loIN THE MATTER OF THE

ACCREDITATION OF COFFINS

OPINION

1. I am asked to advise Mr V. Charles Ward, Company Solicitor to the Institute of Cemetery and Crematorium Management (ICCM), in relation to a number of questions concerning the accreditation of coffins.

2. The ICCM is acting as the lead authority for four national cremation associations, the others being: the Federation of Burial and Cremation Authorities (FBCA); the Association of Private Crematoria and Cemeteries (APCC); and, the Cremation Society of Great Britain (CSGB). The ICCM and FBCA represent both local authority and private crematoria, and offer training, professional qualifications and compliance monitoring.

3. The questions I am asked are as follows:

    a. In respect of a cremation authority's acceptance of one coffin accreditation scheme over another, is a careful evidence-based assessment advised, and reasons documented, as to why one scheme is preferred over the other prior to acceptance of one scheme only;

    b. Are cremation authorities obliged to accept any coffin accreditation scheme;

    c. Should a cremation authority not accept a scheme, would it be successful if accused of restricting trade;

    d. What authority do cremation authorities have to require all coffins submitted to the crematorium to be accredited under what are in effect "self" regulatory schemes;

    e. Can a cremation authority refuse to accept certain types of coffins that are known to have caused damage to cremation equipment;

f. What evidence do cremation authorities require in terms of the likely damage certain types of coffin can inflict on to cremation equipment in order to reject certain coffin material types from being cremated at all;

g. If coffins, which have been tested under a different protocol than the two schemes referenced are submitted to a Crematorium, what is the legal position in relation to the acceptance or rejection of such coffins;

h. Generally?

Factual Background

4. Concerns have been expressed by the FBCA since 2012, to the Funeral Furnishing Manufacturers Association (FFMA), representatives of makers of coffins, in relation to unfortunate incidents involving coffins made from “alternative “materials. Recently-used materials include cardboard, willow and bamboo. There have been a small number of incidents which, according to my Instructions, have placed the health and safety of crematorium staff, and the equipment of crematoria, at risk. I understand that there have in addition been an isolated number of cases where the bottom of a coffin has given way during handling at the crematorium, resulting in stress to the bereaved who witnessed this occurrence.

5. The ICCM has reported similar incidents. It has issued initial guidelines which recommended that all coffins should have a solid base and end panels, in order to allow safe loading into the cremator. This was to avoid difficulties where automatic charging biers, controlled by software, can retract a coffin which has snagged on the rollers of a cremator; whereupon, if the cremator door has already opened, the heat from the creator can ignite the coffin which comes back into the working area of the cremator.

6. A working party of the FBCA, ICCM, National Association of Funeral Directors (NAFD) and Funeral Furnishing Manufacturer Association (FFMA) was created in 2012. The FFMA decided in 2013 to establish an accreditation scheme for coffins based on a comprehensive test programme, about which it began discussions with Intertek, an international testing organisation. Following a competitive process, Intertek has now been awarded the contract for the testing programme. The programme will apply to manufacturers of traditional wooden coffins, as well as ones using “alternative” materials. I understand that it has taken a considerable time to

produce a testing programme acceptable to all of the categories of membership of the FFMA.

7. In the meantime, a further organisation, the Coffins, Cask and Shroud Association (CCSA), has been formed. The CCSA has launched a coffin accreditation scheme similar to that of the FFMA. Both appear to be accredited by the UK Accreditation Scheme (UKAS).

8. I have been referred to the websites of the FFMA and CCSA.

9. I have seen an outline on the FFMA website of the requirements of the Coffin and Casket Protocol (http://www.ffma.co.uk/about/test-protocol); the tests in which appear to relate to the problems summarised in my Instructions, as well as a number of others. The website refers to testing under the Protocol having been contracted to an organisation accredited by the United Kingdom Accreditation Service (UKAS). Registration under the protocol costs £50 pa.

10. The CCSA website also details a number of tests to be carried out on coffins (including those in non-traditional materials) which likewise appear to relate to their ability to carry weight, and suitability for use on rollers or in automatic systems for moving them into a cremator, as well as other issues. It states that its tests have been carried out by a "UKAS accredited and independent testing house in accordance with the Coffin and Casket Testing Protocol developed between 2013-5." I have not compared the scope of the two schemes in any detail.

11. I note that there is no British Standard (nor, I infer, other external independent standard) for the manufacture of coffins.

12. I also note that the burial or cremation organisations are not represented on management boards of either the FFMA or CCSA schemes, and do not appear to have had any other role in determining or proposing standards used in those schemes (other than perhaps at the outset, as a result of the 2012 working party).

Legal Background

Statutory framework

13. Under s 214(5), Local Government Act 1972, district councils (and various other types of local authority, other than a parish meeting) are burial authorities for the purposes of the Cremation Acts 1902 and 1952.

14. Article 3(1) of the Local Authorities Cemeteries Order 1977 provides that:

"(1) Subject to the provisions of this order, a burial authority may do all such things as they consider necessary or desirable for the proper management, regulation and control of a cemetery."

15. Section 4, Cremation Act 1902 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:"

16. Although section 4 refers to the provision and maintenance of burial grounds, rather than to their "management, regulation and control" as in Article 3(1) of the 1977 Order above, the references to the provision of "anything essential, ancillary or incidental" to their provision or maintenance appears to be sufficiently broad to include the activities covered by the Article. In other words, the general powers of management of a cemetery vested in a burial authority in England and Wales appear in my view to extend to the exercise of similar powers in relation to the management of a crematorium (where it is provided and maintained by a burial authority).

17. Section 7, Cremation Act 1902, provides as follows:

"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...."

18. Regulation 4 of the Cremation (England and Wales) Regulations 2008 (SI 2008/2841), made under section 7 of the 1902 Act, provides that:

"The cremation authority must ensure that a crematorium is—

(a) maintained in good working order;

(b) provided with a sufficient number of attendants; and

(c) kept in a clean and orderly condition.

National Association of Memorial Masons case

19. I have been referred in my Instructions to the case of *The Queen on the Application of the National Association of Memorial Masons (NAMM) and Cardiff City Council* [2011] EWHC 922 (Admin). The case was brought by the National Association of Memorial Masons (NAMM), which had previously been part of a scheme for the accreditation of such masons (the British Register of Accredited Memorial Masons, or BRAMM); but which left the scheme and formed its own accreditation scheme, known as the Register of Qualified Memorial Fixers (RQMF).

20. The accreditation scheme in issue arose from concerns, expressed by the Health and Safety Executive, local authorities and others since 2000, over the safety of headstones and other memorials in cemeteries. A number of interested organisations, including the ICCM, came together to devise a national system of accreditation. NAMM announced that it was setting up the BRAMM scheme in 2003, and the scheme came into effect in 2004. Cardiff City Council, which had previously run its own local registration scheme, adopted the BRAMM scheme (after a trial period) in 2007.

21. The NAMM ran the original scheme, collecting the accreditation fees, setting the standards for the working practices required for accreditation, providing a register to demonstrate accreditation and to ensure compliance with best practice, and policing the scheme. The governing body of the scheme, however, included representatives of local authorities and cemetery managers, and others.

22. Following disputes over a number of issues, including whether masons should form a majority of the BRAMM board, and whether the board might be chaired by a person other than an accredited mason, the NAMM withdrew from the working committee in 2009. It subsequently created the RQMF as a new national register of masonry businesses and masons.

23. Cardiff council adopted a policy of allowing only masons accredited under the BRAMM to work in its cemeteries; leading to two masons registered with the RQMF being prevented from working there. After exchanges of correspondence, the council indicated that it was happy to amend its policy to allow masons registered under “an equivalent scheme” to work on its sites, but said that it did not consider the RQMF to be equivalent, for a number of reasons. These included that the fact that the creation of a national scheme had avoided the need for local schemes, and that its board comprised masons, industry professionals and burial authorities. This, it was said by

the council, offered comfort to burial authorities as to standards of work, backed by regular reviews.

24. NAMM sought judicial review of the council's decision to exclude non-BRAMM masons from working in its cemeteries. The High Court rejected the Claimant's contentions that the council's decision was unlawful as in restraint of trade, irrational, or based on a material misunderstanding of the facts. The court found for the claimant, however, on the basis of a procedural flaw by apparent bias in the individual decision-maker, who was both the senior relevant officer of the council and a senior office-holder within the BRAMM.

25. The following statements by the Judge are of relevance in the current context:

    a. The power of a local authority to make its policy in this context [ie under Article 3(1) of the Local Authority Cemeteries Order 1977] was limited to what it considered to be "necessary for the proper management, regulation and control of a cemetery, rather than the general regulation of the industry". "Necessary" meant "more than merely desirable albeit less than imperative"; noting the finding of the Divisional Court in *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin) that it implied the existence of a "pressing social need" (para 30);

    b. A reasonable local authority should be mindful of the fact that municipal cemeteries would constitute a significant part of the market for the masonry profession, and so an "over-intrusive policy" that denied competent masons access to that market unless they made further payment, when an adequate accreditation already existed, might be disproportionate and open to challenge (para 29);

    c. A lawful accreditation policy is not a restraint of trade. It is an incidental cost of trade, in the same way as a modest payment to a regulatory body may be (paras 31 and 45);

    d. Equivalence means "having the same value as the comparator", not "the same as" [the comparator] (para 33);

    e. Once a different scheme (ie from the BRAMM) was launched which promoted the "same standards of professional good practice", the policy of the council needed "careful review" (para 32). In determining whether the RQMF was not equivalent to BRAMM, a reasonable decision called for "careful assessment

and appraisal" [also described as "a careful evidence-based assessment and evaluation]. Such an assessment might rationally have concluded that the RMQF was not an adequate alternative to the BRAMM scheme (para 33);

f. the council's concern that a scheme of accreditation should have local authority representation on its governing body was reasonable, since there would be a "legitimate need to ensure that the standards of accreditation, regulation and discipline were appropriately robust to address the risks to the public of defective memorials inadequately fixed" (para 28). The judge also acknowledged that there was a public interest in the independent scrutiny of a system of professional regulation (ie through having local authority involvement in its governance) (para 33).[1]

26. The factual circumstances of this case differ from those in the *NAMM* case. In this case, rather than works being carried out by an accredited person at a location provided by the authority, the burial authority is the provider of a service (cremation) to a purchaser or fee-payer (eg a funeral director, on behalf of the deceased's family or estate). Further, neither of the accreditation schemes in issue in this case is governed by a body including representatives of the burial authorities.

Restraint of trade

27. A contract in restraint of trade is one by which a party restricts his liberty to carry on his trade, business or profession in future, in such manner and with such persons as he chooses. Such a contract is *prima facie* void, unless it can be shown from the circumstances that the restriction is justifiable from the point of view of the parties themselves, and is not contrary to the public interest.

Questions asked

a. <u>In respect of a cremation authority's acceptance of one coffin accreditation scheme over another, is a careful evidence-based assessment advised, and reasons documented, as to why one scheme is preferred over the other prior to acceptance of one scheme only</u>?

28. Yes. As the Judge made clear in the *NAMM* case, a policy or conclusion that one scheme was not the equivalent of another (as would be the decision where one was accepted over another) "called for a careful assessment and appraisal". The risk to a

[1] This issue does not appear to arise, however, in the context of this matter; see paragraph 52 below.

cremation authority is of a successful challenge at judicial review of a decision on equivalence, so that it is important that it should be undertaken carefully and on the fullest possible consideration of the factors involved. The judge also said that such a decision could be rational (and thus avoid that ground of challenge), if undertaken after a "careful evidence-based assessment and evaluation".

29. Documenting the reasons for the decision would be important to its defence. Thus examples would be needed, with proper evidence, dates, times, statements by witnesses etc, describing the problem or incident that has arisen, and demonstrating a causal link between the development of that problem (or the occurrence of the incident) and one or more deficiencies of any accreditation scheme which is being considered; together with an assessment of the level of likelihood of a recurrence of the problem or incident.

30. The level of likelihood should, in my view, be that of a very significant and weighty chance, which is more than hypothetical or remote. The various meanings of the term "likely" were discussed by Munby J in *R (on the application of Lord) v Secretary of State for the Home* Office [2003] EWHC 2073 (Admin), paragraphs 89-90 and 95-100, in interpreting s 29(1) of the Data Protection Act 1998. The judge said that the word did not have "a single nor even a prima facie meaning; it may mean 'more probable than not', it may mean no more than 'more than fanciful', it may have some intermediate meaning" (paragraph 96). He concluded that, in the context of that provision (paragraph 100):

> "..likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

31. Although obviously applied in that case under a different provision, this appears to me to represent a balanced and relatively cautious view of the meaning of "likely", which may be considered appropriate in the context of this matter. (It should be recognised, however, that a higher threshold – perhaps as high as "more probable than not" - might be argued by a party seeking to bring a challenge).

b. <u>Are cremation authorities obliged to accept any coffin accreditation scheme</u>?

32. No, if the authority has made one of two types of decision (on the same evidential basis as described above).

33. The first basis would be that, as in the *NAMM* case, the authority had agreed a policy that excluded coffins (or a material, or type of manufacture) accredited under a particular scheme, under its general power in Article 3(1) of the 1977 Order to do all such things as it may consider necessary or desirable for the proper management, regulation and control of the crematorium (read by virtue of s4, Cremation Act 1902, as applying to anything essential, necessary or incidental to the provision and maintenance of a crematorium).

34. The test of what could be considered to be "necessary" has been set out at paragraph 25a above. To the description of the test in *NAMM*, based on the *Corporate Officer* decision, may be added a decision of the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55, another freedom of information case,. Lady Hale said (paragraph 27) that "necessary" means "reasonably" necessary:

> "It is well established in community law that, at least in the context of justification rather than derogation, "necessary" means "reasonably" rather than absolutely or strictly necessary (see, for example, *R v Secretary of State for Employment, Ex p Seymour-Smith (No 2)* [2000] 1 WLR 435; *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15, [2012] ICR 704)."

35. The second basis may arise if the authority considers that its duty to maintain a crematorium in good working order, or in a clean and orderly condition, under Regulation 4 of the 2008 Regulations would be likely to be affected adversely by accepting coffins of a particular type (albeit accredited under a particular scheme). This would apply where it had good reason to consider that the type posed a significant risk of damage to its equipment, or the cleanliness or orderliness of its operation (or, possibly, would require additional attendants to deal with the potential consequences). Thus in my view, if it reasonably consider that its duty under Regulation 4 would be likely to be breached on occasion, as a result of the acceptance for cremation of such coffins, the authority would have a basis to reject such a scheme (or, more likely, the relevant part of the scheme) that enabled such coffins to be accredited.

36. The level of likelihood required to meet this threshold would again be that of a very significant and weighty chance, as above.

37. Otherwise, I am not aware of any other basis on which access to the facilities of a crematorium could be refused (other than under the separate powers of the medical referee or deputy referee).

c. Should a cremation authority not accept a scheme, would it be successful if accused of restricting trade?

38. In the *NAMM* case, the issue was whether a requirement for accreditation under a particular scheme was a restraint of trade. The answer was that a lawful scheme was not a restraint of trade in this context, but an incidental cost of trade, if it involved only a modest payment to a regulatory body. Requiring accreditation under one scheme, however, where another existed which promoted "the same standards of professional good practice" might be lawful, but needed "careful review". .

39. In this case, the same question could arise, albeit in the form of excluding an accredited product (or a product of the type concerned that had been accredited under a particular scheme) from submission to a crematorium.

40. The question of whether a policy of excluding one form of accredited product would be lawful, or whether the application of the policy would amount to the imposition of a contract in restraint of trade, would depend on whether the restriction that was intended to protect one of the parties was reasonable as between those parties, and not contrary to the interests of the public. In these circumstances, the protection might have one or more of a number of purposes, depending on the risk sought to be averted, for example: the protection of the bereaved from distress (interpreting the bereaved to be a party, or their protection to be an interest of the party contracting with the crematorium authority); the protection of the authority from damage to its equipment; or, the protection of the health and safety of the authority's employees, if a potentially dangerous situation were envisaged. (In the latter case, the protection would appear to be both of the employees themselves, interpreted as an interest of the authority; and of the authority from liability). Relevant considerations would be the seriousness or otherwise of the potential consequences of the risk identified, and its realistic likelihood (on the same test as above).

41. It may be noted that the lawfulness of such a policy would also depend on whether it was a proper exercise of the authority's powers under Article 3(1), as discussed above.

d. What authority do cremation authorities have to require all coffins submitted to the crematorium to be accredited under what are in effect “self” regulatory schemes?

42. The authorities may rely on their powers in Article 3(1), as described above, if they consider this to be necessary to the proper management, regulation or control or a crematorium. The power enables the authority, in those circumstances, to require the accreditation of coffins submitted to it, as established in the *NAMM* case. This could apply to requiring accreditation under either scheme currently available, under one or other scheme, or in relation to a particular aspect of a scheme (eg as to the robustness of construction); depending in each case on the evidence of likely harm of the types described above. In an exceptional case, it could in my view extend to imposing a more onerous requirement than that contained in a scheme (eg in the event that an important aspect was not adequately covered by any accreditation scheme, in the reasonable view of the authority); although this would need to be extensively justified by the factors and evidence taken into account, including (if possible) on the basis of expert professional opinion.

43. Alongside the evidence of likely harm, the authority would need, however, to give proper weight to the potential adverse consequences for manufacturers, in terms of their access to the market; potentially if the effect of the authority’s decision would be to oblige certain manufacturers who had registered under one scheme to register again under the other, incurring extra expense, without an appropriate justification; or, more seriously, if the requirements posed a significant or unfeasible barrier to the carrying on of their business. It would be unlikely to be considered to be in the public interest for a manufacturer to of coffins to be forced out of that business, or to suffer a significant loss of business, as a result of requirements imposed by burial authorities as to accreditation (or, still more, by requirements which went beyond the terms of any such scheme) without a strong and well-founded reason. The authority could expect to need to be able to demonstrate that it had reached an appropriate and reasonable balance between on the one hand the burden on the manufacturer of any requirements imposed, and on the other the interests of the bereaved, the safety of crematorium staff, or the public purse (in terms of the risk of damage to equipment); and that the latter clearly outweighed the former.

44. For that reason, an authority could expect to be on stronger ground if, in relation to any specific issue, it required accreditation on that matter under a reputable scheme

run by the trade, than if it sought to impose requirements on that matter that were additional to any contained in such a scheme; other than in the exceptional circumstances outlined in paragraph 41 above.

e. Can a cremation authority refuse to accept certain types of coffins that are known to have caused damage to cremation equipment?

45. If a certain type of coffin is known to have caused damage (as the question suggests), then the authority could in my view rely on its duty in Regulation 4, where it reasonably considered that it was likely (based on the *Lord* test) that acceptance of such a type would on occasion cause a breach of its duty. The level of likelihood would thus need to be that of a very significant and weighty chance, rather than a remote possibility. An authority relying on this ground would be well-advised to seek legal advice as to the level and likelihood of harm to its equipment envisaged in the specific case.

46. As in paragraph 42 above, the authority should also be careful, however, to give due weight to the likely impact of a refusal on the business of a coffin manufacturer.

47. An authority also has a right, it appears to me, to safeguard its equipment, and the public resources invested in it, in the event that any serious level of harm to the equipment was envisaged to be likely to occur at some point. The manufacturer of a defective product has a duty of care to anyone foreseeably harmed by the product, under the principles developed in and following *Donoughue v Stevenson* [1932] AC 562. The burden of proof of negligence would rest with the authority. It would appear to me to be likely, however, that if discussion of the risk of harm to equipment (eg from a coffin being retracted while alight) formed part of the consideration of the suitability or otherwise of the product involved, there may be a significant level of awareness within the trade of the issues involved (even if not agreement as to the level of risks), and this might assist a claimant.

f. What evidence do cremation authorities require in terms of the likely damage certain types of coffin can inflict on to cremation equipment in order to reject certain coffin material types from being cremated at all?

48. In an extreme case, there would be no requirement as such for evidence, if the risk of damage was obvious and there was clearly a sufficient level of likelihood, either of an initial occurrence, or of a recurrence if an incident had already taken place. I assume that such circumstances are unlikely to arise, however; or (if they do) that they would relate to only a small proportion of the potential problems. Other than in those circumstances, therefore, it would be advisable to have documented examples, including: dates and locations; evidence of causation; the damage incurred (including photographic evidence, if possible), and its value; any unusual circumstances in the particular case (which might serve to illustrate a reduced level of risk in other cases); and, ideally, statements of expert opinion as to the likelihood of recurrence in a similar case, and the anticipated or actual level of damage to the particular crematorium equipment.

49. It will no doubt be clear to those instructing me that an authority would need to have very strong evidence to seek to ban a particular material or type. No doubt any evidence or experience available could be expected to be shared amongst authorities, in order to assist in comparable cases. An authority would be in a stronger position if the material or type of coffin concerned had been refused accreditation by a reputable body.

g. <u>If coffins, which have been tested under a different protocol than the two schemes referenced are submitted to a Crematorium, what is the legal position in relation to the acceptance or rejection of such coffins</u>?

50. This would depend on whether:

    a. authorities had required accreditation under the existing or other schemes; and,

    b. the new and different protocol required coffins to meet the same or equivalent tests as the present protocols.

51. If a coffin met equivalent tests, which the authority had made requirements of acceptance, the authority would appear to be unlikely to have a basis for a refusal to accept that type of coffin. If the coffin did not meet those standards, however, either because it had failed an equivalent test under one of the existing schemes, or because the new protocol omitted such a test (or set materially lower standards in

that respect), an authority that had adopted a policy of accepting only the standards in the existing protocols would appear likely to have a basis to refuse to accept a coffin that met only the "new" test (if any) in those circumstances. The strength or otherwise of this position would depend, however, on the importance of the requirement and the degree to which the coffin had failed to meet it.

h. Generally

52. It will be clear from the above that care is needed in this area, and that the steps that could be taken are highly dependent on the particular facts involved.

53. For the avoidance of doubt, it does not appear to me that the issue of whether burial authorities are represented on the governance arrangements of either scheme is relevant to this matter, particularly since it represents no point of difference between the schemes (see paragraphs 25f and 26); but I would be happy to consider this point further in the light of any further information from those instructing me.

54. I would be happy to discuss the issues raised by this matter further, if that would be helpful.

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Cornerstone Barristers

22nd February 2017

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OPINION

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