IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

ST BARTHOLOMEW, HORLEY

PETITION BY MRS JUANITA SHARP

1. This is a petition by Mrs Juanita Sharp which is dated 14 October 2008 (but which was received by the Registry on 22 May 2009). By it she seeks permission to exhume the cremated remains of her late father, Mr Keith Barton, from the Garden of Remembrance in the churchyard of St Bartholomew's Church, Horley and to re-inter them in the grave of her late mother, Mrs Lorna Barton, which is situated in the same churchyard at a distance of about 90 yards.

2. The facts of the case are not in dispute, and I have been able to determine the petition without the need for an oral hearing.

3. This is, nonetheless, a long judgment. This is because although the broad principles governing petitions for exhumation are not in doubt, the particular application of those principles does cause difficulty. Certainly in the present case it was not obvious to me what was the correct answer in the circumstances and I was aware that, if I were to grant a faculty, I would be doing so in circumstances which could be considered not dissimilar to those arising in *Re Christ Church, Alsager*[1] and which I consider below.

---

1 [1999] Fam 142.

Since decisions on exhumation are inevitably and, as I consider, properly[2] considered as precedents, it seemed to me necessary to consider the matter in detail.

The facts

4. Keith and Lorna Barton were married in the 1950s and enjoyed more than 50 years life together. They had three daughters, Juanita, Estelle and Aurelia and a son, Ian. They lived for 45 years in Horley, Surrey, where Mrs Barton was a member of the congregation of St Bartholomew's Church.

5. Mr Barton died on 6 April 2007, aged 73. He had expressed a wish to be cremated, and this wish was honoured, his ashes being interred in the Garden of Remembrance (for cremated remains) in the churchyard of St Bartholomew's church.

6. Shortly after Mr Barton's death, Mrs Barton was diagnosed with liver cancer and she died in May 2008. She had always expressed a wish to be buried and this wish, too, was honoured, her remains being buried in the churchyard of St Bartholomew's church, but not, of course, in the Garden of Remembrance. Accordingly, the remains of Mr and Mrs Barton are interred in the same churchyard but at a distance of some 90 yards.

7. Mrs Sharp's petition is supported by her brother and sisters.

The Petition

8. Mrs Sharp explains the basis of the petition as follows:

> *When my father died (6 April 2007) and he was cremated rather than buried, our family decided the most fitting place to place his ashes was in Horley Churchyard. If we had any notion that my mother would have died*

[2] See paragraph 24 below.

so soon afterwards (13 months) we would most certainly have opted to retain them in order that both could be buried together.
My mother would most certainly have wished for my father's ashes to be buried with her if she had realised that she was terminally ill.

None of us anticipated that this [might] be the case; no one could have anticipated that my mother's death would occur so soon afterwards in order to advise us otherwise. It did, however, clearly strike all of us assembled as we buried, my mother on 22 May 2008 that my dear parents should be laid to rest together. We therefore began the necessary official process as soon as practically possible thereafter to apply for permission to move my father's ashes.

This is the most sincere and heart-felt wish of our entire family that our dear parents should lie in rest together (as supported by previous correspondence) and is a request supported fully by our minister Steve Davie, the Church and our Funeral Directors, Ray & Maureen Bateman.

Whilst, as Christians, we accept the principle of a final resting place, we all strongly believe that in these very sad and somewhat exceptional circumstances, moving my father's ashes to my mother's gravesite would be the right and truly Christian thing to do.

9. The Reverend Dr Steve Davie, Priest in Charge in the Horley Team Ministry has written in support of the petition in these terms:

I knew Mr and Mrs Barton for several years, Mrs Barton having been a regular and frequent member of my congregation, caring for her sick husband for many years. Sadly he died and was cremated, his ashes [being] interred in Horley Churchyard. Mrs Barton then quite suddenly and unexpectedly fell ill just as her 'new' life was beginning, went to hospital and died. There was a palpable sense of shock, not least among her three daughters who proceeded with her known wish for a burial in Horley Churchyard. It was not until quite literally at the end of her funeral when the daughter went to visit their father's ashes plot, that anyone considered that they could have been laid to rest together.

The immediate shocks of all this having past, it is now my considered opinion that it would help the family enormously for Father's ashes to be removed to Mother's grave. In retrospect, had Mrs Barton realised her illness she would not have had Mr Barton's ashes interred and at the time everything was moving so fast no-one considered long-term implications.

10. I asked for the views of the Archdeacon of Reigate and he helpfully identified a number of relevant matters for me to consider which I shall do in my judgment below. His

conclusion on the material before him is that it would be appropriate for permission for exhumation to be granted in the circumstances arising.

Diocesan Guidance

11. Diocesan Guidance issued by Chancellor George in 2003 provides as follows:

> *Once a body or ashes have been buried in consecrated ground (whether in a churchyard or in a municipal cemetery) they may not be exhumed save with the authorisation of a faculty granted by the Chancellor, which will never be granted unless there are special circumstances which justify the making of an exception to the norm that Christian burial is final.*

12. It will be seen that this reflects the legal position, particularly as set out in *In re Blagdon Cemetery*[3], which I consider below.

The law

13. The most authoritative statement of the law relating to exhumation is contained in the judgment of the Court of Arches in *In re Blagdon Cemetery*.

Re Blagdon Cemetery

14. As regards the principles involved, the Court of Arches said:

> *33 We have concluded that there is much to be said for reverting*[4] *to the straightforward principle that a faculty for exhumation will only be exceptionally granted. Exceptional means "forming an exception" (Concise Oxford Dictionary, 8th ed (1990)) 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 in* In re Christ Church, Alsager [1999] Fam 142 , 148 *quoted part of the judgment of Edwards QC Ch in* In re Church Norton Churchyard [1989] Fam 37 *on the subject of the discretion of the consistory court. In that passage Edwards QC Ch said: "there should be no*

---

3 [2002] Fam 299.

4 The Court decided not to apply a different test which had been articulated by the Chancery Court of York in *In re Christ Church, Alsager*: as to that test, see paragraph 37 below.

disturbance of that ground except for good reason." In a later decision, In re St Mary Magdalene, Lyminster (1990) 9 Consistory and Commissary Court Cases, Case 1 *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.

15. The Court went on to consider a number of factors which could potentially arise in connection with a petition for exhumation. These were:

(i) medical reasons;

(ii) lapse of time;

(iii) mistake;

(iv) local support;

(v) precedent;

(vi) family grave.

16. As regards medical reasons, the Court said that they would have to be very powerful indeed to create an exception to the norm of permanence. Medical reasons do not arise in the present case, and I say no more about them.

17. As regards lapse of time, in *In re Blagdon Cemetery* twenty years had elapsed before the petition for exhumation was made. The Court said that:

> *Long delay with no credible explanation for it may well tip the balance against the grant of a faculty but lapse of time done is not the test.*[5]

18. In the case before it, the Court considered that there was a credible explanation for the delay. In the present case there was no long delay, so evidently delay does not count against the grant of a faculty. On the other hand, it does not seem to me that because a petition is made speedily, this in itself counts in favour of it.

19. As regards mistake, the Court said that mistake could be a reason justifying exhumation – a good example is where remains are buried in the wrong plot. The Court also held that it was appropriate to categorise as a mistake the position where burial is authorised in consecrated ground but without there being lack of knowledge on the part of the person giving the authorisation as to the effects of consecration. The present is not a case of mistake in the usual sense of that word, although it may be viewed as a mistake in the broader sense of the word (i.e with the benefit of hindsight).

20. As regards local support, the Court generally discounted this:

> *The amount of local support, whether clerical or lay, should not operate as a determining factor in this exercise and will normally be irrelevant.*[6]

21. The court did however say that it considered the views of close relatives as being very significant. It seems to me, with respect, that this is clearly correct but also, from the context, that it seems that what the Court was here identifying was essentially a factor which potentially weighted against granting a petition. If close relatives disagreed about the appropriateness of exhumation, that would evidently be a powerful reason for

---

5 See paragraph 36(ii).
6 See paragraph 36(iv).

refusing the grant of a faculty.[7] It does not seem to me to be likely to be of much relevance in identifying exceptional circumstances that close relatives support exhumation -- they could be doing so for wholly inadequate reasons. In *In re Blagdon Cemetery* case, there was support from close relatives, but, in the event, this was not identified as one of the special factors justifying exhumation.

22. As regards precedent, the Court held that precedent was a relevant matter:

> *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.*[8]

In so holding, it approved what George Ch had said in the Consistory Court of this Diocese in *In re West Norwood Cemetery*[9].

23. In this approach, the Court of Arches was apparently differing from the Chancery Court of York in *In re Christ Church, Alsager* where the Court had regard to the possibility of creating a precedent as irrelevant. It may be, perhaps, that in *In re Christ Church, Alsager* the Court was only really seeking to emphasise that each case is decided on its own facts, which will inevitably be different from the facts of another case.

24. The Court of Arches is the appeal court governing the southern province in which the Diocese of Southwark lies, but its comments are, I think, strictly speaking, *obiter dicta.* However this may be, insofar as there is a difference of approach, I prefer that of the Court of Arches, which reflects the approach adopted by George Ch in this diocese.

---

7 In *In re St Nicholas, Pevensey* (Chichester Consistory Court: 21 May 2002), Hill Ch considered the absence of unanimity *a powerful – if not overwhelming – factor.*

8 See paragraph 36(v).

9 6 July 2006.

Family grave

25. It seems that exhumation to a family grave may form part of the exceptional circumstances justifying that exhumation. The court said of family graves:

> *They are to be encouraged. They express family unity and they are environmentally friendly in demonstrating an economical use of land for burials.* [10]

26. In the present case it is not intended that the place where Mrs Barton's remains are interred should become a family grave. Nonetheless the removal of Mr Barton's remains into the grave of his widow is, it seems to me, expressive of family unity; and it does "free up" a space in the Garden of Remembrance.

Change of mind

27. *Re Blagdon Cemetery* also reiterated what had often been stated in the earlier cases, namely 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. [11]

The facts of *Re Blagdon Cemetery*

28. It is appropriate to look at the facts of *Re Blagdon Cemetery* to see how the Court of Arches applied the principle it had articulated to the facts before it.

29. Steven Whittle was the son of a publican. His father moved pubs every few years and, as a consequence, his parents moved home every few years. At the age of 21 Steven was tragically killed in an industrial accident and buried in the consecrated part of Blagdon Cemetery. His parents left Blagdon just over a year later and after living in

---

[10] See paragraph 36(vi).
[11] See paragraph 36 (iii).

various places in England and Wales, retired to Suffolk. Against the background that it had become difficult for them to visit because of illness, his parents petitioned for his remains to be exhumed and reburied in Stowmarket Cemetery, which was near where they lived. They intended that they should be buried in the same grave in due course.[12] The Chancellor refused the petition.

30. The conclusion of the Court of Arches was as follows:

> *37 ... 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' inquiries 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.*

31. The point about the inquiries of the solicitor shortly after Steven's death refer to the fact that in 1982 (4 years after Steven's death), Mr and Mrs Whittle raised the possibility of moving Steven's remains away from Blagdon to somewhere near their intended permanent home. The Court recorded that:

> *Not surprisingly, they were advised that until they had established such a permanent home it was premature and inappropriate to consider exhumation and reburial.*[13]

32. It seems to me that this goes to meet the objection that if Steven's remains were to be exhumed, it should have happened sooner than after a lapse of 20 years.

---

12 It was a triple depth plot.

13 See paragraph 6.

33. In the light of the approach it identified as the correct one, the Court of Arches decided that the Chancellor had exercised his discretion on the wrong basis, and substituted its own judgment – that a faculty be granted – for that of the Chancellor. On reading the facts one feels instinctively that the decision is right. It is however worth pointing out that factors (1), (2) and (3) – which surely reflect what is most special about the facts of the case – were all matters known about at the time of Steven's death. They gave rise to issues which – at least in theory – were capable of being addressed at that time. What, it seems, Mr and Mrs Whittle should have done is to arrange for Steven's remains to be interred in the unconsecrated part of Blagdon Cemetery.[14] The ground could have been blessed before Steven's remains were interred, and there would have been no theological objection to those remains being interred in unconsecrated ground.[15] The reality however surely was that, in the traumatic circumstances surrounding Steven's death, no-one thought about these matters.

34. I note nonetheless in this context that the Court of Arches expressly discountenanced the idea that exhumation was justified on the facts of *In re Blagdon Cemetery* on the basis of mistake:

> *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.*[16]

---

14 There might perhaps be those who would be uneasy about the remains of their relatives being interred in unconsecrated ground. One can be confident that Mr and Mrs Whittle were not among that number because the plot at Stowmarket, where Steven's remains were ultimately interred, was unconsecrated. As to the position of the Church of England, see further footnote 15 below.

15 There is no requirement under canon law for human remains to be buried in consecrated ground; but if burial takes place in unconsecrated ground, that ground is required to be first blessed (see Canon B38 and, in particular, Canon B38(5)).

16 See paragraph 36 (iii).

Re Christ Church, Alsager

35. It seems to me that it is particularly pertinent to consider this case for two reasons. First of all, because the actual facts are much closer to the facts with which I am concerned than the facts of *In re Blagdon Cemetery* and, second, because although the Court of Arches in *In re Blagdon Cemetery* was critical of certain *dicta* in *In re Christ Church, Alsager*, it did not say that it considered that that case was wrongly decided. I am not aware of any case that suggests that it was wrongly decided on its facts, although it has been cited by consistory courts on a number of occasions since the decision in *In re Blagdon Cemetery*.[17]

36. The facts of *Re Christ Church, Alsager* are that the petitioner's father died in 1981 and his ashes were interred in the consecrated Garden of Remembrance in the churchyard of Christ Church, Alsager. The petitioner's mother died in 1995. She apparently wished to be buried, and so her body was buried in the churchyard of Christ Church, Alsager – 90 feet away from her husband's ashes. The petitioner then applied for her father's ashes to be exhumed and interred in the grave of his mother. The Chancellor of the Diocese of Chester (Lomas Ch) declined to grant a faculty, and his decision was upheld by the Chancery Court.

37. The Court identified the correct test to be applied as:

> *Is there a good and proper reason for exhumation, that reason being likely to be regarded as acceptable by right thinking members of church at large?*[18]

38. However in *In re Blagdon Cemetery*, the Court of Arches, having considered this test, preferred that articulated in paragraph 33 of its judgment set out above at paragraph 13

---

17 See eg *In re Gladys Rowntree (deceased)* (Consistory Court of Newcastle: 17 July 2004).

18 See paragraph 149C-D.

of this judgment. As has been seen, the Court of Arches in *In re Blagdon Cemetery* also distinguished what the Chancery Court of York said about lapse of time.

39. The core of the judgment of the Chancery Court of York is contained in this passage:

> *This court has power to substitute its own discretion for that of the chancellor and, if satisfied that the chancellor's discretion is based on an erroneous evaluation of the facts taken as a whole, it should allow the appeal:* In re St Gregory's, Tredington [1972] Fam 236. *As has been indicated, the essential question for the chancellor was: "Has the petitioner shown 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?" We consider that the decision of Lomas Ch, although differently expressed and seeming to stress some matters which we do not find helpful, e.g., the possibility of creating a precedent, which we regard as irrelevant, was broadly in line with the law as previously understood and as stated in this judgment. Further, he made no errors in his findings of fact. Accepting the law as we have stated it to be we have unanimously decided that the chancellor's decision was not in error. In reaching our decision the most weighty factors have been: (1) the father's remains have remained undisturbed for some 17 years; (2) only a very short distance separates the two places of interment each of which is within the same consecrated curtilage; so that the mortal remains of both of the petitioner's parents have been committed - although at different points of time - to God's care in this churchyard.*[19]

40. It seems to me that the decision was a hard one, as this was a case in which there evidently was a good and proper reason justifying exhumation; however the Chancellor did not consider it, in the circumstances, to be a sufficient reason.

41. I have three further comments.

42. First, it seems to me that the Chancellor and the Chancery Court of York could still have reached the same decision even if they had applied the test that was preferred by

---

[19] See p150B-E.

the Court of Arches in *In re Blagdon Cemetery* and if it had applied what that court said about lapse of time.

43. Second, the Chancery Court of York placed considerable emphasis on the fact that it did not consider the Chancellor to have been in error in exercising his discretion in the way that he did to the facts that he had found. This suggests that the Court would not necessarily have upheld an appeal if the circumstances had been that, on the same facts, the Chancellor had granted a faculty.

44. Third, the Chancery Court of York would evidently have been more sympathetic had the facts been that it had been necessary for the remains of the petitioner's mother to be buried in a place other than the same churchyard in which his father's ashes were buried – the point being that although the remains of the petitioner's parents were separately buried, they were at least buried in the same churchyard; and, in practical terms, the petitioner could visit both in one visit. The facts of the case that I have to consider are that the remains of both Mr and Mrs Barton are buried in the churchyard of St Bartholomew's Church, Horley.

Other cases

45. I need to note a number of other cases. In *In re St Mark, Fairfield* (Worcester Consistory Court: September 1999), Mynors Ch articulated the following principle:

> *... 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 further burial al 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 circumstances must usually be shown.*

46. *In re St Mark Fairfield* was decided after *In re Christ Church, Alsager* but before *In re Blagdon Cemetery*. It seems to me that the principle articulated would also apply where the surviving spouse has died and been buried. I do note however that Mynors Ch was careful to say that the circumstances which he identified would not normally be sufficient to justify exhumation and that some other circumstances must usually be shown.

47. This principle was applied by Cardinal Ch in *In re St Nicholas, Kings Norton* (Birmingham Consistory Court: 31 May 2005). This was another case concerning the burying together of remains within the same churchyard (the precise circumstances which prevented burial in the same grave do not emerge).

48. In *In re All Hallows, Kirkburton* (Wakefield Consistory Court: 21 May 2007), the facts were that the ashes of the petitioner's father were interred in the churchyard. At this time, it was her mother's wish that after her death her remains should be cremated and interred with those of her husband. However she subsequently changed her mind about cremation and wanted her body after her death to be buried. Because of the layout of the churchyard it was not possible for her body to be buried with her husband's ashes. Downes Ch granted a petition to permit the exhumation of the petitioner's father's ashes. He did so applying the test that "persuasive and powerful explanations are required for any disturbance" but did not refer specifically to either *In re Blagdon Cemetery* or *Re Christ Church, Alsager*.

49. Finally, I need to refer to *In re St John the Baptist, Dudley* (Worcester Consistory Court: 24 February 2009). In this case the facts were that the petitioner's brother had died and been buried in Queens Cross Cemetery, Dudley. Shortly afterwards her father died and was cremated and his ashes interred in the churchyard of St John the Baptist, Dudley. It was known that there was only space for the interment of ashes in this churchyard. Twelve years later, the petitioner's mother died. She had always loathed the idea of cremation and accordingly she was buried in Queen's Cross Cemetery, Dudley. However it had always been "the dearest wish" of both the petitioner's father and mother that their remains should be interred together. Mynors Ch granted a faculty in the following circumstances

> *16. I can understand why the then Vicar of St John's suggested the interment of Mr Robinson's cremated remains in the Churchyard there; and I can well imagine that it would have been all too easy for the family simply to go along with that suggestion, especially so soon after the loss of their brother. But with the wisdom of hindsight it was a mistake. The opposition of Mrs Robinson to cremation was known, as was the lack of space at St John's for the interment of bodies. It could — and should — have been predicted that the present difficulty would inevitably arise. The correct course would have been to inter the ashes at Queen's Cross, so that Mrs Robinson's body could be buried at the same place in due course.*
>
> *17. It is unprofitable now to analyse whether the mistake was the fault of the Vicar or of the family. But the suggestion of the Vicar — albeit doubtless made entirely in good faith — will probably have been at least in part to blame. It therefore seems to me that the present petition offers an opportunity to rectify that error. This case thus comes within exception (3)* [mistake at the time of initial burial].
>
> *18. Secondly, the result of allowing the present petition would be that the remains of the three family members who have died father, mother and their son David - will now be together. And it may be supposed that other family members may also in due course seek to be interred at Queen's Cross.. This case thus comes within the spirit, at least, of exception (6)* [creation of a family grave].

50. One does not of course know whether the petition would have been granted if the creation of a family grave had not been involved. It will however be evident that

Mynors Ch gives a broader meaning to mistake than was identified in *In re Blagdon Cemetery*. The petitioner and her mother were in possession of all the relevant facts when they arranged the interment of the ashes of Mr Robinson in the churchyard of St John the Baptist, Dudley: the point is that subsequently they thought that they had made the wrong decision. This is in my judgment a perfectly legitimate use of the word "mistake"; but it is not very different from a change of mind which it is well established is not sufficient to justify exhumation.[20]

The reason for the Christian norm of permanence

51. In *In re Blagdon Cemetery*, the Court of Arches considered the theological justification for the Christian norm of permanence of burial. It said:

> *23 We have been greatly assisted by a paper on the "Theology of Burial", September 2001, from the Right Reverend Christopher Hill, Bishop of Stafford He drew attention to the fact that*
>
> *"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 onto 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.*

---

[20] See paragraph 27 above.

52. I note however that the Court also held that exhumation cases do not involve *a question of doctrine, ritual or ceremony* and that, accordingly, Briden Ch in the case before them and Lomas Ch in *In re Christ Church, Alsager* had correctly so certified.

53. In *In re Christ Church, Alsager*, the Chancery Court of York had said of Lomas Ch's certificate:

> *We agree* [that this case does not "involve a question of doctrine, ritual or ceremonial"]. *This certification seems to us of particular importance in this case as it underlines the fact that the evidence of the archdeacon, although concerned with the theology of burial, did no more than emphasise in addition to the pastoral side of burial services that the committal of mortal remains is of substantial importance. In other words his evidence underscored the theological reason for the protective jurisdiction of ecclesiastical courts in consecrated grounds.*

I cannot be confident that I understand what the Chancery Court of York was saying.

54. As I understand it, there is no doctrinal objection to exhumation, but that there is a theological basis or underpinning to that objection; and justifying the norm of permanence.

55. In *In re West Norwood Cemetery*, a case decided after *In re Christ Church, Alsager* but before *In re Blagdon Cemetery*, George Ch said:

> *The presumption arises because of two considerations, one principled, one pragmatic:*
>
> *(1) respect for the dead. Most people, and not merely most Christian people, feel a sense of respect for the dead and a reluctance to interfere with their remains. This reluctance is increased by the realisation that human remains decay after burial, just as do ashes themselves, and, despite the best attentions of undertakers engaged in the exercise of exhumation and re-burial; such interference threatens what integrity the remains may continue to possess.*

> *(2) social mobility. It is now extremely common for close relatives of the deceased to move away from the place of burial, and to experience inconvenience and difficulty in visiting the grave, particularly by comparison with what was possible when they lived close by. To allow (save exceptionally) exhumation in such circumstances would inevitably encourage transportation of remains from one place to another at the wish of those surviving the deceased.*

56. I think the pragmatic consideration manifests itself as a concern because of the principled objection.

57. It seems to me worth saying that the specifically Christian concern about exhumation also reflects a more general concern. I am aware that in cases of exhumation from ground that is not consecrated, the consent of the Ministry of Justice has to be obtained under section 25 of the Burial Act 1857 and that generally such consents issue in the absence of a specific objection i.e it would not be necessary to show an exceptional circumstance justifying the exhumation. However the fact that the Ministry of Justice may operate what may be described as a liberal regime as regards exhumation, does not mean that a stricter one cannot be justified on secular grounds.

The present case

58. In the present case it is not suggested that there is any reason why the test articulated in *In re Blagdon Cemetery* for considering whether exhumation is appropriate in any particular case should not apply, and I cannot identify such a reason. Accordingly, I turn to consider whether there are special circumstances in the case which justify the making of an exception from the norm of Christian burial.

59. It is evident that if there are exceptional circumstances in this case, they must relate to the short period between the death of Mr Barton and then Mrs Barton. If Mrs Barton

had survived her husband by, say, ten years, it seems to me the petition would have much less weight.

60. If I postulate a situation where A dies, is cremated and is buried in a Garden of Remembrance for the cremation of ashes and then B, his wife, dies ten years later, and is buried at a distance in the same churchyard, I feel that it is unlikely, absent other factors, that it would be appropriate to grant a petition. A's grave would have been undisturbed for a considerable period, and visited by his next of kin. It would not seem generally respectful or specifically recognising the norm of the permanence of Christian burial. Nonetheless one can see that A and B's family might have considerable regrets about the situation that had arisen. What they would be asking themselves is whether they might not have made arrangements when A died so that, in due course, A and B could be buried together. Of course, they could have made such arrangements in one way or another. A's ashes need not have been committed to the ground at all before the death of his wife or could have been interred in unconsecrated ground with a view to their subsequent re-interment elsewhere. These courses however would not I think be viewed as satisfactory by most people nor by the church with its view that human remains are appropriately permanently committed to the ground for symbolic reasons.[21]

61. It might have been possible in the circumstances of the present case for Mr Barton's ashes to have been buried in a full size plot with a view to Mrs Barton's body being buried there in due course. There could perhaps have been difficulties about this – the incumbent in control of the churchyard might not wish to see a full sized burial plot only taken up with ashes in circumstances where there would be no certainty that a

[21] See *In re Blagdon Cemetery* at paragraph 23, set out at paragraph 51 above.

subsequent burial would take place.[22] The point however seems to me to be that people very often do not think about these things. Evidently Mr Barton's family did not. Potentially, of course, they might in effect be penalised for not doing so – I have made it clear that I do not think it would be appropriate for a faculty to issue in the hypothetical circumstances I am now considering where, say, ten years elapses between the deaths of A and B. Of course over a period of ten years, circumstances may change – most obviously B may have re-married and/or moved away from the area

62. It seems to me that if in my hypothetical example I postulate a very short interval indeed between the deaths of A and B – essentially the facts of the present case - this does make a considerable difference to the position. A and B's family would feel that a decision which might otherwise seem unfortunate might now properly described as a mistake – albeit with the benefit of hindsight. B has not remarried and/or moved away from the area. Thus Mrs Sharp says *If we had any notion that my mother would have died so soon afterwards ... we would most certainly have opted to retain [Mr Barton's] ashes in order that both could be buried together.* If I postulate that Mrs Barton was at the time of Mr Barton's death suffering from cancer which was undiagnosed, one can readily categorise the situation that would have arisen as a mistake – a decision taken in ignorance of a material fact; and it may, I think, indeed have been the case that she was suffering with cancer at the time of Mr Barton's death. It may of course be the case that she only began to suffer from cancer after Mr Barton's death. However I do not think that the outcome of a case such as this should turn on this sort of distinction. In either case, the correction of what can appropriately be described as a mistake within a short period does not seem to contradict the norm of the permanence of Christian burial.

---

22 I have not inquired as to whether there would have been an objection to the burial of ashes in a full sized plot in 2007 because it is clear that the question was not asked at that time.

63. I am conscious that my analysis is not rigorously logical, but I think that in any area where human feelings are involved, one may properly be wary of being too logical. Accordingly I am minded to say that in the case of the present petition there are exceptional circumstances.

64. There is however one matter which gives me pause. Although not buried in the same grave, Mr and Mrs Barton are buried in the same churchyard. In a similar situation in *In re Christ Church Alsager*, the Chancery Court of York evidently felt that the nearness of the two interments counted against allowing a petition as I have explained at paragraph x above. I think that if the circumstances were that it had been necessary for Mrs Barton's remains to be interred in a different churchyard, the petition would, on the face of it, be a stronger one.

65. This said, I think that the petition does derive strength from the fact that Mr and Mrs Barton are interred so close together, but separately.[23] I can see that the feeling that the respective remains are "so near, but so far away" may, in the cicumstances, be particularly upsetting to the family. It would, I think somewhat legalistic to insist that there cannot be exhumation and reburial; and I do reiterate the point that this will free up one space in the Garden of Remembrance for the interment of ashes in accordance with the principles of economising the use of grave space. Accordingly I propose to

[23] The Archdeacon has expressed the view that it makes a difference (in its favour) that the petition in the present case is for exhumation and re-internment within the same churchyard. It was suggested in *Re All Hallows, Kirkburton* that there was a lesser health risk where the transfer of remains is within the same churchyard. In the present case this is not a point made by Mrs Sharp and I doubt the health risks involved would count against a transfer involving a longer distance. This, however, would potentially be a matter of evidence.

grant the faculty sought on the basis that there are exceptional circumstances as set out at paragraph 60 above.

66. I would add this about my decision. I am granting this faculty because it accords with the feelings of what Mr and Mrs Barton's children consider is appropriate and in circumstances where I consider that there are exceptional circumstances. I do not however believe that it is any part of the theology of the church that it matters to the dead themselves where their earthy remains are interred. If petitions for exhumation are granted, it is for the benefit of the living and not the dead. Viewed from this point of view, it evidently will be of comfort to them as they come to terms with the loss of both their parents in such a short space of time. Not every family placed in these circumstances would wish to petition for a faculty but after careful thought they have decided to do so. Standing back, I do not think that there is a good reason for denying them their wish; and I derive support for this conclusion from the fact that both the Archdeacon and Dr Davie consider that a faculty should be granted. I do not think that my decision will be a precedent which could be taken as detracting from the principle of the norm of permanence of Christian burial, nor the underlying reasons for the maintenance of that norm.

67. In the circumstances that arise I do not have to consider the impact of the Human Rights Act 1998 or the facts of the case before me. The Human Rights Act 1998 was of course considered in *In re Blagdon Cemetery* but since that decision, the potential impact of Article 8 of the European Convention for the Protection of Human Rights on laws which restrict exhumation has been considered by the European Court of Human

Rights in *Dodsbo v. Sweden*[24]. I considered the implication of that case in *In re St Dunstan's, Cheam.*[25]

68. I need to refer to one final matter. The Chancellor's *Guidance* provides that

> *Interment of ashes should take place by simple pouring of the ashes into a hole in the ground, rather than by the burying of ashes within a container ...*

69. I think that this is both for pragmatic reasons and also because it better represents the words of the Prayer Book Funeral Service ... *ashes to ashes, dust to dust* .... However this may be, in the present case, Mr Barton's ashes were interred in a casket. This is, I think, because this part of the *Guidance* had simply been overlooked. Mrs Sharp makes the point that the casket will still be intact. I think that this is a matter which sounds in favour of the petition. However I do not consider it decisive and I would have granted a faculty even if the ashes had been interred by pouring into the ground. I hope that, for the future, the *Guidance* will be observed, both in this churchyard and generally throughout the Diocese.

PHILIP PETCHEY

Deputy Chancellor

16 February 2010

---

24 [2006] ECHR 38.

25 Consistory Court of Southwark: 22 January 2007.