

37/94 Legal Responsibilities and Liabilities re Columbaria

(A report from the Standing Committee.)

Introduction

1. In October 1994 the Synod resolved as follows -

"In view of the apparently increasing number of columbaria being erected upon church trust property, this Synod requests the Standing Committee to appoint a committee, including the mover, to investigate the legal responsibility of parishes and the Diocese to relatives of a deceased person whose ashes are interred on church trust property, either in a columbarium or elsewhere, and report to the next session of Synod."
2. Standing Committee asked the Property Trust to report its understanding of the matters on which the resolution seeks a report and, in turn, the Property Trust appointed a committee comprising Archdeacon Stoddart, the Secretary of the Property Trust and the Legal Officer to investigate and report.
3. This report is based on the report of the committee.

Relevant Diocesan Legislation

4. Before considering the issues raised by resolution 37/94 it is useful to summarise diocesan legislation which applies to the construction of columbaria and the erection of memorials on church trust property.
5. Clause 9 of the Church Grounds and Buildings Ordinance 1990 prohibits the following, among other things, without the approval of the Archbishop by faculty or other form of permit -
 - (a) the placing of a memorial in or on any part of church trust property; and
 - (b) the erection of a wall on church trust property in which to inter the ashes of a deceased person or the use of a wall for that purpose.
6. Accordingly, a faculty is needed before a columbarium can be erected on church trust property. In practice, the faculty would also cover the placing of memorials on the wall to cover the niches.
7. Under clause 20(1)(p) of the Church Administration Ordinance 1990 the churchwardens must maintain and repair a columbarium erected on church trust property. This clause does not extend to maintaining memorial plaques unless they are the property of the church (see item 19).
8. Under clause 20(1)(h) of the Church Administration Ordinance 1990 the churchwardens must insure the columbarium to the extent appropriate having regard to both risks and amounts insured, except to the extent that such insurance has been effected by the Property Trust. The Property Trust has effected insurance for all parish buildings but whether such insurance extends to a particular columbarium is a matter about which the churchwarden must obtain specific advice from the Insurance and Buildings Supervisor of the Sydney Diocesan Secretariat.
9. Clause 14 of the Church Grounds and Buildings Ordinance 1990, on the charge and administration of burial grounds, does not apply to columbaria since they are not burial grounds for the purpose of that clause.

Responsibilities and Liabilities

10. The terms of resolution 37/94 are very broad and so consideration has been limited to the obligations of the churchwardens, if any, in relation to the following matters -
 - (a) For how long may the ashes and plaque remain in or on the columbarium?
 - (b) Who is responsible for maintaining the memorial plaque?
 - (c) Who is responsible for maintaining the columbarium?
 - (d) Can the memorial plaque and ashes be relocated?
 - (e) Can the church property be sold?
11. To answer the questions referred to in item 10 it is first necessary to determine the nature of the agreement made by the churchwardens under which they allow a memorial plaque and ashes to be placed on church trust property and the legal consequences which follow when ashes and a plaque are placed on church property.
12. An article which is affixed to land with an intention that it remain in position for an indefinite or substantial period, rather than merely for a temporary time span, will usually become part of the land with ownership of the article passing to the owner of the land: *Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR(NSW) 700. There is no Australian authority on whether this principle applies to monuments placed on graves or in relation to ashes and memorial plaques placed in or on columbaria. However English authority suggests that the property of tombstones remains in the persons who erected them: *Spooner v Brewster* (1825 C.P. 3 Bing 131)

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13. From enquiries made through the Australian Cemeteries & Crematoria Association it appears to be the prevailing view in the industry that ownership of memorial plaques and ashes does not transfer to the owner of the columbarium at the time the plaque and ashes are placed in and on the columbarium or at any time thereafter. This is consistent with the English authority in relation to tombstones. Rather the relationship between the parties is regarded as one of licensor and licensee, that is, the owner of the columbarium (as licensor) grants permission by way of licence for the property of another person, namely the plaque and ashes, to be placed on and in the columbarium to remain there for a period of time.

14. In the absence of any express legal authority on the matter it is assumed, for the purposes of this report, that the nature of the relationship created between churchwardens who operate a columbarium and persons who "acquire" niches is also one of licensor and licensee. This being the case, the answer to the questions referred to in item 10 will depend on the terms of the licence agreement. If the express terms of the agreement are not comprehensive, terms may be implied if it can be concluded that the parties would have agreed to those terms at the time the agreement was entered into.

15. Having classified the nature of the relationship between the parties it is now possible to consider the questions in item 10.

For how long may the ashes and plaque remain in and on the columbarium?

16. If the agreement does not specify the term of the licence, the term will be determined having regard to what the parties probably would have agreed had the term been expressly considered at the time the agreement was made. While the specific circumstances would need to be taken into account, the failure to specify a limited term may suggest that the licence was granted in perpetuity. Where the licence is granted in perpetuity, the churchwardens cannot remove the ashes and plaque without permission.

17. Most major crematorium and columbarium operators in Sydney specify a standard licence term of 25 years and the manner of the return of the memorial and ashes to relatives after that term has expired.

18. It is imperative that where churchwardens operate columbaria the term is specified together with the manner of disposal of the ashes and plaque after the expiration of the term.

Who is responsible for maintaining the memorial plaque?

19. The memorial plaque and ashes will not become the property of the church but rather remain the property of the person who put them there. Unless the agreement specifies to the contrary the obligation to repair and maintain the memorial plaque will be that person's.

Who is responsible for maintaining the columbarium?

20. The columbarium is church trust property and the churchwardens will be responsible for maintaining it under the Church Administration Ordinance 1990. If the agreement is silent on the maintenance of the columbarium, it could readily be implied that the churchwardens must maintain the columbarium during the licence term.

Can the memorial plaque and ashes be relocated?

21. The land on which a columbarium is erected may be needed, for example, to extend a parish building necessitating the relocation of the ashes and memorial plaques. Whether the churchwardens can relocate the ashes and memorial plaques without permission of the person who put them in position, depends on whether the agreement between the parties relates to a specific niche in a specified wall or to a niche in a wall anywhere on the church property. In the former case the churchwardens cannot remove the plaque and ashes without permission but in the latter case no such permission is required.

Can the church property be sold?

22. The existence of a columbarium on church land would not prevent the land from being sold although it may reduce the price a purchaser would be willing to pay since it would be imperative for the purchaser to agree to abide by the terms of current licence agreements entered into by the churchwardens. If this agreement were not obtained the churchwardens could be liable if, after purchase, the purchaser interfered with the memorials or ashes.

23. To overcome the difficulties referred to in item 22 it is imperative that any agreement made by the churchwardens contain a term which permits memorials and ashes to be relocated to another property if the original land is to be sold.

24. A licence agreement will not create an interest in the land on which the columbarium is erected.

Liability of the "Diocese"

25. Resolution 37/94 also refers to the potential liability of "the Diocese" although it is not clear what is meant by that expression. Neither the Property Trust as the owner of the property on which the columbarium is erected,

nor any other diocesan body, will have any responsibility under a licence agreement unless it is a party to the agreement.

Concluding Comments

26. While the relationship between the parties would usually be regarded as one of licensor and licensee it is possible that, in a particular case, a different relationship imposing different obligations is created. Accordingly, if churchwardens are in doubt on their obligations for columbaria on property under their control, they must obtain specific legal advice.

27. If uncertainty is to be avoided it is imperative that the terms of any agreement under which ashes and memorials are placed on church property be comprehensive, particularly on what is to happen if the land on which the columbarium is erected is redeveloped or sold.

28. The Property Trust will be bringing forward amendments to the Church Grounds and Buildings Ordinance 1990 to allow the construction of columbaria only on burial grounds and to bring columbaria under the rules and regulations for burial grounds.

For and on behalf of the Standing Committee

MARK PAYNE
Legal Officer

14 June 1995