

In the Consistory Court of the Diocese of Leeds

In the matter of Cottingley Hall Cemetery

Re Catherine Kershaw (deceased)

Frederick Kershaw

Petitioner

Leeds City Council Bereavement Services

Interested Party

David Goodall

Interested Party

JUDGMENT
(23-21C)

1. By a petition dated 20th February 2023 Frederick Kershaw, the son of Catherine Kershaw, seeks exhumation of his Mother's remains to be re-interred in the correct grave within the consecrated cemetery of Cottingley Hall on Beeston Ring Road in Leeds. Catherine Kershaw sadly died in October 2022 at the age of 96 years. At her funeral the Petitioner sought her interment within the family grave. The interment occurred in early November 2022. Unfortunately, through an administrative error that Leeds City Council seem to accept was theirs, the remains were interred in grave 297 row F instead of grave 295 row F. It is therefore surprising that Frederick Kershaw is petitioning to correct that error rather than a representative of Leeds City Council Bereavement Services. I have named LCC Bereavement Services as an 'Interested Party', although they have not formally been made a party to the proceedings. In the circumstances of this matter it seems appropriate to issue a special citation on the basis that Leeds City Council Bereavement Services appears to be the organisation that should bear all the expenses and legal fees arising from the necessity of these

proceedings, for the reasons expressed in this judgment.

2. David Goodall has the reserved right of burial in the grave where Catherine Kershaw's remains were erroneously interred. He does not in law 'own' the grave, although he described himself as 'owner' in correspondence, but he has correctly been informed of the circumstances that have arisen. He has graciously agreed in writing to consent to the exhumation from the plot over which he has legal rights. There clearly rests no fault upon him in the circumstances of this matter.
3. It is to be assumed that bereavement services from Leeds City Council will carry out the planned exhumation and re-interment, and will do so in a reverent manner. There has been no indication whether it is anticipated there will have been any deterioration to the original casket, but after so short a time it is relatively safe to assume an exhumation can be carried out with little or no risk of the remains being exposed.

The Law

4. There are numerous reported decisions on the issue of exhumation arising from Consistory Courts in both provinces. This no doubt arises because the issue of exhumation is considered so important that a judgment will be required in almost every case. The guiding principles are set out in two cases of the ecclesiastical appellate courts. The case of *Re Christ Church Alsager* [1998] 3 WLR 1394 came from the Chancery Court of York. There the Court dismissed an appeal against the refusal of the Chancellor to permit an exhumation and reburial within the same churchyard in order that a married couple's remains could be buried together. The case of *Re Blagdon Cemetery* [2002] 3 WLR 603 is a decision of the Court of Arches. There the court overturned a first instance decision to refuse permission for exhumation apparently on the grounds of the passage of time alone.
5. Chancellor Revd Rupert Bursell QC (as he then was) considered the

application of appellate cases in the Consistory Court in the matter of *St Chad Bensham and the Petition of Sam Tai Chan [2016] Ecc Dur 2*. The Chancellor permitted an exhumation after applying the *Alsager* test. Coincidentally he was one of the three Judges sitting on the *Alsager* appeal in the Chancery Court of York. He also had in mind and referred to the *Blagdon* test and acknowledged that the *Alsager* test received some criticism from the Court of Arches in that judgment. However, the Chancellor also pointed out that although *Blagdon* is an important and influential decision, the binding authority for the Province of York, and so including the Diocese of Leeds, remains *Re Christ Church Alsager*. The test under *Alsager* is for the [Deputy] Chancellor to ask the following question:- *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?* [see page 1401 paragraphs D to E].

6. Notwithstanding the precedence of the *Alsager* judgment in the Northern Province I do note that the Diocese of Leeds petition form for exhumation specifically refers the Petitioner to the *Blagdon* judgment and invites him/her to take legal advice on the principles espoused. Under *Re Blagdon* the guiding principles are set out in paragraphs 33 and 34, as follows:-

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 Edition, 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.*

34. *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.

The presumption is therefore that burial of human remains in consecrated ground is permanent save in exceptional circumstances.

7. In *Blagdon* the Court of Arches was greatly assisted by the words of The Right Reverend Christopher Hill (then Bishop of Stafford) in *The Theology of Christian Burial* (as quoted in paragraph 23 of the judgment) where he explained this permanency:

‘The funeral itself articulates very clearly that its purpose is to remember before God the departed; to give thanks for [his/her] life; to commend [him/her] to God the merciful redeemer and judge; to commit [his/her] body to burial/cremation and finally to comfort one another.’

He went on to explain more generally that :

‘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. 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’.

8. In *Blagdon* the Court of Arches then went on to explain the legal view of permanency thus :

“The general concept of permanence is reflected in the fact that it is a criminal offence to disturb a dead body without lawful permission. Moreover, the fact that there is no ownership of a dead body according to English law, and the

absence of any legal right in English law or under the European Convention of Human Rights to exhume a body or cremated remains, reflects a culture in which the norm is that the remains of a dead person should not be disturbed once they have undergone the initial act of interment.”

9. The above comments do not mean that exhumation cannot occur, but in *Blagdon* the Court expressed that there has to be some exceptional circumstance before the norm of permanent burial is set aside. The Court gave some guidance as to what could constitute exceptional circumstances. These factors include medical reasons supported by necessary psychiatric evidence (which do not apply here), or a mistake in the administration of the burial so that an important error in location had been made (as clearly has occurred here).
10. It is stated under both *Alsager* and *Blagdon* that the decision over exhumation will depend upon the peculiar circumstances of each case, to which general principles can be applied. I therefore have regard to the *Blagdon* principles but will be guided by *Alsager* in my determination.
11. In this matter the circumstances are quite clear that an error in administration lead to Catherine Kershaw’s remains being erroneously interred in the wrong grave. Under *Blagdon* that is specified to be an exceptional circumstance permitting the principal of permanence of Christian burial to be set aside. Under the *Alsager* test I am confident that any ‘right minded member of the Church at large’ would consider that in this case there was clearly a good and proper reason for exhumation and re-interment. No fault can be placed upon the petitioner or his family, who discovered the error within four days of interment and have diligently sought to correct the error as soon as possible.

Let a Faculty be granted permitting the exhumation of the buried remains of Catherine Kershaw from grave 297 row F and the interment of those remains in

grave 295 row F at Cottingley Hall Cemetery.

As the fault in this matter appears to rest entirely with Leeds City Council Bereavement Services I shall make a provisional order against them to pay all legal costs, fees and expenses arising from this application, including the costs of the exhumation and re-interment. In accordance with paragraphs 19.1 and 19.2 of the current Faculty Jurisdiction Rules, as amended, I make a provisional order that Leeds City Council Bereavement Services pays the Court costs and fees, to come into effect as a costs order at 35 days after the Registrar has made his assessment of those cost and fees. I certify that this judgment took two hours to prepare.

Conditions

- (1) The burial plan (or equivalent) of the cemetery shall be endorsed within one calendar month of the re-interment to show the correct location of that interment;
- (2) The (a) burial register and (b) log book (or equivalent) of the cemetery shall be endorsed within one calendar month of the re-interment to show the details of the interment. The endorsement in the register and logbook (or equivalent) must show that there was an exhumation permitted by faculty to correct an error in the location of the original interment.
- (3) All costs, fees and expenses arising from the necessity for an exhumation and re-interment shall be paid by Leeds City Council Bereavement Services, subject to the right in law to raise objection in part or in full to the issuing of a provisional costs order.

Glyn Samuel
Deputy Chancellor
22nd February 2023 (amended 11th April 2023)