Neutral Citation: [2018] ECC Win 2

IN THE CONSISTORY COURT OF THE DIOCESE OF WINCHESTER

19 February 2018

Before:

THE WORSHIPFUL MATTHEW CAIN ORMONDROYD, CHANCELLOR

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In the matter of:
South Stoneham Cemetery
And proposed exhumation from plot N6-107

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The petition of
Mr Mark Edwards
Counsel David Willink

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Parties Opponent

1) **Southampton City Council**
2) **Denise Shaw**
3) **Robert Shaw**
4) **Carol Ann Kiddle**
5) **Kevin John Kiddle**
6) **Julie Spanner**
7) **David Spanner**

Counsel for the City Council Justin Gau

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Hearing date 26th January 2018

JUDGMENT

Introduction

1. On 3 February 2016 the remains of Mrs Patricia Sutton were interred in the consecrated section of South Stoneham cemetery in space N6-107. Unfortunately, the Petitioner (Mr Edwards) already had, or believed that he had, the exclusive right of burial in that space. These proceedings for a faculty for the exhumation of Mrs Sutton's remains are the unhappy result of this very distressing situation.

The proceedings

2. Mr Edwards' petition was brought on 25 October 2017. It is opposed both by Southampton City Council ("the Council"), the burial authority with statutory responsibility for the cemetery, and also by Mrs Sutton's family. Mrs Sutton's three daughters and their husbands chose to become parties opponent, and I also had the benefit of correspondence from Mr Sutton, her husband.

3. I set directions for an early hearing, as it seemed to me that further delay was in no-one's interest. At the hearing on 26 January 2018, Mr Edwards was represented by Mr Willink of counsel, and the Council was represented by Mr Gau of counsel. The Sutton family had elected to make Mr Shaw their main spokesman, which was of great assistance to the orderly running of the proceedings. In addition to the written evidence and documents provided before the hearing, I heard evidence from Mr Edwards, and also from Mrs Heather White and Ms Linda Francis, two employees of the Council. Mr Shaw gave evidence and made closing submissions on behalf of the Sutton family, as Mr Willink had indicated that there was no challenge to the evidence of any of the members of that family. At the hearing I was able to see original copies of various documents referred to by the parties. Following the close of the hearing I also had submissions in writing from Mr Gau and Mr Willink.

4. Before dealing with the substance of the case I should record one preliminary matter. The day before the hearing, the Council wrote to raise a concern about what was described as a "potential conflict of interest". This was said to arise because Mr Willink had recently been appointed as Deputy Chancellor of the Diocese of Salisbury. The registrar of Winchester diocese is also the registrar of Salisbury. I was invited to "maintain the appearance of fairness to reassure the parties opponent".

5. At the very start of the hearing I made the following three points with this in mind. First, by way of reassurance, I explained that the decision in this case was mine and mine alone, and that as far as I knew I had never met Mr Willink before. Second, in terms of the legal position, I set out my preliminary view that Mr Willink's connection with the registry was tangential and not such as to cause any apparent unfairness, although I was open to hear further argument on this. Third, I invited the parties to consider the implications if the point were pressed – namely that I would have to rule on it and if I ruled in favour of the parties opponent the inevitable result

would be further delay. In the event, both the Council and the Sutton family were clear that having heard my explanation they had no objection to the case proceeding and that they were satisfied there was no conflict of interest or apparent unfairness arising from Mr Willink's involvement. I therefore proceeded to hear the case.

The facts

6. In this section I set out the history of these proceedings based on the evidence I have heard and read.

7. Mr Edwards' sister Mrs Julie Williams died on 13 February 1999, aged 41, from staphylococcal septicaemia. Her untimely death was all the more difficult for her family to bear because medical negligence had apparently played a part in it. Her mother's last words to her were that one day her family would be beside her.

8. Julie's remains were interred in plot N6-106. Mr Edwards explained to his parents that as he could not be near to her in life, he would be next to her in death. At the hearing, he spoke with visible emotion about his feelings of not having done enough for his sister when she was alive. His family's plan to be buried beside her was a way to "support her in death".

9. With this aim in mind, he purchased the exclusive right of burial in plot N6-107. At the hearing, he produced the original deed from the Council granting that right. It is dated 31 March 1999. The Council's statutory register records the date of purchase as 15 March 1999, and the date of conveyance as 31 March 1999. It was the practice at that time to post-date all conveyances to the end of the month. The receipt for Mr Edwards' payment for the grave is dated 15 March 1998, which must be an error for 15 March 1999. Mr Edwards agreed to allow his parents to be buried in the space that he had reserved.

10. What happened next goes to the very heart of these proceedings. The Council's statutory register shows the '107' in N6-107 crossed out and replaced with a '59'. A comment in the 'remarks' column reads: 'FAMILY CHANGED TO 59 NEW PAPER SENT B. BEARD 18\3\98'. 'B. Beard' appears to refer to Mrs Barbara Beard, who in 1999 worked in the relevant department of the Council but who has since died. Consistent with this amendment of the register, the plan maintained by the Council had also been altered such that Mr Edwards' name and burial grant number are shown in plot N6-59 and not N6-107. N6-59 is two rows over from N6-107, as the sketch plan attached to this judgment indicates.

11. The circumstances in which the register and plan were altered are to a large extent shrouded in mystery. However, one fact is very clear to me. Mr Edwards has been adamant throughout that he did not contact the Council's bereavement services team between the time when he initially reserved space N6-107 in 1999 and the point at

which he discovered that Mrs Sutton's remains had been buried in it. I accept his evidence. However emotional he was in the period after his sister's death, I do not think that he would have forgotten a conversation about the location of the grave space with the Council entirely. Nor would he have had any cause to contact them, let alone to ask for a different space than the one he had already reserved.

12. This leaves open the question of how the amendment came about. There are no documents bearing on this other than the register and plan and no opportunity to consult the person who apparently made the amendment. The evidence of Mrs White, who has worked in the bereavement services department of the Council since 1997, established the following about the Council's procedures in and around 1999:

    a. At that time there were no electronic records, only written ones;
    b. In her written evidence, Mrs White explained that if someone wished to amend the plot they had reserved, "the family member would have been asked to return the original copy of the Deed of Exclusive Right of Burial and if this was provided the new grave details would have been typed on the rear of the Deed which would then have been signed by the Bereavement Services Manager/Registrar in post at that time. The amended Deed of exclusive right of burial would then have been returned to the family member";
    c. In her oral evidence, Mrs White further explained that before 2000, the Council allowed family members, as well as the person who actually held the exclusive right of burial, to transfer grave space reservations. In her words, the Council only started to do things "properly" after 2000. Since that time it has also insisted that the holder of the right signs a statutory declaration before the right is transferred;
    d. She also explained that a person seeking to amend the location of a grave space was not required to produce the deed; it would only be annotated "if" it was provided, which it might not be. In re-examination she said that a person wishing to make an alteration would need to have the number of the space, the reference number from the deed of grant, and the address of the person holding the right. Asked by Mr Gau "If I didn't have the deed would I need proof of identity?", she replied "possibly".

13. The original deed which Mr Edwards produced at the hearing did not bear any annotation on the back relating to the amendment. I have already recorded my finding that he himself did not contact the Council to ask for the amendment. However, the admitted state of the Council's procedures in 1999 means that some third party could have made the request and had it acted on without either the deed or any other proof of identity. It is therefore perfectly possible that either another member of the Edwards family, or someone else (perhaps connected with Julie's husband or his family), contacted the Council shortly after he had reserved the space and had the space changed on the register, either mistakenly or by accident or out of malice. The date given in the register for the alteration of 18 March 1998 would then

be explicable as a slip of the pen for 18 March 1999. It seems to me that this is as far as I can go on the basis of the evidence I have heard. For reasons which will become apparent, I do not think I need to go any further than that in order to decide the case.

14. Tragedy struck the Edwards family again in 2001, when Julie's first grandchild Sebastian was stillborn. Mrs Patricia Edwards visited the Council's offices to purchase a plot and chose N6-82, as this was at the foot of the plot where Julie's remains were interred. She states that on looking at the plan she "noted my sons plot alongside his sister". Mr Dean Edwards also visited the offices to reserve a space for himself in 2012. He explains that "the staff member on duty provided a large plan of South Stoneham Cemetery stating that she couldn't see Julie Edwards on there, I explained it would be Julie Williams (married name). We discussed the group of four grave spaces together and confirmed that the one I had chosen was definitely below my brothers and alongside my Great Nephew Sebastian with my sister above him". Throughout this period, the Edwards family were tending both N6-106 and N6-107. All of this evidence was uncontradicted and un-challenged.

15. The Sutton family became involved in this unhappy saga in 2016. Mrs Sutton died on 12 January 2016 following many years of suffering from vascular dementia, brought on by a head injury sustained when she was mugged in 2005. I am told by Mrs Shaw that Mrs Sutton had expressed a wish to be buried near to her own mum and dad, although as Mr Shaw clarified at the hearing neither she nor the family had any particular space in mind. The Sutton family were pleased to be offered space N6-107, which was near the plot where the remains of Mrs Sutton's mother and father, Mr and Mrs Middlewick, were buried (N6-129).

16. Mrs Sutton's remains were interred in N6-107 on 3 February 2016. 13 February 2016 was the anniversary of Julie's death, and her parents visited her grave. They were shocked to see that a burial had taken place in plot N6-107. The next working day, Monday 15 February 2016, Mr Edwards and his family went to the Council's bereavement services department to demand an explanation. I have read their accounts of the meeting on that day and of a second meeting on 22 February 2016, and also some notes that Mrs Patricia Edwards took at both meetings. I have also heard from the Council's witnesses about the two meetings and a telephone call on 16 February 2016.

17. It is very clear to me that the Edwards family were extremely upset and angry about what had happened, and that they expressed those emotions forcefully in their interactions with the Council's officers. In that context I can well believe that Mrs Edwards might have said "we will take you for every penny that you have got" and "you have broken the law and you will pay", as Mrs White alleged. However, it is also clear to me that what the Edwards family were actually demanding was reinstatement of the grave, i.e. exhumation, and that this is how they were understood. Ms Francis records of the meeting on the 15th that Mr Edwards "wanted the grave to

be exhumed as soon as possible" so that it would be available for his parents. Mrs White, who was at the 22 February meeting and who spoke to Mrs Edwards on the phone, agreed in cross-examination that it was clear to her that the Edwards family wanted the space restored so that they could use it. She understood them to be asking for exhumation although they did not use that word; there was no other way for them to get the use of the space. I therefore cannot accept Mr Gau's assertion that the initial request was for compensation, not exhumation.

18. The Council's stance at these meetings is summarised by Ms Francis: "I explained that I did not consider that we had made an error and that we were not notifying Mrs Sutton's family as the grave had been allocated correctly". The resolution on the 22 February was that the Edwards family were given forms through which they could pursue the Council's internal complaints procedure. They were not told that they could themselves apply for a faculty and were not given contact details for the registry. Indeed, Mrs White recalls saying that before an exhumation could take place "the Bishop of the Church of England and the family of the deceased person buried in the grave would have to be in agreement".

19. Mr Edwards then set about pursuing the complaints procedure, apparently having spoken to a lawyer and to his member of Parliament for assistance. His complaint letter of 26 February 2016 briefly recounted the situation, and phrased the dispute as one about 'ownership' of plot N6-107. Mr Hamlet, an officer in the Customer Relations Department, wrote back on 29 February 2016 to clarify the scope of the complaint as follows:

> As I understand it, you are seeking an independent review of the following:-
> 1. **To consider the ownership of the grave space situated in South Stoneham Cemetery marked Section N6 Grave space 107.**
> 2. **To consider whether an exhumation would take place so that grave space section N6 Grave space 107 is available to Mr Edwards once more.**

20. Mr Edwards responded with his own slightly different formulation of the issues, essentially seeking confirmation of his ownership and 'reinstatement' of the plot. Mr Hamlet reported his findings on 24 March 2016, with reference to the issues as he had initially phrased them. His findings on the first issue include the following:

> I conclude that you hold a valid legal agreement made between you and the council on 31st March 1999…
>
> I found [the entry in the 'remarks' section of the statutory register] difficult to reconcile because the date preceded the date of the agreement, the agreement was made between you and the council and not a family member and the Statutory Register was not accurate…

> … In your correspondence you stated that since you purchased the grave space you had never been in communication with Bereavement Services. My investigation has revealed that no further correspondence was held by Bereavement Services.
>
> Without any further evidence to the contrary, I can only conclude that you had a legal agreement with the council for grave space to Section N6 grave space 107 and the Statutory Register was not up to date or accurate in this instance because the council was obliged to keep records safely especially where there was a change to the Statutory Register that reflected a material change to support the council's position and to reflect the accuracy of the Statutory Record.
>
> This amounted to a service failure by Bereavement Services to maintain an up to date and accurate record of the Statutory Register.
>
> **I uphold your complaint in this regard.**

21. In my view this was clearly, in context, a finding that Mr Edwards still held the exclusive right of burial in N6-107, and that the register was inaccurate because it had failed to record this fact.

22. On the second issue, Mr Hamlet found that an exhumation was not possible. Various of his reasons for reaching that finding are instructive:

> I found that for a faculty to be considered all the relevant consents would need to be given and an application made by the family of the person to be exhumed, not the council.
>
> I also found that because the land is consecrated, burial is regarded by the Diocese as permanent and applications for a faculty to authorise exhumation are granted only in special circumstances.

23. Mr Hamlet concluded his letter by offering Mr Edwards the use of either N6-59 or N6-81, along with a 'without prejudice goodwill gesture' in the sum of £1,200. If he was dissatisfied, Mr Edwards was offered the option of complaining to the Ombudsman. This he duly did on 29 March 2016. The Ombudsman returned a draft decision on 8 April 2016, including the following passage:

> **What I found**
>
> **4.** In 1999 Mr A purchased the right of burial and interment in a grave space next to the grave of a family member. He complains that someone has been interred in the space without his knowledge or consent. He wants the Council to reinstate the grave space to its condition prior to the interment.

> **5.** The Council has upheld Mr A's complaint. It accepts that a valid agreement exists and that it allowed the interment in error. It has explained that it cannot reinstate the grave space. That would require an exhumation and it is not prepared to support this. It has offered an alternative grave space and a payment of £1200 in recognition of the consequences of the fault on its part.
>
> **6.** It is clear that the Council's actions have caused Mr A significant distress. However, it is unlikely that the Ombudsman's intervention could achieve anything significant for him. The Council has accepted that it was at fault and the payment it has offered to make is reasonable in the circumstances of the case. Investigation by the Ombudsman would achieve nothing more.

24. Having received this draft decision, Mr Edwards saw that the Ombudsman would not help him to achieve what he was seeking. He returned no comments on the draft decision, which was finalised on 26 April 2016. In the meantime, Mr Edwards sought legal assistance through his home insurance policy, completing a claim form on 13 April 2016. Lyons Davidson Solicitors (LDS) were the legal advisers appointed by the insurer. The matter appears to have been allocated to a 'case handler' (i.e. a paralegal), Cicelly Kilgarriff, and she spoke to Mr Edwards on the phone on 20 April 2016, notes of which indicate that he said the case was "not about money it is about the plot".

25. A letter of advice was not provided until 17 May 2016. This analysed the situation in terms of contract law, and repeated the view that exhumation would "require consent from all members of the deceased's family". Mr Edwards discussed the way forward with Miss Kilgarriff on 16 June, the conclusion of which was that the next step was 'LOC', which I understand to mean sending a letter of claim to the Council. There was further delay as the case was passed to a different case handler, Charlotte Woolway, on 23 June 2016. She sent over a draft letter of claim for Mr Edwards' comments on 5 July 2016.

26. The draft letter of claim presented the matter as a claim for breach of contract. It opened with the words "We are instructed by our above named Client to seek damages, interest and costs from you in respect of losses suffered by our Client arising from your breach of contract". Under the heading 'Remedy and losses' it stated that "in a strict legal sense our Client could seek for the body of the deceased in the Plot to be exhumed" but that the client "would be willing in the first instance, to consider other suitable alternative options that may be available. Please be aware, that the small amount of compensation that has currently been offered is not a satisfactory alternative".

27. Mr Edwards sought amendments to the letter on 10 July 2016. He explained that the sentence relating to 'alternative options' was "not entirely true as in conversation with Miss Kilgarriff previously I explained that as difficult as it may be the reinstatement of the plot to how it was prior to February 3rd 2016 (prior to the illegal interment) would always be the main objective". Miss Woolway wrote back on 12 July 2016 to say that she appreciated Mr Edwards wishes but that she had to look at the matter from a wider perspective and "should this go to court, the court would not have the power to be able to order for [reinstatement] to happen". In accordance with this understanding, she amended the draft letter slightly so that it said Mr Edwards 'may' be willing to consider alternatives, not 'would' be willing. He replied on the same day authorising the letter to be sent and assuring her that "my family and I have always had an open mind with the outcome. However should there be a slight chance of reinstatement I will take it". The letter of claim was sent the next day.

28. The Council's response on 28 July 2016 stating that it had admitted it was at fault, an offer of compensation had been made and that a sensible start point for ADR would be for Mr Edwards to "indicate the sort of settlement he is seeking".

29. Mr Edwards called LDS on 3 August 2016, chasing up the Council's response (which apparently had not yet been sent to him). Upon being told of the terms of the letter Mr Edwards is recorded as having said that "it isn't about the money". He had also been doing some 'homework' and had "found 3 cases with similar facts and actually in 2 they ordered an exhumation even without the consent of the other party". He was to send these to Miss Woolway and she assured him she would look at them. The three cases were referred to in a blog post from the 'Law and Religion' website, and included *Re St Andrew, Thringstone* (2013), which Mr Edwards sent to her the same day.

30. It was not until 4 October 2016, and after repeated chasing by Mr Edwards, that Miss Woolway provided a further draft letter to the Council. This did no more than restate Mr Edward's desire for an exhumation and attach the blog post. The letter was sent to the Council on 13 October 2016. It prompted the legal department to ask Mrs White to contact the registry, which she did on 19 October 2016. It was made clear to her that if Mr Edwards continued to press for an exhumation, and the Sutton family did not consent, the matter would be dealt with by me as a contested case. The Council's reply, dated 15 November 2016, did not mention this possibility. Instead it reiterated the Council's opposition to an exhumation, stated that "it is not in the power of the Council to approve an exhumation" and increased the offer of compensation to £2,000.

31. Mr Edwards, who had been chasing LDS for any update in the meantime, was clear when he learned of this position that he wanted to "go to court or to the papers". Miss Woolway advised against the latter course. She was away the following week, and emailed Mr Edwards on 13 December 2016 to say that she had been researching the

possibility of including a trespass claim "so that we can claim for specific performance". On 21 December they discussed the matter and she explained that it would be necessary to "obtain costs of how much it would be to exhume if specific performance is not given" before a claim could be brought. Mr Edwards tried to discover what these might be in January 2017, but wrote on 2 February 2017 to say that he had been "unable to get a cost for the exhumation and reburial" and asking for guidance on how to move forward "myself not being of a legal mind".

32. This guidance does not appear to have been forthcoming. Miss Woolway sent holding emails on 7 and 21 February 2017, and was away between 23 February and 6 March. Nothing further followed and it was left to Mr Edwards to chase for a response on 1 May 2017. On 4 May she drafted a letter, sent on 8 May 2017, threatening the bringing of proceedings for specific performance and an application for summary judgment, and asking the Council to commence the "necessary procedures" to obtain authorisation for an exhumation.

33. Miss Woolway apparently chased a response from the Council by phone on 22 May; the response was dated the same day. It simply restated the Council's position. Mr Edwards spoke to Miss Woolway on the 1 June 2017 and she said that she would be in touch with the insurers about issuing proceedings and would then update him. She was away the following week, and then contacted him on 22 June to say that she wished to discuss the claim with a partner at LDS, but would now be out of the office until 10 July.

34. Mr Edwards called LDS to chase progress on 18 July, and was told that Miss Woolway would call back the next day. Evidently she did not and he called again on 25 July, expressing dissatisfaction with the service he was receiving. This prompted an email from Miss Woolway on the same day apologising for the delay and saying that she would like to discuss the matter with a senior colleague who had had a similar case. She wrote next on 1 August 2017, having considered various cases including *Reed v Madon* [1985] Ch 408, a case on infringement of an exclusive right of burial in an un-consecrated cemetery. The result of her research was that "it is now clear that unfortunately we are unable to issue proceedings to specifically request that the court orders for exhumation to take place". In order for exhumation to take place, a licence would be required from the Home Secretary, and his insurance would not cover the making of an application for that licence. She provided further information about the making of such an application on 8 August 2017.

35. On the same day, Mr Edwards wrote saying he would apply to the Home Secretary to put his case forward. The outcome of that application would determine what he did in respect of the Council. As a result, the file was closed on 10 August 2017. Mr Edwards then wrote to the Council on 14 August 2017 stating that there had been 'no change to his wishes' since 29 March 2016, and reiterating his desire that no headstone should be placed on plot N6-107.

36. There was then a two-month hiatus. On 16 October 2017, Mr Edwards found a memorial on the plot, which appears to have caused him to complain to the Council and, on 17 October, to write to the Home Secretary. Prompted, I understand, by some response from the Home Secretary he contacted the DAC on 20 October, and was given details of the Registry, which he contacted the same day. The petition was dated 27 October 2017 and received at the Registry on 30 October 2017.

The law

37. The relevant principles are set out in the judgment of the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299. The starting point is a presumption of permanence arising from the Christian theology of burial. In order for exhumation to be permitted, exceptional circumstances must be shown. This requires an assessment of all the facts.

38. The court also gave guidance on various relevant factors. The following are of particular relevance here:

> **(ii) Lapse of time**
> …It may well be a factor in relation to assessing the genuineness of the petitioner's case. Long delay with no credible explanation for it may well tip the balance against the grant of a faculty but lapse of time alone is not the test. Mr Hill pointed to a period of 110 years *In re Talbot [1901] P 1* and examples of up to 20 years since the date of burial in other reported cases... we consider that the chancellor erred in treating the lapse of time as determinative instead of concluding that there was a credible explanation for the delay. Having so concluded, he should then have proceeded to consider what other factors operated for or against the grant of a faculty.
>
> **(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. We also agree that a change of mind as to the place of burial on the part of relatives or others responsible in the first place for the interment should not be treated as an acceptable ground for authorising exhumation… 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…
>
> **(iv) Local support**
> …We consider that the views of close relatives are very significant and come in a different category from the other categories mentioned by the Chancery Court. We do not regard it as persuasive that there is particular support for an unopposed petition any more than support for a contested petition of this nature would affect the decision on the merits of the petition. It is the duty of the consistory court to determine whether the evidence reveals special circumstances which justify the making of an exception from the norm of the finality of Christian burial, as we have already said earlier in this judgment. The amount of local support, whether clerical or lay, should not operate as a determining factor in this exercise and will normally be irrelevant.

39. I was also referred to the decisions of various other consistory courts. For the most part these simply apply the law and guidance in *Blagdon* on the facts of that specific case. Two decisions are worth of further mention, however.

40. The first is *Dixon* [1892] P 386. Mr Gau relied on this decision to justify a test of "necessity" where the application is made by someone other than "the executors or members of the family". In *Dixon* itself the application was made by a member of the family (the wife of the deceased), and the remarks relied on were therefore *obiter*. They are not binding on me in any event. As such, I cannot see any warrant in *Dixon* to depart from the simple test of exceptional circumstances articulated in *Blagdon*.

41. The second is *Re Fairmile Cemetery* [2017] ECC Oxf 2, on which considerable reliance was placed by Mr Gau. I consider this decision in more detail in my analysis below.

42. Also of relevance in the context of this case are the provisions of the Local Authorities Cemeteries Order 1977 (LACO 1977). In broad outline these are as follows. Art 10(1) allows a burial authority to grant "the exclusive right of burial in any grave space or grave". Art 9(1) requires a burial authority to maintain a plan allocating numbers to graves in which burials have been carried out or which have been reserved. Schedule 2 Part II requires that a public register be maintained of all exclusive rights of burial granted by the burial authority.

Submissions

43. In concise and helpful closing submissions, Mr Willink suggested that there were three questions which had to be answered, namely:

a. Did the Petitioner hold the exclusive right of burial in plot N6-107 at the time that Mrs Sutton was buried in that plot?
b. If so, did the burial of Mrs Sutton in that plot constitute a "mistake" such that this case falls within the exception to the principle of permanence as set out in *re Blagdon*?
c. If so, should the court exercise its power to issue a faculty for the exhumation of Mrs Sutton's remains?

44. On the first question he refers to the nature of the exclusive right of burial, being like a proprietary right. It was not possible to say what had happened to cause the amendment of the Council's records, but it could have no effect if Mr Edwards was not party to it and as such the court can be satisfied that he did hold the right at the relevant time.

45. On the second question he relies on the remarks in *Blagdon* on mistake, deprecating any suggestion that the stance of the burial authority can make a difference. *Fairmile* relied on the unsustainable conclusion that burial in a space reserved for another was not a 'mistake'.

46. On the third question he refers to the factors counting in favour and against the discretionary grant of a faculty, which I consider below.

47. Mr Gau's primary submission was that this was not a 'mistake' case at all. The Council had not made any admission of a mistake in respect of the transfer of the burial rights to N6-59; the only mistake was in terms of filing documentation. The court was not bound by the conclusions of Mr Hamlet or the Ombudsman and should draw its own conclusions. In the alternative, he contends that no faculty should be granted on the basis of the various factors relevant to discretion.

48. Mr Shaw made very eloquent closing submissions effectively in the course of his evidence. There was no proof as to how the amendment had come about, but it was clear that the Council believed at the time it allowed Mrs Sutton's burial to take place that the space was not reserved. An alternative solution would be for the ashes of Mr Edwards and his parents to be interred in the grave with his sister. The Sutton family had much more to lose than the Edwards family because someone who had been given a Christian burial would be exhumed, which was more important than a simple choice of plot.

Analysis

49. It seems to me that the three questions proposed by Mr Willink form a helpful framework for consideration. I address them in turn.

Did Mr Edwards hold the exclusive right of burial in plot N6-107 on 3 February 2016?

50. There is no doubt that Mr Edwards was granted the exclusive right of burial in plot N6-107 by the Council in March 1999. That much is not controversial. I therefore ask myself whether anything had happened by 3 February 2016 to remove that right from him.

51. Clearly, the register had been amended. That in itself is not sufficient. The register is separate to the grant, as LACO 1977 Sch 2 Part II, para 1 and 2 make clear. By para 1, a "grant under article 10 shall be in writing signed by the officer appointed for that purpose". By para 2, the burial authority is required to maintain a register of such grants. The grant can therefore take effect independently of the register. The Council's witnesses appeared to believe that the statutory register offers incontrovertible evidence as to the rights in existence. This is not the case. A statutory register benefits from the presumption of regularity, so that the starting point is that it is correct. But that presumption is not irrebuttable. It is open to the Petitioner to show that the register is inaccurate. The question for me to address is whether he has done so.

52. I have already explained my finding that he himself did not contact the Council to alter the right, or at all, before 3 February 2016. The deed of grant was not returned to the Council. Nor was it indorsed with any alteration. Indeed, the Council's own record in its register of exclusive rights of burial (which is the only evidence to show that anyone did request the alteration at all) does not refer to Mr Edwards, or to the owner of the right, but to the 'family'.

53. Mr Gau, whilst acknowledging that it is "impossible" to know who precisely asked for the transfer, nevertheless contended that it was clear that a proper and lawful transfer was effected by "someone who had the appropriate authority under the 1999 scheme of reserving grave spaces". In order to deal with this submission it is necessary to consider briefly the nature of exclusive rights of burial under LACO 1977.

54. Exclusive rights of burial have the nature of a proprietary right. LACO 1977 refers to the 'owner' of such a right and accords special status to that person. Only the owner can consent to a burial, and such consent must be in writing: art 10(6). There is an exception for those named in the deed of grant or recorded on it "at the request of the owner". Time expired rights can be determined only after notice has been served on the owner: art 10(3). The right itself can only be assigned by deed or bequeathed by will: Sch 2 Pt II para 3. There is thus a stress on the status of the owner and the need for a formal written instrument to effect any change to the owner's rights. The burial authority has no general discretion to revoke, amend or assign exclusive rights of burial that it has already granted. I note that there are specific provisions allowing relatives to place memorials and inscriptions when the owner cannot be traced: art

10(1)(b). They have no such standing when it comes to the exercise or transfer of the right itself.

55. Given those characteristics of an exclusive right of burial, I do not think family members of the owner have any status or authority to ask for an alteration of such a right. I think Mrs White was correct to say that the Council did not do things "properly" when, before 2000, it allowed family members to request amendments. It therefore follows that, because I have found Mr Edwards did not request any amendment, no lawful amendment could have been carried out. The register must be wrong.

If so, has there been a mistake such that this case falls within the exception to the principle of permanence?

56. It follows from what I have said above that Mrs Sutton's remains were interred in a plot which had been reserved for someone else, in breach of art 10(6) of LACO 1977. This was through no fault of the Sutton family, but it is in fact what happened. It follows in my view that there has been a mistake sufficient to amount to exceptional circumstances.

57. Mr Gau urged me to follow the analysis of McGregor Ch in *Fairmile Cemetery*, where at [49] he found that there had been no 'mistake' in the *Blagdon* sense because the family of the deceased had buried the body just where they intended to bury it (albeit that they were unaware that someone else held exclusive rights of burial in that plot). With the greatest respect to Mr Gau, and to McGregor Ch (whose learning and intellect are very apparent), I cannot accept this analysis. It seems to me to be too sophisticated. I have no doubt whatsoever that neither the Sutton family nor the Council would have wanted Mrs Sutton's remains to be buried in plot N6-107 if they had known that Mr Edwards still held the exclusive right of burial in respect of it. The decision to bury her there was a mistake.

58. It will be apparent from the above that I have not been assisted by a minute textual analysis of the *obiter* paragraph in *Blagdon* dealing with mistake. I take from that decision no more than that a mistake as to the place of burial can amount to sufficient justification to order an exhumation, i.e. it can amount to 'exceptional circumstances'. Whether or not the test of exceptional circumstances is met will of course depend on an evaluation of all the relevant facts. I consider these in the next section.

If so, should a faculty be granted?

59. There are various factors said to weigh for and against the exercise of my discretion to grant a faculty.

60. The following factors it seems to me weigh in favour of the grant of a faculty. The primary factor in favour is Mr Edwards' status as owner of the exclusive right of burial in plot N6-107. These rights would be frustrated if I do not order an exhumation. This does not provide a complete solution to the case, as I am still required to decide whether the circumstances as a whole are sufficiently exceptional to permit exhumation, but it is a powerful factor in favour of a grant.

61. A second factor is that there are suitable plots for the reinternment of Mrs Sutton's remains. The Sutton family very fairly accepted that they were not particularly concerned about the exact space in which she was buried. It seems to me that plots N6-81 or N6-59 would have been equally suitable from their point of view, being a similar distance from the grave of Mrs Sutton's parents.

62. Mr Willink said in support of the petition that exhumation would 'cut the Gordian knot' by allowing the Sutton family to visit the grave of their loved one without being hindered by the prospect of meeting the Edwards family. I do not accept this submission. The Sutton family might still come into contact with the Edwards family when visiting her parents' grave, which is nearby. As it happens, Mrs Shaw has said that she expects it would be too painful for them to visit if the exhumation were carried out. In that respect the Sutton family are the mirror image of the Edwards family; Mrs Edwards feels unable to visit Julie's grave as things stand. I cannot avoid the conclusion that whatever the outcome of this case, one family or the other will experience a great deal of ongoing distress.

63. Various factors are said to point against the grant of a faculty.

64. One of these to which I attach no weight is the attitude of the burial authority. The burial authority may be gracious, admit its mistake, and petition for a faculty to put the mistake right (or at least adopt a neutral attitude). Or it may be truculent and refuse to acknowledge any possibility that its own procedures and records were flawed. I do not see why a faculty should issue less readily in the second case than the first. I also do not think the court in *Blagdon* meant to suggest that this should be the outcome, particularly given that it explained with reference to 'local support' that the views of anyone other than close relatives would normally be irrelevant.

65. Another factor which I am not persuaded by relates to the delay in seeking the faculty. Following the guidance in *Blagdon* I ask myself whether there is an explanation for the delay here between February 2016 and October 2017. There is a very clear explanation, which is that no-one had told Mr Edwards that he could apply for a faculty himself. He was unfortunately misadvised on this score by the Council on two occasions – by Mrs White initially and then by Mr Hamlet in his complaint decision letter. LDS did no better, despite the fact that Mr Edwards sent them information on relevant consistory court decisions and was proactive in chasing them up throughout the 16 month period in which they were advising him. Having appointed Solicitors

(chosen by his insurer) it was entirely reasonable of him to look to them for advice on how to progress the matter.

66. I have set out the history of Mr Edwards' dealings with his Solicitors in some detail, and in the light of that I cannot accept Mr Gau's submission that there is "no evidence that the petitioner appears to have urged his solicitors on at any stage". There is plentiful evidence of him doing just that. The most that could be said against him was that there were sometimes periods of a few weeks when he did not immediately get back in touch with the Solicitors. There was also a period of two months between the Solicitors closing the file and him making the application to the Home Secretary which he had said he would make. I do not hold these small instances of delay against him. They certainly do not indicate any lack of genuineness in his intentions. They are more suggestive to me of exhaustion and despair in the face of the many obstacles that were put in his way. They are insignificant in the context of the delays caused by others.

67. The following factors do however weigh against the grant of a faculty.

68. The first is the wishes of the Sutton family. Although they were not particularly concerned about which space was used, now that Mrs Sutton has been buried they are very clearly opposed to exhumation. This opposition accords with the Christian theology of burial. It is clear from *Blagdon* that the wishes of the family are a factor of great significance.

69. The second relates to the possible consequences for the Sutton family if the exhumation were to take place. Mrs Kiddle has given evidence that this could cause a deterioration in a longstanding mental health condition. The need to allow the ground to settle before any memorial can be erected might also have the result that Mr Sutton does not live to see a memorial erected to his wife. These effects, which go beyond mere preference or emotion on the part of the Sutton family, are potentially severe and have been exacerbated by the length of time this case has taken to come to court.

70. The third relates to the admittedly imperfect alternatives which are, or might be, available to Mr Edwards and his family. At the hearing, Mr Edwards was asked whether he had considered the possibility of further interments in Julie's grave, given that her husband has remarried and moved away. I was surprised that Mr Edwards had not taken any steps to see whether this might be feasible, nor to investigate whether there might be any prospect of exhuming Julie's remains so that they could be reburied in a plot with space to the side. The existence of these options had been flagged by his Solicitors as long ago as 17 May 2016. I can well imagine that it would be distressing for him to contact Julie's ex-husband to discuss either of these possibilities, but then the present proceedings have also been extremely distressing for all concerned. Similarly, although the use of N6-59 or N6-81 would not be an entirely suitable alternative, it would offer Mr Edwards and his parents some ability to

be buried in close proximity to Julie, thereby honouring the spirit if not the word of their final promise to her.

71. I should record in this connection that I do not regard the Council's offer of compensation (now withdrawn) as a satisfactory alternative in any sense. Monetary compensation cannot make up for the wrong that has been done to Mr Edwards. Having read his Solicitors' file (which is summarised above) I am fully satisfied that he has never been interested in pursuing a monetary claim. This was something pursued by his Solicitors because they believed there was no credible alternative.

72. This has not been an easy case to decide at all. The most powerful factors are Mr Edwards' legal rights and the opposition of the Sutton family to the exhumation. If it were just a case of these two factors, I would be minded to grant the petition, particularly given that the Sutton family has no attachment to space N6-107 in particular. As Mr Willink said, this is a court of law and I should not readily allow legal rights to be overborne. However, the possibility of real consequences for the Sutton family (beyond the simple fact of the exhumation and its emotional consequences), coupled with the position on alternatives outlined above, has just persuaded me that, overall, this is not one of those exceptional cases in which exhumation can properly be ordered.

73. I will offer one final thought. I have already recorded Mr Edwards' feeling that he had not done enough to help Julie when she was alive. It seems to me that he could not have done more to achieve his aim of being buried beside her. I find him to have been blameless in respect of the Council's mistake, and since that mistake was made he has done everything in his power to reverse it. I have decided on balance not to order an exhumation, but that is not because of any lack of effort on his part. He has done all that could be expected of him, and more. I expect this will offer scant consolation to him and his family given the result, but I offer it nonetheless.

Addendum on Costs

74. After a draft of this judgment was circulated for comment, it is now agreed between the parties that the Council should pay the costs of the petition and of the parties, including the costs of attendance of the other parties opponent. This seems to me to be right order and as such I order that the Council is to pay those costs, to be assessed if not agreed.

Matthew Cain Ormondroyd
Chancellor 19 February 2018

Plan to accompany Judgment

129 Mrs Sutton’s parents	105 Occupied	81 (Held for Mr Edwards)	57 Occupied
130 Occupied	106 Mrs Julie Williams (nee Edwards)	82 Julie’s grandson, Sebastian	58 Occupied
131 Occupied	107 Mrs Sutton	83 Reserved for Mr Dean Edwards	59 Reserved for Mr Edwards