

In the matter of Clayton Cemetery, Bradford

And in the matter of Colin David Berry, Deceased

Judgment

1. This is a petition concerning the exhumation of human remains, the facts of which are unusual, and the circumstances somewhat distressing. This judgment is not to be made public until the terms of the faculty which is to be granted have been carried into effect.

The petition

2. By an undated petition, the petitioner, Mrs Lesley Town, seeks a faculty for exhumation of the remains of her brother, Colin David Berry, who died aged 49 on 4 April 2013. His remains were buried in plot AC, 104B at Clayton Cemetery, Bradford after a funeral at St Anthony's Church. It is requested that they are reinterred at Queensbury Cemetery where the Berry family have exclusive burial rights in two adjacent plots (H-117A) and where the remains of his father, Malcolm Berry, are already interred. Colin's mother and siblings have countersigned the petition signifying their agreement to what is proposed.

Background

3. The background is somewhat complex and I have been assisted by a sensitive letter dated 16 July 2018, from Mr T Derwin, Senior Bereavement Services Officer with Bradford District Council, the authority responsible for both cemeteries. The petitioner has provided a witness statement, sent under cover of a letter dated 25 October 2018.
4. Mr Berry was fatally shot in the head with his own gun during a struggle while police officers were executing a search of the family home in which a cannabis farm was believed to be operating. Shortly thereafter, Mr Berry's widow, Mrs Janette Berry, vacated the premises with their three children, and moved into another of Mr Berry's homes which had previously been rented out.
5. The decision to inter Mr Berry's remains in Clayton Cemetery was apparently taken by Mrs Berry: their home had been adjacent to the cemetery. From May 2013, Mrs Berry began to distance herself from Mr Berry's relatives. There was a brief contact on 9 November 2013 when Mrs Berry sought from Mrs Town details of B J Melia & Sons, the funeral directors who had made the arrangements for the interment of Mr Berry's remains. Apparently, it concerned settlement of their outstanding fees from Mr Berry's estate. Contact ceased in December 2013 and nothing has been heard from Mrs Berry since. It later transpired that three homes owned by Mr Berry

- (including that into which his family had moved) had been sold off shortly after his death, as had his car and other joint assets. It is understood that Mr Berry probably died intestate. There is no record of letters of administration having been taken out.
6. I have been shown a letter dated 3 November 2017 sent by Melia & Sons to the Ministry of Justice. It indicates that their account for acting as undertakers remained unpaid. Nothing had been received from Mrs Berry nor from Mr Berry's estate. The payment of funeral and any testamentary expenses should properly have been a first charge on the estate of Mr Berry.
 7. Melia & Sons sought authorisation from the Ministry of Justice to transfer the rights in the grave space from Mrs Berry to Mrs Lesley Town. It is not clear on what legal basis the Ministry was invited to act. An earlier letter dated 12 September 2017 had been sent by Mrs Town (and other family members) to the Ministry of Justice making "a formal request for change of ownership of the burial plot". No basis is stated as to the source of the power which the Ministry of Justice was being asked to exercise. Exclusive burial rights are matters of private law as between the local authority and the 'owner' of each individual plot. Apparently there was no written contract between Melia & Sons and Mrs Berry.
 8. The correspondence with the Ministry of Justice arose from the fact that Mrs Berry and her children seemed to have left the area without leaving any forwarding address.
 9. Mr Derwin's letter indicates that on various occasions signs (of which I have seen an example) were left at the grave (which remains unmarked) asking Mrs Berry to contact Bereavement Services, including a period from April to June 2018. Nothing was heard.
 10. A more recent letter from Melia & Sons, indicates they received a letter from one T H Estley, claiming to be a solicitor acting on behalf of Janette Berry. It stated that the funeral fees of £5,905.00 had not been paid due to 'the insolvency on Colin Berry's estate'. Melia & Sons instructed solicitors who could find no trace of T H Estley nor any firm of solicitors for whom she might have worked.
 11. On 10 January 2019, the Secretary of State for Justice granted a licence under section 25 of the Burial Act 1857 for the removal of the remains of Colin David Berry from Clayton Cemetery to Queensbury Cemetery. I assume the reason that a licence was sought and obtained was because (as is now known) none of Queensbury Cemetery is consecrated in accordance with the rites of the Church of England, a matter which to which I shall return later in this judgment.

The law on exhumation

12. The removal of a body or any human remains which have been interred in a place burial is an offence unless it is pursuant to a faculty or a Secretary of State's licence. In *Re Sam Tai Chan (sub nom Re St Chad's, Bensham)* [2017] Fam 68, Durham Cons Ct, it was suggested that the legal tests to be applied in the northern and southern provinces were sufficiently dissimilar that petitions on identical facts might be differently determined. However, as I ventured in M Hill, *Ecclesiastical Law* (fourth edition, 2018) at paragraph 7.115

As both tests are predicated on the operation of judicial discretion, (informed either by the right thinking churchman or the exception to a defined norm), the genuine likelihood of contradictory outcomes is remote. In any event, the benign judicial convention of the

ecclesiastical courts over several decades in assimilating decisions of both appellate courts into a collective jurisprudence makes the contradiction more apparent than real.

13. This widespread (though not universal) practice has now been put on a statutory footing in consequence of a new section 14A, inserted into the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 by the Church of England (Miscellaneous Provisions) Measure 2018. The relevant part reads as follows:

14A 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.

14. In dioceses of the Northern Province (of which Leeds is one) it is no longer necessary to consider the test propounded by the Chancery Court of York in *Re Christ Church, Alsager*, [1999] Fam 142, to the extent that such test was revisited and re-framed by the subsequent decision of the Court of Arches in *Re Blagdon Cemetery*, [2002] Fam 299. The Court of Arches concluded that there was much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted. It is for the petitioner to satisfy the court that there are special circumstances which justify the making of an exception from the norm that Christian burial is final. The somewhat sterile question of whether the *Alsager* and *Blagdon* tests might lead to different outcomes is now entirely academic. I note in passing that in a comprehensive recent judgment in Sheffield Consistory Court, Chancellor Singleton QC concluded on the facts of the case before her (decided prior to section 14A coming into force) that the disposal of the matter would have been the same whichever test were applied: *Re Newton, deceased* [2018] ECC She 1.

Discussion

15. It will be apparent from my prefatory remarks at the beginning of this judgment, that I consider this to be a highly exceptional case. The examples of exceptionality given by the Court of Arches in *Blagdon* do not purport to be exhaustive and it is unnecessary to 'shoe horn' this case into one or more of the categories discussed in the judgment. In my assessment, the petitioners have satisfied me on the evidence that the place of interment for Mr Berry was not one discussed and agreed by his wider family, that the trauma of his death from a gunshot wound inflicted during a police raid gave rise to a febrile situation which denied all concerned the luxury of informed decision making. A rift within the family was in gestation. The subsequent disappearance of Mr Berry's widow and children in unexplained circumstances, has created an 'abandoned' (and still unmarked) grave, the rights in relation to which still vest in Mrs Berry whose whereabouts are unknown. Whilst the agreement of family members and the difficulties in visiting a grave would not, of themselves (whether individually or cumulatively) satisfy the test of exceptionality, the desire to create a family grave was a feature which found favour with the court in *Blagdon*. However, this is not something which I regard as determinative, albeit it adds to the argument of exceptionality which I have already outlined.

16. The Court's difficulty, however, lay in the fact that (as is now known) none of the cemetery where it is proposed that Mr Berry's remains be re-interred is consecrated. I made it clear to the petitioners that the Court would not countenance an exhumation unless the re-interment were to be in ground consecrated in accordance with the rites of the Church of England. Whilst the primary reason for this was doctrinal, an equally powerful justification in this instance was the need to ensure that the new place of burial was within the jurisdiction of the Consistory Court. Whilst every effort had been made to give Mrs Berry notice of this petition, and I determined that it was in the interests of justice to proceed with the matter without her involvement, I was mindful of the power of the Court under rule 20.3 of the Faculty Jurisdiction Rules 2015 to set aside or amend any faculty. That power would be rendered nugatory were Mr Berry's remains to be placed beyond the jurisdiction of the Court. Whilst I neither desire nor expect an application on the part of Mrs Berry to set aside this judgment or the resultant faculty, justice requires that the *status quo ante* be capable of being restored in the event that she does so.
17. Here I express my thanks, once again, to Mr Derwin, on behalf of Bradford City Council for signifying its consent to the land in which these particular plots stand being consecrated, and the cemetery's records revised accordingly. The family of those already interred in the Berry family grave have indicated their agreement to this proposal. I have made enquiry of the registrar and bishop as to their readiness to consecrate the land in question and both Mr Foskett and the Right Reverend Toby Howarth have agreed to do so.
18. It therefore follows, applying the exceptionality test in *Blagdon*, that a faculty may issue for the exhumation of the cremated remains of Mr Berry. It will be subject to the following conditions, in addition to the usual ones concerning seemliness and public health.
- (1) That the exhumation is not to be carried out until the registrar has confirmed in writing that the land in Queensbury Cemetery where the remains are to be reinterred has been consecrated in accordance with the rites of the Church of England and the cemetery maps and records amended accordingly;
 - (2) That the cremated remains are all to be reinterred in the designated plot at Queensbury cemetery and nowhere else;
 - (3) That the exhumation is not to take place until the court costs have been paid in full.
19. The petitioners are responsible for the court costs, to include a correspondence fee for the registrar. These may be sizeable because the matter has been referred to me or to the Deputy Chancellor on several occasions and has occupied a considerable amount of registry time.
20. It is always painful to read of tragic circumstances and divided families. The Court cannot enquire into the conduct and motivations of individuals. The positive element of this case has been the helpful and pastoral conduct of Bradford City Council through its dedicated staff. In addition, B J Melia & Sons have behaved in an

exemplary fashion and have given to Mrs Town and to the Court considerable assistance. I note with regret that they will go unremunerated for the services which they provided in 2013.

21. I hope that the relatives of Mr Berry will derive some comfort from the fact that his remains will now lie alongside those of other family members, providing a seemly and enduring resting place following a life cut tragically short; a fitting plot with an appropriate memorial where he can be mourned and remembered by those who loved him.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Leeds

29 April 2019