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<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 25/79515
	Delivered: 16/10/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

THOMAS McNAIR

Applicant;

and

LISA HARPER

Respondent;

and

DERRY CITY AND STRABANE DISTRICT COUNCIL

Notice Party.

Mr J McClurkin (instructed by Clarendon Legal NI) for the Applicant
 Mr R Dowd (instructed by Dickson McNulty & Co Solicitors) for the Respondent
 Mr J Stitt (instructed by Derry City & Strabane DC Legal Department) for the Notice
 Party

McBRIDE J

Introduction

[1] This case, involves an emotionally charged dispute between family members arising from the death of Mervyn Kevin McNair. Unfortunately, negotiations were unsuccessful and accordingly the court is now required to determine the legal issues. The central dispute relates to whether Derry City & Strabane District Council may permit a person other than the holder of exclusive burial rights to erect a memorial upon the same grave plot, without the burial right-holder's consent. The answer to this question gives rise to novel legal questions concerning the legal nature of an exclusive right of burial and whether such a right includes as incidental thereto the right to erect a headstone on the burial plot.

Representation

[2] The applicant was represented by Mr McClurkin, the respondent was represented by Mr Dowd and Mr Stitt represented the notice party, Derry City & Strabane District Council ("the council"). I am grateful to all counsel for their comprehensive and well-researched skeleton arguments and oral submissions which were of much assistance to the court.

Background facts

[3] The parties agreed that the facts appeared from the affidavits and exhibits filed by the applicant on 16 September 2025 and 5 February 2026 and the respondent on 19 January 2026.

[4] The applicant is the father of Mervyn Kenneth McNair ("the deceased"). The respondent is the deceased's maternal aunt.

[5] The deceased was born on 16 July 2003 to the applicant and Victoria Harper. His parents were not married. Victoria Harper died on 10 May 2014. The deceased died on 10 November 2022 and is survived by the applicant, three brothers, one sister and one half-sibling.

[6] From in or around 2012, the applicant became estranged from his family due to domestic abuse perpetrated by him. The applicant has a lengthy criminal record which includes convictions for domestic violence offences against the deceased's mother and the deceased's siblings.

[7] Following the deceased's death, the applicant contacted the coroner to receive his body to put in place the necessary funeral arrangements. After engagement by solicitors, it was agreed between the parties that the respondent would have carriage of the funeral.

[8] WJ O'Brien & Sons Ltd, funeral undertakers, acting on her behalf and as her agent, completed a registration form for the purchase of a grant of exclusive right of burial from the council and paid the necessary fees on 13 November 2022. No fee was paid for a headstone and to date no headstone has been erected by the respondent although she wishes to reserve the right to do so in the future.

[9] The deceased was buried in grave plot section 17 No. 30 Ballyoan Cemetery Rosstown Road, Derry. No headstone has yet been erected on the grave plot.

[10] The applicant has now purchased and inscribed a headstone and states that he wishes to properly commemorate his son. He wishes to place the headstone on the grave plot. When he asked the respondent for permission, she refused.

[11] Following the respondent's refusal, the applicant wrote to the council with the same request. In correspondence dated 2 May 2024, the council advised that the only person entitled to erect a headstone was the person who was granted the exclusive right of burial in respect of the plot, namely the respondent.

[12] On 20 October 2023, the Council issued a receipt to the respondent acknowledging payment for the purchase of the exclusive right of burial. This receipt details that the total sum of £375.00 was received from the respondent. This fee covers the interment and grant fees. Under the headings, "Fee for Headstone" there is a blank space indicating no fee was paid for this. The receipt further records the name of the deceased and details of the allotted burial plot.

[13] On 29 January 2025, the council entered into a "Deed of an Exclusive Grant of Burial Rights" ("the Deed") with the respondent. The Deed provided as follows:

"Derry City & Strabane District Council (hereinafter called
"the council")

Grant of Exclusive Right of Burial – Ballyoan Cemetery

Derry City & Strabane District Council in pursuance of and in exercise and by virtue of the powers conferred by the Londonderry Corporation Acts 1848-1931 and the Public Health (Ireland) Act 1878, the Local Government Act (Northern Ireland) 1972, the Local Government (Transfer of Functions) Order (Northern Ireland) 1973 and of all other powers as hereunto us enabling and in consideration of the sum of £179.00 paid to us by: Lisa Harper, 14 Henry Street, Derry, BT48 6RU (hereinafter called "the grantee" (the receipt payment of which sum the council does hereby acknowledge) DO HEREBY GRANT unto the grantee the Exclusive Right of Burial in perpetuity in ALL THAT plot of ground, land or grave space in and being part of the Cemetery aforesaid ... No.30 on the Plan of the said Cemetery ... TO HOLD the same unto the grantee his/her personal representative and such of his/her and their assigns as the council shall approve in writing for the purpose of lawful human burial only and subject to the legislation regulations or by-laws now in force ..."

The Deed was dated 29 January 2025, signed and sealed.

[14] The deceased died intestate with no estate. Notwithstanding this, on 18 February 2025, the applicant extracted a grant of letters of administration of his estate.

[15] The applicant avers that he enjoyed a good relationship with his son and had ongoing contact with him throughout his life. He acknowledges that the family were known to social services due to his own addiction issues but avers that he has now overcome these. He states that he regularly attends the grave. To date he has placed various mementos on the grave without seeking the respondent's permission and now wishes to erect a headstone as a permanent memorial.

[16] In the amended originating summons, the applicant seeks an order that he is entitled to erect and maintain a gravestone/headstone at the deceased's grave plot. He further seeks a declaration as to the extent of the rights granted to the respondent pursuant to the grant of exclusive right of burial and a declaration as to the entitlement, if any, of the respondent to erect a gravestone pursuant to that grant and a declaration as to the true construction of the Public Health (Ireland) Act 1878 and Burial Grounds (Northern Ireland) Regulations 1992.

[17] The applicant submits that the grant of an exclusive right of burial does not include the right to erect a headstone. He submits that it is a separate right and the council may therefore confer this right on a person other than the burial right's holder.

[18] In contrast, both the council and the respondent submit that only the burial right's holder is entitled to erect a headstone on the grave plot, unless that owner consents otherwise or pursuant to the provisions of regulation 5 of the Burial Grounds Regulations (Northern Ireland) 1992.

Preliminary issue - standing

[19] Mr Dowd submitted that the applicant had no standing to bring these proceedings under Order 85 rule 2. Although he has extracted letters of administration, because the proceedings do not concern any real or personal estate belonging to the deceased who had no real or personal estate, he has no standing. Further, he submitted, that upon death, a personal representative only has a right to custody and possession of the body until its interment. The deceased was buried in November 2022 and that interment therefore led to a complete cessation of the rights and duties placed upon the personal representative to deal with the body of the deceased – see *Re Campbell* [2013] NIQB 32, para [17].

[20] The applicant seeks a declaration regarding the rights included within an exclusive grant of burial rights relating to the burial of his son. As the father of the deceased, I consider he has a personal interest in the dispute.

[21] Accordingly, I do not consider that the case should be struck out on the basis that the applicant lacks standing.

Legal questions for determination

[22] The key questions to be determined are:

- (a) What is the legal nature of an exclusive right of burial?
- (b) Did the grant of the exclusive right of burial to the respondent include, as incidental thereto, the right to erect a headstone, subject to council permission?

Statutory framework

[23] The statutory framework governing the present dispute is found principally in the Public Health (Ireland) Act 1878 ("the 1878 Act"). The Burial Grounds Regulations (Northern Ireland) 1992 ("the 1992 Regulations") supplement the 1878 Act by detailing how the rights granted therein are to be administered and exercised.

[24] Section 178 of 1878 Act constitutes the statutory source of the council's power to grant the rights in question. Read in full, it provides:

"Section 178

Any burial board, under such restrictions and conditions as they think proper, *may sell* the exclusive right of burial, either in perpetuity or for a limited period, in such parts of any burial ground provided by such board as may be appropriated to that purpose, *and also* the right of constructing any chapel vault or place of burial, with the exclusive right of burial therein, in perpetuity or for a limited period, *and also* the right of erecting and placing any monument gravestone tablet or monumental inscription in such burial ground, subject to the provisions here-in-before contained: Provided always, that such exclusive rights shall not extend in all to a space of one half of such burial ground." [Emphasis added]

[25] Further detail in respect of how section 178 operates is supplied by the 1992 Regulations. It circumscribes the manner in which rights granted under section 178 are to be dealt with and exercised. Regulation 5 reads as follows:

"Rights of burial and rights to erect or place memorials, etc.

5.-(1) Subject to paragraph (2), a person shall not cause or permit a body to be buried, or cremated human remains to be interred or scattered, in or over any grave or vault in which an exclusive right of burial for the time being subsists, except by, or with the consent in writing of, the owner of the right.

(2) Paragraph (1) shall not apply to the body or remains of any person specified in the grant of right, or in an endorsement made on that grant, at the request of the owner for the time being of the right, by the officer appointed for that purpose by the council.

(3) Rights under section 178 of the Act of 1878 shall be dealt with and exercisable subject to and in accordance with Parts I and II of Schedule 1.

(4) Where a council has granted a right to erect or place a memorial under section 178 of the Act of 1878, the council may permit any person who satisfies it –

(a) that he is a relative of the person buried in the grave or vault, or is acting at the request of that relative; and

(b) that it is impractical for him or that relative to trace the owner of the right described, to erect or place a memorial, or to put an additional inscription on a memorial, on the grave space, grave or vault in which the right so described subsists.

(5) A council may at the request of a particular religious denomination. prohibit the interring or scattering of cremated human remains in or over a part of the burial ground allotted for the use of that denomination.”

[26] Regulation 2 defines a memorial as “a memorial, monument, gravestone ...”

[27] Schedule 1 Part I, para [10] provides:

“10. A *person* who causes or permits a body to be buried in a grave in respect of which an exclusive right of burial has been granted *shall*, as soon as convenient after the subsidence of the earth has been completed, cause the surface of the grave to be covered with a memorial in respect of which a right has been granted by the council ...”
[Emphasis added]

Consideration

Question 1 - What is the legal nature of an exclusive right of burial?

[28] Alan Dowling, *"Exclusive rights of burial and the law of real property"*, (1998) 18 Legal Studies 438 comments:

"Despite the certainty of death and the consequent need for disposal of the body of the deceased, there appears to be a notable lack of clarity in regard to the legal aspects of exclusive rights of burial."

[29] Similarly, Professor Conway in *Grave Matters* NIC and LLJ 2016 at page 27 observes that:

"Both the legal status of exclusive rights of burial and their consequent scope have been debated extensively, with opinions divided on whether they generate proprietary interests in or mere contractual rights over the grave in question."

[30] The legal classification of the right is material as this categorisation determines the rights and obligations created. For example, if the right is contractual in nature, the rights and obligations which flow are ascertained principally from the terms upon which it was granted. In contrast, if the right is categorised as proprietary, the rights created include, for example, the right to sue for trespass if another party interferes with the grave and also the right to enforce against third parties and successors in title.

[31] A survey of the jurisprudence reveals that no consistent view has been taken about the nature of the right which an exclusive right of burial creates and such rights have been variously categorised as interests in land, easements or as some form of licence whether a licence coupled with a grant or a contractual licence.

[32] I consider there are difficulties in describing an exclusive right of burial as an easement, not least because there is no dominant or servient tenement and I agree with Dowling's observation at page 441, that to characterise the right of burial as an easement would be to recognise an easement in gross – a form of right alien to orthodox land law.

[33] The idea that the owner of such a right becomes the owner of the soil of the grave has been accepted in some commonwealth jurisdictions. In the Canadian case of *In Re Elmwood Cemetery Co* [1970] 10 DLR 338, the Manitoba Court of Appeal held that a reference in a Canadian statute to burial plots being "sold" clearly contemplated a conveyance of the title to the plot and accordingly the cemetery company had ceased to be the owner of the plot. Section 178 of the Public Health (Ireland) Act 1878 uses

similar language as it provides that a council may “... sell the exclusive right of burial, either in perpetuity or for a limited period ...”

[34] The English and Irish authorities, however, which have considered the nature of exclusive rights of burial have consistently rejected the idea that the grantee of such a right becomes the owner of the soil of the grave itself – see *Dowling* page 440 and *Hoskins-Abrahall v Paignton UDC* [1929] 1 Ch 375 (*Hoskins-Abrahall*) and *Connor v Moran* [1849] 29 ILTR 32.

[35] Turning to the question of whether exclusive rights of burial create an interest in land/a right of property or merely create a right in contract, it appears that the authorities have not taken a consistent view on this question. In *Hoskins-Abrahall*, Sankey LJ thought that an exclusive right of burial was not a right of property. The opposite view was taken in *Representative Church Body v Crawford* [1940] 74 ILTR 49. The most recent authority is *Re Westwood Cemetery* [1995] 1 All ER 387 when the Chancellor of Southwark Consistory Court stated at 393:

“What the purchaser of a burial plot at West Norwood Cemetery acquired was an exclusive licence either in perpetuity or for a limited period to bury in that plot ... What the purchaser did not acquire was any interest at all in the land as real property...”

[36] Further in *McGough v Lancaster Burial Board* [1888] QBD 323 Lord Esher MR when considering the interpretation of section 33 of the Burial Act 1852, which is materially identical to section 178 of the 1878 Act, said at page 325:

“The plaintiff only has statutory rights in this grave; the burial board could only grant him what the statute empowers them to grant him. The rights the board can confer are mentioned in section 33. By that section they are not empowered to grant a freehold estate in a part of the burial ground.”

[37] Whilst categorising an exclusive grant of burial rights as creating a property right reflects the use of the word “sell” in the statute and would create simplicity in relation to the rights and obligations created, this categorisation is difficult considering the existing jurisprudence on the interpretation of the statutory provisions.

[38] Should such a right then be categorised as a contractual licence? This analysis was accepted in *Re Campbell's Application* [2013] NIQB 32 where the applicant sought judicial review of the council's decision to grant a right of burial to the respondent (the father of the deceased), when it was aware that the applicant was the deceased's next of kin. The applicant further challenged the council's decision to grant the respondent a permit to erect a memorial. Treacy J concluded that an exclusive right of burial was

a contractual licence – see para [16]. It is, however, correct to note that the nature of the burial right was not the subject of argument or analysis.

[39] Nonetheless, as Dowling observes, the dominant view in the jurisprudence is that an exclusive right of burial creates a contractual licence. For example, in *Newcastle Corporation v Wolstanton Ltd* [1947] 1 All ER 218, the court held that the effect of section 6 of the Gas Works Clauses Act 1847, conferring power on the corporation to lay gas pipes, gave the corporation no legal or equitable title to the soil surrounding the pipes, but gave them contractual rights only.

[40] I conclude that an exclusive right of burial is contractual in nature, in light of the jurisprudence and also because I consider this categorisation properly reflects the nature of the right created.

Question 2 - Did the grant of an exclusive right of burial to the respondent include, as incidental thereto the right to erect a headstone?

[41] If an exclusive right of burial is by its nature a contractual licence, the rights conferred on the grantee are gleaned from the contractual terms agreed by the parties. In this case the terms are contained within the Deed.

[42] The Deed is dated 29 January 2025. Although it post-dates the contractual agreement, which was formed on 13 November 2022, when the funeral director, acting as agent of the respondent purchased the exclusive right of burial from the council and paid the necessary fee, it was agreed that the Deed represented the outworkings of that earlier agreement.

[43] The Deed avers that it was made by the council “in pursuance of and in exercise and by virtue of the powers conferred by” various statutory provisions. As already noted, the council’s power to grant exclusive rights of burial arise under section 178 of the Public Health (Ireland) Act 1878. Accordingly, the rights granted to the respondent fall to be determined by construing the terms of the Deed, in accordance with the provisions of the 1878 Act.

Statutory Construction

[44] Section 178 of the Public Health (Ireland) Act 1878, provides that the council:

“178. ... under such restrictions and conditions as they think proper, *may sell* the exclusive right of burial, either in perpetuity or for a limited period, in such parts of any burial ground provided by such board as may be appropriated to that purpose, *and also* the right of constructing any chapel vault or place of burial, with the exclusive right of burial therein, in perpetuity or for a limited period, *and also* the right of erecting and placing

any monument gravestone tablet or monumental inscription in such burial ground, subject to the provisions herein-before contained.” [Emphasis added]

[45] In *McGough v Lancaster Burial Board* [1888] QBD 323, the English Court of Appeal discussed the extent of the rights granted to the plaintiff by the Board under section 33 of the Burial Act 1852, which is materially identical to section 178 of the 1878 Act. Lord Bowen observed at page 328:

“... the right to be given under section 33 is a statutory right... The Board may sell an exclusive right of burial, subject to such restrictions as they think proper. They may also sell the right to construct a vault or place of burial, and lastly, they may sell the right of erecting a monument or gravestone. It seems to me that, the Board being expressly given the right of doing these three things, it follows that the first event cannot include the third *ex vi termini*. Therefore, *the exclusive right of burial cannot be considered as including as incident thereto the right of erecting a gravestone, and a person buying the former cannot be considered as thereby buying the latter*. Of course, he may buy the latter as well as the former. What has the plaintiff bought here? He has bought a right of burial, subject to restrictions which the Board were empowered by section 33 to impose.” [Emphasis added]

[46] Bowen LJ therefore considered that the statute gave the council power to grant three rights which were distinct and separate from each other.

[47] I am satisfied that the ordinary and natural meaning of the words “and also” in section 178 creates three distinct and separate rights. Accordingly, the council may choose to sell one, two or three of these rights. *McGough*, a persuasive authority, supports this interpretation and is one which I propose to follow given the similarity in the wording of the English and Irish statutory provisions.

[48] This construction gives rise to two further questions. First, what rights were granted expressly to the respondent by the Deed and specifically was she granted a right to erect a headstone? Secondly, if she was not expressly granted the right to erect a headstone, is there an implied term in the Deed that she has the exclusive right to apply to the council for permission to erect a headstone on the grave plot?

Principles of contractual construction

[49] The parties helpfully set out a joint paper setting out the guiding principles and jurisprudence in relation to contractual construction which was of much assistance. The Supreme Court in *Tesco Stores v Union of Shop Distributive and Allied workers and*

others [2024] UKSC 28 (“Tesco”) at para [32] has helpfully summarised the correct approach to contractual interpretation and the implication of terms by fact as follows:

“[32] ... such terms must be interpreted applying an objective and contextual approach like any other contractual terms. Business (or commercial) common sense may also be relevant.” However, evidence of the subjective intentions of the parties is not relevant in determining what the contractual language means. For the applicable principles of interpretation, which are not in dispute, see, for example, *ICS; Arnold v Britton* [2015] UKSC 36, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.”

[50] In his seminal speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (“ICS”) at 912, Lord Hoffman expressed the aim of contractual interpretation as being to ascertain, “the meaning which [the contract] would convey to a reasonable person having all the [relevant] background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

[51] Lord Neuberger set out his views on contractual construction at para [15] in *Arnold v Britton* [2015] UKSC 36 as follows:

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to ‘what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean’, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.”

[52] In *Tesco*, the Supreme Court elaborated further on the relevant principles of contractual construction in respect of implied terms, at paras [33]–[35] as follows:

“[33] The court must be alive to the possibility that one party may have agreed to something which, with hindsight, did not serve that party’s interest. As Lord Neuberger of Abbotsbury explained in *Arnold v Britton*, the focus must be on the meaning of the words used in the contract, and

‘... commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.’ (para 19)

[34] Construing the express words used by the parties in their contract and implying terms by fact into the contract both involve determining the scope and meaning of the contract. There is an overlap in the material relevant both to interpretation on the one hand and implication by fact on the other. But, as is well-recognised, the implication of contractual terms by fact involves a distinct exercise from that of contractual interpretation because it involves deciding whether, objectively, the parties would have said something in their contract that they did not in fact say had the point occurred to them. As Sir Thomas Bingham MR put it in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481:

“The courts’ usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have themselves expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially

intrusive that the law imposes strict constraints on the exercise of this extraordinary power ...”

[35] This justification for the strict constraint applied to the implication of terms by fact was approved by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, where, at paras 15 to 31, Lord Neuberger authoritatively restated the long-established and consistent learning on this question. It is unnecessary to rehearse the principles that govern when a court may properly imply a term by fact into a contract. They are not in dispute. It is sufficient for our purposes simply to reiterate that, *to imply a term by fact, the term must be necessary for business efficacy or the term must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract.* Importantly, as Lord Hughes emphasised in *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531 (“*Ali*”), at para 7, “... the process of implying a term into the contract must not become the rewriting of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated.” [Emphasis added]

[53] The starting point, accordingly, is to interpret the express words of the Deed. The next stage is to consider whether, and if so what, term(s) must be implied by fact.

[54] The Deed states that the plot was granted to the respondent “for the purpose of lawful human burial only.” The Deed is entirely silent on the grant of a right to erect a headstone. Accordingly, I find that the only right expressly granted to the respondent was the exclusive right of burial. I find that she was not permitted to erect a headstone at the time of the grant and note that she did not pay a fee for erection of a headstone.

[55] Mr Dowd and Mr Stitt, however, argued that the grant of exclusive right of burial to the respondent implicitly included an exclusive option to apply to the council for permission to erect a headstone on the plot and relied on *Re Campbell* as support for this proposition.

[56] In *Re Campbell*, Treacy J held that the right to erect a headstone is “incidental” to the grant of a right of burial and follows from it. *Re Campbell* therefore appears to provide that the right to erect a headstone cannot be given to a person other than the burial rights holder.

[57] Mr McClurkin argued that *McGough* is authority for stating that the right to erect a headstone can be given to a person who is not the holder of the burial rights. This is because the rights are separate and distinct. I do not accept this submission. *McGough* simply recognised that the rights were separate and distinct rights. The court then addressed the factual/evidential question whether the plaintiff had expressly acquired the right to erect a headstone on the grave plot. The court found that on the evidence the plaintiff had acquired such a right expressly. Lord Esher MR stated at page 326, “The conveyance grants to him the exclusive right of burial ... and ... the right of erecting a monument or headstone.” In these circumstances, the court did not have to consider (and did not consider), the question whether there was an implied term in the conveyance granting the plaintiff an exclusive option to apply to the council for permission to erect a headstone.

[58] In the absence of authority on this issue, for the reasons set out below I consider that a term can be implied, in fact, into the contract that the respondent was granted an exclusive option to apply to the council for permission to erect a memorial on the grave plot. If such an application is made by the respondent the council will decide, subject to its control of the cemetery and the relevant regulations and guidance, whether to grant such permission. The respondent’s implied right therefore consists only of an exclusive option to apply for permission to erect a headstone. She does not have an unrestricted right to erect a headstone simply because she has acquired the burial rights. She must first obtain the permission of the council before she can erect a headstone. The outworking of my conclusion, is that the council cannot grant a right to erect a headstone to a person other than the owner of the exclusive rights of burial, save with the burial rights owner’s consent or pursuant to the provisions of Regulation 5.

[59] The canonical tests governing terms implied which were approved by the Supreme Court in *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28 at paras [35](ff) are set out above. The Supreme Court reiterated that the term must be necessary for business efficacy or the term must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. In particular, “... the process of implying a term into the contract must not become the rewriting of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated.”

[60] I consider that the implication of a term that the respondent was granted an exclusive right to apply to the council to erect a headstone on the grave plot, is necessary applying the business efficacy test or, alternatively, applying the obviousness test - it “goes without saying.” The implication of such a term does not conflict with the express terms of the contract as contained in the Deed or the relevant statutory provisions and its implication is not on the basis that it would be reasonable to do so. Rather, the implication of such a term arises for the reasons following.

The nature of the grant

[61] First, an implied term arises because I consider the nature of the grant of an exclusive right of burial is such that it “goes without saying” that the holder also has an exclusive right to apply for permission to erect a headstone on the grave plot. This was the view expressed by Morritt J in *Reed v Madon & others* [1989] 2 ALL ER 431 when he stated at page 420(c)-(d) as follows:

“The extent of the grant of exclusive burial rights falls to be determined by reference to the Cemetery Clauses Act 1847 and the deed of grant to the plaintiffs ... Section 40 of the Cemetery Clauses Act 1847 specifically authorised the third defendant to sell ‘a right of placing any monument or gravestone in the cemetery.’ ... *It would be entirely inconsistent with the grant as a whole, if the company were entitled to permit a memorial to a third party to be placed on a site in which it had granted exclusive burial rights. To do so would, in practice, prevent the exercise of the right of burial and preclude the owner thereof from having any prospect of obtaining the company’s permission to the erection of his own memorial. Thus, in my judgment, the rights granted to the plaintiffs must necessarily include the right that no one else’s memorial shall be placed over the site in which they have exclusive burial rights.*”
[Emphasis added]

Mutual objective intention of the parties

[62] Secondly, I consider that the implication of this term arises because it reflects the mutual objective intention of the parties. Lord Leggatt at paras [102]-[106] of *Tesco*, enquired whether, without the proposed term, the contract would operate in the way the parties “must reasonably have intended and expected it to work.” This entails identifying the relevant contractual purpose disclosed by the express terms and considering whether the proposed implication is necessary to prevent it from being defeated – see para [106]. Applying that reasoning, I consider that the proposed implied term is necessary to preserve the contractual purpose and practical efficacy of the right of burial grant. I consider the contractual purpose and practical efficacy of a burial right is not only to bury the body but also to commemorate the deceased which is normally done by way of a memorial on the grave plot.

[63] If this term were not implied the council could authorise a stranger to place a permanent memorial upon the grave plot and the memorial could be to someone other than the person buried in the grave plot. Such an eventuality would, I consider, materially undermine the contractual purpose and practical content of the original grant of burial. As Treacy J stated in *Re Campbell* a right to erect a headstone is *incidental* to the right of burial. This accurately reflects the intention of those purchasing and selling a right of burial. In this sense “it goes without saying” and is

therefore necessary to give effect to the purpose and proper functioning of the contract. This interpretation accords with the nature of the grant of burial rights and makes practical sense as to do otherwise would lead to preposterous outcomes whereby the headstone to a different person could be erected on the grave.

Intention revealed by extraneous documentation

[64] Thirdly, I consider the implication of this term is supported by the extraneous documentation existing at the time this contract was entered into. It is permissible to consider such material on the basis set out by Lord Neuberger in *Arnold v Britton* at para [15] where he stated that:

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to ‘what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean’ ... That meaning has to be assessed in the light of ... (iv) *the facts and circumstances known or assumed by the parties at the time that the document was executed*, ... but (vi) disregarding subjective evidence of any party’s intentions.”

[Emphasis added]

[65] Similarly, Lord Hoffman in *ICS* expressed the view that the aim of contractual interpretation is to ascertain, “the meaning which the [contract] would convey to a reasonable person having all the [relevant] background knowledge which would reasonably have been available to the parties in the situation they were at the time of the contract.” – see at 912.

[66] At the time this contract was entered into the parties knew and were aware of the existence of the invoice issued to the respondent and were aware or assumed to be aware of the council’s “Cemetery Management Guidance”, created in 2022 and which were therefore operative at the time the grant was made.

[67] The invoice issued to the respondent for the purchase of burial rights contained a section for purchase money and a section entitled “fee for headstone.” This section was not filled in as the respondent did not wish to erect a headstone at that time. I consider the fact that the invoice contained this section indicated that both the purchaser and the vendor (the council) considered that the purchaser of the burial rights was entitled either at that time or at some time in the future to seek permission from the council to erect a headstone on the grave plot.

[68] The “Cemetery Management Guidance” provides under the heading, “Grant of exclusive rights of burial” at page 10, that “the deed owner or beneficiaries have the right to erect headstones or other memorials subject to all conditions being met as per

cemetery rules and regulations.” Mr Dowd submitted that the guidance shows that all the parties knew and understood when they used the words “exclusive rights of burial” in the Deed that this included the right of the burial owner to seek permission to erect a headstone. Additionally, he noted that the council would have been aware of the decision of Mr Justice Treacy in *Re Campbell* when he stated at para [18] that:

“The right to erect a headstone is incidental to the grant of a right of burial and follows from it.”

[69] In light of all the facts and circumstances known or assumed by the parties at the time that the Deed was executed, namely the invoice and council cemetery guidance, I find that the parties each understood that the grant of an exclusive right of burial included the exclusive right of the respondent to seek permission from the council to erect a headstone.

The Statutory Scheme

[70] Fourthly, I further consider that the statutory scheme supports implying a term that the burial rights holder has an exclusive right to apply for permission to erect a headstone on the grave plot.

[71] Section 178 empowers the council to grant three distinct rights, but it does not expressly provide that the rights can be given to different persons. The identity of the person or persons to whom these rights can be sold can however, be gleaned from Regulation 5 of the 1992 Regulations. It provides that the rights under section 178 shall be dealt with and are exercisable subject to and in accordance with Parts 1 and 11 of Schedule 1. Schedule 1 Part I para (10) provides:

“10. A person who causes or permits a body to be buried in a grave in respect of which an exclusive right of burial has been granted *shall*, as soon as convenient after the subsidence of the earth has been completed, cause the surface of the grave to be covered with a memorial in respect of which a right has been granted by the council ...”
[Emphasis added]

[72] Schedule 1 Part I para (10) therefore provides that it is the person who was granted the exclusive rights of burial who is required (“*shall*”), subject to council approval, to erect a memorial, which includes a headstone.

[73] I consider that the mandatory wording of the statutory scheme, by requiring the owner of burial rights to erect a memorial, supports the view that the owner of the exclusive rights of burial has an exclusive right to apply to the council for permission to erect a headstone.

[74] I therefore conclude that the statutory scheme supports the conclusion that a right to erect a headstone can only be granted to the burial rights holder and accordingly a grant of burial includes implicitly an exclusive option to apply for permission to erect a headstone. Accordingly, permission to erect a headstone cannot be granted by the council to the applicant, in the absence of consent by the respondent, or pursuant to regulation 5, as he is not the burial rights holder.

Public policy considerations

[75] Fifthly, I consider this interpretation accords with public policy. It is undesirable as a matter of public policy that a council should be put in the position of arbitrating in family disputes. Treacy J observed in *Re Campbell*, “I agree with the respondent’s contention that section 178 of the 1878 Act does not compel the respondent council to adjudicate on a hierarchy between competing interests of the family of the person to be interred.” – see para [16]. If the applicant’s position is adopted by the court, *i.e.* that anyone can apply to erect a headstone on a grave over which they do not possess the exclusive right of burial, the scope for dispute is greatly increased. These disputes would have to be arbitrated by the council and inevitably further litigated in the courts, which is highly undesirable.

Analogous regulations

[76] Finally, I note that the English Regulations, which appear in the form of the Local Authorities’ Cemeteries Order 1977, specifically provide that the consent of the exclusive right of burial holder is required for the erection of a headstone. Notwithstanding that the 1992 Regulations impose no such explicit requirement for consent, given that both the English and 1992 Regulations emanate from the same statutory wording found in section 178 of 1878 Act in Ireland and section 33 of the Burial Act 1852 in England, I consider that there is commonality in legislative intent. This again supports the view that the burial rights holder has an exclusive option to apply for permission to erect a headstone and the council therefore cannot give permission to another person, save with the burial holder’s consent or pursuant to Regulation 5.

[77] For all these reasons, I find that the council cannot grant the applicant permission to erect a headstone unless the respondent consents or he comes within the provisions of Regulation 5(4) of the 1992 Regulations.

[78] Regulation 5 provides:

**“Rights of burial and rights to erect or place memorials,
etc**

5.-(4) Where a council has granted a right to erect or place a memorial under section 178 of the Act of 1878, the council may permit any person who satisfies it –

- (a) that he is a relative of the person buried in the grave or vault, or is acting at the request of that relative; and
- (b) that it is impractical for him or that relative to trace the owner of the right described, to erect or place a memorial, or to put an additional inscription on a memorial, on the grave space, grave or vault in which the right so described subsists.”

[79] The respondent does not consent, and the applicant does not come within the provisions of Regulation 5(4).

Conclusion

[80] In terms of the relief sought in the originating summons, the court declares as follows:

- (i) On the true construction of the grant of exclusive right of burial dated 29 January 2025 in respect of grave plot No. 30, Section 17 Ballyoan Cemetery, the respondent was granted the exclusive right to apply to the council for permission to erect a headstone on the burial plot.
- (ii) The council cannot grant permission to the applicant to erect a gravestone on grave plot No. 30, Section 17 Ballyoan Cemetery, save in accordance with the provisions of Regulation 5(4) of the Burial Grounds (Northern Ireland) Regulations 1992 or with the consent of the respondent, as he is not the burial rights holder.
- (iii) On the true construction of section 178 of the Public Health (Ireland) Act 1878, the council does not have power to grant permission to a person other than the holder of the exclusive burial rights to erect a memorial on a grave plot, save in accordance the provisions of Regulation 5(4) of the Burial Grounds (Northern Ireland) 1992 Regulations or with the respondent’s consent.

[81] The court will hear the parties in respect of costs.