

**IN THE COMMISSARY COURT OF THE  
DIOCESE OF CANTERBURY**

**ALL SAINTS, BIDDENDEN**

**In the Matter of a Petition to reuse defined sections of the churchyard for burials**

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**JUDGMENT**

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1. The Petitioners are the Revd Alexander Bienfait, Priest in Charge, and Ms Ann Courtness, Churchwarden of All Saints, Biddenden. They seek a Faculty authorising the reuse of two areas of the churchyard for burials. The relevant areas are as follows:

*"The 'West Door' Area A - Western middle of the churchyard. Creating 4 sections measuring 25.5mx5m, yielding 136 plots. The 'Yew Tree' Area B, - north eastern section of the churchyard measuring 9mx1.5m, yielding 6 plots. Each burial plot assumed to take 1.5m width, 2.5m long (3.75m<sup>2</sup>). This includes an allowance for suitable spacing between burials."*

2. The proposed areas have not been used for burials since 1850. It is intended that the primary area to be re-used is A with B held in reserve in case there are problems with A.
3. The Petitioners explain that they have encountered difficulties with maintaining proper order in the existing churchyard with items such as artificial flowers, solar lights, artificial grass and curbing being introduced; they state that such matters "*do not appear to be covered by the current churchyard regulations*" and they propose to require families whose loved ones are to be buried in the new areas to enter into an agreement to uphold the regulations, as is, evidently, the parish's current practice.
4. The Petition is authorised by unanimous resolution of the PCC passed on 5<sup>th</sup> November 2019.
5. The Church is listed at Grade 1. The 4 acre churchyard is consecrated, is still in use for burials and has not been closed by Order in Council. There are Commonwealth War Graves; these, and the village war memorial, are in a part of the churchyard which is not the subject of the Petition. There are no listed tombs, nor is there any known archaeological interest in the churchyard. The churchyard is crossed by two public footpaths.
6. The Petitioners' Statement of Needs explains that there are 4 burial spaces left. 30 spaces have been used over the preceding 13 years. If that rate were to continue, that would

therefore leave less than 2 years' supply. The PCC has considered the options, as described in the Statement of Needs:

- "1. *To create a new row below the existing current row. The PCC judged this to be impractical due to the tightness of space and in wet weather the area collects with water making it very muddy and slippery; carrying coffins there can be potentially dangerous. We also want to allow space along the hedge for a tractor to pass to maintain the hedge. (See uploaded photos 1 and 2)*
2. *Re-use other parts of the churchyard. The existing burial ground is a relatively large, 4 acres site; there are several large sections without tombstones. Local grave diggers argue that it is safe to assume that the immediate area around the church has been re-used several times. They argue that there was little point in rodding to find out about previous burials, as in areas older than about 60 years very little information would be gained. From previous experience in other churchyards grave diggers argue they seldom encounter human remains. Single depth burials would reduce the likelihood of digging up bones.*
3. *Create a new consecrated burial ground beyond the existing churchyard. Suitable land, that is in the ownership of the Parish Council, exists opposite the churchyard across the A262. An estimated half an acre or even quarter of an acre would be sufficient. The Parish Council considered this proposal in July 2018 but deemed the legal details would be too complicated to sort out, in addition there was no ambition on the part of the parish council to maintain a new graveyard.*
4. *Close the Churchyard for burial. This is unreasonable given the extent of land available."*

The Petitioners add in the Statement that they do not want to petition for closure of the churchyard which would deny parishioners the opportunity for burial within the parish. With regard to Option 2, which was the one chosen, the Petition proposes that some graves might be dug at double depth but that this would be monitored depending on the frequency with which human remains are encountered.

7. The DAC recommends the proposals for approval, subject to conditions.
8. The Petition has been subject to the statutory public notice and attracted no representations as a result. There is a letter of support for the proposals from Biddenden Parish Council, following Mr Bienfait's informal consultation of that body.
9. Photographs submitted with the Petition show that Area A is almost wholly free of memorials (there appear to be 3) and it contains only one shrub or tree, which is of no evident note. Area B is close to a large yew tree and contains no memorials.
10. I understand, from correspondence passing between Mr Bienfait and the Registry prior to submission of the Petition, that the memorials in Area A are believed to date from the eighteenth century. The details of the Petition make clear that the intention is to bury around these memorials and not to disturb them or any associated remains.
11. The legal position is summarised in a note prepared by the former Registrar of Oxford Diocese, the Revd Canon John Rees LLB and a note by the Registrar of Canterbury Diocese, Owen Carew-Jones MA, both of which were included with the supporting documents for the Petition. I have also consulted a relevant Opinion of the Legal Advisory Commission of the General Synod. The general position is 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. This position is, however, subject to specific considerations arising under the Burial Act 1857, s.25 of which makes it a criminal offence to remove buried human

remains without a licence from the Secretary of State or, in relation to land consecrated according to the rites of the Church of England, a faculty.

12. As Canon Rees points out, individual memorialisation and the general use of coffins are relatively recent phenomena in respect of most of the deceased. Prior to the late eighteenth century, reuse appears to have been common.<sup>1</sup> The Legal Advisory Commission Opinion states that no period of time between burials is laid down by law, though general considerations of decency and pastoral sensitivity suggest that there should be a lapse of at least 50 years and perhaps more, depending on the presence of memorials and the existence of any surviving relatives visiting the area in question. The Diocese of Southwark has published guidance to the effect that there should be an expectation of reuse of graves after 75 years.<sup>2</sup> A House of Commons Library briefing paper, "Reuse of graves"<sup>3</sup>, outlines the considerable consultation and debate on the issue which has occurred since the early 2000s, noting that the Government in November 2016 was considering whether or not to keep the matter under review in the secular context.
13. In the context of the faculty jurisdiction, I note the observation of Newsom Ch, in Re West Pennard Churchyard [1991] 4 AER 124, considering generally the question of reservations, who said:

*"The court is usually disposed to grant the reservation petition of a person who has a legal right of burial.....Such a case.....may be weakened if the churchyard is on the point of being full. Here there are said to be about 8 burials a year and some 24 spaces left in the churchyard. The latter statement presumably refers to spaces which have never previously been used. 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.....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...."*
14. More recently, faculties for re-use and/or survey for re-use, have been granted in the following cases, despite objections: St Mary and St Hugh Harlow [2018] ECC Chd 1; Re St Michael Heighington [2016] ECC Dur 3 (where the cases were helpfully reviewed by Iles Dep. Ch); St Oswald, Methley with Mickletown [2016] ECC Lee 2; Re Caister Parish Cemetery [2016] ECC Nor 3; St Nicholas Swayfield [2003] 7 ECC LJ 235. Whilst these decisions are not binding on me, they illustrate that re-use of areas containing or possibly containing old burials is a familiar practice in many other dioceses in both Provinces. 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. This is the first such Petition in Canterbury Diocese, which is why I have decided to issue this judgment, setting out relevant considerations for other parishes to bear in mind.
15. Clearly, the choice of location for reburials is important and linked to the question of the appropriate interval between burial phases in any particular part of a churchyard. This is because of the obvious fact that the likelihood of encountering and disturbing buried remains is greater the shorter the interval. I agree with the approach taken in the Diocese of Southwark's guidance to the effect that the period of 75 years is an appropriate minimum. The presence, age and legibility of any memorials must be taken into account; memorials are the property of the descendants of those whom they commemorate and, where it is possible to trace the owners, they should be consulted on any proposal to reuse relevant areas. Where war graves might be affected or nearby, the War Graves Commission should be consulted.

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<sup>1</sup> Taylor's Pocket Guide, "How to read a Church" notes an old gravestone inscription which said, referring to the practice of burying suicides, unbaptized infants and criminals on the north side of the church:

*"That I might longer undisturb'd abide  
I choos'd to be buried on this Northern side."*

<sup>2</sup> Diocese of Southwark, Reuse of Graves.

<sup>3</sup> Number 04060, 6 June 2017, by Catherine Fairbairn.

Given the sensitivity of the subject matter, it is also wise to consult organisations with a legitimate interest, such as the church community and the parish or town council.

16. In this particular case, there has been commendable consultation with the civil Parish Council, which is supportive. There are no known descendants of anyone who may be buried in Areas A or B, it is not proposed to remove any memorials and the War Graves are in another part of the churchyard. There are no objections to the proposal and the PCC have carefully considered all reasonable options. They properly give weight to the desirability of being able to continue to offer a Christian burial space to parishioners. On the evidence, it seems that the risk of encountering buried remains when preparing new graves is slight, especially in the case of single depth graves, but the existence of the faculty I propose to grant will remove any risk of non-compliance with the 1857 Act.
17. The Petition indicates that the introduction of various objects into churchyards is not covered by the Churchyard Regulations 2015. This is not the case. Regulation 1 expressly forbids the introduction of anything which is not expressly authorised pursuant to the Regulations; it provides: *"No object may be introduced into the churchyard without the written permission of the Minister in accordance with Regulations 3, 4 or 5 or the Commissary General of the Diocese."* Those Regulations deal with specific matters and do not permit any of the items referred to in the Petition. Regulation 6 is also relevant; it provides: *"This Regulation concerns artificial flowers. Artificial flowers may be permitted for a temporary period by the Minister. Rose bushes and other shrubs shall not be planted on individual graves."* I do not propose to give guidance as to the terms of the parish's agreement with relatives, save to say that it should not be inconsistent with the Churchyard Regulations 2015 and should refer to the Churchyard Guide which accompanies the Regulations and which gives further information in accessible language.
18. I shall grant a faculty subject to standard conditions concerning the reverent treatment of any human remains uncovered as burials occur and for the proper care and recording, as appropriate, of any archaeological artefacts. The DAC suggested that monitoring of the impact of the digging of the first ten graves should be undertaken with a view to reassessing the decision to grant a faculty. I am not convinced that this is practicable but note that the rationale for Area B is to allow it to be used if Area A proves problematic; I propose to leave the question of monitoring to the good sense of the parish, in dialogue, as required, with the DAC. I shall, however, impose the suggested conditions to prevent removal of any memorials in the relevant areas and prohibiting any form of delineation of the areas as a whole.



MORAG ELLIS QC  
30<sup>th</sup> March 2020