5.11.08

IN THE ARCHES COURT OF CANTERBURY

Sheila Cameron QC, Dean of the Arches
His Honour Richard Walker, Commissary General
Chancellor June Rodgers

ON APPEAL FROM THE CONSISTORY COURT OF THE DIOCESE OF BATH & WELLS

IN THE MATTER OF HUTTON CHURCHYARD, SOMERSET

APPEARANCES:

Mr David Lamming: Counsel for the Appellant, North Somerset Council, instructed by Nicholas Brain, Solicitor, Legal Services, North Somerset Council, Town Hall, Weston-Super-Mare, BS23 1UJ

Hutton Parish Council was not represented, but Councillor John Coote and Mr Andrew Basterfield, Clerk to the Council, attended the hearing as observers.

JUDGMENT

Introduction

1. This is an appeal by North Somerset Council ('NSC') from the judgment, dated 29 November 2007, of Chancellor Briden sitting in the Consistory Court of the diocese of Bath & Wells.

2. The churchyard of St Mary the Virgin, Hutton ('Hutton churchyard') is one of 20 churchyards within the area of NSC, which have been closed for burials by Order in Council. Responsibility for the maintenance of these churchyards passed to NSC under the terms of section 215 (3) of the Local Government Act 1972.

3. A major concern of NSC, as with many other Councils responsible for closed churchyards, or cemeteries, has been the safety of memorials in them. Consequently, NSC sought and obtained a faculty enabling it to carry out a safety test on the memorials in

those 20 churchyards. That faculty, dated 3 March 2005, authorised NSC "to lay flat on its appropriate grave any tombstone or other monument found on hand testing or visual inspection to be unstable or dangerous in some other respect."
A total of nine conditions were attached to the faculty. Although the faculty applied to all 20 churchyards, this appeal relates only to the memorials in Hutton churchyard.

4. The faculty was sent under cover of a letter, dated 3 March 2005, and was addressed by the diocesan Registrar to Mrs Pearce, Landscape Manager for NSC. The letter pointed out that "The Chancellor has asked me to inform you that the faculty provides for hand testing of monuments which is currently the preferred method. If now or at any time in the future some other system (e.g. by Topple Tester) is required, a further direction should be sought from the Chancellor."
It was suggested to Chancellor Briden that this letter had not been received by NSC, and Mr Lamming informed us that only the faculty had reached Mrs Pearce. However, the faculty itself was unmistakeably clear in its wording, and this Court agrees with what the Chancellor said on page 4 of his judgment, namely "on any view the Petitioner's officers ought to have appreciated that additional authorisation was necessary before any steps beyond visual inspection and basic hand testing might lawfully be taken".

5. What happened was that in September 2005 NSC carried out a system of inspection and testing of memorials in Hutton churchyard. The system included a hand test by applying a force of approximately 35 kg at the top of the memorial. Where a memorial failed the hand test, a digital force meter was used to provide an objective check of the force used and to ensure that the memorial had not been over tested. A detailed record of the inspection was made, listing the action taken in respect of each memorial. As the result of this testing about one third of the memorials were laid flat out of a total of 152 memorials identified in the Council's inspection report.

6. The laying flat of over a third of the memorials in this churchyard gave rise to various complaints. Hutton Parish Council ('HPC') in due course wrote to the diocesan Registrar on 19 January 2007 drawing attention to the use of a "topple tester" and pointing out that NSC appeared to have acted in breach of the 2005 faculty,

which provided for hand testing only. They drew attention to the spirit of the diocese being against "a mechanistic approach to this sensitive matter."

7. In the course of subsequent correspondence between the Registrar and both NSC and HPC it was made clear that there were two separate issues to be dealt with. The Chancellor would have to consider first, whether to grant a confirmatory faculty in respect of the work carried out in a manner not authorised by the 2005 faculty and, secondly, the question of the grant of a new faculty for future testing using a digital force meter. Both NSC and HPC were asked if they were willing to have the first matter dealt with by way of written representations, and they agreed to do so. The Registrar's letter, dated 9 May 2007, to NSC stated the Chancellor's view that HPC had "a sufficient interest" to be involved in the consideration of the first issue under the existing faculty.

8. Written representations were made by NSC and HPC and duly considered by the Chancellor. In its representations sent under cover of a letter, dated 10 September 2007, HPC was critical of the manner in which NSC had conducted the safety inspection of memorials and the method of notification of its programme of work. In addition, HPC referred to the distress caused to "parishioners who were taken by surprise when discovering that families' and friends' memorials had been displaced, and the considerable, and in the view of Hutton Parish Council, detrimental change to the appearance and environment of the churchyard [which] caused widespread anger in the community"(para. 1.2). HPC asked that " Memorials laid down but with no known owners should be assessed by the Diocesan Architect and a sufficient number re-erected by North Somerset Council to at least partially restore the original historic appearance to the graveyard"(para. 2.14).

9. In their representations sent under cover of a letter, dated 8 October 2007, NSC explained the inspection and testing process which had been used in Hutton churchyard (section 2), and accepted that the use of the digital force meter was in breach of the faculty and apologised for this. It was used with the best of intentions and was a genuine mistake (section 3.1.2). NSC also accepted that communication could have been better with Town and Parish Councils at the time of the inspection of Hutton churchyard, and explained that due to the absence of records it had not been

possible to write to individual owners of memorials found to be dangerous (section 3.1.5). It was emphasised that NSC "has an overriding duty to take, as far as reasonably practicable, measures to prevent injury or death from unstable memorials" (Section 4).

10. In his judgment Chancellor Briden

(1) drew attention to the conditions attached to the faculty of 3 March 2005, in particular conditions 5 and 6 which provided

> '5. The Petitioner shall abide by any further directions which the Court may give in relation to any monument affected by the faculty;
> 6. Any person having an interest in a monument so affected may make application to the Registry by letter for directions under the faculty;'

(2) referred to the fact that NSC acknowledged that the faculty only authorised hand testing and explained his reason for having imposed this limitation, namely, "in recent years increasing numbers of devices for memorial testing have become available and in zealous or inexperienced hands they can do considerable damage;"

(3) accepted that NSC had made a mistake and that there was no deliberate intention to disobey the law, and consequently he was prepared to make a further order under the existing faculty permitting the use of a digital force meter measuring a force up to 35 kg for future tests in churchyards covered by that faculty. (This aspect of the Chancellor's judgment is not the subject of any appeal);

(4) stated that the letter, dated 19 January 2007, from Hutton Parish Council to the Registrar was treated by the Court "as an application for redress under condition 5 of the faculty", the reason being that "although the Parish Council does not own any monument affected by the Petitioner's activities its role as the organ of local government established under the Local Government 1972 to represent the civil parish of Hutton has given it a sufficient interest to intervene;"

(5) concluded that as he inferred that "many of the 55 monuments affected would have been laid flat even in the absence of checking with a digital force meter" it would not be just or reasonable to impose a requirement for the extent of reinstatement sought by the Parish Council;

(6) made a confirmatory order under the faculty of 3 March 2005 in respect of the works carried out by NSC, and imposed a condition that NSC within 12 months from the date of the order should lodge in the Registry a plan for the following 3 year period setting out the actions which NSC proposed to take in respect of memorials which had been laid down or damaged and in respect of which the owners are untraced;
(7) held that NSC has "the legal power to reinstate and make safe exceptional monuments [those which for historic or aesthetic reasons contribute to the amenity of a closed churchyard] as part of its general obligation under section 215 of the 1972 [Local Government] Act", and that he was willing to indicate "whether this power ought to be exercised in respect of any of the monuments falling within the ambit of the [3 year] plan".

The Appeal

11. NSC sought leave to appeal against part of the judgment and leave was granted by the Dean of the Arches on 13 March 2008. By its notice of appeal NSC seeks
    1. A declaration that Hutton Parish Council did not have sufficient interest to intervene in relation to the faculty granted to the Petitioner on 3 March 2005.
    2. A declaration that the duty of the Petitioner under section 215 (1) and (3) of the Local Government Act 1972 to keep Hutton churchyard "in decent order" in its application to any monuments therein found on inspection to be unsafe or otherwise out of repair did not extend beyond laying them flat and does not empower the Petitioner to carry out any works of reinstatement.
    3. An order that the confirmatory order directed by the Chancellor to be made in respect of the past testing of monuments by the Petitioner in Hutton churchyard be varied by the deletion therefrom of the condition specified by the Chancellor in his judgment and an unconditional confirmatory faculty be issued.
    4. An order that Hutton Parish Council pay the costs of this appeal or that such other order for costs be made as the Court shall think just.

The first declaration sought relates to a procedural matter, and the second and third are concerned with substantive matters involving the interpretation of section 215 (1) and (3) of the Local

Government Act 1972 and the scope of the discretionary powers of the Chancellor in respect of a closed churchyard in which memorials have been laid flat for safety reasons. We consider the issues in turn. Before doing so we mention that we had the benefit of clear and succinct argument from Mr Lamming on behalf of the appellant, but that as Hutton Parish Council could not afford representation we did not hear any oral argument on their behalf.

Whether HPC had a sufficient interest to intervene in the Chancellor's consideration of the breach by NSC of the terms of the 2005 faculty.

12. No objection to the participation of HPC was raised by NSC in correspondence with the Registrar, nor in the representations made to the Chancellor. As a general rule the question of locus should be raised at first instance in the consistory court, so that the Chancellor can deal with the challenge at the outset. If the procedural challenge is upheld at that stage, it may result in a saving of time and money for all concerned. For this reason, when a matter has proceeded to judgment, it is highly unlikely that this Court will permit a challenge to the locus of a party to be raised on appeal. This is particularly so where the party seeking to raise the procedural point on appeal could have sought legal advice at the earlier stage. NSC has a legal department, and we would be entitled to assume that NSC acted with the benefit of advice.

13. Notwithstanding that the challenge to HPC's locus had been raised for the first time in the Notice of Appeal, we agreed to hear the submissions of counsel for NSC on the basis that a novel point had arisen in this case. Mr Lamming submitted that the Chancellor was wrong in holding that the role of HPC as an "organ of local government" gave it a sufficient interest to intervene. He pointed out correctly that HPC had not been party to the faculty proceedings in 2005, which were unopposed. He also pointed out correctly that the words in condition 6 "having an interest in a monument" are not the same as "being interested" in the appearance of a churchyard. However, the Chancellor in his judgment made it clear that he was proceeding under condition 5, which required NSC to abide by any further direction from the court in relation to any monument affected by the faculty, and not condition 6, so his second point does not advance his argument.

14. A faculty is a permission or licence to do the work authorised by the terms of the faculty, and it is to be executed subject to any

conditions, which may be attached to it. It can be compared with a planning permission which, if implemented, must be acted upon in accordance with any conditions attached to it.

15. Public notice is given when a faculty is applied for,[1] and, when granted, a faculty is a public matter, so that it is open to anyone to draw the attention of the Chancellor to a possible breach of the terms of a faculty, or a condition attached to it. The question then arises as to whether the person who made the complaint has any particular standing in relation to the subject matter of the faculty. If so, that person may be permitted to be heard in any proceedings, which the Chancellor may instigate to deal with the alleged breach.

16. A useful test to apply is to consider whether the complainant would be an "interested person" entitled to object to a proposed faculty under rule 16 of the Faculty Jurisdiction Rules 2000. Rule 16 (2) lists a range of people who are interested persons, such as "any person who is resident in the ecclesiastical parish concerned", and "the local planning authority for the area in which the church.... is situated". In addition an interested person may be

> '(f) any other body designated by the chancellor for the purpose of the petition; and
>
> (g) any other person or body appearing to the chancellor to have a sufficient interest in the subject matter of the petition.'

It is obvious that in the original faculty proceedings in 2005 the Chancellor could properly have allowed HPC to object and to become a party to the proceedings as falling within rule 16(2)(f) or (g). The memorials to be affected by the testing regime were within a churchyard in their parish. Furthermore, counsel for NSC accepted that HPC could come within rule 3 (b) of the Faculty Jurisdiction (Injunctions and Restoration Orders) Rules 1992 as appearing "to have a sufficient interest in the matter". That being so, it would be very strange if HPC did not also have a "sufficient interest" in the breach of a faculty to do work affecting some, at least, of the residents whom it represents.

17. Counsel pointed out that although it had been suggested in correspondence that HPC should be joined as a Party Opponent to make an application for "a Restoration Order" no such application under the Faculty Jurisdiction (Injunctions and Restoration Orders)

---

[1] Faculty Jurisdiction Rules 2000 (SI 2000 No. 2047) rule 6

Rules 1992 had been made. Mr Lamming referred to the judgment *in re Welford Cemetery* [2007] 2WLR 506 at 522 where this Court emphasised the necessity of complying fully with these Rules if a restoration order might be made. In that case the local authority had laid flat memorials without any faculty, which was an unlawful act under ecclesiastical law, and the Chancellor had to consider what was the appropriate way to deal with the situation. It was in that context that he purported to make a full restoration order in respect of the memorials which had been laid flat.

18. Where those Rules are applicable they must certainly be complied with, but this case is very different. NSC was not acting unlawfully in laying flat memorials because such action was authorised by the faculty of 3 March 2005. It was the use of the digital force meter which was the problem, as it was a breach of the terms of the faculty. Mr Lamming drew attention to the reference to a 'Restoration Order' in the letter, dated 9 May 2007, from the Registrar to NSC but it is necessary to look at the preceding paragraph which says "The Chancellor says that he is able to deal with this procedurally under the existing faculty (rather than requiring Hutton Parish Council to make separate application for a restoration order or to lodge a petition) ...". We recognise that there was a reference to a restoration order in the letter, but the overall intention was clearly that the matter should be dealt with under the existing faculty, and that is what happened.

19. In our view, a parish council can have an interest in faculty proceedings for the purposes of the Faculty Jurisdiction Rules 2000 as well as for the Faculty Jurisdiction (Injunctions and Restoration Orders Rules 1992, and also generally, in respect of the execution of work under a faculty relating to a churchyard in their area. There is a further reason for us being satisfied that a parish council has an interest in relation to proceedings affecting a closed churchyard. This is because by section 215 of the Local Government Act 1972 Parliament recognised the potential interest of parish councils in the maintenance of closed churchyards by providing that where a parochial church council wishes to divest itself of the liability to maintain a closed churchyard it should first address itself to the parish or community council.[2] It is only after the Parish Council has itself resolved to decline responsibility for the maintenance of

[2] Local Government Act 1972 s.215 (2) (a)

the closed churchyard that, as indeed happened in Hutton, this responsibility passes to the District Council.[3] The fact that the Parish Council has exercised its power to pass responsibility to the District Council does not, in our judgment, mean that the Parish Council can be said to have no further interest in the state of its local churchyard.

20. Quite the reverse, the Parish Council is the democratically elected 'voice' of the local parish community. The appearance of the local churchyard impacts on the whole community in a village such as Hutton. After all, many of their forebears and predecessors as village residents will be buried in this churchyard. It has to be borne in mind that by law every parishioner and every person dying in the parish is entitled to be buried in the parish churchyard regardless of whether he is a member of the Church of England or even Christian.[4] That right is, of course, conditional upon the churchyard being open for burials. When a churchyard is closed for burials local people do not automatically lose interest in the churchyard simply because they no longer attend interments there. The memorials continue to speak of the past, and the Parish Council, as the representative body for the village, is clearly interested in the overall amenity of the churchyard, including the state of the memorials, as an entity. Some parish councils accept the responsibility of looking after their closed churchyards, as Mr Lamming acknowledged. Others, no doubt for a variety of reasons, decide to pass the responsibility to their District Council. However, we believe that it is fair to assume that they do so on the assumption that the District Council will not overlook the interests of the parish as they carry out their responsibilities in relation to the closed churchyard.

21. The widespread laying flat of memorials in Hutton churchyard, even if in the end it were to prove to be fully justified, was bound to affect the local community and not just the owners of the memorials. We accept and endorse the words of the Chancellor

> "Although the Parish Council does not own any monument affected by the [District Council's] activities its role as the organ of local government established under the Local Government Act 1972 to represent the civil parish of |Hutton has given it a sufficient interest to intervene".

---

[3] id. s. 217 (3)

[4] Ecclesiastical Law 3rd ed M. Hill at para. 5.51

22. In retrospect NSC was correct not to challenge the locus of HPC, and to accept that HPC should be allowed to make representations to the Chancellor as part of the agreed procedure. As Chancellor Briden pointed out in his judgment (page2) with reference to conditions 5 and 6 in the 2005 faculty "The purpose of these conditions is to enable any dispute about the exercise of the [District Council's] powers under the faculty to be resolved by the Court without the need for a fresh and potentially costly set of proceedings."

23. Although the procedure set out in rule 26 of the Faculty Jurisdiction Rules 2000 for disposal of proceedings by way of written representations, is designed for proceedings where there is an objection to a proposed faculty, it does not follow that it can only be used for that purpose. Where no express provision in the Rules appears to be applicable, then under rule 34 the Chancellor is required to resolve the question or issue which has arisen and 'shall give such directions as shall appear to be just and convenient and in doing so shall be guided, so far as practicable, by the Civil Procedure Rules for the time being in force.'

24. Rule 3.1 (2) of the Civil Procedure Rules 1998 gives the Court discretion to 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective'. The overriding objective is that the Court should deal with cases justly, and this includes 'ensuring that the parties are on an equal footing', 'saving expense' and 'ensuring that it is dealt with expeditiously and fairly.'[5] The use of a written representation procedure was eminently just and convenient in this case, and the Chancellor acted within the spirit of the overriding objective, which applies in civil litigation and the Faculty Jurisdiction,[6] in using a straightforward and economical method of resolving the issues between NSC and HPC.

25. For these reasons we reject the argument that HPC was not entitled to intervene in the proceedings by participating in the written representation procedure, and it follows that NSC is not entitled to the first declaration sought.

---

[5] Part 1 rule 1.1 (1) and (2)

[6] see The Faculty Jurisdiction Rules 2000 rule 19 (4)

The extent of the duty under section 215 (1) and (3) of the Local Government Act 1972 to keep the closed churchyard in decent order

26. Section 215 (1) of the Local Government Act 1972 provides that where a churchyard has been closed by an Order in Council

> 'the parochial church council shall maintain it by keeping it in decent order and its walls and fences in good repair.'

Subsection (2) provides for the parochial church council to serve a written request on the parish council

> 'to take over the maintenance of the churchyard'

and the subsection goes on to say that

> 'the maintenance of the churchyard shall be taken over by the authority on whom the request is served'.

Section 215 (3) allows the parish council in turn to pass on the responsibility to the District Council which

> 'shall take over the maintenance of the churchyard'.

27. The 'maintenance' referred to in subsections (2) and (3) of section 215 could have been set out in full in the same terms as the duty imposed upon the parochial church council by subsection (1). However, the draftsman clearly took the simpler course of using the words 'the maintenance' to incorporate the fuller description of 'keeping it in decent order and its walls and fences in good repair.'

28. We have no doubt that the duty of maintenance now resting upon NSC under section 215 (3) in relation to Hutton churchyard is the same as the duty of maintenance imposed by section 215 (1) on the parochial church council. Mr Lamming sensibly did not argue to the contrary, but took us through some of the history relating to the duty of maintenance in support of his argument that the words 'keep in decent order' do not extend to works of repair to memorials. The separate duty to keep the walls and fences in good repair is not in issue.

29. We were referred to section 18 of the Burial Act 1855 (now repealed[7]) the predecessor of section 215 of the Local Government Act 1972 which provided

> 'In every case in which any Order in Council has been or shall hereafter be issued for the discontinuance of burials in any churchyard or burial ground, the burial board or churchwardens, as the case may be, shall maintain such

[7] Local Government Act 1972 s. 272 (1) and Sch.30

churchyard or burial ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof, and the costs and expenses shall be repaid by the overseers, upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such costs and expenses.'

30. The significant points about this section are first, the words 'maintain such churchyard ... in decent order' which are replaced by similar words 'maintain it by keeping it in decent order' in section 215 (1), and secondly, the fact that the expense of carrying out this duty of maintenance was to be borne out of public funds (then the poor rate). Ever since 1855, therefore, it has been recognised that maintaining a closed churchyard in decent order was likely to involve expenditure. From 1855 onwards the churchwardens were entitled to recoup their expenditure. Then under section 4 (ii) (c) of the Parochial Church Council (Powers) Measure 1956 the parochial church council, which inherited the duties and liabilities of churchwardens, had the power to give a certificate under section 18 of the Burial Act 1855 as to the 'costs and expenses' incurred in carrying out the duty of maintenance of a closed churchyard, so that the amount could be recovered from the local rates. Thus a present day local authority, such as NSC, carrying out the duty of maintenance is not being subjected to some novel financial burden because, as a matter of law, the cost has been required to be borne locally since 1855.

31. We mention the question of cost because the meaning of 'keeping it in decent order' cannot be determined by whether or not it is costly to do so, as has been pointed out by District Judge Thomas in *Lydbrook Parochial Church Council v Forest of Dean District Council*.[8] Mr Lamming referred us to a passage from Prideaux's Churchwardens Guide 1895[9] which describes the churchwardens' responsibility as 'to see that the churchyard be kept in a decent and fitting manner, that it be cleared of rubbish, muck, thorns, briers, shrubs and anything that may annoy parishioners when they come into it.' Any of these apparently

[8] (2003) 7 Eccl LJ 494
[9] 16th ed. p.99

simple tasks of clearance will no doubt have a cost attached to them.

32. We were referred to two authorities, one of the Court of Appeal in 1879 and one of the Chancellor of London in 1892. The judgments of the Court of Appeal in *R v Burial Board of Bishop Wearmouth* (1879) 5 QBD 67 are not of assistance on the question of interpretation of the words 'keep in decent order' in section 18 of the Burial Act 1855, because they did not consider the extent of the duty to maintain in decent order. The main issue was whether the expenses of keeping the churchyard in order were to be repaid to the churchwardens out of the rate for the township in which it was situated rather than out of the whole parish of which it had been the burial ground.

33. The second authority, *The Vicar and Churchwardens of St Botolph without Aldgate v Parishioners of the Same* [10] has greater relevance to the issue under consideration. In that case a faculty was granted authorising the closed churchyard to be planted and laid out as a garden and it directed that "no vaults should be interfered with" without the express sanction of the Court. There were two vaults, one in a good state of repair, the other "in a state of dilapidation". In his judgment dealing with the future of the two vaults Dr Tristram said

> "The rule of the Court in these cases is, where a private vault is in good repair not to interfere with it without the consent of the family, but where it is in a dilapidated condition, unless the family come to repair it, to order it to be levelled with the ground and filled up, taking care that all memorial slabs belonging to it on which the inscriptions are legible be carefully preserved in the churchyard, and placed as near the vault as convenience will permit. The reason of this rule is, that it is the duty of the family, and not that of the vestry, to keep private vaults in repair; but it is the duty of the vestry to keep the churchyard in sanitary and decent order. The Court, therefore, orders the Gibbon vault to be levelled with the ground and filled up, and the memorial slabs at the end and side to be placed against the north wall of the church, and the other slabs to be buried over the vault, and that the Sidney monument and vault remain undisturbed."[11]

[10] [1892] P 173
[11] id. p.174

34. Bearing in mind that this closed churchyard was being turned into a public garden it is to be inferred that a dilapidated vault, apparently partially open, was at the very least a potential hazard to users of the garden. Dr Tristram treated the levelling and filling up the vault as falling within the duty of the vestry (forerunner of the local authority) to keep the churchyard in "sanitary and decent order." Chancellor Briden referred to this case in support of his statement that NSC's duty under section 215 to keep Hutton churchyard in decent order extended to "the safety of structures such as memorials situated in it" (page 7/8 of judgment). We consider that he was justified in doing so.

35. Mr Lamming submitted that as Dr Tristram had emphasised that it was not within the duty of the vestry to keep private vaults in repair, the limit of the obligation of NSC under section 215 was to lay flat unsafe memorials, which it had done as authorised by the faculty dated 3 March 2005.

36. However, it has to be noted that in that case as part of the exercise of making the churchyard safe "the memorial slabs at the end and side" were to be placed against the north wall of the church and the other slabs were "to be buried over the vault." In other words, the memorial slabs were not simply to be left lying around after the vault had been filled in and levelled with the ground. Dealing with the memorials was a necessary step to keep the churchyard in decent order. We observe that Cotton LJ in the Wearmouth case said "it is upon the churchwardens that the order ought to go to do what is necessary (emphasis added) for keeping it in decent order." [12]

37. We are satisfied that ensuring the safety of memorials is part of the duty of keeping the churchyard in decent order, but it goes further than simply laying a large number of memorials flat on the ground. 'Keeping' indicates an element of continuity, which means that the local authority's duty does not come to an end when it has laid memorials flat. We return to Prideaux's guide,[13] which dealt with things which may 'annoy' parishioners. We comment that rubbish and muck can be visually annoying as well as ill-smelling and a possible risk to health. Thorns, briars and shrubs could affect parishioners physically by preventing their safe

[12] (1879) 5QBD at p.76.
[13] paragraph 30 above

passage through parts of the churchyard, or catching their clothes or skin. Mr Lamming correctly described these as health and safety matters.

38. Prideaux added the word 'anything' to his specific list thus leaving at large the category of items, which might annoy parishioners. This meant that the churchwardens, as predecessors of the parochial church council, were expected to be vigilant in carrying out their duty to keep the churchyard in a decent and fitting manner. Mr Lamming agreed that in the present context 'anything' could include the safety of memorials. We agree, and add that this is not limited to the time when they are upright and dangerous but also includes the subsequent period when those memorials are horizontal on the ground.

39. A dictionary definition of 'decent' is 'suitable or appropriate to the circumstances of the case; fitting', and a definition of 'in order' is 'proper condition.'[14] This means that to keep in decent order will not only involve regular inspection of the churchyard to ensure that those flat stones are not in themselves a hazard, but also the need to take whatever steps seem prudent to deal with them, with the consequential costs of doing so.

40. We re-affirm what this Court said *in re Welford Road Cemetery*[15] that the legal responsibility for a memorial initially belongs to the person who set it up and then to the heir at law of the person commemorated. The difficulty comes when the heir at law is unknown and no one comes forward to accept responsibility for putting a particular memorial in repair. A local authority with a faculty to do so can properly interfere with a memorial in the interests of safety when there is no known owner (as in the *St Botolph* case "unless the family come forward to repair it") and in the present case, but is then left with the resultant problem. Section 215 specifies no duty to repair memorials, but within the duty of keeping the churchyard in decent order it is necessary for NSC to consider the best way to deal with those memorials over time.

41. We have some sympathy for NSC, which like many other local authorities responsible for cemeteries and closed churchyards, felt

[14] Shorter Oxford English Dictionary 5th ed Oxford University Press
[15] [2007] 2 WLR 506 at p.516 para 31

compelled to respond to the 2004 advice from the Health and Safety Executive to check the safety of memorials using the ICCM guidelines. Having followed the prescribed procedure local authorities were understandably upset by the public reaction. The report of the Local Government Ombudsman, published in March 2006, came too late for NSC, but it contains various recommendations to mitigate the effect of testing systems and the laying flat of memorials, and we have seen the extracts which were before the Chancellor. However, the Ombudsman's report appears to fall short of advice on the management of these prostrate memorials for the future notwithstanding that local authorities have a continuing responsibility for ensuring safety and a need to avoid potential liability under the Occupiers Liability Act 1957. [16] Under sections 2(1) and (2) of the 1957 Act the duty of an occupier to visitors is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted to be there. This Court pointed out in *re Welford Road Cemetery* that there is a risk that a person can suffer injury by falling over a memorial, which is flat on the ground, and if vandals were to break any of them they would then present a different form of danger to life or limb. We consider that such matters need to be taken into account by NSC for the purpose of its duties under both the Occupiers Liability Act and section 215 of the Local Government Act 1972.

42. Mr Lamming drew our attention to the Local Authorities Cemeteries Order 1977, which confers various powers on burial authorities for dealing with memorials, subject to compliance with the terms of the articles. Included in Article 16 are a power to repair a memorial, a power to remove a memorial from the cemetery and destroy it if it is dilapidated, and a power to re-erect it in another place in the cemetery. These are all useful powers, which can be used in managing a cemetery. However, a statutory duty implicitly carries with it a power to do what is reasonably necessary to fulfil that duty and it is not necessary to have it spelt out in the section. Section 215 imposes a mandatory duty in relation to a closed churchyard - 'shall maintain it by keeping it in decent order and its walls and fences in good repair'. The duty to repair walls and fences must include a power to do that, and equally a duty to keep in decent order includes a power to do what

[16] In re Keynsham Cemetery [2003]1 WLR 676 at para 20

is reasonably necessary to carry out that duty. That may mean putting some element in the churchyard into repair, for example, a gate or a seat which has fallen into disrepair. Such items would fall within the general duty to keep the closed churchyard in decent order for visitors, and it would be absurd to suggest that the local authority could not carry out its duty because a specific power to repair such items is not spelt out in the section.

43. Those responsible for churchyards, whether open or closed, can be authorised by faculty to deal with memorials in similar ways to cemetery managers, and this is an important point to be borne in mind. Section 3 of the Faculty Jurisdiction Measure 1964, in summary, enables the Chancellor to grant a faculty 'for the moving, demolition, alteration or execution of work to any monument'[17] on consecrated ground, although the owner cannot be found 'after reasonable efforts to find him have been made'[18]. This power has been used by Chancellors to enable parochial church councils, responsible for their churchyards, to reposition memorials around the perimeter of the churchyard, or to remove indecipherable stones from the churchyard completely. If NSC wished to take any of these steps as ways of dealing with the aftermath of laying flat the memorials in Hutton churchyard, then a petition for a faculty under section 3 would be a way forward. In the light of what we have said above, we consider that there is a power implicit in section 215 to take any of such steps if the local authority considers that it is reasonably necessary in carrying out its duty to keep the churchyard in decent order.

44. We turn to the question of the appearance of the churchyard, which was a matter raised by HPC. The general appearance of the churchyard is a factor which NSC may take into account in considering future maintenance of this churchyard so as to keep it in decent order, but the primary consideration must be the safety of the visitor and employee whether the duty arises under the Health and Safety legislation or under the Occupiers Liability Act 1957. We do not read Chancellor Briden as disagreeing with that in any way.

45. The present appearance of Hutton churchyard may annoy parishioners, but the fault essentially lies with the owners of the memorials for having neglected them so that it became necessary

[17] section 3 (1)
[18] id (2) (i)

for NSC to take the steps it did in the interest of safety. NSC is not under a duty to reinstate memorials simply because of the appearance of the churchyard. Otherwise it would hamper a local authority in laying flat unclaimed memorials for safety reasons in the first place, and would place the local authority in the position of having to assume the liability of the owners, or heirs of the owners of the memorials, which would be wholly wrong. Chancellor Briden rightly refused to accede to the request of HPC for the reinstatement by NSC of some of the memorials "to at least partially restore the historic appearance to the graveyard". It is, of course sad that the churchyard, as it had been known, was changed in appearance in 2005. However, despite the references in HPC's representations to "families' and friends' memorials" there was apparently no evidence given to the Chancellor of any 'families' willing to resume their responsibility to repair the relevant memorials, although he has helpfully stated at the end of his judgment that any individual owner may apply to the court under condition 5 of the existing faculty of 3 March 2005.

46. Where Chancellor Briden appeared to depart from the interpretation and reasoning we have just set out was in his treatment of "monuments the owners of which are untraced, and which for historic or aesthetic reasons contribute to the amenity of a closed churchyard." He regarded these to be " a very restricted class of monument" and concluded that NSC "has the legal power to reinstate and make safe " exceptional monuments of this nature as part of its obligation under section 215 of the 1972 Act." It can be said in his favour that this appeal is premature, because the Chancellor has not identified any monument in this category and has merely offered to "indicate... whether the power ought to be exercised in respect of any of the monuments falling within the plan" he had required to be produced. He did not make any order requiring NSC to reinstate any monument which it had laid flat, although NSC seems to be apprehensive that this might follow.

47. We have already sought to clarify the distinction between the lawful act of laying down memorials under the authority of a faculty and the continuing responsibility of a local authority under section 215 to keep the closed churchyard in decent order with those prostrate memorials in it. In general, all memorials which are unsafe can properly be treated in the same way, unless someone comes along and offers to repair one or more of them and make them safe.

48. In *re Welford Road Cemetery* various relatives were not given this opportunity, but in the present case the Chancellor was satisfied that there had been "due compliance with notification of works" (page 7 of judgment), presumably under the prescribed faculty procedure. No one suggested at the time that there were any specially interesting memorials in this churchyard, so the Chancellor's anticipation of some emerging seems somewhat speculative. The correct time for a claim to be made that a particular memorial is of special historical or aesthetic interest is before the local authority embarks on a lawful safety testing exercise. Then it may be possible to stake the memorial whilst further efforts are made to trace the owner or to secure funds to repair the memorial and make it safe. It would be unreasonable to permit a local authority to incur the expense of laying memorials flat and then require it to reinstate and repair one or more of them.. In our view there can be no question of NSC being required to reinstate at its expense any special monument in Hutton churchyard should one be identified. However, if there were to be a desire locally to reinstate and make safe a particular historic monument where the rightful owner remains unidentified, and the necessary funds could be raised to do so, then it would clearly be within NSC's power to agree to that reinstatement as it would be part of keeping the churchyard in decent order.

49. It seems that Chancellor Briden was intending to give guidance as to the possible way forward in dealing with the future of a hypothetical and very small number of exceptional memorials, which might be identified in the plan he had ordered to be produced. However, we recognise that his remarks were capable of different interpretations, and we consider that the formulation of a plan should be left entirely to the local authority, which will have to take various considerations into account in preparing it.

50. We consider that in future where a local authority seeks a faculty in relation to the testing, laying flat or taking any other action in respect of memorials in a closed churchyard on safety grounds then

> (i) a condition should be attached to the faculty requiring an initial survey to be carried out to identify any unsafe memorial which

(a) commemorates one or more persons of national or local importance, or
(b) is of particular significance, for example, designed by a renowned artist,
and the result of the survey should be reported to the Chancellor within a specific time scale set out in the condition;

(ii) an order should be made for special citation to be given to any known relative of such person or persons , if any, and /or a direction given for advertisement by the local authority in a national or local newspaper about the state of the memorial and the fact that it may be laid flat if not put into repair by the heirs of the person(s) commemorated, or by some other person or body;

(iii) pending the outcome under (ii) the local authority should be permitted to stake, or take some other temporary step, to indicate to the public the unsafe state of the memorial in question;

(iv) in the absence of any response under (ii) then, unless the local authority is willing to carry out limited repairs to keep the memorial in a stable and safe condition, leave should be given to the local authority to lay it flat or reposition it elsewhere in the churchyard;

(v) because individual churchyards can give rise to different considerations a faculty should generally be limited to memorials within a particular churchyard, and should not include memorials in other churchyards.

Whether the provision of a 3 year action plan was a proper condition to be attached to the confirmatory order

51. Mr Lamming argued forcefully that the condition requiring NSC to produce within 12 months a plan for the following 3 year period setting out the actions which NSC proposed to take in respect of memorials laid down or damaged in respect of which the owners are untraced was "unnecessary, unreasonable and

disproportionate." He suggested that an adequate sanction for the breach of the faculty would have been an order to pay costs.

52. It is necessary to note that the Chancellor was faced with two different matters to consider (1) the question of whether all the memorials would have been laid flat if testing had been limited to hand testing as authorised by the faculty, and (2) the fact that about a third of the memorials were lying on the ground with the consequences identified in *re Welford Road Cemetery* and quoted by him (page 8 of judgment).

53. As to the first point, Chancellor Briden inferred from the written information before him that "many of the monuments affected would have been laid flat even in the absence of checking with a digital force meter" (Page 7 of judgment). Without detailed oral evidence, and possibly cross-examination as well, which would have made the proceedings very costly, this was a reasonable conclusion. In the absence of any other evidence we have to proceed on the same assumption.

54. As to the second point, we have already mentioned that this Court in *re Welford Road Cemetery* drew attention to a continuing problem as the result of the laying flat of memorials: that they could be unsafe on the ground "because they are potentially a hazard from tripping, and an attraction to vandals who usually have scant respect for anything which appears to be broken." Chancellor Briden decided in his discretion to follow the precedent set *in re Welford Road Cemetery* of requiring a plan to be produced by NSC within a reasonable time scale of 12 months describing the action proposed in respect of the memorials which had been laid flat.

55. Mr Lamming correctly pointed out that the condition in *re Welford Road Cemetery* was attached to a faculty for the future, but there is no reason why such a condition should not be attached to a confirmatory faculty, or a confirmatory order under an existing faculty as in this case. The power in section 12 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 to attach conditions to a faculty is wide[19] and the grant of a confirmatory faculty is always a matter of discretion.[20] Further, it is important not to lose sight of condition 5 to the faculty of 3 March 2005 by

[19] In re Welford Road Cemetery at para59
[20] id. at para 78

which NSC was bound to abide "by any further direction which the Court may give in relation to any monument affected by the faculty." Each and every monument laid down in Hutton churchyard fell within this condition and it gave the Chancellor the right to give directions for the future about those monuments.

56. It may be that after due consideration the plan will include a proposal to remove some of the flat memorials from the churchyard both in the interest of maintenance as well as the safety of visitors. If that were so, then the consistory court has power to make an order for their removal, as we have already pointed out above. A scheme to lift some of the flat memorials and place them against the wall of the churchyard so that they do not present a tripping hazard is a possibility, as is a scheme to use some of them usefully as to create a stone pathway. There are numerous possible solutions to be explored. The point is that monitoring safety is an ongoing matter, and presenting a plan to the Chancellor is a form of protection, because it is a way of demonstrating that NSC is taking reasonable care to ensure that the churchyard is reasonably safe for visitors.

57. We do not consider that the imposition of an order for costs would have met the situation here. The Chancellor was using the condition as a means of emphasising the importance of complying with the requirements of a faculty and also, as he said, to place on NSC "a positive obligation to perform its statutory duty in relation to the churchyard". He was referring to the duty under section 215 of the Local Government Act 1972 to keep the churchyard in 'decent order,' which as we have explained above is not a 'one-off' event.

58. Having regard to all the points mentioned above, we regard the imposition of the condition requiring the production of a plan as a necessary reminder to NSC of its continuing obligation in respect of the memorials it had laid down, and consequently it was entirely reasonable and proportionate as a means of taking account of the safety of future visitors to Hutton churchyard.

Conclusion

59. It follows from the reasons we have given that the appellant has failed to satisfy this Court on the first and third issues. As to the second issue, the appeal is allowed only to the extent that the

confirmatory order to be issued under the faculty, dated 3 March 2005, shall require the submission of a plan in the terms set out on page 8 of the Chancellor's judgment but shall not contain any reference to possible reinstatement of any memorial by the appellant Council, and the time for submission of the plan shall be 12 months from the date of issue of the confirmatory order.

Costs

60. As to the costs of this appeal NSC, as appellant, will pay the court costs in accordance with the principles in *In re St Mary the Virgin, Sherborne* [1996] Fam.63 These will include correspondence fees for the registrar and the expenses incurred by the court. Mr Lamming submitted that Hutton Parish Council should pay the costs personally because they had asked for an order to restore the visual appearance of the churchyard and this had influenced the Chancellor in reaching his decision. We have already held that the Chancellor was correct in rejecting HPC's request, and the parish council cannot be held to blame for other aspects of the judgment. HPC was not represented at the hearing of the appeal so did not add in any way to the time taken over it. Furthermore, time was taken up with NSC's argument that HPC should not have been allowed to intervene and this was an unmeritorious point. We refuse the application for costs and there will in consequence be no order as to costs between the parties.

Sheila Cameron QC

His Honour Richard Walker

June Rodgers

5 November 2008