Trinity Term
[2025] UKSC 32
On appeal from: [2024] EWCA Civ 507

JUDGMENT

Wathen-Fayed (Appellant) *v* Secretary of State for Housing, Communities and Local Government (Respondent) and Horizon Cremation Limited and another (Interested Parties)

before

Lord Reed, President
Lord Hamblen
Lord Leggatt
Lord Stephens
Lady Simler

JUDGMENT GIVEN ON
30 July 2025

Heard on 20 May 2025

Appellant
Patrick Green KC
Kate Gardiner
(Instructed by Fladgate LLP)

Respondent – Secretary of State for Housing, Communities and Local Government
Guy Williams KC
Jonathan Darby
(Instructed by Government Legal Department)

Interested party – Horizon Cremation Ltd
Peter Goatley KC
Sioned Davies
(Instructed by Addleshaw Goddard LLP (Manchester))

LORD HAMBLEN (with whom Lord Reed, Lord Leggatt, Lord Stephens and Lady Simler agree):

1. This appeal concerns the interpretation of the Cremation Act 1902 (the "Act") and in particular the provisions of the Act which govern where a crematorium may be sited.

2. This matters because section 5 of the Act (the "radius clause") generally prohibits siting a crematorium within 200 yards of dwelling houses and 50 yards of public highways.

3. The essential issue on this appeal is the point from which these distances are to be measured, which in turn depends upon what is meant by a crematorium for the purpose of the radius clause.

4. This is an issue upon which differing views have long been taken. In the present case the view of the judge was that a crematorium comprises any building, structure or open area which is used for the purpose of burning human remains. The Court of Appeal's view was that it comprises the crematory and all other buildings or structures on site in which functions incidental or ancillary to the cremation process are carried out. The appellant's case is that it comprises any area on site the use of which is incidental or ancillary to the purpose or activity of burning human remains, which includes areas used for the disposal and storage of ashes.

5. The area of the crematorium site in issue on this appeal is a proposed memorial garden which could allow for storage of ashes in storage structures and pillars which can incorporate urns.

The factual and procedural background

6. The current dispute arises out of a planning application made by the first interested party, Horizon Cremation Ltd ("Horizon"), for the development of a crematorium on a site comprising an open field in the Metropolitan Green Belt to the north of Oxted Road (the A25), in Surrey (the "Site"). The proposal included a ceremony hall, memorial areas, a garden of remembrance and associated parking and infrastructure.

7. The application was made to the second interested party, Tandridge District Council ("Tandridge"). Horizon made it clear that there would be no disposal or scattering of ashes on the Site but that storage of ashes in the memorial gardens in suitably designed receptacles was contemplated.

8. Horizon's planning application was refused by Tandridge. Horizon appealed that decision to an inspector appointed by the respondent, the Secretary of State for Levelling Up, Housing and Communities. The appeal was allowed and planning permission was granted.

9. The appellant, Mrs Heini Wathen-Fayed, brought proceedings under section 288 of the Town and Country Planning Act 1990, seeking to quash the inspector's decision, on the basis that (amongst other arguments, no longer material) the grant of planning permission was contrary to the radius clause. It was contended that the radius distances were required to be measured from an area that included the memorial garden in which ashes might be stored and so the development contravened the Act.

10. On 20 January 2023, Timothy Mould KC, sitting as a Deputy High Court Judge, gave judgment dismissing Mrs Wathen-Fayed's claim: [2023] EWHC 92 (Admin); [2023] PTSR 524. Mrs Wathen-Fayed appealed to the Court of Appeal. On 10 May 2024, the Court of Appeal (Sir Andrew Macfarlane P, Andrews and Snowden LLJ) gave judgment dismissing the appeal; [2024] EWCA Civ 507; [2025] PTSR 302. The lead judgment was given by Andrews LJ. On 9 October 2024, the Supreme Court granted permission to appeal.

The statutory and regulatory framework

The Act

11. The long title to the Act states that it is "[a]n Act for the regulation of the burning of Human Remains and to enable Burial authorities to establish crematoria".

12. Section 2 defines "crematorium" as "any building fitted with appliances for the purposes of burning human remains, and shall include everything incidental or ancillary thereto".

13. Section 4 provides that the powers of a burial authority "to provide and maintain burial grounds or cemeteries, or anything essential, ancillary or incidental thereto, shall be deemed to extend to and include the provision and maintenance of crematoria."

14. The radius clause in section 5 is in the following terms:

> "No crematorium shall be constructed nearer to any dwelling house than two hundred yards, except with the consent, in

> writing, of the owner, lessee, and occupier of such house, nor within fifty yards of any public highway, nor in the consecrated part of the burial ground of any burial authority."

15. Section 7 provides for the making of regulations, including in relation to the disposal of ashes:

> "The Secretary of State shall make regulations as to the maintenance and inspection of crematoria, and prescribing in what cases and under what conditions the burning of any human remains may take place, and directing the disposition or interment of the ashes…"

As originally enacted, section 7 provided for the regulations to be laid before Parliament and for them to "have the same effect as if they were enacted in this Act". This provision was repealed in 1952.

16. Section 8 provides sanctions for breaching the regulations and the provisions of the Act.

17. Section 9 allows for a burial authority to demand fees "for the burning of human remains in any crematorium provided by them".

18. In *R (Ghai) v Newcastle City Council* [2010] EWCA Civ 59; [2011] QB 591 (*"Ghai"*) Lord Neuberger of Abbotsbury MR summarised the aims of the Act as follows, at para 34:

> "…to ensure that cremations were subject to uniform rules throughout the country, to enable the Secretary of State to regulate the manner and places in which cremations were carried out, to require a crematorium to be a building which was appropriately equipped, and to ensure that a crematorium was not located near homes or roads."

The Regulations

19. The Cremation Regulations 1903 were made on 31 March 1903. Both the regulations (the "1903 Regulations") and the Act came into force on 1 April 1903.

20. Regulation 1 provided for every crematorium to be "maintained in good working order".

21. Regulation 3 provided that "no cremation of human remains shall take place except in a crematorium of the opening of which notice has been given to the Secretary of State".

22. Regulation 16 provided for the disposition or interment of ashes, as follows:

> "After the cremation of the remains of a deceased person the ashes shall be given into the charge of the person who applied for the cremation if he so desires. If not, they shall be retained by the Cremation Authority, and, in the absence of any special arrangement for their burial or preservation, they shall be decently interred in a burial ground or in land adjoining the crematorium reserved for the burial of ashes. In the case of ashes left temporarily in the charge of the cremation authority and not removed within a reasonable time, a fortnight's notice shall be given to the person who applied for the cremation before the remains are interred".

23. It is to be noted that regulation 16 treated land reserved for the burial of ashes as "adjoining" the crematorium rather than as being part of the crematorium.

24. The Cremation Regulations 1920 replaced the 1903 Regulations and were then replaced by the Cremation Regulations 1930 which were later amended in 1952. These continued to provide for disposition of ashes in the same terms as regulation 16 of the 1903 Regulations, save that from 1930 the regulations allowed for the scattering of ashes as an alternative to interment.

25. The regulations currently in force are the Cremation (England and Wales) Regulations 2008 (SI 2008/2841) (the "2008 Regulations"), which came into force on 1 January 2009. Paragraph (3) of regulation 30 provides:

> "(3) Where paragraph 1(b) applies, any ashes held by a cremation authority must be decently interred in a burial ground or part of a crematorium reserved for the burial of ashes, or scattered there."

26. In contrast to regulation 16 of the 1903 Regulations, regulation 30(3) treats land reserved for the burial or scattering of ashes as being part of the crematorium.

27. This is consistent with the Department of the Environment Guidance issued in April 1978 as to "The Siting and Planning of Crematoria" (the "Guidance"). Paragraph 18 of the Guidance states:

> "By Section 2 of the Act 'crematorium' means 'any building fitted with appliances for the purpose of burning human remains, and shall include everything incidental or ancillary thereto'. The Department is advised that the crematorium buildings, chapels and parts of the grounds used for the disposal of ashes come within this definition, but not ornamental gardens, carriageways or houses for staff."

28. The Guidance is now accompanied by the following "Explanatory Note":

> "Section 188 of the Local Government, Planning and Land Act 1980 and Part XVI of Schedule 34 rescinded the requirement in section 1 of the Cremation Act 1952 that the sites and plans of proposed crematoria must be approved by the Secretary of State for the Environment, paragraph 3 (page 1) therefore of the above Memorandum is no longer relevant. We feel we must stress that the above Memorandum was only issued for guidance and certain aspects may well be out of date. However, prospective cremation authorities may find it informative which is why it has been decided to publish it in this Directory."

Legislative background

29. In October 2024 the Law Commission of England and Wales issued a Consultation Paper (No 263) on Burial and Cremation (the "Consultation Paper"). This summarises the background to the Act as follows:

> "1.74 Cremation was not typically practised in the UK before the nineteenth century. Christians did not favour it, given their belief in the resurrection of the body. In addition, it may have had associations with Pagan treatment of the body (being practised by the Greeks and Romans). However, the end of the nineteenth century saw the increasing emergence of cremation when it was encouraged as a more sanitary funerary method (including by the surgeon to Queen Victoria, who had been impressed with a model cremating apparatus he saw at the Vienna Exposition in 1873).

> 1.75 When cremation first emerged in the nineteenth century, it was not clear that it was permitted under the law. An 1884 criminal case found that cremation (meaning simply burning a body) was legal so long as it did not amount to a public nuisance or prevent a coroner's inquest. An initial attempt was made, at the instigation of the Cremation Society, to introduce a Bill enabling the regulation of cremation, but this was opposed by the Government and the Opposition.
>
> 1.76 A number of local Acts of Parliament were then passed enabling councils or corporations to establish crematoria. This continued until the Cremation Act 1902 was enacted, creating a regulatory system which allowed all burial authorities to establish crematoria, as well as governing how private crematoria should operate."

30. The Consultation Paper explains the growth of cremation since the Act. In 1899 there were 351 cremations. In 1950 there were 81,633 cremations. In 2022 there were 477,629 cremations, amounting to 82% of all deaths in that year.

31. One of the issues put out to consultation is whether the radius clause should be repealed or retained and, if retained, the location from which the radius distance should be measured.

32. As the Consultation Paper makes clear (para 12.4) the radius clause was modelled on a similar provision first contained in the Cemeteries Clauses Act 1847 ("the 1847 Act") and adopted in the Burial Acts of 1852 and 1855.

33. The 1847 Act was described in its long title as "[a]n Act for consolidating in one Act certain Provisions usually contained in Acts authorizing the Making of Cemeteries". Its radius clause was set out in section 10 which provided as follows:

> "No part of the Cemetery shall be constructed nearer to any dwelling house than the prescribed distance, or if no distance be prescribed, two hundred yards, except with the consent in writing of the owner, lessee, and occupier of such house."

34. "Cemetery" was defined in section 3, as follows:

> "The expression 'the cemetery' shall mean the cemetery or burial ground, and the works connected therewith, by the special Act authorized to be constructed."

35. The 1847 Act made specific provision for the building of chapels for the performance of the burial service (section 11), the widening and improvement of roads (section 12), and a requirement that "every part of the cemetery shall be inclosed by walls or other sufficient fences" such as "substantial walls or iron railings of the height of eight feet at least" (section 15).

36. Section 10 of the 1847 Act was incorporated into the Public Health (Interments) Act 1879 and subsequently modified by section 2 of the Burial Act 1906, which reduced the distance to 100 yards. Section 10 was repealed by the Local Government Act 1972, Schedule 30.

37. The radius clause in the Burial Act 1852 provided:

> "No ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground, or as an addition to a burial ground, under this Act, nearer than two hundred yards to any dwellinghouse, without the consent in writing of the owner, lessee and occupier of such dwellinghouse."

38. This was amended by the Burial Act 1855 which provided that no ground not already used as or appropriated for a cemetery "shall be used for burials under the said Act or this Act or either of them, within the distance of one hundred yards from any dwellinghouse, without such consent as aforesaid."

Subsequent legislation

39. Two subsequent statutes have modified the Act's radius clause as applied to land in Central London and in Greater London.

40. Section 64 of the London County Council (General Powers) Act 1935 (the "1935 Act") provides for the distance of 200 yards to be reduced to 100 yards from "the site of a proposed crematorium" to be constructed by a borough council in Central London. No change was made in relation to the public highway. Section 64(2) provides:

> "The expression 'site of a proposed crematorium' means the land which is proposed to be covered with a building intended to be used for the purpose of burning human remains."

41. Section 7 of the Greater London Council (General Powers) Act 1971 (the "1971 Act") enacts similar provisions in relation to burial authorities within Greater London as did the 1935 Act for Central London. It redefines the word "crematorium" in section 5 of the Act and section 64 of the 1935 Act to mean "building fitted with appliances for the purpose of burning human remains".

42. Both the 1935 Act and the 1971 Act therefore provide for the radius distance to be taken from the building used or to be used for burning human remains.

The judgments below

43. Before the deputy judge, counsel for the appellant (Mr Paul Brown KC) submitted that the extension of the definition of crematorium in section 2 of the Act to include "everything incidental or ancillary thereto" incorporated wide words which must be given their natural meaning and that they extended to access roads, car parking areas and memorial gardens to be used for the disposal of ashes. The judge observed that it was difficult to imagine that the definition was intended to be so wide as to bring any incidental component of a crematorium development within the scope of section 5, such as, for example, planting or landscaping for the purpose of enhancing visual amenities. He considered that the statutory purpose of the Act was the regulation of the burning of human remains and that the separation distances in the radius clause were imposed for this purpose. "They were intended to apply to any part of the process of burning human remains at a crematorium, irrespective of whether that operative element of the process was carried out within the main crematorium building itself" (para 98). He concluded that:

> "102. In my judgment, the purpose of the 200 yard separation distance between a crematorium and any neighbouring dwellinghouse imposed by section 5 of the 1902 Act was with a view to protecting the health of the occupiers of that dwellinghouse from the process of burning human remains carried on at the crematorium. In any given case, therefore, the question whether any building, structure or open area of the crematorium facility is to be treated as part of the crematorium within the meaning of section 2 of the 1902, and so subject to that 200- yard separation distance, falls to be answered by determining whether, on the evidence, that building, structure

> or open area is actually used in the process of burning human remains at that crematorium facility…"

44. On the facts the judge concluded that the use of land for the strewing or burial of ashes would be a use ancillary to the process of burning human remains, but that storage of ashes pending their removal from the Site would not be.

45. Before the Court of Appeal counsel for the appellant (Mr Patrick Green KC) accepted the judge's view that the definition of crematorium extends to everything incidental or ancillary to burning human remains. It was therefore no longer contended that it extended to access roads or car parking areas, but it was said that it did extend to a service yard and any areas used for the storage of ashes.

46. The Court of Appeal held that:

> "…the definition of 'crematorium' includes all those other buildings/structures on site in which functions that can properly be described as incidental or ancillary to the cremation process are carried out, such as the ceremony hall, the porte cochère, and any part of the building in which the cremated remains are pulverised, and the ashes are collected" (para 98).

47. Its principal reasons for so concluding were:

(1) A purpose of the Act was to facilitate the establishment of crematoria. A wide interpretation of the restrictions imposed by the radius clause would be contrary to that purpose by creating "impediments to the establishment of new crematoria exceeding the objectives underlying those restrictions" (para 66).

(2) The judge was right to regard public health as the primary purpose of the radius clause restrictions (paras 74 to 86). Its "underlying concern is the distance of houses and roads from the location of the burning process and anything directly connected with that" (para 88). "The definition of 'crematorium' in section 2 must be interpreted with that concern in mind" (para 89).

(3) "It is clear from the opening words of section 2 that the expression 'crematorium' in the Act *shall mean* a building. Moreover, the section stipulates that the building must be fitted with appliances for the purpose of burning human remains". That this is to include "everything incidental or ancillary thereto" does

not have the effect of "extending the definition of crematorium to something which is not a building (or part of a building)" (para 90).

(4) Such an interpretation has the advantage of simplicity, is in keeping with the underlying purpose of the restrictions of the radius clause (para 93) and is consistent with the fact that the restrictions relate to where a crematorium is "constructed". "The crematorium must be something which can be 'constructed,' for the simple reason that section 5 specifies where the crematorium (as so defined) is (and is not) to be constructed" (para 87).

(5) The Act itself "contains no provisions about what happens to the ashes after the cremation. Although the ashes are a by-product of the cremation process, and after the cremation they must be processed, gathered up and dealt with in some way, the strewing of ashes (or their interment) thereafter is not something that is incidental or ancillary to the process of cremation within the meaning of section 2. Those matters occur after the cremation process has finished, sometimes years later, and not necessarily on the same site" (para 107).

(6) The radius clause "is only concerned with the distance between roads, houses and a building (or buildings) and not with the location of the memorial gardens or any other open space. On the face of it, the distances prescribed by section 5 are purely concerned with the location of the cremation; they have nothing to do with where the ashes might be interred or scattered afterwards" (para 108).

48. The Court of Appeal agreed with much of the judge's reasoning but held that he had erred in not confining the place where the incidental or ancillary activities are carried out to a building or structure (para 103).

The parties' cases

49. The appellant's case on the appeal may be summarised as follows:

(1) The words in section 2 of the Act defining a "crematorium" are clear and wide on their face. They "include everything incidental or ancillary" to "the purpose of burning human remains" (or, in the secondary alternative, the activity of "burning human remains"). The production, collection, storage and disposal of ashes are all necessarily incidental to that purpose (or activity).

(2) The Court of Appeal was wrong to elide the requirement that the crematorium must be capable of being "constructed" with a requirement that it must be one or more "building[s]".

(3) The Court of Appeal was wrong to confine the purpose of the radius clause to the protection of public health and failed to have any (or any sufficient) regard to the public sensibilities concerning cremation in 1902 which were essential context to the Act.

(4) The Court of Appeal's conclusion is inconsistent with Parliament's decision to alter the reach of the distance prohibitions in section 5 of the Act, as it did for both inner and outer London in the 1935 and 1971 Acts. It also departed from the law as understood for at least 40 years, as reflected in the Guidance, the 2008 Regulations and settled practice.

50. The respondent's case may be summarised as follows:

(1) The Act contains an explicit definition of "crematorium" in section 2; "crematorium" is defined first and foremost as any "building". Giving the words their ordinary meaning, it is clear that a crematorium for the purposes of the Act is a building. Section 5 places a restriction on the "construction" of such a building fitted with appliances for the purpose of burning human remains within 200 yards of a dwelling house or within 50 yards of a public highway.

(2) The role and meaning of the words "and shall include everything incidental or ancillary thereto" is that all parts of the building(s) that perform an ancillary or incidental function to the process of burning human remains are included.

(3) The storage or disposal of ashes after the act of cremation is distinct, and not determinative of the extent of the crematorium. It is not subject to the restriction in section 5 of the Act.

(4) This interpretation is supported by the historical context of the Act in general and section 5 of the Act in particular, and by the fact that the distance restrictions were motivated primarily by public health concerns.

51. Horizon supported the Secretary of State's case. It further contended that even if the proposed storage of ashes would breach the radius clause in the Act, that would not affect delivery of the scheme as issue is taken with an illustrative plan. That illustrative

plan does not form part of the planning permission and so there are no grounds for quashing the grant of such permission.

52. Tandridge did not appear on the appeal or in the proceedings below.

Statutory interpretation

General principles

53. It is well established that courts are to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision: see, for example, *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, para 8 (per Lord Bingham of Cornhill); *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29-31 (per Lord Hodge).

54. As Lord Bingham stated in *Quintavalle* (para 8):

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

Particular principles

55. There are a number of particular principles of statutory interpretation of potential relevance in this case.

56. First, there is a presumption that a word has the same meaning throughout the Act when used more than once in the same statute – see, for a recent example, *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16; [2025] 2 WLR 879, paras 13-14. As stated in *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) at section 21.3:

> "Legislation is generally assumed to be put together carefully with a view to producing a coherent legislative text. It follows that the reader can reasonably assume that the same words are intended to mean the same thing and that different words mean

> different things. Like all linguistic canons of construction this is no more than a starting point."

57. Secondly, there is a presumption against absurdity. As explained in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594 ("*PACCAR*") at para 43 (per Lord Sales):

> "The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore JSC), citing a passage in *Bennion on Statutory Interpretation*, 6th ed (2013), p 1753. See now *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 13.1(1): 'The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature'. As the authors of *Bennion, Bailey and Norbury* say, the courts give a wide meaning to absurdity in this context, 'using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief'. The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), '[t]he strength of the presumption … depends on the degree to which a particular construction produces an unreasonable result…'"

58. Thirdly, in appropriate cases subordinate legislation may be taken into account as persuasive authority as to the meaning of the primary statute. This is most likely to be so where it is broadly contemporaneous with the primary statute and is part of a single legislative scheme – see *Deposit Protection Board v Dalia* [1994] 2 AC 367, 397 (per Lord Browne-Wilkinson); *R v McCool* [2018] UKSC 23; [2018] 1 WLR 2431, para 105 (per Lord Hughes); *PACCAR* at para 44 (per Lord Sales). "Clear guidance" may be obtained from "regulations which are to have effect as if enacted in the parent Act" – *Hanlon v The Law Society* [1981] AC 124, 194 (per Lord Lowry).

59. Fourthly, statutory guidance has no particular legal status. It is of persuasive authority, as an academic textbook or article would be. Its persuasiveness depends on the strength of its reasoning.

60. As stated in *Bennion, Bailey and Norbury* at section 24.17:

> "…guidance is not a source of law and cannot alter the true legal meaning of a statute. In the context of statutory construction guidance 'has no special legal status'. The judiciary, not the executive, determine the meaning of legislation. Guidance that tries to explain what the legislation means will be given no more weight than the quality of any reasoning contained in it deserves. If it is wrong, the courts will not hesitate in saying so."

61. Its status was explained by Lloyd-Jones J in *Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin); [2007] 1 WLR 1407 at para 17:

> "It is, of course, for the courts and not the executive to interpret legislation. However, in general, official statements by government departments administering an Act, or by any other authority concerned with an Act, may be taken into account as persuasive authority on the legal meaning of its provisions… In any given case, it may be helpful for a court to refer to the guidance in the interpretation of the legislation. It may be of some persuasive authority. However, to my mind that is the limit of its influence. It does not differ in that regard from a statement by an academic author in a textbook or an article. It does not enjoy any particular legal status."

62. Fifthly, settled practice is relied upon as an aid to interpretation. Whether and if so, how, settled practice is relevant to statutory interpretation has not been authoritatively determined. The position is expressed as follows in *Bennion, Bailey and Norbury* in section 24.20(2):

> "Where the meaning of a statute has been considered by the lower courts and business or other activities have been ordered on that basis for a significant period of time, the courts may be slow to overturn settled practice and understanding. However, the extent (if any) to which settled practice is relevant to interpretation is presently unclear."

63. In *R (N) v Lewisham London Borough Council* [2014] UKSC 62; [2015] AC 1259 Lord Carnwath expressed the view that settled practice may be a legitimate aid to statutory interpretation. At para 95 he stated:

> "…settled practice may, in appropriate circumstances, be a legitimate aid to statutory interpretation. Where the statute is

> ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts."

64. In so stating he was reflecting views he had earlier expressed in *Isle of Anglesey County Council v Welsh Ministers* [2009] EWCA Civ 94; [2010] QB 163, para 43.

65. In *R (N)* Lord Hodge stated that in his view settled practice may be relied upon "where there is ambiguity in a statutory provision" (para 53). In their dissenting judgments, however, both Lord Neuberger of Abbotsbury (para 148) and Baroness Hale of Richmond (para 168) expressed strong reservations about whether there is a settled practice or customary meaning principle or rule. As Lord Neuberger stated at para 148:

> "…a court should not lightly decide that a statute has a meaning which is different from that which the court believes that it has. Indeed, so to decide could be said to be a breach of the fundamental duty of the court to give effect to the will of Parliament as expressed in the statute."

66. For reasons which are apparent below, this is not an appropriate case to address what amounts to settled practice and its relevance to statutory interpretation. If there is such a principle, there is much to be said for the view that its relevance is limited to providing evidence that the statutory words are capable of conveying the settled meaning and that that meaning is workable in practice – see D Bailey, "Settled Practice in Statutory Interpretation" (2022) 81 CLJ 28.

The interpretation of the radius clause

67. It is appropriate to start with the statutory wording and with clause 2 and the definition of "crematorium" there set out, namely:

> "The expression 'crematorium' shall mean any building fitted with appliances for the purpose of burning human remains, and shall include everything incidental or ancillary thereto."

68. I agree with the Court of Appeal and the respondent that the core definition of a crematorium is that it is a "building fitted with appliances for the purpose of burning

human remains". That definition is then extended by the additional wording of "everything incidental or ancillary thereto" ("the extended wording").

69. I agree with the appellant that these are wide words. "Everything" generally means all kinds of things; not simply buildings. "Incidental" generally means something which is connected with something else or happens as a result of it. "Ancillary" generally means something which is additional to or supportive of something else. I also agree with the appellant that the words "ancillary" and in particular "incidental" most naturally refer to an activity rather than a building and that in the context of section 2 they, and the word "thereto", are referring to the "burning of human remains" rather than the crematory "building".

70. The difficulty with the appellant's proposed interpretation is that, if these words are to be given their ordinary wide meaning, there is no basis for limiting their application to matters such as the disposal, scattering or storage of ashes. The core purpose of any crematorium is the burning of human remains. On the face of it, all parts of a crematorium site are there to support that purpose and are connected with it. There is no reason to include any part of a crematorium site within that site unless there is such a connection. That is true of an access road or a car park (as the appellant's case originally recognised), but also of ornamental or memorial gardens, regardless of whether there are ashes there. The appellant suggests that the requisite connection is with the "process" of burning human remains, but that is not what section 2 states. It simply refers to the "burning of human remains".

71. This broad interpretation of the extended wording makes good sense in relation to section 4 of the Act. The evident purpose of this section is to confer on burial authorities wide powers in relation to the provision and maintenance of crematoria, equivalent to those which they had in relation to burial grounds and cemeteries. As a statutory body, it was clearly necessary for wide powers to be conferred if the purpose of the facilitation of the establishment of crematoria, which the Court of Appeal rightly held to be a purpose of the Act, was to be met. To establish a crematorium the burial authority would need first to have the power to acquire the requisite land and then to do whatever may be required to provide and maintain a crematorium on that land. That would involve not only providing a crematory building but also all the other facilities which are commonly part of a crematorium site – such as a chapel, waiting area, ceremony hall, access road, car park, service yard, memorial and ornamental garden, area for disposal or other dealings with ashes, landscaping and fencing. If a crematorium was defined as being only the crematory building it would be questionable whether any necessary or incidental powers would extend to the provision and maintenance of facilities such as these. They would arguably be confined to those related to the building itself. It therefore made obvious sense to include the extended wording so as to ensure that all appropriate powers were conferred on the burial authority.

72. The linkage between the extended wording and section 4 is borne out by the similarity of the language used. Thus, section 2 refers to "everything incidental or ancillary thereto", whilst section 4 refers to "anything essential, ancillary or incidental thereto". This linkage is further borne out by the fact that this language was added to these clauses of the bill at the same time.

73. As explained in Stephen White, "Cremation Act 1902 s. 5 (the 'distance' or 'radius' clause): The Balloon and String Theory of Statutory Interpretation" (2013) 78 Pharos International 4, which is extensively referenced in the Consultation Paper, these clauses were apparently added because "the Local Government Board wanted to ensure that a burial authority would be empowered not just to build (and be able to borrow money to build) the structure housing the cremator, but everything else that a burial authority might provide in connection with cemeteries, such as chapels and mortuaries."

74. The extended wording therefore makes good sense in the context of the permissive purposes of section 4. It, however, makes little or no sense in the context of the restrictive purposes of section 5.

75. If the extended wording is given its naturally wide meaning, as explained above, it would include access roads. This, however, results in an absurdity and renders the Act unworkable. It would mean that a burial authority would never be able to connect its proposed crematorium site to a highway because any access road has to be 50 yards from the public highway. The consequence would be that a crematorium could only be built in cemeteries or burial grounds which already had the necessary access roads. That would completely undermine the Act's purpose of facilitating the establishment of crematoria.

76. Mr Green for the appellant suggested that a possible answer to this is the "balloon and string" theory of statutory interpretation referred to in the Stephen White article. This suggests that a distinction can be drawn between works on the crematorium site and those leading up to it. The crematorium up to its boundary fences is the balloon, from which radius distances are to be measured, and the access road is the string, which is not within the distance requirements. Whilst this may be a convenient solution, there is no basis for it as a matter of statutory wording. If it is necessary to build an access road in order to establish a crematorium then such a road is incidental or ancillary to the purpose of burning human remains. That is as true of an access road within the boundary of a crematorium site as it is of an access road leading to the site. Giving the extended wording its natural meaning results in both sections of that access road being within the definition of crematorium, and so the absurdity remains.

77. Mr Green's other suggested answer was his argument that the extended definition only applies to the "process" of burning human remains, but I have already rejected that unwarranted gloss on the statutory wording.

78. The presumption against absurdity therefore strongly suggests that the extended definition of crematorium cannot apply to section 5. There are other indications to the same effect. If there is no justification for limiting the extended wording to the process of burning human remains and to dealings with ashes, then it applies to all incidental and ancillary uses of the site. It is, however, impossible to see what rationale there could be for applying distance restrictions to all such uses. Why, as the judge pointed out, should there be a distance requirement from landscaping or an ornamental garden? The same applies to many other uses, such as a chapel, waiting area, ceremony hall, access road, car park or service yard. This is even more so when one considers that the distance requirement applies not just to a dwelling house but also to a public highway. An example given in oral argument is of a gate lodge building, which is a common feature of many cemeteries. If this is part of a crematorium, then no such building could be located within 50 yards of the gate. It makes no sense to impose such a distance restriction.

79. A solution to the difficulty and indeed absurdity of applying the extended definition of crematorium to section 5 is to hold that, for the purposes of that section, only the core definition applies. In other words, in section 5 "crematorium" means a "building fitted with appliances for the purpose of burning human remains" (ie the crematory building). This is supported by other provisions in section 5.

80. First, the word "constructed" is consistent with something which is constructed, such as a building, rather than merely land use, as the extended wording and the appellant's interpretation would require. Mr Green pointed out that the same word is used in the radius clause in the 1847 Act and that many parts of a cemetery will not consist of buildings or other structures. However, this can be explained by the fact that the definition of "cemetery" in section 3 includes the "works connected therewith", that the construction of walls or fences is required and the building of chapels is provided for.

81. Secondly, section 5 provides that no crematorium may be constructed "in the consecrated part of the burial ground of any burial authority". It is well understandable why a crematory building should not be allowed to be built on consecrated ground, but what possible objection could there be, for example, to the disposal of ashes on such ground, or indeed to a memorial or ornamental garden? Indeed, the same applies to the building of a chapel. The extended wording and the appellant's interpretation would, however, require all such uses to be restricted.

82. With regard to the statutory context, there are other provisions of the Act in which the word crematorium can only apply to a building. For example, section 9 provides for the charging of fees by a burial authority "for the burning of human remains <u>in</u> any crematorium" (emphasis added). This can only refer to the crematory building itself. Human remains are not burnt "in" any other part of the crematorium site or "in" the site as a whole. Indeed, the combined effect of the Act and the Regulations is that a cremation can only lawfully take place in a building. As the Court of Appeal held in *Ghai* (para 10):

> "The combined effect of the Act and the Regulations is, therefore, that a cremation can only lawfully take place in a structure (i) which is a 'building', reading regulation 13 [regulation 3 of the 1903 Regulations] together with section 2, (ii) which has been constructed in a location which satisfies section 5, (iii) which is 'fitted with appliances for the purpose of burning human remains', pursuant to section 2, and (iv) whose 'opening . . . has been notified to the Secretary of State', under regulation 13."

83. Further, and importantly, regulation 16 of the 1903 Regulations is consistent with a crematorium being a building, and inconsistent with it including related land uses, as the extended wording and the appellant's interpretation requires. Under regulation 16 land reserved for the burial of ashes is treated as not being part of the crematorium but rather as land "adjoining it". Moreover, at the time of the Act this regulation was to have the same effect as if enacted in the Act (section 7). Mr Green acknowledged that regulation 16 ran contrary to the appellant's case but suggested that this was one of those relatively rare examples of a statutory term having a different meaning in different parts of the same legislation. He suggested that the application of the definition of cemetery in the 1847 Act provided another and relevant example and that this may have been a more common feature of statutory drafting at that time.

84. The 1903 Regulations contain other provisions which treat the crematorium as being the crematory building. For example, regulation 1 provides that the "crematorium" shall be "(a) maintained in good working order; (b) provided with a sufficient number of attendants; and (c) kept constantly in a cleanly and orderly condition". This is clearly referring to the crematory, which under the Act and Regulations, is required to be in a building. Regulation 3 provides that no cremation of human remains shall take place "except in a crematorium" (emphasis added).

85. That section 5 only applies to the core definition of crematorium is further supported by the purpose of the radius clause.

86. I agree with the judge and the Court of Appeal that the primary purpose of the radius clause was the protection of public health. The public health concerns at the time of the 1847 Act and the Burial Acts of 1852 and 1855 are set out in the Consultation Paper:

> "1.54 In 1839, George Walker published *Gatherings from Grave Yards*, an exposé of the condition of graveyards of the time and, as its subtitle stated, containing 'detail of dangerous and fatal results produced by the unwise and revolting custom

> of inhuming the dead in the midst of the living.' His book advanced the miasma theory, which held that emissions from graves were responsible for a host of deaths and diseases. The public health reformer Edwin Chadwick subsequently sought to reform burial law to address such concerns.
>
> 1.55 The Public Health Act 1848, the first major piece of public health legislation in England and Wales passed at the urging of Chadwick, included only limited regulation of burial. It provided for the closure of burial grounds which were a danger to public health, but only if alternatives were available, and required the permission of the new national General Board of Health before new burial grounds were opened.
>
> 1.56 In 1850, following a cholera epidemic which was blamed on the state of churchyards, the General Board of Health presented the Metropolitan Interment Act 1850. That Act provided for a single burial authority for London, with powers to open its own burial grounds, close existing churchyards and restrict other burials, and provide mortuaries – what has been described as an 'integrated funerary and cemetery system'. However, the Act was viewed as imposing excessive regulation, and was swiftly repealed.
>
> 1.57 In its place came the Burial Acts, beginning with the Burial Act 1852 concerning London, and the Burial Act 1853 which contained similar provisions relating to the rest of the country…"

87. There can be little doubt that such public health concerns were the primary reason for the radius clauses in these Acts. In relation to the radius clause in the Burial Act 1855 this was judicially confirmed by Jessel MR in *Lord Cowley v Byas* (1877) 5 Ch D 944, 951 who referred to the distance restrictions being imposed "with a view to the health of the public"; see also *Wright v Wallasey Local Board* (1887) QBD 783, 785 per AL Smith J.

88. These clauses were the model for the radius clause in section 5 of the Act and that strongly suggests that public health concerns were similarly the primary reason for the radius clause. Such concerns would arise from the main activity promoted and regulated by the Act, namely the burning of human remains. Smoke emissions from the burning process would create an obvious hazard and potential nuisance. This would explain both the greater dwelling house distance requirement under the Act as opposed to the Burial

Acts (200 rather than 100 yards) and the inclusion for the first time of a distance requirement relating to public highways. As the Court of Appeal explained:

> "84…it can be inferred that at the time when the 1902 Act was enacted, the prescribed distance of the crematorium from a dwelling house, being twice the distance between a house and a burial site, must have been considered far enough away to prevent the occupants from suffering any ill-effects from the smoke or other emissions from the chimneys of the crematory. It would also have reduced their exposure to any other nuisance caused by those emissions (such as the soiling of washing on a clothes line, for example). Unlike passers-by, the occupants of a house would be exposed to the emissions whenever a cremation took place, and that can happen several times a day, virtually all year round.
>
> 85. Public health concerns regarding emissions from the chimneys also provides a good explanation of why Parliament included provisions relating to the distance from a public highway. Someone walking, riding or driving past a cemetery, even in an open carriage, is unlikely to be exposed to noxious substances travelling through the air, and even if they were, it would not be for long enough to be likely to have an adverse impact on their health. Someone passing by a crematorium in 1902 would be in a different position, but they would not be exposed to by-products from the cremation process and against that background process for as long or as often as the occupants of local houses, hence the shorter distance between the road and the crematorium."

89. The appellant submitted that the key purpose of the radius clause was to protect religious sensibilities to the practice of cremation. She relied in particular on comments made about such sensibilities by Stephen J in *R v Price* (1884) 12 QBD 247, 255; see also *Ghai* at para 28. It is correct that such sensibilities would explain the prohibition on the construction of a crematorium within the consecrated part of a burial ground in section 5, and also the provision in section 11 that the "incumbent of any ecclesiastical parish shall not … be under any obligation to perform a funeral service before, at or after the cremation of their remains, within the ground of a burial authority". That this was a concern addressed by parts of the Act does not, however, detract from the protection of public health being the primary purpose of the radius clause. In any event, whether it is a matter of public health or public sensibilities the important point is that it is the burning of human remains that is the main cause for concern.

90. The significance of this is that it is consistent with the focus of the radius clause being the place where the burning of human remains takes place – ie the crematory building. Equally, it is inconsistent with its focus being other buildings on the site or land use on the site. The appellant suggested that there could be public health concerns arising out of the disposal of ashes and in particular the scattering of ashes near dwelling houses. The Act, however, does not itself address the disposal of ashes. This is left to the regulations. The regulations do not address or control the disposal of ashes generally and only apply where ashes are left with the cremation authority. This does not suggest that such disposal raised public health concerns and, in any event, it is difficult to see why the interment of ashes should do so. As to scattering, the 1903 Regulations did not address the scattering of ashes at all (although regulations since 1930 do so).

91. In summary, the conclusion that crematorium for the purpose of the radius clause means the "building fitted with appliances for the purpose of burning human remains" is supported by the presumption against absurdity; by other language in the clause which references a building; by other provisions in the Act and in the regulations in which a crematorium can only mean a building; by the fact that regulation 16 of the 1903 Regulations distinguishes between the crematorium and adjoining land used for related purposes and by the public health purpose of the radius clause.

92. The strongest argument against such a conclusion is the presumption that a word has the same meaning throughout an Act. However, this is met by a counter presumption, by many matters of context and also by a consideration of purpose. Further, Mr Green recognised that the presumption may be rebutted and he himself so contended in order to try to explain away regulation 16. I have no doubt therefore that this is one of those relatively rare cases where the presumption has been rebutted.

93. The other arguments of the appellant which are still to be addressed are those relating to subsequent legislation, the Guidance, the 2008 Regulations and settled practice.

94. With regard to subsequent legislation, it is correct that the 1935 and the 1971 Acts adopted a different definition of crematorium for the purpose of their reduced radius clauses. That does not, however, mean that a different meaning was intended. It may equally well be explained by there being a degree of uncertainty surrounding the application of the Act's definition to its radius clause, as there clearly was. As stated in the Consultation Paper, the Stephen White article "shows that previous interpretations by Government officials and solicitors have suggested that the distance might be measured from the cremator, or the cremator room, or the boundary of the site – each view appears to have been held by people working in the funeral sector at different points in time" (para 12.20). It is to be noted that the solution adopted in the 1935 and 1971 Acts is entirely consistent with what I consider to be the correct interpretation of the Act.

95. With regard to the Guidance, the 2008 Regulations and settled practice, it is to be observed that on the appellant's best case they would only provide support for an interpretation which included open areas used for the disposal of ashes. They do not address open areas used for storage of ashes. In any event, no weight can be placed on these matters, whether individually or collectively.

96. As to the Guidance, it could only at most be persuasive authority. In the present case, however, no reasoning is provided for the view expressed in the Guidance that "parts of the grounds used for the disposal of ashes come within [the statutory] definition". As such, it is of little or no persuasive weight.

97. As to the 2008 Regulations, these can be of no possible relevance to the interpretation of an Act passed over 100 years previously. They are far from being broadly contemporaneous.

98. As to settled practice, it is said that the Guidance fairly reflects settled practice as it was by 1978 and over some 40 years since. It is further submitted that this has been the basis on which operators and communities have ordered their affairs for many years. There is, however, no evidence, still less a finding, to support either of these assertions.

99. The same applies to various assertions made by the appellant as to the suggested impact and practical consequences of the Court of Appeal's decision. They are not evidenced. In any event, if there are any consequences which might cause concern, they are likely to be identified and addressed by the Law Commission.

100. As the Law Commission observes, the Court of Appeal decision "offers certainty". The same is even more true of an interpretation which measures the radius distance from the crematory building itself and does not include other buildings that may be on the crematorium site. It enables the distance to be measured by reference to a fixed point on a single, permanent, substantial structure. By contrast, the appellant's interpretation involves measuring distance from areas of land dependent upon their use. This is not only far more difficult to apply, as it does not relate to a structure, but it also makes everything dependent on a variable – land use from time to time.

Conclusion

101. For all these reasons I conclude that "crematorium" in section 5 of the Act means "a building fitted with appliances for the purposes of burning human remains". It follows that the distances specified in section 5 of the Act are to be measured from the building which houses the crematory.

102. This means that the development does not contravene the Act and that no error of law was made by the inspector. In these circumstances it is not necessary to consider Horizon's alternative case that any such error would not affect the grant of planning permission.

103. The appeal must accordingly be dismissed.