

Neutral Citation Number: [2022] ECC Chd 1

IN THE CONSISTORY COURT OF THE DIOCESE OF CHELMSFORD

IN THE MATTER OF HOLY TRINITY, PLESHEY: PETITION NO. 2021-062982

JUDGMENT

Introduction

1. There has been a Christian church in Pleshey since 1163. The present building, Holy Trinity Church, Pleshey, has served the villagers of Pleshey since the early 1700s, though it includes some remnants of a fourteenth-century structure. It was extensively remodelled in Victorian times. It is a grade II* listed building. Its rural setting is most attractive.
2. For centuries, Pleshey's villagers and the members of its congregation have been buried in its churchyard. There are tomb slabs from the fifteenth century within the church, and a number of eighteenth-century monuments in the churchyard, which attest to this. The Parochial Church Council are keen for the churchyard to remain open for burials. That is said to be an outward sign of the church's commitment to the local community. On average, three burials take place in the churchyard each year.
3. The local undertakers advise, however, that very little space for burials remains within the part of the churchyard that is currently "recognised for burials", to adopt the wording of the Petitioners' Statement of Significance. At the date of this petition, it was estimated that only five burial plots were left.
4. The Petitioners, who are the churchwardens and Priest-in-Charge, now apply for permission to use three additional areas within the churchyard for burials. In doing so, they recognise that it is possible – though, they suggest, unlikely – that these areas have previously been used for burials.

The three areas in respect of which permission is sought

5. I have been supplied with plans and photographs which identify the areas which the Petitioners wish to be designated for future burials. They are described in those plans and photographs as Area 1, Area 2 and Area 3 (or, together, "Areas 1-3").
6. Area 1 is an area of approximately 175m² on the west side of the churchyard. The Petitioners advise that it forms the eastern boundary of land which was acquired to enlarge the churchyard in around 1920.
7. Area 2 is on the eastern boundary of the churchyard and is an area of approximately 119m². It is shielded by three large yew trees.

8. Area 3 is to the south of the church, and adjoins a part of the churchyard which is currently used for burials. It comprises two rectangular blocks, in an L-shape; their approximate dimensions are 76m² and 156m² respectively.
9. The Petitioners do not believe that any of Areas 1-3 has previously been used for burials, and it certainly seems that there is no surviving written record which would indicate otherwise. However, in 2021 the Petitioners (very prudently) commissioned a geophysical survey of Areas 1-3, which was carried out by Messrs Peter Turner and Stephen Twist of Magnitude Surveys. In their report, which was issued on 19 April 2021, they advise that their survey *“has identified anomalies that may indicate the presence of sub-surface structures, though the form of these and the interference from roots and airwaves prevents any confident classification of these as vaults or brick lined tombs”*. The *“anomalies”* appear to be of especial concern in Area 3, where it is suggested that there is *“a strong and spatially extensive reflection”* which may indicate a buried structure. There are also reflections in Area 1 which indicate that the ground may have been disturbed or cut in a manner which would be consistent with earlier burials.
10. Accordingly, and even though the Petitioners maintain their view that it is unlikely that any of Areas 1-2 was previously used for burials, it seems to me that that is not a safe assumption. I therefore proceed on the basis that it is at least possible that part or parts of the land in respect of which permission is sought have been used for burials in the past.

The relevant law

11. The legal position in relation to the re-use of churchyard areas for burials is helpfully set out in the recent judgment of Morag Ellis Q.C., the Dean of the Arches, in Re All Saints, Biddenden [2020] ECC Can 1. She notes, at [11], that *“where a churchyard has not been closed by Order in Council, further burials may take place in existing graves on the authority of the Minister, without a faculty”*, but that this is subject to the provisions of (in particular) the Burial Act 1857, in particular s. 25 thereof, which provides that it is a criminal offence to remove human remains from ground that is consecrated according to the rites of the Church of England without a Faculty. That being so, it is always prudent to seek a Faculty in relation to the re-use of land which has been or may have been used for burials in the past, as the Petitioners have done in this case. Indeed, the Legal Advisory Commission of the General Synod, whose opinion on (amongst other matters) the re-use of churchyards is published as guidance on the Church of England’s website, makes clear that where re-use of a large area of land is intended, it is essential to obtain a Faculty.
12. In recent years, Faculties for the re-use of churchyards have been granted in a number of cases. In Biddenden (*supra*), it was noted at [14] that,

“Given the need to make best use of land and the Church’s resources, the practice is a sustainable and sensible one, subject to safeguards which can be secured by way of condition.”
13. Those safeguards include the following:

- (i) Selection of a suitable location, bearing in mind in particular whether there is any evidence of burials in the recent past. Biddenden suggests that an interval of at least 75 years should be allowed to elapse before re-use of land is permitted;
 - (ii) Taking account of the presence, age and legibility of any memorials on the land that is proposed to be re-used;
 - (iii) Consultation with the descendants of those commemorated in those memorials (or the Commonwealth War Graves Commission, where relevant);
 - (iv) Consultation with the church congregation and in the local community, in particular with organisations with a legitimate interest such as the Parish Council;
 - (v) The imposition of appropriate conditions relating to the reverent treatment of any human remains that may be exhumed, and to any archaeological discoveries.
14. It is also – perhaps self-evidently – necessary to consider whether there is any sensible alternative to the re-use of land.

Application of the principles to the present case

15. I have come to the clear view that the Faculty sought ought to be granted, subject to the imposition of appropriate conditions. I do so for the following reasons.
16. First, and as noted above, even assuming (as I have already indicated that I do so for the purposes of this judgment) that burials have taken place in the past in some or all of Areas 1-3, there is no evidence at all of *recent* burials. It appears unlikely that burials have taken place in any of those areas in the last hundred years, if at all. That in and of itself suggests that Areas 1-3 are appropriate locations for re-use. The risk of encountering human remains appears to be greatest in the case of Area 3, and I therefore propose to direct that Areas 1 and 2 be used first.
17. Secondly, there is no other land within the parish of Pleshey available for consecrated burials. Nor is there any prospect of further land being acquired. The Petitioners advise that in the 1980s, the Diocese sold land adjacent to the present churchyard. That land is thus not available to be used; further, its sale means that there is no longer access from the church's land to neighbouring farmland which might otherwise, at least in theory, have been capable of being used for burials.
18. It follows that the only alternative to making use of Areas 1-3 would be to close the churchyard for burials altogether. The Petitioners believe that this would have a negative impact on the mission and ministry of the church in Pleshey. They also consider that it would necessarily lead to an increase in cremations, which they regard as less environmentally friendly than burials. In the light of the first of those concerns in particular, I agree that re-use of existing land is preferable to petitioning for the closure of the churchyard.

19. Thirdly, and subject to one point which I propose to address by way of condition, I consider that the Petitioners' plans have been sufficiently publicised. Since the land sought to be re-used contains no (or no visible) memorials, there are no descendants who need to be identified and informed. No objections have been received from within the church community, nor in response to the Public Notices which have been displayed in accordance with the normal Faculty procedure.
20. The point to be addressed by way of condition is as follows: I consider that before any work is undertaken, the Petitioners ought to inform the Parish Council of their plans. I am told that they have not done so to date because this is not required by the Faculty guidelines. However, because of the additional sensitivities that arise, or potentially arise, where re-use of a churchyard is sought, it is generally appropriate to consult more widely within the community in relation to such a petition, which impacts not only on the members of the congregation but on the community as a whole.
21. In addition, the use of Areas 1-3 will need to be monitored sensibly by the PCC. If – contrary to expectations – human remains are encountered in large numbers, it may be necessary to seek further guidance, in the first instance from the Registry but if necessary from the Court. The PCC can and should exercise common sense here. For example, if digging double depth graves results in problems being encountered, but there is no issue with single depth graves, then double depth graves should not be used.

Conditions to be applied

22. I accordingly grant a Faculty on the terms set out in the Petition, subject to the following conditions:
 - (i) The Petitioners are to notify the Parish Council of their plans and are to allow them a period of 6 weeks within which to provide any response, before any works are commenced. If the Parish Council's response is negative, the matter is to be referred back to me.
 - (ii) The Petitioners are to procure, in accordance with the DAC's suggestions, that a topographical survey of the churchyard is undertaken which shows marked graves, the information that has been obtained from the geophysical survey and to which information can be added in the event that any discoveries are made when new graves are dug.
 - (iii) Areas 1 and 2, as identified in the plans supplied with the Petition, are to be used for burials before Area 3.
 - (iv) If any non-articulated human remains are disturbed in the creation of a new grave in any of Areas 1-3, they should be reverently and discreetly re-interred by the incumbent in the deepened grave before any new burial is added.

- (v) The use of the new Areas is to be monitored by the PCC. If difficulties occur in any of the Areas (in particular, if large numbers of human remains, or articulated remains, are uncovered during burials), the advice of the Registry is to be sought and burials should cease in the meantime.

- (vi) If other archaeological remains are uncovered in the creation of a new grave in any of Areas 1-3, the Diocesan Archaeologist is to be notified and, if he so advises, digging is to cease pending his investigation.

Philippa Hopkins, Q.C.
Chancellor

13 May 2022