

Neutral Citation Number: [2021] ECC Swk 8

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF THE CHURCHYARD OF ST NICHOLAS'S CHURCH,  
CHARLWOOD

AND IN THE MATTER OF A PETITION BY PETER ANDERSON

### JUDGMENT

1. This is a petition dated 13 February 2021 by Peter Anderson, who is one of the churchwardens of St Nicholas's Church, Charlwood. Mr Anderson is also the Church Treasurer. By it he seeks permission

*To carry out repairs to three box tombs in the churchyard (dating from the late 18<sup>th</sup> and [early] 19<sup>th</sup> centuries).*

2. At a meeting on 11 March 2021, the PCC of St Nicholas's resolved to seek a faculty for these works. By its advice dated 9 February 2021 the DAC has recommended the works for approval by the Consistory Court.
3. The Court has received an objection to the proposals from Dr J Cuthbert who lives close to the church. This is dated 19 April 2021. She does not want to become a party opponent, asking me to take her concerns into account in reaching my decision.
4. St Nicholas's Church is an attractive and interesting mediaeval church containing remarkable mediaeval wall paintings of St Margaret and St Nicholas. The churchyard contains a number of fine trees and historic monuments and gravestones.
5. Box tombs deteriorate over the years. As regards two of them, the top slab is broken and needs repair if it is not to deteriorate further, presenting a potential safety hazard. As regards the other, the two (longer) sides have collapsed, leaving the top slab supported only by the two (shorter) sides. Unless it is repaired, this tomb, too, will deteriorate further and present a safety hazard.
6. In principle repairs of churchyard monuments are the responsibility of the heirs of those who erected them. Occasionally it happens that a family keeps a grave or tomb in good repair over the centuries but for this to happen is exceptional. In the present case, the owners of these three tombs is unknown. Thus the burden of maintaining them in practice falls upon the parish. In the present case, the local authority, Mole Valley District Council are prepared to pay the cost (some £1,779) and I here record the thanks of the parish and diocese for this grant.
7. In her objection, Dr Cuthbert raises a number of matters of concern as regards the churchyard. None of them could be a reason for refusing to grant a faculty for these essential repairs. Accordingly, subject to one matter, I shall direct that a faculty do issue.

8. The caveat is as follows. The “ecclesiastical exemption”<sup>1</sup> applies to listed buildings and to objects (not themselves listed) within the curtilage of a listed building<sup>2</sup>.
9. Although there is scope for argument about it<sup>3</sup>, it might appear that the tombs are within the curtilage of the church. Further, if the ecclesiastical exemption did **not** apply, then the tombs would be treated as listed buildings.
10. The DAC certified that in its opinion the work proposed would not be likely to affect the character of the church as a building of special architectural or historic interest. In the light of this, they did not advise that Historic England be consulted<sup>4</sup>. I cannot tell from this advice (given, of course, in the prescribed form) whether for this purpose they did or did not consider the three tombs to be part of the church.
11. It seems to me that out of an abundance of caution it will be appropriate that Historic England be consulted: if this happens no-one can say that due process was not followed and the key heritage stakeholder given the opportunity to comment on the substance of the proposals.
12. Because it seems to me unlikely that there will be any objection from Historic England to works which have been carefully designed to preserve the historic fabric of the tombs, I am going to direct that a faculty do issue subject to Historic England not making any representations on the petition within a period of 28 days of service of this judgment upon it (which may be electronically). If there are any representations the matter is to be referred back to the Court for further directions.
13. It would not be appropriate to part with this petition without saying something about Dr Cuthbert’s concerns, albeit they are not relevant to the petition.
14. The first is as to the management by the PCC of the churchyard trees. These are subject to a TPO made by the District Council. Mr Anderson tells me that the PCC have worked closely with the Tree Officer of the District Council in the management of the trees, obtaining the requisite consents where necessary. It does not sound as if Dr Cuthbert has any basis for complaint but, if complaint is to be made, it seems to me to be made to the Tree Officer of the District Council who will know exactly what has happened; and, by virtue of his role, represents the interests of what I may call the secular community.
15. The second is that at a music festival held in the churchyard in 2016 inadequate respect was shown to her family graves. Mr Anderson says:

*Over the years a couple of mistakes have been made when cordoning off the cremation area for the Music Festival but these have not been unintentional slights and have been put right when pointed out and apologies made.*
16. Dr Cuthbert says that no apology was made. I do not know why there are different recollections about this. I can at least add my apology to that of Mr Anderson. From a practical point of view I do know that it can be difficult to ensure use of churchyards like this without potentially

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<sup>1</sup> I.e. the exemption from secular listed building control arising by virtue of the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 2010 (SI 2010 No 1176).

<sup>2</sup> See article 3 (2) of the 2010 Order.

<sup>3</sup> See e.g. the discussion in *In re St George’s, Oakdale* [1976] Fam 210 (Salisbury Consistory Court). The true meaning of curtilage is the subject of on-going litigation: see *Blackbushe Airport v Hampshire County Council* [2021] WLR (CA). I should point out that (as a barrister in private practice) I appear for one of the parties in this litigation.

<sup>4</sup> It will not be necessary to consult the local planning authority: it is evidently well aware of the works.

causing offence. It does sound as if the problem has been solved and of course no-one would wish deliberately to cause offence to Dr Cuthbert.

17. The third matter is that in September 2020, her family grave was damaged and pot plants stolen from it. Mr Anderson tells me that (for whatever reason) the local police have not recorded this a criminal incident. It does not appear to be anything to do with the PCC. Although I can understand that Dr Cuthbert was distressed by what has happened, I do not think that there is anything that the church authorities can do.
18. Mr Anderson concludes his comments on Dr Cuthbert's objection as follows:

*Please be assured that the Priest-in-Charge and PCC are working with the best intentions to ensure that the churchyard is maintained as a safe environment so that everyone can enjoy it, and that it is treated with reverence and sensitivity.*

I am grateful for this assurance.

19. Finally as regards Dr Cuthbert's objection, Mr Anderson will have noted that, as it appears on the Online Faculty System, there is a short section of Dr Cuthbert's representation that has been redacted. This was because Dr Cuthbert did not want the Petitioner to see this part of her objection. The Registrar and I have both seen the redacted passage. It seems to me to bear upon a matter which might conceivably have arisen in the proceedings but, in the event, did not do so. As Mr Anderson will appreciate, it has not led me to conclude that the faculty should not be granted. If it had had a potential bearing on the outcome of the case, I would have given further directions as to a process to determine how that material was to be dealt with. As it is, it can stay redacted on the OFS and the un-redacted version destroyed.

PHILIP PETCHEY

Chancellor

26 October 2021