

IN THE CONSISTORY COURT OF THE DIOCESE OF OXFORD

IN THE MATTER OF THE RADCLIFFE INFIRMARY BURIAL GROUND

IN THE MATTER OF THE PETITION OF THE CHANCELLOR, MASTERS AND
SCHOLARS OF THE UNIVERSITY OF OXFORD

JUDGMENT

1. Dr John Radcliffe bequeathed the sum of £140,000 to the University of Oxford; the bequest was known as ‘the Radcliffe Trust’. His main intention was to create a new library, the Radcliffe Camera, but on its completion the balance was to be used for “such charitable objects as [the Trustees] in their discretion think best”. The first such object was the creation of the Radcliffe Infirmary. Building commenced in 1759 and the Infirmary was opened on the 18th October 1770. (See the *University of Oxford: Radcliffe Observatory Quarter Archaeological Strategy* prepared by Turnberry Consulting in September 2010 at 2.1-2.3.)

Burial Ground:

2. On the 30th November 1770 the Bishop of Oxford consecrated the Radcliffe Infirmary Burial Ground (hereafter ‘the burial ground’) and it remained open for burials until 1855 when the minutes of the Weekly Board of the Governors of the Infirmary for the 16th May 1855 record that the Infirmary had received notice from the Government to close the burial ground. There is no record of the burial ground ever having been deconsecrated thereafter. (See the report by Museum of London Archaeology entitled *Radcliffe Infirmary Burial Ground: Documentary Research* dated March 2009 at 2.1.1 and 2.3.2.) By reason of its continuing consecration the burial ground remains within the jurisdiction of the consistory court of the diocese of Oxford: see *In re St John’s, Chelsea* [1962] 1 All ER 850 at 853.
3. The outline of the burial ground apparently remained partially visible until it was built over, in the first instance by the construction of an extension to the Eye Hospital and thereafter by the construction of a laboratory building: MoLAS at 3.1.3. The precise dates of these two constructions are unclear but the former seems to have been constructed between 1921 and 1939 and the latter between 1939 and 1957 (*ibid* at

2.3.11-12 and 3.1.3; statement of Michael Wigg at para 16). This later construction is complicated by the fact that the laboratory was extended by the addition of another storey with foundations on stilts (Wigg at 16). These constructions are shown on the Ordnance Survey map (1957/58) reproduced at MoLAS, fig. 9, and on the plan of the site at 1970 in *University of Oxford Radcliffe Observatory Quarter Blavatnik School of Government* (see the statement of Michael Wigg, exhibit 3).

4. All of these buildings seem to have been built without any regard for, or (possibly) without any knowledge of, the provisions of the Disused Burial Grounds Act 1884 (see below). However, it is clear that at least “a small area at the centre of the original burial ground remains completely untouched”: see the *Archaeology Strategy* at para 12.17-12.18. Unfortunately, as Mr Wigg, the Acting Director of Estates for the University of Oxford, pointed out in evidence, the white blocking on the aerial photograph reproduced in the *University of Oxford Radcliffe Observatory Quarter Masterplan* dated December 2008 at page 13 is inaccurate in that the oblong inset on the south west side does not (as it was intended to do) delineate Freud’s café – previously St Paul’s chapel (now deconsecrated); rather, that café is immediately below that inset. Below that again is the extension to the Eye Hospital to the southeast of which is a green patch and then a dark patch before, even further to the south east, one sees the laboratories. I accept Mr Wigg’s evidence that the green patch and the dark patch both comprise that part of the burial ground that remains untouched. (The dark is because of the shadow cast by the laboratories.) Everything, of course, is relative but in my view this untouched area should not be dismissed as merely “a small area” although, even if it were, the bodies buried there would be as worthy of protection as those in a larger area. Nonetheless, it is clear that the extension to the Eye Hospital, the laboratories and the upper storey on stilts will all to a greater or lesser extent have interfered with the burials in the burial ground.
5. In addition, the area running southeast/southwest at the southern end of the burial ground has already been severely compromised by the previous laying of pipes such that very few human remains were any longer to be found; I have therefore already granted a faculty (under archaeological supervision and subject to conditions as to articulated and disarticulated human remains) for a new run of pipes to be laid over that same area.
6. Unfortunately “the cemetery population [that is, in the burial ground] is largely unrecorded” (see the *Oxford University: Radcliffe Observatory Quarter Radcliffe*

Infirmary Burial Ground Evaluation Report dated February 2010 at 4.3) and it was for that reason that on the 16th December 2009 I granted a faculty for trial trenches to be dug under archaeological supervision in an attempt to determine the extent of the burial ground and the likely number of burials still to be found. This archaeological work estimated that “that there may actually be 700” surviving burials (*ibid*), although (as I understand it) this does not take into account burials that have already been disturbed (*op. cit.* at 4.2).

The Hospital and its subsequent sale:

7. The Radcliffe Infirmary was a voluntary hospital within the meaning of the National Health Service Act 1946 (see section 79(1)) and by section 6(1) of that Act _
“ ... all interests in or attached to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital ...”
were transferred to the Minister of Health. Thereafter in 1948 a Board of Governors of the United Oxford Hospitals was appointed by the Minister of Health and the board took over responsibility for the hospitals in Oxford, including the Radcliffe Infirmary: see the *University of Oxford: Radcliffe Observatory Quarter Archaeological Strategy* prepared by Turnberry Consulting in September 2010 at 2.16. By the National Health Service and Community Care Act 1990 the relevant government minister was given power to establish National Health Trusts (see section 5(1)) which would have the power “to acquire and dispose of land” (see schedule 2, para 16(1)(a)) and thereafter to order the transfer to such trusts of hospital property: see section 8(1). It was under these provisions that the burial ground was transferred to the Oxfordshire Area Health Authority which had been founded in 1974 (*op. cit.* at 2.20). However, in the 1990s it was decided by the Health Authority that the Radcliffe Infirmary site should close and all remaining clinical functions were transferred to the present John Radcliffe site. On the 23rd March 2003 the Radcliffe Infirmary site (including the burial ground) was thereafter sold to the University of Oxford with the benefit of a leaseback arrangement to the National Health Service which continued to occupy the site until the 2nd February 2007 when the hospital finally closed.

University:

8. The University of Oxford has continually reviewed the availability of sites in Oxford for potential education accommodation because of its need to continue to grow in a

historic city: *op. cit.* at 3.1-3.2. The Turnberry Consulting report (the accuracy of which has not been challenged before me and which I therefore accept) summarises the position in this way (at 3.22):

“The University has continually monitored its likely future needs for additional space and reviewed land availability in Oxford. Studies undertaken for the University in respect of land requirements over the last 50 years identified a critical need for additional space. The matters they considered are still relevant today, given the continued growth of the University and the absence of any solutions in the interim.”

Turnberry Consulting was commissioned in 2000 to report on the future land requirements of the University specifically in relation to the Radcliffe Infirmary site. They identified four regulating factors that have influenced the extent of the University’s development since 1950, namely (see *op. cit.* at 4.4):

- “i) the introduction of planning control and the Development Plans, in particular the creation of the Oxford Green Belt;
- ii) the designation of Conservation Areas;
- iii) the listing of buildings; and
- iv) Oxford high buildings restrictions, as specified in the ‘High Buildings in Oxford Report of the City Architect and Planning Officer, 1962 ...’”

The Report continued (*op. cit.* at 4.4):

“The University is regarded as one of the first rank Universities in the world and Government policy has identified such institutions to be influential in education and the transfer of knowledge for the future. To meet the broad thrust of Government policy, the University will have to grow. It must also provide better facilities on an ongoing basis if it is to retain and enhance its position against its contemporaries.”

The University is committed to retaining all principal teaching and research functions at the centre and a move away from this position would “fundamentally undermine the special nature” of a collegiate university (*op. cit.* at 4.17). In these circumstances the Report identified a likely growth of 100,000m² over the next 20 years (*op. cit.* at 4.18) but commented that (*op. cit.* at 4.16):

“... it is ... clear that development activity has increased space constraints to a level that is unsustainable and that the biggest threat to the University’s continued eminence is the requirement of physical space.”

It was because of this that the University purchased the Radcliffe Infirmary site in 2003. It is also for this reason that the Report states (*op. cit.* at 6.17) that _

“ ... it is imperative that the opportunity presented by the Radcliffe Infirmary site is used to its fullest extent.”

9. In November 2009 Gardiner and Theobald undertook an analysis of the development capacity of the Radcliffe Infirmary site (*op. cit.* at 6.19) _

“ ... reflecting the designs that were current at the time for the Mathematical Institute, Humanities Building and Library, the Radcliffe Infirmary, St Luke’s Chapel and Outpatients’ Building, the Somerville College Accommodation and the Jericho Health Centre.”

Such designs on the site already embrace Somerville College’s accommodation, the Mathematical Institute, the Humanities Building and Library and the Jericho Health Centre, as well as a central energy centre. However, even if the as yet undesignated plots (known as plots G, H, K and L) reach their hoped for maximum capacity, the completed master plan for the development of the site would only just provide the required 100,000m². Nonetheless, in order to reach that capacity the design incorporates an extensive underground basement (*op. cit.* at 6.19-6.20); this is necessitated by the restrictions imposed on the height of new buildings in order to conserve the Oxford sky line. It is, of course, for this reason that Mr Wigg says in his written statement (which was incorporated into his oral evidence):

“The University decided that the ... site should be developed as a single piece of consistent development rather than through piecemeal redevelopment or refurbishment of existing buildings. This would allow the University to develop a coherent strategy for the provision of common facilities to be used by all the developments on the [site] which would utilise the space more effectively and lead to better arrangements for the servicing of the site.” (See para 22)

Indeed, he continues (at paras 24-27):

“In order to make the best use of the limited land available within central Oxford, the University decided to make full use of basements across the site particularly bearing in mind the need to comply with the height constraint in the Local Plan. This would also help the development [to] be in keeping with the heights and density of buildings in the surrounding area. For practical reasons, therefore, the University is proposing to create a double height

basement across the majority of the site. The lower storey of the basement will supply servicing to the site as a whole, run from a substantial servicing trench which will eventually surround the perimeter of the site [*sic*]. ... An area within the basement will also accommodate a limited amount of car parking for disabled users of the site and servicing. ... The basement heights will range from a double basement across the majority of the site to a high single basement closer to the Walton Street frontage to the site within Plots K and L. This is due to the difference in ground levels across the site as Walton Street is approximately 3 metres lower than the Woodstock Road. At the moment, the site appears to be level but that is due to the burial ground which is immediately behind the wall on Walton Street being substantially higher than the street level. The University is proposing to use the larger part of the basement area for a library and teaching spaces including large lecture theatres and seminar rooms for the use of all the faculty buildings on the site. This will enable straightforward access to books covering a range of disciplines and assist in the collaborative working across academic disciplines. It will also enable the library facilities to be secure.”

The proposed extent of the basement excavation area is shown in the *University of Oxford Radcliffe Observatory Quarter Masterplan December 2008* (at page 6) and embraces the site of the burial ground.

10. Mr Wigg explained that (see paragraph 39) _

“ ... [T]he only two plots available in the short to medium term for a new development are the plots along Walton Street (plots K and L). The remaining plots along Walton Street are either necessary to enable the contractor building the remaining developments to access the site or currently have buildings which will require demolition and are occupied. Furthermore, both the Blavatnik School of Government and the arts centre will require immediate street access and a high level of public visibility which is only available on the Walton Street frontage to the site.”

Plots J, K and L:

11. Plots J, K and L are shown on the sketch map headed *Introduction The ROQ Masterplan* and dated November 2009 (see, too, the *University of Oxford: Radcliffe Observatory Quarter Archaeological Strategy* prepared by Turnberry Consulting in

September 2010 at page 52). Plot K is to the north-west of Freud's café (although described as "St Paul's") and plot L is to the south-east of the café and embraces the burial plot. Plot J is to the north-west of plot K. All three front onto Walton Street.

12. Plot J has been designated for the Jericho Health Centre and already has the necessary external planning consents (Wigg *op. cit.* at para 34); indeed, construction is to commence shortly. This allocation of plot J was the outcome of mediation between the Oxford Primary Care Trust and the University. I am satisfied not only that this plot will provide easy access for patients but that it is legally binding on the University as the Trust's interest has been registered as a charge on the University's title (see Wigg *op. cit.* at paras 6-7). This being so, it is not open to the University to reallocate this plot or to provide basement space beneath it for the use of the University which in any event would (according to Mr Wigg's oral evidence) have "less relevance for university needs". It follows that the only two sites currently available in the short to medium term are plots K and L.
13. Currently there are advanced negotiations between the University and Oxford Museum of Modern Art with a view to providing a joint arts centre within the University; it is possible that this will also include the Music Faculty (Wigg *op. cit.* at paras 36-37). Plot K is the larger of the two plots and Mr Wigg stated orally in evidence that the proposed art development would struggle to fit into plot L.
14. As to plot L Mr Blavatnik, who with munificent generosity has promised some £75 million pounds to found a School of Government, has expressed a preference for the School to be built on plot L as it would provide a frontage onto Walton Street opposite the Clarendon Building that houses the University Press: see the letter dated April 12th 2011 to Professor Andrew Hamilton, the University's Vice-Chancellor.
15. Nonetheless, as Mr Wigg points out (*op. cit.* at para 42), even if plot L is not allocated to the School of Government, the design restrictions that I have already set out mean that _

"the same or greater mass of building, including the basement, would have to be provided on Plot L"

Only in that way can the full potential of the site can be utilised and the University's requirements be met. What is more, any foundations of a new building on this plot would necessarily further disturb the human remains in the burial ground, even if it were possible to utilise some form of piling.

School of Government:

16. Although the University of Oxford has educated more than 60 Heads of State (see the brochure entitled *Blavatnik School of Government*) and 26 British Prime Ministers, it has never had a School of Government. Indeed, as I was told in evidence by Professor Woods, who has been appointed as Academic Director of the School, the world's top public policy schools have until now all been in the United States of America with the Harvard Kennedy School being pre-eminent; these schools, however, concentrate on American policy. Moreover, the top schools of government are very enthusiastic about such a school outside America to balance those in America. Oxford University is one of the very few universities that can compete with the Harvard Kennedy School.

17. According to Professor Woods' written statement (that was taken as read) it is intended that the School's curriculum should _

“... train students from around the world for public service thereby enabling them to respond fully and in considered manner to the global challenges which are becoming increasingly evident. The school is adopting a multi-disciplinary approach to teach students ‘how to think’ and complete courses in negotiation, strategic communication, budgeting, and finance and evaluation. This will include opportunities to engage wider areas of knowledge than the traditional fields of politics, law and economics with the application of biochemistry, engineering, history and ethics.” (see paras 18-19)

In summary,

“The creation of the School is anticipated to be of a real and significant public benefit. As well as the University's general aim of supporting and enabling advancement of learning, the particular aim of the School will be the improvement or world-wide government. ... We believe the provision of the Blavatnik School of Government is of overwhelming public importance” (see paras 21 and 23)

18. Indeed, the Vice-Chancellor has said of the project (quoted in the *University of Oxford: Radcliffe Observatory Quarter Archaeological Strategy* prepared by Turnberry Consulting in September 2010 at 10.4):

“The creation of the School would represent an immensely exciting milestone for Oxford. For centuries the University has made a uniquely varied contribution to government and public policy around the world. The prospect

now of being able to bring together under one roof, both this rich tradition, and new and exciting strands of thinking, represent the culmination of a long journey and a new beginning for Oxford.”

It is therefore not surprising that on the 12th October 2010 the Congregation of the University of Oxford allocated space on the site for the Blavatnik School of Government.

19. As to the detail, according to Professor Woods’ oral evidence, it is intended that the School of Government will have a small library and data centre but it will not replicate the large libraries elsewhere on the site; the School will therefore utilise the other libraries to be provided on site. The School will also utilise the common lecture and seminar rooms as well as the common services (including underground access).

Petition:

20. It is against this background that the Chancellor, Masters and Scholars of the University of Oxford now petition for the exhumation, and subsequent reburial, of the human remains in the burial ground. There has been no formal objection although the diocesan registrar has received detailed criticism from Mr George Lambrick dated the 2nd and 21st June 2010. I have borne these criticisms in mind throughout the hearing of the petition and in writing this judgment, although a number of them are more relevant to the planning application that is still to take place.
21. I have also borne in mind that it is usual for the consistory court to decline to rule upon a petition until all relevant planning permissions have been obtained. However, this approach is tempered by common sense and any faculty, if granted, can always be made conditional upon the grant of planning permission. I do not accept that to grant a conditional faculty in the present case would be either premature or contrary to the recent guidelines entitled *Guidance for best practice for treatment of human remains excavated from Christian burial grounds in England* published by English Heritage in 2005.
22. Here I accept the evidence of Mr Wigg that the financial implications of making a planning application without the comfort of knowing that a faculty would be forthcoming at the end of the day would be immense (see Wigg, *op. cit.* at 55 *et seq.*). Indeed, I accept his evidence that the design costs alone of applying for planning permission will be in the region of £1.3 million in addition to the cost of submitting the application and preparing the environmental statement to accompany the

application. In the circumstances it would in my view be draconian in the extreme to insist that such expenditures should be incurred without prior consideration of this petition.

The Law:

23. Section 3 of the Disused Burial Grounds Act 1884 enacts that _

“It shall not be lawful to erect any building upon any disused burial ground, except for the purposes of enlarging a church, chapel, meeting house, or other places of worship.”

By section 2 of the Act (as amended) a “building” includes “any temporary or movable building” and a “burial ground” includes _

“... any churchyard, cemetery or other ground, whether consecrated or not, which has been at any time set apart for the purpose of interment”.

A “disused burial ground” is defined as _

“any burial ground which is no longer used for interments, whether or not the ground has been partially or wholly closed for burials under the provisions of a statute or Order in Council.”

In the present case there is no doubt either that I am concerned with a burial ground which is no longer used for interments or that it has in fact been closed for burials for many years. The provisions of the Act therefore apply to the Radcliffe Infirmary burial ground. Indeed, in spite of the arguments of Mr Briden, in the light of this definition I am entirely satisfied that the burial ground would continue to fall within the ambit of the Act even if I were to permit the proposed exhumations and the legal effects of consecration removed pursuant to the provisions of section 22 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991. It is self evident that the University wish to place a building or buildings on the burial ground area if it is lawful to do so. The fulfilment of this wish, however, all depends upon the provisions of section 5 which state:

“Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament”.

24. Although there is the possibility that some of the buildings previously built on this burial ground were built on the authority of some Act of Parliament (for example, a local Act of Parliament), Mr Briden has been unable to discover it; it therefore seems

that their erection was unlawful. Be that as it may, I am now only concerned with the proposal to build on the burial ground in the future.

25. In this regard I bear in mind the case of *London County Council v Greenwich Corporation* [1929] 1 Ch 305 where Astbury, J decided that section 15 of the Admiralty Lands and Works Act 1864 did not give the Admiralty power to sell or dispose of a burial ground within the meaning of section 5 of the 1884 Act. On its face section 15 of the 1864 Act did in fact seem to grant such power as it provided that where any lands purchased or taken by the Admiralty under the Act, or under any special Act of the present or any future session, appeared to the Admiralty to be no longer required to be held by them for the public service, the Admiralty might, with the previous consent of the Lords Commissioners of the Treasury, sell it. Nonetheless, as Astbury, J went on to point out, section 15 needed to be read in the light of section 27 which read:

“Nothing in this Act shall take away or prejudicially affect any power, right or authority which would or might have been vested in or exercised by the Admiralty if this Act had not been passed.”

He therefore concluded:

“It appears to me that s 15 did not give to the Admiralty the right to sell this land as a burial ground, or in fact any other land; what it did do was to provide, with regard to the rights of sale which the Admiralty had before, certain provisions and restrictions as to such disposition, all general rights being safeguarded by s. 27.”

26. Perhaps fortunately, it is clear from the legislative history in relation to the original voluntary hospital and its successors set out above that the transfer of the hospital grounds and its subsequent sale to the University have all been pursuant to the authority of Acts of Parliament and not pursuant to a mere general power of sale apart from an Act of Parliament such as was the case in *London County Council v Greenwich Corporation*. It follows that the provisions of the Disused Burial Grounds Act 1884 no longer apply to the Radcliffe Infirmary burial ground.
27. The matter does not end there, however. Not only is it an indictable offence to exhume a body without lawful authority but section 25 of the Burial Act 1857 provides:

“Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary for that purpose, it shall

not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without licence under the hand of one of Her Majesty's Principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence. ...”

28. In the present case, if a faculty is granted for exhumation, it is intended to request the Bishop of Oxford to consecrate a portion of Botley Cemetery specially for the re-interment of the relevant bodies and, if that occurs, no licence would arguably be necessary over and above the authority of a faculty. However, the grant of such a faculty is a matter of discretion resting in the diocesan chancellor and must be exercised in accordance with legal principle.

29. In recent years both the Chancery Court of York in the case of *Re Christ Church, Alsager* [1999] Fam 142 and the Arches Court of Canterbury in the case of *Re Blagdon Cemetery* [2002] Fam 142 have considered the legal principles to be applied in the case of individual exhumations. In the latter case the Dean of the Arches emphasised that “the norm is permanence in relation to Christian burial” (see [2002] Fam 142 at para 28) and that a faculty for exhumation should only be “exceptionally granted” (*op. cit.* at para 33). Indeed, the Dean continued:

“We consider that it should always be made clear that it is for the petitioner to satisfy the consistory court that there are special circumstances in his/her case which justify the making of an exception from the norm that Christian burial (that is burial of a body or cremated remains in a consecrated churchyard or consecrated part of a local authority cemetery) is final. It will then be for the chancellor to decide whether the petitioner has so satisfied him/her.

30. The two above cases, however, were concerned with individual exhumations whereas historically the court has in addition always entertained petitions for multiple exhumations in what Mr Briden has called “public works” cases: see, for example, *In Mary-at-Hill* [1892] P 394 (public health); *In re St Botolph without Aldgate* [1892] P 161 (street widening); *In re St Mary's, Sledmere* [2007] Ecc LJ 343 (medical research). Indeed, in *St Mary the Virgin, Woodkirk* [1969] 1 WLR 1868 (road improvements) where the Deputy Auditor stated (at 1873H):

“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.”

Moreover, in *In re St Nicholas, Sevenoaks* [2005] 1 WLR 1011 (exhumation for the purposes of historical research) the Dean of the Arches said (at 1015F-H):

“ ...[W]e consider that a crucial point that needs to be emphasised at the outset, is that the test of special circumstances for exhumation is not the scale of what is proposed but the credibility of the reasons put forward for exhumation. It is an evaluation of the evidence, which the chancellor has to carry out in determining whether special circumstances have been established. There is no question of it being permissible for that evaluation to be any less rigorous, because the proposed interference is small. We do not consider that there is an inconsistency between the approach of the court when considering a petition to exhume a number of remains to achieve an objective of public benefit and that adopted when considering a petition to exhume individual remains for some private purpose. To succeed each needs to be based upon a sound factual basis providing a convincing reason or reasons for the exhumation proposed.”

31. Applying this test in the present case I have no doubt whatever that the proposed use of the burial ground by the University for academic purposes, and in particular the Blavatnik School of Government, would be greatly for the public benefit. Indeed, I am entirely satisfied that the most credible and convincing reasons have been put forward for exhumation and that in this particular case these amount to special circumstances. In particular I am satisfied that there is no viable alternative to exhumation if the site is to be utilised to its full and necessary potential. There are no formal objectors to the petition and I find on a balance of probabilities that the public interest that the consecrated land should continue to be used for the sacred use to which it was dedicated is far outweighed by the need for the proposed development of the land.

Medical research:

32. There is, however, a further matter that I must consider. According to the *University of Oxford: Radcliffe Observatory Quarter Archaeological Strategy* prepared by Tumberry Consulting in September 2010 at para 12.26-27:

“The potential of human bone material that could be recovered from the Radcliffe Infirmary burial ground may have considerable significance due to the rarity of medical specimens in the archaeological record If the ... site is archaeologically investigated it is anticipated that further evidence of medical intervention and dissected remains might be found during excavation. To date there have been relatively few archaeological investigations of historic hospital cemeteries or of dissected human remains and few publications on the subject.”

It continues (at para 12.32):

“Evidence of surgical intervention or post-mortem dissection, preparation of specimens, drilled holes, staining, wiring, varnishing and possible embalming meant the techniques and tools used for dissection, surgery and autopsy could be examined. By recording locations of cuts and describing portions, it would be possible to differentiate between amputation, dissection and autopsy. There is also the potential for examination of treatment within the infirmary and evidence of medical care.”

Indeed, these possibilities receive some support from the evaluation report entitled *Oxford University: Radcliffe Observatory Quarter Radcliffe Infirmary Burial Ground* (February 2010) prepared by the Museum of London Archaeology in relation to two trial trenches dug under the permission of a faculty. In the Summary the report states (at page 23):

“In general, the bones are well preserved and the articulated burials contain a mix of both complete and truncated individuals. It would be anticipated that any further excavations would reveal burials of a similar quality in terms of bone preservation (survival quality). This would mean that the ability to detect skeletal pathology will be greatly enhanced. Accuracy in classification or diagnosis will also be greatly improved. The completeness of the skeletons would also mean that age indication and sex data could easily be retrieved from each skeleton.

During the 18th and 19th century there would be advances in the medical sciences, and this in part was due to systematic anatomy training for physicians. It is not uncommon to find evidence of post-mortem examination, such as craniotomies or amputations, in post-medieval skeletal material. This cemetery is no exception; the craniotomy plus the sectioned long bones point

to dissection and/or surgery and this is to be expected in a cemetery associated with a hospital.

.... The disarticulated material contained the remains of adults and children as well as both sexes. There was considerable evidence for chronic infection (osteomyelitis) and sawn limb bones (above/below knee amputations). This is typical of material associated with a hospital.”

Indeed, the same evaluation report states (at 4.3):

“The archaeological remains are undoubtedly of local significance as the Infirmary played an important role in the social history of Oxford. Whilst they are not considered nationally important, there may also be a wider regional potential in comparison with investigations of other hospital burial grounds, in areas such as documentary sources, social status, demographics and pathology. This includes possible evidence of medical practice, the cemetery dating to the period of pioneering work in dissection and human anatomy.”

33. *In re Holy Trinity, Bosham* [2004] Fam 125 at para 31 Chancellor Hill considered the proper approach of the consistory court to exhumations in support of scientific research:

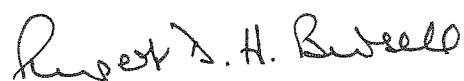
“As I read the authorities, the following approach would appear to be appropriate in cases such as these. (i) As a matter of Christian doctrine, burial in consecrated land is final and permanent. (ii) This general norm creates a presumption against exhumation. (iii) Exhumation in this context comprises any disturbance of human remains which have been interred. (iv) Departure from such presumption can only be justified if special circumstances can be shown for making an exception to the norm. (v) An applicant might be able to demonstrate a matter of great national, historic or other importance concerning human remains. (vi) An applicant might also be able to demonstrate the value of some particular research or scientific experimentation. (vii) Only if the combined effect of evidence under (v) and (vi) 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.”

34. Fortunately, I do not have to decide in the present case whether exhumation should be permitted on the grounds of medical research as I have already concluded that

exhumation should occur for the public benefit on other grounds. Nonetheless, this necessity for exhumation raises the opportunity to carry out such research. In *St Nicholas, Sevenoaks* (at para 24) the Dean of the Arches approached the question of medical investigation in this way:

“ ... [I]t is accepted within the Church that human osteology (the scientific study of human skeletal remains) is capable of benefitting 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” 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”

35. In these circumstances it seems to me that a proper case has been made out by the petitioners that during and after exhumation the bodies, or parts thereof, from the burial ground should undergo appropriate archaeological/medical research but only under very strict conditions. A faculty will therefore issue accordingly. However, I add that section 25 of the Burial Act 1857 probably did not envisage this course of events and therefore in my discretion I will only permit the delayed reburial of any of the bodies or body parts if a Home Office licence is also obtained for the exhumation.



Chancellor of the Diocese of Oxford

1st June 2011

Schedule to Faculty

The exhumation of all human remains (whether articulated or disarticulated) from the consecrated burial ground attached to the former Radcliffe Infirmary, Walton Street, Oxford, and their subsequent re-interment in consecrated land at Botley Cemetery in the parish of North Hinksey and Wytham, together with their archaeological and/or

osteological and/or medical investigation whilst being held in accordance with the directions of the Court.

Conditions

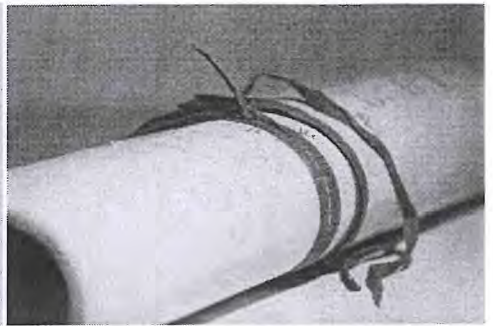
1. No exhumation shall be carried out under this Faculty until:
 - (i) A licence for the exhumation has been obtained from the relevant Secretary of State and a copy thereof lodged in the diocesan registry;
 - (ii) Planning permission has been granted for the construction on the former burial ground of the Blavatnik School of Government to a design incorporating basement or other underground structures within the space now occupied by graves;
 - (iii) A copy of such planning permission has been shown to the diocesan registrar (such copy to be placed with the faculty papers); and
 - (iv) A written scheme of archaeological investigation (whether as set out in 'University of Oxford: Radcliffe Observatory Quarter Archaeological Strategy September 2010' or otherwise) has been approved in writing by the Court after consideration of further advice from the diocesan archaeological adviser.
2. At least 21 days prior to notice of the commencement of the said works shall be given to the diocesan archaeological adviser, who shall exercise general supervision over the excavations and archaeological investigation of the burial ground.
3. Exhumation shall be conducted in a reverent and seemly manner and in accordance with any directions given by the public health department of the local authority.
4. No artefact or ecofact discovered in the course of the works shall be removed from the burial ground other than to a place of safety without further written order of the Court. If any such item is so removed to a place of safety the diocesan registrar must be immediately informed and his written directions in relation to the said items must thereafter be strictly complied with.
5. The further directions of the Court shall be obtained in respect of the treatment of any excavated lead coffin or other casket found to be intact.
6. Save as provided in paragraph 8 below, forthwith after their archaeological/medical assessment the exhumed remains shall be re-interred

reverently in accordance with this Faculty and such remains shall not be cremated without further written order of the Court.

7. A memorial shall be provided to record the re-interment of the remains in the said cemetery and a further memorial in the vicinity of the site of the said burial ground shall record the original place of burial.
8. The petitioners shall have leave to retain no more than 50% of the exhumed remains for archaeological and/ or osteological and/or medical research on the following terms:
 - (i) Such remains shall be kept at all times in a secure location and be available for inspection by or at the direction of the Court;
 - (ii) Only non-destructive testing may be undertaken;
 - (iii) Copies of the written report arising from the research shall be made available to the diocesan advisory committee and to the Court;
 - (iv) Retention of the said remains under this paragraph shall be limited to a period of 10 years (or such extended period as the Court may in writing allow) and thereafter the remains shall be dealt with in accordance with paragraph 5 above.
9. No building works may commence upon the site of the burial ground until the land has been de-consecrated.
10. Liberty to apply

Order for Costs

The Petitioners shall pay the Court fees in a sum to be determined by the diocesan chancellor after consideration of any representations made by the Petitioners as to the amount thereof.



Season's greetings from Lamb Chambers

Key developments

Property: Consecrated burial grounds; an obstacle to developers?

In re Radcliffe Infirmary Burial Ground
[2011] PTSR 1508

TIMOTHY BRIDEN

During the past three centuries many hospitals, barracks and other institutions were provided with adjacent burial grounds for the victims of disease or war. With the disposal of the sites of such institutions (including their annexed burial grounds) on the open market the law governing the treatment of long buried human remains has been brought into focus.

Generally, a developer seeking to remove human remains from acquired land as a preliminary to building will be able to adopt the procedure set out in the Schedule to the Disused Burial Grounds (Amendment) Act 1981, and on completion of the statutory process the prohibition against building on a disused burial ground, imposed by section 3 of the Disused Burial Grounds Act 1884 will cease to apply.

In practice the 1981 Act provides a satisfactory mechanism for clearing old burial grounds. The Act does not, however, apply to land consecrated according to the rites and ceremonies of the Church of England. Often burial grounds unattached to churches were consecrated by the diocesan bishop or his suffragan, and thereby came within the jurisdiction of the diocesan Consistory Court. Thereafter, all further use and management of the land is subject to the control of the court. Thus where a burial ground is consecrated, and there is no explicit statutory provision (for instance, section 238 of the Town and Country Planning Act 1990 concerning compulsory acquisition) overriding the jurisdiction of the Consistory Court, the treatment of the land will be subject to ecclesiastical law.

Such were the complications faced by Oxford University after its acquisition from an NHS Trust of the former site of the Radcliffe Infirmary in the city centre. The site included a burial ground, consecrated in the 18th century and closed

in 1855 by Order in Council. The University proposed building a prestigious School of Government over the burial ground; planning constraints required the design to incorporate an extensive basement which, in turn, would necessitate the exhumation of over 500 sets of skeletal remains for reburial in a local cemetery.

The diocesan authorities understandably declined, under the administrative powers contained in section 22 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, to permit this large scale exhumation and deconsecration of the land. Instead the University was required to prove its case in the Consistory Court, The judgment of Chancellor Bursell QC was directed to two principal issues.

First, in order to justify the removal of human remains a good reason, in terms of public benefit, had to be established. In the event, the Chancellor was persuaded that proposed use of the land for academic purposes amounted to a convincing justification for allowing exhumation. In this respect, the University was at a considerable advantage, as compared with a commercial developer, in advancing a case based on public benefit.

The second issue concerned the prohibition in section 3 of the Disused Burial Grounds Act 1884 against building on such a burial ground. The Chancellor (at least by implication) considered that the prohibition would survive the removal of the remains and deconsecration of the land. Fortunately for the University, however, section 5 of the Act created an exception in respect of 'any burial ground which has been sold or disposed of under the authority of any Act of Parliament'. Since the original voluntary hospital had been vested in the Minister of Health by statute (section 79(1) of the National Health Service Act 1946) and there had been subsequent transfers to and from NHS entities, under statutory authority, section 5 was held to come into play, releasing the land from the constraints imposed by section 3.

Accordingly the University was successful in obtaining a faculty for exhumation; and deconsecration of the land was expected to follow as a consequence of the Chancellor's judgment. The case serves however, to highlight the difficulties which arise when old burial grounds are acquired. Careful investigations into the history of the site, and the law applicable to it, are essential if costly mistakes are to be avoided.

Credit hire: *Pattni v First Leicester Buses Limited; Bent v Highways and Utilities Construction and another* [2011] EWCA 1384

VAUGHAN JACOB

On 24 November 2011 the Court of Appeal handed down judgment in the above conjoined appeals. Both appeals concerned the amounts recoverable by a claimant who is the innocent victim of an RTA and who could have afforded to hire a replacement car without credit terms. Lord Justice Aikens gave the leading judgment and provides a useful summary of the principles involved in determining the basic hire rate at paragraphs [29]-[41]. The judgment has further clarified issues relating to interest on credit hire charges and how to claim the 'spot hire' rate.

No interest on credit hire charges

Mr Pattni claimed for interest on credit hire charges for the period between the end of the hire of the replacement car and the date when the claim against the defendant driver was finalised, pursuant to the terms of his credit hire contract. The claim for interest was denied at first instance and on first appeal, where Swift J held the claimant had suffered no loss in relation to interest for which he required to be compensated.

The Claimant submitted three arguments as to why interest on the credit hire charges was recoverable:

- 1) The Agreement in this particular case specifically provided for it.
- 2) The loss of interest was damage suffered as a consequence of the defendant's tort. If the Claimant had hired a car in the usual way he would have lost the use of his money thereby paid away. The judge should have awarded both the basic hire rate and interest on that sum.
- 3) The Claimant was entitled to statutory interest pursuant to s69 CCA 1984 to reflect the loss of use of funds that the Claimant would have incurred if he hired a replacement car on a standard basis.

The appeal was dismissed. In response to the first argument, any element in the credit hire charge that represents the cost of providing credit facilities to the hirer is not recoverable as part of a claimant's damages for loss of use of his car. Interest is to be regarded as an 'additional benefit,' specifically the benefit of delayed payment of the credit hire charges until the claim against the other driver had been finalised. Following *Dimond v Lovell* this additional benefit is not recoverable by a hirer who is not impecunious.

In response to the second and third arguments, a claimant can claim interest if he has proved that he has suffered loss of money by reason of the defendant's tort, subject to

remoteness and a failure to mitigate. In this particular case Mr Pattni had not incurred any financial cost at all up to the date of trial and he had not had to pay out any interest. For a claim for interest on this basis to succeed actual proof is required.

Basic Hire Rate evidence

The long running Bent saga was appealed on the basis that the 'spot rate' had been miscalculated. The appeal sought to clarify what method of calculating the spot hire rate should be used.

The Court of Appeal firstly eradicated the vague term "spot hire" rate. Instead the term "Basic Hire Rate" (BHR) more accurately describes the basic measure of damages recoverable in cases where the Claimant could afford to have hired a car by paying in advance.

The approach to calculating the BHR is as follows:

- (1) The starting point is to ask whether the Claimant needed to hire a credit hire vehicle at all?
- (2) If they did, was the Claimant impecunious? An impecunious claimant is entitled to recover the whole of the credit hire rate paid, provided that it was otherwise a reasonable rate to pay.
- (3) If not, has the defendant proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been the BHR for the model of car actually hired?
- (4) If there is a such a difference, the Claimant can only recover the BHR.

In Bent the assessment of the basic hire rate was flawed and the appeal was allowed. The trend to assess the BHR at the higher end of average has been stopped. Now the task of the judge is to assess the BHR in respect of the vehicle hired instead of the higher end of a range of average BHRs for similar vehicles.

Chambers news

Chambers will close at 6p.m. on 23 December and reopen on 3 January, with the exception of 29 December when we will be open 10a.m.-4p.m. The main switchboard number will provide contact details in respect of urgent business.

This information and commentary is provided for general information only. No responsibility is assumed by the authors or other members of Lamb Chambers for accuracy or for relying upon it. The material is not, and is not intended as, legal advice and must not be relied on in relation to any actual or potential legal dispute. Anyone requiring advice about their dispute should instruct a solicitor or barrister specifically in relation to that dispute.