

IN THE CONSISTORY COURT OF THE DIOCESE OF LEICESTER
IN THE MATTER OF LOUGHBOROUGH CEMETERY
AND IN THE MATTER OF A PETITION BY FRANCES WAI-LING SUN
DEPUTY CHANCELLOR DAVID REES
9TH JUNE 2014

JUDGMENT

Introduction

1. This petition is brought by Mrs Frances Wai-Ling Sun. She seeks a faculty permitting exhumation of the remains of her daughter Win-Lan Frances Sun who was born on 25th September 1968 and sadly died three days later on 28th September 1968.
2. Win-Lan was buried in the consecrated part of Loughborough Cemetery. Some years later her parents emigrated to Australia where they continue to live. Mrs Sun and her husband Shiu-Foon Louis Sun wish for Win-Lan's remains to be exhumed and cremated, and for the cremated remains to be taken to Australia. There it is planned that they will be placed in a niche at a cemetery where Mr and Mrs Sun have themselves reserved niches for their own cremated remains to be placed in due course.

3. Mr Sun and Win-Lan's two surviving siblings Paul Sek-Chung Sun and Angela Win-Sey Harris have all given their consent to the proposed disinterment.
4. This petition first came for directions before Blackett-Ord Ch. In December 2013 he requested Mrs Sun to provide further details in respect of certain parts of the petition which had initially been left blank. He also directed that Mrs Sun should be provided with a copy of the judgment of Hill QC Ch in the case of *Re Marley Lane Cemetery, Battle* Cons Court (Chichester, 9 December 2013), which contained a recent and accessible summary of the relevant legal principles. Finally the Chancellor indicated that he would be prepared to deal with the petition on the papers if Mrs Sun were to consent to this course of action.
5. Mrs Sun has subsequently provided the additional information requested and provided her consent to the petition being determined by written representations. The Chancellor has referred the petition to me for determination.
6. I have every sympathy with Mr and Mrs Sun. Their love for their daughter and their grief at her death are quite plain from the evidence that they have submitted to this Court, and I appreciate that my decision is likely to cause them considerable distress. That said I must determine this petition in accordance with the established legal principles and I am not satisfied that the grounds for the grant of a faculty have been made out in this case.

Background

7. In 1968 Mr and Mrs Sun were living in Wymeswold, Leicestershire. They already had one daughter, Angela. Win-Lan was their second child and was born at Leicester Maternity Hospital on 25th September 1968. In her evidence Mrs Sun records the events that followed:

“Tragically [Win-Lan] suffered from some complications at birth but was never fully explained to me by the hospital. She was kept in incubation for three days but did not survive. I hardly had the chance to hold her in my arms.”

8. Win-Lan was buried in the consecrated part of Loughborough Cemetery. Shortly after her death Mr and Mrs Sun moved from Wymeswold to Loughborough. As Mrs Sun explained:

“It was always a great solace for me in visiting her little grave to feel that I could give her the motherly protection for my tiny helpless baby alone in the cold dark space. My husband and my elder daughter Angela sometimes came with me to the cemetery.”

9. Subsequently Mr and Mrs Sun had a son, Paul, who was born in about 1973. In 1974 they decided to emigrate to Australia. In her witness statement Mrs Sun explains that at the time of Win-Lan’s death and burial the possibility of emigration had not occurred to them and that it was a matter that only arose some years later.

She stated:

“During the migration process while facing the usual problems of uprooting the whole family we did consider about Win-Lan’s remains but within the limited space of time and equally limited resources we could hardly find a satisfactory solution.”

10. I am told little about events since their migration, but Mr and Mrs Sun have plainly succeeded in making a new life for themselves in Australia. They continue to live there, in the suburbs of Sydney, New South Wales and both their surviving children and their families also live in Australia. Nonetheless the memory of Win-Lan has plainly remained an important part of their lives. Mrs Sun described her thoughts thus:

“We pinned on fervent hopes that it would not be too many years before we would return to visit our beloved baby daughter Win-Lan’s grave. Much to our sorrow such hopes vanished in no time when faced with the struggles of establishing ourselves in a new land particularly in the bringing up of two young children. Half a lifetime went by (since we left England) we both had retired, I said to my husband last year, “No matter what there is one journey we have to make, back to Loughborough to visit Win-Lan’s grave before we die!” In all these intervening years I often felt so sorry that we had not been able to do anything about Win-Lan’s remains. Every anniversary is a reminder, I am so sad that I do not even possess anything personal of hers because when a baby died in an incubator in three days there was not even a photograph of hers.

So in May 2013 for the first time after a span of almost forty years I was crying my heart out (and so was my husband) in front of Win-Lan’s grave. The tombstone had badly weathered and her name barely legible but it was the only thing I could hug as if I were hugging her tiny body, after half of my life time. To tear myself away from her grave this time was more heart wrenching than the first time when we left England in 1974. We are now in our mis-seventies, the likelihood of revisiting her grave will be slim indeed from our age and resources point of view. This thought filled me with sorrow because it spelled out to me that it was our final visit.”

11. Following this visit and “after much deliberation” Mr and Mrs Sun decided to apply for Win-Lan’s exhumation so that her remains could be cremated and taken to Australia. The proposal is that Win-Lan’s cremated remains would be interred in a niche in Macquarie Park Cemetery, North Ryde, Sydney, New South Wales. Mr and Mrs Sun have pre-purchased niches for the eventual interment of their own ashes and they indicate that if the faculty is granted a further niche would be purchased for Win-Lan’s cremated remains. I am told that Macquarie Park

Cemetery is non-denominational and that any re-interment will not be in consecrated ground.

12. Mrs Sun explains that she has brought the petition so that she and her husband:

“...can have solace knowing that we can say our last farewell to her at her graveside when our time comes. At the same time for our other children (and family) it will create a feeling of closer family togetherness.”

She has also stated in an addendum to the petition:

“We would be greatly comforted if we could be granted our fervent hope of having her remains with us in Australia (now our home).”

The Law

13. It is settled law that an exhumation of human remains from consecrated ground requires the authority of a faculty: *The Queen v Dr Tristram* [1898] 2 QB 317. The principles which I must apply when considering whether to grant or refuse such a faculty were considered by the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299, and a summary of aspects of that judgment is found in the decision of Hill QC Ch in *Re Marley Lane Cemetery, Battle Cons Court* (Chichester, 9 December 2013) a copy of which has been provided to Mrs Sun.

14. In *Blagdon* the Court of Arches made clear that permission to exhume human remains was not something which would be given automatically. At paragraphs [20] to [21] of the judgment the Court stated:

“[20] ... permission is not, and has never been, given on demand by the consistory court. The disturbance of remains which have been placed at rest in consecrated land has only been allowed as an exception to the general presumption of permanence arising from the initial act of interment.

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

15. At paragraph [23] of its judgment in *Blagdon* the Court of Arches quoted from a paper *The Theology of Burial* prepared by the Rt Revd Christopher Hill, then Bishop of Stafford in September 2001. In that paper Bishop Hill drew attention to the fact:

“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.”

16. A fuller and revised version of this paper was subsequently published in the *Ecclesiastical Law Journal* (2004) 7 Ecc LJ 447. An extract from that article was quoted by Hill QC Ch in *Re Marley Lane Cemetery* at paragraph [7] of his judgment.

That additional quotation reads:

“In cases of Christian burial according to Anglican rites, prescinding from cases where there has been a mistake as to the faith of the deceased, I would argue that the intention of the rite is to say ‘farewell’ to the deceased for their ‘journey’; to commend them to the mercy and love of God in Christ; to pray that they may be in a place of refreshment, light and peace till the transformation of resurrection. Exhumation for sentiment, convenience, or to ‘hang on’ to the remains of life, would deny this Christian intention.”

17. Having regard to the fact that permanence is the norm in relation to Christian burial the Court of Arches in *Blagdon* went on to consider the circumstances in which it

would be appropriate to depart from that general principle. The Court's conclusion is set out at paragraphs [33] to [35] of its judgment:

"[33] We have concluded that there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted. Exceptional means 'forming an exception' (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 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."

18. Accordingly, in order to grant a faculty, I must be satisfied that the petitioner has established, on the balance of probabilities, that the facts in this case justify an exception to the general presumption of the permanence of Christian burial.

Relevant Factors

19. In *Blagdon* the Court of Arches considered a number of factors which were said on the facts of that particular case to be relevant to the Court's exercise of its jurisdiction. Two of the factors identified in *Blagdon* (medical reasons and mistake)

have no parallel in the facts of the present case and I do not consider them further. A further factor, that of the existence of support for the petition, was considered to be irrelevant in most cases and in my view the fact that Mrs Sun's petition is supported by her husband and children does not assist me in deciding whether she has established that this is a case where an exception should be made to the general principle that a Christian burial should be regarded as permanent.

20. However, it seems to me that the other three factors identified by the Court of Arches in *Blagdon* (lapse of time, establishment of a family grave and precedent) may have greater relevance in this case, and I will look at each of these together with other factors which appear to me to also be relevant in the present case.

(1) Moving to A New Area

21. First however, I should make clear that a move by surviving family members to a new area cannot, of itself, establish sufficient reasons to permit a grant of a faculty for exhumation. As George QC Ch pointed out in *In re South London Crematorium* (unreported) 27 September 1999 :

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

In *Blagdon* the Court of Arches held that a practice of permitting exhumation simply to facilitate visits to the grave by surviving family members would make unacceptable inroads into the principle of permanence of Christian burial and needed to be firmly resisted. The fact that Mr and Mrs Sun have moved from

Loughborough to Australia cannot, by itself, justify the grant of the faculty sought.

(2) Lapse of Time

22. I am required to take into account the length of time that has passed since Win-Lan's burial. In *In re Christ Church, Alsager* [1999] Fam 142, the Chancery Court of York (at 149h) held that:

“the passage of a substantial period of time will argue against the grant of a faculty”.

In *Blagdon* (at paragraph [36(ii)]) the Court of Arches indicated that they did not consider this statement as signifying that time alone will be determinative. It may well be a factor in relation to assessing the genuineness of the petitioner's case. Long delay with no credible explanation for it may well tip the balance against the grant of a faculty but lapse of time alone is not the test. (For example in *In re Talbot* [1901] P 1 an exhumation was permitted after a lapse of 110 years).

23. In the present case Win-Lan died nearly 46 years ago and Mr and Mrs Sun emigrated to Australia nearly 40 years ago. Although their recent visit to Loughborough has clearly been the trigger for the present application, no substantive reason is advanced to explain why a petition for a faculty has not been brought before now. In my view the very long period of time that Win-Lan's remains have been at rest in Loughborough and the lack of substantive reasons for the delay in the presentation of the petition weigh against the grant of a faculty.

(3) Establishment of A Family Grave

24. A further factor which may provide the court to conclude that an exception should be made to the general rule is where it is proposed that remains should be exhumed in order to be re-interred in a family grave. Whilst the Court of Arches in *Blagdon* made clear that a wish to establish a family grave would not automatically give cause for a faculty for exhumation to issue, it did conclude (at paragraph [36(vi)]) that family graves were to be encouraged.
25. Since the decision in *Blagdon* a number of reported decisions on petitions for exhumation have considered the establishment of family graves. In *Re Peters's Petition* [2013] PTSR 420 (Southwark), Petchey Ch held that the establishment of a family grave whilst a relevant consideration was not a sufficient reason to justify exhumation as if this were the case practically every "portable remains" case could be put on the basis that it would permit the creation of a family grave. This decision has been criticised in a number of cases such as *Re Kenilworth Cemetery Cons Court* (Coventry, 5 June 2012) and *Re St Mark's Churchyard, Fairfield* [2013] PTSR 953 (Worcester). In the latter case Fookes Dep Ch held that transfer of the remains of a family member to an existing and established family grave or graves is capable of being an exception and of constituting a special circumstance sufficient to outweigh the presumption of permanence of burial, without more. A credible explanation will be required for any lapse of time but that is not a determinative factor.

26. I do not consider that I have to determine this issue in the present case. It is not clear that Mr and Mrs Sun intend to create a family grave in the sense that it is understood in these authorities. Rather it appears to me that the primary desire behind the petition is a wish to have Wan-Lin's remains nearby to them so that they can more easily visit them during their own lifetimes.

27. Whilst it would appear that they have reserved individual niches for themselves at Macquarie Park Cemetery, no niche has as yet been reserved for Wan-Lin and there is no evidence before me that if such a niche were reserved it would be adjacent to those that Mr and Mrs Sun have chosen for themselves. In *Blagdon* the Court of Arches held (at paragraph [40]):

“Where special circumstances are relied upon in respect of a child who has predeceased his or her parents, it will be insufficient if there is simply a possibility of establishing a family grave. As in this case there would have to be clear evidence as to the existence of the legal right to such a grave if no family member was already buried in it.”

28. In the circumstances I find that even if a desire to create a family grave is capable, by itself, of amounting to a sufficient reason to grant a faculty for exhumation, the evidence before me would be insufficient to demonstrate that such a family grave could or would be created in the present case. In any event, it appears to me that there are other relevant factors in the present case which I must also take into account.

(4) Re-interment in Unconsecrated Ground

29. A further factor that I must take into account is that it is proposed that Win-Lan's

cremated remains should be re-interred in an unconsecrated cemetery. This was another issue considered by the Court of Arches in *Blagdon* (at paragraphs [13] to [16]):

“[13] Prior to the Burial Act 1857 (20 & 21 Vict c 81) consistory courts, as a matter of practice, declined to grant a faculty authorising remains buried in consecrated ground to be reinterred in unconsecrated ground. The reason was that, per Dr Tristram QC Ch, in *In re Talbot* [1901] P 1, 5: ‘by so doing they would be sanctioning the removal of remains from a place of burial under the special protection of the ecclesiastical courts to a place of interment under the protection of no court.’

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

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

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

30. A proposal to re-inter remains in unconsecrated ground is thus not fatal to a petition for a faculty for exhumation. However, where the proposal is for re-interment in unconsecrated ground (other than in a local authority cemetery in England and Wales) even if the court is otherwise persuaded that it is appropriate for such a faculty to be granted, it will nonetheless also need to be satisfied that the proposed site for re-interment is suitable and that the grave will be properly cared for and

maintained in the future.

31. I do not have before me any formal evidence as to the status or condition of Macquarie Park Cemetery. However, I note that it has website that describes its status thus:

“Macquarie Park Cemetery and Crematorium is an Australian public trust cemetery situated on 64 hectares of Crown Land owned by the New South Wales Government, administered by the Department of Primary Industries and managed by successive honorary Boards of Trustees as a not for profit community service in perpetuity since the first burial within the grounds in 1922.”

There is nothing in the information and images on this website to suggest that Macquarie Park Cemetery would be an unsuitable resting place for Win-Lan’s remains. Whilst none of this is formally before me in evidence (and I have not taken it into account one way or the other in reaching my decision), if I had concluded that this was otherwise an appropriate case to grant a faculty for exhumation I would have been prepared to adjourn the petition to permit formal evidence of the status and suitability of Macquarie Park Cemetery to be filed.

(5) Other factors

32. Another relevant factor in this case is that it is proposed that Win-Lan’s remains should be cremated after their exhumation, prior to being taken to Australia. This cremation (which I understand would be required in order to admit the remains to Australia) would represent a further interference with remains which have been at rest for a long period of time. Whilst this is not, of itself, determinative of my decision, it is a factor which in my view points against the grant of the faculty.

33. I also take into account the fact that Win-Lan, during her lifetime, had no connection with Australia. She lived her brief life entirely in Leicestershire. At the time of her death her family was settled there and there was no intention on the part of her parents to emigrate to Australia. Their decision to move is a supervening factor which arose some years after her death.

(6) Precedent

34. In *Blagdon* the Court of Arches approved dicta of George QC Ch in *In re West Norwood Cemetery* (unreported) 6 July 2000 in which the Chancellor had stated:

“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.”

The Court of Arches in *Blagdon* took the view that precedent was a relevant factor in determining whether to grant a faculty because of the desirability of securing equality of treatment, so far as circumstances permit it, as between petitioners.

35. In considering my decision in this case I have referred myself to a number of reported cases of exhumation. It seems to me that care has to be taken against placing too great a weight on the decisions reached in previous cases, as even where cases appear superficially similar, their underlying facts may differ sufficiently so as to justify different outcomes. Nonetheless, I entirely accept that it is important that there should be equality of treatment between petitioners and (as Petchey Ch

commented in *Re St Edward, King and Confessor, New Addington* Cons Court (Southwark, 23 October 2013)) it would be undesirable for the outcome of a petition to depend upon the diocese to which it related.

36. Broadly speaking, the facts of most reported decisions on exhumation appear to be sufficiently removed from the case before me to offer little assistance. There are a number of cases where a spouse or parent has been granted a faculty to exhume and move the remains of a close relative. Equally there have been many cases where a faculty has been refused. I mention below three cases (all of which were decided by Petchey Ch sitting in the Consistory Court of the Diocese of Southwark) to which I have had particular regard. However, I make clear that I do not consider that any of these cases is sufficiently close to the one before me such that I am effectively bound to follow it.

37. In *Re Wandsworth Cemetery* Cons Court (Southwark, 22 November 2013) Petchey Ch allowed a petition for a faculty to exhume the remains of a stillborn baby. In that case the child had been buried in 2006 in Wandsworth, an area of London that the parents were about to move to. Subsequently, their anticipated house purchase fell through and after some years in rented accommodation they purchased a house in Winchester with the intention of making their permanent home there. In granting the faculty, the Chancellor took into account the fact that the parents had not had a permanent home available to them at the time that they took the decision to bury their child in Wandsworth and the difficulty that the mother had had in coming to

terms with her child's stillbirth. I accept that the evidence in that case of the mother's difficulty in coming to terms with the death of her child does not appear to differ substantially in its nature from the evidence that Mrs Sun has provided in the present case. On the other hand, in this case Mr and Mrs Sun were permanently settled in Leicestershire at the time of Win-Lan's death. Moreover, the lapse of time between the burial and petition in the Wandsworth case was about 7 years as opposed to 45 in the present one.

38. In *Re Streatham Park Cemetery* Cons Court (Southwark 16 February 2011) Petchey Ch refused a petition to exhume the remains of a stillborn girl that had been buried in 1942 in Streatham Park Cemetery to permit them to be cremated and for those cremated remains to be interred with those of the child's late father at Maidstone Crematorium. In that case the Chancellor considered that the child had no link with Maidstone beyond the fact that her parents' ashes were buried there. There had been a lapse of nearly 70 years between burial and the fact that it was proposed that the remains should be cremated before re-interment was a factor against the grant of a faculty.
39. The facts of that case are perhaps superficially the closest to those of the case before me, but there remain important differences. In that case the child was stillborn and both her parents were dead by the time of the petition. In the present case Win-Lan lived, albeit for a short period of time, and both her parents are alive and are clear that her exhumation and move would be a comfort and solace to

them.

40. Finally in *Re St Edward, King and Confessor, New Addington* Cons Court (Southwark 23 October 2013) a faculty was granted to permit the exhumation of cremated remains with a view to them being re-interred in consecrated ground in Australia alongside the deceased's late wife. In that case the deceased who had died in 1975 had had his permanent home in India, but had been visiting his daughter in England at the time of his death. Subsequently his widow had moved to Australia, and in time she had died and been buried in that country. The petitioner (the deceased's daughter) had also determined to emigrate to Australia and sought the faculty to enable her father's ashes to be buried in the same grave as his late wife.

41. Granting a faculty, the Chancellor attached weight both to the fact that the deceased had not been resident in England when he died and that there had also been a "re-focussing" of the family after his death which had led to the remains of the deceased and his wife being buried separately. These factors do not appear to me to be present in the case before me. Win-Lan lived the whole of her short life in Leicestershire. She never had the opportunity to marry (so this is not a case of reuniting the remains of two spouses) and as set out above, I am doubtful as to whether this is properly considered a "family grave" case.

Conclusion

42. Taking all of the above matters into account I am not satisfied that Mrs Sun has established that this is a case for making an exception to the general principle of permanence that applies in relation to Christian burial. Indeed in my view the weight of evidence is clearly in favour of allowing Win-Lan's mortal remains to continue to rest in Loughborough. Whilst I do not underestimate the distress that my decision may cause to Mr and Mrs Sun and their wider family, I am unable to conclude that this is an appropriate case for the grant of a faculty
43. I accordingly dismiss this petition. The fees, including the correspondence fee for the registrar, are to be paid by Mrs Sun.

David Rees

Deputy Chancellor

9th June 2014