

# Maintenance of monuments in closed churchyards

## Legal Advisory Commission Opinion

### Introduction

1. The purpose of this Opinion is to provide advice upon the extent to which a local authority, taking over responsibility for the maintenance of a churchyard under Section 215 of the Local Government Act 1972, thereby becomes responsible for the safety of monuments within the churchyard.

2. Section 215 of the 1972 Act applies specifically to churchyards closed by an Order in Council. The procedure for making such Orders is contained in Section 1 of the Burial Act 1853. A churchyard may have been entirely disused for many years but it would not on that account be described as a closed churchyard, nor would a churchyard where all further burials have been prohibited by a local Act of Parliament. Where the requisite Order in Council has been made, section 215(1) provides that,

*...the parochial church council shall maintain [the churchyard] by keeping it in decent order and its walls and fences in good repair.*

A PCC which is liable to maintain a closed churchyard under subsection (1) may however serve upon the appropriate local authority a request under subsection (2)

*...to take over the maintenance of the churchyard*

in which event, three months after service of the request

*...the maintenance of the churchyard shall be taken over by the authority on whom the request is served ...*

Subsections (2) and (3) contain additional provisions, irrelevant for present purposes, identifying the organ of local government which is actually to assume the maintenance responsibility.

### Relevant powers and duties of the parochial church council

3. The PCC is a body corporate which is entirely the creature of legislation. Its powers are derived exclusively from statute, measure or canon. They do not extend to ownership of the churchyard, the legal interest in which is vested elsewhere. Specific powers and duties in relation to the churchyard (as outlined in the following paragraphs) have however devolved upon the PCC.

4. Before the passing of the Parochial Church Councils (Powers) Measure 1921, responsibility for the maintenance of churchyards was borne by the churchwardens pursuant to Canon 85 of 1603. In the case of closed churchyards, Section 18 of the

Burial Act 1855 (now repealed, with a saving in respect of the City of London) enabled the churchwardens to recover the resultant expenses from the poor rate.

5. As from 21 July 21 1921, by the successive operation of Section 4(1)(ii)(c) of the Parochial Church Councils (Powers) Measure 1921 and Section 4(1)(ii)(c) of the Parochial Church Councils (Powers) Measure 1956, there were transferred to the PCC all the powers and duties of churchwardens in relation to open or closed churchyards.

6. Canon 85 of 1603, in a modernised form, became Canon F13 of the modern Canons of the Church of England:

(1) *The churches and chapels in every parish shall be decently kept and from time to time, as occasion may require, shall be well and sufficiently repaired and all things therein shall be maintained in such an orderly and decent fashion as best becomes the House of God.*

(2) *The like care shall be taken that the churchyards be duly fenced, and that the said fences be maintained at the charge of those to whom by law or custom the liability belongs, and that the churchyards be kept in such an orderly and decent manner as becomes consecrated ground.*

(3)....

Canon F14 reflected the transfer of the churchwardens' responsibilities to the PCC by providing that:

*...The things appertaining to churches and chapels, and the obligations relating thereto, and to the care and repair of churches, chapels and churchyards referred to in the foregoing Canons shall, so far as the law may from time to time require, be provided and performed in the case of parochial churches and chapels by and at the charge of the parochial church council.*

7. The drafting of Section 215(1) of the Local Government Act 1972 is consistent with Canon F13.2, Canon F14, and Section 4(1)(ii)(c) of the Parochial Church Councils (Powers) Measure 1956. Whether a churchyard is open for burials, or closed by Order in Council, precisely the same duty to maintain it falls upon the P.C.C. concerned until the obligation to maintain has been taken over pursuant to Section 215(2) of the Act. The content of the duty is expressed throughout the legislation in almost identical terms, there being no material difference between a churchyard being kept 'in decent order' and 'in such an orderly and decent manner as becomes consecrated ground'.

### **The duty to maintain monuments**

8. Churchyard monuments, whether ancient tombs or modern memorials, are not annexed to the freehold but remain private property. The legal complexities concerning the devolution of title to monuments are identified in the Commission's Opinion, *Churchyards: Ownership of Monuments and Trees*. The owner of the monument is the

party primarily liable for maintaining it in a safe condition, and may have to satisfy a claim for damages if injury is caused by a negligent failure to keep it in good order.

9. In the case of a churchyard maintainable by the PCC under Canon F 13.2 or Section 215(1) of the Local Government Act, a liability for personal injury (secondary to that of the owner) may arise by reason of the failure of the PCC to exercise its powers in relation to a dangerous monument. These powers are also identified in the Commission's Opinion, *Churchyards: Ownership of Monuments and Trees*. They are ancillary to the duty to keep the churchyard 'in decent order' or 'in an orderly and decent manner', a concept which extends beyond its cosmetic appearance. Safety to the public is one necessary aspect of what, in the context of a place of burial, amounts to 'decency'. Thus in *The Vicar and Churchwardens of St Botolph Without Aldgate v Parishioners of the Same* [1892] P 173, the Chancellor of London held that the filling and levelling of a dilapidated vault came within the duty to keep the churchyard in a sanitary and decent order.

10. The existence of the general duty to maintain the churchyard, coupled with the power (under faculty) to make safe any dangerous monument there, constitute a sufficient degree of control for the PCC to be liable as an occupier under legislation considered at paragraph 14 of this Opinion.

### **Consequences when maintenance is taken over by a local authority**

11. The drafting of Section 215 of the Local Government Act 1972 demonstrates that, after a request has been made for the appropriate authority to maintain a churchyard, the responsibility of the PCC will in its entirety pass to the authority, leaving the P.C.C. without any residual maintenance obligation in respect of that churchyard. So much is clear from the phrase 'the maintenance of the churchyard shall be taken over' which appears in subsection (2). The words 'taken over' themselves signify a complete transfer from one entity to another. Their meaning is reinforced by the unqualified reference to 'the maintenance of the churchyard', which relates back to the expression 'the parochial church council shall maintain' in subsection (1). The remaining words in subsection (1), which appear after those just quoted, only serve to define the content of the statutory duty to maintain, and do not create separate self-standing duties with regard to walls or fences.

12. Where notice is properly served under Section 215, it is not open for the local authority to agree with the PCC to limit its maintenance liability or to confine it to particular areas in the churchyard whilst including liability in respect of others. The recent decision in *Lydbrook Parochial Church Council v Forest of Dean District Council* (heard in Gloucester County Court before District Judge Thomas in December 2003 and noted at (2004) 7 Ecc LJ 495), reinforces the legal position that the duty is one of substantive

maintenance and not merely management of decline (see generally *R v Burial Board of Bishopwearmouth* (1879) 5 QBD 67 at 68) nor is it conditional on adequate funds being available.

13. By Section 215(2) the PCC is therefore wholly divested of its duties under subsection (1), which are also co-extensive with the duties imposed by Canons F13.2 and F14. The canonical obligation does not survive the transfer of function under Section 215(2) because the canon only operates 'so far as the law may from time to time require'. Thus the canon on its own terms is supplanted by the local authority's legal duty under the Act. It follows that there is nothing of a mandatory nature left for the PCC to do by way of churchyard maintenance.

14. The legal responsibility for injuries arising from the state of land, or property annexed to land, is predicated not upon ownership but occupation. The duty of care is articulated in two Occupiers' Liability Acts, that of 1957 in respect of those lawfully on the land (styled 'visitors'), and that of 1984 for trespassers. An occupier is someone who has control over the land in question. Since control may be shared (for example, as between a landlord and a tenant) two or more persons may simultaneously be occupiers. See *Wheat v E Lacon & Co Ltd* [1966] AC 552. The owner of a monument exercises control over it, and hence owes a duty of care under these statutes. Following a Section 215(2) transfer, the element of control which is the necessary foundation of an occupier's liability passes from the PCC to the local authority. Even if in particular circumstances a PCC is found voluntarily to have retained some residual control over the churchyard, it is entitled to claim an indemnity or contribution pursuant to the Civil Liability (Contribution) Act 1978 from the local authority whose breach of duty occasions injury.

15. The operation of Section 215 of the Local Government Act 1972 has no effect upon the primary liability of the owner of a monument. The secondary liability, however, is taken over by the local authority under Section 215(2) as one aspect of the duty to keep the churchyard in decent order. The local authority thereby acquires sufficient standing to apply to the Consistory Court for a faculty empowering it to make safe dangerous monuments. See generally *Re Keynsham Cemetery* [2003] 1 WLR 66 (Bath and Wells Consistory Court), and *Re Welford Road Cemetery* (2006) *Times* 2 November (Court of Arches). Where there is an emergency involving interests of health and safety, the Consistory Court has special powers under Rule 13(10) of the Faculty Jurisdiction Rules 2000 to grant a faculty at short notice.

### **Employer's Liability**

16. The law as outlined above has further consequences for a local authority whose workforce is engaged in churchyard maintenance. The churchyard thereby becomes a 'workplace' for the purposes of the Workplace (Health, Safety and Welfare) Regulations 1992. Under Regulation 4 of those Regulations the employer has duties in relation to the

safety of any workplace under his control, while parallel duties are imposed upon any other person having control of a workplace.

17. Where the workplace is a closed churchyard the maintenance of which has been taken over by a local authority, the duty to maintain it, associated with the power to seek any necessary faculty from the Consistory Court, gives rise to the requisite control under Regulation 4. If a dangerous monument constitutes a hazard to the authority's workforce (whether directly employed or not) the duties under the Regulations require the authority to take the necessary steps to obviate the hazard. In doing so the authority has to plan and conduct its operations in such a way as to comply simultaneously with the Regulations, Section 215(2) of the Local Government Act 1972, and the requirements of the faculty jurisdiction. Compliance with each of these legal regimes is mandatory.

### **Conclusion**

18. The legal position may be summarised as follows. The primary responsibility for the safety of a monument in a churchyard closed by Order in Council rests with the owner of the monument. If the owner defaults, a secondary responsibility is imposed upon the body having the duty to maintain the closed churchyard. This may be the PCC, pursuant to Section 215(1) of the Local Government Act 1972. Where, however, a local authority has taken over the maintenance of the churchyard under Section 215(2) its maintenance obligation extends to the safety of the monuments there. In that event the PCC is discharged from further liability as from the time of transfer and, if sued for injury caused by a dangerous monument it is entitled to seek indemnity or contribution from the local authority.

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