

Neutral Citation Number [2018] EACC 4

IN THE ARCHES COURT OF CANTERBURY

APPLICATION FOR PERMISSION TO APPEAL

FROM THE CONSISTORY COURT OF THE DIOCESE

OF ST ALBANS

(DEPUTY CHANCELLOR LYNDSEY DE MESTRE QC)

[2018] ECC StA 2

IN THE MATTER OF CHESHUNT CEMETERY (No 2)

THE PROPOSED EXHUMATION OF THE LATE INFANT TED TWILLEY

(1) KAREN TWILLEY

(2) ROBIN TWILLEY

Applicants/Proposed Appellants

On consideration of the deputy chancellor's Judgment, her reasons for refusing permission to appeal, the Applicants' renewed application for permission to appeal (and supporting materials)

ORDER OF THE RIGHT WORSHIPFUL CHARLES GEORGE QC, Dean of the Arches

1. Permission is given to appeal on the grounds:
 - (a) That the deputy chancellor was wrong (para 15) to categorise the Appellants' case as "one of change of mind rather than a (potentially operative) type of mistake....., namely a lack of understanding as to the significance of interment in consecrated ground";
 - (b) That the deputy chancellor thereby failed to consider whether this mistake was capable of constituting exceptional circumstances within the law as laid down in *Re Blagdon Cemetery* [2002] Fam. 299 and/or to explain why this was not so.

Reasons

The deputy chancellor found (para 3) that the petitioners "did not enquire into and were not provided with any explanation of the nature and significance of the consecrated ground", and received (and apparently accepted) evidence that they were from "non-religious families", or at least "are not Christian". As the deputy chancellor recognised (para 12), it was held in *Blagdon* (para 36(iv)) that a "relevant" 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 Christian beliefs it may be said that a fundamental mistake had been made in agreeing to a burial in consecrated ground.....We reiterate our plea for more readily available information so as to reduce the chances of such mistakes occurring again in the future". No such information was supplied in this case. This ground has a realistic prospect of success. The Applicants should not, however, assume their appeal will succeed, particular by reason of the Applicants' 14 year delay in lodging their petition, which the deputy chancellor said was a "significant" factor (para 19), and her finding that the "location of Ted's interment...suited the family very well at the time and for many years afterwards" (para 12).

2. Permission is refused for the Applicants to contend under para 1 of their Grounds that the funeral service provided for their child was not a Christian one (para 4 of the Judgment).

Reasons

It is conceded under para 1 of the Grounds that Mr Twilley, in evidence before the deputy chancellor, has referred to the service having been a "Christian service", and that the service was conducted "by a local clergyman" (para 3 of the Judgment). It is not a proper ground of appeal that it is now asserted that Mr Twilley's evidence "was not factual" (para 1 of the Grounds"), because based on a mistaken perception. As an alternative to pursuing the appeal it remains possible for the Applicants to request the consistory court to set aside its refusal decision under rule 20.3(1)(a) of the Faculty Jurisdiction Rules 2015, with a view to reconsideration on the basis of new evidence; or if refused to submit a further petition.

3. The Applicants' request to change the basis of their petition from "complete exhumation to relocation from consecrated ground to non-consecrated ground...due to a change of our personal circumstances in that we are no longer moving" (para 3 of the Applicants' Grounds) will depend on whether the appellate court is prepared to admit new evidence relating to this at the hearing of the appeal, and no order is made at this stage in respect of that matter.

Reasons

The Applicants' change of intention post-dates the Judgment, and is because "we are no longer moving [house]" (para 3 of the Applicants' Grounds). Before the deputy chancellor their evidence was that "they were moving", and that this "had brought matters to a head at this stage" (see para 13 of the Judgment). If the appeal is pursued, the appellate court will at the hearing consider any application to vary the basis of the petition, but the Applicants should not assume that such application will be granted. As an alternative to pursuing the appeal it remains possible for the Applicants to request the consistory court to set aside the refusal decision under rule 20.3(1)(a), with a view to reconsideration on the basis of their revised proposal to re-inter the deceased (if exhumation were permitted) in unconsecrated space available within the same cemetery; or if the consistory court refuses an application to set aside, to submit a further petition on that basis.

4. The Applicants shall pay the court costs of the application for permission to appeal. The Provincial Registrar shall notify them of the amount of such costs within 14 days and such costs shall be paid within 21 days thereafter, failing which the appeal shall be dismissed.

Reasons

A discretion is conferred on the Dean of the Arches under rule 23.5(1)(b) of the Faculty Jurisdiction Rules 2015 in relation to costs. Where, as here, the original petition was unopposed, then save most exceptionally costs fall to be paid by those applying for permission to appeal.

DIRECTIONS

Without prejudice to the requirements of rule 24.2(1)(b)(ii) and (2)(b) of the Faculty Jurisdiction Rules 2015:

1. If they intend to pursue the appeal, the Applicants (hereafter the Appellants) shall give notice to the Provincial Registry within 56 days of issue of this Order. (Such a long period is given so that the Appellants may have adequate time to consider their options, and (if they wish) to seek legal advice before incurring further costs on an appeal.)
2. If the Appellants wish to seek permission of the appellate court to receive oral evidence at the hearing of the appeal, or to admit any written evidence which was not before the consistory court, they must give notice, together with precise details of what oral or written evidence they wish to adduce and why at the same time as giving notice under Direction 1 of this Order.
3. Within 28 days of any notice given to the Provincial Registry under 1 above, the Appellants shall file and serve an indexed and paginated trial bundle, together with a Skeleton Argument and an indexed bundle of any legal authorities they wish to rely upon.
4. Subject to compliance with Direction 1 above, the matter will be set down for hearing (time estimate half a day, excluding judgment) at a place and at a date and time to be notified to the Appellants by the Provincial Registrar.

26 October 2018

CHARLES GEORGE QC, Dean of the Arches