches, which might reflect differences in wealth and status. One trench revealed several brick-built tombs, which were often bought by more affluent families. These tombs could accommodate several coffins and signified the family's status.

In another trench, activity was particularly intense, with little order and many burials overlapping their neighbours. This had led to a degree of disturbance, as the Georgian and Victorian grave diggers had dug through earlier remains when making new burials. As a result, large amounts of loose bones were scattered through the soil.

In total, 194 burials were encountered during the evaluation, of which 151 were exposed and briefly examined on site by a bone specialist (an osteologist). Fewer than half of the skeletons studied (just 67) were of adults, with the rest being juveniles. Examination also indicated that the bones were generally in good condition, that there was a range of pathological conditions present, and that study of the remains could provide significant information about the people of Hull in the late eighteenth and first half of the nineteenth century.

## **The proposal**

23. The proposal is for the excavation of the part of the burial ground that will be required for the road widening scheme, with the exhumation of the human remains that will be exposed in the course of the excavation. It is further intended that there will be an examination of a proportion of those remains.
24. The anticipation is that somewhere approaching 19,000 interments will be disturbed. It is proposed to take a sample of 1,500 skeletons for analysis. This is on the basis that the preliminary investigation revealed 70.9% of those burials that lay fully within the trenches excavated were over 25% complete (using a system where the most analytically significant bones are scored more highly than others, rather than gross presence/absence), which is considered to be the appropriate threshold for having the potential to have their ages and sexes estimated. 1,500 such skeletons will therefore be set aside for detailed examination. After they have been examined they along with all other exhumed remains will be reburied in a 2 metre wide trench that is to be dug along the northern boundary of the burial ground.
25. The full methodology, as it is currently envisaged, is set out in the report by Oxford Archaeology North and Humber Field Archaeology. In brief: tenting will be erected, trackways running both north/south and east/west will be laid, thereby identifying a series of distinct

working areas. In those areas all human remains will be recovered with any charnel deposits and the disarticulated remains being reburied immediately, full recording of the articulated skeletons will take place, the skeletons identified as fitting the criteria for examination will then be examined. The report sets out the processes that will be undertaken so that the maximum information can be gained. They are concerned to identify sex, age and stature; then to record any paleopathological information so as to learn about the health status of the community in its broadest sense, then to gain an understanding of the origins of members of the population both through morphological characteristics and through the selection of some for isotype analysis. Other work is also identified. The intention is that the methodology will be kept under review as work progresses through an Updated Project Design process.

### **Statement of significance**

26. The burial ground is situated in the Hull Old Town Conservation Area. None of its boundaries or monuments is Listed, although two 19<sup>th</sup> century cast iron gas lamps (which are not functional) are listed as being of local interest. The wall on the north side of the burial ground is constructed of machine-made bricks, once topped by iron railings, and is thought to be of mid-19th-century date. There is a possibility that the burial ground once extended slightly to the north of this boundary. The north-east area of the burial ground is surrounded by a high wall constructed of handmade bricks of 18th or early 19th century type, the wall once served as the party wall between the burial ground and the gaol. The west and south walls are thought to be of mid-19th-century date, while the east wall is of later 20th century construction.
27. The Statement of Significance accompanying the petition describes the burial ground as having heritage significance at a local level although not being a designated heritage asset. Its main evidential value relates to its use as a burial ground. It has historical value said to be of high significance. That is because it is an example of the 18th century municipal improvement involving both the burial ground and the gaol, and of course there is significant amount of detailed recording both on monumental inscriptions and in parish records. Its aesthetic value is assessed as medium. It is noted that the current neglected appearance detracts from its aesthetic value, but this could be addressed to enhance the significance. The communal value is said to be high, the current use by what are described as "disadvantaged sections of the community" deters other visitors and creates an intimidating atmosphere. An ecological assessment has been carried out. Although no potential bat roosts have been identified, it is an important bat foraging habitat and commuting route. An

arboricultural survey has been undertaken. Overall the site is described as a 'non-statutory site of nature conservation importance'.

## **Consultation**

28. As long ago as 1994 when the upgrading of the A 63 involving the use of part of the burial ground was first raised, the PCC of Holy Trinity Church approved the proposed removal of burials from approximately one third of the Trinity Burial Ground. That scheme did not progress.
29. The current scheme has now been under discussion for a substantial number of years, during which there has been engagement not only with the PCC and the local authority but also with the wider public and with a number of other authorities and agencies. Engagement with Historic England has resulted in a wide agreement about this project. There are two areas on which agreement has not been reached. Historic England considers that the sample size should be between 2000 and 5000 and not limited to 1500. Historic England also considers the samples for analysis should be removed from and stored off-site for up to 10 years so that funding could be applied for to enable biomolecular analysis also to take place. The position taken by Highways England has been governed by the view held by the PCC and the DAC. That view is that all remains should be reinterred within the time to be taken by the overall construction works. Further, the obtaining of funding for any such further research is speculative at this stage.
30. A series of public meetings also took place in the course of which about 60 people identified themselves as being the descendants of people buried in the Trinity Burial Ground.

## **Objection**

31. I have already referred the letter received from Miss Johnson.
32. I understand that there is a memorial to her forebears in the churchyard on which it is said:

Sacred  
to the memory of  
ELIZABETH the wife of  
FRANCIS CONYERS  
who departed this life  
October the 5<sup>th</sup> 1817  
aged 61 years  
Also of the above named



FRANCIS CONYERS  
died Novr 2nd 1842  
aged 78 years

33. In her letter Miss Johnson also says that it is possible that their son, Leonard Conyers, is buried with them, although his name is not on the gravestone. She says that he died of Asiatic cholera in 1849. She notes that cholera can remain in the bones of the deceased centuries after death.
34. She says that she is strongly opposed to disturbing the dead. She thinks that an injustice has already been inflicted upon the deceased in Castle Street cemetery, when work was carried out to remove graves in the early 1980s. She asks how many more times the peace of the deceased will be disturbed in this manner.
35. She says "None of us would agree to be buried anywhere, if we thought that, within 170 years, our bodies would be exhumed and reburied elsewhere, perhaps in a mass grave, to widen a road."
36. She says that as a genealogist and family historian, she appreciates being able to stand by her ancestors' graves, where their families once stood as they watched their beloved ones being laid to rest and being able to see and photograph their original gravestones.
37. She says she does not want her ancestors exhumed, removed and reburied in a mass, communal grave. That would be disrespectful. She presumes that her ancestors bought their burial plot and either chose to be buried in that spot or a family member chose it for them.
38. She notes that this is Hull's oldest surviving cemetery, that it catches a glimpse of what the old town looked like, and she says she will fight to conserve and preserve it as part of her history, for future generations to enjoy and people who have yet to embark on researching their ancestry.
39. Finally she says that the Conyers surname came to our shores during the Norman Conquest and is one of the oldest surnames and families in England, and that HM the Queen is also descended from the Conyers family.
40. As is required by the Rules the petitioners were asked for any response they wished to make to Miss Johnson's letter. The Vicar of Hull Minster responded saying that "whilst we can understand that it does seem unfortunate that burials would have to be disturbed in order to allow the A63 scheme to proceed, as a PCC we also recognise that Hull desperately needs a major upgrade to this extremely busy and congested piece of road. Therefore, the PCC voted some years ago in support of the Highways England scheme and is satisfied that HE is

taking all possible precautions both to minimise the impact of the work on the burial ground and to ensure that any remains disturbed in the process are reinterred on the same site with due care and dignity, and in accordance with best practice."

## The law

41. Three issues of law are raised by a case such as this. First the putting to use of a consecrated churchyard for a secular purpose and contrary to the terms of the sentence of consecration. Second the exhumation of human remains which have been interred in consecrated ground under the protection of the ecclesiastical court of the diocese and about which the presumption, set out in my 'Guidance on the Exhumation of a Body or Cremated Remains From Consecrated Land' (reissued on the Feast of the Apostle Peter 2018) is that "that once remains have been laid to rest, it is the responsibility of the church to ensure that they lie there undisturbed. That presumption requires compelling reasons for it to be set aside." Third the scientific examination of those human remains between exhumation and re-interment.

42. In relation to the first issue, the law is regarded as having been settled *In re St John's Chelsea* [1962] 1 W.L.R. 706 in which case Deputy Chancellor Newsom reviewed the authorities and concluded:

"To sum up on this part of the matter:

1. Faculties can be granted, either in respect of a church site or a churchyard, for ecclesiastical user. One example is a church school, as in *Corke v. Rainger* [1912] P. 69, but the principle is not, in my opinion, confined to buildings.

2. Faculties can be granted for throwing small parts of a churchyard (whether still available for burials or not) into a highway, or for granting other rights of user in the nature of wayleaves. These faculties are justified by *Walter v. Mountague and Lamprell* 1 Curt. 253, as approved in the *Bideford* case [1900] P. 314. But those decisions have been somewhat stretched in practice. This part of the jurisdiction must be sparingly exercised and should not be extended.

Faculties may be granted for secular user where the original purpose of consecration can no longer lawfully be carried out. (See the *Bideford* case and the *Lincoln* case [1956] P. 166."

43. It was that case which was relied on by Owen Stable QC sitting as Deputy Auditor of the Chancery Court of York in the case of *In re St Mary the Virgin Woodkirk* [1969] 1 W.L.R. 1867 as giving him jurisdiction to allow the local authority to take from the Churchyard of St Mary a strip of land some 260 yards in length and varying between approximately 7 yards and 20 yards, a total of 2000 square yards, and to use the same for a road improvement scheme.

44. Having decided that he had the authority to deal with the matter he went on to say:

"In my judgment I ought not to grant a faculty unless I am satisfied that considerations of the public interest require that the proposed road improvements should be carried out;

that there is no reasonable alternative and that the public interest outweighs the interests of the objectors and the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.”

45. Since then it has not been doubted that a churchyard, particularly one that has been closed by Order in Council, that can no longer be used for its original purpose, can be given over to perpetual use as a highway if the need is established.

46. The case for the proposals must of course be proved conclusively or else it will fail, as happened *In re Parish of Caister on Sea* [1958] 1 W.L.R. 309, a case which of course was decided before either the *Chelsea* or the *Woodkirk* cases were heard, in which Ellison Ch said:

“Although the consistory court is an ecclesiastical court it is nevertheless a court of the realm and one of the Queen’s courts, and not infrequently it is called upon to do justice between the church authorities and others of the Queen’s subjects. The court has long assumed a jurisdiction to permit within its discretion the user of consecrated land for purposes such as road-widening schemes, where it has been satisfied that it is necessary for public good that such user should be allowed, and many are the examples in the textbooks and reports. In my judgment, there is no doctrinal or other rule which says in effect that the dead once buried in consecrated land shall for ever after take absolute priority over the compelling needs of the living; and if I was satisfied in any case that there was a substantial need based on danger to the living, or other cogent reasons why a road should be widened at the expense of using consecrated land, it would be my duty to grant a faculty to enable that to be done.”

47. Having considered the facts in that case Ellison Ch decided that the burden on the Petitioners had not been discharged and he refused the petition.

48. The second matter, namely that of exhumation, is not one that was specifically addressed in the *Woodkirk* case, it being accepted that if the need was sufficiently great to overcome the implicit bar of permanent consecration and permit the secular use of the land, then it would follow that any bar to exhumation of remains that was also required to fulfil the new secular purpose was also overcome.

49. Ellison Ch however had specifically dealt with both the issue of exhumation and also the reintering of the exhumed bodies in “a communal grave”. He had heard from the Archdeacon of Norwich in the course of the proceedings. The Archdeacon had said that there was no doctrinal objection either to exhumation or to reburial in a communal grave but that each should only take place if it was proved to be necessary. The Chancellor said “I accept those views entirely. In my judgment, they are sound.”

50. The third issue is whether it is permissible for human remains that have been exhumed and that will be reinterred in consecrated ground to be the subject of scientific examination.

51. In the cases of *Re Holy Trinity Bosham* [2004] Fam 125 and *Re St Nicholas Sevenoaks* [2005] 1 W.L.R. 1011 permission was refused to

allow exhumations so that research could be carried out to see if the petitioner could establish in *Bosham* whether the coffin contained the remains of the Saxon king Harold Godwinson and in *Sevenoaks* to enable the petitioner to establish whether or not he was the illegitimate son of a daughter of Queen Victoria. In both cases the courts held that there was no sufficient basis for accepting the premises on which the petitions were presented. On the other hand in *St Mary Sledmere* 10<sup>th</sup> January 2007 [unreported], it was found that there being no doubt that the coffin did contain the body of a victim of the 1919 Spanish influenza epidemic, there was a real public benefit that might follow from medical research into tissue that it was proposed to take from the body, if it were exhumed for that purpose.

52. The principles arising from those cases can be set out in this way: In *Bosham*, Hill Ch summarised the position in this way at para 31 of his judgment:

“As I read the authorities, the following approach would appear to be appropriate in cases such as these: (1) as a matter of Christian doctrine, burial in consecrated ground is final and permanent; (2) this general norm creates a presumption against exhumation; (3) exhumation in this context comprises any disturbance of human remains which have been interred; (4) departure from such presumption can only be justified if special circumstances can be shown for making an exception to the norm; (5) an applicant might be able to demonstrate a matter of great national, historic or other importance concerning human remains; (6) an applicant might also be able to demonstrate the value of some particular research or scientific experimentation; (7) only if the combined effect of evidence under (5) and (6) proves a cogent and compelling case for the legitimacy of the proposed research will special circumstances be made out such as to justify a departure from the presumption against exhumation.”

53. That passage was specifically approved by the Court of Arches in *Sevenoaks* (“An example of the correct approach to assessment of evidence in a case involving the proposed use of modern scientific techniques is to be found in the full and clear judgment of Hill Ch in *In re Holy Trinity, Bosham* [2004] Fam 125 which was cited to this court”).

54. In *Sevenoaks* the court also said

“24. .... However, it is accepted within the Church that human osteology (the scientific study of human skeletal remains) is capable of benefiting the public by contributing to medical history and to forensic science. In theological terms “there may be every justification for arguing that a corpse has no more eternal significance than an empty shell, but it continues to be the vestiges of a once loved and loving human being”: see (*Church Archaeology Human Remains Working Group*) report, para 153. Consistent with this approach is the essential requirement that skeletons made available for investigation are treated with respect and reburied in a dignified manner at the conclusion of the investigation. It has been said that “A society that cares for its dead demonstrates that it values life”: see report, para 153.

55. These were both cases dealing with free standing petitions in relation to exhumation purely for the purpose of research. What those judgments show is that the advancement of science and of human understanding is a public benefit and it can be a reason for allowing an exhumation without more.

56. Further, in my judgement if there is a public benefit that is likely to accrue from the examination and analysis of a large scale exhumation through scientific examination of the remains exhumed prior to reinterment then that is a factor that can be weighed in the balance when deciding whether the exhumation is justified.

### The test

57. What does all this mean in the context of this particular case?

- (i) Notwithstanding the fact of consecration it is possible for a consistory court to allow land set aside by the sentence of consecration to be taken and used for road widening schemes provided that the necessity for such a scheme is established.
- (ii) If the case for allowing the land to be so used is made out, the fact that it will involve exhumation and re-interment, possibly in communal graves, is not in and of itself a reason why the scheme should not be permitted.

58. The issue of necessity is one that has long exercised chancellors. For many years chancellors had to answer the questions posed by Cameron Ch in the matter of *Re St Helen Bishopsgate* 26 November 1993 [unreported].

- (a) Have the petitioners proved a necessity for some or all of the proposed works either because they are necessary for the pastoral well-being of the parish or for some other compelling reason?
- (b) Will some or all of the works adversely affect the character of the church as a building of special architectural and historical interest?
- (c) If the answer to (b) is yes, then is the necessity proved by the petitioners such that in the exercise of the court's discretion a faculty should be granted for some or all of the works?

59. The question of necessity now needs to be understood in the light of the decision of the Court of Arches in the case of *Re St Alkmund, Duffield* [2013] Fam 158. Prior to that decision consistory courts had usually dealt with cases affecting a heritage asset on the basis that "necessity" had to be established in the sense set out above. Following *Duffield* the test is now 5-fold:

1. Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?
2. If the answer to question (1) is 'no', the ordinary presumption in faculty proceedings 'in favour of things as they stand' is applicable, and can be rebutted more or less readily depending on the particular nature of the proposals.....
3. If the answer to question (1) is 'yes', how serious would the harm be?
4. How clear and convincing is the justification for carrying out the proposals?
5. Bearing in mind that there is a strong presumption against proposals which will adversely affect the character of a listed building, Will any resulting public benefit ... outweigh the harm? The more seriously the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be

the case if the harm is to a building which is listed Grade I or II\*, where serious harm should only exceptionally be allowed.

60. That is how the consideration of “necessity’ has developed in relation to permitting development in a church which will do damage to a heritage asset.
61. The issue facing me is similar but different. Just as there is a presumption against damaging a heritage asset so there are presumptions against the secular use of consecrated land and against permitting the exhumation of human remains.
62. If those presumptions are to be overcome then there must be public benefit that will justify the setting aside of the presumptions in the particular case.
63. Owen Stale QC put it this way in the *Woodkirk* case:

“In my judgment I ought not to grant a faculty unless I am satisfied that considerations of the public interest require that the proposed road improvements should be carried out; that there is no reasonable alternative and that the public interest outweighs the interests of the objectors and the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.”

### **The balancing exercise**

64. It is clear that Miss Johnson is deeply distressed at the prospect of her forebears being disturbed, exhumed, possibly being the subject of examination and then being reinterred in what she can only regard as a mass grave.
65. It is, in part, thoughts and feelings exactly like those, that the presumption against exhumation protects. Equally, the presumption is intended to encourage precisely those thoughts and feelings. Thoughts and feelings like those not only show respect for those who have died, but also show an appreciation for Christian theology which teaches us that those who have been laid to rest are to rest in peace as they await the resurrection from the dead.
66. The fact that she has been the only person to raise these matters by writing a letter does not diminish the significance of her letter.
67. However, what she expresses is the very personal meaning for her of the underlying principles giving rise to the presumptions I am being asked to set aside.
68. In my judgement it follows that although she gives direct personal expression to the presumptions in the circumstances of this case it does no more than that.

69. So the question remains whether there is a sufficient public need for this road improvement scheme to justify setting aside the presumptions.
70. There is no doubt that the Mytongate junction is a significant pinch point on this major trunk road into Hull. There would in my judgement be significant public benefit in the proposed improvement. Indeed the very fact that Highways England is proposing to invest so much money in the scheme is a powerful indicator of the extent of the benefit that will be derived if the scheme is permitted to take place. The fact that the Vicar and PCC of Hull Minster through whose parish the road runs speak of the “desperate need for a major upgrade to this extremely busy and congested piece of road” and are supportive of the proposal is powerful local evidence of the significant benefit that will flow from allowing the scheme to proceed.
71. There are the additional benefits that will be gained from the analysis and examination of the burials that will be uncovered in the course of his work. They would probably not justify the proposals in and of themselves but they are a real public benefit to put into the scales.
72. In all these circumstances it is my judgment that the balancing of maintaining the presumptions and the public benefit of allowing the proposals clearly comes down in favour of permitting the road widening scheme to take a part of the churchyard with the necessary consequent exhumation and re-interment of the remains disturbed in that process. The analysis and examination of some of those remains is also in my judgment a public benefit that I should permit.
73. There has been an issue about the extent of that examination. I accept the case made by the PCC and the DAC that this work should all be completed within the timescale of the construction project. In those circumstances I do not consider it appropriate for any of the remains to be removed from the site for further examination within 10 years.
74. As to the number of skeletons to be examined, the same principle must apply, namely that there is a limited time scale for the doing of the work. I understand that at the time the scheme was designed there was no major published work about the percentage of remains in a case like this that should be the subject of examination. Since the design work was done I am aware that the Advisory Panel on the Archaeology of Burials in England has published ‘Large Burial Grounds – Guidance on sampling in archaeological fieldwork projects’ (2015) in which they say at page 7:

“From the scientific perspective there is no clear cut-off point at which sufficient skeletons for analysis have been obtained from a site: the larger the sample, the greater will be its research potential and significance. The uniqueness of each assemblage means that the existence of other large museum collections of remains of similar date and geographical location does not, in general, remove the need to obtain further large assemblages.

Normally, subject to assessment of their condition and significance, all skeletal remains more than 100 years old impacted by a development should be archaeologically excavated, subject to specialist assessment, and studied in the analysis phase of the project at an appropriate level of detail (Mays et al., 2002). However, for sites yielding many thousands of skeletons, the high costs and logistical problems throw into particularly sharp relief the need to balance the public benefit arising from a development against that accruing from the increased knowledge of the past brought about by the study and retention of the skeletal remains. This is particularly so in not-for-profit developments, for example public buildings of clear community benefit such as schools or hospitals. Those desiring to pursue a strategy whereby only a sub-sample of burials impacted by a development is excavated archaeologically and / or scientifically studied need rigorously to justify it on a site by site basis."

75. This is clearly a case where such balancing of the public benefit against the accruing of increased knowledge is necessary, and where the justifying of only studying a sub-sample is required.
76. I have already indicated that I accept the arguments against off site retention in this case and that in relation to the size of the sample the same principle applies: the work must all be completed within the construction time scales. At Appendix 1 to the Report is the programme which sets out in detail the work which will commence in November 2018. It details very precisely the many stages of the work for which dates and time have been allocated concluding with the reburial of all the exhumed remains by 13<sup>th</sup> March 2020. It is clear that any increase in the number of samples examined and analysed would necessarily extend that timetable and impact on the public works being carried out in relation to the road widening. The cost of the archaeological work is being borne by Highways England. In my judgment all these circumstances do justify their decision to limit the size of the sample to be examined and analysed.
77. In the circumstances I do not consider that I could justify requiring them to increase the size of that sample. If however they chose to do so having regard to the matters set out in the 2015 Guidance document then I would of course be prepared to consider an application to amend the faculty in that respect.

### **Landscaping and other post archaeological works**

78. This is the subject of the second petition. The proposed works are intended to retain the historic characteristics of the Trinity Burial Ground, to improve the remaining area of it, and to encourage visitors who will appreciate the public open space as an area of historic value and place of rest. The particulars of the proposals include: rebuilding the northern boundary wall of the burial ground using reclaimed bricks from the existing wall; installing the gates and pillars from the Holy Trinity Churchyard; repositioning memorials removed from the impacted area; planting replacement trees and other woodland planting; upgrading and installing paths; installing interpretation



boards to provide information on the history of the burial ground, including an overview of the archaeological works completed as part of the improvement work; and providing habitat enhancement such as bat boxes, bird boxes and hibernacular.

79. It is uncontroversial. I am delighted to see that what was anticipated in 2015 when I granted a faculty to remove the western end of the boundary wall from the church of Holy Trinity, namely that the gates would “be stored for potential re-use within the Castle Street burial ground” (para 13 (iv) of judgement 16.11.15) is now to be fulfilled. The proposed works have been the subject of public consultation. The DAC has recommended the proposals subject to the following provisos:

1. The repositioning of memorials will be in accordance with a Method Statement to be agreed with the Diocesan Church Buildings Adviser on behalf of the DAC.
2. The design and content of interpretation boards will be agreed with the Diocesan Church Buildings Adviser on behalf of the DAC.
3. The style and location of benches and litter bins will be agreed with the Diocesan Church Buildings Adviser on behalf of the DAC.
4. The design of the boundary railings will be agreed with the Diocesan Church Buildings Adviser on behalf of the DAC.
5. The DAC, Registry and PCC must be added to the circulation lists for any reports which are disseminated

80. These various provisos followed a meeting on 16 May 2018 between Highways England and the DAC representatives. I have seen the full minutes of that meeting. It is clear that there was broad consensus about the plan to improve the current state of the part of the churchyard that will remain and to deal sensitively with properly recording what will by then have taken place. There were a number of matters of detail upon which it was too early to make clear decisions. It was decided that discussions about those matters would continue and that the Church Buildings Adviser would represent the DAC in those discussions and reach agreement on its behalf with Highways England. It will be a condition of the faculty that if they are not able to reach agreement then the matter will be referred to the Chancellor for further directions.

## **Finally**

81. Public Notice has taken place in relation to the second petition and no objections have been received.

82. I therefore direct in relation to each petition that a faculty shall pass the seal until further order.

83. I will allow 48 months for the completion of all the proposals including the analysis and the writing of reports following the completion of the examination of the human remains exhumed.

## **Conditions**

There will be the following conditions to the faculties

- A. Miss G T Johnson shall be consulted about the memorial to her forebears and in particular as to its relocation.
- B. Copies of the various reports that will be produced in relation to these works shall be sent within 14 days of their respective completions to the following bodies:-
  - (i) The Parochial Church Council (for keeping with the church log book)
  - (ii) The Diocesan Advisory Committee (for its records)
  - (iii) The Diocesan Registry (for placing with the faculty papers)
- C. Highways England shall continue to consult in relation to the details of making good and improvement works to the remaining part of the Trinity Burial Ground and shall endeavor to reach agreement with the DAC Church Buildings Adviser about the matters outstanding from the meeting on 17 May 2018. Any matters not resolved in that way shall be referred to the Chancellor for further directions.
- D. Highways England shall be responsible for the Faculty fees which will be assessed by me after the grant of the faculties.

His Honour Canon Peter Collier QC  
Diocesan Chancellor

2<sup>nd</sup> August 2018