SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2019] SC GLA 33

GLA-B248/2019

NOTE BY SHERIFF A M CUBIE

in the application by

THE DIOCESE OF GLASGOW AND GALLOWAY
OF THE SCOTTISH EPISCOPAL CHURCH

For the disinterment of cremated remains
at the former Holy Cross Church

Background

[1] Holy Cross Church was an Episcopal Church in the north west of Glasgow. The applicant was the proprietor of the building and land. Due to a decreasing congregation in 2017 the applicant closed the church, all adherents joining alternative congregations. The building and land was sold to a business operating a children's nursery in 2017.

[2] Adjacent to the church is a memorial garden, which from time to time was used to inter cremains[1]. There are 107 recorded cremains in 96 plots. The memorial garden was part of the sale of the building. Part of the agreement arising from the sale of the building was that the applicant would remove the interred ashes at their cost and make good all damage by 25 June 2022.

[3] The applicant has identified a suitable alternative site in the grounds of St Bride's Church, Hyndland where they will prepare a new memorial garden incorporating the cremains and allowing for future interments. The applicant, in conjunction with the church

[1] Cremated remains are apparently properly referred to by the portmanteau term "cremains", although I note that the Burial and Cremation (Scotland) Act 2016 which comes into force on 4th April 2019 confines itself to defining "ashes" as the material (other than any metal) to which human remains are reduced by cremation.

management (vestry) of St Bride's, has investigated an appropriate new garden and the removal of the cremains.

Application to the Court

[4] This summary application first appeared before me in chambers when the applicant sought an order in terms of the first crave, seeking a declarator that:

> "All processes of disintegration have occurred at the memorial garden adjacent to former Holy Cross Church. And no warrant to disinter cremated remains is required for the disinterment of the remains within the memorial garden."

Processes of disintegration

[5] As a matter of law, as the applicant rightly recognises, there is no requirement for a warrant from the court to disinter bodies if the process of disintegration has occurred. In *Steel* v *St Cuthbert's* 1891 18 R 911 the Lord President said:

> "But it is a very well established fact, leading to a rule of law, that after a certain period human remains resolve into their original dust, and it is by no means necessary to maintain the ground, in which they are buried, intact."

[6] That appears to have as its basis a quotation from *Erskine* who dealt with burial grounds which had ceased to be used, when he said (ii. 1, 8):

> 'these, when they are no longer to continue such, should be sequestrated from the ordinary uses of property till the remains of the bodies there interred shall have returned to their original dust.'

[7] It is not clear that the test of whether all "processes of disintegration" have occurred can be read across to cremains. I note that the process of cremation as defined in the Burial and Cremation (Scotland) Act 2016 (which comes into force on 4 April 2019) can include cremulation (grinding) and indeed any other process; so there may be no further "process of disintegration" to take place so far as cremains are concerned. But it can hardly be correct

that cremains are not subject to some measure of control over their interment or disinterment.

[8] In *Steel* the original burial ground was closed by order of the sheriff in 1874 as it had become so crowded with interments as to be a nuisance under the Public Health Act, 1867. The church wished to extend into the burial ground. The period of time during which a body was expected to disintegrate into dust was established by evidence to be eight to ten years, allowing for a conclusion to be reached about the soil having returned to its natural state.

[9] Modern cremation gives rise to different considerations. If, as may be the case, there is no further process of disintegration to occur in relation to cremains, theoretically no warrant would be required for any interference with memorial gardens or other areas where ashes are buried or scattered, whatever the timescale between interment and interference. The absence of that natural period of disintegration could potentially impact upon the requirement for reverence, dignity and respect which the court takes into account in exercising its discretion. Accordingly in my view any intention to disinter cremains should involve an application to the court.

[10] I declined to grant the declarator sought in Crave One, on the basis that the material supplied did not establish that all processes of disintegration had occurred but principally because of the novelty of the application. I granted warrant for the applicant to serve the proceedings on interested parties and the Lord Advocate for the public interest.

[11] The applicant no longer insists upon Crave One.

Disinterment application

[12] The applicant and its agents were diligent in their researches to identify surviving relatives of those whose ashes were in the memorial garden and warrant was sought to serve on those traced.

[13] No respondent has intimated any wish to oppose the application. The Lord Advocate has indicated that he does not propose to intervene given that Crave One is no longer insisted upon.

[14] I now deal with the Crave Two, which is as follows:

> "To grant a warrant to the applicant to disinter the remains which are interred in the memorial garden adjacent to the southwest wall of the former Holy Cross Church."

[15] As narrated, the building is no longer a place of worship. It has been sold to be used as a nursery and the applicants wish to disinter and re-inter the cremains in an alternative garden due to the change of use and their obligation arising from the sale.

[16] I am satisfied from the material provided that the applicants have taken appropriate reasonable and practical steps to publicise the intention to disinter. Intimation was made to five individuals, none of whom challenge the application.

[17] The Diocesan architect provided information that there was no definitive method of burial for cremains (Report para 3.04-3.07). Three alternatives had been used over the years; burial in an urn, pouring of cremains into a specific site, or scattering over the garden. The memorial garden has a mixture of these methods. It is likely that about half of the area contains urns.

[18] The method of interment is not known for many of the cremains so the applicant, on advice, concluded that they would be unlikely to be able to disinter any single set of ashes.

This prevents any discrete arrangement for any individual set (and also fortifies the view that to consider that all processes of disintegration had occurred is potentially premature).

[19] The proposal is that after careful excavation under supervision, the entire volume of soil and material in the memorial garden will be removed to ensure that all of the areas with definite evidence of cremains will be included. It has been calculated at 7.5 cubic metres. The operation will be overseen by an archaeologist experienced at identifying cremains (Rebecca Shaw). The removed material will be carefully placed into the new memorial garden. The wooden crucifix, and those plaques and flower vases from the original garden which remain intact, will be reinstated. The new memorial garden will be completed by paving paths, laying turf and planting of flowers and shrubs into new beds.

Legal background

[20] There is apparently no authority dealing with cremains. Cuisine and Paisley in *Unreported Property Cases from the Sheriff Court* (2000) p 70 say, in terms, that there is no such authority and the researches undertaken for this have not identified any such case since then. I wish to record my gratitude to the staff of the Sheriff Court Library who were able to source additional material in relation to how such matters have been dealt with in Scotland and elsewhere.

[21] The law in Scotland has developed in relation to the disinterment of coffins. I consider that a parallel can be drawn. In circumstances where the permission of the court is required, a helpful starting point is the case of *Paterson Petitioner (No 2*) 2002 SC 160 in which Lord Carloway identified the broad principles which applied to bodies after interment as follows:

> "51. The broad principles of the relevant law affecting this case are best set out in summary by Lawrence Hill Watson, Advocate, in his introduction to subject of Burial and Cremation in Green's Encyclopaedia (2nd edn, Vol 2, para 1265) and I cannot improve upon his succinct statement of the position. After a body has been interred: 'the remains are sacred wherever they are interred; and so a grave is protected against disturbance, at least until "the process of disintegration is complete" (*Earl of Mansfield* v *Wright* [(1824) 2 Sh App 104]). There are two exceptions to this rule: (1) If those having the management of a public burial-ground are compelled to disturb the grave from considerations of necessity or high expediency (*Steel v Kirk-Session of St. Cuthbert's Parish* or (2) if the burial was in ground in which there was no right of burial (*Officers of State* v *Ouchterlony* [(1825) 1 W&S 533]*)*; in these cases disinterment appears to be permissible, on condition that the remains be reinterred with all decency and respect. In other cases authority to disinter and reinter may, on cause shown, be obtained from the Court of Session or (more usually) from the sheriff'…
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> 52. Where there is no right to be enforced but a person wishes to disinter remains for practical or other reasons then he may apply to the court for authority to do so. The court may grant that authority on cause shown. Because of the manner in which the general law regards remains, such cause would have to be something more than a matter of convenience (see e.g. the approach of the sheriff in *Nicholls* v *Angus Council* [1997 SCLR 941] at p 945 under reference to the various examples of applications under this head in Mr Brand's article at p 536)… the court [is] exercising a discretion whether or not to permit the disinterment having regard to all the circumstances."

[22] In *Nicholls* Sheriff Veal approached the matter as follows, having considered that the case required the court to exercise its discretion:

> "…The only way that the applicant can proceed is if the court grants warrant.
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> I have looked at the few cases where authority to disinter has been given. These cases are set out in paragraph 536 of the Stair Encyclopaedia, volume 3. Many of these cases have concerned the reinterment of foreign nationals in their country of origin. The case of *Sister Jarlath , Petitioner*[1908 SLT (Sh Ct) 72], was granted in the wholly exceptional circumstances where a religious order wished to extend an old persons' home into grounds which they owned, part of which had been utilised as a private cemetery in which forty-six members of the order had been interred. Indeed, Sheriff Principal Reid in that case stated that a private burial place 'may be dealt with by the owner like any other part of his property subject to the sole condition that, except for some good cause, the graves shall not be disturbed until the process of disintegration is complete'. The Sheriff Principal goes on to state:
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> > 'A court may permit those having the management of a public burial ground to disturb graves before the process of disintegration is complete if they are compelled to do so from considerations of necessity or high expediency.'
>
> … [I]n paragraph 535, volume 3 of the Stair Encyclopaedia, it is stated:

> '[E]xamples of good reasons are where a body has been buried in the wrong grave and where the relatives of a foreigner whose remains have been buried in Scotland wish to have them removed for reinterment in his home country.'"

Conclusions

[23] Standing that the issue of disintegration is not insisted upon, I conclude that remains including cremains are sacred wherever they are interred. The memorial garden and the cremains therein are protected against disturbance. Cause must be shown for the disinterment. The reason for disinterment must be necessity or high expediency - something more than mere convenience. The court should be satisfied that the remains are to be reverently reinterred, with dignity and respect.

[24] The applicant is bound contractually to remove the cremains; on one view, that obligation engages "necessity." But it is an unattractive proposition if applicants, by committing themselves contractually to a course of action, could elide the legal requirement by arguing for that self-imposed necessity. I consider that the court should look beyond the contractual obligation. The existence of that contractual obligation is relevant but not determinative and must be looked at in context.

[25] The context is this; the church building has come to the end of its useful life as a place of worship. The applicant has realised the church building in furtherance of their wider obligations to the diocese. The new occupier proposes use of the church and its grounds as a nursery, but whatever the intended use, the applicant recognises that the continued presence of the memorial garden is not consistent with a building no longer used as a place of worship. The applicant wishes to have another memorial garden and has taken steps to identify a location and work with the vestry to provide a suitable and appropriate

alternative, and has provided information in relation to the sensitive excavation, removal and reinterment of all material contained within the original garden.

[26] I am satisfied from the material presented that there is a necessity or high expediency in disinterring the cremains and that they can be disinterred and re-interred with decency and respect into an atmosphere and situation akin to the previous garden.

[27] I will grant the declarator sought in Crave Two.