

**In the Consistory Court of the Diocese of Worcester:**

**Archdeaconry of Dudley**

**Hagley Municipal Cemetery:**

**Faculty petition 09-36, relating to proposed exhumation of Victor Fernandez**

**Judgment**

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**Introduction**

1. This is a petition by Mrs Lawrenzina Fernandez for the exhumation of the remains of her late husband Mr Victor Fernandez from Hagley Municipal Cemetery prior to their re-interment in the Roman Catholic Cemetery at Norton Road, Stourbridge.
2. Mr Fernandez died on 17 August 2008, and his body was buried on 3 September 2008 in the Municipal Cemetery. The plot is at the edge of the area of the Cemetery used for burials; it is adjacent to the path along the edge of the Cemetery, but the area used for burials is significantly higher than the path at that point. The Cemetery is consecrated, and thus subject to faculty jurisdiction.
3. The petition was initially submitted on 8 June 2009. In my preliminary response, I drew attention to the decision of the Court of Arches in *Re Blagdon Cemetery*,<sup>1</sup> emphasising that the normal rule is that burial in consecrated land is permanent, and that a faculty will only exceptionally be granted for exhumation. I pointed out that in that decision and in that of the earlier decision of the Chancery Court of York in *Re*

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<sup>1</sup> [2002] Fam 299

*Christ Church Alsager*,<sup>2</sup> various factors were considered that may justify exhumation in particular cases. But I noted that none of those seemed to be applicable in this particular case, and I indicated that I was therefore not minded to authorise the proposed exhumation.

4. However, I delayed proceeding to a final determination to enable further representations to be made by the petitioner. In the light of those representations, I then sought further information from H. Porter & Sons, the funeral directors who dealt with the initial interment and who would be undertaking the exhumation and re-interment if a petition were to be granted. I have since then been able to visit Hagley Municipal Cemetery myself, to see the site of the interment.
5. I have also been assisted by reading two relevant judgments that have recently been issued in the Southwark Consistory Court – *Re St Bartholomew, Horley* and *Re Putney Vale Cemetery*.<sup>3</sup> The former summarises the various decided cases on exhumation; the latter explores the position in relation to cases involving practising Roman Catholics.
6. I have considered it expedient to determine this petition on the basis of the full written representations that have been made, without the need for an oral hearing.

### **Reasons said to justify the exhumation**

7. Mrs Fernandez initially stated that the reason for the proposed exhumation was that the place where her late husband's body had been buried was not suitable as it was too close to the edge of the burial area; however, there is a drop of at least 3 metres down to the path, with no retaining wall. A monument could not be safely placed

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<sup>2</sup> [1999] Fam 142

<sup>3</sup> 16 February and 30 April 2010; both as yet unreported.

there, as it would be subject to damage by water and therefore the possibility of landslip.

8. She accordingly wished to have the body exhumed, and re-buried in the Roman Catholic Cemetery at Norton Road, Stourbridge – Mr Fernandez had been a practising Roman Catholic, and she is also a Roman Catholic. However, at the time of her husband's death she had been unaware that there was a Catholic cemetery in Stourbridge.
9. In the light of my preliminary indication as to the legal position relating to petitions for exhumation, Mrs Fernandez (helpfully assisted by Age Concern at Stourbridge) made a number of further points. She explained that she was given no choice for the burial plot for her husband's body; she and her family only saw the allocated plot at the actual funeral. Thus she did not change her mind about where he was to be buried; had she been shown in advance the plot that had been allocated, she would have objected.
10. Secondly, she reiterated her initial complaint that this plot was unsafe and unsatisfactory. It was 26 inches away from a five-foot drop, and subject to landslide when it rains. She had discussed having a monument erected, but the funeral directors could not guarantee that it would remain in place long-term because of the possibility of subsidence. She was concerned that if a memorial were to be erected, and then subsequently collapse, there would be no-one to take remedial action to ensure that it would remain standing in future.
11. Thirdly Mrs Fernandez had noticed, as the body of her husband was being lowered into the grave, that he was being buried with his head facing in the opposite direction to those buried nearby (insofar as the direction of those bodies could be deduced

from the location of the headstones). She had queried this with Mr Porter (the funeral director), who assured her that this was correct, and continued to bury the body.

12. She accordingly considered that, for the first two reasons, the location of the burial plot was a mistake on the part of the Council. And the third reason constituted a mistake on the part of the funeral director.

### **Representations by the funeral directors**

13. In the light of those representations by and on behalf of Mrs Fernandez, I sought further information from the funeral directors.
14. They explained that, at the time of arranging the funeral, Mrs Fernandez and her family had been given three options for burial of her husband's body.
15. First, she had been offered a plot at Norton Catholic Cemetery, in view of the fact that both she and Mr Fernandez were Roman Catholics and that their place of worship was Our Lady and All Saints Church. However, she had requested that she and her husband should be buried in adjacent plots, and it was not possible to reserve a plot in the Catholic Cemetery; so that idea was dismissed. Secondly, she had been offered a plot at Stourbridge Cemetery, where an adjacent plot could also have been purchased in advance; but unfortunately she lived outside the area of Dudley Council, and would therefore have to pay double fees, so that was considered too expensive. In the light of those considerations, Hagley Cemetery was then discussed as a third option, as there too an adjacent plot could be purchased in advance.

16. The funeral directors also indicated that they understood that Mrs Fernandez was of Indian descent, and that part of her belief was that her body could not be buried in the same grave as that of her husband.
  
17. Once the decision had been made to inter the body of Mr Fernandez in the Cemetery at Hagley, Mrs Fernandez did not request that the plot be on the end of a row; however, she specifically stated that she needed to be interred on the left side of her husband, as viewed looking directly in front of the graves. She did not ask to view the plot prior to the funeral. There were at the time no other plots at the top of the slope, as this row was started specifically for the body of Mr Fernandez in view of those special requirements. The plot next to that occupied by his body has been reserved for the bodies of Mrs Fernandez and their daughter, and the relevant fees paid to the Parish Council.
  
18. The funeral directors stated that they had been advised by the Council that other plots will be used along this row in the future. Further, they had been advised that this plot is not close enough to the top of the slope for any memorial to slide down.
  
19. Finally, they stated that Mrs Fernandez had not expressed to them any concern regarding the coffin being buried in wrong direction. However, it had in any event been buried in accordance with the Cemetery regulations.

### **Other points**

20. The Roman Catholic parish priest of Our Lady and All Saints, Stourbridge, the Rt Revd Monsignor Patrick McKinney, wrote shortly after Mr Fernandez's death to say that he had discussed the matter with Mrs Fernandez several times, at some length; that she was "quite distressed", and that she was adamant that she wished her husband's body to be exhumed and buried at Norton Road. He had accordingly give permission for Mr

Fernandez's body to be buried there "when the due authority had considered the matter". His letter is noteworthy in that it does not go into any more detail, nor offer any further justification.

21. The only surviving close relatives of Mr and Mrs Fernandez are their four children, each of whom has given his or her consent in writing – although none offered any further justification.

### **Exhumation: the general law of the Church of England**

22. As already noted, the law of the Church of England governing the determination of petitions for exhumation has been authoritatively laid down by the two appeal courts in *Re Blagdon Cemetery* and *Re Christ Church Alsager*. Strictly speaking, only the former is binding on this court, as it is in the southern province; but the latter will obviously be highly influential.<sup>4</sup> Those decisions have since been followed – and applied to various factual situations – in numerous decisions of consistory courts in both provinces, including in particular the two in Southwark to which I have already drawn attention.
23. These decisions all emphasise that the normal rule is that burial in consecrated land is permanent, and that a faculty will only exceptionally be granted for exhumation. Thus in *Blagdon* the Court of Arches indicated:

“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” ... and guidelines can assist

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<sup>4</sup> This Court noted in *Re St Mark, Fairfield* (1999, unreported) that “a judgment of the Chancery Court of York technically binds only consistory courts in the northern province, and is therefore only of persuasive force in relation to this Court (see *St Mary, Tyne Dock (No 2)* [1958] P 156 at 169). I am satisfied, however, that there is no reason why the practice of consistory courts in one province of the Church of England should be different in relation to this topic from that of courts in the other province – indeed I should have thought that it is highly desirable that practice should be, as far as possible, uniform. I therefore take this opportunity to adopt the decision in *Alsager* and, as far as it goes, the guidance set forth in it.”

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. ...

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.”<sup>5</sup>

24. It is thus up to the petitioner in each case to demonstrate that there are special circumstances to justify the making of an exception to the norm that the burial of a body – whether in a churchyard or the consecrated part of a cemetery – is final.

### **Possible exceptions to the presumption that burial is permanent**

25. As I have already noted, the Court of Arches in *Blagdon*, having re-emphasised the general rule that burial in consecrated ground is permanent, went on to note various matters that should be taken into account and that may justify exhumation in particular cases, as exceptions to that general rule. I consider them in turn.

#### *(1) Medical reasons*

26. It is likely that in the case of many if not most or even all petitions for exhumation the petitioners will feel very strongly that they want the remains in question to be removed – otherwise they would not trouble the court in the face of the clear presumption against such petitions being granted. It follows that there will inevitably be considerable distress where a petition is not granted. However, the Court in *Blagdon* said that medical reasons would have to be very powerful indeed to create an exception to the norm of permanence.

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<sup>5</sup> *Re Blagdon Cemetery* [2002] Fam 299, at paragraphs 33-35.

27. In the present case, I have no doubt that Mrs Fernandez would be distressed if her petition were to be unsuccessful; but I am not persuaded that she has made out a case purely on that basis.

*(2) The lapse of time*

28. The second matter raised in *Blagdon* is the amount of time that has elapsed since the interment of the body or ashes in question. The present petition relates to a burial less than a year ago, so there has not been undue delay in applying for a faculty; as against which, lack of delay does not of itself justify a faculty being granted. Thus the promptness with which this petition was brought does not of itself justify a faculty being granted – any more than the delay in its determination justifies it being refused.

*(3) Mistake*

29. As regards the third matter, mistake, the Chancery Court in *Alsager* provided guidelines as follows:

“(2) Where a mistake has been made in effecting the burial, for example a burial in the wrong grave, the court is likely to find that a good reason exists, especially when the petition is presented promptly after the discovery of the facts.

(3) In other cases it will not normally be sufficient to show a change of mind on the part of the relatives of the deceased, or that the spouse or another close relative of the deceased has subsequently been buried elsewhere. Some other circumstance must usually be shown.”<sup>6</sup>

30. Shortly after that decision, this court in *Re St Mark, Fairfield* then expanded upon the principles outlined in it, as follows:

“I would thus expand as follows the third guideline commended by the Court ... :

“(3) In other cases, it will not normally be sufficient to show:

(a) a change of mind on the part of the relatives of the deceased,

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<sup>6</sup> *Alsager*, at para 148.



- (b) that some or all of those relatives are no longer able conveniently to visit the grave,
- (c) that the spouse or another close relative of the deceased has subsequently been buried elsewhere, or
- (d) that a surviving spouse or other close relative wishes to be buried (in the future) in the same place as the deceased – but that a further burial at the same location as that which has already taken place is either for some reason now impossible or else considered to be undesirable.

Some other circumstance must usually be shown.”<sup>7</sup>

31. The Court of Arches in *Blagdon* then expanded upon the guidance in *Alsager* as follows:

“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. ... 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. ...”<sup>8</sup>

32. In the present case, the petitioner seems to be relying on the doctrine of “mistake”, and in essence puts her case in this way:

- (1) There was a mistake by the Parish Council, as owner of the Cemetery:
  - (a) the plot she was allocated for her husband was unsatisfactory;
  - (b) therefore, if she had been shown it in advance, she would not have chosen it; and

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<sup>7</sup> 1999, unreported.

<sup>8</sup> *Blagdon*, at para 36(iii).

- (2) There was a mistake by the funeral directors in that her husband's body was buried facing in the wrong direction.
33. I have considered carefully the points raised regarding the choice of plot. However, I do not consider the plot that was allocated is in any way unsatisfactory. It is true that it is at the edge of the area allocated for burials; and it is close to a significant change in ground level. However, every burial area – be it churchyard or municipal cemetery – has edges, and most have other areas that may be perceived as less desirable for one reason or another (for example, being shaded by trees, or next to a noisy road, or next to a busy path, or too far from any path, or close to an area used for depositing rubbish). It is for the owner of each such burial area – the incumbent or the relevant local authority – to allocate spaces in an efficient manner; and it will not always, or even often, be possible for the bereaved to have a free choice of plot – unless they reserve it in advance.
34. Mrs Fernandez feels that it would be impossible for a headstone to be erected over her grave and that of her husband; but the funeral directors, having discussed the matter with the Council, say that there would be no problem. Having inspected the site myself, I see no reason to doubt the reassurance they offer. And it would of course be perfectly possible for her to commission a memorial now, to commemorate her husband, with a suitable space to enable the addition of her own details in due course, as is commonly done. That would enable her to be satisfied that a suitable memorial would indeed be possible.
35. I also note that similar plots, along this edge of the burial area, will be offered to others. This seems to me highly likely; and I do not consider it at all likely that there will be a landslide as feared by Mrs Fernandez.

36. Finally, I note that Mrs Fernandez (and her family) were offered several possible locations for the burial of her husband – including the Roman Catholic cemetery at Stourbridge. It was open to her to visit the Cemetery at Hagley to see if she was satisfied; and if she felt that she would only be satisfied depending on the precise location of the plot, she could have made that plain. Whether in those circumstances an alternative plot would have been offered must now be a matter of speculation; but the plot she was actually offered was the one that was thought by those responsible to be the best one for her in view of her specific requirements.
37. It follows that I do not consider objectively that it was a mistake for the burial authorities – in this instance, presumably either the parish council or the funeral directors or both in consultation with each other – to allocate to Mrs Fernandez the plot they did. It may well be that, if she had been offered a free choice, she would have opted for a different plot – although, as I have noted, there is no guarantee that she would have been allowed such a choice. But that does not amount to a “mistake” in the sense indicated in *Blagdon*.
38. Mrs Fernandez no doubt feels now that she would have made a different choice had she known then what she knows now; and that is of course unfortunate. But that would seem to be more in the nature of a change of mind, which is well-recognised to be not a ground on which to justify exhumation, rather than a mistake.
39. And even if Mrs Fernandez feels that she now no longer wishes to be buried at Hagley, that would come within the principle outlined by this court in *Re St Mark, Fairfield*, when it pointed out that

“it will not normally be sufficient to show ... that a surviving spouse or other close relative wishes to be buried (in the future) in the same place as the deceased – but that a further burial at the same location as that which has

already taken place is either for some reason now impossible or else considered to be undesirable.”<sup>9</sup>

40. I therefore do not consider that any of the factors raised so far justify the proposed exhumation in this case on the grounds of mistake.
41. There is one further category of “mistake” referred to by the Court of Arches in *Blagdon*, namely the situation that arises where a body is buried in consecrated ground in circumstances where there was at the time of burial a lack of knowledge of the significance of consecration. I deal with this below, under the heading “other factors”, since it seems to me that this is significantly different from the categories of mistake considered above.

#### *(4) Local support*

42. The Court in *Blagdon* explained that support from the close relatives of the deceased is very significant; but the Southwark Consistory Court in *Horley*, in my judgement correctly, pointed out that what the Court was there identifying was essentially a factor that potentially weighed *against* granting a petition – so that if close relatives of the deceased disagreed about the appropriateness of exhumation, that would evidently be a powerful reason for refusing the grant of a faculty; but support from close relatives would not of itself amount to an exceptional circumstance.<sup>10</sup>
43. It follows that the fact that in this case the four children of Mr and Mrs Fernandez have given their assent to the proposed exhumation of their father’s body does not amount to an exceptional circumstance.

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<sup>9</sup> 1999, unreported.

<sup>10</sup> See paragraph 20.

44. The Court in *Blagdon* also indicated that “the amount of local support, whether clerical or lay, should not operate as a determining factor and will normally be irrelevant.” Here too, it seems to me that this is a factor that would largely be relevant if such support were not forthcoming. Thus if in the present case Monsignor McKinney had opposed the re-interment of the remains of Mr Fernandez at Stourbridge, that would of course have been a major factor weighing against the grant of a faculty; but, as it is, his support is not of particular significance. And his support is in any event conditional on the grant of a faculty for exhumation.

*(5) Precedent*

45. It is of course important that all such petitions are treated on an equal basis. That is why it is necessary that each should be considered carefully on the basis of the relevant principles of law. However, there is no suggestion in the present case that to allow or refuse this petition would operate as an undesirable precedent.

*(6) Family grave*

46. Finally, an intention to create a family grave may be relevant, albeit not automatically determinative. Here, it seems that the proposition was initially that Mr and Mrs Fernandez and one of their daughters would all be buried at Hagley; and the neighbouring plots had been reserved (and paid for) on that basis. But it is now proposed that his body should be re-interred at Stourbridge. It appears not to have been explicitly stated that Mrs Fernandez intends that her body too should be buried there when the time comes; but that is presumably her intention. But I note that nothing has been said about reserving a neighbouring plot for her body (or that of her daughter) – indeed it has been suggested that that may be impossible.

47. In short, there seems to be nothing to indicate that it would be possible to justify this proposal as being exceptional on the basis that it would create a family grave.

### *Other factors*

48. The Roman Catholic Church does not recognise the significance of consecration (other than legal significance under the law of the Church of England, which forms part of the general law of England) – that is, it has no significance either theologically or in Roman Catholic canon law. Accordingly, before a burial of the remains of a Roman Catholic takes place in ground that is not part of a Roman Catholic cemetery (and thus has already been blessed), that ground is first blessed.<sup>11</sup>
49. I do not know whether in the present case the plot at Hagley was blessed – or whether indeed the whole Cemetery was blessed, if that is possible. However, I note that in *Re Putney Vale Cemetery* – also a case that related to the interment of the body of a Roman Catholic from a plot in a municipal cemetery – the relevant Roman Catholic authorities were specifically asked whether they had any objection under Roman Catholic Canon Law to the exhumation of the body of a Roman Catholic from a grave that had been blessed, and said that they had no such objection. And Monsignor McKinney raised no such objection in the present case. I therefore conclude that, even if the cemetery or the plot at Hagley was blessed, there could be no objection to the present proposal on that basis.
50. This case thus falls to be decided solely on the basis of the applicable law of the Church of England. As to how that law applies in the case of the burial of those other than members of the Church of England, this was dealt with by the Court of Arches in *Blagdon*, as follows:

“... 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 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*<sup>12</sup>) and to orthodox Jews (in *Re Durrington Cemetery*<sup>13</sup>), without the need for recourse to the Human Rights

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<sup>11</sup> See Canon 1240 of the Roman Catholic Canons.

<sup>12</sup> [2001] Fam 308.

<sup>13</sup> [2001] Fam 33.

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.”<sup>14</sup>

51. This was considered in the context of the burial of a Roman Catholic in the *Putney* case. The learned Chancellor held:

“30. The position being that Mrs Guadagno [a Roman Catholic] and her family did not know that the land in which Mr Guadagno’s remains were interred was consecrated, it seems to me that a mistake was made which justifies making an exception to the norm of permanence of Christian burial. If the Roman Catholic authorities had been of the view that, from the perspective of their canon law, exhumation was inappropriate, then an interesting situation might have arisen: namely whether it would be appropriate to seek to uphold Roman Catholic canon law by reference to the law of the Church of England, both systems of law having the same origin and ultimate justification. I note that in the passage from *In Re Blagdon Cemetery* set out at paragraph 17 above [and at paragraph 23 of this judgment], the Court of Arches was enunciating what it perceived to be the principle of Christian burial and did not contemplate that there might be differing views among Christians about this. This case demonstrates that there may be differing views or at least, seemingly, about the application of those Christian principles. However this may be, as far as concerns the position as regards a person who has agreed to burial in consecrated ground without appreciating its significance – or even knowing that the ground was consecrated – I see no reason to distinguish between a humanist (the position in *Re Crawley Green Road Cemetery, Luton*) and a Roman Catholic (the position here).

31. I do not think that the petition derives significant support as regards any of the *other* factors identified by the Court of Arches in *Re Blagdon Cemetery* and set out above. In *Re Blagdon Cemetery*, the Court clearly identified mistakes as to the significance of burial in consecrated ground as an appropriate basis on which a petition for exhumation may be founded, and accordingly I do not think that to permit exhumation in the present case establishes a precedent – it is simply an example of a defined exception within what I think are narrow limits.”

52. He had also, earlier in the same judgment, referred to *Re South London Crematorium, Streatham*<sup>15</sup> and *Re Lambeth Cemetery*,<sup>16</sup> two cases decided in the Consistory Court of the same Diocese by George Ch. The former concerned a Roman Catholic whose body

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<sup>14</sup> *Blagdon*, at para 36(iii).

<sup>15</sup> 25 October 2002.

<sup>16</sup> 6 July, 2003.

had been buried in consecrated ground, but in that case there had been a positive misunderstanding that exhumation would be possible after ten years to enable the remains to be taken to Ireland. The latter concerned a Roman Catholic whose body had been buried in consecrated ground, and whose family had had no understanding of the significance of burial in consecrated ground. A faculty permitting exhumation issued in both cases.

53. On that basis, it seems to me that it would be possible to justify exhumation in the present case. Mrs Fernandez makes no reference to having been aware that her husband had been buried in consecrated ground; and I should be very surprised if she was. But she is likely at best to have had a very different understanding of the idea of consecration, in the light of the practice of the Roman Catholic Church, referred to above.
54. I cannot say that I am particularly attracted by this argument, as it seems to me highly likely that – in spite of the plea by the Court of Arches in *Blagdon* for more readily available information – the vast majority of those who arrange for the bodies of their loved ones to be buried in ground consecrated in accordance with the rites of the Church of England will have no understanding of the nature and significance of consecration. Further, it would seem surprising if those few who did have such knowledge were to be thereby deprived of the ability to petition successfully for exhumation. This argument is thus in truth not so much a matter of “mistake”, as categorised in *Blagdon*, but rather merely “ignorance”.
55. Be that as it may, I would be bound by the decision of the Court of Arches if this were a case relating to a humanist or an orthodox Jew; and I accept the logic in the *Putney* case that the same approach should apply in the case of the burial of a Roman Catholic.



56. I am therefore prepared to authorise the exhumation of the body of Mr Fernandez, for re-interment in the Roman Catholic Cemetery at Stourbridge – not for the reasons suggested by Mrs Fernandez, but on the basis that (on the balance of probability) she had no understanding of the nature and significance of consecration, and therefore did not fully appreciate the permanence of burial.
57. I would however echo the plea of the Court of Arches in *Blagdon*, to the effect that those in this Diocese responsible for burials – both incumbents and (especially) the managers of municipal cemeteries – should ensure that, for so long as the Church of England retains its position as to the permanence of burial in consecrated ground, the relatives and dependents of those being buried are clearly informed as to the problems that will attend any attempt at seeking exhumation.

### **Conclusion**

58. A faculty should issue as sought.

**CHARLES MYNORS**

27 July 2010