

IN THE CONSISTORY COURT OF THE DIOCESE OF MANCHESTER

Re Doreen Payne Deceased [nee Shottin], Edward Shottin Deceased and Elizabeth Shottin Deceased

-and-

Re an application for a faculty by George Leslie Shottin

JUDGMENT

Delivered on 3 April 2013

Introduction

1. By three Petitions each dated 16 November 2012 George Leslie Shottin [the Petitioner] applies for faculties authorising the exhumation of the cremated remains of Doreen Payne [nee Shottin] Deceased, Edward Shottin Deceased and Elizabeth Shottin Deceased [the deceased persons] who died on 17 June 1957, 16 June 1985 and 18 August 1991 respectively from Christ Church Bacup where they were each interred inside the Church under the floor behind a plaque and the re-interment of such cremated remains in the Shottin family grave numbered 711 in row E of the Church of England consecrated section of Bacup Cemetery Rossendale.

2. Doreen Payne tragically died at the age of 38 years and Edward Shottin and Elizabeth Shottin were her surviving parents who died subsequently. The Petitioner is the brother of Doreen Payne and the son of Edward Shottin and Elizabeth Shottin. He annexes to his application consents to the exhumation and re-interment from Keith Shottin Payne and Mrs M A Davies [nee Payne] who are the son and daughter of Doreen Payne.

3. All the deceased persons were interred in Christ Church Bacup which has recently closed for public worship. Doreen Payne's cremated remains were interred in a ceramic pot. The cremated remains of Edward Shottin and Elizabeth Shottin were interred in caskets made of oak.

4. The grounds in support of such application are expressed thus :

‘The church is now closed and we assume that the church will be up for sale and therefore we would like the final resting place to be at Bacup Cemetery in our family grave E711.’

5. It seems clear that a decision has been made by all family members that since Christ Church Bacup has been closed for worship and there is uncertainty as to its future, the final resting place of all such deceased persons should be in a family grave in Bacup Cemetery.
6. Revd Garry Whittaker, the Team Rector of the Bacup and Stacksteads Team does not object to the exhumation.
7. Rossendale Borough Council consent to the proposed re-interment in Bacup Cemetery.
8. Having visited Christ Church Bacup to ascertain whether the caskets could be moved, John Winfield, of Fred Hamer Funeral Services, confirms that in his opinion he could see no problems in removing the three caskets and their re-interment. Although he had requested permission to unscrew the plaques which covered the cremated remains, I declined to give permission for this.
9. It will thus be observed that there were two grounds to the application : [a] the closure of Christ Church Bacup and [b] the wish to re-inter the cremated remains in a family grave in Bacup Cemetery.
10. On the facts of this case I consider that it is expedient to determine these applications upon consideration of written representations under Rule 26 of the Faculty Jurisdiction Rules 2000 and I do so.

The legal principles to be applied on applications for exhumation

11. There can be no doubt that I have a discretion as to whether I should grant a faculty.
12. The starting point for the exercise of such discretion was conveniently explained by Steel Ch in *Re Matheson (Decd)* [1958] 1 WLR 246, at 248, when he stated :

`From the earliest times it has been the natural desire of most men that after death their bodies shall be decently and reverently interred and should remain undisturbed. Burial in consecrated ground secured this natural desire, because no body so buried could lawfully be disturbed except in accordance with a faculty obtained from the church court. As all sorts of circumstances which cannot be foreseen may arise which make it desirable or imperative that a body should be disinterred, I feel that the court should always be slow to place any fetter on its discretionary power or to hold that such fetter already exists. In my view there is no such fetter, each case must be considered on its merits and the chancellor must decide, as a matter of judicial discretion, whether a particular application should be granted or refused.`

13. However, there is a presumption against exhumation : this derives from the Christian theology of burial that the disposal of the dead, whether by way of burial or cremation, has an aura of permanence about it. So in *'Theology of Burial'* the then Bishop of Stafford, the Right Revd Christopher Hill, wrote :

`The permanent burial of the physical body / the burial of cremated remains should be seen as symbolic 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 the ultimate destination, with us, in 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 on to the `symbol` of a human life rather than a giving back to God. ... In general, therefore, the reluctance to agree to faculties for exhumation is well grounded in Christian theology and eschatology. It is also right generally from the point of view of the mourner, who must learn to let go for their psychological and spiritual health`.

This passage was cited in *In Re Blagdon Cemetery* [2002] 3 WLR 603, at 609 : the revised text is at 7 Ecc LJ 447.

14. A similar approach appears in the *Guidance for best practice for treatment of human remains excavated from Christian burial grounds in England* [English Heritage / Church of England 2005] which states :

`In summary, it is central to Christian theology that, after death, the human body ceases to have any significance for the ongoing resurrected spiritual life of the individual. However, following death, the physical remains should be treated with respect and reverence, even though ultimately it is the fate of the soul, rather than of the physical remains, which matters.`

15. Such presumption also exists in English secular law which provides that there is no ownership of human remains, that it is a criminal offence to disturb human remains without lawful permission and that there is no legal right to exhume human remains. Such reflects a secular culture in which the norm is that the remains of a deceased person should not be disturbed once they have undergone the initial act of interment.

16. The question thus arises : in what circumstances should a court allow the disturbance of remains as an exception to such presumption of permanence.

17. In *Re Christ Church Alsager* [1999] 1 All ER 117 the Chancery Court of York concluded, at 122, that when determining an application to grant a faculty for an exhumation the critical question for a Chancellor is -

`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 ? If there is he should grant faculty. If not, he should not.`

18. In *In Re Blagdon Cemetery* the Arches Court of Canterbury observed that there were practical difficulties associated with the test formulated in *Re Christ Church Alsager* and, at 610, concluded thus :

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 edn, 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.

...

35. The variety of wording that 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`.

19. The court went on to consider various factors which may be argued in support of an exhumation. Such included the desire to create a family grave.

20. The guidance set out in *Re Blagdon Cemetery* was confirmed in *In Re St Nicholas Sevenoaks* [2005] 1 WLR 1011.

The closure of Christ Church Bacup

21. By a Pastoral Church Buildings Scheme made by the Church Commissioners on 10 July 2012 pursuant to the Mission and Pastoral Measure 2011 and with the consent of the Bishop of Manchester the church of Christ Church Bacup was declared closed for regular public worship. Such scheme came into effect on 31 August 2012.

22. Currently the Church Commissioners are investigating future uses for Christ Church Bacup.

23. Section 78(1) of the Mission and Pastoral Measure 2011 provides that :

'Where any human remains are believed to be buried in or beneath a building closed for regular public worship ... the body or person in whom the property is vested ... shall not, subject to this section, demolish, sell, lease or otherwise dispose of it or any part of it, or use it or any part of it, carry out any development of it or any part of it, unless -

- (a) as respects the human remains, either the Secretary of State has made an order under subsection (3) in relation to such demolition, use or development or the remains have been removed and reinterred or cremated in accordance with the provisions of Schedule 6; and
- (b) any tombstones, monuments or memorials commemorating the deceased persons have been disposed of in accordance with these provisions.

24. In effect where a scheme involves the disposal of property containing human remains then either [a] the Secretary of State may make an order under section 78(3) [“a dispensing order”] which enables the remains to be left undisturbed in situ where no disturbance of the human remains is required by the new use, or [b] the human remains are removed pursuant to the provisions of Schedule 6 which provides a mechanism whereby if the relatives of a deceased person were given notice, there would be a right to remove and re-inter such remains.

25. As yet the Secretary of State has not made any order under Section 78(3) and the provisions of Schedule 6 have not been invoked.

My determination

26. It is not yet known what will be the future use of Christ Church Bacup.

27. Thus, as a matter of law, it is not strictly necessary, to remove the cremated remains of the deceased persons at this stage and indeed it may never be necessary to remove them.

28. However it is entirely understandable that the Petitioner and other family members should wish to exhume the cremated remains from a building which has been closed for regular public worship and to re-inter them elsewhere.

29. Applying the test in *In Re Blagdon Cemetery* I turn to the facts of this case.

30. To grant a faculty I must be satisfied that it is established by the Petitioner, on the balance of probabilities, that the facts here justify an exception to the general presumption of the permanence of Christian burial.

31. On the facts here I am persuaded that sufficient special circumstances, namely the desire to re-inter the cremated remains of all the deceased persons in a family grave, exist to justify my making an exception from the norm that Christian burial is final.

32. I am mindful that the interments at Christ Church Bacup took place very many years ago. Notwithstanding such lapse of time I have no doubt that, in the exercise of my discretion, it is appropriate that I should make the orders sought.

33. Accordingly, I grant each application. In accordance with the practice of the court, the Petitioner must pay the court fees incurred in relation to these proceedings.

GEOFFREY TATTERSALL QC
Chancellor of the Diocese of Manchester

3 April 2013