Neutral Citation Number [2023] ECC Man 1

IN THE CONSISTORY COURT
OF THE DIOCESE OF MANCHESTER
RE ST GEORGE UNSWORTH

Francis Taylor Building
Temple
London EC4Y 7BY

Date: 10 March 2023

Before:

The Worship Gregory Jones KC
(Sitting as the Chancellor of the Consistory Court of the Diocese of Manchester)

Petition of:

SUSAN BENNETT

Petitioner

Determined without a hearing or any legal representation.

Approved Judgment

This judgment was handed down by the Chancellor remotely by circulation to the parties by email and release to the National Archives. The date and time for hand-down is deemed to be 10 am on 10 March 2023.

The Worship Gregory Jones KC (sitting as the Chancellor of the Consistory Court of the Diocese of Manchester):

Introduction

1. By a petition dated 21 January 2022, the Petitioner, Mrs Susan Bennett seeks a faculty to exhume the cremated remains of her brother, Brian Yates from their parents' grave.

2. I address first the factual background, followed by the appropriate legal approach including how case law has dealt with such petitions and finally, I will give my judgement on how this petition should be determined based upon the facts before me.

Factual Background

3. The factual background informing this petition is contained in the email exchanges and correspondence between members of Brian Yates's family, the Diocesan Registrar, Donna Myers, and the Reverend Donna Williams.

4. On 16 May 2020, the cremated remains of Mr Brian Yates were interred with those of his parents at St George Unsworth by the Reverend Donna Williams. Only Jacqueline Haslam (the deceased's sister) and Bethany Maher (his daughter) were in attendance due to the then current restrictions imposed during the COVID-19 pandemic.

5. In her letter dated 15 October 2021, the Reverend Donna Williams recalls being contacted by Mrs Haslam following the death of her brother regarding the interment of his ashes. The Reverend Donna Williams informed Mrs Haslam that the graveyard was full pending an application for a new garden of remembrance. Mrs Haslam asked how long it would be before the garden would be available and was then advised by the Reverend that it would probably not be ready for quite some time but if the family already had an existing grave, it might be possible to inter Mr Yates's ashes there. Mrs Haslam mentioned that her parents were interred in the old ashes garden. Having assessed whether or not there was space, the Reverend Donna Williams informed Mrs Haslam that it would be possible to inter Mr Yates's ashes alongside those of his parents.

6. The Reverend Donna Williams remembers interring Mr Yates's ashes on 16 May 2020. When she enquired as to the names of family members for the prayers, she was given only the names of Mrs Haslam and Ms Maher. The Reverend Donna Williams has confirmed that at the time of making the funeral arrangements, she was unaware of the existence of Mrs Bennett or that Mrs Haslam had not arranged the burial of her parents' ashes.

7. On 13 October 2020, Mrs Haslam signed an application for an additional inscription to add Brian Yates's name to the existing memorial tablet. The Reverend Donna Williams co-signed the application for an additional inscription on 29 June 2021.

However, she has confirmed in her letter of 15 October 2021 that this permission did not extend to placing a new stone on the grave. It appears that the addition of the new stone was what alerted Mrs Bennett to the fact that Mr Yates had been interred with their parents. On 18 September 2021, Mrs Bennett complained about her brother's burial arrangements to the parish, claiming that she had 'ownership' over the grave and therefore, her permission should have been sought for Mr Yates to be buried with his parents.

8. Mrs Bennett wrote a letter requesting the exhumation of Mr Yates's ashes on 27 September 2021. This was followed by a letter from Mr Yates's daughter, Ms Maher, on 13 October 2021 opposing the exhumation of her father's ashes. She considers the grave as her father's 'final resting place' and believes that despite his alleged estrangement from the family, her grandparents would want their son to be buried alongside them, particularly, she says in light of the fact that Mr Yates is said to have cared for his mother when she was suffering from Alzheimer's disease.

9. As noted at the outset of this judgment, Mrs Bennett submitted a formal petition for a faculty of exhumation on 21 January 2022, citing a previous alleged incident of violence by her brother against his mother and aunt in 2010 as well as Mr Yates's apparent excessive drinking as the reasons for his estrangement from the family. Consequently, Mrs Bennett stated that her and other unnamed family members consider that their parents' grave has been 'violated' and that the 'desecration' of the grave has caused such 'grief and separation' within the family that some family members no longer feel able to visit the plot as long as Mr Yates remains are interred there. In the petition, Mrs Bennett states that if a faculty is granted, Mr Yates's remains would be returned to his next of kin (undefined) and that the arrangements for re-interment were 'unknown'.

10. The statutory fee to lodge this petition has been paid by the parish on this occasion. I understand that the Petitioner considers that the need for the petition only arises out of the action of the incumbent for the burial of her brother's ashes creating the need as she now sees it to make this petition. I offered all parties the opportunity to deal with the matter by way of a hearing as opposed to dealing with the matter by way of written representations. However, all preferred the matter to be dealt with by way of written representations.

11. For reasons which I explain below, I asked the Registrar to explore whether the Archdeacon would be prepared to act as a mediator. On 12 April 2022, the Registrar confirmed in an email that the Archdeacon of Bolton was willing to act as a mediator for the family.

12. In May 2022, I issued directions requesting the following:

    a. That Mrs Bennett, provide the court with full details of Mr Yates's conduct and any previous convictions he may have had;

b. That the Reverend Donna Williams detail her understanding of the cause of the estrangement and whether the plot in question was subject to any graveyard reservation;
c. That Ms Maher confirm that she is Mr Yates's legal next of kin, that she still objects to the proposed exhumation and that she would have ownership of his exhumed remains;
d. That Mrs Haslam confirm whether she is now content for the exhumation to take place;
e. That Mrs Bennett, Mrs Haslam and Ms Maher indicate whether they would be prepared to attend a mediation session with the Archdeacon.

13. On 14 May 2022, Mrs Haslam confirmed that she did not agree to her brother being exhumed. However, if he were to be exhumed, Mrs Haslam stated that either she or Ms Maher would receive Mr Yates's remains. She further confirmed her willingness to engage in mediation with the Archdeacon.

14. On 17 May 2022, the Reverend Donna Williams responded to the Directions. In her letter she stated that after speaking with some previous church wardens as to whether any of the graveyard plots have had reservations, she could confirm that this has never been the case. Regarding her knowledge of the reasons behind the estrangement, she said that none of the concerned family members had given her any clear evidence of what occurred. Any knowledge she had acquired since the date of the interment was simply a result of 'local gossip.' She does say that she might not have proceeded with the burial if she had known about the objection from Mrs Bennett.

15. In a written response to the Directions dated 30 May 2022, Mrs Bennett stated that she is unable to provide details of any convictions and had not been in contact with Mr Yates since 2010. With regard to the conduct leading to his estrangement from his family, Mrs Bennett stated that he was arrested on 11 January 2010 for attacking his mother and aunt and locking them out of the house. The police are said to have advised the family not to allow Mr Yates back to the property out of concern for the safety of his mother and aunt. He was allegedly charged with assault on his mother, aunt and the police officer. There is no further evidence before me of what happened, still less, evidence of a trial or a conviction arising from these events. Mrs Bennett further confirmed that she was not prepared to attend a mediation session with the Archdeacon. She said it would be too stressful for her.

16. On 1 June 2022, Ms Maher responded by email to the Directions. She confirmed that she was Mr Yates's next of kin, that she still objected to his exhumation and that she would be willing to attend a mediation session. However, despite Ms Maher confirming that she is Mr Yates's next of kin, a 'Letter of Administration' dated 21 September 2020, confirms that Mrs Haslam is the administrator of Mr Yates's estate.

17. In October 2022, matters appeared to be inching towards an agreement between the parties. The Registrar confirmed in an email dated 3 October 2022 that Mrs Bennett and Ms Maher had spoken and come to a tentative compromise whereby it would

be acceptable to all parties that Mr Yates's remains be exhumed and reinterred as close as possible to his parents. However, after verifying with the parish whether this would in fact be possible, on 8 November 2022, the Registrar emailed to say that the plot where Mr Yates's parents are laid to rest is full and as such, his remains would have to be moved to a new section of the graveyard where no memorial stones are allowed. As a result of this new information, Mrs Bennett and Ms Maher could no longer reach an agreement on the way forward.

The Legal Framework

18. As I have noted previously[1], Christians have buried their dead in churchyards since at least 752 AD when Archbishop Cuthbert obtained papal permission to bury within city walls.[2] In general, any disturbance of human remains in consecrated places of burial requires the authority of a faculty.[3]

19. A grave space may be reserved by a faculty issued by the diocesan chancellor (*The Perivale Faculty, de Romana v Roberts* [1906] P 332 at 338; *Re West Pennard Churchyard* [1991] 4 All ER 124). The grave itself is not owned by the deceased or by his relatives whether before or after the burial (*Cripps on Church and Clergy* (8th Ed, 1937) at 572; this applies even if there is an exclusive right of burial confirmed by faculty after 1964: S8(1) Faculty Jurisdiction Measure 1964. In *Re St Mary the Virgin Burghfield* [2012] P.T.S.R. 593 Bursell Ch. stated at paragraph 13:

> … [the] general law applicable to graves … is not a question of diocesan regulations but, rather, of the general law of the land. I emphasise this in order to underline that [the petitioner] is mistaken in her belief that she and her husband are 'owners of that precious piece of land', although I suspect that many others share a similar belief….

The Approach of the Chancery Court of York

20. The Chancery Court of York in *In Re Christ Church Alsager* [1999] Fam 142 ('*Alsager*') gave the following 'guidance' to chancellors in respect of exhumation by providing a list of factors which would favour the grant of such a faculty, 'is there a good reason and proper reason for exhumation, the reason being likely to be regarded as acceptable by right thinking members of the church at large?' Hill noted in 'Ecclesiastical Law' (3rd ed): that the guidance was difficult to apply in practice and that this was not assisted by the 'highly subjective element of the determinative question'[4] citing in support of this criticism: P Petchey 'Exhumation reconsidered' (2001) 6 Ecc. LJ 122.

[1] *In re St Andrews Churchyard, Alwalton* [2012] PTSR 479 Gregory Jones Dep Ch (Ely).
[2] English Heritage and the Archbishop's Council of the Church of England, *Guidance for best practice for treatment of human remains excavated from Christian burial grounds in England*, January 2005, para. 168.
[3] See the judgment of Wills J in *R v Dr Tristram* [1898] 2 QB 371.
[4] Hill, *Ecclesiastical Law* (3rd Ed. 2007), p.267 at 7.105. This passage does not appear in the later 4th edition of Hill.

The Approach of the Court of Arches

21. In *In re Blagdon Cemetery* ('*Blagdon*')[5]the then Dean of the Court of Arches, Cameron QC, commented on the historic attitude to the disposal of the dead:

> During the process of human history respect for the dead and the recognition of the inevitable process of decay have led to different cultural practices and laws about the disposal of the dead. Whether such disposal has been by way of burial or cremation it has been a feature of such cultures that the disposal has had an aura of permanence about it…the general concept of permanence is reflected in the fact that it is a criminal offence to disturb a dead body without lawful permission.[6]

22. More specifically, the Christian doctrinal basis for this notion of permanence- or, at least, in so far as the Anglican faith is concerned[7] was also examined in *Blagdon*. The Court of Arches quoted from extracts of the paper entitled, 'Theology of Burial' of September 2001 prepared by the Rt. Revd. Christopher Hill, the then Bishop of Stafford. The paper included the following passage quoted at paragraph 23 of the judgment:

> The permanent burial of the physical body/the burial of cremated remains should be seen as a symbol 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 their ultimate destination, with us, the heavenly Jerusalem.

23. Following delivery of the judgment in *Blagdon* a fuller and updated version of Bishop Hill's statement appeared in the Ecclesiastical Law Journal (2004) 7 Ecc. L.J. 447. Its concluding paragraph, not quoted in *Blagdon*, states:

> In cases of Christian burial according to Anglican rites, prescinding from cases where there has been a mistake as to the faith of the deceased, I would argue that the intention of the rite is to say 'farewell' to the deceased for their 'journey'; to commend them to the mercy and love of God in Christ; to pray that they may be in a place of refreshment, light and peace till the

[5] [2002] Fam 299; [2002] 3 WLR 603.

[6] See Gallagher (2010) *Raising the Dead: Exhumation and the Faculty Jurisdiction: Should We Presume to Exhume* 1 Web JCLI for an examination of the relationship of the Christian presumption of permanence and Jewish and Pagan practices.

[7] In *In re Putney Vale Cemetery* (2011) 13 Ecc LJ (Southwark Consistory Court) (April 2010) Petchey Ch., at paragraph 30 of his judgment, drew attention to the fact that in the light of the lack of objection in that case from the Roman Catholic authorities to the exhumation of the deceased remains -the deceased being a Roman Catholic- and their proposed interim storage for an indeterminate period of time of the remains at the home of the deceased's widow, the assumption made at paragraph 12 of *In re Blagdon Cemetery* as to permanence *may* not be shared by Roman Catholics. Be that as it may, the position so far as this jurisdiction is concerned as to the permanence of Christian burial is well established by the Court of Arches in its judgment *In re Blagdon Cemetery.* In *In re Hagley Municipal Cemetery* (Worchester Consistory Court) (09-36) (27 July 2010) Mynors Ch. at paragraph 48 of the judgment found that: 'The Roman Catholic Church does not recognise the significance of consecration (other than legal significance under the law of the Church of England, which forms part of the general law of England) – that is, it has no significance either theologically or in Roman Catholic canon law. Accordingly, before a burial of the remains of a Roman Catholic takes place in ground that is not part of a Roman Catholic cemetery (and thus has already been blessed), that ground is first blessed.'

transformation of resurrection. Exhumation for sentiment, convenience, or to 'hang on' to the remains of life, would deny this Christian intention.

24. This theological approach was translated into law by the Court of Arches so that the starting point is that there exists a rebuttable presumption against exhumation:

> 20. Lawful permission can be given for exhumation from consecrated ground as we have explained. 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 had only been allowed as an exception to the general presumption of permanence arising from the initial act of interment.

25. As to how then should the court address the question of whether an exception has been made out, the Court of Arches stated:

> 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 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.
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> 34 The Chancery Court of York in *In re Christ Church, Alsager* [1999] Fam 142, 148 quoted part of the judgment of Edwards QC Ch. in *In re Church, Norton Churchyard* [1989] Fam 37 on the subject of the discretion of the consistory court. In that passage Edwards QC Ch said: "there should be no disturbance of that ground except for good reason." In a later decision, *In re St Mary Magdalene, Lyminster* (1990) 9 Consistory and Commissary Court Cases, Case 1 the same chancellor used somewhat different language in saying "the question may be thus stated: has this petitioner shown that there are sufficient special and exceptional grounds for the disturbance of two churchyards?"

26. Thus, the burden of rebutting the presumption of permanence is upon the Petitioner[8]on the balance of probabilities.[9]

27. The Diocese of Manchester is, of course, located within the Province of York. There had been some debate about the different formulations adopted by the two appellate courts of the respective Provinces.[10] I have therefore considered the status of each judgment, whether I am bound by either and whether the two decisions can,

[8] See also *In re St Peter ad Vincula, Wisborough Green*, CH025/09,30 June 2009, Hill Ch.:"…the fact [is] that [it] is for the petitioner in each case to establish exceptional grounds from doctrinal principle of the permanence of Christian burial …" at paragraph 1 of the judgment.

[9] *In Re St Nicholas, Sevenoaks* [2005] 1 W.L.R. 1011.

[10] See e.g. David Pocklington, 'Application of Provincial Court decisions' in *Law & Religion UK*, 29 January 2018, https://lawandreligionuk.com/2018/01/29/application-of-provincial-court-decisions/

in any event, be reconciled and if not, whether any differences would alter the outcome in this case.

28. As Hill notes in 'Ecclesiastical Law' (4th ed): 'Although traditionally there was no binding rule of precedent in the canon law, the judges and canonists recognised that it was sensible to follow what had been established in prior decisions and practice…The decision of a consistory court of one diocese does not bind that of another, but it is afforded considerable weight and often approved and followed unless there is good reason otherwise'.[11] Whilst it has been said that a strict theoretical canonist would see no place for precedent in canon law, it being a doctrine of the common lawyers, Hill records that the decisions of ecclesiastical courts are today generally considered to be binding on the particular court making the decision and on the courts of inferior jurisdiction.

29. In *Re Sam Tai Chan* [2016] ECC Dur 2 in which Bursell Ch. concluded that by reliance upon 'rules of precedent … within the two Provinces' (paragraph 9) that 'in so far as the Northern Province the *Alsager* test still prevails' (paragraph 22). Chancellor Bursell was one of the three judges of the Chancery Court which decided *Alsager*; a distinguished ecclesiastical lawyer and editor of the ecclesiastical volume of *Halsbury Laws*. According to Professor Norman Doe, the position as to precedent is as follows:[12]

> Finally, central to Arches' practice is judicial precedent. This has been so for centuries. For instance, in 1756, the Dean relied on 6 earlier decisions of the Arches and Court of Delegates; the next year, he used 5 common law cases and 1 from the Prerogative Court. By the 19th century, the binding force of precedent was fully accepted. An Arches' decision bound lower courts in Canterbury Province, as did a decision of the Chancery Court in the York Province. But an Arches' decision did not bind the Chancery Court, nor vice versa – it was persuasive, even though the Dean and Auditor were the same person after 1874. However, in *Re St Nicholas Sevenoaks* (2005) the Dean, held as to Arches and Chancery decisions, because 'all chancellors are judges of each court and the offices of Dean and Auditor are…held by the same person, it is realistic to treat the Arches Court and Chancery Court…as being, for the purposes of the doctrine of precedent, two divisions of a single court'. Accordingly: consistory courts in each Province should have regard to decisions of the appellate court, whether or not given in their Province, and a later decision should prevail if it differs from that given in an earlier decision irrespective of the Province concerned'. A new rule appears in the 2018 Measure[13]: a decision of the Arches or of the Chancery Court is to be treated

[11] Hill, *Ecclesiastical Law* (Fourth Ed. 2018), 1.31-1.32.

[12] The Court Of Arches: Jurisdiction To Jurisprudence –"Entirely Settled"? Norman Doe Professor of Law, Cardiff University St Mary-le-Bow, Cheapside, City of London, 20 November 2019.

[13] Ecclesiastical Jurisdiction and Care of Churches Measure 2018:
4A Decisions treated as taken by each Court
(1)A decision of the Arches Court of Canterbury or the Chancery Court of York is to be treated by the other Court, and by the lower ecclesiastical courts in the province of the other Court, as if it were a decision which the other Court had itself taken.

by the other Court, and by the lower courts in the province of the other Court, as if it were a decision which the other Court had itself taken. Lower courts are the Vicar General's court of the province (including under the Clergy Discipline Measure 2003), and the consistory court for a diocese or a disciplinary tribunal. This rule applies to a decision of the Arches or Chancery made before or after the commencement of this rule. It was enacted to combat a 2016 decision of Durham Consistory Court. [*Re Sam Tai Chan*]. In 2019, Leeds Consistory Court pointed out that, as a result, in exhumation cases: 'In dioceses of the Northern Province…it is no longer necessary to consider the test propounded by the Chancery Court…in *Alsager* [1999]…to the extent that such test was revisited and re-framed by the subsequent [Arches] decision…in *Re Blagdon* [2002]'. In *Blagdon* the Arches favoured the principle that a faculty to exhume will only be exceptionally granted, because of the norm that Christian burial is final. Chancellor Hill concludes: 'The somewhat sterile question of whether the *Alsager* and *Blagdo*n tests might lead to different outcomes is now entirely academic'. In his book Ecclesiastical Law, he recognises the change reflects (1) 'the pragmatic approach which has generally been adopted by most ecclesiastical judges when applying the ecclesiastical common law in the light of the [available] judgments'; (2) the change in the composition of the Arches and Chancery Courts into a single appellate court of appeal; and (3) 'to a lesser extent, the benign adoption of the reasoning of one consistory court by another'.

30. However, in his reply the then Dean of the Court of Arches, Charles George QC, challenged some of these assertions:

> …to what extent is the Court of Arches bound by its own previous decisions? And if so, is there a *Young v Bristol Aeroplane* (1944) exception? This goes unmentioned in Norman's lecture, although Norman described to us the use of precedent as "central to Arches' practice", and told us that "by the nineteenth century, the binding force of precedent was fully accepted". You may recall that in *Duffield* (2013) the Court of Arches departed quite considerably from the approach to listed buildings in St *Luke the Evangelist*, *Maidstone* (1994) which had endorsed the *Bishopsgate* principles. What we said (para 85) was this: "Because this court stated in *Maidstone* that it was merely "setting out certain guidelines, emphasising that they are not rules of law", we are not constrained by the doctrine of judicial precedent (in so far as, if

(2)The reference to a decision of the Arches Court of Canterbury or the Chancery Court of York is a reference to a decision taken by it in the exercise of—
(a)its jurisdiction under section 14(1), (2) or (3), or
(b)its jurisdiction under section 7 of the Ecclesiastical Jurisdiction Measure 1963 (disciplinary jurisdiction).
(3)"Lower ecclesiastical court", in relation to a province, means—
(a)the Vicar-General's court of the province (including as constituted in accordance with the Clergy Discipline Measure 2003),
(b)the consistory court for a diocese in the province, or
(c)a disciplinary tribunal within the province.]
Textual Amendments
(S. 14A inserted (1.3.2019) by Church of England (Miscellaneous Provisions) Measure 2018 (No. 7), ss. 7(1), 17(3) (with s. 7(3)); S.I. 2019/67, art. 2(1)(f)).

at all, that doctrine is strictly applicable in this court, a point we do not have to decide: see *In re Lapford (Devon)* Parish Council [1955])". In *Lapford* the Dean of Arches, Sir Philip Wilbraham-Baker, declined to hold that he was bound by a previous decision of the Court of Arches. What he said was this: "Sitting in this court I am perhaps less strictly bound [than the consistory court]. The question of re-opening previous decisions of ecclesiastical courts was discussed in *Read v Bishop of Lincoln* [a Privy Council decision of 1892]; but although some latitude may be allowable it would need strong reason to justify me in departing from Sir Lewis Dibdin's decision in the *Capel St Mary* case." *Read v Bishop of Lincoln* (to which the Dean was referring) is instructive as showing that the Privy Council is not strictly bound by its previous ecclesiastical decisions. As Lord Halsbury LC said at 655: "whilst fully sensible of the weight to be attached to such [previous] decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest and to give effect to their own view of the matter" (something quite different from a strict doctrine of *stare decisis*). But Norman in his The Legal Framework of the Church of England (1996) is clear that "The Arches Ct is bound by its own previous decisions". In *Sam Tai Chan* (2017) Chancellor Bursell endorsed this view, but made no mention of *Lapford*, notwithstanding, I may playfully add, that he had himself been a member of this court in *Duffield*! Careful readers of s.7 of the Church of England (Miscellaneous Provisions) Measure 2018 to which Norman referred in his lecture will have noticed the absence of any reference to precedent, binding or otherwise. That oversight was deliberate."

31. *Blagdon* is the more recent judgment of the two courts and precedent aside, in the light of section 7 of the 2018 Measure, there seems to me to be no reason why I should not follow it. In any event, in my view, the apparently more liberal guidance in *Alsager* can for practical purposes be reconciled with the 'stricter' guidance in *Blagdon*. The two approaches shortly stated are: 'the straightforward principle that a faculty for exhumation will only be exceptionally granted' (*Blagdon*) as opposed to the *Alsager* approach which asked: 'Is there a good and proper reason for the exhumation, that reason being likely to be regarded as acceptable by right thinking members of the Church at large?' As noted above, critics have identified the introduction of the concept of 'right thinking members of the church at large' as the principal problem. But this need not be troubling. In my view, it is not to be taken literally, so for example, as to require a polling or referendum within the Church of England as a whole or even the relevant Parish itself. The hypothetical 'right thinking member of the church at large,' just like 'the reasonable man,' or 'the man on the Clapham omnibus' is in reality the court itself, steered by the guidance of the superior courts and other material considerations.

32. In this instance, the later decision of the Court of Arches contained the paper entitled 'Theology of Burial' of September 2001 prepared by the Rt. Reverend Christopher Hill, the then Bishop of Stafford. As Hill notes, the Bishop was called by the court to give expert evidence. In my view, a right-thinking member of the [Anglican] church can currently be presumed to adhere to the theology on burial as

contained in that note. It is upon this basis that any exhumation would only be justified in exceptional circumstances (see *Blagdon,* and also see, *In re St Peter ad Vincula, Wisborough Green*, CH025/09,30 June 2009, Hill Ch.: who quite correctly refers to the *Blagdon* presumption having arisen out of *doctrine* see further fn. 14).

33. Accordingly, properly applying *Alsager* guidance in the light of the evidence in *Blagdon* a good and proper reason in accordance with the right-thinking member of the Church would have to be of an 'exceptional' nature sufficient to override the rebuttal presumption arising from Anglican doctrine as to the permanence of burial. Applied in this way I see no conflict between the two approaches. Certainly, in any event, in applying *Alsager* I would regard the paper produced by Bishop Hill as to be a highly relevant consideration in any judgment of mine as to what a right-thinking member of the church at large would consider to be a good enough reason to permit exhumation. [14]

34. I now turn to examine some of the examples of where consistory courts have permitted exhumation. The terms 'exceptional reasons' and 'good reasons' as short-hand for the respective *Blagdon* and *Alsager* approaches.

Exceptional or Good Reasons

35. Neither *Blagdon* nor *Alsager* set out a defined closed list of what counts as exceptional circumstances or good reasons; the overarching principle being that each petition falls to be considered on its own facts. *Alsager* did consider a number of factors which could potentially arise in connection with a petition for exhumation. These were: medical reasons; lapse of time; mistake; local support; precedent; and family grave. Plainly, this is not an exhaustive list. However, in *Blagdon*, the Court of Arches also set out general guidance on what might constitute an exceptional reason and what would fail to meet this threshold. For example, the presence of a serious psychiatric or psychological condition linked to the location of a grave, mistake as to location of a grave and the burial of family members in double or triple depth graves may all fall within the exceptionality test. Advancing years, deteriorating health, change of residence, a long delay with no credible explanation, change of mind by relatives and local support are all insufficient reasons for setting aside the presumption in favour of permanence.

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[14] Certainly, in the absence of any equally authoritative theological expert evidence to the contrary before the consistory court in question. In his reply to Professor Doe, referred to in the body of this judgment, Charles George QC questioned the validity of the approach adopted in *Blagdon* saying that 'there remains an element of uncertainty as to how far the Court of Arches (and its sister court in York) may venture into doctrinal matters, given that s.14(1) of the 2018 Measure excludes an appeal which "to any extent relates to matter involving doctrine, ritual or ceremonial" – as [Professor Doe] mentioned, such appeals go to the Court of Ecclesiastical Causes Reserved which has been eagerly awaiting such an appeal since 1987. You referred in a different context to *Blagdon* (2002), an appeal in which I was myself a winger in the Court of Arches, where undoubtedly part of the reasoning related to a matter of doctrine, namely the alleged Anglican doctrine of the one off nature of burial and the importance of maintaining, save most exceptionally, its permanence. Was the evidence of Bishop Christopher Hill in that case inadmissible? Once the relevance of the issue became clear, should the court have referred the matter to the two [*sic*] three bishops and two senior secular judges of the Court of Ecclesiastical Causes Reserved? In *Sam Tai Chan* reported in [2017] Fam 68, Chancellor Bursell, sitting in the other Province, boldly described the Court of Arches' "active consideration of the theology of burial" in *Blagdon* as having been *ultra vires*. and to "raise questions as to the overall authority of that decision". https://www.stmarylebow.org.uk/wp-content/uploads/2019/11/COA-lecture-and-response-2019.pdf.

36. In circumstances where a family conflict has arisen due to the interment of a family member in a specific grave, the Consistory Court in *Re St Andrew, Cubley* [2020] ECC Der 2 refused an application for a faculty of exhumation where the petitioner was the nephew of the deceased and sought her exhumation from the grave of his father, the deceased's brother. The petitioner sought the faculty on the basis that the deceased had been buried with her brother without the knowledge or consent of that part of the family. However, no alternative proposals were made for re-burial. The petitioner further argued that they had an exclusive right to burial in the grave, which they understood to be a single grave. Following *Blagdon*, despite the division within the family, the Court found that the decision to bury the deceased in the grave of her brother effectively created a family grave. The Court also observed at paragraph 9 that there was no property right in a grave. With respect to the need to consult all members of the family, the court observed that there was no known family dispute. It follows that an expectation on church officials to make enquiries of all relatives of whom they had no knowledge was an unreasonable burden. At paragraph 72 the Court further stated that even if a failure to consult other family members might properly be considered as an exceptional circumstance, this would only be the first step in obtaining an order for exhumation. It would not be sufficient on its own and would not lead to an inevitable exhumation without more.

37. Furthermore, as I have noted elsewhere[15], it seems to me that a factor which of itself may not be sufficient to rebut the presumption of permanence may, nonetheless, along with other points cumulatively amount to special circumstances sufficient to make out an exception to the presumption of permanence. I draw an analogy with the approach taken by the secular courts to the (albeit different) requirement for 'very special circumstances' to outweigh harm caused to the green belt by inappropriate development. The National Planning Policy Framework ('NPPF') provides at paragraph 137 that: 'The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land *permanently* open.' (emphasis added) Nonetheless, that presumption can be overridden where the overall harm to the green belt and other planning harm is clearly outweighed by very special circumstances (see paragraph 148 of the NPPF). Something which of itself is not a very special circumstance may cumulatively amount to very special circumstances when added to other circumstances. (See *Wychavon DC v Secretary of State for Communities and Local Government* [2008] EWCA Civ. 692, (2009) 1 P & CR 15). Indeed, in *Blagdon* itself, the Court of Arches at paragraph 37 of the judgment found five special factors which together amounted to an exception sufficient to allow the petition for exhumation.

38. *Re St Andrew, Cubley* distinguished the case of *Re St Mary's, Polstead* [2017] ECC SEI 2, where a petition was granted to exhume the remains of a woman from the burial plot containing her parents' remains where two sides of a family held differing views

[15] *In re St Andrews Churchyard, Alvalton* [2012] PTSR 479 Gregory Jones Dep Ch. (Ely).

on where the deceased should have been buried. The Court considered that the factual circumstances of that case satisfied the test in *Blagdon* as they amounted to a mistake having been made with regard to the deceased's interment in a particular location. In particular, the Court held at paragraph 32 that once an application for interment had been made, next of kin should have been contacted to have their wishes taken into account. In this regard, knowledge that a close family member objected to the proposed burial arrangements meant that an application for a faculty should have been made before burial so that family members who were known to object were given the opportunity to do so formally. At paragraph 34 the Court also took into account the fact that no proper provision was ever made for anyone to be interred in the plot other than the deceased's parents and that it could not be satisfied that either of the deceased's parents have ever expressed a wish for other family members to be interred in their plot.

39. With regard to the relevance of unsubstantiated and speculative accounts of family conflict, the Court in *Re St Mary's, Polstead* pointed out at paragraph 18 that 'anecdotal accounts of historic family matters are notoriously prone to error'. In *Blagdon*, a serious psychiatric or psychological condition linked to the location of a grave could amount to an exceptional circumstance warranting the grant of a faculty. The Court in *Re Cremated Remains of AA* [2018] ECC Lic. 7 granted a faculty on this ground where the interment of an alleged sexual abuser in a family grave caused great psychological distress to other family members. The Court further emphasised that exhumation was to be exceptional and the burden of establishing the special circumstances was on the petitioner.

Analysis

40. This is an unfortunate case. The family relationship is deeply fractured. Sadly, such breakdowns are now becoming an increasingly familiar aspect of petitions for exhumation. It is therefore important to take a step back and reflect on some basic principles. As Christians and, in particular, Anglicans, we believe that when a person dies, the Holy Spirit is released from the body to be returned to God while the body is returned to the earth that had sustained it through life. Accordingly, in that sense, there is nobody buried in a plot, the spirit has moved on. Whilst I can appreciate the logical force in the view held by some, such as, the Society of Friends ('the Quakers') that no one place is any more holy than another, I agree with my immediate predecessor, Tattersall Ch, when he said in *Re St James Daisy Hill Westhoughton* [2020] Man 2 at paragraph 24 that:

> I entirely agree with Eyre Ch when in *Re St James, Newchapel* [Lichfield] he stated:
>
> > `16. Churchyards are consecrated to God, Father, Son and Holy Spirit. Accordingly, they must be treated and cared for in a manner consistent with that consecrated status. Churchyards fulfil important spiritual roles. They provide appropriate settings for Christian places of worship and as such send out a message of the Church`s commitment to worshipping God in the beauty of holiness. They

> contain memorials to departed Christians demonstrating the Church`s continuing love for them and its belief in the communion of saints. In addition, they are places of solace and relief for those who mourn. It is notable also that many people find comfort in knowing that their mortal remains will be interred in a particular churchyard and in a particular setting. That comfort derives in part from a confidence that the character of that setting will be preserved.

41. The jurisdiction which I exercise must inevitably also engage with the views of those currently alive. It is a great benefit of an established church to be there in times of both joy and sorrow for those who may not have previously appreciated their desire for spiritual support. In this case, whichever way I decide the outcome, a close relative of the deceased will be upset, at least, initially. The underlying problem is the continued fracture of the family relationship. This is part of the reason I directed the parties consider mediation through the service of the Archdeacon. I had hoped that the mediation might, at least, present the court with a united position on the part of the family and also perhaps it might begin a healing process. However, the Petitioner refused to participate. That is, of course, her right. The court does not draw any adverse conclusion from this refusal. That being the case I turn now to examine the relevant factors as I see them.

42. I have made requests for further information on the nature of the family conflict, but no further details on Mr Yates's alleged assault on his mother and aunt and the aftermath of this incident have been provided. I have very limited material before me and no contemporary documentation.

43. The current situation is evidently unpleasant for all concerned, but a Court must be careful not to conflate a family rift and vague allegations of an isolated incident of abuse with circumstances which would give rise to serious psychological distress. (See the discussion of *Re Cremated Remains of AA* above). It is also important to emphasise that the focus should rather be the relationship of deceased persons with one another, not whether one of the deceased was estranged from other family members. In this regard, Ms Maher's statement that Mr Yates's cared for his mother as she suffered from Alzheimer's disease suggests that they at least remained on good terms before her death to some extent, although, of course, I do not know any more about this or the stage of dementia had then impaired Mrs Yates's mental faculties. However, in the absence of evidence that he was a poor and/or exploitative carer, it does at least suggest Mr Yates had some loving feeling for his mother and that these feelings were reciprocated by his mother whilst of course taking into account as best I can the general impact of dementia would have had upon his mother's mental and emotional faculties and her ability to form relationships.

44. The absence of any concrete evidence pointing to Mr Yates's estrangement from his parents may militate against granting an exhumation on the basis that their interment in the same plot effectively creates an undesired family grave. However, I am conscious too that there is a lack of evidence indicating whether Mr Yates's parents

were willing to have anyone else interred in their plot. Mrs Bennett does indicate in her application that when her father was buried, the family was told that the plot was for two caskets only. However, the fact that the Reverend Donna Williams enquired as to whether or not there was space in Mr Yates's parents' grave suggests that there was no explicit restriction on the amount of people who could be buried in that grave. This is further supported by the Reverend Donna William's letter of 17 May 2022 which confirmed that there was no reservation on the graveyard plot.

45. I have further considered whether the arrangements for Mr Yates's interment could be said to have been conducted on an improper and secretive basis. In my view, this might amount to an exceptional circumstance in light of the Court's decision in *Re St Mary's, Polstead* where a Court found it appropriate to grant a faculty for exhumation where family members were effectively deprived of making their wishes known. However, the present case can be contrasted with *Re St Mary's, Polstead*. Although there are factual similarities, there are differences. The Reverend Donna Williams was entirely unaware of the existence of other family members who might object to the location of Mr Yates's burial. It is true that she says that had she known about the objection from Mrs Bennett she might not have agreed to the burial but this does not mean that *she* made a mistake. Furthermore, restrictions on numbers attending funeral services during COVID-19 meant that the process for arranging Mr Yates's funeral and interment was incomparable to that in *Re St Mary's, Polstead*. There is also no evidence that Mrs Haslam deliberately did not inform the Petitioner and other unnamed family members of the burial *because* she planned to use her parents' grave. Indeed, Mrs Haslam first enquired about the availability of the Garden of Remembrance and only considered her parents' plot on the suggestion of the Reverend Donna Williams. On the other hand, this also suggests that Mr Yates did not leave instructions that he particularly wished to be buried with his parents.

46. Another important distinction between the facts in this case and that in *Re St Mary's, Polstead,* is that the deceased's exhumed remains were to be kept safely and privately within the church. It is now somewhat unclear whether Ms Maher or Mrs Haslam would wish to receive his cremated remains. The eventual destination of Mr Yates's remains following any exhumation is uncertain. This might result in his disinterment from consecrated ground without any guarantees of re-interment. However, were I to grant this Petition, I would need to be satisfied that a satisfactory solution could be found.

47. I consider that this application is better interpreted in the light of *Re St Andrew, Cubley* where a faculty for exhumation was not granted on the basis that it would be unreasonable and disproportionate to expect clergy members who had no reason to suspect a family dispute or the existence of other family members to conduct a thorough investigation before authorising a burial. The Court in that case also took into account the lack of any subsequent burial arrangements post-exhumation.

48. A final, although not decisive consideration against Mrs Bennett's application is the fact that Mr Yates's interment with his parents in one single plot is more sustainable

than interring him separately in a grave. In *Blagdon*, the Court held at paragraph 36(iv) that the burials of family members in double or triple-depth graves are to be encouraged because 'they express family unity and they are environmentally friendly in demonstrating an economical use of land for burials'. Although the burial of Mr Yates with his parents is evidently not an expression of family unity due to the divisions amongst his family, it is undoubtedly a more environmentally friendly and economical use of land for burials than having him interred elsewhere. I give this point only very limited weight in the circumstances.

Human Rights

49. I should add that although it has not been raised in this petition, I have considered the implications of the European Convention on Human Rights ('ECHR'), in particular, articles 8[16] and 9[17] of the ECHR and article 1 of the first protocol[18] to the ECHR. The dead have no rights in common law (*R v Price* (1884) 12 QBD 247) and the ECHR does not grant human rights to the dead. The duty of executors, administrators or the state decently to inter the body gives rise to an exception to the general common law principle that there is no property in a corpse, as those with the duty to dispose of the corpse gives rise to the right to possession of the corpse for the purpose of decent disposal (*Williams* v *Williams* (1882) 20 Ch. D 659). That right to possession of the corpse for decent disposal is recognised at common law but it is only enforceable in equity. In the present case, that duty of disposal was satisfied when Mr Yates's cremated remains were interred in the churchyard. As stated above, the grave plot is not owned by the Petitioner. Accordingly, I do not consider that article 1 to the first protocol to the ECHR is engaged by facts of the present Petition. In the present case, the desire of the Petitioner to exhume her brother's remains is not a matter of conscience or the result of any religious belief. Accordingly, article 9 of the ECHR is not engaged.

50. I turn to consider article 8 of the ECHR. In this case the Petitioner is not the executor of the deceased, she is also not his next of kin. Her right to family life is in relation not to the deceased – although he is a close family member – but rather

[16] Article 8: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[17] Article 9: (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

[18] Article 1 to the first protocol of the ECHR: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

to her family relationship with her dead parents. It also conflicts with the family relationships of Ms Maher and Mrs Haslam with Mr Yates.

51. In accordance with section 2(1) (a) of the Human Rights Act 1998, I must take into account any relevant judgments of the European Court of Human Rights - although I am not bound by them. In the case of *Elli Poluhas Dödsbo v Sweden* [19]the European Court of Human Rights proceeded on a concession made on behalf of the Kingdom of Sweden that the refusal to allow exhumation was an interference of the article 8 rights of the deceased's widow. The ECHR held that such interference was justified under article 8 as *being necessary in a democratic society*. The test used by the Swedish authorities as to whether to permit exhumation was the existence of 'special reasons' which, in my view, is very similar to the test which I have applied in accordance with the judgment in *Blagdon Cemetery*. The European Court of Human Rights considered that the sanctity of the grave was such an important and sensitive issue that there was a wide margin of appreciation which justified an interference with human rights in this case. The court held that there had been no violation of the right to respect for private and family life under Article 8.

Conclusions

52. For the reasons set out above, I have come to the view that Mrs Bennett's application for a faculty to exhume the remains of Mr Yates does not meet the test of exceptional circumstances envisaged in *Blagdon*. I am also of the opinion that it does not amount to a sufficiently good reason by reference to a 'right thinking' member of the church at large (*Alsager*).

53. In light of the above, I consider that Mrs Bennett's application for a faculty to exhume the cremated remains of Mr Yates should be refused.

54. Whilst I know that this is not the decision which the Petitioner has sought, I trust that she will be offered appropriate pastoral support by the incumbent of St George Unsworth should she seek it.

55. Finally, as already stated the statutory fee to lodge this petition has been paid by the parish. Therefore, on this occasion, I make no order in relation to the costs of the preparation and circulation of this judgment and have waived my fees for the preparation of the same.

GREGORY JONES KC
Chancellor of the Diocese of Manchester

[19] 61564/00, No 82; (2006) 8 Ecc. LJ 496 and which post-dated the judgment of the Court of Arches in *Blagdon* in which the court held that article 8 of the ECHR was not engaged at all.