Neutral Citation Number: [2020] ECC Swk 4

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF LAMBETH CEMETERY

AND IN THE MATTER OF A PETITION BY IAN ARMSTRONG

JUDGMENT

Introduction

1. This is a petition dated 13 July 2020 by Mr Ian Armstrong to exhume the remains of his stillborn son Crusoe Musa Mohammed Armstrong from a consecrated grave in Lambeth Cemetery to enable them to be re-interred elsewhere in Lambeth Cemetery.

2. The facts are these. Crusoe was the still born son of Mr Armstrong and his wife Sana. On 26 October 1998, his body was buried in a part of the cemetery reserved for the remains of children.

3. On 29 June 2020, Mrs Armstrong died, aged 50. As matters stand, her body cannot be buried together with Crusoe. Nonetheless this is something that Mr Armstrong would like to happen. This will reflect the bond that his wife always felt with Crusoe; like many others in a similar position, she never forgot him and would often speak of him to her husband. Accordingly Mr Armstrong has agreed to purchase a burial chamber elsewhere in the Cemetery where it will be possible for Mrs Armstrong's body to be interred and, at the same time, for Crusoe's remains to be re-interred. The burial chamber is not consecrated. It is Mr Armstrong's intention that in due time he, too, should be interred there[1].

4. At the date of the petition, Mr Armstrong had not arranged for the interment of the remains of Mrs Armstrong. Having carefully considered the matter, I decided that this was an appropriate case in which a faculty might issue and I so directed on 23 July 2020, thus enabling Mr Armstrong to make appropriate arrangements. I indicated that I would give my reasons later. These are those reasons.

5. It might be argued that the restrictions on the exhumation of human remains, which I shall describe below, do not apply to the remains of a child that is stillborn. I did not adopt such an approach in *In re Wandsworth Cemetery*[2]. Since I am permitting exhumation of Crusoe's remains despite the restrictions I describe, it is not necessary for me to consider this point further.

The law

6. In *In re Blagdon Cemetery*[3], the Court of Arches re-iterated that the norm of Christian burial was permanence[4]. Against this background, the Court decided that the appropriate approach to deciding whether to grant a faculty to permit exhumation was to ask the question whether an

[1] A burial chamber differs from a burial plot in that it is already excavated.
[2] 23 November 2013 (Southwark Consistory Court).
[3] [2002] Fam 299.
[4] See paragraph 28.

exception should be made to that norm[5]. Helpfully, in its judgment, the Court identified matters which might be relevant to a judgment as to exceptionality and expressed its views about them.

7. One of the matters that it considered relevant was whether the proposed exhumation was to facilitate re-interment of the remains in a family grave. The Court said;

   [Family graves] 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[6].

8. The facts of *In re Blagdon* concerned the remains of the son of Frank and Audrey Whittle. Mr Whittle ran a pub in Blagdon, Somerset. When the Whittle's son was tragically killed in an industrial accident at the age of 21 his body was buried in the churchyard at Blagdon. The nature of Mr Whittle's work meant that the Whittles moved several times to places in England and Wales before finally retiring to East Anglia to be near their surviving child and their grandchild. Living in East Anglia, they found it difficult to visit the grave and accordingly they petitioned to exhume their son's remains and re-inter them in a cemetery near to where they lived. The Court found that exceptional circumstances existed to justify permitting exhumation. The Dean (Sheila Cameron QC) said:

   ... 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[7].

9. In applying an exceptional circumstances test, the Court of Arches declined to follow the approach adopted by the Chancery Court of York in *In re Christ Church, Alasger*[8]. In that case, the Court applied the following test:

   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?[9]

10. The facts of *Alsager* were that the petitioner's father had died in 1981 and been cremated. His ashes were then interred in the Garden of Remembrance in the churchyard. The petitioner's mother died in 1995. She was buried in the churchyard about 90 feet away from her husband's ashes. The petitioner thought that his mother being a Roman Catholic, it was inappropriate that her remains should be cremated[10]. The Chancellor refused to grant a faculty for exhumation of the petitioner's father's remains so that they could re-interred in his mother's grave. His decision was upheld by the Chancery Court, applying the test set out above.

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[5] See paragraph 33.
[6] See paragraph 36 (vi).
[7] See paragraph 37.
[8] [1999] Fam 142.
[9] See p149.
[10] This fact emerges from the unreported judgment of Chancellor Lomas. The petition was in error in his belief; however Roman Catholic Canon Law had forbidden cremation until 1963. Since the Chancery Court did not refer to this aspect of the matter in its judgment, it appears that it did not consider it to be relevant.

11. The result of the decision of the Court of Arches in *Blagdon* declining to follow the Chancery Court of York meant that a different test was applicable in the Province of Canterbury to that applicable in the Province of York, albeit that there might not in any particular case be any difference in terms of outcome.

12. *In re St Chad's Churchyard, Bensham*[11] was a case arising in the Province of York, some 15 years after the decision in *Blagdon.* In it Bursell Ch applied the test in *Alsager* in preference to the test in *Blagdon*[12].

13. It is evidently undesirable that the law should be different in the different provinces in relation to a matter such as exhumation. Accordingly section 7 of the Church of England (Miscellaneous Provisions) Measure 2018 inserted a new section 14A (1) into the Ecclesiastical Jurisdiction and Care of Churches Measure 2018. This provided as follows:

    A decision of the Arches Court of Canterbury or the Chancery Court of York is to be treated by the other Court, and by the lower ecclesiastical courts in the province of the other Court, as if it were a decision which the other Court had itself taken.

14. Section 7 (3) of the 2018 Measure provided that the provision was to be retrospective in effect:

    This section applies to a decision of the Arches Court of Canterbury or the Chancery Court of York made before the commencement of this section (as well as to a decision made afterwards).

15. Before the enactment of section 14A (1) the position was that the Consistory Court of Southwark was bound by *Blagdon* and not by *Alsager.* The position now is not so clear.

16. *In re Clayton Cemetery, Bradford*[13] (a case in the Diocese of Leeds) Hill QC Ch said this about the effect of section 14A:

    In dioceses of the Northern Province (of which Leeds is one) it is no longer necessary to consider the test propounded by the Chancery Court of York in [Alsager] to the extent that such a test was revisited and re-framed by the subsequent decision of the Court of Arches[14].

17. He did not say why he preferred the authority of *Blagdon* to *Alsager,* In any event he was considering the potential effect of the decision in *Blagdon* in the Province of York; I have to decide the potential effect of *Alsager* in the Province of Canterbury.

18. In this context, it is appropriate to begin by noting that *Blagdon* was a decision of the highest ecclesiastical court which considered and accepted criticisms of the decision in *Alsager.*

19. However in *Bensham* Bursell QC argued that in *Blagdon* the Court of Arches had been wrong to consider (as it did) the theology of burial. His conclusion was

[11] [2017] Fam 68.This was a "mistake" case; it is not necessary to refer to the facts.
[12] There had of course been exhumation cases in the Province of York after the decision in *Blagdon* and before *Bensham* but none, so far as I am aware, had addressed the issue as to the status of that decision in the Province of York (see paragraphs 13 – 16 of *Bensham*).
[13] [2019] ECC Lee 2.
[14] See paragraph 14 of his judgment.

... in spite of the ultra vires active consideration of the theology of burial, the theological exegesis was unnecessary to the decision in the Blagdon *case, although the fact that it was made at all may well raise questions as to the overall authority of that decision*[15].

20. He also defended the *Alsager* test:

None the less, in the light of the criticisms in the Blagdon *case I note that the civil courts have had no difficulty in applying the approach of the equally notional man on the Clapham omnibus (see* McQuire v Western Morning News Co Ltd *[1903] 2 KB 100 , 109, per Collins MR) or of the right thinking members of society, the officious bystander, the reasonable landlord and the fair minded and informed observer: see* Healthcare at Home Ltd v Common Services Agency for the Scottish Health Service *[2014] PTSR 1081, paras 1–4. Indeed, in the* Healthcare at Home *case the Supreme Court explained that these legal fictions, at para 2:*

> *belong to an intellectual tradition of defining a legal standard by reference to a hypothetical person, which stretches back to the creation of the Roman jurists of the figure of the bonus paterfamilias.*

For this reason no evidence can be called in civil cases as to how such a hypothetical person would respond to the situation under consideration and, as the ecclesiastical law is part of the general law of England, there seems to be no reason why a "right thinking member of the [Anglican] Church" should not be approached in a similar, hypothetical way[16].

21. There is some helpful law on conflicting decisions of courts of equivalent jurisdictions, which has also been applied more widely and which I consider helpful in considering the correct approach to section 14A (1).

22. In *Minister of Pensions v Higham*, Denning J (as he then was) had to consider a pension scheme established under the Pensions (Mercantile Marine) Act 1942. He was faced with conflicting decisions on the same Act of the English High Court and the Scottish Court of Session. He said:

This case therefore raises an important point as to the use of precedents in pensions cases. I desire to state, what I have said before, that the doctrine of stare decisis does not apply in its full rigour to this branch of the law. The decisions of the Superior Courts (The High Court in England, the Court of Session in Scotland and the Supreme Court in Northern Ireland) are binding on the pensions Appeals Tribunals. They are not absolutely binding on the Superior Court itself or on the courts of co-ordinate jurisdiction but will be followed in the absence of strong reason to the contrary. But what is to be done when there is a decision of the Court of Session which is in conflict with a decision of this court or vice versa? The conflict cannot be resolved by an appeal to a higher tribunal because there is no provision for any such appeal, yet resolved it must be. I am told that when this court gave rulings on the law which were more in favour of the claimants than those of the Court of Session, some claimants would move from Scotland to England in order to come before the tribunals in this country; and the reverse has happened. When the Court of Session in Ballantyne's case[17] *gave a ruling which was more in favour of the claimant than* Staynings' case[18] *in this court, one claimant took an accommodation address in Scotland in order to come before a tribunal there. Such a state of affairs must be remedied. I lay down for myself therefore the rule that, where the Court of Session have felt compelled to depart from a previous decision of this court, that is a strong reason for my*

[15] See paragraph 19. It should be noted that Bursell QC Ch was a member of the Chancery Court which decided *Alsager.*
[16] See paragraph 22.
[17] 1948 SC 176.
[18] [1947] 1 All ER 347.

reconsidering the matter: and if on reconsideration I am left in doubt of the correctness of my own decision, then I shall be prepared to follow the decision of the Court of Session, at any rate in those cases when it is in favour of the man, because he should be given the benefit of the doubt. In this respect I follow the general rule that where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred, if it is reached after full consideration of the earlier decision.[19].

23. In *Colchester Estates (Cardiff) v Carlton Industries plc*[20], Nourse J applied the principle in respect of two conflicting decisions of the High Court. He observed of the final sentence of the quotation from Denning J's judgment in *Higham* set out above:

    That unqualified statement of a general rule comes from a source to which the greatest possible respect is due. It is fortuitous that my own instinct should have coincided with it. However diffident I might have been in relying on instinct alone, the coincidence encourages me to suggest a reason for the rule. It is that it is desirable that the law, at whatever level it is declared, should generally be certain. If a decision of this court, reached after full consideration of an earlier one which went the other way, is normally to be open to review on a third occasion when the same point arises for decision at the same level, there will be no end of it. Why not in a fourth, fifth or sixth case as well?[21]

24. The principle enunciated and applied by Denning J in *Higham* and applied by Nourse LJ said in *Colchester Estates* was endorsed by Lord Neuberger of Abbotsbury MR in *Patel v Secretary of State for the Home Department*[22] in the context of conflicting decisions of the Court of Appeal where by reference to *Young v Bristol Aeroplane Co Ltd*[23] the Court of Appeal is at liberty to choose between conflicting decisions[24].

25. In the light of this high judicial pronouncements, it seems to me that I should start from the position that it is appropriate for me to follow *Blagdon* rather than *Alsager* unless there are particular reasons why I should not. I note the criticism of *Blagdon* in *Bensham* that the Court of Arches had strayed into theological realms where it had no business to be. Without wishing to express a view about that, it does seem, as Bursell QC Ch seems fairly to have accepted, that this is not directly related to the test for allowing exhumation, going rather to establish the norm of permanence (which was not in issue either in *Alsager* or *Blagdon*).

26. As to the test propounded in *Alsager*, I would accept that a test of this kind has a long and illustrious pedigree. However I do think that in practice, its application does give rise to difficulty. One can see this by considering the facts of *Alsager.* It will be seen that it took a restrictive view of the circumstances in which exhumation should be permitted; it is not clear why the (hypothetical) right thinking member of the church should necessarily have thought that there were not good and proper reasons for permitting exhumation. The point is highlighted by the fact that an actual right thinking member of the church who had considered the matter did not object, namely the incumbent[25]. In *Bensham* Bursell QC Ch evidently considered that the *Alsager* test was more lenient than that in *Blagdon*[26]. This illustrates a potential difficulty with tests of this kind, namely that they are insufficiently precise.

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[19] See pp 155 – 156.
[20] [1986] Ch 80.
[21] See p85.
[22] [2013] 1 WLR 63 at paragraph 59.
[23] [1944] KB 718.
[24] See pp 725 – 726.
[25] See p144.
[26] At paragraph 23 of his judgment he said that *... the* Alsager *test may in some few instances be more flexible than that outlined in the* Blagdon *case ...* It does not seem that he thought that there might be cases where the Blagdon test was more flexible.

27. I do accept that the test propounded in *Blagdon* is also capable of criticism along similar lines to the criticism set out above of *Alsager.* However the judgment in *Blagdon* was accompanied by an extended exposition of the considerations which the Court thought relevant to the determination of the question of whether exceptional circumstances exist[27]. These helpful observations, considered, elaborated and applied in subsequent cases have, it seems to me, achieved a consistent approach in cases determined by this Court and, as far as I aware, in other courts in the Southern province[28].

28. For the reasons set out in paragraphs 18 to 27 above, I think it is appropriate for this Court to continue to apply the test set out in *Blagdon* and not to begin to apply that set out in *Alsager.*

29. Before turning to the application of that test to the facts of this case, there is one other matter that I should mention.

30. In *Blagdon*, the Court of Arches said this about precedent;

> *We are aware that the common law doctrine of precedent was not historically part of canon law, and that on the facts of* 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* In re St Mary Magdalene, Lyminster *(1990) 9 Consistory and Commissary Court Cases, case 1 to have regard to the effect of setting a precedent. More recently George QC Ch in* In re West Norwood Cemetery *(unreported) 6 July 2000 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.*

31. In *In re Bingham Cemetery*[29] Ockelton Ch observed:

> *The temptation to treat other cases … as a pointer to what is likely to be regarded as exceptional is to be resisted. Like cases are no doubt to be decided alike, and the decided cases offer guidance on the determination of the issues, which ought to be applied in the interests of consistency. But precedent operates in the area of law, not of fact. The facts of every case are different. The question is whether the circumstances as a whole establish the exceptionality*[30].

32. In *In re Hither Green Cemetery*[31], I said of this comment:

> *I think that this is a salutary reminder that each case needs to be decided on its merits and on its own particular facts. However I think that it is looking at the matter too narrowly to say that precedent does not operate in the realm of fact; the desirability of securing equality of treatment between petitioners was described by the Court of Arches in* In re Blagdon Cemetery *[2002] Fam 299 as the practical application of precedent. It would make the lot of a chancellor much easier if all he or she had to do in an exhumation case were to apply the test of exceptional circumstances with reference to the guidance in* In re Blagdon Cemetery*, but without reference to any other decided case. However, if I am to be confident that equality of treatment is being secured, I need to consider other decided cases. In this context, it should be noted that petitioners are usually unrepresented and will have no idea that there exists a large corpus of decided cases, let alone that the facts of some of them may be relevant to his or her own case.*

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[27] See paragraph 36.
[28] All decisions of substance of the consistory courts are posted on the website of the Ecclesiastical Law Association and are publicly available.
[29] [2018] ECC S & N 1.
[30] See paragraph 15.
[31] [2019] Fam

It falls to the consistory court to identify and consider the relevant cases. This is particularly important as what has happened, over time, is that in the cases the courts have identified a large number of circumstances which they have considered exceptional. The issue that then arises as to how properly to distinguish one set of facts which are exceptional from another which are potentially not. It is comparatively easy to distinguish one case from another; as Ockelton Ch emphasised, the facts of no two cases are identical and even if the same relevant factors are identified in two different cases, that does not necessarily mean that they will be decided in the same way. However it is important that the distinctions drawn should be intellectually defensible and not subject to the criticism that they are too fine to be justifiable[32].

The application of the test in *Blagdon* to the present facts

33. In the present case, there are five factors which together have led me to a conclusion that this is an appropriate case in which to make an exception to the norm of the permanence of Christian burial. These are that
    (i) Crusoe was still born;
    (ii) it is not possible for Mrs Armstrong's body to be buried together with the remains of Crusoe, in the area of Lambeth Cemetery reserved for the burial of children;
    (iii) the tragically early death of Mrs Armstrong;
    (iv) the re-interment of Crusoe's remains is within Lambeth Cemetery;
    (v) the re-interment is to establish a family grave.

34. The particular relevance of the fact that Crusoe was still born is that Mr and Mrs Armstrong would not in 1998 have been expecting to make arrangements for their son's burial. It speaks to the proposition (against permitting exhumation) that there is nothing exceptional in the present circumstances: because if Mr and Mrs Armstrong wished in due course to be buried together with their infant son they could have made appropriate arrangements in 1998. I accept that this is the case. However this is surely a counsel of perfection. The last thing that they were probably thinking about in 1998 was their own deaths; and in 1998 the interment of Crusoe's remains in the children's part of the cemetery would, no doubt, have seemed particularly appropriate and comforting. However it did close off the possibility of Mrs Armstrong being buried together with her son when the time came. Had Mrs Armstrong not died so young, Mr Armstrong might not have felt the same need to establish a family grave. As it is, he may expect that he may be visiting the grave of Crusoe and his wife for many years to come. I consider that the fact re-interment is what may be regarded as a re-arrangement within the same churchyard or cemetery is also an important part of the factual matrix. Obviously it means that the present is not a "portable remains" case (exhumation to facilitate visiting when relatives move from the area within which the remains are buried) against which the consistory courts have set their face[33] but, further, for my part, I consider that this makes what is proposed intrinsically more acceptable. I realise that in *Alsager* the fact that the two relevant interment plots were close together was considered to be a reason for not permitting exhumation. I do see this point but in the context of the desire to establish a family grave, which is natural and commendable (as *Blagdon* points out), it is much better that the family grave be (if possible) established in the same churchyard or cemetery. As regards family graves, in *In re Peters's Petition*[34], I observed that

It is impossible to foresee every case and, accordingly, I would not want to be categorical, but I would not generally regard the consolidation or creation of a family grave of itself as sufficient to justify exhumation. This is because, despite the benefits arising out of the consolidation or creation of family graves, to hold that consolidation or creation of such a

[32] See paragraph 13.
[33] See eg *In re St Mary Magdalen, Lyminster* (1990) 2 Ecc LJ 127. The objection applies even though the need to move and the difficulty in visiting arise through infirmity.
[34] [2013] PTSR 420.

grave were sufficient would undermine the norm of permanence[35].

35. This remains my view and I have sought to apply it in this court: in any particular case it may pertinently be asked why the remains were not buried in an existing family grave in the first place or did not become the first interment in a family grave established at the outset. However, in the present case, Mr Armstrong did not in 1998 foresee the circumstances in which twenty years later he would wish to establish a family grave - in a similar way to that in which Mr and Mrs Whittle in *Blagdon* did not foresee the circumstances in which they would wish to create a family grave. In each case, in principle they might have done; however it is entirely explicable that they did not.

36. In the present case, it was generally important that I should decide whether I would apply the *Blagdon* test or the *Alsager* test. However I hope that it will now be seen why it was particularly important that I should do so. Until I decided otherwise *Alsager* existed as a potential precedent both as to the test to be applied and as to the application of the test. If I had taken the view that the *Alsager* test did apply, I think that it would have been difficult credibly to distinguish the facts of that case from the present and to have held that a faculty should issue. As it is, it will be seen that the facts of the present case bear some similarity to those of *Blagdon.*

37. I should note that the chamber to which Crusoe's remains will be transferred is not consecrated. The position in *Blagdon* was the same[36]. It seems to me that there is no prospect of Mr Armstrong or anyone else wanting hereafter to exhume Crusoe's remains for a second time. Of more concern is the fact that the burial rights are for 50 years. I inquired about this and have been told that this means that after 50 years the right to inter remains in the burial chamber expires, not that the remains will be disturbed at that date. The area where the burial chamber is located is not suitable for re-use. This is not quite the absolute assurance that one would like but in practice it is hard to see the remains hereafter being disturbed. The residual uncertainty does not seem to me to afford grounds for refusing a faculty.

38. Finally, I have borne in mind in considering Mr Armstrong's petition that Article 8 of the European Convention on Human Rights (applied in law by the Human Rights Act 1998) is likely to be engaged. However I consider that the law of exhumation as applied by the Church of England is generally compliant with convention rights. In circumstances where the Court considers that it is appropriate to permit exhumation by reference to that law, it is not necessary to consider the Convention further.

PHILIP PETCHEY
Chancellor
28 July 2020

[35] See paragraph 52
[36] See paragraph 7 of the judgment.