

In the matter of All Saints, Heathfield

## Judgment

1. By a petition dated 15 May 2013, Julian Gerhard Vietinghoff seeks a faculty for the reservation of a grave space on behalf of his mother, Mary Angela Vietinghoff. Regrettably this petition must be dismissed and, in deference to the gracious, dignified and respectful manner in which Mr Vietinghoff pursued the matter both in correspondence and in oral submissions at the hearing, I set out my reasons briefly in this short judgment.
2. Mr Vietinghoff's father, Hans Georg Vietinghoff, died in a car accident on the road between Lagos and Kano whilst working in Nigeria in 1964. It was some days afterwards that his remains were found by a missionary and they were duly returned to this country. Those remains were interred in the churchyard of All Saints, Heathfield in December 1964. There is no marker or gravestone to mark the interment, but Hans Vietinghoff's name is recorded in the church's Book of Remembrance in that month, alongside which his age at the date of his death, namely thirty-nine, is recorded in pencil.
3. It would appear that a faculty was granted in 1963 for the establishment of a Garden of Remembrance within the churchyard and, as was customary and remains so, the names of those whose ashes were deposited in the Garden of Remembrance were noted in the Book kept in the church on a side altar. Mr Vietinghoff did not attend his father's funeral. He was thirteen at the time. He had been under the impression that his father's remains were buried in the churchyard. The circumstantial evidence suggests that it is more likely that his cremated ashes were interred in the Garden of Remembrance.
4. Mr Vietinghoff's mother is elderly and in poor health. At the time of her husband's death, she was living in Old Heathfield, in a flat on School Hill. This was the childhood home of Mr Vietinghoff and his younger sister. Mr Vietinghoff's mother moved to Eastbourne in 1973 where she still resides. She has not remarried.
5. Mr Vietinghoff informed me, and I have no hesitation in accepting, that it is his mother's earnest wish that after her death she be buried in the churchyard at All Saints, Heathfield and that a headstone be erected over her grave which might also bear the name of her late husband. Her desire is that they be reunited in death in a sacred place which has been the source of solace to her and to her family in the decades which have passed since his untimely death in the prime of his life.
6. It is in carrying forward the sincerely held wish of his mother that Mr Vietinghoff came to petition the Court for a faculty. He did so following a number of sensitive conversations with the incumbent who, in turn, consulted the archdeacon. The incumbent and the parochial church council were opposed to the grant of a faculty and declined to support the

petition. I should interpose that the measured, thoughtful and pastoral conduct of the incumbent, churchwardens and parishioners mirrored the sensitivity exhibited throughout these proceedings by Mr Vietinghoff.

7. When the matter became contentious, Mr Vietinghoff expressed a preference for it to proceed to a hearing rather than being determined on written representations. This was his right under rule 26 of the Faculty Jurisdiction Rules 2000. A hearing was convened on 29 November 2013. In accordance with the Court's directions, witness statements were exchanged prior to the hearing which stood as the evidence-in-chief of the deponents. Mr Vietinghoff gave evidence on oath in which he supplemented his written evidence and made representations in support of his petition. None of his evidence was challenged by Keith Warner, Deputy Churchwarden, who acted as a spokesman for the PCC.
8. The evidence on behalf of the parish comprised short statements from Richard Leever, G J Porter and Roger Kenward, who were present at the hearing to be cross-examined. Mr Vietinghoff did not challenge any of their evidence, and there were no points of clarification which I considered needed to be raised. A two-page statement had been served from the Reverend David Guest, dealing largely with the shortage of space for burials. Mr Guest was unable to be present, and I had excused his attendance. Mr Vietinghoff informed me that there was nothing in Mr Guest's statement which he wished to challenge and was content that it be admitted into evidence without the need for Mr Guest to attend for cross-examination. Mr Warner made no representations, save to indicate that the parish's case was fully encapsulated in Mr Guest's statement.
9. It was common ground that as Mrs Vietinghoff lived outside the parish and was not on the electoral roll she had no legal right of burial in the churchyard. There is no analogous 'qualifying connection' in respect of burial as was introduced for marriage under the provisions of the Church of England Marriage Measure 2008. Nor was it disputed that at the time of the petition in May of this year there were seven grave spaces remaining for use. It would appear that at least two of these have been used in the intervening months, such that as at the date of the hearing only four (or at the most five) remained. Mr Vietinghoff made the point to me in evidence, and I fully accept, that when he first raised the matter with Mr Guest he was unaware of just how little space there was for burials in the churchyard.
10. This Court recently had occasion to consider the law as it applies to the reservation of grave spaces in *Re St Nicolas, Pevensey* (28 March 2012). In giving judgment I set out the following principles, derived from the decision of Newsom QC Ch in *Re West Pennard Churchyard* [1991] 4 All ER 125:
  - i. At common law, every parishioner has a right of burial in the churchyard of the parish unless it is closed by due legal process;
  - ii. The common law right extends also to all persons dying in the parish, whether or not they are parishioners;
  - iii. By statute a similar right is enjoyed by all persons whose names are on the electoral roll of the parish: see Church of England (Miscellaneous Provisions) Measure 1976, s 6(1);
  - iv. The incumbent has power at common law to prescribe in what position in the churchyard any burial is to take place: but that is the extent of his power in respect of cases where the deceased had a legal right of burial;

- v. As freeholder of the churchyard, the incumbent is also entitled to grant consent to the burial in the churchyard of the remains of a person who has no legal right of burial; in doing so he is to that extent ousting those who have existing prospective rights. In deciding whether to give consent in such a case, he is therefore required by statute to 'have regard to any general guidance given by the parochial church council of the parish with respect to the matter': see s 6(2) of the 1976 Measure;
- vi. These common law and statutory rights crystallise only when the person in question dies.

11. This case engages the fifth of these general principles. It was drawn to the attention of Mr Vietinghoff prior to the hearing, as was the very recent decision of Briden Ch sitting in the Consistory Court of the Diocese of Bath and Wells in *Re Churchyard of Wick, St Lawrence* (4 November 2013). That case concerned the informal 'reservation' of two grave spaces for a family. A donation was made to PCC funds and the then incumbent indicated that provision would be made. As Briden Ch makes clear, this arrangement was of no legal effect in the absence of a faculty, although he was able to regularise the position as regards one space in relation to which a 'moral claim' was acknowledged by the PCC.

12. The most salient part of Briden Ch's judgment is as follows:

Section 6(2) of the Church of England (Miscellaneous Provisions) Measure 1976 empowers the minister of a parish, having regard to any general guidance given by the parochial church council, to permit the interment in the churchyard of a person having no right of burial. Where a person without a right of burial applies for a space to be reserved by faculty, as Chancellor Newsom Q.C. explained at page 33 of the report [in *Re West Pennard Churchyard*],

such a faculty can also be applied for, with the concurrence of the incumbent, by a person who does not have a legal right of burial. The grounds on which such a faculty is granted vary; among them are the association of the petitioner with the church or with the parish, or the presence in the churchyard of the remains of relatives of the petitioner.[...] But as I understand it, no interment of a person not having a legal right of burial can take place at all, and no faculty for such a burial ought to be granted, unless the incumbent has signified his concurrence. In such a case he appears to me to have a veto.

Thus in deciding whether or not to grant a faculty the Court must consider whether the minister's consent to the burial has been signified, and in its absence the petition ought to be dismissed. To do otherwise would be to subvert the purpose of Section 6(2) of the Church of England (Miscellaneous Provisions) Measure 1976, since the provision of a space reserved by faculty would override the minister's power to give or withhold consent to the eventual burial.

13. Applying the law to the facts of this case, Mrs Vietinghoff has no legal right of burial in the churchyard and the incumbent has not given consent to the reservation of a grave space in her name. These matters taken together are sufficient to be dispositive of this petition. It is bound to fail.
14. I wish to add two observations. I should record and acknowledge that the absence of consent on the incumbent's behalf is entirely reasonable. He reached his decision after consultation with the archdeacon and the PCC on matters of principle and in relation to the particular request on behalf of Mrs Vietinghoff. There are hardly any grave spaces available in this churchyard and to reserve one for any particular individual would serve to prejudice the public right of burial enjoyed by all parishioners until such time as the churchyard is full. I need not rehearse in this judgment the observations made in the witness statements of those living in the parish. Mr Vietinghoff is respectful to their sensibilities and makes no criticism of them or of the incumbent. He fully understands their position and so do I.

15. Secondly, I note that the parish is actively exploring some means of re-using parts of the churchyard such as to make further grave spaces available. This may mean that a future request from Mrs Vietinghoff might be treated differently. Equally it may be that consideration could be given to the erection of a headstone, naming both Hans Georg Vietinghoff and Mary Angela Vietinghoff, were her ashes to be interred in the churchyard. This might go some way towards satisfying her wishes. However, as neither of these matters is before the Court, it would be wiser for me not to express a view.
16. In all the circumstances, this petition must be dismissed. The Court costs, to include a correspondence fee for the registrar, are to be paid by the Petitioner, Mr Vietinghoff. I have nothing but compassion for his dignified efforts to do the right thing by and for his mother, and I am sure he will understand and accept the reasons for this adverse determination.

The Worshipful Mark Hill QC  
Chancellor of the Diocese of Chichester

3 December 2013