

21 MAR 2012

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK
IN THE MATTER OF WEST NORWOOD CEMETERY
AND IN THE MATTER OF A PETITION BY ALLAN JAMES JENKINS

JUDGMENT

Introduction

1. This a petition dated 30 January 2012 by Mr Allan James Jenkins (“Mr Jenkins”) who seeks a faculty to exhume the remains of his late mother, Mrs Marjorie Helena Jenkins (“Mrs Jenkins”), from a grave in the consecrated part of West Norwood Cemetery and to re-inter them in the same grave, but at a greater depth. Mrs Jenkins died on 8 January 2010 and her remains were interred in a family grave on 28 January 2011.
2. Mr Jenkins is assisted by Peter Mitchell Associates. Mr Peter Mitchell of that firm has wide experience of the practice of burial in this country and in written representations on Mr Jenkins’s behalf has assisted me with his expertise. I have also been assisted by the comments of Mr Ken Dry, the Cemeteries, Crematoria and Coroners Manager of the London Borough of Lambeth, which owns and manages the Cemetery.

The basic facts

3. As may be guessed, there is a “history” to this matter.
4. There were three burials in the grave before the burial of the remains of Mrs Jenkins. These were as follows:

1939 Alice Tribe

1949 William Hewitt

1959 Johanna Hewitt.

5. Johanna Hewitt was Mrs Jenkins's mother, and Mr Jenkins's grandmother; William Hewitt was Mrs Jenkins's father and Mr Jenkins's grandfather; Alice Tribe was Johanna Hewitt's sister and, accordingly, Mrs Jenkins's aunt and Mr Jenkins's great aunt.
6. The cemetery records show that the remains of Alice Tribe were buried at a depth of 11 feet, of William Hewitt at a depth of 10 feet and of Johanna Hewitt at a depth of 9 feet. Cemetery records also show that in circumstances where an initial burial has been at 11 feet, it has been possible to accommodate five burials in a grave. The fourth burial would be at 8 feet and the fifth burial at 7 feet. In recent years, coffins are generally made to greater depth than 1 foot, typically being about 1 foot 3 inches in depth, and it is to be expected that the coffin in which Mrs Marjorie Jenkins's remains were buried was of this depth. However even leaving a margin between the level at which the remains of Mrs Hewitt were interred and allowing for Mrs Jenkins's coffin to be of a depth of 1 foot 3 inches, there should still be space in the grave to accommodate five burials.
7. Mr Jenkins, who used to visit the grave regularly with his late mother, says that it is clear to him her understanding was that the grave could accommodate up to five burials. Also he attended the burial of the remains of Mrs Hewitt. He clearly remembers that the grave was dug to the depth of the burial of Mr Hewitt's remains:

he remembers seeing the coffin and the plate on it. This is independent verification of the cemetery's records.

8. West Norwood Cemetery was originally a private cemetery. It was acquired by the London Borough of Lambeth. Its practice is so to use graves that they accommodate only four burials, as follows:

Burial 1 at a depth of 11 feet

Burial 2 at a depth of 9 feet

Burial 3 at a depth of 7 feet

Burial 4 at a depth of 5 feet.

9. In accordance with this practice, the grave that was dug to accommodate the coffin containing the remains of Mrs Jenkins was dug to a depth of 5 feet.
10. This would not preclude a fifth burial in the grave. However because of the soil conditions at West Norwood this could not be achieved by the simple expedient of the fifth burial being at a shallower depth than usual. Instead, what would be required would be the construction of a bricked chamber on top of the existing interments. This would have the effect of precluding any cremated remains being interred within the grave.

The basis for the petition

11. When the time comes, Mr Jenkins wishes his remains to be interred by way of burial in the grave in which his mother, grandmother, grandfather and great aunt are already interred. His wife wishes her remains to be cremated and the ashes interred within the

same grave, and (unless the bricked chamber approach is adopted) there is scope for the interment of further ashes within the grave.

12. Against this background, Mr Jenkins wants permission for the exhumation of the remains of his late mother and for them to be reburied within the same grave at a greater depth. This will enable both his own remains to be buried there in due course without recourse to the expedient of the bricked chamber, and also for the ashes of further family members to be interred there.¹

Position of London Borough of Lambeth

13. The London Borough of Lambeth is amenable to a faculty being granted. Mr Dry, however, is not convinced that there is room above the remains of Johanna Hewitt to enable the remains of Mrs Jenkins to be lowered. He envisages that, if this proved to be the case, it would then become necessary to re-inter the remains of Mrs Jenkins more or less where they are.

Consideration

14. What Mr Jenkins wants to achieve makes obvious sense. However, anyone who has read this judgment to this point will ask himself or herself the question *Why was this matter not addressed before the burial of the remains of Mrs Jenkins?*
15. Mr Jenkins says that he did raise it, and it seems that this is accepted by the London Borough of Lambeth, although it does not necessarily accept Mr Jenkins's account of the matter. It is clear that Mr Jenkins did raise it at the graveside before the burial of

¹ I raised with Mr Jenkins the possibility that his wife might predecease him, potentially leading to a situation where the interment of her remains in the grave might preclude the burial of his remains later. The position is that, if this situation were to arise, it is intended that Mrs Jenkins's remains would be stored until after the death of her husband.

the remains of Mrs Jenkins, but by then it was too late to do anything. The matter then became the subject of a complaint to the Council, and subsequently to the Local Government Ombudsman. Both complaints were rejected. I have not seen copies of either the complaints or the determinations of them.

16. This aspect of the matter is relevant to my decision because it seems to me that if the question of the appropriate depth of the burial could have been raised with the Council before the burial of the remains of Mrs Jenkins but was not, that fact would sound against the granting of a faculty. As it was, the matter was raised. For the reasons I explain below I am going to grant a faculty. For these purposes it seems to me that it is enough that the matter was raised and that I do not need to go into the rights and wrongs of why the question of the depth of the burial of the remains of Mrs Jenkins was not addressed in 2010.
17. In *In re Blagdon Cemetery*² the Court of Arches stressed that permanence was the norm of Christian burial and that permission for exhumation should only be granted exceptionally. It seems to me, however, that rather different considerations apply to a proposal which is for exhumation and re-interment in the same grave.
18. In recent years there have been concerns expressed about the shortage of burial space. One of the suggestions that has been made is that additional space could be made available within churchyards and cemeteries by the practice known as “lift and deepen”, ie lifting the remains in a grave and re-burying them at a greater depth in order to provide additional space. The Government consulted on such proposals in 2004. In its response dated 21 July 2004, the Cathedrals and Church Buildings Division of the Archbishops’ Council made it clear that it welcomed the practice of

² [2002] Fam 299.

“lift and deepen” in respect of graves in consecrated ground and did not suggest that the general objection to exhumation applied to it.

19. I think that this represents the correct approach. Historically, churchyards were used over and over again and to facilitate this it must have been necessary from time to time to lift and deepen. If remains are not moved, save to be placed deeper in the ground, it seems to me that this is not exhumation to which the presumption articulated in *In re Blagdon Cemetery* applies. This facilitates the efficient use of burial space which it is clear is to be encouraged. In *In re Blagdon Cemetery* the Dean of the Arches³ said:

*Burials in double or treble depth graves continue to take place at the present time. They are to be encouraged. They express family unity and they are environmentally friendly in demonstrating an economical use of land for burials.*⁴

- 20.0 This said, respect for the dead suggests that human remains be disturbed as little as possible. In this regard, as I indicated above, I would have been concerned if in the present case Mr Jenkins had not raised the question of the depth of the burial with the cemetery authorities at the appropriate time; however I am satisfied that he did. Given this, it seems to me that a proposal to facilitate a fifth burial in this grave without the trouble and expense of the construction of a brick chamber and in order to facilitate the further use of it for the interment of ashes is an appropriate one for the grant of a faculty.

21. It does appear as if all that will be required is to deepen the grave by lowering the remains of Mrs Jenkins within it. However, as I have explained, Mr Dry has raised

³ Dr Sheila Cameron QC.

⁴ See paragraph 36 of that judgment.

the concern that it may not be possible so to lower the remains. It seems to me that it would be potentially very distressing for Mr Jenkins and his family for the exhumation to take place, for it to be discovered that the remains cannot in practice be lowered and for the grave then to be restored in circumstances where I would imagine that by deepening and lowering the other burials in the grave it would be possible to achieve the necessary depth. Accordingly what I shall do is to grant a faculty for the exhumation and reburial of the remains of Mrs Jenkins at a depth sufficient to permit the interment of a further burial in due course. As part of that faculty I also give conditional permission to “deepen and lower” the other remains interred in the grave if it is necessary to achieve the required depth. I shall expect there to be the minimum disturbance to those remains consistent with the object of achieving sufficient depth. Both Mr Mitchell and Mr Dry have indicated that they consider the grant of this additional conditional permission to be appropriate in the circumstances.

Ministry of Justice

22. I am not convinced that a licence for the lifting and deepening proposed requires a licence under section 25 of the Burials Act 1857. However, Mr Mitchell takes the view that it is, and has undertaken to apply for a licence⁵. I do not envisage that this will be in any sense controversial and it was evidently sensible for a faculty to be obtained before such a licence was sought.

⁵ The 2004 Report of the Archbishops’ Council records the view of the Home Office at that time as being that a licence was required in these circumstances, and I imagine that that departmental view is now that of the Ministry of Justice (which has succeeded to the Home Office’s responsibilities in this area).

Philip Petchey

PHILIP PETCHEY

Chancellor

20 March 2012