

In the Consistory Court of the Diocese of Chichester CH 136/11

In the matter of St Nicolas, Pevensey And in the matter of a petition for the reservation of a gravespace by (1) John Lindon Seldon and (2) Carol Patricia Allison Seldon

Judgment

1. By a petition dated 14 August 2011, John Lindon Seldon and Carol Patricia Allison Seldon seek a faculty for the reservation of a grave space (identified as being in Row D, north of number 1) in the churchyard of St Nicolas, Pevensey. The petition has the support of the Parochial Church Council, as signified by a minute of a meeting held on 21 September 2011, and the incumbent of the parish, the Reverend Dr Anthony Christian also supports the petition, having submitted a letter dated 25 January 2012 to this effect. However, as is apparent from the petition, the churchyard is very nearly full and this court must therefore consider the extent to which any further reservations of grave spaces may properly be granted in relation to this particular churchyard having regard to the long-established right of parishioners to be buried.
2. The petitioners were alerted to this issue by letters from the Registry dated 19 October 2011 and 14 December 2011 respectively, and it was suggested that they might benefit from obtaining the advice of an experienced ecclesiastical solicitor. The petitioners sent letters in response dated 11 November 2011 and 31 December 2011 respectively in which they set out written representations which they wished the Court to consider in the determination of the petition. I have considered with care all of the matters advanced by the petitioners in these letters.

Background

3. The petitioners live in Bexhill. They have a long association with St Nicolas, Pevensey. Mrs Seldon's parents lived in King's Lodge, Pevensey from 1953 to 1970, Mr Seldon's parents moved into Lyon's Close, Pevensey, during this period and the petitioners were married in St. Nicolas' church in 1964. Their daughter was married in the parish church in 1988, and the son of that marriage was baptised there in 1992. The petitioners returned in 2000 after some years abroad. Mrs Seldon serves as an acolyte and both petitioners support the activities of the church including fundraising and maintenance. Mrs Seldon's parents' remains are buried in the churchyard.
4. These matters are amplified in the petitioners' letter of 11 November 2011. It records that Mrs. Seldon has been on the electoral roll of the parish for some years; that she previously taught at Sunday school and was for a short period in the choir. The petitioners had explored buying a building plot within the parish on which to construct a home, but this did not proceed as planning permission would not be granted. Their home in Bexhill is currently on the market with the hope that they can move into the parish in the future. They say that they have no similar allegiance to any other parish and would not wish to be buried in a 'foreign graveyard'.

The petitioners observe that 'it seems that to be granted a petition at present requires something more than a lifetime attachment to the village, the parish and the church.'

5. In the letter of 31 December 2011, signed by both petitioners, it is stated that Mr. Seldon has now had his name added to the electoral roll of the parish. The petitioners further assert:

The church surely has a remit to allocate grave spaces in preference to those who actively support the church rather than allow them to be assigned *ad hoc*, simply on the basis of date of death, to people who have not attended church regularly if at all, who have not supported the activities of the church, who have not made financial contribution to the church, who have not raised funds for the church (all of which we have done and continue to do) and in general have shown no interest in the church despite living in the parish. Such a person would, I understand, have an absolute right to be buried in the churchyard while we, despite our active support, contribution, and life long association with the parish and its church are denied.

6. The petitioners further mention the support of the parish council, which I take to be a reference to the Parochial Church Council and not the secular local authority from whom this court has had no comment or representations. They point out that the decision of the PCC, which I have already recorded at paragraph 1 above, was unanimous and without abstention and was made in the full knowledge of the limited space available. The petitioners state that this Court should take into account the view of the PCC as to how available grave spaces should be assigned.
7. The evidence in relation to available grave spaces comes from the petitioners themselves and is to be found at page two of the petition dated 14 August 2011. It states that the average number of burials of bodies in the churchyard over the last ten years was '4/5 per year' and that the number of grave spaces remaining in die churchyard is '10-12'. A simple projection of these figures means that the graveyard might be full two years after the petition (by August 2013) and would certainly be full within three (August 2014).

The law

8. The law on the subject of reservation of grave spaces was considered at some length by the late Chancellor G H Newsom QC in *Re West Pennard Churchyard* [1991] 4 All ER 125. In that case the petitioner was a single woman in her 30s who lived in the parish, as did her father, and whose mother's remains were buried in the churchyard. The incumbent and PCC opposed the petition. Newsom Ch. approached the exercise of his discretion by summarising the law and the following principles can be extracted from the passage of die judgment which begins at page 126f:
 - i. At common law, every parishioner has a right of burial in the churchyard of the parish unless it is closed by due legal process;
 - ii. The common law right extends also to all persons dying in the parish, whether or not they are parishioners;
 - iii. By statute a similar right is enjoyed by all persons whose names are on the electoral roll of the parish: see Church of England (Miscellaneous Provisions) Measure 1976, s 6(1);
 - iv. The incumbent has power at common law to prescribe in what position in the churchyard any burial is to take place; but that is the extent of his power in respect of cases where the deceased had a legal right of burial;
 - v. As freeholder of the churchyard, the incumbent is also entitled to grant consent to the burial in the churchyard of the remains of a person who has no legal right of burial; in

doing so he is to that extent ousting those who have existing prospective rights. In deciding whether to give consent in such a case, he is therefore required by statute to 'have regard to any general guidance given by the parochial church council of the parish with respect to the matter': see s 6(2) of the 1976 Measure;

vi. These common law and statutory rights crystallise only when the person in question dies.

9. Following these general propositions, Newsom Ch. comes to a key section of his judgment which is highly significant to the determination of the current petition. I reproduce it verbatim:

If a person with a legal right of burial wishes in his lifetime to assure his personal representatives of a right to bury his remains in a particular place in the churchyard, he must apply to this court for a faculty to reserve that grave space. Whether such a faculty shall be granted rests wholly in the judicial discretion of the court. If there is plenty of room in the churchyard it is freely granted to a petitioner who has a legal right of burial. What such a faculty does is to protect the petitioner against the hazard of losing his legal right in his lifetime (e.g. by ceasing to live in the parish), and to require whoever is the incumbent when the petitioner dies to allow his remains to be buried in the position in the churchyard defined in the faculty. To this extent, therefore, the faculty deprives the incumbent of his right to prescribe the position where a burial is to take place, and it deprives the parishioners generally of the space becoming available if the petitioner moves away. [126j 127b]

Such a faculty can also be applied for, with the concurrence of the incumbent, by a person who does not have a legal right of burial. The grounds on which such a faculty is granted vary, among them are the association of the petitioner with the church or with the parish, or the presence in the churchyard of the remains of relatives of the petitioner.

10. In considering how the judicial discretion should be exercised in cases of this type, Newsom Ch. made the following helpful observations at page 128a:

The court is usually disposed to grant the reservation petition of a person who has a legal right of burial. Such a case may further be strengthened if the remains of one or more of the petitioner's relatives are buried nearby, as is the case here. Or it may be weakened if the churchyard is on the point of being full.

Analysis

11. The petitioners submitted two sets of written representations in support of their petition, and I have set out the nature and scope of those representations earlier in this judgment. Both Mr and Mrs Seldon have the legal right of burial in the churchyard, since each of their names are on the electoral roll of the parish, albeit Mr Seldon's name was only added once these proceedings were already in train. The incumbent and the PCC both support the grant of a faculty, but such support, though relevant, cannot be determinative as such would be to emasculate entirely the judicial discretion identified by Newsom Ch. Other factors which weigh in the exercise of the judicial discretion include the fact that although they may not perhaps be classified as 'stalwarts', the associations of the petitioners, and of Mrs Seldon in particular, with the parish and the church are not insignificant and date back over many years. Furthermore, the remains of Mrs Seldon's parents are interred in the churchyard.
12. However, although these are significant considerations which might otherwise militate in favour of granting a faculty for the reservation of a grave space, an important caveat amounts to a restraining hand on the exercise of judicial discretion. As Newsom Ch. put it, 'If there is plenty of room in the churchyard it is freely granted to a petitioner who has a legal right of burial'. In this instance, there is not plenty of room. Far from it.

13. I note that in the course of Newsom Ch.'s judgment in *West Pennard Churchyard*, he engaged upon conjecture as to the stage at which a churchyard is full and ripe for closure. In that case, there were apparently 24 spaces left with the rate of burial being approximately 8 per year. He contemplated whether the number of plots remaining referred to those which had never previously been used; and spoke of the practice of burying over parts of the churchyard. He concluded 'on the evidence before me I am not prepared to treat the churchyard as being full or anything like it'.
14. I do not consider it to be open to this Court to enter into the realm of speculation which appears to have animated the assessment of Newsom Ch. at page 128a-c of his judgment. Forming clear conclusions on whether a churchyard is full and should be closed to further burials can prove extremely problematic for Consistory Courts as the judgment in *Re Brightlingsea Churchyard* [2005] 8 Ecc LJ 233 (Pulman Ch.) makes plain: it can bring parishioners into conflict one with another, and become a source of discord between the PCC and the secular parish council.
15. Despite being afforded the opportunity of making two separate sets of written representations, no evidence has been placed before me concerning re-use of some or all of the burial ground (whether immediate or at some time in the future) and I do not consider it to be appropriate to embark upon an exercise of the Court's own motion which looks behind the unchallenged evidence of the petitioners that the average number of burials of bodies in the churchyard over the last ten years was '4/5 per year' and that the number of grave spaces remaining in the churchyard is '10-12'. That being so, I am inevitably drawn to the conclusion that there is not plenty of room in this churchyard. Despite both petitioners having a right to burial in the churchyard and despite there being a number of factors which might otherwise favour the grant of a faculty for the reservation of a grave space, the very limited number of available plots is such that, even with the most generous exercise of judicial discretion, it would not be appropriate or just for this Court to authorise the grant of a faculty.
16. I should make plain to the petitioners that, although they may well be disappointed by this conclusion, it should not be read as being a value judgment on them. They have not been singled out for adverse treatment because they do not live in the parish. The fact that they are on the electoral roll accords them precisely the same status as if they were resident parishioners. They are not disadvantaged in any way, and to the extent that this is not entirely clear from paragraph 6.2 of the *Chancellor's General Directions for the Diocese of Chichester* (Issue 2, Easter 2007) it will be made explicit and unambiguous when next the Directions are revised.
17. The Church of England is the established church in England. With establishment come privileges and also duties. These include the duty to marry parishioners regardless of their religious affiliation, and the duty to bury parishioners. The former right was recently restated by Baroness Hale of Richmond in the course of the House of Lord's determination in *R (on the application of Baijai and another) v Secretary of State for the Home Department*; *R (on the application of Bigokeu and another) v Secretary of State for the Home Department*; *R (on the application of Tilki) v Secretary of State for the Home Department* [2008] UKHL 53 at paragraph 37:

... the Church of England believes itself (with some Parliamentary encouragement, for example in sections 57 and 58 of the Matrimonial Causes Act 1857) required to marry for the first time anyone who lives in the parish regardless of faith or the lack of it.

18. In relation to burial, it matters not whether the deceased is a Christian, has attended worship or has donated money to the church during his or her lifetime. All are treated alike. Where, as here, pressure of space is acute, it would be wrong for any Consistory Court to grant the reservation of a grave space such as to prejudice future burials. Some dioceses have formulated rigid guidelines, but all apply this general principle as it is a matter of ecclesiastical law.
19. The judgment in *Re St Andrew Bainton* [2009] 11 Ecc LJ 235 (Hill Dep. Ch.) engaged this general principle although the underlying facts were somewhat different. The case concerned the proposed introduction into the churchyard of a bench in memory of a 17 year old boy who had died of meningitis. Amongst the grounds advanced by an objector in opposition to the grant of the faculty was the fact that the deceased boy's family were not regular attenders at the church in question. Dismissing that argument, I observed at paragraph 9 of my judgment:

An incumbent exercises a cure of souls in respect of all in the parish, and the right of burial extends to parishioners of all faiths and of none. To make acts of remembrance on the part of the bereaved conditional upon attendance at church would be ungracious, undignified and unchristian

20. When space in a churchyard is limited, individuals with a legal right of burial must be interred in the order in which they die until such time as the churchyard is full. Neither the provision of alms in the past nor regular attendance and support of the Church's ministry can give rise to a presumptive priority for a certain class of individuals when the number of available burial plots has become so few.
21. It therefore follows that for the reasons already given, this petition must be dismissed; and the costs of and occasioned by it (to include a correspondence fee for the registrar) are to be borne by the petitioners.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Chichester

28 March 2012