

IN THE CONSISTORY COURT OF THE DIOCESE OF MANCHESTER

Re John Ashton McGarry Deceased

-and-

Re an application for a faculty by Michael John Ashton McGarry

JUDGMENT

delivered on 3 April 2013

Introduction

1. By his Petition Michael John Ashton McGarry [‘the Petitioner’] applies for a faculty authorising the exhumation of the cremated remains of John Ashton McGarry [‘the Deceased’], his father, who died on 15 August 1992 from a grave at plot 76 col 6 row 11 at St Paul’s Church Peel Little Hulton in which they were interred and that such cremated remains be re-interred at Christ Church Harwood.

2. The Petitioner’s brother Keith was a signatory to the Petition and his brother Colin has confirmed that he has no objection to the exhumation and re-interment.

3. The deceased’s cremated remains were interred in a casket made of oak effect. Mrs Emma Turnbull, of Shaw & Son funeral directors, confirms that ‘the existing cremated remains casket will be non existent but we will be able to remove all of the ashes with dignity and place in a new cremated casket’.

4. The relevant background circumstances are somewhat unusual and may be summarised thus :

[a] The Deceased was interred at St Paul Peel which was the church which both the Petitioner’s parents attended.

[b] The Deceased was survived by his wife Edith Esther McGarry who herself died on 5 August 2011. Her remains were cremated and initially it seems to have been agreed by the family that her cremated remains should be interred in her parents’ grave at St Paul Peel.

[c] During visits by the Petitioner’s brothers to the Deceased’s grave, they noticed that ‘the stone was leaning over’ and having started to straighten the same, they observed that the Deceased’s casket was in view. The casket had been placed in situ by the Deceased who at the time of its interment felt that that the grave was

too shallow. Although the Petitioner received assurances from the churchwardens that this would be sorted out, nothing had been done to remedy the situation.

- [d] It appears that subsequently it was decided that because of the ongoing unsatisfactory situation in relation to the Deceased's grave, it was not deemed suitable to inter the cremated remains of Edith Esther McGarry at St Paul Peel and her cremated remains were interred at Christ's Church Harwood, adjacent to the grave in which the Petitioner's own wife has been recently interred.
- [e] The Petitioner and the family wish to exhume the cremated remains of the Deceased so that they may be re-interred with those of Edith Esther McGarry at Christ's Church Harwood.

5. So it was that the grounds in support of such application are expressed thus :

‘My mother's casket is interred at Christ Church, Stitch Mi Lane, Harwood Bolton, Lancs and myself and my family respectfully request that the remains of my late father, John Ashton McGarry be exhumed from the churchyard of St Paul Peel and re-interred with those of my late mother Edith Esther McGarry at Christ Church Harwood so that our parents can rest reunited together in one place.’

6. In essence this application thus raises two matters : firstly, the unsatisfactory nature of the churchyard at St Paul Peel and secondly, the desire that the Deceased's cremated remains should be moved so as to be with those of his deceased wife.

7. The PCC at St Paul Peel supports the application to proposed exhumation.

8. Although I have seen no communication from Revd Canon Wendy Oliver, the incumbent at Christ's Church Harwood, in which she expressly consents to the proposed re-interment, if I grant the faculty sought it will be on condition that she does consent.

9. I am satisfied that it is expedient to determine this application upon consideration of written representations under Rule 26 of the Faculty Jurisdiction Rules 2000 and I do so.

The legal principles to be applied

10. There can be no doubt that I have a discretion as to whether I should grant a faculty.

11. The starting point for the exercise of such discretion was conveniently explained by Steel Ch in *Re Matheson (Decd)* [1958] 1 WLR 246, at 248, when he stated :

‘From the earliest times it has been the natural desire of most men that after death their bodies shall be decently and reverently interred and should remain undisturbed. Burial in consecrated ground secured this natural desire, because no body so buried could lawfully be disturbed except in accordance with a faculty

obtained from the church court. As all sorts of circumstances which cannot be foreseen may arise which make it desirable or imperative that a body should be disinterred, I feel that the court should always be slow to place any fetter on its discretionary power or to hold that such fetter already exists. In my view there is no such fetter, each case must be considered on its merits and the chancellor must decide, as a matter of judicial discretion, whether a particular application should be granted or refused.`

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

`The permanent burial of the physical body / the burial of cremated remains should be seen as symbolic of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their `journey`), entrusting them in peace for the ultimate destination, with us, in the heavenly Jerusalem. This commending, entrusting, resting in peace does not sit easily with `portable remains`, which suggests the opposite : reclaiming, possession, and restlessness ; a holding on to the `symbol` of a human life rather than a giving back to God. ... In general, therefore, the reluctance to agree to faculties for exhumation is well grounded in Christian theology and eschatology. It is also right generally from the point of view of the mourner, who must learn to let go for their psychological and spiritual health`.

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

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

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

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

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

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

‘Is there a good and proper reason for exhumation that reason being likely to be regarded as acceptable by right thinking members of the Church at large ? If there is he should grant faculty. If not, he should not.’

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

‘33. We have concluded that there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted. Exceptional means ‘forming an exception’ (Concise Oxford Dictionary (8th edn, 1990)) and guidelines can assist in identifying various categories of exception. Whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the chancellor to determine on the balance of probabilities.

...

35. The variety of wording that has been used in judgments demonstrates the difficulty in identifying appropriate wording for a general test in what is essentially a matter of discretion. We consider that it should always be made clear that it is for the petitioner to satisfy the consistory court that there are special circumstances in his/her case which justify the making of an exception from the norm that Christian burial (that is burial of a body or cremated remains in a consecrated churchyard or consecrated part of a local authority cemetery) is final. It will then be for the chancellor to decide whether the petitioner has so satisfied him/her’.

18. The court went on to consider various factors which may be argued in support of an exhumation, including medical reasons, lapse of time and mistake.

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

20. It should be noted that in some cases faculties have been granted to allow family members to be brought together into a single grave - see *In Re St James’ Churchyard, Hampton Hill* (1982) 4 Consistory and Commissary Court Cases, case 25 and the decision in *In Re Blagdon Cemetery* itself.

My determination

21. Applying the test in *In Re Blagdon Cemetery* I turn to consider the facts of this case. To grant a faculty I must be satisfied that it is established by the Petitioner, on the

balance of probabilities, that the facts here justify an exception to the general presumption of the permanence of Christian burial.

22. Although the Petitioner refers to the unsatisfactory nature of the Deceased's grave and the failure of the authorities at St Paul Peel to remedy the problem of the casket containing the Deceased's casket being visible, I do not believe that I would be justified in granting a faculty on such ground because the problem ought to be capable of correction. Such would be akin to a situation where an exhumation was sought to re-inter in a more convenient or appropriate place. So it was that in *Re Martin Deceased* [Manchester Diocesan Consistory Court : 5th August 2004] I refused an application for a faculty where I adjudged that the real reason for the exhumation sought was to move remains to another area of the churchyard which was perceived to be more peaceful and acceptable.

23. However I do readily understand that when the Petitioner's own wife died and was interred at Christ's Church Harwood, the family thought it was appropriate, given the continuing problem at St Paul Peel, to also inter the Petitioner's mother's cremated remains at Christ's Church Harwood. I do not think that it would have been reasonable to have expected them to have been interred at St Paul Peel.

24. In many ways had the Petitioner not voiced his concerns about the unsatisfactory present location of the Deceased's cremated remains, I would have found this application much easier to resolve. However on the facts of this case I am satisfied that the real and substantial reason for the exhumation sought is that the cremated remains of the Deceased and his widow should be together in what is akin to a family grave.

25. On the facts here I am persuaded that sufficient special circumstances, namely the desire to re-inter the cremated remains of both the Deceased and his widow in a family grave, exist to justify my making an exception from the norm that Christian burial is final.

26. Although I note that it is over 20 years since the Deceased's cremated remains were interred, I do not think that such fact should persuade me against making the orders sought, although it may well be that if, as Mrs Turnbull concedes may be the case, the casket in which the cremated remains were interred may be non-existent, there must be the possibility that only some, and not all, of the cremated remains will remain. That is something which the Petitioner should bear in mind before deciding to proceed with any exhumation and re-interment.

27. I thus grant the faculty sought on condition that Revd Canon Oliver consents to the re-interment of the Deceased's cremated remains at Christ's Church Harwood. In accordance with the practice of the court, the Petitioner must pay the court fees incurred in relation to the Petition.

GEOFFREY TATTERSALL QC
Chancellor of the Diocese of Manchester

3 April 2013