IN THE CONSISTORY COURT OF
THE DIOCESE OF OXFORD

Neutral citation no. [2017] ECC Oxf 2

19 April 2017

Before:

THE REVEREND AND WORSHIPFUL ALEXANDER McGREGOR,
CHANCELLOR

In the matter of :

Fairmile Cemetery, Lower Assendon

Between:

(1) Alexis Leventis

Petitioner

– and –

(1) Louise Morley

(2) Linda Miller

(3) Victoria Miller

(4) Henley-on-Thames Town Council

Parties Opponent

Mr David Cheetham (Debenhams Ottaway) for the Petitioner
The first, second and third Parties Opponent in person
Mr Nicholas Leviseur (instructed by Director of Law and Governance, Oxfordshire County Council) for the fourth Party Opponent

Hearing date: 20th March 2017

JUDGMENT

The Chancellor:

Factual background

1. Fairmile Cemetery is situated just outside the village of Lower Assendon, to the north-west of Henley-on-Thames. It is owned and managed by Henley-on-Thames Town Council as provided for in the Local Authorities Cemeteries Order 1977 (SI 1977/204). On 21st July 2003, the Bishop of Dorchester (in the exercise of functions delegated to him by a scheme made under section 11 of the Dioceses Measure 1978) consecrated part of the cemetery following a petition from the Town Council to that end.

2. On 23rd February 2012 the body of Mr Constandinos Leventis was buried in plot 192, in the consecrated part of the cemetery. His widow, Mrs Christine Leventis acquired from the Town Council an exclusive right of burial in respect of that plot with effect from the date of his burial.

3. Members of the Leventis family subsequently acquired grants of exclusive rights of burial in three adjacent plots. Mrs Christine Leventis acquired such a right in respect of plot number 193 on 25th April 2012 (her intention being that this plot would be available in due course for the burial of her daughter, Anna Leventis-Stevens; Mrs Leventis would herself be buried in plot number 192 with her late husband whose plot had been dug to double depth to accommodate this). On 27th March 2013 Mr Alexis Leventis, son of Mr Constandinos Leventis, acquired an exclusive right of burial in plot number 173 (his intention being that this plot would be available in due course for the burial of his sister, Chrysoulla Jackson). On 8th August 2013, Mr Alexis Leventis acquired an exclusive right in respect of plot number 172 (which was to be for his own burial).

4. The exclusive rights in respect of these three plots were acquired in pursuance of a desire which had been expressed by the late Mr Leventis that his family be buried together in a square configuration. The four plots in respect of which members of the Leventis family acquired exclusive rights together formed a rectangular block, which is referred to slightly less precisely in the pleadings and witness statements as a square.

5. On 25th April 2013 the body of a Mr John Summersby was, as a result of an error, buried in plot 171. Mr Summersby in fact had an exclusive right of burial in plot 170. The location of his burial was not correctly noted in the cemetery records and the error remained unknown for some two years.

6. Mr Victor Miller died on 25th March 2015. On 2nd April 2015, Mr Justin Morley, his son-in-law, applied for and was granted an exclusive right of burial in the consecrated part of the cemetery in what was stated in the application and grant to be plot 171. On 13th April 2015 the body of Mr Victor Miller was buried (at double depth so as to accommodate the body of his widow, Mrs Linda Miller, in due course). But, following the earlier but as yet unidentified error in relation to the burial of Mr Summersby, a further error was made by those responsible for the management of the cemetery with the effect that the body of Mr Miller was buried in plot 172 – the exclusive right of burial in which had already been granted to Mr Alexis Leventis.

7. The true situation was discovered by Mrs Christine Leventis and her daughter Anna Leventis-Stevens in the second half of April 2015 when visiting the grave of Mr Constandinos Leventis. Mr Alexis Leventis – to whom the rights in respect of plot 172 belonged – was informed by his mother of what had happened within a fortnight.

8. A meeting took place between members of the Leventis family and the then Town Clerk and the then Cemetery Manager about a fortnight after the discovery of the situation. The Leventis family made it clear to the staff of the Town Council that they wished to assert their exclusive rights in respect of plot 172.

9. The Town Clerk and the Cemetery Manager made enquiries with the Diocesan Registry and received a letter from the Registry dated 30th April 2015 explaining the procedure for petitioning for exhumation, and matters that were likely to be material to the Court's consideration. That letter was forwarded to Mr Alexis Leventis on 5th May 2015 under cover of a letter from the Town Clerk which stated that it was Mr Leventis' choice whether to petition for a faculty. It explained that if he chose to do so, the Court would order that the family of Mr Miller be given special notice of the petition and that they would be entitled to object.

10. On 8th May 2015, Mr Leventis wrote to the Diocesan Registry stating, "I would like to proceed with a petition for a faculty from the Consistory Court." His letter then gives some reasons as to why he wishes to do so. It also expresses concern for the Miller family and recognises that his seeking to exhume Mr Miller's body is likely to be difficult for them; but he says, "Hopefully as not too much time has passed since burial this will make things easier."

11. The Registry replied to Mr Leventis on 13th May 2015 explaining the steps he should take in order to submit a petition. That letter included a pro-forma petition. It also suggested that he might wish to obtain legal advice and provided the details of two solicitors who practise in ecclesiastical law and stated that it would be possible to suggest others if Mr Leventis wished. The letter set out a list of documents and other items that Mr Leventis should submit along with his petition. It informed him that notice of his petition would be served on the family of Mr Miller and that the proceedings might be contested. It explained that the Registry would not approach Mr Miller's family until a petition had been lodged with the Court.

12. On 12 June 2015 the then Town Clerk met Mr Justin Morley (Mr Miller's son-in-law) and explained to him that the Leventis family were asserting their exclusive right of burial in plot 172 and wished Mr Miller's body to be removed. The Town Clerk sent Mr Morley an email following that meeting in which he explained that the Miller family would be contacted to seek their views as part of the faculty process.

13. On 23rd June 2015, the Town Council sent a cheque to the Registry under cover of a letter which stated, "Please find enclosed a cheque for £244.60 to enable Mr A Leventis to lodge his petition in regards to plot 17s [sic] at the Fairmile Cemetery, Henley on Thames. I have also enclosed a copy of your letter to Mr Leventis and his reply to your office dated 8 May 2015."

14. On 15th September 2015 the Town Clerk wrote to Mr Leventis stating,

> I have recently been contacted by the office of the Diocesan Registry, who advised me that you have instructed them that Henley Town Council will be lodging a petition to have the body of Mr Miller exhumed.
>
> Unfortunately, this is not the case, as a gesture of good will, the town council made the relevant payment on your behalf to enable you to raise the petition, but as you clearly state in your letter to the [Diocesan Registrar] on 8 May 2015, you will be petitioning for a Faculty from the Consistory Court.

15. At some point between 15th September and 28th September 2015 Mr Leventis instructed his solicitor, Mr Cheetham. Mr Cheetham wrote to the Town Clerk on 28th September asking for information about the burial of Mr Miller, and about his family, which he required for inclusion in the petition. He also asked for details of how the error as to the correct place of burial had been made.

16. Emails were exchanged between Mr Cheetham and a member of the Town Council staff on 21 October. The Town Council then replied to Mr Cheetham on 22 October 2015 describing the background and providing various details. It did not provide details of the Miller family. On 2nd November Mr Cheetham wrote again to the Town Council seeking this information. Having received no reply, Mr Cheetham chased this up by letter on 9th November and 16th December. The Town Council replied on 22nd February stating that they had sought the consent of the Miller family to the disclosure of their contact details.

17. Some details were disclosed and Mr Cheetham contacted Mr Morley by email on 29th February 2016, attaching a draft of the faculty petition and asking for a postal address for service.

The Proceedings

18. A petition by Mr Alexis Leventis for the exhumation of the body of Mr Miller from plot 172 dated 13th April 2016 was lodged at the Registry by 27th April.

19. Special notice of the petition was given to members of Mr Miller's family. Three letters of objection were received in response, from Mrs Linda Miller (Mr Miller's widow), Mrs Louise Morley and Miss Victoria Miller (Mr and Mrs Miller's daughters).

20. On 23 August 2016 I gave directions. I specially cited the Town Council pursuant to section 13(2) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 on the grounds that it appeared the Town Council was responsible for the act or default in consequence of which the proceedings had been instituted and that the Court would need to consider making an order for costs against the Town Council.

21. Those directions also provided for the filing of particulars of objection, replies, witness statements and for the holding of a hearing on the first available date after the end of the timetable for filing documents. The timetable was subsequently extended at the request of some of the parties.

22. Joint particulars of objection were filed by Mrs Linda Miller, Mrs Louise Morley and Miss Victoria Miller. Particulars of objection were also filed by the Town Council who thereby became a party opponent in its own right.

23. Directions for the hearing itself were given in December 2016 and January 2017.

24. The hearing took place at Reading County Court on 20th March 2017. At the hearing, the Petitioner, Mr Alexis Leventis, was represented by Mr Cheetham. Mrs Louise Morley appeared in person and on behalf of her mother and sister. Mr Nicholas Leviseur of counsel appeared for the Town Council.

25. Evidence for the Petitioner was given by Mr Leventis himself, and by his sisters, Mrs Anna Leventis-Stevens and Mrs Chrysoulla Jackson. Evidence for the Miller family was given by Mrs Morley and Mrs Linda Miller. Mrs Janet Wheeler, who became Town Clerk on 4th April 2016, gave evidence for the Town Council. (The previous Town Clerk left on 12 February 2016 and the other member of staff who had previously been involved was on

long-term sick leave.) As Mrs Wheeler had had no involvement in the matter prior to April 2016, her evidence relating to the earlier period was based on the correspondence on the Town Council's files.

26. The case for the Petitioner was that what had happened amounted to a mistake of the sort identified by the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299 at paragraph 36(iii). As an error in administration on the part of the Town Council this was an example of the sort of case where "faculties can be readily granted". The circumstances of this case were similar to those which arose for decision by this court in *Re Twyford Cemetery* [2015] PTSR D47, that the Petitioner was doing no more than seeking to secure a right that legally belonged to him and that there was nothing to suggest that he was doing that for anything other than entirely proper motives; that therefore most weight should given to the legal position of the parties and judgment for the Petitioner should be the result.

27. The case for the Miller family was that none of the exceptions to the presumption of permanence of burial identified in *Blagdon* were applicable. Although a mistake had been made by the Town Council, the circumstances did not justify exhumation. An alternative burial plot adjacent to the plots reserved by the Leventis family was available. Over a year had elapsed between the burial of Mr Miller and the bringing of the proceedings, during which time they had reasonably assumed that no action was to be taken. This case was distinguishable from *Twyford* because Mr Miller could not have been buried in the plot in respect of which his family had acquired an exclusive right of burial, that plot already being occupied by the body of Mr Summersby. If Mr Miller's body was to be exhumed that would seem to have further implications for the permanence of the burial of Mr Summersby whose body was buried in plot 171 but in respect of which the Miller family had been granted an exclusive right of burial.

28. The Town Council accepted sole blame for what had happened up to and including the burial of Mr Miller and publicly apologised to both families for the distress they have faced as a result. Nevertheless, it had decided that it could not support the petition and was therefore a party opponent. It saw its principal role as being to assist the Court. The Council suggested that there were a number of factors which operated in favour of the presumption against exhumation, in particular the delay in bringing the proceedings.

The evidence

29. The facts concerning what had happened up to and including the burial of Mr Miller in April 2015 were not in dispute and are as I have set out above.

30. There was some dispute as to the length, nature and cause of the delay between the discovery of the mistake by the Leventis family in April 2015 and the lodging of the petition in April 2016.

31. In cross examination Mr Leventis said that he had first become aware that Mr Miller's body had been buried in plot 172 – in respect of which he had an exclusive right of burial – when he was told by his mother between 10 and 14 days after that fact had been discovered by her and Mrs Leventis-Stevens. He acknowledged receiving the letter from the Town Council dated 5th May 2015 which stated that it was his choice whether to petition for a faculty and enclosed the detailed letter from the Registry. So far as his letter to the Registry of 8th May was concerned, he said that it was his understanding that he "had to write to the diocese to start the ball rolling". He said that he knew there was a formal process but he thought the Town Council would deal with it.

32. He acknowledged receiving the letter from the Registry dated 13th May 2015 inviting him to submit a petition and providing details of solicitors who might be able to act for him. In response to a question from Mr Leviseur as to why, in the light of that letter, he was so certain that the Town Council would lodge a petition, he replied that it was morally right that they should do so as it was their mistake which made a petition necessary. In response to the question as to why he had not, in that case, been chasing the Town Council to commence the proceedings, he replied that the relevant member of the Council staff was meant to be dealing with the matter. He said that if he had known that the Town Council were not going to petition, he would have gone to a solicitor and not wasted time. Mr Leventis accepted that he first instructed Mr Cheetham between 15th and 28th September 2015.

33. In approaching Mr Leventis's explanation for the delay between the discovery that Mr Miller had been buried in plot 172 in April 2015 and his instructing Mr Cheetham in September 2015, I make due allowance for the fact that Mr Leventis will naturally have been distressed by the matter. I also accept that he will not have been familiar with the procedure for obtaining a faculty. But even making those allowances, I am unable to accept that he was, on any reasonable basis, entitled to assume that the Town Council would petition for the exhumation of Mr Miller's body or that it was actually doing so. It is clear from the letters he received from the Registry that it was he who would need both to decide whether to petition and, if he wished to do so, to submit the petition himself. There is nothing in the correspondence which could reasonably have led him to believe that the Town Council would submit the petition. On the contrary, the letters he received both from the Town Council and the Registry expressly stated that he would need to do so.

34. A particular suggestion by the Petitioner that the Town Clerk had said, at his initial meeting with members of the Leventis family in April 2015, that the Town Council would submit a petition is contradicted by the evidence of Mrs Chrysoulla Jackson as to what was said at that meeting. Her evidence in relation to that meeting was that, far from suggesting that legal proceedings be taken by the Town Council to deal with the situation, the then Town Clerk had said that he could arrange for Mr Miller's body to be relocated informally. This would be achieved by what he referred to as "sliding" the body, i.e. excavating the ground so as to move the coffin sideways so that it no longer occupied plot 172, but without lifting it out of the ground. Mrs Jackson questioned the propriety of this, having received the impression that it would be done without the Miller family being told.

35. I pause at this point to observe that any interference with human remains that have been buried in consecrated ground would, unless authorised by faculty, be unlawful under ecclesiastical law: see *R v Tristram* (1899) 15 TLR 214 at 215. If such interference amounts to the remains being "removed" it is also a criminal offence: see section 25 of the Burial Act 1857 – which has recently been substituted by section 2 of the Church of England (Miscellaneous Provisions) Measure 2014. I was therefore concerned to learn that the relocation of Mr Miller's remains without lawful authority in the form of a faculty had been proposed by the then Town Clerk. I was even more concerned to hear in evidence from Mrs Wheeler that she was aware that the practice referred to as "sliding" was one she was aware of being used in other cemeteries to correct mistakes, albeit not a practice she herself would ever resort to. Such unlawful action by a burial authority is to be deprecated. Should cases of this happening become known to the court, I shall instruct the Registrar to report the matter both to the Archdeacon with a view to appropriate steps being taken to enforce ecclesiastical law, and to the Police with a view to their investigating whether a criminal offence has been committed.

36. As it is, "sliding" was not undertaken in the present case. However, the fact that it – rather than the bringing of faculty proceedings – was proposed by the Town Clerk to the Leventis family, further undermines Mr Leventis's assertion that what had been said to other members of his family by the Town Clerk encouraged him in his belief that the Town Council would submit a petition for the exhumation of Mr Miller's remains.

37. Mr Cheetham submitted that Henley Town Council had a duty to submit a petition for a faculty in the manner envisaged by the Court of Arches at paragraph 36(iii) of *Blagdon* and that it was not therefore surprising that Mr Leventis thought that they were doing so. *Blagdon* does not provide any authority for the proposition that where a burial authority has made a mistake as to the place of a burial it is under a duty to petition for a faculty. *Blagdon* was not concerned with that question. There is no basis in the Local Government Act 1972, the Local Authorities Cemeteries Order 1977 or in any applicable principle of public and administrative law that places such a duty on a burial authority. The Town Council certainly had the power to petition for a faculty in furtherance of their general powers of management under article 3 of the 1977 Order, but whether to do so was a matter of discretion; it was not a duty. The Town Council did not decide to exercise its discretion to petition and nothing in its correspondence with Mr Leventis suggested that it had done so or would do so.

38. For the reasons I have given, I regret to say that I am unable to accept Mr Leventis's explanations as to why no steps were taken by him between April and September 2015 to commence faculty proceedings. I find that he was dilatory in not taking such steps.

39. There was a further period of delay between Mr Leventis instructing Mr Cheetham in September 2015 and the lodging of the petition in April 2016. Some of that further delay was the result of inefficiency on the part of the Town Council is replying to Mr Cheetham's letters in which he requested information for the purpose of settling the petition. That said, a draft petition was in existence by November 2015, albeit that it omitted certain particulars that had not yet been provided by the Town Council to Mr Cheetham despite his requests. The missing details included the consent or otherwise of the Town Council to the petition and to the reburial of Mr Miller's body in the cemetery. Mr Cheetham also lacked the contact details of the Miller family at that stage, these not being provided to him until February 2016.

40. Nevertheless, a petition could have been lodged much sooner than April 2016 even without that information being available to the Petitioners' solicitors. The court would then have issued the directions necessary to bring the proceedings to the attention of the Miller family and to obtain from the Town Council any other particulars that were considered to be necessary for the purpose of the proceedings.

41. Accordingly, I find that at least some of the further delay between September 2015 and April 2016 was additional undue delay on the part of the Petitioner.

The applicable legal test: the parties' submissions

42. All of the parties cited the *Blagdon* case. Mr Cheetham, on behalf of Mr Leventis, submitted that the burial of Mr Miller's body in plot 172 was a mistake and he cited paragraph 36(iii) of the judgment in *Blagdon*. That paragraph (so far as relevant) states

> **36** The Chancery Court of York in *In re Christ Church, Alsager* [1999] Fam 142 considered various factors which can arise in connection with a petition for a faculty for exhumation. Many of these have arisen in this appeal and we have had the benefit of argument upon them. We consider them in turn.

…..

(iii) Mistake

We agree with the Chancery Court of York that a mistake as to the location of a grave can be a ground upon which a faculty for exhumation may be granted.

…..

Sometimes genuine mistakes do occur, for example, a burial may take place in the wrong burial plot in a cemetery or in a space reserved for someone else in a churchyard. In such cases it may be those responsible for the cemetery or churchyard who apply for a faculty to exhume the remains from the wrong burial plot or grave. Faculties can in these circumstances readily be granted, because they amount to correction of an error in administration rather than being an exception to the presumption of permanence, which is predicated upon disposal of remains in the intended not an unintended plot or grave. A mistake may also occur due to a lack of knowledge at the time of burial that it was taking place in consecrated ground with its significance as a Christian place of burial. For those without Christian beliefs it may be said that a fundamental mistake had been made in agreeing to a burial in consecrated ground. This could have been a sufficient ground for the grant of a faculty to a humanist *In re Crawley Green Road Cemetery, Luton* [2001] Fam 308 and to orthodox Jews in *In re Durrington Cemetery* [2001] Fam 33, without the need for recourse to the Human Rights Act 1998. The need for greater clarity about the significance of consecrated ground in cemeteries, in particular, is demonstrated by these examples and we reiterate our plea for more readily available information so as to reduce the chances of such mistakes occurring again in the future.

43. Mr Cheetham submitted that the present case represented a clear case of "an error in administration" on the part of the Town Council. That being so, the burial did not have the permanence of what he referred to as a "known interment" would have.

44. Mr Leviseur accepted that this case had arisen as a result of a mistake and that the Town Council, as managers of the cemetery, were responsible for that mistake. But he submitted that the present case was distinguishable from *Blagdon*. So far as what was said in *Blagdon* about mistakes were concerned, he drew attention to precisely what the Arches Court had said, namely that "a mistake as to the location of a grave can be a ground upon which a faculty for exhumation may be granted". He emphasised the words I have underlined and submitted that this choice of words on the part of the Court must have been deliberate. The Arches Court was describing circumstances in which a consistory court had a discretion to grant a faculty for exhumation; not in which it necessarily ought to do so.

45. In connection with that part of the judgment in *Blagdon*, Mr Cheetham drew on what I said in *Twyford* (at paragraph 31) about the significance of the parties' respective legal positions where the issue was concerned with an exclusive right of burial granted under article 10 of the Local Authorities Cemeteries Order 1977. Mr Cheetham submitted that the legal position in that regard was equally significant here. The Leventis family had deliberately chosen specific plots following the death of Mr Constandinos Leventis. The legal rights they had acquired had been breached and should be upheld.

46. Mr Leviseur submitted that the conclusion in *Twyford* – namely that the Petitioners were doing no more than seeking to secure a right that legally belonged to them; there was nothing to suggest that they were doing that for anything other than entirely proper motives; and that as most weight there was to be given to the legal position of the parties, judgment should be for the petitioners – could not be elevated into an overriding principle. To do so could not stand against a careful analysis of *Blagdon* as it would leave no room for judicial discretion.

47. Mr Leviseur also referred to *Re Church Norton Churchyard* [1989] Fam 37 at 40F where Quentin Edwards QC Ch referred to the court exercising its discretion "in the knowledge that the canonical intention of those who committed the body or ashes to the ground was committal into the safe custody of the Church"; and at 43E where he referred to the discretion being exercised "according to the circumstances of each case … [beginning] with the presumption that, since the body or ashes have been interred in consecrated ground and are therefore in the court's protection … there should be no disturbance of that ground except for good reason". Mr Leviseur submitted that a factor which would always cause a discretion to be exercised in a particular way was arguably unlawful because it would operate so as to prevent the operation of the discretion. A rule that mistake, when coupled with infringement of an exclusive right of burial, will always operate so as to require exhumation would be inconsistent with the existence of the discretion which was clearly recognised in *Blagdon*.

The applicable legal test: analysis

48. As I noted in *Twyford* (at paragraph 28), *Blagdon* does not provide any guidance as to how petitions where exhumation is opposed should be dealt with. *Blagdon* itself makes it clear that the court has a discretion (see for example paragraph 35). What is said in paragraph 36(iii) of *Blagdon* about mistakes does not amount to a rule, or even a presumption, that exhumation will be permitted where a mistake as to the location of a grave has been made. It is true that the Arches Court said, "Faculties can in these circumstances readily be granted, because they amount to correction of an error in administration rather than being an exception to the presumption of permanence". But I do not understand that to mean that in every case where there has been a mistake as to the location of a grave no presumption of permanence is applicable. The Court went on to say that the presumption of permanence "is predicated upon disposal of remains in the intended not an unintended plot or grave". Accordingly, where a body is deposited in an unintended grave, the law does not presume that burial to be permanent. In such a case there is no presumption against exhumation for petitioners to overcome. But where a body is buried in the place where those concerned with the arrangements for the burial intended it should be buried, the burial is presumed to be permanent and a petitioner must overcome that presumption of permanence if he is to be granted a faculty to exhume the body.

49. In the present case, Mr Miller's body was buried where his family intended him to be buried. He had not obtained an exclusive right of burial prior to his death; his son in law had acquired an exclusive right as part of the arrangements he made for Mr Miller's funeral. The spot where Mr Miller was buried was precisely where it was intended by his family that he was to be buried. It is true that the grant to his son-in-law was of "plot number 171" but it was not in fact intended that Mr Miller should be buried in the plot which is number 171 on the cemetery plan. That plot was already occupied by the body of Mr Summersby. The intention was to bury Mr Miller in the vacant plot adjacent to the plot where Mr Summersby was buried. The misdescription of the vacant plot as plot number 171 in the documentation issued by the Town Council is not material to that intention. None of this is to ignore the fact that the Petitioner, Mr Alexis Leventis, had an exclusive right of burial in respect of that vacant plot. The intention of the Miller family – entirely unknown to them – was to bury Mr Miller's body contrary to the exclusive right belonging to the Petitioner; but that it was their intention to bury Mr Miller's body in that place remains the case.

50. This is not therefore a case where the presumption of permanence does not apply because the burial was in an unintended rather than an intended grave. It is not the sort of case identified by the Court of Arches as being one where faculties can readily be granted.

51. In addition to what I have said above about intention, it also appears that where the Court of Arches addresses cases of mistake it is concerned with cases where exhumation is carried out at the behest – or at least with the support – of the family of the deceased; not with cases where it is proposed by someone else to exhume a body in the face of opposition from the family of the deceased. That the Arches Court had meant that faculties for exhumation can be "readily granted" in the latter type of case would be a surprising conclusion. In *Re Dixon* [1892] P 386 at 393, 394, Tristram Ch held,

> … one result of being buried in consecrated ground is, that … no body buried there can be moved from its place of interment without the sanction of a faculty to be granted upon the application of the executors or members of the family, for reasons approved of by the court, or upon the application of other parties upon the ground of necessity or of proved public convenience … .

Where – as in the present case – it is "other parties" who apply for the faculty the test would seem to be a higher one than that which applies where the application is made by the executors or members of the family. At any rate, what is said in *Re Dixon* about necessity in the case of applications by "other parties" is not consistent with faculties being "readily granted" in such cases.

52. I have therefore concluded that on the facts of the present case the presumption of permanence does apply and the normal principle identified in *Blagdon* is applicable: it is for the Petitioner to satisfy the Court on the balance of probabilities that there are exceptional circumstances which constitute good and proper reason for making an exception to the norm that Christian burial is final.

53. I also accept Mr Leviseur's submission that the conclusion that was arrived at in *Twyford* cannot be elevated into an overriding principle. It is axiomatic that in exercising a discretion – as the court is doing in determining whether to grant a faculty which it has jurisdiction to grant – the court must take into account all material factors: see *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 1 WLR 1507 at 1523. It is contrary to the nature of a discretion that it must inevitably fall to be exercised in a particular way provided certain conditions are met.

54. The conclusion in *Twyford* was arrived at on the basis of the material factors in that case. The fact that the deceased had been buried in infringement of the exclusive right of burial of the petitioner was the most significant factor in that case. Other factors included the absence of any significant lapse of time between the discovery of the mistake and steps being taken to rectify it. Both parties would have been equally distressed by the outcome, the parties opponent because their mother would be exhumed and reinterred if the petition were granted; the petitioner – who was on his death bed – because he would not be able to be buried next to the grave of his son (who had predeceased him) if a faculty had not been granted.

55. That cases such as these have to be decided upon their particular facts is illustrated by the different results in *Re St Luke, Holbeach* [1991] 1 WLR 16 (where Goodman Ch granted a faculty on the opposed petition of a third party where the body of the deceased had mistakenly been buried in a grave space reserved for a wife so that she could be buried next to her husband) and *Re St Mary's Churchyard, Speldhurst* (1990) 2 Ecc LJ 131 (where – in addition to there not having been a reservation to a wife of an exclusive right of burial in the grave of her late husband which had since been filled, without her agreement, with other sets of remains – there had been a delay of 4 years before petitioning and the same chancellor refused a faculty). The present case has to be decided in the light of the factors

which are material here rather than those which resulted in a particular outcome in a different case.

Article 10 of the 1977 Order and ecclesiastical law

56. The fact that Mr Miller's body was buried in a plot in respect of which the Petitioner had an exclusive right of burial is very clearly material. Although the Miller family were acting in good faith at all times, as a result of poor administration of the cemetery by the Town Council, the burial of Mr Miller's body in plot 172 was unlawful, being contrary to the terms of article 10(6) of the Local Authorities Cemeteries Order 1977 which prohibits the burial of a body in a grave in which an exclusive right of burial subsists except with the consent of the owner of the right.

57. As Mr Leviseur pointed out, the rights that may be granted under article 10 of the 1977 Order exist within a wider legal context. They exist within the framework of the general law of England which includes the ecclesiastical law. The 1977 Order itself recognises that there is an interrelationship between the provision it makes and ecclesiastical law. Article 5(1) of the Order provides for the burial authority to apply to the bishop for the consecration of any part of a cemetery. Article 5(5) recognises that the legal effect of consecration imposes restrictions on what may happen in terms of religious services in the consecrated parts of a cemetery. While it provides that a burial in the consecrated part of cemetery may take place without any religious service, or with a Christian service other than the service of the Church of England, it remains the case that it is unlawful for a non-Christian religious service to be used in the consecrated part of a cemetery. Article 13 expressly recognises the bishop's jurisdiction to prevent objectionable inscriptions in the consecrated part of a cemetery. And without the need for any provision to be made to that effect in the 1977 Order itself, the jurisdiction of the consistory court extends to the consecrated parts of cemeteries to which the Order applies: see *Re Welford Road Cemetery, Leicester* [2007] Fam 15 at paragraphs 8-17.

58. The nature of an exclusive right of burial granted under article 10 of the 1977 Order is, in the words of Mr Leviseur, a right that is subject to qualification. It is not an exclusive property right as it vests no title in the owner of the right; rather, it is an exclusionary right. Moreover, where the right is granted in respect of a plot in the consecrated part of a cemetery, the right is subject to the law and doctrine of the Established Church. Mr Leviseur drew attention to the sentence of consecration, the operative part of which is in the following terms–

> **NOW WE COLIN WILLIAM** Bishop Suffragan of Dorchester **DO BY THESE PRESENTS** … separate for the future from all common and profane uses the said piece of land … and do **CONSECRATE** and set apart the same forever as and for a Burial Ground for the burial of the dead of the Parish of Henley-on-Thames according to the Rites and Ceremonies of the Church of England **WARNING** all men that they think not lightly of this Our Solemn Ordinance and Decree whereby these Holy Places are for ever set apart and consecrated unto Almighty God.

Mr Leviseur submitted – and I accept – that the sentence of consecration speaks of permanence and of the setting apart of the land for a singular purpose – the burial of the dead – which must partake of that permanence.

59. Mr Leviseur also drew to my attention the prayer for the blessing of a grave in *Common Worship: Pastoral Services*. That prayer is for use where the ground in which a body is to be buried is not consecrated and which the priest is therefore required to bless by Canon B 38.5. Although that prayer would not have been used in the present case as the ground is

consecrated, the content of the prayer, having been formally approved as a form of service by the General Synod under the Church of England (Worship and Doctrine) Measure 1974 and pursuant to Canon B 2, is nevertheless material as being indicative of the doctrine of the Church of England in relation to burial. It reads,

> O God,
> whose Son Jesus Christ was laid in a tomb:
> bless, we pray, this grave
> as the place where the body of N your servant
> may rest in peace,
> through your Son, who is the resurrection and the life;
> who died and is alive and reigns with you
> now and for ever.

The prayer connotes finality by referring to the particular grave as "the place where the body [of the departed] may rest in peace". It represents a distillation of the theology of the permanence of Christian burial in a recently authorised form of service.

60. In *Church Norton*, Chancellor Quentin Edwards noted that in the Order for the Burial of the Dead in the Book of Common Prayer (one of the places where the Church of England's doctrine is, in particular, to be found: see Canon A 5), the critical words are "we… commit his body to the ground" and cited Wheatly *On the Book of Common Prayer* (1858), page 586:

> The phrase of 'commit his body to the ground' implies that we deliver it to the safe custody and into such hands as will safely restore it again. We do not cast it away as a lost and perished carcass; but carefully lay it in the ground, as having in it a seed of eternity and in sure and certain hope of the resurrection to eternal life … .

61. As Chancellor Quentin Edwards noted, while the finality of Christian burial must be respected, it "may not be absolutely maintained in all cases". He referred – as did Bursell QC Ch in the recent decision of the Durham Consistory Court in *Re St Chad's, Bensham* [2017] Fam 68 – to the decision of Tristram Ch in *Re Talbot* [1901] P 1. In that case Dr Tristram allowed the exhumation of a body which had been buried in consecrated ground some 110 years previously so that it could be reinterred in a Roman Catholic burial ground with other past superiors of a seminary. As the Rt Revd Dr Christopher Hill observes in his *Note on the Theology of Burial in Relation to Some Contemporary Questions* 7 Ecc LJ 447 at 450, that was a case where exhumation and reburial took place because there had been a separation between the superior's remains and the rest of the community to which he belonged. As such, it represented an exception to the norm. The general position remains, as the Chancellor pointed out in *Church Norton*, that "[t]here is a burden on the petitioner to show that the presumed intention of those who committed the body or ashes to a last resting place is to be disregarded or overborne."

62. In the present case, the intention of those who committed Mr Miller's body to the grave does not need to be presumed. Mrs Linda Miller's unchallenged evidence was that she and her late husband were Christians and that they regarded the place of burial as a person's "last resting place". Mr Miller was buried with the Church of England burial service. Mr Miller, she said, believed that burial was final. As Mrs Morley submitted, the Miller family are a Christian family and they ensured Mr Miller had a Christian burial. Having laid their father to rest, they expected his place of burial to be permanent. To exhume and relocate his body now would be contrary to the Christian belief of the family.

63. So far as the late Mr Constandinos Leventis's religious beliefs are concerned, Mr Alexis Leventis gave evidence that he was a member of the Church of England. Mr Leviseur

submitted that the late Mr Leventis would, or at least should, therefore have understood the position of Mrs Miller and her late husband; namely that their wish that his body once buried should not be disturbed represented their Christian beliefs and was not simply a matter of their personal preference. I do not find this argument especially compelling. The late Mr Leventis is not the petitioner in these proceedings and I do not consider that the Court should seek to impute a particular position to him when he is not in a position to speak for himself.

The wishes of the late Mr Constandinos Leventis: burial of family members together

64. Of greater potential relevance is the evidence given for the Petitioner that it was one of the late Mr Leventis's last wishes that his wife and children should all be buried together, in a square. The mistakes which resulted in Mr Miller being buried in plot number 172 mean that, unless his body is exhumed, Mr Leventis's wishes cannot be fulfilled. Members of his family deliberately acquired exclusive rights of burial in adjacent plots in order to comply with those wishes.

65. The Petitioner confirmed in cross examination that this represented a personal wish of his late father; it did not reflect any particular religious or cultural practice. Moreover, the history of the acquisition of the plots by members of the Leventis family does not demonstrate they considered there was any pressing need to comply with Mr Leventis's wishes. The three further plots which make up the square were acquired one by one over a period of 14 months following the death of Mr Leventis. Mr Leventis explained this by reference to the cost of acquiring exclusive rights of burial in these plots. The cost of acquiring the right was £575 in respect of each plot. While, therefore, the total sum was certainly not trifling, not taking steps to secure the plots as quickly as possible – with the possible result that one or more of the other plots in the square would in the meantime cease to be available – seems at least to indicate that the family did not at that time feel urgently compelled to comply with the late Mr Leventis's wishes.

66. Mr Leviseur submitted that the marital status of the late Mr Leventis's children was a relevant consideration. All three children are married. Mr Leviseur cited the following passage in the homily provided in the Form of Solemnization of Matrimony in the Book of Common Prayer which is to be read "if there be no Sermon declaring the duties of Man and Wife":

> For this cause shall a man leave his father and mother, and shall be joined to his wife; and they two shall be one flesh.

He did so in support of a submission that there was no theological basis for any assumption that a parent can expect to be buried next to adult children. In fact he went further than that and submitted, in reliance on the passage just cited, that there is a theological presumption that a married child will not be buried with his parents.

67. While I accept the first part of Mr Leviseur's submission – that there is no theological basis for an assumption that a parent should be buried next to adult children – the second part of his submission goes too far. While the passage cited undoubtedly represents the Church's teaching (which is grounded in the Holy Scriptures: cf. St Matthew 19.5 and Ephesians 5.31), that teaching is concerned with marriage, not with burial practice. Moreover, as the words of the marriage service and Canon B 30.1 make clear, holy matrimony is ended upon the death of one of the parties to the marriage:

> Wilt thou have this Woman to thy wedded wife, to live together after God's ordinance in the holy estate of Matrimony? Wilt thou love her, comfort her, honour,

> and keep her in sickness and in health; and, forsaking all others, keep thee only unto her, so long as ye both shall live?
>
> …
>
> I *N.* take thee *N.* to my wedded wife, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part, according to God's holy ordinance; and thereto I plight thee my troth.
>
> *Form of Solemnization of Matrimony* (emphasis added)
>
> The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union permanent and lifelong, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity.
>
> Canon B 30.1 (emphasis added)

68. There is no theological presumption that a married child will not be buried with his parents. I therefore reject Mr Leviseur's submission that it is "bad theology" for married children to be buried with their parents. I do, however, accept that as there is no theological basis for an assumption that a parent should be buried next to adult children, Mr Leventis's wish that he, his wife and children should be buried together in a square did not have the character of an expression of religious doctrine but of a personal preference.

The relevance of delay

69. I have already found that there was undue delay in the lodging of the petition. Approximately a year passed between the discovery by the Petitioner of the fact that Mr Miller had been buried in the plot in respect of which he had an exclusive right of burial and the lodging of the petition. I note that in *Blagdon* the Arches Court held that delay should not of itself be decisive but that it is one of the factors to be considered. I consider that in the context of this case the delay that occurred in bringing the proceedings represents a significant lapse of time. I accept Mrs Morley's submission that exhumation after this lapse of time will have a substantial impact on the Miller family. In evidence – which was not and could not reasonably be challenged – Mrs Miller said that she attends her late husband's grave twice a week and that her children and grandchildren accompany her there. The place where Mr Miller was buried has become his resting place.

70. I accept Mr Leviseur's submission that in a case such as this delay is to be considered in terms of those whom it might affect. The undue delay in this case meant that the Miller family – having heard nothing further about the matter between June 2015 and April 2016 – could reasonably have assumed that no action was being taken. It will have come as a shock to them when they received special notice of the petition in April 2016. In the meantime they will have become accustomed to Mr Miller's place of burial being in the place where it currently is.

Availability of alternative plots

71. The Town Council have produced a diagram of the plots in the immediate vicinity of Mr Leventis's grave. While the availability of vacant plots in the vicinity will not now allow

the formation of a square, there are nevertheless vacant plots which would enable the members of the Leventis family to be buried together in a different configuration. The available vacant plots would allow the family members to be buried together in an L-shaped or a T-shaped configuration. The Town Council have stated that they will make vacant plots available as necessary for such a configuration. Alternatively, they would – were a faculty to be granted to exhume and reinter the body of Mr Leventis – make a square of 4 vacant plots available at another location in the consecrated part of the cemetery. The availability of these – admittedly imperfect – alternatives is material to the exercise of the Court's discretion.

Views of close relatives

72. In *Blagdon* the Arches Court (at paragraph 36(iv)) dealt with the question of "local support". It held that the views of close relatives of the deceased "are very significant" and that they come in a different category from the views of, for example, the incumbent, parochial church council or nearby residents. In the present case, the close relatives of the deceased – the Miller family – are strongly opposed to the exhumation of Mr Miller's body. The Leventis family are, of course, equally close relatives of Mr Leventis; but it is not Mr Leventis's body which it is proposed to exhume. The support of Mr Leventis's family for the exhumation of Mr Miller's body is – under the factors identified in *Blagdon* as being potentially material – not of such significance as the opposition to exhumation on the part of Mr Miller's family.

Potential impact on other cases

73. I have also considered what the Arches Court said in paragraph 36(v) of *Blagdon* about the potential impact of a decision on other cases. It was suggested by Mrs Morley and Mr Leviseur that if Mr Miller's body were to be exhumed, his family might then need to seek to rely on the exclusive right of burial they had acquired in respect of plot number 171 for the purposes of his reinterment. That would then raise the possibility of a further petition to exhume the body of Mr Summersby which is buried in that plot. In the event I do not attach any real significance to this point. Although he had an exclusive right of burial in plot number 170, when Mr Summersby was buried in plot number 171 no-one had an exclusive right of burial in the latter plot; Mr Morley only obtained the exclusive right of burial for Mr Miller after Mr Miller had died. The right granted by the Town Council to Mr Morley in respect of plot number 171 was not a grant they were in fact entitled to make. The taking by this Court now of a view that the exhumation of Mr Miller's body would be likely to have implications for the body of Mr Summersby would involve a degree of speculation that would make doing so wrong in principle.

Balancing the material factors

74. As explained above, the onus is on the Petitioner to satisfy the Court that there are special circumstances which constitute good and proper reason for making an exception to the norm that Christian burial is final. The decision whether grant of a faculty in such a case involves the Court exercising a judicial discretion for which purpose it must take account of all material matters. Those factors include, but are not limited to, the matters discussed by the Court of Arches in *Blagdon*.

75. Of the factors I have considered above, I consider the following to be in favour of the Petitioner's case.

76. First, the burial of Mr Miller's body in plot number 172 was unlawful and an infringement of the Petitioner's rights under the grant to him of an exclusive grant of burial in respect of

that plot. That infringement, and the infringement of the prohibition under article 10(6) of the 1977 Order, are clearly substantial matters weighing in favour of the Petitioner.

77. Secondly, with Mr Miller's body present in plot number 172, the Petitioner's late father's wish that he, his wife and his children be buried together in a square configuration cannot be fulfilled. This is a cause of significant distress to the Petitioner and other members of the Leventis family (one of whom is seriously ill).

78. I consider the following factors to weigh against the Petitioner's case.

79. First, while the burial of Mr Miller was an infringement of the Petitioner's legal rights, the grant of an exclusive right of burial in the consecrated part of a cemetery takes effect subject to the general law including ecclesiastical law. Ecclesiastical law – and the doctrine of the Church of England – presume that Christian burial is final and permanent and that its finality and permanence is to be overborne only where there are special circumstances.

80. Secondly, Mr Leventis's wish to have his family buried with him in a square configuration did not represent a religious or cultural practice but was a personal preference; while the opposition of the Miller family to the exhumation of Mr Miller's body is founded on Christian theology and the doctrine of the Church of England. The exhumation of his body would cause serious distress to his widow and other members of his family. The wishes of the late Mr Leventis, while they cannot be satisfied in the terms in which he expressed them, can be approximately satisfied by the acquisition by the Leventis family of alternative plots which would enable them to be buried together in a different configuration. In his *Note on the Theology of Burial* Dr Hill observes that "[e]xhumation for sentiment, convenience, curiosity, or to 'hang on' to the remains of life, would deny this Christian intention [i.e. the intention of saying farewell to the deceased and of commending the deceased to the mercy and love of God to await the resurrection]". The proposal to exhume Mr Miller's remains, in order to fulfil the personal preference of the late Mr Leventis that he and his family be buried not just together but in a particular configuration, comes close to what Dr Hill describes as exhumation for sentiment or convenience.

81. Thirdly, I note that the Arches Court said in *Blagdon* (at paragraph 36(ii)) that lapse of time alone will not be determinative. But the delay of approximately one year between the discovery that Mr Miller's body had been buried in plot number 172 and starting proceedings for a faculty, much of that delay being undue delay in the sense that there was no good reason for it, is significant in this case. The impact of that delay on the Miller family was substantial. During that period they came to know plot number 172 as the resting place of the late Mr Miller. With no formal steps having been taken to alter the position for such a period of time they were reasonably entitled to assume that such steps were not going to be taken. The Petitioner himself was clearly aware that the lapse of time would become a material factor and make things harder for the Miller family, because in his letter to the Registry dated 8th May 2015, having expressed concern for the position of the Miller family, he said, "Hopefully as not too much time has passed since burial this will make things easier." That may have been true at that stage. It was no longer true by the time the petition was lodged.

82. While a decision not to grant a faculty would prevent Mr Leventis directly enforcing the exclusive right of burial he had properly acquired from the Town Council under article 10 of the 1977 Order, to grant a faculty in this case would, in my view, not be justified as an exception from the law and doctrine as to the permanence of Christian burial. While the mistaken burial of Mr Miller's body in plot number 172 – together with a desire to fulfil the late Mr Leventis's' wishes – is capable of constituting a special circumstance which might overcome that presumption of permanence, taking into account the other relevant factors

of this case the Petitioner has not discharged the burden that lies on him. The existence of that special circumstance is outweighed by the desire of the Miller family, following substantial undue delay in addressing the mistake which reasonably resulted in their believing that Mr Miller's place of burial was not to be contested, to uphold the permanence of his place of burial.

Conclusion

83. I have accordingly concluded that I should exercise my discretion by not granting the faculty sought by the Petitioner.

84. Towards the end of the hearing I raised the question – adverted to by Mr Cheetham in his written submissions – of whether, if a faculty were not granted in a case such as this, that would leave a person who had lawfully obtained an exclusive right of burial under article 10 of the 1977 Order without a remedy in respect of the infringement of that right. I am satisfied that that would not be the case. Where a body is buried contrary to article 10(6) as a result of poor management of a cemetery by the burial authority, the person whose right has been infringed has the option of pursuing the matter with the Local Government Ombudsman or by bringing a claim in the temporal courts for damages.

85. In the present case the Town Council have accepted responsibility for the errors which resulted in this state of affairs. They have given an unreserved apology to all concerned. They have said they will make such vacant plots as there are available to the Leventis family in any configuration they wish. Although they were clearly at fault in the events that resulted in Mr Miller's body being buried in plot number 172, they are doing all that they reasonably can to make amends now.

86. The Town Council has accepted that it should pay the court costs and the costs (including the legal costs) of the other parties.

87. The order will therefore be that the petition is dismissed and that the Town Council pay the court costs and the other parties' own costs incurred in connection with the proceedings. The Registrar will notify the Town Council of the Court costs which will then be payable forthwith. The costs of the parties are to be assessed by the Registrar unless agreed within two months of the date of this judgment.