

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK
IN THE MATTER OF STREATHAM PARK CEMETERY
AND IN THE MATTER OF A PETITION BY PHILIP GEORGE JULIEN WALKER

JUDGMENT

Introduction

1. In this judgment, I shall, after introducing them, generally refer to the relevant parties by their Christian names. This is for ease of understanding; I intend no discourtesy thereby.
2. This is a petition dated 24 December 2009 by Philip George Julien Walker for the exhumation of the remains of his father, James Walker ("James (II)") and the remains of a stillborn child, Rosemary, from consecrated ground in Streatham Park Cemetery.
3. I should say at once that, after careful thought, I have come to the view on the papers that it is appropriate to grant the petition in respect of the remains of James (II). However, I would not, on the material now before me, be minded to grant permission for the exhumation of the remains of Rosemary.
4. I visited the Cemetery on 8 February 2010. Mr Philip Walker attended, together with Mr Peter Mitchell, who is assisting him in this matter. They were able to assist me in finding both the grave of James (II) and Rosemary (which is the subject of this petition), and also that of Rose (the wife of James (II)), which is nearby. Both graves are unmarked. (The circumstances in which this came to be the case will be explained below). Both Mr Walker and Mr Mitchell were able to assist me with various factual matters in the course of my visit, but this was obviously not an occasion on which I heard any submissions.

The facts

5. James Walker (II) was born in 1921, the son of James Walker ("James (I)") and his wife, Amy Walker. James (I) and Amy also had a stillborn daughter, Rosemary, whose remains were buried in the consecrated part of Streatham Park Cemetery in January 1942.
6. During the Second World War, James Walker (II) was a signaller in the Army, and served behind the enemy lines in Belgium in order to provide intelligence about the enemy.¹ There he met and married Rose, who was a Belgian national and whose family were in the resistance. At the end of the war, James and Rose moved to England. They had two children James ("James (III)") and Philip, the petitioner.
7. Rose committed suicide in 1958, and her remains were buried in the Roman Catholic section of Streatham Park Cemetery, which is unconsecrated. I am satisfied, from the records of the Cemetery, that the burial was at a depth of 7 feet in a space which was the standard 2 feet 6 inches (wide) by 6 feet 6 inches (long). I am further satisfied, from the records of the Cemetery, that if it had been envisaged that the grave would only contain one burial, the burial of her remains would have taken place at a depth of six feet. The implication of this is that it was envisaged that a second burial would take in place in the grave in due course.
8. James (II) committed suicide in 1961. At that time James (III) and Philip were children – aged 13 and 10 – so the arrangements for the burial of his remains were made by James (I) and Amy. The remains of James (II) were not buried with those of Rose but of Rosemary.
9. Both the graves of Rose and also of Rosemary and James (II) were marked with a kerbed stone surround. Although neither survive, I have seen photographs of both. That of Rosemary and James (II) had the following inscription:

IN MEMORY OF
A BELOVED SON AND FATHER
JAMES WALKER
WHO DIED 21ST JULY 1961

¹ I understand that he was decorated by the Belgian government for his war service.

AGED 40 YEARS

ALSO BABY ROSEMARY
WHO DIED 14TH JANUARY 1942

“EVER IN OUR THOUGHTS”

10. James (III) and Philip were brought up by their grandparents, being educated as boarders at the Royal Wanstead Children's Foundation School. Because of their differing ages, however, they saw little of each other.
11. When he was a boy, Amy used to take Philip to visit the graves of his parents. She did not explain to him why they were buried separately.
12. James (I) and Amy in due course left London and went to live in the Isle of Sheppey. Amy Walker died in 1972 and her ashes (her remains were cremated) were interred at Maidstone Crematorium (Vintners Park) – Maidstone Crematorium is much nearer to the Isle of Sheppey than Streatham Park Cemetery. James (I) died in 1983 and Philip arranged for his remains to be cremated and interred at Maidstone Crematorium. It was not possible, however, for his ashes to be buried together with those of Amy; they are interred in separate plots.
13. After he had grown up, Philip used to visit his parents' graves at least once in each year. He tells me that as a child he had been distressed that they were buried separately, and that his distress has not diminished with time. He says that his distress was increased when in the 1980s the cemetery cleared the memorials from his parents graves:

When I enquired, I was informed that the purpose of this was to assist grounds maintenance. However, the maintenance standards at that cemetery have in my experience been very poor, particularly in the sections where my parents buried.

14. The removal of the memorials meant that Philip was uncertain where precisely his parents' graves were. Recent more precise measurement has revealed to him that he was putting flowers in the wrong place.

15. Philip conceived the idea of exhuming his parents' remains in the late 1990s. He took advice from a solicitor, who advised him that he had no chance of achieving what he wanted. Accordingly, he let the matter rest. (I am not sure what the basis for this advice would have been because at this time Philip apparently was under the impression (derived from what the Cemetery had told him) that both graves were in unconsecrated ground.) In 2001 he saw a television programme about Peter Mitchell, who provides advice about exhumation and got in touch with him. At this point it seemed that it would be a matter of getting appropriate licences from the Home Office. The difficulty was that Philip was out of contact with James (III). They had last met at their grandfather's funeral, where James (III) had indicated that he wanted no further contact with him. After advertisement, Philip did trace James (III), but James (III) informed Peter Mitchell that in no circumstances would he agree to exhumation.

16. However some years later, James (III) sent Philip a Christmas card, and the two branches of the family got together again; Philip has written: *This was the starting point for us to resolve our differences and forge a new relationship.*

17. He continued

Within days my brother's adult children made their first visit to the graves of their grandparents in Streatham Park Cemetery. They were appalled at the state of the area around the graves and that they could only locate the graves by reference to the holly wreaths upon them. They encouraged my brother to give his consent to my plan to re-inter the remains in Belgium, which he did in April 2007.

The time between April 2007 and the date of making the petition was taken up with securing the agreement of the Belgian authorities and sorting out the details.

18. As the above indicates, the proposal is to re-inter the remains of James (II) and Rose in Belgium. I turn now to the details, and to details of what is proposed in respect of the remains of Rosemary.

19. It is proposed that the remains of James (II) and Rose should be interred in the municipal cemetery at Court St Etienne, which Philip tells me is a well maintained cemetery. Burial

rights there are apparently² for 50 years, although extendable; if the right is not extended the remains are re-interred in a common grave.

20. As regards the remains of Rosemary, it is proposed that, following exhumation, they should be taken to Maidstone Crematorium, cremated, and interred with the ashes of James (I).

The justification put forward for the petition

21. The justification for what is proposed is founded in the proposition that the burial of the remains of James (II) was not in accordance with his wishes – he wanted his remains to be buried with those of his wife Rose. There may be an issue about delay, which I shall come to in due course, but essentially what the petition is about is bringing this about in an appropriate way, and in a way that brings comfort to Philip and to other members of his family, knowing that their Father's wish had been honoured.
22. There are of course two ways in which the desired objective could be brought about without taking the remains to Belgium. The remains of Rose could be exhumed and placed in the grave of James (II), or the remains of James (II) could be exhumed and placed in the grave of Rose.
23. Philip's particular objection to these suggestions is because of maintenance standards at the cemetery. I have already referred to the removal of the memorials. I have not gone into this with the cemetery – it happened, after all, more than 20 years ago - but it does seem that Philip has some concerns about the justification for what then happened. More recently Mr Mitchell on Philip's behalf has written:

The maintenance standards in the cemetery are very poor in the area where his father's remains lie. There are piles of spoil and debris, and on a visit last year it looked as if there had been a disturbance of the grave. In fact, it seems that surplus spoil was spread over the grave and adjoining areas for no apparent reason.

² There is a suggestion in the papers that they may be for 75 years, but the municipality's documentation is to the contrary.

24. As stated above, I have visited the cemetery. It was a bright February morning, but the cemetery struck me as somewhat bleak – perhaps because it is essentially flat and lacking in landscape features, and seems at first glance to be full of memorials, all of which are situated very close together. There are some cleared areas, evidently dating from the 1980s, and these now form small areas of rough grassland, albeit not overgrown. It is in such cleared areas, albeit at a distance of some 300 yards, that Rose's and James (II)'s remains are buried. They are not marked, and when he goes to visit, Philip has to measure out the distance from other graves to locate them precisely. The owners of the cemetery evidently run thick tyred vehicles over the grassed areas when they transport soil around the cemetery, and one such set of tracks runs very close to the grave of James (II). When I visited, there was near James (II)'s grave a headstone which had become separated from the grave it was intended to mark, and was lying askew in the grass.

The law

25. The law is summarised by the Court of Arches in *In re Blagdon Cemetery*³.
26. In her judgment, the Dean began by stating that permanence was the norm of Christian burial:

Lawful permission can be given for exhumation from consecrated ground ... However, that 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.

27. Having considered the cases the Dean set out the test to be applied when considering applications for exhumation. She said:

We have concluded that there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be

³ [2002] Fam 299 (Court of Arches).

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...

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.⁴

The Court then identified a number of factors which could be relevant to an application to permit exhumation. Only one is relevant, and that is a matter which potentially sounds against permission, namely the lapse of time since burial. I shall consider this in due course.

Consideration

28. I should begin by emphasising that I am only concerned with the remains of James (II) and Rosemary; I have no jurisdiction over the remains of Rose. As the fact that she was buried in the part of Streatham Park Cemetery set apart for Roman Catholic burials indicates, she was a Roman Catholic. As I understand Roman Catholic canon law, this means that the burial plot will have been blessed before Rose's remains were interred in it. However despite my lack of jurisdiction over Rose's grave, in these circumstances I would not, on the face of it, have wanted to make any order which would have facilitated something about which the authorities of the Roman Catholic Church were not happy. In this regard, I have been supplied with a letter dated 8 July 2010 from the Most Revd Peter Smith LLB JCD, who is the Roman Catholic Archbishop of Southwark. He has written:

⁴ See paragraphs 22 – 25 of the judgment.

Having considered the petition and the associated documentation, I have no objection whatsoever to it, and I think that given the circumstances of the petitioner, the exhumation and the reburial of the remains will finally bring closure and peace of mind for him.

There is no obstacle from the point of view of the canon law of the Catholic church, and I wholeheartedly support the petition.

29. Having cleared this matter out of the way, I turn to consider the particular justification that arises in this case. This is the proposition that James (II)'s remains were buried in Rosemary's grave against his wishes, and that their remains should now be brought together, as he wished.
30. It does look to me as though James (II) did intend that his remains should be buried in Rose's grave. This is because Rose's remains were buried at a depth of 7 feet; and because of the absence of any indication as to why he would want his remains to be buried with Rosemary rather than with Rose.⁵
31. Philip firmly believes that his grandparents overrode his father's intentions. Although he was young at the time, he was conscious that Amy and Rose did not "get on" in a way that went beyond typical family frictions.
32. I am, however, troubled about making a finding that Amy did indeed override James (II)'s wishes. This is generally because I am considering events of more than 50 years ago in the light of slender evidence, and I am conscious that such a finding would involve criticism of Amy. All other things being equal, it may seem unlikely, but it is certainly possible that James (II) may have changed his mind about where he wished to be buried at some time after the death of Rose. One can certainly imagine that in 1960, it might have seemed more appropriate than it might seem now that a husband and wife of different denominations of the same Christian faith should be buried separately (I think

⁵ It may also be significant that the inscription on James (II)'s grave referred to him as a son and father, but not as a husband.

that there might have been particular concern about the burial of someone who was not a Roman Catholic in unconsecrated ground)⁶. Further, standing back, although I am considering the intention of James (II), it seems to me that it cannot now matter to him where he is buried. In *In re St Bartholomew, Horley*, I said this:

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.

33. It seems to me that, if, as I have decided, a faculty should issue in this case, it is for the benefit of Philip and his living family. Against this background, it is evident that ultimately what this case and others like it are about is what the Petitioner thinks is the position. (I emphasise the word *ultimately*, a matter to which I shall come back). Absent some discovery, it seems to me that Philip is never going to change his mind about the circumstances of James (II)'s burial. If his parents' remains were not brought together he would think that James (II)'s wishes had not been honoured.
34. It seems to me that Philip's belief is a reasonable one, having a basis in objective fact. In these circumstances, I am satisfied that exceptional circumstances have been made out, which may justify exhumation. That they do not in this case **necessarily** justify exhumation, is because, as I have explained, exhumation of James (II)'s remains is not the only way in which those of James (II) and Rose may be united. I shall consider this further aspect in a moment.

⁶ It occurs to me that Amy may have been particularly concerned to ensure that her son, having committed suicide, should be buried in consecrated ground.

35. I am very conscious in what I have said above that there are petitions to the consistory courts for exhumation which are made in good faith which have no objective justification, but which, if permitted, would bring comfort to the petitioner. These are, if one likes, "hard" cases with which every Diocesan Chancellor will be familiar. They cannot be permitted, it seems to me, if the norm of permanence of Christian burial is to be upheld. They are, however, readily distinguishable from this case. I am permitting exhumation here because of what Philip believes on reasonable grounds. To say that the justification ultimately rests on what he believes is not to say that is the only component of what has to be shown: I emphasise that there has to be an objective and reasonable basis for the belief.

36. If the case before me were to exhume the remains of James (II) so that, in accordance with what Philip reasonably believes to have been James (II)'s wishes, they could be interred in the grave of Rose, I think that, subject to any issue of delay, I would not have to consider any other aspect of the matter. But that is not the case here: what Philip proposes is that the remains of James (II) and Rose should be united, but in Belgium not in Streatham Park Cemetery. As set out above, the reason that he does not want to inter the remains of James (II) in the grave of Rose is, first, his unhappy experience when the graves of James (II) and Rose were cleared without reference to him and, more recently, the quality of maintenance; and on the positive side, that he thinks that Court St Etienne is a more appropriate place for the remains of James (II) and Rose to be interred. Court St Etienne is where

- Rose lived
- James (II) carried out brave war service
- James (II) and Rose were married
- Philip has many relatives
- Philip often visits.

37. I do not think that the quality of maintenance at the cemetery itself rules out the solution of interring the remains of Rose in the grave of James (II). I think that, marked with a

new memorial, the grave would not be subject to the risk of being driven over by vehicles, although it would probably look a bit sad on the edge of a grassed area and close to what is now used as a track across the grass for vehicles. Nor do I think that the answer is to be found in a somewhat legalistic analysis which points out that if the remains of James (II) had been buried in the grave of Rose, as Philip considers should have happened, the remains of James (II) would now be outside my jurisdiction. Rather it seems to me that if one is considering permitting exhumation in circumstances such as these, what the Court should be striving to facilitate is the best possible solution. It does seem to me that although exhuming the remains of Rose and interring them in the grave of James (II) would achieve the aim of uniting the remains of Rose and James (II) and would have the benefit of only requiring the exhumation of the remains of one person rather than two, it would not be the best solution in the circumstances. I am persuaded that the best solution would be what Philip now proposes. I think in reaching this conclusion, I can appropriately take into account the tragic circumstances of the deaths of Rose and James (II), and the fact that permitting the solution proposed by Philip will assist the healing of scars which those deaths have left.

38. The above is on the assumption that there is no objection to the burial in the municipal cemetery at Court St Etienne. It seems to me that there is no such objection. In *In re Blagdon Cemetery*, the Court had to consider whether there was any objection, if exhumation from consecrated ground was otherwise acceptable, because the remains were proposed to be re-interred in the unconsecrated section of a municipal cemetery elsewhere in England. The Dean addressed the matter in this way:

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 Trisram 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 reinterred 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 Re-interment in unconsecrated ground which is not in a local authority cemetery is a different matter. No general inference of the suitability for re-interment 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.

17 In the present case the principle of suitability of re-interment in unconsecrated ground, in the absence of any available consecrated ground, is not an issue for the reasons we have already given.

39. In that case, the Court could reasonably assume that the re-interment would be in land that would be suitably maintained and would be permanent. In the present case, I can assume that the re-interred remains will be in a grave that will be suitably maintained but I cannot be certain as to what will happen to them after 50 years. I think it likely that, if as one might hope, there are still members of the family around who keep the memory of Rose and James (II) alive, they would purchase an extension of the right of interment. But I have to face the possibility that, sooner or later, the remains might come to a common grave. This, as I understand it, is the tradition in Belgium.
40. I think that by permitting exhumation in these circumstances I am contemplating the erosion, to a degree, of the principle of the permanence of Christian burial within the Anglican tradition. Nonetheless, if the remains were to end in a common grave it would be many years after they had been exhumed in England and at a time when, sadly, no one thought it important that this should not happen. I do not think that this is a significant erosion of the principle of permanence.
41. I turn to lapse of time. In *In re Blagdon Cemetery*, the Dean identified delay as a potential reason for not granting a faculty. If, before her death, Philip had felt able to raise with Amy the circumstances of the burial of the remains of his father, any petition made in respect of exhumation would have been conducted on a more informed basis and potentially might have been brought sooner. Nonetheless I appreciate that he may have felt inhibited from doing so; and that, after her death, he may also have felt inhibited from raising the matter with James (I). In principle he might have pursued the matter after James (I)'s death, but at that point there may have been difficulty in getting the consent of

James (III); and it may be that the idea would not have been pursued if the memorials over both graves had not been removed. In any event, it seems to me that delay at this point ceases to be a matter of such importance.⁷ I am prepared to say that, in this case, there may have been some delay (ie after the removal of the memorials and before Philip thought of the idea of exhumation) but it does not seem to me to be very relevant. As I understand it, at this point, Philip assumed, without advice, that exhumation would not be possible. It seems to me that it would be unrealistic to hold that any delay could be a decisive factor against exhumation in this case, all other things being equal, and I do not so hold.

42. The final aspect of this matter relates to the proposed exhumation of the remains of Rosemary, their cremation and re-interment in Maidstone.
43. First of all, I can see that there is an argument that the remains of a stillborn child should be treated differently to the remains of a child who has lived and died, and that the guidance contained in *In re Blagdon Cemetery* does not apply. However, without hearing argument, I would not be prepared to treat the remains of a stillborn child in any way differently to those of a child that has lived and died.
44. Whatever may have been the thoughts of Amy and James (I) about who might in the future be interred in the grave of Rosemary, there is no mistake or misunderstanding surrounding the burial of Rosemary. Rosemary has no link with Maidstone apart from the fact that the ashes of her parents are interred there. Her grave is currently unmarked, but it would be possible for a new memorial to be erected which could mark it. What is proposed requires not only the exhumation of remains which were interred nearly 70 years ago, but also their cremation. I do not feel that the case for the exhumation of the remains of Rosemary is a strong one. I am mindful in saying this that the Dean in *In re Blagdon Cemetery* identified as a relevant matter the fact that the exhumation was part of

⁷ I have in mind that cases involving a simple mistake should if possible be considered immediately after the mistake has occurred. If an application is not made for such correction within a short space of time, the Court is entitled to ask for an explanation.

a process of creating a family grave. I do not read the Dean as saying that of itself the creation of a family grave would ever, or usually, amount to exceptional circumstances⁸. However this may be, a family grave would not be created in the present case - because the remains of Amy and James (I) are not interred together. I appreciate that the “spirit” of the family grave exception (insofar as it can properly be viewed as an exception) may be said to apply, and with it one of the benefits of the exception – the fact that the exhumation, if permitted, would “free up” a grave space. Nonetheless, taking everything into account, I am unpersuaded on the material before me that exceptional circumstances arise whereby I should permit exhumation of the remains of Rosemary.

45. I have not had detailed written submissions to me on this aspect of the case, and it would not be appropriate to refuse this part of the petition without hearing oral argument, if Philip so wished.
46. In the circumstances I shall order that a faculty shall issue for the exhumation of the remains of James (II), but that part of the petition which seeks a faculty for the exhumation of the remains of Rosemary shall be dismissed unless within 28 days of this judgment the Petitioner requests that there should be an oral hearing. Note that because the re-interment of the remains of James (II) will not be in consecrated land, the licence of the Ministry of Justice under the Burial Act 1857 will be required.
47. As is usual, the Petitioner will pay the correspondence fees incurred by the Registrar.
48. I should conclude that I am grateful to the care and restraint with which Mr Philip Walker has presented his case, and for the assistance which Mr Mitchell has skilfully given both him and me. Determining this case on paper has undoubtedly saved costs, but inevitably it has involved me raising a series of detailed questions. Mr Mitchell dealt with these efficiently and thoroughly.

⁸ See paragraph 40 of the judgment.

PCip Pg .

PHILIP PETCHEY

Chancellor

16 February 2011