

Neutral Citation Number: [2018] ECC Swk 3

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF HITHER GREEN CEMETERY

AND IN THE MATTER OF A PETITION BY MS JANINE HARDWICK

## JUDGMENT

### **Introduction**

1. This is the petition of Ms Janine Hardwick. It was filed some time ago and I regret the delay in dealing with it. What happened was that, having read the petition and supporting documentation, I considered that it might be appropriate for an appropriate person to see the Petitioner and discover whether she might be assisted by some pastoral support. The matter was complicated by the fact that Ms Hardwick does not live in the Diocese and, in the event, a visit did not happen. It is now clear that the moment when such a visit might have been of value has now passed. Ms Hardwick remains of a fixed resolve to pursue her petition, as is her right.

### **The facts**

2. The petition seeks a faculty to exhume the remains of Owen Stephen Flight from Plot CZ 1i in the consecrated part of Hither Green Cemetery. This is in order that his remains may be cremated and kept at home by Ms Hardwick.
3. The background to the petition is that Owen Flight was the son of Ms Hardwick and Stephen Flight. He died aged five as a result of a brain tumour in October 2011 and his remains were buried in the consecrated part of Hither Green Cemetery. At a time of profound grief, Ms Hardwick and Mr Flight did not themselves make the arrangements for the burial. The funeral

was a humanist rather than a Christian ceremony. Ms Hardwick and Mr Flight did not know that the land was consecrated.

4. Over time, Ms Hardwick came to regret the decision to inter Owen's remains in a Cemetery. She wishes that she had arranged for his remains to be cremated to enable her to keep his ashes at home.

5. She sets out her case as follows:

*When Owen passed, I thought that the right thing to do was to bury him in our local cemetery, everything seemed to happen so fast.*

*As time passed, we have been able to reflect on our decision and wish that we had considered cremating Owen.*

*I regularly visit the cemetery and see other children's services taking place in the crematorium, the thought of bringing Owen's remains home with me is now what I want.*

*When the grave was purchased we weren't told that the plot was on consecrated ground, it does not state this on my deeds, the burial authority selected the grave for us because we were in a children's hospice at the time and out of the borough.*

*Since Owen's burial I have not been able to sleep or come to terms with what has happened. I need to have Owen at home with me and his father.*

*I have since moved and the additional journey has added to my stress because I am unable to see Owen's grave as much as I would wish to. I cannot see this changing with time, I can only see my feeling towards this will get worse. I need to put pieces in place so I can move forward, exhuming Owen and having him home with me will help me to do this. Both myself and Owen's father have taken a considerable amount of time to reflect on our decision. We have spoken to the burial authority and friends. This has only strengthened our decision to exhume Owen.*

6. As this makes clear, Mr Flight supports the petition.
7. In the circumstances I decided that it was not necessary for the petition to be subject to any publicity. I would have preferred to have heard Ms Hardwick and more fully understand why she seeks a faculty but she declined the opportunity of a hearing. She did not wish to present any medical evidence.

## Christian burial in England

8. Before the Reformation and for a long time afterwards, when someone died his or her body was buried in the churchyard adjoining his or her parish church. The church and the churchyard were consecrated; that is, permanently set aside for sacred uses. It was appropriate that human remains were interred in this holy place. Such interment was permanent and was seen as

*... the symbol of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their 'journey'), entrusting them in peace for their ultimate destination, with us, the heavenly Jerusalem. This commending, entrusting, resting in peace does not sit easily with 'portable remains', which suggests the opposite: reclaiming, possession, and restlessness; a holding on to the 'symbol' of human life rather than a giving back to God<sup>1</sup>.*

9. The question of possible exhumation did not arise<sup>2</sup> and, in any event, graves were generally unmarked.
10. With the great increase in the population in the nineteenth century, the churchyards could not meet the demand for burial space. In the first half of the nineteenth century private cemeteries were established to meet the demand and, following the enactment of the Public Health Act 1848, municipal cemeteries were established. Although these cemeteries contained areas which were unconsecrated, they also all contained areas which were consecrated according to the rites of the Church of England. The areas which were unconsecrated were intended for the use of those who were not members of the Church of England and the areas which were consecrated were intended for the use of those who were members of the Church of England.

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<sup>1</sup> See *The Theology of Christian Burial* a paper prepared by the Rt Revd Christopher Hill (then Bishop of Stafford) for the use of the Court of Arches in *In re Blagdon Cemetery* [2002] Fam 299.

<sup>2</sup> In some Christian traditions in Europe, bones are sometimes exhumed and placed in an ossuary. There are two surviving examples of ossuaries in England but the practice does not seem to have been widespread in this country.

By this time the practice had arisen of graves (at least those of the more prosperous) being marked by a memorial of some kind.

11. Although interment was intended to be permanent, the consecration of a churchyard or cemetery conferred on the Consistory Court jurisdiction to authorise exhumation; and the practice of marking graves made exhumation a possibility. However, unsurprisingly, Consistory Courts declined to grant faculties as a matter of course and, in different words, expressed reluctance to permit exhumation save for good cause shown.

### **Law and guidance on exhumation**

12. In 2001 a case came before the Court of Arches which gave the Court the opportunity to review the basis on which faculties for exhumation should be granted: *Blagdon*. In that case, the Court emphasised the norm of permanence of burial and said that permission for exhumation should be granted only exceptionally. If the matter had been left there, it would have left at large what circumstances might properly be regarded as exceptional<sup>3</sup>. However it helpfully did give more general guidance. In doing so it recognised that a decision in one case might well act as a precedent in another case, because of the desirability of securing equality of treatment as between petitioners (so far as circumstances permit it). In *In re Bingham Cemetery*<sup>4</sup>, Chancellor Ockelton observed:

*The temptation to treat other cases ... as a pointer to what is likely to be regarded as exceptional is to be resisted. Like cases are no doubt to be decided alike, and the decided cases offer guidance on the determination of the issues, which ought to be applied in the interests of consistency. But precedent operates in the area of law, not of fact. The facts of every case are different. The question is whether the circumstances as a whole establish the exceptionality.*

13. I think that this is a salutary reminder that each case needs to be decided on its merits and on its own particular facts. However I think that it is looking at the matter too narrowly to say

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<sup>3</sup> Save of course that Chancellors would have been able to compare the facts of any case that they were called upon to decide with the facts of that case.

<sup>4</sup> [2018] ECC S&N 1.

that precedent does not operate in the realm of fact; the desirability of securing equality of treatment between petitioners was described by the Court of Arches in *Blagdon* as the practical application of precedent. It would make the lot of a Chancellor much easier if all he or she had to do in an exhumation case were to apply the test of exceptional circumstances with reference to the guidance in *Blagdon*, but without reference to any other decided case. However, if I am to be confident that equality of treatment is being secured, I need to consider other decided cases. In this context, it should be noted that petitioners are usually unrepresented and will have no idea that there exists a large corpus of decided cases, let alone that the facts of some of them may be relevant to his or her own case. It falls to the Consistory Court to identify and consider the relevant cases. This is particularly important as what has happened, over time, is that in the cases the Courts have identified a large number of circumstances which they have considered exceptional. The issue that then arises as to how properly to distinguish one set of facts which are exceptional from another which are potentially not. It is comparatively easy to distinguish one case from another; as Chancellor Ockelton emphasised the facts of no two cases are identical and even if the same relevant factors are identified in two different cases, that does not necessarily mean that they will be decided in the same way. However it is important that the distinctions drawn should be intellectually defensible and not subject to the criticism that they are too fine to be justifiable.

14. I return to the guidance given in *Blagdon*.

15. In providing context for what **could** constitute exceptional circumstances, the Court identified what would not do so: a change of mind as to the place of burial on the part of relatives or others responsible in the first place for the interment should not be treated as an acceptable ground for authorising exhumation<sup>5</sup>. This meant that in the view of the Court it was not

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<sup>5</sup> The Court did not qualify this guidance in any way. However the context makes it clear that it was approving what had been said by the Chancery Court of York in *In re Christ Church, Alsager* [199] Fam 142. In *Alsager* the Court said ... *it will not normally be sufficient to show a change of mind on the part of relatives of the deceased ... Some other circumstance must usually be shown*. This does contemplate circumstances in which a change of mind is sufficient.

appropriate for permission for exhumation to be granted where the relatives had moved from one part of the country to another and wanted to take the remains with them (the so called “portable remains” cases) although the principle expressed was capable of wider application.

16. Pertinently to the present case, the Court of Arches recognised that a mistake can amount to exceptional circumstances justifying exhumation. All Chancellors will be familiar with cases where human remains are buried in the wrong plot. The ensuing difficulties have to be sorted out as fairly and sensitively as possible and this will usually involve permitting exhumation.
17. There is however another category of mistake which arises when a person does not know that the ground in which the remains have been interred is consecrated. If he or she **had** known, the person concerned would not have organised the burial in the consecrated ground. In these circumstances there is an operative mistake, which the Court of Arches said would justify exhumation: *For those without Christian beliefs it may be said that a fundamental mistake has been made in agreeing to a burial in consecrated ground.* It justified on this basis the decision in *In re Crawley Green Road Cemetery, Luton*<sup>6</sup>, a case in which a widow who was a humanist would not have arranged for the burial of her husband in consecrated ground if she had known of its status<sup>7</sup>.
18. A similar case arises where a person does not know that the ground is consecrated and, although he or she has no objection as such to the remains being interred in consecrated ground, they would not have organised the interment in consecrated ground had they known what were the legal effects of such interment. Thus in *In re Lambeth Cemetery*<sup>8</sup>, Roman Catholic parents had organised the burial on the basis that it was not permanent, always

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<sup>6</sup> [2001] Fam 308.

<sup>7</sup> The case was decided by the Chancellor by reference to the Human Rights Act 1998 rather than mistake. I shall have to consider the human rights aspect of the present case in due course.

<sup>8</sup> 6 July 2003.

intending that their daughter's final resting place would be elsewhere. They successfully petitioned for a faculty for exhumation. There are other cases along these lines<sup>9</sup>.

19. The cases considered at paragraphs 17 and 18 above are ones of operative mistake; that is, had the person responsible for making the burial arrangement been aware of the facts, he or she would not have made those arrangements. There are cases where the Petitioner is not able to say that at the time the information would have made any difference and it is these cases that I next turn to consider.

20. It is a short step from permitting exhumation in circumstances identified in paragraph 18 above to permitting it in circumstances more generally where a person does not know that the land is consecrated (or does not appreciate the legal effects of consecration<sup>10</sup>). He or she only discovers the fact of consecration and its effects when they want to exhume the remains to a different place. However in these circumstances, the Petitioner is not able to say that, had he or she known that the land was consecrated, he or she would have organised matters differently and not interred the remains in consecrated ground in the first place. What has happened is that he or she has changed his or her mind about the appropriateness of his or her initial decision, he or she now wants to deal differently with the remains and he or she finds that the fact of consecration inhibits them from doing as they wish. If exhumation is permitted in these circumstances, the Court would be saying that exceptional circumstances sufficient to justify exhumation arise simply from the fact that the Petitioner did not know at the time of burial that the land was consecrated (or did not appreciate the legal consequences of such consecration)<sup>11</sup>. Such cases are complicated by the fact that inevitably the Petitioner will say

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<sup>9</sup> See *In re Putney Vale Cemetery* (6 August 2014) and *In re the Garden of Remembrance at the South London Crematorium* [2017] ECC Swk 8.

<sup>10</sup> I here note that there may be cases where a distinction is appropriately drawn between ignorance of the fact that the land was consecrated and ignorance of the legal effects of consecration (but knowledge of the facts of consecration). I do not have to engage with this potential difference in the present case. The distinction is blurred in *In re Lambeth Cemetery*.

<sup>11</sup> Such a case was *In re Putney Vale Cemetery* (30 April 2010) but that was also a case where a refusal to permit exhumation would have prevented a Roman Catholic family from dealing with remains in accordance with Roman Catholic belief (see paragraph 18 above).

that if he or she had known at the time of burial or interment that the fact of burial or interment in consecrated land would be to inhibit a subsequent (and not hypothetical) change of mind, they would not have organised the burial or interment in consecrated ground. However this is not the same thing as a mistake operative at the time of the decision as to arrangements as to burial or interment.

21. Before considering the circumstances identified in paragraph 20 above further, it is appropriate to consider the position under the Human Rights Act 1998. As is well known, the European Convention on Human Rights, applied in English law by the Human Rights Act 1998, guarantees a right to respect for private and family life (Article 8) and freedom of thought, conscience and religion (Article 9). Article 9 includes the freedom generally to manifest one's religion or beliefs. In *Blagdon*, the Court of Arches discounted the application of the Human Rights Act 1998 to exhumation cases<sup>12</sup> although it did not go so far as to say that the rights of a petitioner were not engaged when considering exhumation. Since *Blagdon*, the European Court of Human Rights has decided *Dodsbo v Sweden*<sup>13</sup>. This was a case where a refusal to permit exhumation under the municipal law of Sweden<sup>14</sup> was challenged as an infringement of Article 8. It was accepted by the parties that refusal of exhumation was an interference with the Applicant's human rights; the question to be determined was whether that infringement was justifiable in the circumstances. The Swedish Courts had considered whether exhumation should be permitted in the particular circumstances of that case, there being a discretion to do so in appropriate cases (not unlike the discretion exercised by the Consistory Court). The European Court of Human Rights held that there was no breach of Article 8. Accordingly there is no doubt that, in general, a law of a state that is restrictive of exhumation but allows for appropriate exceptions does not offend the European Convention. The law applied by the Consistory Courts is generally in conformity with the European

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<sup>12</sup> See paragraph 36 (iii) and 41.

<sup>13</sup> 17 January 2006.

<sup>14</sup> The law applied a restrictive approach, reflecting the fact that most burial grounds are under the management of the Church of Sweden (see paragraph 16 of the judgment).

Convention. This however does not dispense a judge in any particular case from considering the application of the Convention to the facts before him.

22. In *Crawley Green Road Cemetery, Luton* if permission for exhumation had been refused it would have prevented a humanist from manifesting her beliefs; in *In re Durrington Cemetery*<sup>15</sup> it would have prevented a Jewish family from doing so; in *Putney Vale Cemetery* it would have prevented a Roman Catholic family from doing so; in *In the matter of the Consecrated section of Putney Vale Cemetery*<sup>16</sup> and *In re Quoc Tru Han*<sup>17</sup> it would have prevented Buddhists from doing so. It is perfectly possible to maintain a principled position that permission would have been appropriately refused in these cases (all of which, apart from *Durrington* were cases where the petitioner did not know that the land was consecrated) on the basis of the importance of maintaining the principle of the permanence of Christian burial but it would have been harsh to do so; and in each case the Chancellor declined to do so. As well as more generally, the exceptional grant of permission in all these cases may be justified on the basis that otherwise the petitioner's rights under Articles 8 and 9<sup>18</sup> of the European Convention would otherwise have been infringed.

23. It will be seen that where the effect of refusing permission for exhumation in circumstances where the petitioner did not know that the land was consecrated and the refusal of permission would be to prevent the manifestation of belief, a Court may hold that Articles 8 and 9 would be infringed. What is the position where it is just Article 8 in play? It seems to me that it is very difficult to distinguish one case from the other.

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<sup>15</sup> [2001] Fam 33.

<sup>16</sup> 26 October 2015.

<sup>17</sup> [2016] ECC Man 2.

<sup>18</sup> It seems to me that if Article 9 would be infringed it is hard to say that, in similar circumstances, Article 8 would not be infringed also. Of course the application of Articles 8 and 9 would be different if the person seeking to rely on them had known about consecrated land and its effects in the first place.

24. However, having said this, it is not necessarily the case that in every application for exhumation where the basic facts are that the Petitioner did not know that the land was consecrated (or did not know the legal effects of consecration) the Court will hold that exceptional circumstances do exist or that to refuse permission for exhumation would involve breach of Articles 8. In the present case, it does seem to me relevant that Ms Hardwick made the arrangements for the burial of Owen's remains (or agreed to the arrangements) at a time of great personal grief and stress; that the current arrangements are productive of stress, leading to loss of sleep; that the circumstances of Owen's early death were very sad. Thus, subject to the further consideration set out at paragraphs 25 to 28 below, I consider that there exist exceptional circumstances justifying the exhumation of Owen's remains.
25. I am very aware that, at root, this is a "change of mind" case. If Ms Hardwick had been content with the arrangements that were made at the time that Owen died, then obviously there would have been no petition. Yet change of mind as an inadequate justification for exhumation was emphasised in *Blagdon*. I am also aware of the recent case of *In re David Ernest Newton deceased*<sup>19</sup>, Chancellor Judge Sarah Singleton QC decided that a widow had made a mistake in arranging for the ashes of her husband to be buried in the churchyard of the church of the place where he had lived until he was 11, rather than in the grounds of Rotherham Crematorium (nearer to Rotherham where he had lived and spent his married life). The Chancellor concluded that the widow had made the mistake because she was confused by grief; exceptional circumstances accordingly arose. It is not a criticism of that decision to suggest that the facts seem to be weaker than those of Ms Hardwick's case, even though the mistake that occurred in that case was an operative one - evidently the initial decision as to the interment was rational, if mistaken. There will be similar cases where a Petitioner may accept that the initial decision cannot be categorised as the result of an operative mistake but nonetheless, with the benefit of hindsight, was a mistake. He or she may, like the widow in *Newton*, have come *profoundly to regret* the initial decision. The distinction is a fine one. It

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<sup>19</sup> [2018] ECC She 1

does occur that the stricture in *Blagdon* about change of mind cases is capable of being applied too rigidly. Experience suggests that although “portable remains” cases do occur from time to time, the justification for exhumation is rarely simply because those who visit the grave have moved or are experiencing difficulty visiting, the circumstances at which the strictures in *Blagdon* are principally aimed<sup>20</sup>. For present purposes, all I need say is that, although I recognise that the present is a change of mind case and that this matter sounds against the identification of exceptional circumstances, my conclusion at paragraph 24 above is unaltered.

26. What does give me pause is the fact that Ms Hardwick wants to exhume Owen’s remains so that they may be cremated and that she may keep the remains at home<sup>21</sup>. Her wish to keep the remains at home is the opposite of what has been considered appropriate by the Christian culture of this country over many hundreds of years. It is at odds with the Anglican theology of burial set out at paragraph 8 above. The passage there set out continues:

*This commending, entrusting, resting in peace does not sit easily with ‘portable remains’, which suggests the opposite: reclaiming, possession, and restlessness; a holding on to the ‘symbol’ of human life rather than a giving back to God<sup>22</sup>.*

27. It might be observed that rather than giving back, Ms Hardwick is holding on. But whatever her beliefs, she is entitled to reject what has for long been considered the appropriate way of doing things; and she evidently does not share the mind of the Church of England on this matter.

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<sup>20</sup> Note also the observation at footnote 5 above.

<sup>21</sup> I was concerned about this in *In Re Putney Vale Cemetery* but in the event the Petitioner in that case agreed to the temporary interment of the remains in the grounds of a Roman Catholic Church before they were taken to Italy.

<sup>22</sup> It is only fair to point out that in *In re St Chad’s, Bensham* [2016] ECC Dur 2, Chancellor Bursell QC questioned the admissibility of what Bishop Hill had said in *Blagdon*, indicating that it might not be correct. *Bensham* was however a case in the Province of York where, for reasons which he explained, the Chancellor felt able to question the authority of *Blagdon*.

28. I do not think that it is appropriate for me to seek to impose on her a particular way of looking at things and of treating Owen's remains. Having accepted that there exist exceptional circumstances, I do not think it is appropriate not to permit exhumation on this basis of what is to happen to the remains thereafter; and if I were to seek to do so an issue would evidently arise under Article 9. In this regard, it seems to me that the important point is that it is evident that, if a faculty be granted, Ms Hardwick will treat the remains with respect<sup>23</sup>.
29. Accordingly, for the reasons set out above, I have decided that it is appropriate that a faculty should issue in this case.
30. I should add that, if the time should come when Ms Hardwick and Mr Flight feel that they would like Owen's remains interred in consecrated ground, that will of course be an option available to them. Similarly if they wished to discuss the situation with their parish priest – either now or in the future – he is there to help them.
31. Finally, *Blagdon* emphasised the importance of information about consecrated ground and the legal effects of consecration being widely disseminated. I am not sure how it came about in the present case that Ms Hardwick did not know that Owen's remains were being interred in consecrated ground. Although I hope those who advise those who have been bereaved are generally aware of the significance of consecration and the need to advise the bereaved about it, I shall ask the Registrar to circulate this judgment to the Archdeacons in order that they may re-iterate the position to incumbents. I shall also ask for it to be sent to local authority cemetery managers, those who are responsible for the management of private cemeteries and to funeral directors<sup>24</sup>

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<sup>23</sup> It does not require much imagination to see that there are practical complications to retaining the ashes of someone who has died at home, of which loss and damage are the most obvious. However these practical complications would arise in any case in which the executors of someone who has died made these arrangements. Before interment in consecrated ground there exists a free choice to deal with remains in this way.

<sup>24</sup> There was a similar circulation of my judgment in *In re Putney Vale Cemetery* in 2010.

PHILIP PETCHEY  
Chancellor

17 August 2018