

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

ST DUNSTAN'S CHEAM

JUDGMENT

1. This matter concerns a petition dated 21 December 2009 by the Rector and Churchwardens of St Dunstan's Church, Cheam for a faculty to build a new church hall on land to the east of the churchyard. The need for a faculty arises for reasons which I shall explain in due course.
2. St Dunstan's was built in 1864 and is listed Grade B. Planning permission and conservation area consent for the new hall was granted by Sutton LBC on 15 August 2007. Listed building consent (because Sutton LBC took the view that the development was within the curtilage of the listed building) was granted on 1 April 2008.
3. The petition has been publicised in the usual way and, because it affects graves, has been advertised in a local newspaper.¹ There have been no objections. The proposed church hall will provide important new facilities for the Parish. There is no separate room for children's work in the church and very little storage space. There is only one toilet and there are very limited catering facilities. Existing activities that would benefit from a separate hall include:

¹ A notice was also published on the Parish's website.

- Tiny Tots (50+ children and carers);
- Sunday service crèche (which currently meets in vestry but is limited to 10 children);
- Trailblazers (Sunday morning children's group now meeting in a remote hall);
- Friday drop-in;
- after-service refreshments (Sunday and midweek);
- catering for special events;
- choir/servers activities.

New groups that could be set up for which there is currently no space include a luncheon club and a pre-school group.

4. It is proposed that the building should occupy the site of an old shed-like building which stood to the east of the churchyard. No one is quite sure about the origins of this building, but it seems that it was originally connected with a farm which existed next to the church before the Second World War. The land on which it stands was acquired in 1935 together with other land which has been used as an extension to the churchyard. That other land was in due course consecrated, but the land on which the shed stood was not consecrated. It seems that about 20 years ago it was being used as a meeting place for a youth group, but more recently it was only used as a store. In 2004 it was severely damaged by fire.
5. Because the land on which the remains of the shed stand is not consecrated, if the proposal were limited to building on that land, there would be no need for a faculty. However it is not so limited, in three regards.

6. First, for reasons I am not aware of, the alignment of the new building is not quite the same as the old one. This means that a part of the western wall of the new building intrudes by a matter of a foot or so into the churchyard.
7. Second, a part of the churchyard will be used as a fenced off work site for the storage of equipment and materials during the construction of the new building.
8. Third, the construction of a new pathway through the churchyard from the Church to the new hall requires two gravestones and grave markers to be moved laterally (by about 3 feet 6 inches in one case and 1 foot 6 inches in the other).²
9. Before I turn to the detail, a point of principle arises. Although the churchyard at St Dunstan's has not been closed by Order in Council made under the Burial Act 1853, it is no longer used for burials. That is, it is no longer used for the burial of the bodies of those who have died. It is however still used for the interment of ashes – this occurs in plots throughout the churchyard. There is space for perhaps another dozen or so interments.³ The question arises as to whether Section 2 of the Disused Burial Grounds Act 1884 has effect to prohibit the construction of a building which is not a church nor an extension to a church.
10. Section 3 of the 1884 Act provides as follows:

² The requirement to provide the path comes about because it is necessary to provide a fire exit from the hall. The Rector tells me that the route of the path has been carefully planned to minimise disturbance to graves.

³ This arrangement is, in my experience, unusual. It is more common for space to be found in circumstances where there is no more space for burials for a Garden of Remembrance. The Vicar tells me that the Parish has identified an area which might be suitable as such a garden.

It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other place of worship.

11. Section 2 of the Act (“Interpretation”) provides as follows:

In this Act ... “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

“disused burial ground” means 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

12. The question arises as to whether a burial ground which is no longer used for burials, but which **is** used for the interment of ashes is a disused burial ground for the purposes of the 1884 Act.

13. Churchyards are closed by Order in Council under the terms of Section 1 of the Burial Act 1853:

In case it appears to her Majesty in Council, upon the representation of one of her Majesty’s Principal Secretaries of State that ... burials in any city or town, or within any other limits, or in any burial grounds or places of burial, should be wholly discontinued ... it shall be lawful for her Majesty, by and with the advice of her Privy Council to order ... that after a time mentioned in the Order burials in such city or town, or within such limits, or in such burial grounds or places of burial, shall be discontinued wholly ...

14. As is well known, this provision was addressed to the problem that the centuries old practice of re-using the space within a churchyard over and over again could not work in a densely populated urban area where the number of burials greatly exceeded the ability of the ground to accept them through the process of natural decay.⁴ It will be noted that the section refers to *burials*. This was the word selected by the draftsman as apt to describe the committal of the bodies of the dead to the ground. This is what, of

⁴ In 1819, the population of the parish of St Andrew, Holborn had a population of 30,000, and there were 700 burials per year: see *R v Coleridge* (1819) 2 B and Ald 806.

course, one would expect – both because it is the natural word to use (the Prayer Book title for the funeral service is *The Order for the Burial of the Dead*) and also because in 1853 the interment of ashes was unknown.⁵

15. As originally enacted, the Disused Burial Grounds Act 1884 applied only to burial grounds which had been closed by Order in Council. However in 1887, the Act was amended and the definition of disused burial ground was extended to any burial ground which was no longer used for interments, whether or not closed by Order in Council.⁶
16. On the face of it, it does not. This is because although the churchyard is no longer used for the **burial** of the bodies of those who have died, it **is** still used for the **interment** of ashes of those who have died. The only way the 1884 Act would operate to prevent the construction of a building which was not a church nor an extension to a church would be if **interments** in section 2 of the 1887 Act were interpreted to mean *burials [of the bodies of those who have died]*.
17. I should begin by noting that the word *interment* with the meaning of *burial* goes back to the 14th Century⁷, and is recorded in Dr Johnson's dictionary. Because *cremation* as we know it was not invented until the nineteenth century, anyone using the word *burial* in those periods is likely to have in mind the burial of a human body.⁸ Cremation as we know it today began in Woking in 1885.⁹ Against this background, I think it unlikely, although it is possible, that the draftsmen in 1887 had in mind both the burial of the

⁵ See further paragraph 18 below.

⁶ The definition of disused burial ground set out at paragraph 12 above derives from an amendment of the 1884 Act by the Statute Law (Repeals) Act 1993, but that amendment reflects the change made by the 1887 Act.

⁷ See the Oxford English Dictionary (2nd Edition: 1989).

⁸ Although of course the practice of cremation would have been well known from the classical period.

⁹ See Davies on the *Law of Burial, Cremation and Exhumation* (7th edition: 2002) at p196.

bodies of those who had died and also the interment of ashes when he used the word *interments* in the amendment to the 1884 Act.¹⁰

18. However even if I assume that the draftsman of the 1887 Act only had in mind the burial of bodies of those who had died when he used the word *interments*, it does not seem to me that it is appropriate to limit the meaning of that word to such burials.
19. This is because the word *interments* is entirely apt to cover the interment of ashes even though cremation was not generally practised in 1887; and I apply, if necessary, the following presumption of statutory interpretation identified in Bennion *Statutory Construction*.¹¹

*It is presumed that Parliament intends to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as **always speaking**. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as correct law.*¹²

20. Thus in *A-G v. Edison Telephone Co of London Limited*¹³ a telephone was held to be a telegraph within the meaning of the Telegraph Acts 1863 – 1867, although the first telephone was not invented until 1877. Examination of the cases referred to in *Bennion* shows that it may be difficult in any particular case to determine whether the presumption applies, but in my judgment the present is a clear case.

¹⁰ Examination of *Hansard* does not throw light on this. It may of course be argued that there was no reason why the word *interments* should have been used rather than *burials* unless the 1887 Act was intended to reflect the possibility of the interment of ashes. However it seems to me more likely than not that no distinction between burial and interment was being drawn.

¹¹ 5th edition: 2008.

¹² See p890.

¹³ (1880) 6 QBD 244.

21. As I have explained, it turns upon what is the appropriate meaning of *interments* in the 1887 Act and does not have reference to what the meaning of *burials* may be in the 1853 Act. I make this point because in the *Legal Opinions Concerning the Church of England*¹⁴, the following passage occurs

11. Faculties are often granted to permit part of the churchyard (including a closed churchyard) to be set aside for the interment of cremated remains.

22. This is obviously a view as to the meaning and effect of the Burial Act 1853. It does however potentially raise a question as to the application of the 1884 Act to a closed churchyard which is used for the interment of ashes. I am not called upon to consider that issue.

23. Against this background, I now need to consider the merits of the petition. The proposed hall will evidently provide new facilities for the Church, which no doubt will be generally useful as well as assisting the mission of the Church in Cheam. Although the hall itself will not itself be a consecrated building, its function is closely allied to that of the parish church, which **is** a consecrated building, and the extent to which it extends into consecrated ground is very limited. Accordingly I take the view that it is appropriate for the church hall to be permitted to “encroach” to a small degree upon the churchyard. It would no doubt be possible to design the new hall so that it does not encroach at all upon the churchyard but it does not seem to me that the basis properly exists for insisting that it should do so. Extensions to churches for this sort of purpose are very often permitted and, subject to appropriate safeguards, are it seems to me, appropriate.

¹⁴ Eighth edition: 2007. The legal opinions are those of the Legal Advisory Commission of the General Synod. As Professor McClean (Chairman of the Commission 1996-2006) says in his Preface: *Over the years [the Commission] has been served by many distinguished ecclesiastical lawyers and its Opinions have established themselves as authoritative.*

24. I do not think that the temporary use of the churchyard as a work site is objectionable.

25. I would prefer it if it were not necessary to move the graves for the construction of an access path to the hall. I think that it is not an altogether happy solution to end up with grave markers which appear to indicate a burial in a place where the particular person commemorated is not in fact buried: in a sense it is better for the grave markers to be removed altogether. Nonetheless no one directly interested in these graves has objected, nor anyone generally. In the circumstances, I consider it is appropriate that I should permit the graves to be moved.

26. Accordingly a faculty will issue as prayed for the construction of the new church hall, subject to appropriate safeguards to protect the churchyard and the remains of those buried in it.

PHILIP PETCHEY

Chancellor

27 April 2010