

Re Holy Trinity, Bosham

Mr Timothy Briden of Counsel instructed by Messrs Brutton & Co, solicitors, of West End House, 288 West Street, Fareham for the Petitioners.

Mr Justin Gau, acting archdeacon, as Counsel to the Court.

Judgment

CONFIDENTIAL

This judgment is embargoed until 10.30 am on Wednesday 10 December 2003.

1. As every schoolboy knows, King Harold was killed at the battle of Hastings in 1066. He was hit in the eye with an arrow. He is reputedly the only king of England since the time of Edward the Confessor whose final resting place is unknown. The issues before me in this petition include whether or not his mortal remains are interred at the foot of the chancel steps in the ancient church of Holy Trinity, Bosham. The consistory court was convened in the parish church immediately above the location in question. The case for the petitioners was advanced by Mr Timothy Briden of counsel. The evidence was tested by Mr Justin Gau of counsel who had been appointed acting archdeacon to act as counsel to the court. I am grateful to both counsel for the skill and economy with which they dealt with the complex scientific, historic and archaeological issues raised and for their assistance on the doctrinal and legal questions involved.

The petition

2. By a petition dated 26 June 2003, the incumbent and churchwardens of the parish seek a faculty to authorise the following works: 'Archaeological investigation of two grave sites in the nave, to be followed by complete restitution of the area.' This is a somewhat innocuous shorthand for a specific project more fully explained in the parish's Statement of Needs dated 18 February 2003. This commendably detailed Statement sets out factors indicative of a nexus between the parish and King Harold II. Amongst the matters referred to was the depiction in the Bayeux Tapestry of Harold's visit to 'Bosham Ecclesia' in 1064; excavations in 1865 which exposed a child's tomb reputed to be that of the daughter of King Canute; and the opening up in 1954 of a tomb which contained bones believed to be those of King Harold. Reference was made to the possibility that there may be another grave nearby and to interest which had been shown by television companies in the story of Harold.

3. The Statement of Needs went on to assert that,
'the parish will be very glad to have the most authoritative possible investigation of what is, may, or may not be under the floor of the church. The opportunity for the graves to be examined and assessed by the best available experts, using modern technology, is very welcome, particularly because substantial disruption to this area of the nave floor is required now, because of continuing problems with rot to the wooden area ... [and] the proposed investigation and archaeological study will be fully funded by the [television] production company.'

It refers to the comparatively new technologies of carbon dating and DNA testing. Implicit in the proposal is the exhumation of such human remains as may be found. The Statement of Needs continues:

'The investigation would form part of a substantial, serious, and not sensational, television programme about the death and burial of Harold ... [I]t is the very fact of the present mixture between history and conjecture which justifies an attempt to get closer to the truth, even if a full scientific resolution cannot be guaranteed.'

4. To this Statement of Needs was annexed a summary of the arguments for the case that Harold may be buried at Bosham. The proposal documentation included a draft Method Statement from Development Archaeology Services. Under the heading 'Objectives of the Excavation' at paragraph 2.1 it is stated: 'To locate and record burials [two] under the nave of Holy Trinity Church Bosham. After archaeological recording make faunal/skeletal material available for recovery by selected specialists for subsequent scientific analysis'. The methodology of DNA testing is set out at paragraph 3.21.
5. The proposal which I have merely summarised above was made the subject of timely and appropriate consultation with the Council for the Care of Churches and with English Heritage, together with the archaeological departments of West Sussex County Council and Chichester District Council. None of the consultees evinced any support for it. Advice was sought from the Diocesan Advisory Committee on the basis of the proposal set out in the Statement of Needs. This resulted in a decision not to recommend the works. A certificate to this effect was issued on 13 June 2003. The Council for British Archaeology and the Society for the Preservation of Ancient Buildings declined to comment on the proposal.
6. The petitioners' case, however, was somewhat modified both prior to and during the hearing. In opening, Mr Briden abandoned the proposal to open up the second of the coffins and to examine the contents thereof. In closing, the focus had moved further. DNA testing of the remains seemed no longer to be the dominant objective, although this was revived to some extent in a letter received subsequent to the hearing to which I shall return. Instead, Mr Briden urged upon me a threefold gradated approach to the petition. He invited me first to consider a detailed archaeological investigation, secondly the opening up of the putative coffin of Harold, and thirdly the authorisation of the removal of a sample of bone

for destructive testing. I regret that this superficially attractive course belies the complexity of this case.

Witnesses

7. For the petitioners, Mr Briden called Mr Timothy Tatton-Brown, consultant archaeologist, Mr Richard Meynell RIBA, the parish's inspecting architect, and Canon Thomas Inman, the incumbent. Each read his witness statement, which was supplemented by some further evidence-in-chief, and was then cross-examined. There was little that proved contentious. Mr Tatton-Brown produced a detailed report dated 29 January 2003 by Professor James Campbell, FBA, Professor of Anglo-Saxon History, Worcester College, Oxford. Mr Meynell produced a copy of the Church Guide 'The Story of Holy Trinity Church, Bosham', revised in 1995 by the late Geoffrey W Marwood; a pamphlet entitled 'The Stone Coffins of Bosham Church' also by Mr Marwood; and a copy of a draft Method Statement from Development Archaeology Services. In the immediate run up to the hearing, two further Method Statements, each prepared by Cambrian Archaeological Projects, were filed in substitution for the original draft. The most recent was a second revision dated 6 November 2003. Canon Inman produced two publications by John Pollock, one entitled 'Bosham: Ecclesia - A Speculative Guide to Bosham Church c 1066' (third edition, revised, 1999) and the other 'Harold: Rex - Is King Harold II Buried in Bosham Church?' (1996). The latter included a 2002 supplement to the fourth edition. Dr Mark Thomas, senior lecturer in the Department of Biology at University College, London was not called to give evidence. Counsel had agreed that his statement of 26 September 2003 be admitted in written form together with the written answers to certain pertinent questions settled by Mr Gau. Further, during Mr Briden's closing submissions, in a *coup de theatre* rarely witnessed in the consistory court, he led evidence of certain scientific tests, the results of which Dr Thomas had telephoned to his instructing solicitors. This was later reduced into writing in a short statement dated 1 December 2003. I also received in evidence a witness statement from Mr Peter Huggins, an amateur archaeologist with a particular interest in Waltham Abbey.

8. Mr Gau called no evidence since both he and the Venerable Roger Combes, Archdeacon of Horsham, in whose place he stood, were entirely neutral on the merits of the petition. I then heard from Dr Joseph Elders of behalf of the Council for the Care of Churches, Miss Judith Roebuck representing English Heritage, and Mr Martin Brown, formerly archaeological advisor to the Chichester Diocesan Advisory Committee who gave the views of the committee. Each read their statements and were questioned on them. As with the petitioners' witnesses both the factual and opinion evidence were largely uncontroversial. I received evidence in written form from Mr Mark Taylor, senior archaeologist at West Sussex County Council, and from Mr James Kenny, archaeological officer with Chichester District Council. I wish to record my thanks to the petitioners for the proactive manner in which they engaged in the consultation process, and to all of the consultees for their very helpful responses. It has greatly assisted the court.

Historic evidence

9. Long tradition runs that King Canute, who succeeded the English throne in 1017, had a home in Bosham. His daughter reputedly fell into the mill-stream behind the church and was drowned. In 1865, the then vicar took it upon himself to test the belief that she lay buried in the nave in front of what is now the chancel arch. On 4 August 1865, a stone coffin was found a few feet beneath the level of the floor in which were the remains of a child of about 8 years. According to the Church Guide at page 7, 'the coffin was of rude workmanship, and was pronounced by archaeologists to be undoubtedly of the date of Canute'. It was left open for about three weeks for public view and then reburied. Fortunately, for the purposes of these proceedings, I am not asked to determine whether or not these remains really are those of Canute's daughter as a memorial tablet erected by the children of the parish in 1906, albeit in the wrong location, positively asserted. I note, however, that Mr Kenny helpfully directs enquirers to D W Peckham, 'The Bosham Myth of Canute's Daughter' (1970) *Sussex Notes and Queries* XVII, 6, 179-184.

10. In 1954, it was decided to replace the Victorian flooring with the present paving and at the same time the child's coffin was reopened. The Church Guide continues:

'To the great astonishment of the excavators, they found, close to the little girl's coffin, a second, beautifully carved Saxon coffin, previously undiscovered. This contained the remains of a stockily built man with evidence of an arthritic hip joint. Much speculation ensued as to who this was and the suggestion was made that it was Godwin [the great Earl of Wessex] himself. But, as the Anglo-Saxon Chronicle clearly states that Godwin died at Winchester in 1053 and was buried there, the theory is untenable.'

The excavations of 1865 and 1954 are more fully described in Geoffrey Marwood's booklet, 'The Stone Coffins of Bosham Church'. It was rightly posited by Mr Briden that the excavation of 7 April 1954 was performed unlawfully, there being no faculty in place. However, as he also pointed out, it had something of an official flavour, there being some nine witnesses present including the Archdeacon of Chichester, the church architect, a surgeon, and a representative of the Ministry of Works.

11. At page 4 of the 'The Stone Coffins' there is the following description of the newly discovered coffin:

'[It] was made of Horsham stone, magnificently finished, and contained the thigh and pelvic bones of a powerfully built man of about 5ft 6ins in height, aged over 60 years and with traces of arthritis. Whoever was buried here must have been a person of great importance to have been placed in such a prominent position in the church next to a King's daughter.'

It is also stated that it was probable that the coffin was opened at a much earlier

date and the contents vandalised as there was in 1954 no trace of a skull and the remaining bones showed signs of fractures which would not have occurred with natural decomposition.

12. Mr John Pollock, who was present at the hearing but was not called to give evidence, seeks in his booklet 'Harold:Rex' to make the case for the remains being those of King Harold. He acknowledges certain discrepancies, for example Harold died at the age of 44, significantly younger than the age suggested following the 1954 examination. However he refers to Dr J P O'Sullivan, chief pathologist at St Richard's Hospital, Chichester, who formed the view from photographs that the grave contained part of the fractured femur of a left leg. Dr O'Sullivan agrees (although it is unclear with whom) that if the fracture occurred in life, then death must have followed within a week. Mr Pollock makes reference to *Carmen de Hastingae Proelio* (the Song of the Battle of Hastings) attributed to Guy, Bishop of Amiens from 1058-1075. The poem gruesomely records Harold's final moments as he is encompassed by four French knights:

'With the point of his lance the first [Duke William] pierced Harold's shield and then penetrated his chest, drenching the ground with his blood, which poured out in torrents. With his sword the second [Count Eustace of Boulogne] cut off his head, just below where his helmet protected him. The third [Hugh of Ponthieu] disembowelled him with his javelin. The fourth [Walter Giffard] hacked off his leg at the thigh and hurled it far away. Struck down in this way, his dead body lay on the ground.'

It may be that the legendary arrow in the eye merely incapacitated Harold and that it was through the work of this raiding party by which he met his death. However, the Saxon historian R H C Davis describes the foregoing passage as 'the most impossible scene in the whole poem'. A later account by William of Malmesbury also emphasises a leg wound.

13. Further, Mr Pollock seeks to justify the anonymity of the grave as follows:

'It is understandable that William had no wish to establish a shrine or any form of memorial to Saxon times which might develop into a focus for discontented interests in the unsettled years which were bound to follow the Conquest. His refusal to hand over the corpse to Harold's own mother, Gyda, for burial instances his discretion. She, surely, would have wanted her son to be buried in Westminster with the Confessor or in Winchester where all the earlier Saxon kings, and her own husband, had their resting place. Both of these sites were potentially places of pilgrimage.'

He also makes reference to the pictorial representation of the events as they appear on the Bayeux Tapestry. In a scene in the tapestry which shows Harold being cut down by a horseman it looks as if the King is being struck on his left thigh. Certainly the historic embroidery portrays Harold stopping to pray in Bosham church before he started from Bosham on his ill-fated journey to Ponthieu and Normandy in 1064. A reproduction of this section of the Tapestry now hangs on the north wall of the church.

14. Against this background, the petitioners commissioned a report from James Campbell, Professor of Anglo-Saxon History and Fellow of Worcester College, Oxford, to investigate the claim. In his paper 'Could King Harold II have been buried at Bosham?', he describes Mr Pollock's case, which I have outlined above, as 'unconvincing'. Professor Campbell accepts that the incompleteness of the skeleton at Bosham and particularly its headlessness tends to support the hypothesis that the remains are those of a battle casualty. He makes reference to dismemberment and decapitation of enemy corpses in eleventh century warfare. However, he also ventures that the translation of 'coxa' in the Carmen is more likely to mean 'genitals' than 'thigh' or 'femur'. The Carmen records '*Heraldi corpus collegit dilaceratum*' (translated by Barlow as 'He assembled Harold's mangled body').
15. Professor Campbell also considers and discounts the traditional understanding that Harold was buried by the sea. References to this effect appear in the Carmen and in the accounts of William of Poitiers and Ordericus Vitalis. William seems to lay aside the title of Duke and assume the royal title beside the tumulus following the cliff top funeral and he distributes alms to the poor. However, Professor Campbell states that by far the most plausible and detailed account of the burial of Harold is of his interment at the house of secular canons at Waltham, which had been lavishly endowed by Harold. Referring to Watkiss and Chibnall (eds), 'The Waltham Chronicle' pp 46-56, he puts it thus:

'Harold visited the monastery on his way home from Stamford Bridge to Hastings. Two canons were sent with him to bring back Harold's body. After the battle they begged William for the body. He first refused, saying that he intended to found a monastery where all the fallen, including Harold, might be prayed for. Then he changed his mind, refused the gold they offered, and went to look for the body. They were unable to identify it. Therefore one of them went to fetch Edith swan-neck, Harold's *cubicularia* (concubine, or 'hand-fast' wife). She found the body; and they took it to Waltham.'

Support for this account is to be found in William of Malmesbury's *Gesta Regum* (c 1130) (edited by Mynors, Thomson and Winterbottom, paragraph 247). See also Freeman, 'Norman Conquest', iii, pp 781-784. Mr Peter Huggins, an amateur archaeologist, indicates that he and his wife have dug extensively inside the present Norman church and in the abbey grounds at Waltham. He concludes that no grave which could be attributed to Harold has yet been found at Waltham Abbey.
16. In part of his report, Professor Campbell indicates that we are 'at a loss to distinguish between fact and fiction, true reporting and literary artifice, or politically angled contrivance'. In similar vein, Mr Gau in his closing submissions spoke of the 'beguiling romanticism' of Bosham church with a long history and engaging oral tradition. This court must look at the best available interpretation of the best available evidence. Professor Campbell's objective and expert report is compelling. He states, 'in short the great likelihood is that Harold could have been

buried at Waltham'. This was the church which he had endowed. From the time of William of Malmesbury his remains were widely believed to be so interred, both by the community there and by commentators and chroniclers. Professor Campbell states:

'The written sources and the Tapestry do not support the 'Harold is buried at Bosham theory', and to the extent that they can be made to do so it is by argument so tortuous as to be almost self-defeating and by resort to the contention that in circumstances of very imperfect information a very large number of things are, technically, possible.'

The possibility that Harold might have survived the battle of Hastings and died later, which gained some currency, is considered by Professor Campbell and convincingly rejected.

17. In cross examination by Mr Gau, both Mr Tatton-Brown and Mr Meynell expressed the opinion that it was unlikely that Bosham church was the resting place of King Harold. Canon Inman remained curious to have a 'yes' or 'no' answer to the current uncertainty. He did not regard ambivalence as a satisfactory outcome. He appeared content when I suggested to him that Professor Campbell's report seemed determinative. Such conclusion is bolstered by Dr Elders who states, 'After wide consultation, I know of no professional historian or archaeologist who considers it likely that King Harold is buried at Bosham'; by Mr Taylor who 'always felt that Waltham Holy Cross had a better claim'; and by Mr Kenny whose conclusion is that 'there is no evidence that King Canute, his (unknown) daughter, Earl Godwin or his son King Harold are buried in the church'. Miss Roebuck and Mr Brown are of the same mind. The reality is that in advancing the case in favour of Harold being buried in Bosham church, Mr Pollock finds himself in a minority of one. His imaginative theory does not bear academic scrutiny.

Scientific evidence

18. The preponderance of the scientific evidence came in written form from Dr Thomas of University College, London whose expertise lies in the study of human genetic variation and its use in inferring ancestry, population history and human evolution. His statement refers to the techniques employed in his laboratory to carry out research on bones believed to be approximately 1000 years old. He says it is possible to extract DNA from such ancient material and compare Y-chromosome markers with those obtained from modern putative descendants. He would require a piece of bone weighing approximately 1 gram for the purposes of extracting DNA. This would involve taking approximately one square centimetre of bone from the middle of the femur for preference as compact bone is more likely to produce positive results. He states that DNA may be recovered from bones as old as 2000 years, but recovery is dependent on a number of factors relating to preservation conditions and age. From the information which Dr Thomas had as to the state of the bones when examined in 1954, he believed it possible to recover DNA although the results could not be guaranteed. The testing is styled 'destructive' and Mr Briden informed me that nothing would remain of

the sample following the test.

19. One problem which Dr Thomas identified was the handling of the bones in 1954. Mr D A Langhorne, surgeon, is photographed with ungloved hands, standing astride the open grave holding a piece of bone. It is highly likely that all the named witnesses to the excavation in 1954 might likewise have handled the bones as may others whose identities are not recorded. The DNA of a direct male relative of each such person needs to be taken so that contamination can be excluded. No evidence was led by the petitioners as to whether such a venture in this instance was feasible. As Dr Elders pointed out, it may well be impossible to exclude the DNA type of all those who have previously handled the bones. Thus, in the words of Dr Thomas, 'an extra layer of credibility' will be lost.

20. Dr Thomas expresses the opinion that it is worth undertaking the technically difficult process of extracting and typing DNA from these ancient remains. In answer to Mr Gau's written questions, he concedes that the oldest bone samples from which he has successfully extracted DNA for comparison with that of living people claiming descent date from the Holocaust, some sixty years ago, and puts the likelihood of recovery of Y-chromosome at 10%-30%. Commenting on the process in his statement, he continues: 'However, this should only be undertaken if it can be shown that the putative descendants of Harold II and his brother Tostig do share a recent common male-line ancestor through Y-chromosome evidence.' Here again, the petitioners' case has changed over time. According to the Statement of Needs, the intention was to compare the DNA with that of the bones in the funerary chests of the Godwin family in Winchester cathedral. Next came a proposal for the study of individuals in the Cheshire area. On this matter, Dr Thomas commented in an e-mail of 13 May 2003:

'Assuming that a combination of reliable genealogical records and consistent Y-chromosome typing results led us to believe with a reasonable degree of confidence that they were indeed descended from Tostig [Harold's brother], I think that the proposal to test these bones would have scientific merit. Most importantly, I believe that the study of the Cheshire individuals should be carried out before attempting to extract DNA from the bones since without information on Tostig's Y-chromosome, there is little point in going through the partially destructive, technically difficult and rather laborious process of extracting and typing DNA from ancient remains.'

21. For reasons which were not explained, the testing of the Cheshire Godwins was not pursued. Instead Dr Thomas apparently carried out tests on samples taken from three people each claiming direct patrilineal descent from Harold. These were Roger Anderson, Maurice Stack and Mark Godwin. When Mr Briden opened his case, the results of these tests were unknown. All the court had was a bundle of genealogical papers including a document headed 'Ahnentafel Chart for Roger Lyle Anderson'; others in French for, respectively, Grand-Duc Vladimir II, Monomakh de Kiev, and Prince Mstislav 1er de Kiev; some handwritten and

- largely incomprehensible notes; an extract from M Biddle (ed) 'Winchester in the Early Middle Ages: An Edition and Discussion of the Winton Domesday' (Oxford, 1976); and an ancestor chart for Tarjei Førstøyl. Mr Briden made no submissions based on these documents and Mr Gau's questioning of Mr Tatton-Brown, whilst an interesting discursus, was far from illuminating. I do not consider that this documentation advanced the petitioners' case in any meaningful way. It called for explanation and interpretation, and there was none.
22. As the hearing was drawing to a close, a succession of Chinese whispers brought to the court the results of the tests conducted in Dr Thomas' laboratory in London. Mr Briden informed the court that having examined the samples from each of the gentlemen claiming to be direct descendants of Harold, the results proved conclusively that there was no common Y-chromosome type in that all three were different. Absent a known comparator any DNA testing would be pointless. Following the hearing, the petitioners' solicitors wrote to the diocesan registrar suggesting that there were six further candidates who had come forward as a result of the publicity which it generated. Even in the absence of a formal application from the petitioners, I have considered whether to reopen the evidence and to allow further testing to take place but have decided against such a course. It remains a matter of speculation whether this further testing would yield better results. Even if it were to do so, which is far from certain, and the prospects of identifying DNA from a known comparator were improved, the other difficulties highlighted elsewhere in this judgment would remain and the petition would not be differently determined. Further, even with a known comparator, the best that could be achieved would be to point to a commonality with the male Godwins and not necessarily with Harold himself.
23. That only left the question of carbon dating, a matter outwith the expertise of Dr Thomas, as appears from the answers to Mr Gau's questions. Mr Brown indicated that the best that this testing could do would be to provide the age of the sample of bone with an accuracy of plus or minus 30-40 years. Dr Thomas has suggested in his witness statement that carbon dating should also be carried out 'to determine the time scale within which the bones are likely to have been buried which would be accurate to within fifty years'. The difficulty with this, as Mr Gau rightly submitted, is that the test is insufficiently precise to be determinative. It could not rule out the bones being those of Harold's father, brothers, or male issue.
- Archaeological evidence*
24. This is a matter to which I shall return later. For present purposes, it is sufficient to note that all witnesses who expressed an opinion were agreed that it is a matter of conjecture as to what might be found within the coffin. Whilst there are photographs and notes of the 1954 excavation, the current content is unknown. Mr Tatton-Brown said in cross-examination that there was no guarantee that any human remains would be found. When the reputed grave of Canute's daughter was opened up in 1954 there was only dust, as opposed to the skeletal material which had been present in 1865. There is a distinct possibility that, whoever

might have been buried in the past, there may be nothing left to exhume at all.

The law on exhumation

25. Any disturbance of human remains in consecrated places of burial requires the authority of a faculty. See the judgment of Wills J in *The Queen v Dr Tristram* [1898] 2 QB 371. The principles which govern the grant or refusal of any such faculty were explored in the recent decision of the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299; [2002] 3 WLR 603. At paragraph 20 it is summarised thus:

'Lawful permission can be given for exhumation from consecrated ground as we have already explained. However, that permission is not, and has never been, given on demand by the consistory court. The disturbance of remains which have been placed at rest in consecrated land has only been allowed as an exception to the general presumption of permanence arising from the initial act of interment.'

Reference is made to a paper entitled 'Theology of Burial' of September 2001 which was prepared by the Rt Revd Christopher Hill, Bishop of Stafford and extracts from which are quoted in the judgment including the following at paragraph 23:

'The permanent burial of the physical body/the burial of cremated remains should be seen as a symbol of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their 'journey'), entrusting them in peace for their ultimate destination, with us, the heavenly Jerusalem.'

26. A full copy of Bishop Hill's statement was put before me by Mr Gau. Its concluding paragraph, not reproduced in *Blagdon*, reads:

'In cases of Christian burial according to Anglican rites, prescinding from cases where there has been a mistake as to the faith of the deceased, I would argue that the intention of the rite is to say 'farewell' to the deceased for their 'journey'; to commend them to the mercy and love of God in Christ; to pray that they may be in a place of refreshment, light and peace till the transformation of resurrection. Exhumation for sentiment, convenience, or to 'hang on' to the remains of life, would deny this Christian intention.'

27. The Court of Arches in *Blagdon* stated at paragraph 33:

'We have concluded that there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted'.

This general test has been variously articulated, not least by my distinguished predecessor, Chancellor Quentin Edwards QC as 'good reason' and 'special and exceptional grounds'. See *In Re Church Norton Churchyard* [1989] Fam 37, and *In Re St Mary the Virgin, Lyminster* (1990) 9 CCC 1 respectively, as approved in *Blagdon* at paragraph 34. The Court of Arches in *Blagdon* continued at paragraph 35:

‘The variety of wording which has been used in judgments demonstrates the difficulty in identifying appropriate wording for a general test in what is essentially a matter of discretion. We consider that it should always be made clear that it is for the petitioner to satisfy the consistory court that there are special circumstances in his/her case which justify the making of an exception from the norm that Christian burial, that is burial of a body or cremated remains in a consecrated churchyard or consecrated part of a local authority cemetery, is final. It will then be for the chancellor to decide whether the petitioner has so satisfied him/her.’

28. Mr Gau informed me that his researches had revealed that this is the first occasion in which a consistory court had been invited to permit the exhumation of human remains so that a sample might be removed and destroyed. Earlier cases are of limited relevance. The case of *In Re Sarah Pope* (1851) 15 Jur 614 concerned whether or not the deceased, very recently buried having died in a workhouse, was one Sarah Pope, a co-trustee of certain property who had gone missing some months before. The application, described by Dr Lushington as being of a 'novel nature' was allowed and an exhumation was permitted for identification purposes. In *Druce v Young* [1899] P 84 the issue was whether or not there were any remains at all in the vault. It arose out of a disputed probate action in which it was alleged that the testator had been seen alive after the date of the grant of probate. A faculty was issued. More recently, in *Re Walker, deceased* (2002) 6 Ecc LJ 417, a faculty was granted permitting an exhumation for a pathological inspection and examination of the remains of stillborn twins since cogent evidence indicated that only one twin might have been buried. Conversely in *Re Makin, deceased (sub nom Molyneux)* (2002) 6 Ecc LJ 414, a faculty for the opening up of a casket was refused despite questions being asked about whether it contained all the bodily organs of a five month old child who had died at Alder Hey Hospital in Liverpool.
29. More recent still is the case of *Re Locock, deceased* (2003) 7 Ecc LJ 237 in which a faculty was sought for the exhumation of a gentleman who had been buried in December 1907. It was contended that he was the illegitimate son of Her Royal Highness Princess Louise, a daughter of Queen Victoria. It was proposed to compare DNA obtained from his remains with that of the Russian Tsarina, Alexandra who had been murdered in 1918 and whose remains had been identified by a comparison with a blood sample obtained from His Royal Highness Prince Philip, Duke of Edinburgh. I was informed by Mr Briden, who acted as *amicus curiae* in the case, that details of the Tsarina's DNA are on a website. In refusing the faculty, Chancellor Goodman observed,
- ‘the Locock family has lived with its legend or tradition for well over a century without any real difficulty and without any real need to know the answer which Mr Locock has sought. The family has had to accept, and indeed managed to accept, up to now, that its curiosity as to the truth or otherwise of the legend or tradition would have to remain unanswered’.
- The chancellor concluded that the petitioner had failed to discharge the burden of proof to demonstrate that an exception should be made to the presumption that a

body or ashes, once interred in consecrated ground should remain undisturbed. In this case, it should be noted, the prospect of obtaining typable DNA was placed at better than 50%. I am aware that an appeal is pending. However it is unlikely to be heard for some months and there may be a further delay before a judgment is handed down. I content myself by observing that Chancellor Goodman's judgment to my mind represents both the correct approach and the proper conclusion.

Applying the law in the instant case

30. I consider that Dr Elders may have been placing the test too high when he said in his witness statement, 'the Council for the Care of Churches recommends that, in order to override the presumption against disturbance, an *overwhelming* case must be proved for the *necessity* of the research' (emphasis added). I consider that this test would be better expressed that in order to displace the doctrinal principle that human remains are not to be disturbed a cogent and compelling case must be proved for the legitimacy of any research.
31. As I read the authorities, the following approach would appear to be appropriate in cases such as these:
 - (i) As a matter of Christian doctrine, burial in consecrated land is final and permanent;
 - (ii) This general norm creates a presumption against exhumation;
 - (iii) Exhumation in this context comprises any disturbance of human remains which have been interred;
 - (iv) Departure from such presumption can only be justified if special circumstances can be shown for making an exception to the norm;
 - (v) An applicant might be able to demonstrate a matter of great national, historic or other importance concerning human remains;
 - (vi) An applicant might also be able to demonstrate the value of some particular research or scientific experimentation;
 - (vii) Only if the combined effect of evidence under (v) and (vi) proves a cogent and compelling case for the legitimacy of the proposed research will special circumstances be made out such as to justify a departure from the presumption against exhumation.
32. Applying that approach to the facts of this case, I am satisfied that there may well be a legitimate national historic interest in identifying the final resting place of the only English monarch since Edward the Confessor of whom this is unknown. I consider that Mr Gau was wrong when he suggested otherwise. Despite their laudable objective, I am far from satisfied that the petitioners' proposal will advance their aim. On the contrary, I am convinced that it is doomed to failure. My principle reasons are as follows: it is a matter of conjecture whether any human remains will be found in the coffin; such remains as may be found are highly unlikely to be those of Harold since the vast preponderance of academic opinion points to him having been buried at Waltham Abbey; the prospect of recovering Y-chromosome material from such bone as may be found is as little as 10%-30%; there is currently no evidence of putative descendants of Harold

- sharing a recent common male-line ancestor through Y-chromosome evidence; the prospect of obtaining such evidence remains speculative; thus any DNA testing is futile and the margin of error in carbon dating testing can, at best, only produce an inconclusive result
33. Whilst I am sympathetic to the continuing quest for knowledge concerning our nation's history, the prospect of obtaining a meaningful result is so remote in this instance that the presumption against disturbance is not displaced. The evidence led by the petitioners fails to come near to the standard required. This aspect of the petition therefore fails.
34. In deference to the submissions which I received, I should add some further comment. First, Dr Elders referred me to the Draft Guidelines on the Treatment of Human Remains, taken from 'Church Archaeology: Its Care and Management' (Council for the Care of Churches, 1999) and to his work as co-ordinator of the Church Archaeology and Human Remains Working Group, set up by the Cathedral and Church Buildings Division of the Archbishops' Council and English Heritage. This Group is due to report in the New Year. In paragraph 9.1, reference is made to the taking of samples for scientific analysis. It concludes, 'However, such invasive techniques should only be permitted as part of a planned programme of clearly justified research'. I endorse both the work of the Group and these Guidelines. In this case, the evidential justification for the research is patently inadequate.
35. Secondly, much was made by counsel and some of the witnesses as to the floodgates argument whereby if this petition is to be allowed then a rush of similar petitions will result. Mr Briden found himself arguing the contrary of that which he had advanced in *Locock*. I do not consider that the floodgates argument has any application in cases of this type. Since special circumstances must always be demonstrated in each and every case in order to justify a departure from the presumption against exhumation, the test *ex hypothesi* is self-regulating. Each case will be determined on its own facts. Only if consistory courts devalue the concept of special circumstance will the floodgates open.
- Archaeological investigation*
36. I therefore turn to those parts of the proposal which fall short of scientific investigation. Mr Briden invited me to permit the opening up of the coffin for visual inspection only. He styled this a 'technical exhumation', as indeed he had the scientific testing proposal. Professor Campbell stated in his report that even though the evidence is against the identification of the remains with those of Harold, that does not mean that this burial is not interesting and raises questions worth pursuit. Whilst I am satisfied that something may be learned from such an exercise, I consider it to be little more than well-founded curiosity. Dr Elders told me that one could tell slightly more from the bones now than in 1954, but he regarded them as one of the less interesting groups of bones to be found. I do not consider that the evidence which I have rehearsed at some length in this judgment,

amounts to a good reason for permitting even this lesser exhumation. I therefore also reject the petition on this more limited basis.

37. That then leaves the question of a more general archaeological investigation. The starting point for this discussion takes us away from the putative Harold grave and to a separate and discrete area of the nave, to an 'anomaly' which was identified by a non-invasive radar survey in 1999. It is situated in the nave beneath the second pew from the front on the north side. It may be a further grave. According to Mr Meynell, it is difficult to say what it is although there is an ingress of water or dampness. This dampness is causing the floor to rot and Mr Meynell indicated that it will be necessary to remove the rotten floor and timber supports together with the granular fill, and to replace them. He envisages that this will be to a depth of about 30 cms although this work may prove more extensive upon opening up. He did not anticipate the removal of any stone floor slabs.
38. Mr Briden informed me that these works will be the subject of a future petition and the petitioners consider that the archaeological investigation could sensibly be combined with those works. I understand that the proposal has been considered by the Diocesan Advisory Committee. Mr Briden stated that the petition is likely to be uncontroversial. He has considerable experience in these matters and I have no reason to doubt him. However, I am reluctant to adjudicate upon this aspect of the current petition when I am not yet seized of the forthcoming petition upon which it is predicated. Dr Elders, Mr Brown and Miss Roebuck each indicated that they would be more inclined to support a petition limited to archaeological research, and although they were broadly happy with the content of the Method Statement prepared by Cambrian Archaeological Projects Limited, they were disadvantaged in that it embraced not merely the archaeological survey but also the scientific research already discussed. Equally, it addresses a 32 square metre area and does not differentiate between the putative Harold site and that of the anomaly.
39. In the circumstances, the appropriate course is for the question of an archaeological investigation of the anomaly site to be determined within the context of the forthcoming petition, by which time informed comment will have been obtained from relevant consultees on both the extent of the remedial works proposed and the specific archaeological investigation as contained in a further revision of the Method Statement taking into account my findings and rulings in this judgment.
40. Returning to the putative Harold grave, I consider that I have no option but to stand over a consideration of an archaeological investigation of this site since it is dependent upon the outcome of the forthcoming petition. The justification for the proposed investigation is the disturbance inevitably caused by the proposed works to the anomaly. Until the extent of those works has been determined, it would be premature to resolve this matter. Additionally, this petition has been pursued on the basis that the funding for the proposal is to be met by a television production company. In the light of my adjudication on the primary issue there is to be no

exhumation and thus the financial support may not be forthcoming. It would appear from Canon Inman's statement that the parish wishes to apply its limited resources in mission, ministry and maintenance. I make no criticism of that. Mr Briden could only go so far as to say that there was a fair chance that the television company would be interested in funding a limited proposal.

41. Having regard to these uncertainties, but conscious of the widespread professional opinion which favours a revisiting and tidying up of the excavation site of 1954, I propose to adjourn consideration of this aspect of the petition for determination at the same time as the forthcoming petition relating to the anomaly. Amongst other things, I will need to be satisfied that the further revision to the Method Statement has regard to my adjudication on the exhumation issue and ensures that in such archaeological investigation as may be permitted, proper respect is accorded the human remains in the coffin.
42. Subject to this one matter, I therefore order that the petition be dismissed. As agreed at the conclusion of argument, the costs of the petition, to include those of the acting archdeacon, will be borne by the petitioners.

The Worshipful Mark Hill
Chancellor

10 December 2003