RE BLAGDON CEMETERY

J U D G M E N T

The full transcript of the judgment of the Court of Arches is reproduced below. The Court comprised the Dean of Arches, the Right Worshipful Dr Sheila Cameron QC, sitting with Chancellor Christopher Clark QC and Chancellor Charles George QC. Mr Mark Hill appeared for the appellants, instructed by Birketts, 24-26 Museum Street, Ipswich, Suffolk, and Mr Philip Petchey appeared as *amicus curiae*, at the invitation of the Court. The hearing took place in the undercroft of the church of St Mary-le-Bow on 6 October 2001. Judgment was handed down on 16 April 2002.

1. This is an appeal from the decision of Briden Ch. given on 16 February 2000 in the Consistory Court of the Diocese of Bath and Wells, by which he refused to grant a faculty for the exhumation of the remains of Steven Whittle from Blagdon Cemetery, Somerset with a view to their re-interment in Stowmarket Cemetery, Suffolk. The appeal is brought following the grant of leave to appeal under rule 6 of the Faculty Jurisdiction (Appeals) Rules 1998, SI 1998/1713.

2. **The facts**
The Appellants had three children; two sons and a daughter, until the untimely death of their son Steven, aged 21, on 25 September 1978.

3. Mr Whittle spent his working life as a publican and moved every few years from one public house to another in different parts of the country. In August 1978 he and his wife left a public house in Ellesmere Port, Wirral to move to another one at Blagdon, Bristol. Steven and their daughter remained in Ellesmere Port. Only a few weeks after their move Mr and Mrs Whittle heard on 25 September 1978 that Steven had tragically died in an industrial accident at his work. His employers assumed responsibility for the funeral arrangements and Steven's body was brought from Ellesmere Port to Blagdon. A funeral service was held in Blagdon Church and Steven was buried in the consecrated part of Blagdon cemetery.

4. Mr and Mrs Whittle left Blagdon just over a year later, in October 1979. They then moved around both in Wales and in England every few years, ending up in 1995 in Long Melford, Suffolk, Mr Whittle's last position before his retirement. Their daughter had lived in Suffolk since her marriage in the early 1980s, and Mr and Mrs Whittle decided to retire to Suffolk to be near to her and their grand-daughter.

5. These facts were before Briden Ch. and he referred to them in his Judgment. In addition, he recorded the difficulties encountered by Mr and Mrs Whittle in visiting Steven's grave in Blagdon following upon Mr Whittle's deteriorating health and his impaired vision, which made it impossible for him to drive from Suffolk. Mrs Whittle does not drive.

6. As the result of additional evidence admitted with leave in this Court we know that Mr and Mrs Whittle raised with their solicitor in about 1982 the question of moving Steven's remains away from Blagdon to somewhere near

their intended permanent home. Not surprisingly, they were advised that until they had established such a permanent home it was premature and inappropriate to consider exhumation and reburial.

7. Briden Ch. was told that the burial plot which Mr and Mrs Whittle had acquired in Stowmarket cemetery was a triple depth plot in the consecrated section of the cemetery. However, some time after the hearing of this appeal we were provided with a letter from Stowmarket Town Council saying that the plot is 'in the unconsecrated section of the cemetery as there are no consecrated plots remaining'.

8. It is to this plot that Mr and Mrs Whittle wish to move Steven's remains. They intend to have a minister present at the re-interment (if allowed) to bless the grave before the coffin is placed in it. Their permanent home is in Stowmarket and they have purchased the plot with the intention that they will both be buried in it in due course.

9. This appeal necessitates the consideration of a number of different matters, both as to the principles in relation to faculties for exhumation and reburial and the practical application of those principles. The Court has received great assistance from the arguments put forward with skill and sensitivity by Mr Hill and Mr Petchey[1][1], and we express our appreciation of their contributions.

10. **Consecrated Land**

The difference between consecrated and unconsecrated land is not widely known or understood. It is appropriate to differentiate between them in this case, which is concerned with a petition for a faculty to exhume remains from a consecrated part of one local authority cemetery so as to transport them for reburial in the unconsecrated part of another local authority cemetery.

11. Land becomes consecrated when the bishop of a diocese signs a document, called a sentence, by which he separates and sets apart an area of land and dedicates the land to the service of Almighty God. The effect of this sentence where the land is to be used for the interment of the remains of the dead, whether the land consists of churchyard around a church or an identified area of land in a cemetery, is to set apart the land as being held for sacred uses and to bring it within the jurisdiction of the Consistory Court.

12. Unconsecrated burial land is not set apart as sacred and is not usually within the jurisdiction of the Consistory Court. There is, therefore, a difference between the consecrated and the unconsecrated parts of local authority cemeteries. This does not mean that a local authority has different management responsibilities for the unconsecrated part of the cemetery as compared with the consecrated part. The management has to be carried out in accordance with the rules laid down under statute[2][2] for the whole cemetery, but any question of exhumation is determined by the Consistory Court in relation to the consecrated part of the cemetery, whereas in the

---

1 Mr Petchey's article 'Exhumation Reconsidered' (2001) 6 Eccl. L.J. 122 was helpfully cited to us.

2 See the Local Authorities Cemeteries Order 1977, SI 1977/204.

unconsecrated part it is a matter for the local authority, in terms of policy, and for the Secretary of State as a matter of law.

13. Prior to the Burial Act 1857 Consistory Courts, as a matter of practice, declined to grant a faculty authorising remains buried in consecrated ground to be re-interred in unconsecrated ground. The reason was that

> 'by so doing they would be sanctioning the removal of remains from a place of burial under the special protection of the Ecclesiastical Courts to a place of interment under the protection of no Court'[3][3].

14. That particular objection was removed when unconsecrated land became subject to statutory control on the introduction of a licensing system under section 25 of the Burial Act 1857. This was a new system of protection for remains buried in unconsecrated ground, which provided that remains could not be removed without permission from the Secretary of State. Thus remains in unconsecrated ground became protected just as remains in consecrated ground had been, and continue to be, under the protection of the Consistory Court and removable only under faculty, that is by permission of the Court.

15. Apart from this legal protection afforded to remains in the unconsecrated part of a cemetery, it can generally be assumed that local authorities carry out their legal responsibilities for care and maintenance of their cemeteries. Thus, if remains are to be removed from the consecrated ground of a churchyard, or the consecrated part of a cemetery, and to be re-interred in the unconsecrated part of the same or another cemetery it is reasonable for the Consistory Court to conclude (certainly in the absence of evidence to the contrary) that the new grave will be cared for in a seemly manner and will be protected in this sense.

16. Re-interment in unconsecrated ground which is not in a local authority cemetery is a different matter. No general inference of the suitability for reinterment in such land can properly be drawn by the Consistory Court. Questions about proper care of the new grave in the future and the prospects for visiting access by future generations would need to be addressed by those involved in such cases, and in turn examined with care by the Consistory Court in deciding whether or not to exercise its discretion to grant a faculty for exhumation.

17. In the present case the principle of suitability of re-interment in unconsecrated ground, in the absence of any available consecrated ground, is not an issue for the reasons we have already given. However, because of the two different systems of legal control, if a faculty is granted permitting the exhumation of Steven's remains from Blagdon Cemetery it will also be necessary for a Home Office Licence to be obtained to permit the transfer of his remains to the new grave in Stowmarket Cemetery. This is because a faculty alone is sufficient to authorise exhumation from consecrated land, but a Home Office Licence as well as a faculty is required where an exhumation

---

3 *Re Talbot* [1900] P.1 at p.5, London Cons Ct, per Dr Tristram.

is proposed from consecrated land but re-interment is proposed into unconsecrated land.

18. **Exhumation: General Principles**
During the period of human history respect for the dead and the recognition of the inevitable process of decay have led to different cultural practices and laws about disposal of the dead. Whether such disposal has been by way of burial or cremation it has been a feature of such cultures that the disposal has had an aura of permanence about it.

19. In English common law there is a duty to dispose of a dead body[4][4]. The general concept of permanence is reflected in the fact that it is a criminal offence to disturb a dead body without lawful permission[5][5]. Moreover, the fact that there is no ownership of a dead body according to English law, and the absence of any legal right in English law or under the European Convention of Human Rights to exhume a body or cremated remains, reflects a culture in which the norm is that the remains of a dead person should not be disturbed once they have undergone the initial act of interment.

20. Lawful permission can be given for exhumation from consecrated ground as we have already explained. However, that permission is not, and has never been, given on demand by the Consistory Court. The disturbance of remains which have been placed at rest in consecrated land has only been allowed as an exception to the general presumption of permanence arising from the initial act of interment.

21. This presumption originates in the Christian theology of burial. This theology underlies the consecration of land especially for burials, and it is present in every funeral service and burial of a body or interment of cremated remains according to the rites of the Church of England.

22. Many Chancellors have emphasised the finality of Christian burial in their judgments, and the recent judgment of the Chancery Court of York in *Re Christ Church, Alsager* [1999] Fam. 142, [1999] 1 All ER 177, refers to the evidence of the Archdeacon about the theology of burial. We agree with that Court that exhumation cases do not **'**involve a question of doctrine, ritual or ceremonial**'**. Briden Ch. correctly so certified in this case as did the Chancellor in *Re Christ Church, Alsager*. However, we consider that a summary of the theological principles can be usefully stated here so as to promote a better understanding of the theological reason for the approach taken by the Consistory Courts to applications for exhumation from consecrated land.

23. **Exhumation: Theology of Burial**
We have been greatly assisted by a paper on the 'Theology of Burial' from the Right Reverend Christopher Hill, Bishop of Stafford. He drew attention to the fact that

---

4 *Halsbury's Laws of England* (4th edn), vol 10, para. 1017.

5 Ibid at para. 1196.

> ‘The funeral itself articulates very clearly that its purpose is to remember before God the departed; to give thanks for their life; to commend them to God the merciful redeemer and judge; to commit their body to burial/cremation and finally to comfort one another.’

He went on to explain more generally that

> ‘The permanent burial of the physical body/the burial of cremated remains should be seen as a 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 a human life rather than a giving back to God’.

24. In the light of his restatement of these theological principles the Bishop expressed the opinion that a reluctance by the Consistory Court to grant faculties for exhumation is well grounded in Christian theology.

25. In this case Steven Whittle was a baptised and confirmed member of the Church of England and his parents chose to have a funeral service in Blagdon Church conducted by a minister of the Church of England. The purpose of the funeral, as described by the Bishop of Stafford, will, therefore, have been made known to Mr and Mrs Whittle at the service. At the time when he was buried in the consecrated part of Blagdon Cemetery they entrusted Steven to God for resurrection. They, therefore, come to this Court seeking to persuade us that there are special circumstances in their case which should be treated as an exception to the principle that as Steven was laid finally at peace in 1978 his remains should not be disturbed.

26. Many people choosing to have their relatives or friends buried in a churchyard or in the consecrated part of a local authority cemetery may have little or no understanding of the Christian theology of burial as outlined in the passages we have quoted above from the Bishop of Stafford. It is, therefore, very important that cemetery managers and funeral directors give a simple explanation to the bereaved about the difference between consecrated land (to which the theology of burial has application) and unconsecrated land. Members of the public do have choices nowadays in relation to burial and cremation and places of disposal of the dead, and they need to be informed in making their choices. We hope that the principles we have stated above will be noted and used for the purpose of providing such information.

27. It is important that any guidance issued by cemetery managers or funeral directors should make it clear that permanence of burial is the norm in relation to consecrated land, so that remains are not to be regarded as 'portable' at a later date, because relatives move elsewhere and have difficulty in visiting the grave.

28. **Exhumation: General Approach**
We have explained that the norm is permanence in relation to Christian burial. The question then arises as to how to determine the exceptional circumstances which would justify departure from the norm. The Chancery Court of York formulated the question as

> 'Is there a good and proper reason for exhumation that reason being likely to be regarded as acceptable by right thinking members of the Church at large?'[6][6]

29. Whilst we understand the Chancery Court's intention to set some objective standard within a Christian context we note that the Court in *Re Christ Church, Alsager* did not have the advantage of any argument from Counsel. The appeal was dealt with on written representations alone at the specific request of the petitioner appellant, who was seeking a faculty for exhumation of the cremated remains of his father.

30. Both Mr Hill and Mr Petchey have argued in this Court that the reference to right thinking members of the Church at large is an extremely difficult test to apply in practice. The Chancellor may consider that evidence ought to be taken on the matter. It could then transpire that there are various different views which are honestly and rationally held upon the subject of exhumation. If the Chancellor does not take evidence, then an assumption has to be made as to the notional views of right thinking members of the Church at large.[7][7] For a petitioner the test may give the impression that mustering support for the petition is the way to persuade the Court that exhumation would be acceptable within the notional body of right thinking members of the Church at large for the reason relied upon in the petition.

31. The difficulty of applying the test formulated by the Chancery Court of York is exemplified in this case. Briden Ch. set out the question early in his judgment, then considered the various factors recommended as guidance in *Re Christ Church, Alsager* and concluded

> 'Bearing in mind that the judgment in *Re Christ Church Alsager* sets out guidelines as opposed to rules of law, and that it is necessary to evaluate all the circumstances placed before me, the critical question which has already been quoted from that judgment must be answered in the negative'.

The Chancellor made no assessment of the notional views of 'right thinking members of the Church at large' in respect of 'all the circumstances before him'. He confined himself to determining whether 'a good and proper reason for exhumation' had been established to his satisfaction on the evidence before him.

---

6 *Re Christ Church, Alsager* [1999] Fam 142 at p.149.

7 See George QC Ch. in *Re Kingston Cemetery (Wyeth)* unreported 3 July 2000.

32. Having regard to the practical difficulties associated with the test, as formulated by the Chancery Court of York, we do not consider that Briden Ch. can be criticised for not seeking to justify his conclusion by reference to the notional views of 'right thinking members of the Church at large'.

33. We have concluded that there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted. Exceptional means 'forming an exception'[8][8] and guidelines can assist in identifying various categories of exception. Whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the Chancellor to determine on the balance of probabilities.

34. The Chancery Court of York quoted part of the judgment of Quentin Edwards QC Ch. in *Re Church Norton Churchyard*[9][9] on the subject of the discretion of the Consistory Court. In that passage Edwards Ch. said

> 'there should be no disturbance of that ground except for good reason'.

In a later unreported decision[10][10] the same Chancellor used somewhat different language in saying

> 'the question may be thus stated: has this petitioner shown that there are sufficient special and exceptional grounds for the disturbance of two churchyards?'.

35. The variety of wording which has been used in judgments demonstrates the difficulty in identifying appropriate wording for a general test in what is essentially a matter of discretion. We consider that it should always be made clear that it is for the petitioner to satisfy the Consistory Court that there are special circumstances in his/her case which justify the making of an exception from the norm that Christian burial (that is, burial of a body or cremated remains in a consecrated churchyard or consecrated part of a local authority cemetery) is final. It will then be for the Chancellor to decide whether the petitioner has so satisfied him/her.

36. **Relevant Factors**
The Chancery Court of York considered various factors which can arise in connection with a petition for a faculty for exhumation. Many of these have arisen in this appeal and we have had the benefit of argument upon them. We consider them in turn:-

(i) **Medical Reasons**
We were shown a medical certificate relating to Mr Whittle's health in the context of his inability to drive from Stowmarket to

---

8 Concise Oxford Dictionary.

9 *Re Church Norton Churchyard* [1989] Fam 37 at p.43, quoted *Re Christ Church, Alsager* at p.148.

10 *Re St Mary Magdalene, Lyminster* (1990) January.

Blagdon so that he and his wife might visit Steven's grave. Mr Whittle is receiving appropriate medication and, as a senior citizen, he is in no different a predicament than many thousands of his age group who find that advancing years have an effect on certain aspects of life, including travelling. In so far as Briden Ch. treated the petition of Mr and Mrs Whittle as one seeking exhumation of Steven simply in order to visit his grave more easily, we cannot fault his conclusion that this was not a sufficient reason for exhumation.

Mr Hill wisely abandoned any reliance upon Mr Whittle's state of health in the course of his argument at the hearing of this appeal.

If advancing years and deteriorating health, and change of place of residence due to this, were to be accepted as a reason for permitting exhumation then it would encourage applications on this basis.

As George QC Ch. pointed out in *Re South London Crematorium*[11][11]

> 'Most people change place of residence several times during their lives. If such petitions were regularly to be allowed, there would be a flood of similar applications, and the likelihood of some remains (and ashes) being the subject of multiple moves'.

Such a practice would make unacceptable inroads into the principle of permanence of Christian burial and needs to be firmly resisted. We agree with the Chancery Court of York that moving to a new area is not an adequate reason by itself for removing remains as well.

Any medical reasons relied upon by a petitioner would have to be very powerful indeed to create an exception to the norm of permanence, for example, serious psychiatric or psychological problems where medical evidence demonstrates a link between that medical condition and the question of location of the grave of a deceased person to whom the petitioner had a special attachment.

(ii) **Lapse of Time**

Briden Ch. treated the lapse of time of a period in excess of twenty years since Steven's death as determinative:

> 'Despite the particular circumstances of Steven Whittle's death and burial, and the inability of his parents to take any active steps for so long, I am forced to conclude that it is now simply too late for a disturbance of his remains to be permitted'.

---

11 Unreported, 27 September 1999.

The Chancellor was probably influenced by the statement of the Chancery Court of York in *Re Christ Church, Alsager* that 'the passage of a substantial period of time will argue against the grant of a faculty'.[12][12] However, we do not read this statement as signifying that time alone will be determinative. It may well be a factor in relation to assessing the genuineness of the petitioner's case. Long delay with no credible explanation for it may well tip the balance against the grant of a faculty but lapse of time alone is not the test. Mr Hill pointed to a period of 110 years in *Re Talbot* [1901] P.1 and examples of up to 20 years since the date of burial in other reported cases.

Having found that Mr and Mrs Whittle had been unable to take any active steps earlier to apply for a faculty for exhumation of Steven's remains because of their peripatetic existence, we consider that the Chancellor erred in treating the lapse of time as determinative instead of concluding that there was a credible explanation for the delay. Having so concluded, he should then have proceeded to consider what other factors operated for or against the grant of a faculty.

(iii) **Mistake**

We agree with the Chancery Court of York that a mistake as to the location of a grave can be a ground upon which a faculty for exhumation may be granted. We also agree that 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.

Mr and Mrs Whittle very properly did not attempt to justify their petition on the basis that they had made a mistake in burying Steven at Blagdon. The evidence showed clearly that, however traumatic the experience of his sudden death was for them, their unequivocal decision was that he should be buried in Blagdon Cemetery.

Sometimes genuine mistakes do occur, for example, a burial may take place in the wrong burial plot in a cemetery or in a space reserved for someone else in a churchyard. In such cases it may be those responsible for the cemetery or churchyard who apply for a faculty to exhume the remains from the wrong burial plot or grave. Faculties can in these circumstances readily be granted, because they amount to correction of an error in administration rather than being an exception to the presumption of permanence, which is predicated upon disposal of remains in the intended not an unintended plot or grave.

A mistake may also occur due to a lack of knowledge at the time of burial that it was taking place in consecrated ground with its significance as a Christian place of burial. For those without

---

12 [1999] Fam 142 at p.149H.

Christian beliefs it may be said that a fundamental mistake had been made in agreeing to a burial in consecrated ground. This could have been a sufficient ground for the grant of a faculty to a humanist in *Re Crawley Green Road Cemetery, Luton*[13][13] and to orthodox Jews in *Re Durrington Cemetery*14[14] without the need for recourse to the Human Rights Act 1998.

The need for greater clarity about the significance of consecrated ground in cemeteries, in particular, is demonstrated by these examples and we reiterate our plea for more readily available information so as to reduce the chances of such mistakes occurring again in the future.

(iv) **Local Support**

Mr Hill argued that this Court should take account of the fact that Mr and Mrs Whittle's petition is supported by Steven's closest relatives and also by the Rural Dean of Stowmarket. In so arguing he was relying upon *Re Christ Church, Alsager* where it was suggested that persuasive matters may be 'that all close relatives are in agreement; and the fact that the incumbent, the parochial church council and any nearby residents agree'.[15][15]

We differ from the Chancery Court of York in this respect. We consider that the views of close relatives are very significant and come in a different category from the other categories mentioned by the Chancery Court.

We do not regard it as persuasive that there is particular support for an unopposed petition any more than support for a contested petition of this nature would affect the decision on the merits of the petition. It is the duty of the Consistory Court to determine whether the evidence reveals special circumstances which justify the making of an exception from the norm of the finality of Christian burial, as we have already said earlier in this judgment. The amount of local support, whether clerical or lay, should not operate as a determining factor in this exercise and will normally be irrelevant.

(v) **Precedent**

Mr Hill made some limited criticism of Briden Ch.'s reference to the fact that there was nothing, in his view, to distinguish the motivation of Mr and Mrs Whittle 'from that of many other petitioners whose similar objective has been held an inadequate reason for granting a faculty'. The suggestion was that precedent was taking priority over consideration of the merits of the case.

---

13 *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308, St Albans Cons Ct.

14 *Re Durrington Cemetery* [2001] Fam 33, Chichester Cons Ct.

15 *Re Christ Church, Alsager* [1999] Fam 142 at p.149G.

We do not accept that criticism of the Chancellor, nor the implication that precedent should play no part in the decision-making process in the Consistory Court. We are aware that the common law doctrine of precedent was not historically part of canon law, and that on the facts in *Re Christ Church, Alsager* the Chancery Court of York considered the possibility of creating a precedent as irrelevant. However, we consider that Edwards QC Ch. was right in 1990 in *Re St Mary Magdalene, Lyminster* to have regard to the effect of setting a precedent. More recently in July 2000 George QC Ch. in *Re West Norwood Cemetery (Petition of Jean Murray)* was right in saying

> 'Whilst the focus must be on the particular circumstances of the individual petition, the Court's approach has to take account also of the impact its decision is likely to have on other similar petitions'.

In our view, precedent has practical application at the present day because of the desirability of securing equality of treatment, so far as circumstances permit it, as between petitioners.

(vi) **Family grave**

Both Mr Hill and Mr Petchey invited us to regard the death of Steven at such early age, and the circumstances of his sudden death and burial, as unnatural and thus creating special circumstances in themselves. The intention of Mr and Mrs Whittle, they said, is essentially to bring Steven's remains to a family grave. In the normal course of events, they would have expected to predecease him and be the first occupants. The concept of a family grave is, of course, of long standing. In a less mobile society in the past, when generations of a family continued to live in the same community, it was accepted practice for several members of a family to be buried in one grave. Headstones give a vivid picture of family relationships and there are frequent examples of one or more children predeceasing their parents due to childhood illnesses, which were incurable.

Burials in double or treble depth graves continue to take place at the present time. They are to be encouraged. They express family unity and they are environmentally friendly in demonstrating an economical use of land for burials. Normally the burial of family members in the family grave occurs immediately following the death of the particular member of the family, whereas in this case Steven's remains will have to be disturbed after many years in order to inter them in a new family grave.

37. Notwithstanding this, we have concluded that there are special factors in this case which make it an exception to the norm of permanence which we have explained earlier in this judgment. These factors are:

(1) the sudden and unnatural death of Steven at an age when he had expressed no view about where he would like to be buried;

(2) the absence of any link between him and the community in which he was buried;

(3) his parents' lack of a permanent home at the time of his unexpected death;

(4) his parents' enquiries of their solicitor shortly after Steven's death about the possibility of moving his remains once they had acquired a permanent home;

(5) having lived in Stowmarket for several years as their permanent home and having become part of the local community, their purchase of a triple depth burial plot in Stowmarket Cemetery.

38. Our decision is not a novel one. Faculties have been granted in the past for the bringing together, or accumulation, of family members in a single grave after many years provided special reasons were put forward for the lapse of time since the date of burial. Mr Hill drew our attention to an unreported decision of Newsom QC Ch. in *Re St James Churchyard, Hampton Hill* (1982) where he granted a faculty over fifty years after the death for remains to be exhumed and transported to Canada to be reburied in a family plot in Woodstock, Ontario.

39. Briden Ch. did not address this petition specifically in terms of the bringing together of parents and child in a family grave. We are satisfied that the exercise of his discretion was flawed insofar as it was based on an erroneous evaluation of the facts in this respect and, as we have already said, in the way he treated the lapse of time as being determinative.

40. We, therefore, allow this appeal. In doing so it should not be assumed that whenever the possibility of a family grave is raised a petition for a faculty for exhumation will automatically be granted. As in this case it is to be expected that a husband and wife will make provision in advance by way of acquisition of a double grave space if they wish to be buried together. Where special circumstances are relied upon in respect of a child who has predeceased his or her parents, it will be insufficient if there is simply a possibility of establishing a family grave. As in this case there would have to be clear evidence as to the existence of the legal right to such a grave if no family member was already buried in it.

41. Finally, we record that although Article 8 of the European Convention on Human Rights was mentioned in argument, greater emphasis was rightly placed on other factors to be taken into account in the exercise of the discretion of the Consistory Court. We are not persuaded that the judgment of Briden Ch. constituted an interference with any Article 8 right. In the absence of any right to exhumation petitioners can expect fairness and equality of treatment in the exercise of the discretion of the Consistory Court. Those safeguards have been and will continue to be present as Courts exercise their discretion on a proper evaluation of the facts in the light of the principles set out above.

42. This Court directs that a faculty be issued out of the Consistory Court of the Diocese of Bath and Wells, on the usual terms, for the exhumation of the remains of Steven Whittle from plot 100 in Blagdon Cemetery and for their

transportation to, and re-interment in, plot E148 in Stowmarket Cemetery on condition that the exhumation does not take place unless and until a Home Office Licence has been obtained authorising the re-interment as proposed in Stowmarket Cemetery.

43. No order as to costs save that the Appellants will pay the prescribed fee and also correspondence fees of the Registrar and the expenses incurred by the Court.

Footnotes

[1] Mr Petchey's article 'Exhumation Reconsidered' (2001) 6 Eccl. L.J. 122 was helpfully cited to us.
[2] See the Local Authorities Cemeteries Order 1977, SI 1977/204.
[3] *Re Talbot* [1900] P.1 at p.5, London Cons Ct, per Dr Tristram.
[4] *Halsbury's Laws of England* (4th edn), vol 10, para. 1017.
[5] Ibid at para. 1196.
[6] *Re Christ Church, Alsager* [1999] Fam 142 at p.149.
[7] See George QC Ch. in *Re Kingston Cemetery (Wyeth)* unreported 3 July 2000.
[8] Concise Oxford Dictionary.
[9] *Re Church Norton Churchyard* [1989] Fam 37 at p.43, quoted *Re Christ Church, Alsager* at p.148.
[10] *Re St Mary Magdalene, Lyminster* (1990) January.
[11] Unreported, 27 September 1999.
[12] [1999] Fam 142 at p.149H.
[13] *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308, St Albans Cons Ct.
[14] *Re Durrington Cemetery* [2001] Fam 33, Chichester Cons Ct.
[15] *Re Christ Church, Alsager* [1999] Fam 142 at p.149G.