Consecrated burial grounds; an obstacle to developers? In re Radcliffe Infirmary Burial Ground [2011] PTSR 1508

During the past three centuries many hospitals, barracks and other institutions were provided with adjacent burial grounds for the victims of disease or war.

With the disposal of the sites of such institutions (including their annexed burial grounds) on the open market the law governing the treatment of long buried human remains has been brought into focus. Generally, a developer seeking to remove human remains from acquired land as a preliminary to building will be able to adopt the procedure set out in the Schedule to the Disused Burial Grounds (Amendment) Act 1981, and on completion of the statutory process the prohibition against building on a disused burial ground, imposed by section 3 of the Disused Burial Grounds Act 1884 will cease to apply.

In practice the 1981 Act provides a satisfactory mechanism for clearing old burial grounds. The Act does not, however, apply to land consecrated according to the rites and ceremonies of the Church of England. Often burial grounds unattached to churches were consecrated by the diocesan bishop or his suffragan, and thereby came within the jurisdiction of the diocesan Consistory Court. Thereafter, all further use and management of the land is subject to the control of the court. Thus where a burial ground is consecrated, and there is no explicit statutory provision (for instance, section 238 of the Town and Country Planning Act 1990 concerning compulsory acquisition) overriding the jurisdiction of the Consistory Court, the treatment of the land will be subject to ecclesiastical law.

Such were the complications faced by Oxford University after its acquisition from an NHS Trust of the former site of the Radcliffe Infirmary in the city centre. The site included a burial ground, consecrated in the 18th century and closed in 1855 by Order in Council. The University proposed building a prestigious School of Government over the burial ground; planning constraints required the design to incorporate an extensive basement which, in turn, would necessitate the exhumation of over 500 sets of skeletal remains for reburial in a local cemetery.

The diocesan authorities understandably declined, under the administrative powers contained in section 22 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, to permit this large scale exhumation and deconsecration of the land. Instead the University was required to prove its case in the Consistory Court. The judgment of Chancellor Bursell QC was directed to two principal issues.

First, in order to justify the removal of human remains a good reason, in terms of public benefit, had to be established. In the event, the Chancellor was persuaded that proposed use of the land for academic purposes amounted to a convincing justification for allowing exhumation. In this respect, the University was at a considerable advantage, as compared with a commercial developer, in advancing a case based on public benefit.

The second issue concerned the prohibition in section 3 of the Disused Burial Grounds Act 1884 against building on such a burial ground. The Chancellor (at least by implication) considered that the prohibition would survive the removal of the remains and deconsecration of the land. Fortunately for the University, however, section 5 of the
Act created an exception in respect of ‘any burial ground which has been sold or disposed of under the authority of any Act of Parliament’. Since the original voluntary hospital had been vested in the Minister of Health by statute (section 79(1) of the National Health Service Act 1946) and there had been subsequent transfers to and from NHS entities, under statutory authority, section 5 was held to come into play, releasing the land from the constraints imposed by section 3.

Accordingly the University was successful in obtaining a faculty for exhumation; and deconsecration of the land was expected to follow as a consequence of the Chancellor’s judgment. The case serves however, to highlight the difficulties which arise when old burial grounds are acquired. Careful investigations into the history of the site, and the law applicable to it, are essential if costly mistakes are to be avoided.

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