UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – Adverse possession – Sepulture - Burial vault under floor of church building

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN:

(1) EILEEN PATRICIA COLLINGWOOD KING
(2) IAN GAVIN BLAIR **Appellants**

And

(1)THE INCUMBENT OF THE BENEFICE OF NEWBURN IN THE DIOCESE OF NEWCASTLE
(2) NEWCASTLE DIOCESAN BOARD OF FINANCE

Respondents

Re: Holy Trinity Church,
Dalton,
Newcastle upon Tyne,
NE18 OAA

His Honour Judge David Hodge QC
Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
21 May 2019

Mr Charles Auld (instructed on a direct access basis) appeared for the Appellants
Ms Gemma de Cordova (instructed by the Legal Office, National Institutions of the Church of England) appeared for the Respondents

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The following cases are referred to in this decision:

Dyer v Terry [2013] EWHC 209 (Ch)
Farquhar v Newbury RDC [1909] 1 Ch 12
Haynes's Case (1615) 12 Co Rep 11
JA Pye (Oxford) Limited v Graham [2002] UKHL 30, [2003] 1 AC 419
Powell v McFarlane (1977) 38 P & CR 452
Pwllbach Colliery Co v Woodman [1915] AC 634
Roberts v Swangrove Estates Ltd [2007] EWHC 513 (Ch), [2007] 2 P & CR 326
Rugg v Kingsmill (1867) LR 1 A & E 343; on appeal (1867) LR 2 PC 59
Tower Hamlets LBC v Barrett [2005] EWCA Civ 923, [2006] 1 P & CR 9
Wretham v Ross [2005] EWHC 1259 (Ch)

No additional cases were referred to in the skeleton arguments

DECISION

Introduction

1. This is an appeal from a decision dated 11 June 2018 of the Land Registration Division of the Property Chamber of the First-tier Tribunal (Judge Elizabeth Cooke). The FTT's decision was made on two references made by HM Land Registry arising from separate applications made by the Respondents for the first registration of title to the church building and churchyard of Holy Trinity, Dalton, near Newcastle Upon Tyne. Nothing turns, for the purposes of this appeal, on the somewhat protracted and complicated procedural history of those two references. The church (which is now Grade II listed) and its churchyard were originally conveyed to the Church Building Commissioners by Edward Collingwood on 1 October 1837 as a chapel of ease for the parish of Newburn; and they were consecrated by the Bishop of Durham nine days later. As originally constructed, the church contains a burial vault which lies below the central aisle of the nave of the church. The dispute between the parties is about the ownership of this burial vault. The decision of the Court of Arches (Dr Lushington) in *Rugg v Kingsmill* (1867) LR 1 A & E 343 at 350 establishes that the consecration of a church or chapel extends to the vaults beneath; and this part of his decision was not affected by the opinion of the Privy Council on appeal at (1867) LR 2 PC 59. The Sentence of Consecration therefore extends to this burial vault.

2. The 1837 Conveyance expressly excepted and reserved to the grantor, Edward Collingwood:

> "… the Vault or Burying Place in the interior of the said Chapel lately made by me the said Edward Collingwood with full power for me the said Edward Collingwood my heirs and assigns to enlarge the said Vault so only that it do not extend beyond the Body of the said Chapel and do not injure the walls or foundations thereof And also with full power for me the said Edward Collingwood my heirs and assigns to open such Vault as aforesaid and use and repair the same at all reasonable times … "

The FTT found that on the true construction of the 1837 Conveyance, the grantor retained the paper title to the burial vault (or sepulchre) and that the exception of the burial vault from the 1837 Conveyance was not invalidated by the provisions of s. 37 of the Church Building Act 1818 or affected by the act of consecration of the church nine days later. There is no challenge to, or appeal from, those findings; and the appeal has proceeded on the basis that neither of the respondents can assert a valid paper title to the vault. However, the FTT went on to find that since (at the latest) 1940 (when the last interment in the vault took place), successive incumbents of the church had been in physical possession and control of the burial vault; that the unambiguous fact of possession and control of the church building constituted sufficient evidence of the intention to possess the vault; and that the successors in title to Edward Collingwood, as represented by the appellants (who are brother and sister, and the great-great-grandchildren of Edward), had lost their title to the vault by (at the very latest) 1953 by virtue of the incumbents' adverse possession.

3. On 26 October 2018 the Deputy Chamber President (Mr Martin Rodger QC) refused the appellants permission to appeal on various procedural grounds, and on issues concerning the burden of proof; but he gave the parties permission to appeal and to cross-appeal on the main

substantive issue between the parties, namely whether the respondents (or either of them) had made out a claim to the vault based on adverse possession. He considered that it was arguable that no incumbent of the church had ever gone into possession of the vault, and that acquiescence by Edward Collingwood (or his successors) in the church building being locked (which would otherwise have been an interference with the easement of necessity which the FTT had found that they enjoyed by virtue of the 1837 Conveyance) neither extinguished their right of access nor made it conditional on the permission of the incumbent. The Deputy President directed that the appeal should proceed by way of re-hearing of the two references to the FTT so far as they concerned the issues for which permission had been given, with such appeal being conducted under the Tribunal's standard procedure. Since this appeal is proceeding by way of a re-hearing, it is unnecessary for the Tribunal to undertake a more detailed review of the FTT's decision at this stage.

4. The context in which this dispute has arisen is the closure of Holy Trinity, Dalton for regular public worship by virtue of a Pastoral Scheme made on 9 February 2004 (and coming into effect on 19 April 2004) by the Church Commissioners under the Pastoral Measure 1983 (since re-enacted as the Mission & Pastoral Measure 2011) declaring the church to be redundant. As a result, the church building (but not the surrounding churchyard, which remains vested in the incumbent for the time being, in his capacity as such) vested in the Newcastle Diocesan Board of Finance ("the DBF"), the second respondent and the effective respondent to this appeal. According to a letter dated 26 February 2007 from the Redundant (now the Pastoral & Closed) Churches Division of the Church Commissioners to the second appellant, Mr Blair, once a suitable new use is found for a closed church, the Church Commissioners prepare a Redundancy Scheme (now a Pastoral (Church Buildings Disposal) Scheme). However, the existence of the family vault below the nave of the church, and the uncertainty as to its true ownership, which have given rise to these proceedings have prevented the Commissioners from making any significant progress towards preparing a viable scheme for its alternative use for residential purposes and consequent disposal. It is the evidence of the relevant Case Officer, Ms Emma Cosgrif (who gave evidence to the Tribunal), that, pending the making of such a scheme, the church remains subject to the faculty jurisdiction. From the terms of s. 74 (1) (b) of the 2011 Measure (re-enacting provisions previously contained in s.61 of the 1983 Measure), this would appear to be correct; but it is strictly unnecessary for the Tribunal to make any finding on this point for the purposes of determining this appeal. The DBF and the Church Commissioners have been, and they remain, keen to settle the future of the church building before its condition deteriorates to the point where its re-use is unviable. If this appeal fails, the Church Commissioners will be free to dispose of the church building for residential use. If this appeal succeeds, making the re-use of the church building for residential purposes unviable, the only available option may be a proposal to demolish the church. The Tribunal would urge the parties to engage constructively with each other to avoid such an undesirable outcome, which would be contrary to their personal interests and also to the wider public interest.

The hearing and evidence

5. The hearing took place in London and was completed in less than a day. The parties had not responded to an invitation from the Deputy President to indicate a preference for the hearing to take place in Newcastle and therefore there was no opportunity for any physical inspection of the church; but during the course of the hearing both parties produced several helpful colour photographs which show the interior of the church and the surface of the floor above the burial vault, which lies below the central aisle of the nave. Plans of the church, and its surrounding

churchyard, were also in evidence before the Tribunal. The appellants were represented by Mr Charles Auld (of counsel) and the respondents by Ms Gemma de Cordova (also of counsel).

6. The appellants rely upon statements from each of the appellants and from the adult son of the first appellant, Mr Timothy King. Both Mrs Patricia King and Mr Timothy King reside in New Zealand and so they were not able to be present at the hearing. There was no application to cross-examine them via a video-link. The second appellant was called to confirm his witness statement, and he was very briefly cross-examined, but there was no real challenge to the evidence relied upon by the appellants. The respondents' only witness was the relevant case officer, Ms Emma Cosgrif. She was called to confirm her witness statement and she was cross-examined for about 40 minutes. Ms Cosgrif's involvement with Holy Trinity, Dalton had only commenced in September 2013; and her evidence as to matters before this date was based entirely upon her reading of relevant documents and records. Not surprisingly, there was no real challenge to any of Ms Cosgrif's evidence, with cross-examination being directed to exposing the limitations of the respondents' evidence. Ms Cosgrif explained that when a church is closed for regular public worship there is a close working link between the relevant DBF and the Church Commissioners, with the latter overseeing the process of disposing of closed churches and having the ultimate 'say-so'. Ms Cosgrif said that she understood that the church had been left unlocked until its closure in 2004 although she could not say for sure; and that the normal practice was to lock a church once it had been closed for regular worship. Ms Cosgrif accepted that there was no evidence that any incumbent of the church, or any representative of the Church Commissioners or the DBF, has ever entered the vault. The only evidence that anyone had ever done so was that three or four coffins of members of the Collingwood family had been interred in the vault, with the last interment being in 1940. Ms Cosgrif also accepted that the interment of coffins was the normal use of a burial vault, and that the only people who had (until 1940) made use of the burial vault for that purpose had been the Collingwood family. The Tribunal finds that all the witnesses were honest witnesses who were genuinely doing their best to assist the Tribunal; and it accepts their evidence.

7. The Tribunal makes the following findings of fact: At the time of the 1837 Conveyance, the vault had been constructed as part of the original church building, but no interments had by then taken place within it. Although written records held or identified by the Church Commissioners refer to three interments within the vault, the parish burial records point to there having been four interments. The first interment was Arabella Collingwood, the wife of Edward Collingwood, at the age of 45, on 9 June 1840. The second was Edward Collingwood himself, at the age (according to the parish burial records) of 75, on 10 August 1866. The third was their eldest son, also called Edward Collingwood, at the age of 45, on 18 January 1868. The fourth (and apparently the last) interment was that of Edward Gordon Collingwood (the grandson of the original Edward Collingwood and the eldest son of his daughter, Arabella), at the age of 81, on 20 June 1940. Immediately to the south of the chancel, at the front of the central aisle of the nave of the church, a monumental brass memorial is set in to the stone floor of the church which bears the inscription: "Here rest the bodies of Edward Collingwood of Dissington who departed this life August 4th 1866 aged 74 years [sic] and Arabella his wife who departed this life May 31st 1840 aged 45 years". There is a white marble tablet on the south side of the east wall of the church which is erected to the memory of "Edward Collingwood of Dissington who departed this life August 4th 1866 and Arabella his wife who departed this life May 31st 1840, by their son Edward Collingwood. Edward Collingwood their son departed this life January 12th 1868". Since the brass memorial set in to the floor of the nave contains no reference to the Edward Collingwood who passed away in 1868, the Tribunal infers that this brass memorial was installed

between the death of the original Edward Collingwood on 4 August 1866 and the death of his son on 12 January 1868. On the north side of the east wall of the church there is a marble tablet in memory of "Edward Gordon Collingwood of Dissington Hall who passed to the eternal on 20th June 1940 aged 81". There is no evidence that any incumbent of the church, or any representative of the Church Commissioners or the DBF, has ever entered the burial vault. The only evidence that anyone has ever done so is that between 1840 and 1940, four members of the Collingwood family have been interred in the vault, with the last interment being in 1940, 72 years after the most recent previous interment. Research carried out in the church and Diocesan records has failed to reveal the existence of any faculties relating to any interments within the vault of the church. Since the sentence of consecration extends to the burial vault, it would have been subject to the faculty jurisdiction.

8. It is common ground that the burial vault was at all times accessed from the interior, and not the exterior, of the church. This would appear to have been by way of a stone pavement slab (now cracked) immediately to the west of the brass memorial set in to the stone floor at the east end of the central aisle of the nave, into the centre of which there is set a round metal stone ring. However, even if this stone were to be raised, on its own it would not afford sufficient space to enable a coffin to be taken down into the vault below. Further pavement stones would also need to be raised. There is no evidence of any steps leading down into the vault from the interior of the church. On or about 29 March 2010, Mr Timothy King, the son and nephew of the first and second appellants respectively, visited the interior of the church with his wife and sons. There he met (as arranged) with Mr Patrick Earle (an Associate Planner and Case Officer with the Closed Churches Division of the Church Commissioners) and also with Ms Vanessa Ward (from the Newcastle Diocesan office), who held the key which gave them all access to the interior of the church. Two flagstones were lifted from the central aisle which revealed a layer of soil. From the various photographs which are before the Tribunal, these two flagstones were separated from the flagstone with the metal ring by a further two stone flagstones immediately to the east of the two flagstones which were raised. Once the layer of soil had been removed, the roof of the vault was revealed. This was of a completely different structure to the stone floor of the church, apparently being built of brick construction. A small hole was made in the roof of the vault which was just large enough to insert a camera through, and a number of photographs were taken showing the brick roof of the vault and some of the four coffins within. No-one physically entered the burial vault. Unfortunately, by that time of the day it was felt to be too late to remove any more flagstones or to undertake any further investigations into how a coffin might be introduced into the vault without breaking open its brick roof. When Mr Earle acknowledged receipt of the CD of Mr Timothy King's photographs (in a letter dated 20 April 2010) Mr Earle also acknowledged that there was "a strong suggestion of there being four interments in the vault".

9. There is no direct evidence of what might be observed if the stone pavement slab with the metal ring, and the two stone slabs immediately to the west of it, were to be raised. Ms Cosgrif gave hearsay evidence that Ms Carol Hepple, who works for the Diocese, had visited the church after she had received copies of the photographs taken by Mr Auld on a recent visit to the church (which he had placed before the Tribunal) and that she had lifted the stone with the ring and had found that it rested on a bed of soil. Regrettably, there is no evidence of whether access to the burial vault could be obtained without breaking open the floor of the church and opening the soil beneath. However, s. 80 of the Church Building Act 1818 (by reference to which the 1837 Conveyance was made) renders it unlawful (and a criminal offence) to "break open the pavement or to open up the soil beneath the same within any church or chapel" erected under the provisions

of that Act for the purposes of burial, subject to a saving proviso permitting the burial of dead bodies in any vault wholly arched with brick or stone which may have been constructed for such purpose under any such church or chapel and to which the only access was by steps on the outside of the external walls thereof. One would therefore expect that Edward Collingwood would have taken steps to ensure that the vault was constructed so to be capable of being accessed without any contravention of s. 80 of the 1818 Act. What is clear is that four interments have taken place in the vault between 1840 and 1940, and that there is no record of the church authorities having ever expressly consented to such interments or having objected that they would involve a contravention of s. 80 of the 1818 Act.

10. The Tribunal finds that before the church was closed for regular public worship, its door was left unlocked, and there was no impediment to access to the interior of the church or to the floor of the church nave above the burial vault or to the Collingwood memorials. After the church was closed for regular worship, it was kept locked, with the keys being held in a key safe at the Newcastle Diocesan office in North Shields; but the Tribunal also finds that this was done for reasons of security and safety, and that there was never any intention on the part of the Church Commissioners, acting on behalf of the respondents, to exclude the descendants of Edward Collingwood from accessing the interior of the church, or the floor of the church nave above the burial vault, or the Collingwood memorials. At all material times, the Church Commissioners, acting on behalf of the respondents, have recognised the property and rights reserved to the successors of Edward Collingwood by the 1837 Conveyance (although Ms De Cordova rightly emphasised that the appellants had not relied to their detriment upon any relevant correspondence by or on behalf of the respondents). On 24 July 2006, the then Diocesan Secretary wrote to the second appellant asking if he, "as a descendant of the family, would be prepared for the burial rights over the vault to come to an end and for the three caskets to be reinterred". On 26 February 2007, a case officer with the Redundant Churches Division of the Church Commissioners wrote a letter to the second appellant which included the statement: "Obviously the question of your family vault has a significant impact on the search for a future use for the church building." On 14 July 2011, Mr Earle wrote to the second appellant referring to a meeting which had taken place at Dalton a few days earlier on 2 July at which Mr Earle had explained "that while the Commissioners recognised the property and rights reserved by the conveyance of the church property, these did not impose [an] absolute bar to subsequent alternative use". Reference was made to the fact that the Diocese of Newcastle was considering whether to register title to the church building as a voluntary first registration which would "refer to the rights in the vault as contained in the [1837] conveyance". Paragraph 2.6 of background notes relating to Holy Trinity, Dalton, located within the Church Commissioners' files in Leeds, records: "In effect, we are now satisfied that the [Collingwood] family are the rightful heirs to the vault. We also understand that they do not accept the removal of the vault and a consequent share in any financial return. We must therefore examine the scope for finding a use which accommodates their continuing interest."

11. At no time have the respondents (or the Church Commissioners on their behalf) sought to deny any request from the appellants, or members of their families, for access to the site of the burial vault or to the Collingwood memorials. The first appellant speaks of two visits to the inside of the church (which she found to be unlocked) and the family vault in the early 1950s and 1960s. Having moved to New Zealand for good in 1968, the first appellant next visited the church in 1996 when she was once again in England. She went into the church (which was again found to be unlocked) and she went and stood by the family vault and paid her respects to her grandfather. In 2006 the first appellant went to the church with her brother (the second appellant)

and they met with Mr Davies, the then Diocesan Secretary. The first appellant does not recall Mr Davies giving any indication that the Diocese claimed to own the vault. Indeed, Mr Davies is said to have specifically asked the appellants what they, as Collingwood family descendants, wanted to do with the vault and its occupants. The first appellant also makes the point that her mother (who had been born at Dissington, and who is believed to have been christened in the font at Holy Trinity) had declared that she wished to be cremated and her ashes scattered, which is the reason why she was not buried in the vault. The second appellant also refers to the meeting with his sister and Mr Davies at the church to discuss the vault in 2006. He refers to a letter from the Church Commissioners in August 2008 in which they said that he should arrange any further access through local property agents, Lamb & Edge; although his recollection is that the arrangements for the visit by Mr Timothy King in 2010 were made directly with Mr Earle. The second appellant also recalls a visit he made to the church in the late 1960s: the church was unlocked and he was able simply to walk in; and (although he cannot specifically recall) he believes that he must have gone to the brass memorial set into the stone floor because it is in the centre of the church, at the front of the pews, and it would have been one of the reasons for his visit. The second appellant also refers to a visit by Mr Earle to himself and his sister at the second appellant's farm in Gloucestershire in 2009 to discuss the matter. The second appellant states that before the application by the respondents for first registration of title was made to HM Land Registry, there was no question of preventing the appellants, or members of their families, from having access to the church to visit the vault. "On the contrary the church was very accommodating and provided facilities for access whenever they were wanted. If the church had refused to allow a visit, [the second appellant] would have taken advice as to whether [he] could require them to give [him] access, but this simply never happened." The second appellant also records that once the church was no longer being used for services, the appellants were pleased that it had been locked because, in addition to the vault under the church, there were a number of Collingwood family memorabilia within the church which they did not want to be stolen or vandalised. Mr Timothy King refers to visiting the church on a visit to Northumberland in 2006, discovering that it had been closed, and reporting the matter to the appellants. He also refers to the visit to the church, and the excavations, in 2010. Mr Timothy King further refers to another family visit to England in 2014 during which he had met Ms Cosgrif at the church; and he had later discussed possible options for the future use of the church with Ms Cosgrif over a cup of tea at Dissington Hall. Mr Timothy King had come away from that meeting thinking that it had been both positive and productive.

The appellants' case on adverse possession

12. The appellants emphasise that since there is no appeal from the FTT's finding that the respondents do not have the paper title to the vault, it is for the respondents to establish that they have obtained title to the vault by adverse possession. The appellants also stress the limited scope and utility of Ms Cosgrif's evidence, which is based largely upon her reading and understanding of the documentary records for the period before her involvement in the case began on 18 September 2013. However, the appellants do rely upon Ms Cosgrif's evidence (at paragraph 21 of her witness statement) that no faculty has ever been granted "either authorising any private vault or burial space under the Church or authorising any works to access such space" as evidence that in 1940 Edward Gordon Collingwood was buried in the vault as of right, and that the family did not require any permission from the incumbent or the church authorities to be buried there.

13. The appellants submit that, on analysis, the respondents' case falls at the first hurdle because they have produced no evidence either that they ever took possession of the vault or that the incumbent, or, after the closure of the church, the second respondent, ever evinced the requisite intention to possess the burial vault. The appellants also rely upon the various written acknowledgments of their title to the vault summarised at paragraph 10 of this decision, which were written by or (in the case of the Church Commissioners) on behalf of the second respondent. The appellants submit that there is nothing essentially different between a burial vault and any other kind of underground vault. They are both a subterranean space that can be used for storage; and, although there is no property in a deceased human body, the coffin itself is an asset of the estate (citing *Haynes's Case* (1615) 12 Co Rep 11 as authority for the proposition that the property in a winding-sheet remains in the person to whom it belonged when the corpse was wrapped in it.) Mr Auld postulates the case of a transfer of land to build a warehouse which reserves to the transferor an underground room in which casks of whisky are left to mature for 50 years. Every 50 years the transferor (or his successors) comes and removes the mature casks and replaces them with new casks. The transferor's 'use and enjoyment' of the vault is said to be not his ability to come and stand on it and think about his whisky maturing below but rather the ability to store the casks and replace them from time to time. Thus, until the transferee (or his successors) actually enters into the underground room, no claim for adverse possession can begin. The position is said to be no different with a burial vault; the use that an owner makes of it is to store coffins in it and, from time to time, to introduce new ones into the vault. However, the mere fact that access is with the permission of the transferee cannot be relevant unless and until the latter prevents access or (possibly) makes it clear that access is now under his control. As Slade J put it in *Powell v. McFarlane* (1977) 38 P&CR 452 at 480:

> "In view of the drastic results of a change of possession, however, a person seeking to dispossess an owner must … at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him."

In the present case there is evidence that the church has been locked since 2004; but such locking would be equivocal, as being equally consistent with excluding members of the general public for reasons of safety and security. There is no evidence that the respondents have ever contended that they were locking the church to prevent the descendants of Edward Collingwood from having access to the vault, and thereby seeking to obtain title to the vault. Far from being prevented from having access to the vault, whenever the appellants have wished to have access the respondents have arranged for such access to be provided precisely because the appellants were descendants of the original grantor, Edward Collingwood. Mr Auld further instances the case of a developer who builds an estate of houses and sells them but reserves for himself the estate access roads. Anticipating that it may be possible to develop some neighbouring land, and wanting to be able to re-route some of the access roads if that possibility occurs, he only grants the house owners a licence over the presently constructed roads. Mr Auld suggests that there can be no question of the developer in that example obtaining title by adverse possession to the houses that he has sold off simply because the householders' access to them is permissive. It would only be if the developer started to obstruct the estate roads, thereby preventing the householders from getting to their homes, that time could possibly start to run.

14. Since there is no evidence that the respondents have ever sought to restrict access to the vault by the descendants of Edward Collingwood, whether their access is by way of licence or easement is said by Mr Auld to be irrelevant to the real issues in this case. However, if necessary, Mr Auld would submit that the Collingwood descendants, as the owners of the freehold of the

vault, enjoy an easement entitling them to have access to the vault because the 1837 Conveyance expressly included the right for Edward Collingwood and his successors "to open such Vault as aforesaid and use and repair the same at all reasonable times". It is submitted that a right "to use and repair" the vault must include a right to have access to it. So, on its true construction, the 1837 Conveyance included a right of access to the vault. Even if that were wrong, citing para 1-92 of *Gale on Easements*, 20th edn (2017), the grant of an easement is also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment; and access to the vault is clearly ancillary to the rights to use and repair it. Even if neither of these arguments were correct, an easement of necessity would arise; and such an easement is not easily lost, and is certainly not lost merely by not being used, the more so with an easement to access a family vault which is unlikely to be used more than once or twice in every generation. There was no burial in the vault between that of the younger Edward Collingwood in 1868, only two years after the interment of his late father, and that of his nephew, Edward Gordon Collingwood, 72 years later in 1940; but there is no evidence that his widow (the appellants' grandmother) was prevented from burying her late husband in the vault on the supposed basis that, by 1940, there was no right of access thereto.

15. In the course of his oral submissions, Mr Auld made the following points: Citing paras 9-103 and 9-104 of *Jourdan & Radley-Gardner: Adverse Possession*, 2nd edn. Mr Auld emphasised the high standard of proof required from a squatter who takes possession without the true owner's consent; and the need for a trespasser whose use of the land was equivocal to adduce compelling evidence of his own animus possidendi. Mr Auld pointed to the surprising lack of evidence adduced by the respondents in support of their claim to adverse possession of the vault. It was founded largely upon the documentary records, without calling anyone who had been involved in the case prior to Ms Cosgrif's involvement as Case Officer; yet it was difficult to prove the necessary animus possidendi by reference to documents alone. In any event, the documents summarised at paragraph 10 above were said to be entirely inconsistent with any intention on the part of the respondents to possess the vault or to exclude whoever was the true paper title owner. Whenever the appellants asked to visit the interior of the church, facilities were made available for them to do so, precisely because they were the descendants of Edward Collingwood. The respondents' ability to prevent access to the vault was said to be irrelevant in circumstances where there was never any factual possession of the vault and never any intention on their part to take possession of the vault. Factual possession required some dealing with the land as an occupying owner, yet there was no evidence that anyone representing the respondents had ever even entered the vault. Mr Auld had been unable to identify any previous case in which a party had obtained title by adverse possession without even entering upon the relevant land. The respondents had not sought to put any other coffins into the vault or to use it for any other purpose; nor had they prevented the paper title owners from carrying out any further interments within the vault. The respondents' ultimate objective in these proceedings was to remove the coffins within the vault and to re-inter their remains elsewhere so as to free up the church for re-use for residential purposes and to that end to take physical possession of the vault; but the fact that it had not yet done so was said to undermine its case to have already entered into adverse possession of the vault. Mr Auld asked rhetorically: would the paper title owners have been entitled to obtain an order for possession of the vault against the respondents on the basis of what they had already done? They might have been entitled to injunctive relief against the respondents had they interfered – which they had not – with any easement of access to the vault; but even that would not have given rise to any entitlement to an order for possession of the vault, precisely because the respondents were not in possession of it. The respondents had adduced no evidence of their factual possession of the vault simply because there was no such factual possession. Nor had the respondents produced the compelling evidence of their intention to possess the vault

which would be required to displace the title of the paper title owners. The only evidence of an intention to possess the vault had been the locking of the church; but this was clearly equivocal, being directed to excluding members of the public in general for reasons of safety and security, and not to exclude descendants of Edward Collingwood from seeking to visit the site of the burial vault and the Collingwood memorials in the church. The locking of the church doors did not put the paper title owners of the burial vault on notice that they were being excluded from possession of the vault. Indeed, the respondents' ability to prevent access to the vault from outside the church did not amount to the act of taking possession of the vault. The respondents had provided the descendants of Edward Collingwood with access whenever they had requested it, and without any reservation. Were they to be accepted by the Tribunal, the respondents' submissions would put at risk the paper title of any owner of a subterranean burial vault within a church that was locked outside the hours of normal church services. There was said to be simply no answer to Mr Auld's submission that the respondents had never ever taken, or been in, possession of the burial vault.

The respondents' case on adverse possession

16. The respondents' case is that at all material times since 1940 either the first respondent (before 19 April 2004) or the second respondent (since the closure of the church) have been in exclusive physical possession and control of the church building, including the vault space in which the coffins are placed, the brass memorial set into the stone floor of the church which marks the site of the burial vault, and the regulation of access to the same; and that they, and no-one else, have dealt with the burial vault as an occupying owner could be expected to act have done. Both, or either, of the respondents have intended to possess the church building, including the burial vault, and they have done so in fact. In particular, at all material times access to the vault has required the consent of the respondents, their officers or agents. The correspondence with the family, which proceeded on an amicable basis and in a facilitative spirit, was entirely motivated by considerations of common humanity, courtesy and concern for the descendants of those who had been interred in the burial vault within the church building; and it was wholly consistent with the pastoral caring role of the Church of England and its various emanations.

17. The respondents rely on the statement of the principles identifying the nature of adverse possession, and what is required to demonstrate it, which, sitting as a Deputy Judge of the High Court in *Dyer v Terry* [2013] EWHC 209 (Ch) at [14], Mr Richard Millett QC derived from the seminal judgment of Slade J in the leading case of *Powell v McFarlane* (1977) 38 P & CR 452 at pages 470-471 (as approved by the House of Lords in *JA Pye (Oxford) Limited v Graham* [2002] UKHL 30, [2003] 1 AC 419). The respondents submit that this case is particularly fact-sensitive and that the Tribunal's decision will need to be based on the particular factual circumstances of the land in question, taking account both of the particular nature of the use which could be expected to be made of the vault by a full owner (namely to put any human remains interred therein to rest, and keeping those remains undisturbed and well away from the rest of the world) and of the way that the respondents have dealt with the land in question (by controlling access to the church). The respondents dispute that the appellants (or anyone else) has exercised any degree of possession or control in relation to the vault, much less anything that is comparable to the degree of possession and control exercised by the respondents. No-one, whether the true owner or a squatter, was going to break open the vault and literally enter into physical occupation of it. The respondents submit that, in all the circumstances, their control of the church building, and of access to the vault, and their search for an alternative use for this redundant church, *were* an unambiguous assertion of control. Relying upon the statement at para

9-11 of *Jourdan & Radley-Gardner: Adverse Possession*, 2nd edn., that: "The squatter must intend to exercise exclusive control for his own benefit, but he need not have a conscious intention to exclude the owner. The required intention is to possess, and not to dispossess", the respondents submit that, in all the circumstances, title to the vault has vested in the respondents by reason of adverse possession. The last interment in the vault took place in or around 1940; and no-one has physically entered the vault since then except for the purpose of taking exploratory photographs of the construction and the interior of the vault. Since at least the last interment, the church, including the vault, has been in the continuous, and exclusive, physical possession and control of the respondents, without any third-party consents; and they have dealt with the same as an occupying owner would have done. There is no physical access to the vault unless the floor of the church is literally lifted up. At all material times, access to the vault has been controlled by the respondents, and it has required the consent of themselves, their officers or agents. Ms Cosgrif's evidence is said to lead to the clear conclusion that, from April 2004, the church has been closed and the respondents have had exclusive possession of it and controlled all access to it, which included possession of, and access to, the vault. It was not simply that the door to the church was locked; the church had been declared redundant and permanently closed for public worship, and the respondents were actively seeking to find some suitable alternative use for the church with a view to its permanent disposal. If the respondents' control of the church and the vault did not amount to physical and exclusive possession, what else could do so? Furthermore, the evidence is said to make it clear that the respondents were taking possession of the vault and that they intended to exclude the outside world from it. The respondents rely upon the classic definition of animus possidendi supplied by Slade J in *Powell v McFarlane* at 471-2 (and approved by the House of Lords in *Pye v Graham*) as involving "the intention, in one's own name and one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow." They point to a number of cases (considered at paras 7-51 and following of *Jourdan & Radley-Gardner*) where the true owner has made some limited use of the disputed land yet the squatter has been held to be in adverse possession; and they pray in aid the statement at para 9-10 of the same work that: "If the squatter has and manifests the intention to exercise exclusive control of the disputed land, and in pursuance of that control permits the owner to make limited use of the land, he will have the animus possidendi." Given the passage of time, the respondents submit that title would now be indefeasible, and any claims to the contrary long since statute-barred. The appellants' analogy with storage are said to be unhelpful because goods - even matured whisky or vintage port – are stored or laid down with a view to their ultimate retrieval and re-use or disposal, but that is not the case with human remains. Ms de Cordova does, however, acknowledge that there is no recorded authority which is directly in point.

Determination

18. Since it is common ground between the parties that there is no recorded authority which is directly determinative of the principal issue raised by this appeal, it is necessary to proceed from first principles. As stated by the editors of *Megarry & Wade: The Law of Real Property*, 9th edn (2019), at paras 7-028 and following, when the owner of land is entitled in possession, time begins to run as soon as both: (1) the owner has been dispossessed or has discontinued his possession, and (2) adverse possession has been taken by some other person. Discontinuance occurs where the owner abandons possession of the land; but abandonment will not be lightly presumed, and the slightest acts done by the owner will negative discontinuance. There will be a dispossession of the owner in any case where, there being no discontinuance, a squatter

assumes possession in the ordinary sense of the word. Dispossession does not therefore require an ouster of the owner. It is thus not necessary that the owner should have been driven out of possession. If the owner abandons possession, or if the owner dies and the person next entitled does not take possession, time will begin to run as soon as adverse possession is taken by another. What matters is not how the owner has ceased to be in possession, but that some other person has taken possession that is adverse to that owner's title. Until then, there is nobody against whom the owner is failing to assert his or her rights. Accordingly, in practice nothing is likely to turn on the distinction between dispossession and discontinuance; and, indeed, the expression "dispossessed owner" has been used as shorthand to refer to the owner displaced by the squatter.

19. In the absence of concealed fraud, it is irrelevant that the true owner does not know that he or she has been dispossessed. Nor is there any requirement that adverse possession must be objectively apparent. However, as David Richards J observed in *Wretham v Ross* [2005] EWHC 1259 (Ch) at [31]: "It is without question a vital protection to paper owners that there must be physical possession of the property by the squatter with the requisite intention of exclusive possession. It is hard to imagine cases where legal possession could be established without it being apparent to a properly-informed owner visiting the property at appropriate times in the 12-year period". To a similar effect are observations in *Roberts v Swangrove Estates Ltd* [2007] EWHC 513 (Ch), [2007] 2 P & CR 326 at [40], where Lindsay J suggested that the squatter's "factual possession must be sufficiently clear that, if the owner were present on the land, he would appreciate that the squatter was dispossessing him". As *Jourdan & Radley-Gardner* point out (at para 7-51), referring to observations of Neuberger LJ (with the agreement of Thorpe and Wall LJJ) in *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P & CR 9 at [53-55], provided the squatter is the only person in effective control of the land, the fact that the true owner makes use of it in a way that does not amount to effective control of the land will not prevent the squatter from being in possession; but, the Tribunal would observe, this presupposes that the squatter is in actual possession of the land, which involves some sort of physical presence on the land, or at least being in physical control of it in some real way.

20. Today, 'adverse possession' merely means possession inconsistent with, and in denial of, the title of the true owner of land, and not, for example, possession under a licence or under some contract or trust. There is a presumption that the owner of the land with the paper title is in possession of the land. The principles which determine whether conduct amounts to adverse possession were affirmed by the House of Lords in *J A Pye (Oxford) Ltd v Graham*, largely in accordance with Slade J's "remarkable judgment" in *Powell v McFarlane*. To establish adverse possession, a squatter must prove both factual possession of the land and the requisite intention to possess (or 'animus possidendi'). If a person is in possession of land with the permission of its true owner, his possession cannot be adverse. Moreover, adverse possession will cease where the squatter gives a written acknowledgment of the owner's title (which causes time to run afresh): see Limitation Act 1980 s. 29 (1) and (2).

21. The Tribunal accepts the respondents' submissions that this case is particularly fact-sensitive and that its decision needs to be based on the particular factual circumstances of the land in question, taking account both of the particular nature of the use which could be expected to be made of the vault by a full owner (namely to put any human remains interred therein to rest, and keeping those remains undisturbed and well away from the rest of the world) and of the way that the respondents have actually dealt with the land in question (by controlling access to the church). The Tribunal also accepts the respondents' submissions as to the spirit in which the

correspondence with the appellants has proceeded, although it considers that this in no way detracts from the objective meaning and effect of that correspondence, which is entirely inconsistent with any intention on the part of the respondents to possess the vault by excluding whoever was the true paper title owner, and by treating it as the respondents' own. Likewise, the Tribunal accepts, for the reasons advanced by Ms De Cordova, the respondents' criticisms of the utility of the appellants' suggested analogy with the storage of goods. Otherwise, however, the Tribunal prefers the submissions of the appellants to those of the respondents.

22. The Tribunal does not accept that since at least 1940 the first, and then the second, respondents have been in exclusive physical possession and control of the burial vault, or that they had the requisite intention to possess the vault by treating it as their own. The Tribunal also rejects the alternative case that since the church closed for regular worship in 2004, the second respondent has been in exclusive physical possession and control of the burial vault, or that it had the requisite intention to possess the vault by treating it as their own. The respondents cannot demonstrate physical possession of the vault because they have never entered it, or sought to exclude the descendants of the Collingwood family with the paper title to the vault from exercising any of the rights attaching to such paper ownership. Nor, in the light of the conduct of the second respondents and their agents, the Church Commissioners, in affording access to the interior of the church, and the terms of their correspondence with the appellants (summarised at paragraph 10 above), can the second respondents properly assert that they had the requisite intention to possess the vault to the exclusion of the owners with the true paper title. In the Tribunal's judgment, the respondents have failed to demonstrate either of the limbs of the two-fold test established in *Powell v McFarlane* and endorsed in *Pye v Graham*. Given the particular physical characteristics and purpose of a burial vault, on the facts established by the evidence (as identified above) it cannot properly be said that the descendants of Edward Collingwood, as the persons with the paper title to the vault, have ever been dispossessed, or discontinued or abandoned their possession of the vault; nor can it properly be said that the respondents, or either of them, have ever taken adverse possession of the vault. The Tribunal accepts the appellants' submission that the locking of the church was clearly equivocal, being directed to excluding members of the public in general for reasons of safety and security, and not to exclude the descendants of Edward Collingwood from seeking to visit the site of the burial vault and the Collingwood memorials within the church. The Tribunal accepts that the locking of the church doors did not operate so as to put the paper title owners of the burial vault on notice that they were being excluded from possession of the vault. Nor can the respondents' ability to prevent access to the vault from outside the church sensibly be said to amount to the act of taking physical possession of the vault. The respondents have provided the descendants of Edward Collingwood with access whenever they have requested it, and without any reservation. The Tribunal accepts the appellants' submission that by accepting the respondents' case, however convenient that might be in terms of securing a future use for this redundant Grade II listed church, it would be putting at risk the paper title of any owner of a subterranean burial vault within a church that is locked outside the hours of normal church services.

23. The Tribunal considers that there is simply no answer to Mr Auld's submission that the respondents have never taken, or been in, possession of the burial vault, or evinced any intention to do so to the exclusion of the paper title owners. The Tribunal would entirely accept the point made by Neuberger LJ in the *Tower Hamlets* case that it self-evidently would not have assisted the paper title owners to have shown that they had the right to enter and use the vault during the 12-years that a squatter was in occupation of the vault if they had never actually done so. Indeed, as Neuberger LJ also recognised, in a sense it is because the paper owners would have had that

right that they would have been at risk of losing their title to the squatter. However, that cannot assist the respondents if they have never taken, or been in, possession of the burial vault, and have never evinced any intention to do so. The paper title owners cannot sensibly be said to have "discontinued" their possession of the vault; nor can the respondents, or either of them, sensibly be said at any point in time to have gone into possession of the vault without the consent of the paper title owners so as to have "dispossessed" them, with the consequence that time began to run against the paper title owners pursuant to s. 15 (1) of the Limitation Act 1980. The Tribunal accepts the appellants' submission that the respondents' ability to prevent access to the vault is irrelevant in circumstances where the respondents were never in factual possession of the vault and have never had any intention to take possession of it. Factual possession requires some dealing with the land as an occupying owner, yet there is no evidence that anyone representing the respondents has ever even entered the vault. Neither respondent has ever sought to remove the existing coffins from within the vault; they have never sought to put any other coffins into the vault, or to use it for any other purpose; nor have they ever sought to prevent the paper title owners from carrying out any further interments within the vault. Even if s. 80 of the Churches Act 1818 would operate to prevent any further interments within the vault – and this has not been properly made out on the meagre evidence as to the construction of, and means of access to, the vault that has been put before the Tribunal – the reality is that the respondents have never sought to prevent the appellants from accessing the vault; rather they have permitted them to have access to the vault whenever they have requested it, and to carry out the limited exploratory excavation that was undertaken in 2010.

24. Neither counsel has been able to identify any previous case in which a party has obtained title by adverse possession without even entering upon the relevant land. The Tribunal considers that there is force in the rhetorical question posed by Mr Auld: Would the paper title owners have been entitled to an order for possession of the vault against the respondents on the basis of what they had already done if the paper title owners had applied for one within 12 years after 1940 or within 12 years after 2004? In the Tribunal's judgment, the answer would have been: No. The Tribunal also asks itself: On what basis might the paper title owners have sought to prevent the respondents from locking the church building once it had been closed for regular public worship so as to render it safe and secure? The Tribunal struggles to find a satisfactory answer so long as the respondents were prepared to afford reasonable access to the descendants of Edward Collingwood to the interior of the church whenever they asked for it (as, on the evidence, they were prepared to do). Even if the respondents could establish that the paper title owners have failed to exercise any degree of possession or control in relation to the vault, that would not assist the respondents unless they can also establish that they have themselves entered into adverse possession of the vault. Given that there is no challenge to the FTT's decision that the respondents cannot demonstrate a paper title to the vault, the burden lies upon the respondents to establish a case of adverse possession. In the Tribunal's judgment, they have failed to do so, for the reason advanced by the appellants. The Tribunal does not consider that the conduct of the respondents in relation to the burial vault would have indicated to the paper title owners, if they had visited the church at appropriate times during any relevant 12-year limitation period, that the respondents were engaged in dispossessing them of their paper title to the vault.

25. The Tribunal does not dispute that, on other facts, church authorities might successfully be able to assert possessory title to a burial vault, as where they have denied the right of the paper title owners to inter further human remains within the vault and/or where they have removed human remains already interred within the vault to some other place of burial. Both those are not the facts of the instant case.

26. The FTT correctly identified (at para 55 of its Decision) the questions it had to answer: as a matter of fact, whether Edward Collingwood or his successors in title had discontinued possession of the vault, and whether the incumbent for the time being since (at the latest) 1940 had been in adverse possession of it. The FTT found as a fact that the successors in title to Edward Collingwood had discontinued possession of the vault from (at the very latest) 1941, after the last interment in 1940 (and that they might well have done so long before then): see para 69 of its decision. The FTT reasoned that the very least that an owner in possession of a vault must have is the ability to access it, not in the sense of getting inside it, but in the sense of being able physically to approach it and look at the external evidence of its presence. An owner who could not do that without permission could not, in the FTT's judgment, be said to be in possession of the vault: see para 59. The logical consequence of this approach is that the paper title owner of a burial vault located within a church, and with no independent external means of access, would automatically discontinue possession if the church authorities were to keep the church building locked unless the paper title owners were permanently provided with a key. The Tribunal cannot accept that this is the case. In the Tribunal's judgment, it would only be if reasonable access were refused on request by the paper title owner, or if the church authorities were to refuse their reasonable request to inter the remains of a further family member within the vault, or if the church were to take steps to remove the human remains and coffins or caskets resting within the vault, that the paper title owners could sensibly be said to have been dispossessed of the vault. Only at that point would the paper title owners have been in any position to bring legal proceedings to enforce their right of possession of the vault.

27. The FTT found as a fact that since (at the latest) 1940 successive incumbents of the church had been in physical possession and control of the vault because they had controlled access to the church building, which was the only means of approaching the vault. It was said to defy common sense to suppose that the church had been left unlocked and open 24 hours a day. It was not plausible that the church had stood open and unlocked even during the day for some years before 2004, when the church was regarded as no longer needed by its parishioners and was closed. The FTT acknowledged that there was no separate evidence of intention, but the unambiguous fact of possession and control of the church were said to speak for themselves. In fact, the unchallenged evidence of the appellants suggests that the church was kept unlocked, at least until 1996 and probably until 2004. But in any event, for the reasons already given, even if it were established that the church had been locked except for normal church services, the Tribunal would not have regarded that as sufficient evidence that successive incumbents had been in possession of the vault.

28. The FTT also found as a fact that the second respondent had been in possession of the vault since the closure of the church on 19 April 2004 so that it had acquired title to the vault itself by April 2016 in the event, described as "extremely unlikely", that title to the vault had not passed to the incumbent decades earlier. The FTT relied upon the second respondents' control of the church building since 2004; it considered that this manifested its intention to possess the vault, and that this was not negatived by documentary references made by the Church Commissioners to the Collingwood family's freehold title to the vault. Again, the Tribunal cannot agree with the FTT's analysis and conclusions for the reasons already given.

29. Before the FTT there was much discussion of the nature, and basis, of the paper title owner's rights of access to the burial vault. The FTT considered that only an easement of necessity could have given Mr Collingwood and his family access to the vault since, unlike others of this kind and period, the burial vault did not have access by a door and steps to the

outside of the church. The FTT accepted that an easement of necessity would have arisen for the benefit of the vault and its freehold owner, initially Mr Edward Collingwood: see para 63 of the FTT's Decision. This finding by the FTT has given rise to the argument by the respondents that an easement of necessity only arises where the implied grantee has no other means of access to the relevant land. In fact, it is said by the respondents that Mr Collingwood (the grantor) was a parishioner and, subject to the church being open, that he would have been entitled to visit the site of the burial vault by way of a right known as 'a church way', which is a customary right granted to parishioners at large (i.e. a class of people, not any identified individuals) to go to and from the parish church over the land of a private individual owner as a means of access to the parish church. This has led, in turn, to a submission by the appellants that as the church was newly constructed in 1837, there could be no question of there existing at that time a customary right of church way to Holy Trinity, Dalton. Reliance is placed by the appellants upon observations of Farwell LJ - not Fletcher Moulton LJ as erroneously stated at f-n 3 to para 37 of Vol 32 of *Halsbury's Laws*, 5th edn (2019) (Title: Custom & Usage) - in *Farquhar v Newbury RDC* [1909] 1 Ch 12 at 14 (in the course of argument) and 19 that since it depends for its origin upon immemorial custom, a church way must arise from user from time immemorial and so cannot now be created anew.

30. The Tribunal does not consider it necessary to engage with this debate. The 1837 Conveyance in terms conferred upon the grantor and his successors "full power … to open such Vault as aforesaid and use and repair the same at all reasonable times … ". The Tribunal accepts the appellants' submission that the right "to use and repair" the vault must include the right to have access to it. As stated at para 1-92 of *Gale on Easements*, 20th edn (2017), the grant of an easement is also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment; and access to the vault is clearly ancillary to the rights to use and repair it. Thus, on its true construction, the 1837 Conveyance included an express right of access to the vault. Alternatively, such a right of access is readily to be implied into the 1837 Conveyance. In *Pwllbach Colliery Co v Woodman* [1915] AC 634 at 646 (cited at para 3-71 of *Gale on Easements*) Lord Parker of Waddington said: "The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used." He added: "… it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may nor may not involve this definite and particular use." In the Tribunal's judgment, a right of access to the vault is necessary to give due and proper effect to the rights reserved by the 1837 Conveyance. It is therefore to be implied into the 1837 Conveyance. It follows that there was no need for Edward Collingwood or his successors to rely upon any easement of necessity to the burial vault.

Order

31. For the reasons set out above, the Tribunal would allow the appeal and dismiss the cross-appeal. Paragraphs 1 and 2 of the FTT's order dated 11 June 2018 will stand; but paragraphs 3 and 4 are set aside. The Chief Land Registrar is directed to give effect to the second respondent's application dated 23 November 2017 to first registration of title to the church building but excluding the underground vault or burial place within the church building which was excepted and reserved to Edward Collingwood and his successors in title by the 1837 Conveyance. The

Tribunal directs the parties' counsel to seek to agree an appropriate form of Order, with any differences to be resolved by the Tribunal on paper.

32. The Tribunal makes it clear that it is not deciding whether the appellants, or either of them, are the freehold owners of the burial vault, as successors in title to Edward Collingwood. The Tribunal would also reiterate its invitation to the parties to engage constructively with each other to avoid any outcome that might result in the demolition of this fine, historic Grade II listed church building. This would be contrary to the personal interests of the parties and also to the wider public interest.

David R. Hodge

His Honour Judge Hodge QC

17 June 2019