

Neutral Citation Number: [2020] ECC Ely 3

In the Consistory Court of the Diocese of Ely

In the Matter of the Faculty Petitions

The Churchyard of St Clement Terrington

JUDGMENT ON GRAVESPACE APPLICATIONS

BACKGROUND

1. In October 2020 I received applications to reserve four gravespaces and a reservation for the burial of ashes. I granted the application for the reservation for the burial of ashes but postponed consideration of the other applications to allow the petitioners the opportunity to apply for a full hearing before the court or to make further written representations. I provided a Note dated 1st November which set out the principles which I was required to adopt in accordance with the statutory framework and assisted by the decisions of the Consistory Courts in other Dioceses who have had to consider similar issues.
2. I have been provided with a very helpful and full submission from the Reverend Robert Slipper (who I shall refer to hereafter as the incumbent) in which he has provided further information about the church's plans and about the background of the petitioners. I am very grateful to him for the time he has taken to draft his response.
3. Two preliminary matters need to be addressed. Firstly, it has been confirmed that PCC had considered re-use of graves to alleviate the problem which they face. The incumbent has informed me that they have rejected re-use and their grounds for doing so are sound. It follows that that option is not available.
4. Secondly, he has confirmed that the churchyard is scheduled for closure from 1st April 2021. I accept, as he identifies, that calculating how much space is left is not easy. He questions whether the form that he is obliged to fill in should take account of reserved gravespaces. For the avoidance of doubt all applications must take account of what reservations have been granted in

order to give a true picture of what spaces are left. He submits that, even if all four reservations were granted there would be at least a further eleven plots available. Adding into the calculation the number of double depth as opposed to single plot burials which are likely to occur, he assesses that the spaces left would accommodate burials for more than a further two years.

5. The forms submitted to me calculated that that there was sufficient space for less than one year which, although substantially different from the incumbent's latest calculation, does not materially alter the fact that the churchyard is rapidly running out of space to fulfil its statutory obligation pursuant to s.88 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 ("the Measure") to provide a grave in the churchyard to anyone who was at the date of death living in the parish, or on the electoral roll, or who died in the parish. Where the churchyard has no further space for burials or it has been closed for burials by Order in Council, no burials can take place.
6. I am concerned that the PCC has decided on a date for closure and is now permitting reservations to be made in the hope, it seems, of using up the spaces before the churchyard is closed. That approach, in my judgment, runs the risk of ignoring the statutory requirement to provide the space for parishioners and instead is filling the available spaces via the faculty jurisdiction. There are many examples where such spaces are never used, for example, where someone moves to a different area of the country and decides to be buried there, or they want to be buried with their husband or children, or because of a decision to be cremated or simply because they fail to leave instructions identifying that they have reserved a space.
7. There is a moral issue in respect of reservation which has been brought to my attention, that the faculty system advantages those who can afford to pay the fee for a faculty over those who may not be able to do so but nevertheless have a right to burial.

8. In my judgment it would be appropriate to postpone the application for closure until the churchyard is full. Section 88 of the Measure cannot require burials to take place where there is no room even if the PCC is still awaiting an Order in Council to close the churchyard. By this route it will ensure, especially in circumstances where it is so difficult to predict how many spaces will be needed in any year, that all available spaces are used, and that they are used by those who have the right to be buried in the churchyard without applying for a faculty.

THE APPLICATIONS

9. I have received the following applications to reserve gravespaces:
 - F2020/102 a double depth gravespace for Susan (76) and Holly (72) Atkin; resident in the parish and active supporters of the church. Members of their family are buried in the churchyard.
 - F2020/103 a double depth gravespace for Catherine (67) and Peter (69) Flowers; born and resident in the parish, married in the church, and active supporters of the church. Their relatives, Frank and Alice Atkin, and George and Alice Flowers are buried in the churchyard.
 - F2020/104 a single gravespace for Jane Green (34) who is not resident, is not on the Electoral Roll, does not subscribe to parish funds but attends church. Her father and grandmother are buried in the churchyard.
 - F2020/105 a double depth gravespace for Dawn (35) and James (46) Wadham; who are not residents, are not on the Electoral Roll and do not subscribe to parish funds. Dawn was baptised in the church and, according to the form she completed, regularly attends church with her family. Her father, John Atkin, is buried in the churchyard.
10. Each application is supported by the Parochial Church Council (“PCC”) and by the incumbent. The incumbent has also provided further information since I provide the Note. He submits that there is a strong case for supporting the application by Susan and Holly Atkins on medical grounds. He suggests that the application of Mr & Mrs Flowers is “worthy of particular further consideration” because they are parishioners, regular attenders and servants of the church. He acknowledges that the other two applicants do not have as strong a case because they live outside the parish and, although their applications, would tend to indicate “attendance” or “regular attendance” at

church, it might be more accurate to describe their attendance as once a year. He draws my attention to the fact that the four applications are all related to the burial of the remains of John Atkin.

11. In answer to my observation in the Note that within the diocese and elsewhere there are PCC's who do not support, and Chancellors do not grant, reservations where spaces in the churchyard will fulfil the needs of the parishioners only for the next 5, 10 or even 20 years, the incumbent submits that, because, the churchyard only has approximately four to five months until closure, it significantly reduces the uncertainties. With respect, this is a circular argument: the need to plan ahead a number of years is to provide for the right to burial in conformity with s.88 of the Measure. It is not a matter of reducing uncertainties but allowing the church to fulfil its statutory duty. By supporting applications for reservations when little room remains, the PCC places itself in the potentially invidious position of recommending the application of one parishioner over another for a gravespace.
12. The incumbent suggests that six faculties have been granted in the last two years and that it seems unfair to apply the guillotine at this stage. In answer to that, I have considered each application on its merits at the time it was made.
13. With the assistance of the Registry they have found that in 2018 I granted a reservation for a single grave space and a plot for cremated remains; in 2019 one single and one double plot and a plot for cremated remains. I have been able to review the application for the double depth plot and note that it was in respect of a husband and wife in their 70's who were residents in the parish and had strong connections to the church and relations buried in the churchyard. The only application I have granted in 2020 was the plot for cremated remains which was applied for at the same time as these four reservations, having been told that there was room for cremated remains for five more years and being confident that other areas within the churchyard could be used for the burial of cremated remains.

14. Even if there is perceived to be an inconsistency in approach in respect of these applications it comes about as a result of the number of applications which I have received from churches in the diocese which are facing a similar problem which has led me to consult the Archdeacons on how to tackle this problem. I intend to issue a Practice Direction in the New Year to give the parishes further guidance on my approach to such applications. The petitions have been decided on the strength of their particular applications and even if it could be argued that they should not have been granted a faculty, that could not amount to a reason for allowing the present applications, so long as I apply my discretion to these applications fairly.

THE LAW

15. In my Note I set out the position in law and I repeat it in this judgment.
16. By s.65(4) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 the exclusive right to a burial place may not be granted or acquired by a parishioner or non-parishioner otherwise than by faculty on application to the Chancellor of the Diocese, the matter being entirely within his discretion.
17. Some parishes, especially those where there is limited space, have a policy periodically approved by the PCC – which typically provides that only those who have a significant or longstanding connection with the parish may reserve a space. In other parishes, and in my judgment the better approach, the policy is to resist all such applications leaving the parish in a position to comply with its legal requirements until such time as the churchyard is full.
18. Looking at the decisions of the Consistory Courts the pre-eminent factor in determining a petition for reservation will be the number of spaces remaining for future burials; where there are not many a faculty will normally be refused or granted for a limited period which is determined by the number of years left for which there is the space or to fulfil the needs of the parishioners.

19. The decision of Chancellor G H Newsom QC in Re West Pennard Churchyard [1991] 4 All ER125 sets out the principles affecting the grant of such discretionary applications:

- (a) At common law, every parishioner has a right of burial in the churchyard of the parish unless it is closed by due legal process;
- (b) The common law right extends also to all persons dying in the parish, whether or not they are parishioners;
- (c) By statute a similar right is enjoyed by all persons whose names are on the electoral roll of the parish;
- (d) 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;
- (e) 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'
- (f) These common law and statutory rights crystallise only when the person in question dies.

20. He said:

"[Where] 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.

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.”

21. As to the exercise of judicial discretion in cases of this type, Newsom Ch. made the following helpful observations:

“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.”

22. In Re St Nicolas, Pevensey 2012 Ch 136/11 Hill Ch. considered applications by a husband and wife, who had a long association with the church; they were married there and so was their daughter; their grandson was baptised there. After an absence abroad the petitioners returned in 2000 and thereafter played an active rôle in the life of the church. The remains of the wife's parents were buried in the churchyard. Although they had tried to get planning permission to build a house there, they were not resident in the parish. The application to reserve a gravespace was unanimously supported by the Parochial Church Council and the incumbent and when they did so they knew that the churchyard was likely to be full within two years.

23. Hill Ch. reviewed the law and relied on the judgment in Re West Pennard Churchyard. In refusing the faculty he said:

“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.

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.”

24. In Re St Benedict Biscop, Womborne [2019] Ecc Lic 2 Eyre Ch. said:

“The approach to be taken to reserving a gravespace in a churchyard is in part a matter of fact and degree. Any reservation has the potential for prejudicing the rights of others to be buried in the churchyard in

question. The court will, however, look at the practicalities of the number of remaining spaces in a churchyard and the likely level of usage with a view to considering the degree of risk that a reservation would preclude the burial in the churchyard of someone who would otherwise be entitled to be buried there before the interment of the person in whose favour a reservation is made. The greater the risk that the grant of a reservation would mean that a parishioner was prevented from being buried in the churchyard because the reserved plot was being kept vacant and unoccupied awaiting the later death of the person with the benefit of a reservation then the less appropriate it will be to grant a reservation.... Accordingly, regard is to be had to the available space and the degree of risk that the reservation will prevent a person entitled to be interred ... from being buried there when there would otherwise be sufficient space.”

25. In St John the Baptist Ashley 2020 ECC Lic 1 Eyre Ch. considered the application for a faculty from a petitioner aged 31 whose father and other relations were buried in the churchyard. 50 spaces remained and on average seven spaces were used each year. He concluded that the churchyard would be full within 7 years; to grant the faculty sought will prevent a parishioner with a right of burial in the churchyard from exercising that right and that she had members of her family buried there did not amount to the exceptional grounds which would be needed to justify the grant of a faculty.

DECISION: SUSAN AND HOLLY ATKIN

26. I will grant their application for a faculty. They are in their 70's and are both longstanding residents with strong connections to the church. There are additional compassionate grounds on which to grant the application.

DECISION: CATHERINE AND PETER FLOWERS

27. I will grant their application for a faculty. They are in their late 60's, they are both resident in the parish and are active supporters of the church.

DECISION: JANE GREEN

28. I refuse her application. She is only 34 years' old which is an age at which I would not normally consider allowing a reservation unless there were specific reasons, usually medical or strong pastoral reasons – such as the burial of a sibling at a young age – to support the application. She is not resident in the parish and there is no other connection with the church.

29. I accept that her father and grandmother are buried in the churchyard. In his judgment in Re West Pennard Churchyard, Chancellor G H Newsom QC stated that although 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.
30. In my judgment he was right to identify it as a further reason which might strengthen an application by someone with a legal right to be buried in the churchyard. He was not accepting that someone without that legal right gains a right to be buried there because a relative is already buried there. It is a factor which could affect my decision whether to grant a faculty in circumstances where there was space within a churchyard for burials for decades to come, but it does not provide a reason on its own for usurping the legal right of others to be buried in the churchyard.
31. I reject the submission of the incumbent that the decision to close the churchyard makes her application more tenable. In my judgment the requirements of s.88 of the Measure have to be followed until such time as the churchyard is full or the Order in Council is granted.

DECISION: DAWN AND JAMES WADHAM

32. I refuse their application. They are both young. They are not resident in the parish and there is no other connection with the church to support their application. For the same reasons as expressed above, the fact that Mrs Wadham's father is buried in the churchyard cannot on its own provide a reason to grant a faculty where there is so little space left in the churchyard.
33. I have not repeated the other grounds that I set out in respect of Ms Green, but they are equally relevant to this application.

POSTSCRIPT

34. I appreciate that my decision will be a disappointment to the unsuccessful petitioners. If cremation is an acceptable route it may be possible to reserve a

plot for the burial of cremated remains either within the grave of Mr Atkin, or beside it, or elsewhere in the churchyard. That may be something that the incumbent may want to discuss with them.

35. I invite the PCC to consider postponing any application to close the churchyard until such time that all available spaces have been used up by those who pursuant to s.88 have a right to burial there.

His Honour Judge Leonard QC
Chancellor of the Diocese of Ely
28th November 2020