

**IN THE CONSISTORY COURT OF THE DIOCESE OF DURHAM
IN THE MATTER OF ST MICHAEL'S, HEIGHINGTON**

JUDGMENT

1. By a petition dated 10 February 2016 the Vicar and Churchwardens of St Michael's Church, Heighington petition to:

“1. survey the area of the churchyard added in 1926 to confirm the accuracy of the burial plans; and

2. survey those areas of the churchyard where there are no plans, identify prospective burial plots where there are no existing memorials and to use the plots identified when the area currently being used is full. Any recovered remains will be reinterred lower in the same grave (also called the ‘lift and lower’ method);

In both cases the survey will include the common practice of inserting rods into the ground”.

2. As is apparent from the petition, there are two main areas of the churchyard at St Michael's – the original older part, and a newer part which was acquired in 1926 on the site of the former vicarage.
3. I made an unaccompanied visit to St Michael, Heighington. Visiting the churchyard helped me to understand its layout and the proximity of some of the neighbouring homes.
4. The Diocesan Advisory Committee's Notification of Advice, of 3rd March 2016, recommended that the petition be approved by the court.

Public Notice

5. A preliminary point about the public notice under rule 6.3 of the Faculty Jurisdiction Rules 2015 was taken by Mr John Sowerby, who later became a party opponent. A public notice was displayed inside the Church on the notice board, but Mr Sowerby contended that two notices outside the church did not amount to valid notice: one notice attached to the church door was not in Form 4A and invited anyone who wished to comment on the proposals to write to the Vicar rather than to the Registry; and one notice which was in Form 4A was displayed on the notice board at the north western corner of the churchyard but was, he said, impossible to read from the road. The Chancellor therefore gave directions that public notices in Form 4A should be displayed also at each of the three entrances to the churchyard, and this was duly done.

6. I am satisfied that the requirements of rule 6.3 have been complied with. Indeed, the public notices certainly seem to have been effective. Many letters of objection to the proposals were received by the Registrar, both from people who are resident in the parish, and also from others who live outside the parish. In addition there has been an online petition of objection from 62 people, a manuscript petition of objection signed by 11 people, and the case has received attention in the local media.

Objections by interested persons

7. I have disregarded both the online petition of objection and the written petition of objection because there is no proof of the signatures of those purporting to support them, and also because, where the signatories' addresses have been stated, those addresses appear to be situated outside the parish. I have disregarded the written petition for the further reason that I do not know what representations were made to those who signed it. On this issue I have had regard to the judgment of the Court of Arches in *Re Emmanuel Church, Bentley* [2006] Fam at p50 G.
8. For the purposes of rule 10.1(h) I directed that those people making objections who are resident outside the parish and not on the electoral roll would be interested persons only if they had a relative buried in the churchyard. Pursuant to this direction there are, in total, 25 objectors entitled to be treated as interested persons, and two chose to become parties opponent. I have, in accordance with rule 10.5, taken all letters of objection from the interested persons into account in reaching a decision on the petition.
9. The two objectors who chose to become parties opponent were Mr John Sowerby and his adult daughter Miss Harriet Sowerby. Mr Sowerby objected to the proposals in Particulars of Objection dated 18 June 2016, in which he referred to and incorporated earlier letters he had written on 7 March and 29 April, and he also sent further written representations on 11 November. Miss Sowerby likewise objected to the proposals in Particulars of Objection dated 18 June. She had made earlier written representations by letters dated 29 April and 30 April. The parties opponent and the petitioners agreed that the proceedings may be determined on consideration of written representations instead of by hearing.
10. Miss Sowerby has very recently, by letter dated 21 November, notified the Registry that she does not wish to continue as a party opponent, but she asks that her letters of objection still be taken into account. Her application to withdraw as a party opponent comes at a very late stage, but I see no prejudice to the petitioners in the particular circumstances of this case. I do therefore direct that she ceased to be a party opponent with effect from 23 November, which is when her application was received. Nonetheless, I have taken her objections into account as an interested person.
11. Mr Sowerby and Miss Sowerby both live in a property which directly abuts the churchyard. There is no garden, wall or fence separating their home from the churchyard, and so the windows at the back of their house look out directly on to the older part of the churchyard. Consequently the view from their living room and from a bedroom upstairs is straight out over the churchyard. They have lived there since 2010. When Mr Sowerby moved into his home he understood from local people, incorrectly as it transpires, that the

older part of the churchyard was full, and therefore he believed there would not be any burials taking place right by his home. Had he known otherwise, he says, he would not have bought the property.

12. Although the Sowerby family have only relatively recently moved into Heighington, they have family connections with the village going back many years. Mr Sowerby's great grandfather, great grandmother and his cousin are buried in the churchyard. He says he has studied his family ancestry and has discovered what he describes as a large network of family from the village, a great many of whom would have lived in the village all their lives, and who may therefore be buried in the churchyard without any permanent headstone. He contends that he could therefore have relatives buried anywhere in the churchyard, including in the land directly outside his home. He objects to the petition because he is concerned that graves of his family members might be disturbed by rods being inserted into the ground, and their remains might be dug up. He would find it deeply upsetting if any remains were to be disturbed, especially since he would be able to observe clearly from his home what was going on. He points out that, in particular, children or babies might have been buried right by his windows, and he contends that it would be immoral and obscene to disturb their graves.
13. Mr Sowerby further makes the point that, because there have historically been many burials in the old part of the churchyard without detailed records having been kept, the petitioners' proposals would result in an extensive and wholesale disturbance of an unascertained number of human remains, and this would make substantial inroads into the principle of the permanency of Christian burial. It would, he argues, in effect amount to exhumation, and every such case should be decided on its own facts. He further contends that it would not be right to put a person into an existing grave of another person when they are not related to one another.
14. Mr Sowerby has an additional concern, namely that there would be a detrimental effect on his property, such as to affect its value and its saleability, if burials were to be conducted right by it and buried remains disturbed. He goes so far as to argue that his property would be blighted. Mr Sowerby asserts that if a faculty were granted, it would seriously affect the way he and his family enjoy their property. It would be distressing for them to observe a funeral service taking place outside their windows, with the lowering of coffins into the grave, and after that seeing regular visitors to the grave bringing flowers; it would be to them a constant reminder of death.
15. He maintains that this would be a substantial interference with the use and enjoyment of his property such as to be an actionable nuisance, and he also relies on article 1 of the First Protocol to the Convention for the Protection of Human Rights:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance

with the general interest or to secure the payment of taxes or other contributions or penalties.”

16. Mr Sowerby also contends in his written submissions that the churchyard is full so there should be no more burials. He maintains that the older part of the churchyard has been full for some time, and that even the newer part of the churchyard, i.e. the part in use since 1926, is now full.
17. Miss Harriet Sowerby’s objections are similar to her father’s. She describes it as obscene that there should be rodding of the ground and disturbance of people laid to rest in the graveyard. She too argues that since the Church does not have detailed records for the old part of the churchyard, it cannot be known what is below the surface or whose remains are being disturbed. She contends that it is immoral and unlawful to try to fit as many people as possible into the churchyard when it is already full, and that it would be disrespectful to those persons already buried there. Miss Sowerby is particularly anxious in case friends of hers or her parents were to be buried within feet of her bedroom and sitting room window, and she would have to cope, as she puts it, with the idea of their bodies slowly rotting next to her home. She criticises the proposals as cruel and not Christian. She, like her father, refers to the scenario of graves being dug right by their home, then burials taking place, and grieving mourners coming to visit the graves and leaving flowers – she describes it as being incredibly gloomy and it will result in her having to face death every day.
18. Letters of objection from interested persons who chose not to become parties opponent had common themes. Many of the objectors object to the proposals because they would lead to the disturbance of the remains of their relatives who have been buried in the churchyard going back over many years. Others, who do not have relatives buried in the churchyard, object because they are opposed to the disturbance of any remains. A number of objectors contend it would be immoral and disrespectful to the dead to reuse their graves. A minority view was that the churchyard would somehow be spoilt if more headstones were placed in it, and it would become like “a town cemetery” with “regimented rows of graves”, as one objector described it. There were calls for alternative plans to be properly considered and pursued, in particular, for inquiries to be made into the possibility of acquiring other land in the village to be used as a graveyard.
19. The grounds of objection of two people in particular need to be considered separately, namely the objections of Mr Ian Hall, and of Mr R A Owen. They are neighbours on either side of Mr Sowerby and Miss Sowerby.
20. Mr Hall objects because his sitting room, kitchen and dining room windows overlook the churchyard, and he believes there would be an invasion of his privacy if burials were to take place right outside. He has relatives buried in the churchyard and he does not wish to see any remains disturbed anywhere in the churchyard; he describes the prospect as immoral and objectionable, and contends that buried remains should be left in peace.
21. Mr Owen also has relatives buried in the churchyard, and does not wish to see them dug up and then someone else be buried on top of them. He suggests the PCC should have

had a meeting with neighbours, so that they could have been consulted on the proposals and given an opportunity to air their views before the petition for a faculty was presented.

The Petitioners' proposals and response to objections

22. The Statement of Needs from the PCC, dated 17 March 2016, explains the proposals in more detail, and states that the churchyard is open. The PCC intends to fill all the places in the new part of the churchyard where the vicarage was once situated. For this part of the churchyard there are burial plans, but the PCC wishes to ensure the plans, which date from 1926, are accurate. Once that area is full the proposal is to use the older part of the churchyard, which the petitioners say has been in use for burials since medieval times. Since it has been common practice to use headstones only since 1760, they acknowledge there are likely to be graves in this older part of the churchyard which are unmarked. The petitioners therefore intend to work with funeral directors to use rods to survey the land to discover where existing graves are, and they make it clear that: *"If we did come across any recognisable human remains we would, of course, re-inter them immediately"*.
23. The intention of the petitioners was re-stated and confirmed in an email dated 16 April 2016 from the Vicar to one of objectors, Mr Christopher Chapman. She writes:

*"You mention that you have relatives buried in our churchyard. Can I reassure you that we have no intention of disturbing **any** grave where it is possible to identify the person buried there, whether from the headstone or from our records, so there is no question of disturbing a grave which relatives would be able to visit, or whose location they could know.....What we are seeking to do is to find and use land where there are **no** remains, and there is no question of any remains being "dug up" or removed, as you say you fear in your email.*

To give you some background, the churchyard is over 1000 years old and there will have been about 8000 burials over that time. Until a couple of hundred years ago, it was normal practice to re-use burial plots on a very regular basis. This became less common as people began to place headstones on graves. Over the last 100 years St. Michael's has kept accurate records so we know where every grave is since then, but we also know where almost all graves are for much longer, as over the last 200 years nearly every grave has had a headstone. I cannot say that in the older part of [the] churchyard it is impossible that we could come across unidentifiable human bone fragments – partly because over centuries there is soil movement and such fragments can move. If we did so, then we would not dig them up but bury them deeper under the new grave. Should we come across anything remotely resembling a human skeleton, there would be no question of disturbing it and the grave would immediately be re-filled with the remains untouched."

24. In their response to the parties opponent (only one party opponent now) and the letters of objection, the petitioners made the following points:
- a. The church was built around 1140, and since records began in the 16th century there have been around 8,000 burials with plots being reused.

- b. There is only one churchyard – the older part and the post 1926 newer part are both part of the same churchyard, which has never been closed.
- c. The PCC accepts that there may be disturbance of remains and is seeking to minimise this by undertaking the survey.
- d. The churchyard is not a museum and the PCC is seeking to balance the current needs of the parish with the historic nature of the churchyard. There are no plans to remove or re-site existing memorials, and new memorials will be distributed throughout the churchyard continuing the existing variety of memorials spread through time (subject, of course, to compliance with the Churchyard Regulations).
- e. The re-use of burial plots is not against Christian doctrine or immoral, and the process of lifting and deepening where necessary is accepted practice, and the general objection to exhumation does not apply.

The Law

25. At common law every parishioner has a right of burial in the churchyard of the parish unless it is closed by due legal process (i.e. closed by Order in Council). The common law right extends also to all persons dying in the parish, whether or not they are parishioners. Under section 6(1) of the Church of England (Miscellaneous Provisions) Measure 1976 a similar right is given to all persons whose names are on the electoral roll of the parish. The incumbent has power at common law to prescribe the position in the churchyard where any burial is to take place. These principles were set out by Newsom QC Ch in *Re West Pennard Churchyard* [1992] 1WLR at p33, and followed by Hill QC Ch in *St Oswald, Methley with Mickletown* [2016] ECC Lee 2.
26. The result of being buried in consecrated ground is that the site is under the exclusive control of the Ecclesiastical Courts, and a body buried in such ground cannot be moved from its place of interment without the sanction of a faculty from the Consistory Court, (see Tristram QC Ch in *Re Dixon* [1892] P at p393).
27. Subject to the principle in the previous paragraph that a body or human remains in consecrated ground cannot be moved, there is in general no legal impediment to the re-use of old grave sites for fresh burials after a suitable period of time has elapsed; for this purpose no faculty is required except where the removal of gravestones is involved – see Halsbury’s Laws (5th ed.) vol 34, para 1084 footnote 11. A sufficient period to have elapsed was held to be 100 years in *St Nicholas Swayfield* (2003) 7 Ecc LJ 235, whereas for the diocese of Southwark, Chancellor Petchey has issued guidance indicating that 75 years is a long enough period to have elapsed for grave sites to be reusable. In *Re Caister Parish Cemetery* [2016] ECC Nor 3 Arlow Ch referred to this guidance from Petchey Ch and observed that it was indicative of the approach often taken in the Church of England. The view expressed in *Legal Opinions concerning the Church of England* at paragraph 13 of p254 (produced by the Legal Advisory Commission of the General Synod of the Church of England) is that a period of 50 to 100 years should elapse since the last known burial, the precise period depending on all the circumstances of the case.

28. In *Re West Norwood Cemetery* [2012] (noted in ELJ vol 14 p462), Petchey Ch observed:

“In recent years there have been concerns expressed about the shortage of burial space. One of the suggestions that has been made is that additional space could be made available within churchyards and cemeteries by the practice known as “lift and deepen”, i.e. lifting the remains in a grave and re-burying them at a greater depth in order to provide additional space. The Government consulted on such proposals in 2004. In its response dated 21 July 2004, the Cathedrals and Church Buildings Division of the Archbishops’ Council made it clear that it welcomed the practice of “lift and deepen” in respect of graves in consecrated ground and did not suggest the general objection to exhumation applied to it.

*I think this represents the correct approach. Historically, churchyards were used over and over again and to facilitate this it must have been necessary from time to time to lift and deepen. If remains are not moved, save to be placed deeper in the ground, it seems to me that this is not exhumation to which the presumption articulated in *In Re Blagdon Cemetery* applies. This facilitates the efficient use of burial space which it is clear is to be encouraged...*

This said, respect for the dead suggests that human remains be disturbed as little as possible.”

29. These observations of Petchey Ch concerning the re-use of burial space are consistent with those of Newsom QC Ch in *Re West Pennard Churchyard* (above) at page 34H:

“But I should point out that no churchyard is full and ripe for closure until all the parts of it in which reburial is possible have been buried over again at least once. And, until closure, all legal burial rights continue. Over the centuries churchyards have been buried in several times over and it cannot be said that a churchyard is nearly full by considering only the areas which have never been used for burials...It is the standard practise of [the] diocese [of Bath and Wells], and has been so for at least the last ten years, to advise parishes that the Department of the Environment will not allow the closure of a churchyard except after careful inquiry as to how far areas already used for burial can be used again.”

30. Recently, section 2 of the Church of England (Miscellaneous Provisions) Measure 2014 amended and clarified section 25 of the Burial Act 1957 so that a Home Office licence is not required before a body can be reburied deeper in the same plot of consecrated land.

31. In respect of Mr Sowerby’s contention that the petitioners’ proposals will amount to a nuisance, I rely on Halsbury’s Laws of England (5th ed) vol 78, paragraph 101 onwards, as setting out the relevant principles of law to be applied:

- a. A private nuisance is generally connected with the use or occupation of land which causes damage to another person in connection with that other's user of land or interference with the enjoyment of land or of some right connected with the land.

- b. Damage, actual, prospective or presumed, is one of the essentials of nuisance. Its existence must be proved, except in those cases in which it is presumed by law to exist.
 - c. Damage alone, whether actual or presumed, gives no right of action; the mere fact that an act causes loss to another does not make that act a nuisance. There must also be an act or omission which interferes with a person's use or enjoyment of land or some right over or in connection with land, commonly referred to as an 'unlawful act', although the activity complained of need not necessarily be unlawful of itself, and whether or not it constitutes a nuisance depends on the circumstances.
 - d. An act which in some circumstances does not constitute a nuisance may in others become actionable as such. Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself but by reference to all the circumstances of the particular case, including, for example, the time of commission of the act complained of, the place of its commission, the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights, and the effects of its commission, that is, whether those effects are transitory or permanent, occasional or continuous. Thus the question of nuisance or no nuisance is one of fact.
 - e. Every person is required by law to exercise his rights, whether over his own or over public property, with due regard to the co-existing rights of others, and an unreasonable, excessive or extravagant exercise of his rights to the damage of others constitutes a nuisance.
 - f. Owners or occupiers of land are legally entitled to use or occupy their land for any purpose for which in the ordinary and natural course of the enjoyment of land it may be used or occupied. An owner or occupier is entitled to the full use and enjoyment of his property in the ordinary manner of its use and for the ordinary purposes for which premises are designed, and, so long as he confines himself to such user and exercises such user and enjoyment in a reasonable manner, having regard to surrounding circumstances, he does not commit a nuisance in respect of his neighbour's property.
32. Article 1 of the First Protocol to the European Convention on Human Rights, which Mr Sowerby relies on, is incorporated into English law by the Human Rights Act 1998. Public bodies are required to act in ways that are compatible with the Convention, and a person who has been a victim of an unlawful incompatible act by a public authority is able to bring proceedings against that body, or to rely on Convention rights in any legal proceedings. Even in litigation not involving public bodies, English courts and tribunals, as public authorities, are themselves under a statutory duty to interpret domestic law (both legislation and the common law) in accordance with the rights granted by the Convention wherever possible.
33. Following the principles laid down in *Aston Cantlow* [2004] 1AC 546 it is clear that neither the petitioners nor the PCC of St Michael's Heighington are core public

authorities. Nor in applying for a faculty to regularise the use of the churchyard can they be regarded as ‘hybrid’ public authorities, as understood by that term in *Aston Cantlow*. They may be acting in the public interest, in a general sense, but they are still carrying out a church rather than a governmental function. There might be an argument for contending that the minister in conducting a funeral in the churchyard may be acting as a ‘hybrid’ public authority, (which, following *Aston Cantlow*, seems to be the position in respect of a minister taking a marriage service in church), but I do not need to decide that issue in light of other conclusions which I reach below.

Conclusions

34. I am satisfied, contrary to the assertions of the party opponent and Miss Sowerby, that the churchyard of St Michael Heighington is not full and has never been closed by Order in Council. Funerals may continue to take place there and the Vicar is entitled at law to prescribe where any burial is to take place – whether that be in the older part of the churchyard near the homes of some of the objectors or the part that has been used only since 1926. No faculty is required for this, but for the avoidance of doubt, my order will envisage that burials will continue to take place in the churchyard.
35. The use of rods to survey burial sites is a common practice. The rods are not used to prod remains, but to test the ground for soil density to indicate whether the land has been previously used for burials, and to make sure there are no obstructions for grave diggers such as rocks or tree roots. Surveying the churchyard is a sensible step for the incumbent and PCC to take, so that they can ascertain where available space in the churchyard may be found. I am not convinced that the petitioners need a faculty for this purpose, but for the avoidance of doubt, I shall grant a faculty.
36. In so far as the re-use of burial space is concerned, it is clear that the law permits it provided a satisfactory lapse of time has taken place since the previous burial, and it is clear, furthermore, that the Church encourages it. It is neither contrary to Christian doctrine, nor repugnant or immoral or otherwise objectionable.
37. The incumbent and PCC are entitled to use the churchyard for the purposes of burials – that is, after all, the natural and ordinary purpose of a consecrated churchyard. Indeed the incumbent and PCC are under a duty to so use it where the churchyard has not been closed, so that the burial rights of parishioners and persons on the electoral roll can be exercised. In doing so they commit no nuisance.
38. In any event there is no actionable damage in respect of the neighbouring properties. I do not accept the party opponent’s argument that his property would be blighted if burials once again take place in the old part of the churchyard adjacent to his home. The churchyard as a whole has been in constant use for the purpose of burials, both before and after 2010, which is when Mr Sowerby and Miss Sowerby moved into their home. Until a churchyard is closed by Order in Council there will always be the distinct possibility or likelihood that further burials will take place there. Even if no funerals have actually taken place in the part of the churchyard right by their property since 2010, funerals have taken place elsewhere in other parts of the churchyard, and would have been within sight from their windows. In so far as neighbours in homes adjoining the churchyard may be

upset at the sight of burials taking place right next to them, and the reuse of existing burial plots were that to happen, that is not damage or harm of which the law of nuisance takes account.

39. Article 1 of the First Protocol to the European Convention on Human Rights does not avail the party opponent. Even if the incumbent were a ‘hybrid’ public authority for these purposes when conducting a burial, I am quite satisfied on the facts that article 1 is not engaged. There would be no interference with the peaceful enjoyment of the party opponent’s possessions (within the meaning of article 1) when burials and re-burials took place in the churchyard, whether in the older or newer parts. Even if I am wrong in concluding there would be no interference, it is in the public interest that the space in the churchyard should be maximised, and the law clearly permits it.
40. Although the petition refers to reintering any recovered remains in the same grave by the lift and lower method, it is clear from the PCC’s Statement of Needs and from the Vicar’s email of 16 April 2016 that the proposals are more limited than might otherwise appear to be the case in the petition. The intention of the incumbent and PCC is to survey the churchyard so as to ascertain what space is available in the churchyard, and then having done so, to use only spaces where there are no remains – there being no intention to disturb deliberately any existing graves. That is a sensible course to take. Until the PCC knows how much unused land is still available in the churchyard for burials it is unnecessary to disturb known existing graves by reusing them. As and when the graveyard is known to be full, that would be the time to consider whether known plots should be reused. One of the factors to be taken into account at that time would be whether there was other suitable land available for burials in the village, and if so, what attempts had been made to acquire it – that is an issue that has not been explored in this faculty application.
41. Although there will be no intention to disturb deliberately existing graves, there is inevitably a risk, as recognised by the Vicar in her email of 16 April 2016, that human remains might be disturbed accidentally in the older part of the churchyard. This eventuality will be covered by conditions attached to the faculty.

42. A faculty is therefore granted:

- (a) To survey the area of the churchyard added in 1926 for the purpose of identifying and thereafter using plots for burials where no known burials have previously taken place, such survey or surveys to include the use of rods being inserted into the ground;
- (b) To survey other areas of the churchyard for the purpose of identifying and thereafter using plots for burials where no known burials have previously taken place, such survey or surveys to include the use of rods being inserted into the ground;

Subject to the following conditions:

- (a) If any disarticulated human remains are discovered, they must be reverently reburied in the churchyard as soon as reasonably practicable;

(b) If any articulated human remains are discovered, (i) they are not to be removed or otherwise disturbed; (ii) all digging or other work in the immediate area of the remains must cease forthwith; and (iii) further directions from the Court must be sought forthwith.

43. I direct that with effect from 23 November 2016 Miss Harriet Sowerby has ceased to be a party opponent.

44. The petitioners are to bear the court's fees arising from this petition, in accordance with the general rule.

Adrian Iles
Deputy Chancellor of the Diocese of Durham
8 December 2016