**IN THE CONSISTORY COURT OF**
**THE DIOCESE OF GUILDFORD**
**The Worshipful Andrew Burns KC, Chancellor**

Date: 22 November 2024

**IN THE PARISH OF Knaphill and Brookwood**
**RE BROOKWOOD CEMETERY (No.2)**

**In the matter of a petition for a faculty for the exhumation of the cremated remains of Cecil Gordon Tennant**

**And an application to set aside the Judgment of the Consistory Court in *Re Brookwood Cemetery* [2023] ECC Gui 4 refusing a faculty for the exhumation of the cremated remains of Cecil Gordon Tennant**

# JUDGMENT

1. In a judgment dated 21 June 2023 HHJ Sarah Whitehouse KC, the Deputy Chancellor of the Diocese of Guildford refused to grant a petition from Victoria Tennant for the exhumation and reinterment of the cremated remains of Cecil Tennant. His ashes have been interred in the consecrated ground of Brookwood Cemetery, Woking, Surrey in a plot in Fern Path since 1967. The proposed place of re-interment was St Mary's Church, Conistone, Skipton, North Yorkshire.

## The Deceased

2. Mr Tennant was born in Conistone, Yorkshire. He was tragically killed in a car crash on 12 July 1967 when the family lived in Surrey. At the time the petitioner and her siblings were children and he was buried in Brookwood Cemetery without them attending the funeral or burial. Several of the extended Tennant family have graves in in the churchyard at St Mary's Church, Conistone where the wider family have lived for 200 years. Mrs Tennant, their mother, was distraught and moved to Australia two years after Mr Tennant's death, without her children. She died there in 2008 at the age of 89. Her ashes were scattered in America, Scotland and Australia.

## The First Judgment

3. The Deputy Chancellor noted that Mr Tennant's children had all moved away and felt their father's ashes were 'abandoned' in Surrey in somewhere he would not have chosen.

She recorded the unresolved trauma surrounding his death. The decisions about his funeral were made at a time of chaos and crisis. The death of the father, followed by the departure of the mother destroyed the family and the siblings sought peace and closure to place their father's ashes in St Mary's churchyard and mark the occasion with a service of thanksgiving.

4. The Deputy Chancellor applied the legal principles in *re Blagdon Cemetery* [2002] 4 All ER 482 which she summarised:

> "i. Burial in a particular space permanently set aside for God is intended to be permanent and the peaceful rest of the departed is of paramount importance.
> ii. A faculty court will only grant a faculty for an exhumation in exceptional circumstances. Whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the Court to determine on the balance of probabilities.
> iii. It is for the petitioner to satisfy the Court that there are special circumstances in her or his 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."

5. She noted that a long delay made it less likely that an exhumation will be allowed, without compelling reasons (*Re Christ Church, Alsager* [1999] Fam 142). She said:

> "The granting of a petition for exhumation after 56 years must therefore show these compelling reasons for a change now, as well as the exceptional circumstances required by *Blagdon*."

6. She observed that:

> "If there was clear and strong evidence of some mistake made at the time of burial, that would be capable of amounting to an exceptional circumstance. However, a mistake in 1967 would have likely resulted in a petition in the years after that. A mistake must be distinguished from a case in which a family have simply changed their minds as to the preferred location of the remains. A mistake may 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. "

7. She noted that there was no family grave at St Mary's Church, Conistone and held that the "very long passage of time" was one of the key considerations in this case. Mrs Tennant lived for a further 41 years after her husband died without trying to move his remains. She held that the evidence indicated a change of mind by the family at a very late stage which was understandable, but which did not meet the legal test for an

exhumation. For those reasons she refused the petition.

**The Second Petition**

8. In a fresh petition dated 14 August 2024 Mrs Tennant applies for the same exhumation from Brookwood Cemetery and reinterment in St Mary's, Conistone. Within that petition she alternatively formally applies for the judgment to be set aside. She put forward the following grounds:

    a. "I considered appealing that decision but, after taking legal advice and consulting with the registry of the Court, I decided to lodge a fresh petition.
    b. I decided to take this course of action because I felt that it was important to particularise my request and the reasons for it more fully. In particular, I am conscious that I did not fully explain the reasons for the petition being made so long after the interment or the reasons why I consider that this case is different to those seeking to disregard the permanence of a committal.
    c. I was advised that the scope to develop my arguments at appeal level beyond those set out in my petition was limited and that an alternative would be simply to set out my request in fuller terms and put it before the Consistory Court on one further occasion.
    d. I understand a petition for a faculty to be a request for permission and that the denial of permission does not prevent the granting of permission in the future. However, formally, I understand that you wish me to petition for the decision of the deputy chancellor to be set aside and accordingly I do so."

9. The new petition repeats many of the grounds addressed in the first judgment. It also states that "a committal to God, of the sort envisaged by Bishop Christopher [Hill, in a paper on burial relied on in *Blagdon*] has not taken place for my siblings or me which has caused significant spiritual harm, leaving us feeling that we have not properly handed over our father to God and have instead abandoned him in the place and time at which he was suddenly taken." This is because the burial took place while Mr Tennant's children were still recovering from their injuries and they were unable to attend. The petitioner described her brother's spiritual wound, which has not healed for decades, caused by them not being able as children to be present at the funeral and burial. The petitioner says that this is different from *Blagdon* as the deceased's children were not part of the burial process. Alternatively she says that her mother made a mistake in burying their father so swiftly in Brookwood and leaving Surrey thereafter. She explains that she did not apply sooner so as not to 'tread on her mother's toes' and to avoid her mother realising the severity of her mistake. She applies again to exhume from Brookwood as Surrey is painfully associated with the tragedy and to reinter in Conistone with a therapeutic committal service.

**The Petitioner's Submissions**

10. I gave the petitioner an opportunity to make further submissions whether a fresh petition can go behind the judgment of a Consistory Court determining the same issue involving the same parties. I noted that the power to set aside a judgment in rule 20.3 of the Faculty Jurisdiction Rules 2015 can be exercised when it appears to the Court just and expedient to do so. I gave the petitioner an opportunity to address the circumstances in which this power can or should be exercised and when it is just to set aside having regard to the principle of finality of a court's judgment.

11. I have been assisted by the supplementary submissions of Mr Baldwin, partner of Winckworth Sherwood, dated 28 October 2024. The petitioner's proposition that a fresh petition may be lodged is derived primarily from the permission to appeal order in *Re Cheshunt Cemetery (No 2)* [2018] EACC 4 which concerned a proposed exhumation of a child's remains.

12. The order records that permission to appeal was granted as the Arches Court considered that the deputy chancellor was arguably wrong in the application of one of the principles in *Re Blagdon Cemetery* [2002] Fam. 299. The Court also noted the Applicants' request to change the basis of their petition from "complete exhumation to relocation from consecrated ground to non-consecrated ground… due to a change of our personal circumstances in that we are no longer moving". The Dean of Arches said that this "will depend on whether the appellate court is prepared to admit new evidence relating to this at the hearing of the appeal, and no order is made at this stage in respect of that matter."

13. In his brief reasons the Dean noted that this was a substantial change in the original petition and indicated that the Court would "consider any application to vary the basis of the petition, but the Applicants should not assume that such application will be granted. As an alternative to pursuing the appeal it remains possible for the Applicants to request the consistory court to set aside the refusal decision under rule 20.3(1)(a), with a view to reconsideration on the basis of their revised proposal to re-inter the deceased (if exhumation were permitted) in unconsecrated space available within the same cemetery; or if the consistory court refuses an application to set aside, to submit a further petition on that basis."

14. Although not part of the main reasons for the order of the Arches Court, it is submitted that these words indicate that a petitioner has a right to present a new petition not only when he or she has a new application for a different relief, but also when seeking the same relief but on different grounds and even where the Consistory Court has refused permission of the setting aside of the prior refusal.

15. Mr Baldwin candidly admits that "this decision of the Arches Court might be described as somewhat surprising. Nevertheless, this faculty is squarely within the same field as that before the Arches Court in *Cheshunt* – an unopposed petition for exhumation in which the petitioner seeks to advance new grounds and for which the consistory court is clearly the appropriate forum for consideration."

16. He submits that "the Court's function [in granting a faculty] has perhaps more in common with an administrative decision-maker dealing with a permission application and the route suggested by the Arches Court would be less suitable where the Consistory Court had acted as a tribunal in the adjudication of a dispute." In effect he suggests that res judicata only applies to the Consistory Court where a petition has been opposed and not where "an applicant for permission wished to apply for permission again with developed grounds, and was willing to pay the requisite fee. In this scenario, we submit, a fresh petition is appropriate so long as the aim or effect was not to abuse or 'clog up' the consistory court."

17. He submits that "The *Cheshunt* order suggests that a petitioner should make a set aside application first. It does not explain why, and it is curious that it does so in circumstances where, even if that application is refused, a new petition may be lodged. We speculate that, in some cases, there might be a clear advantage in 're-opening' an existing case rather than starting one afresh – for example, doing so might avoid a new lodgement fee, or avoid the need for repeated public notice. In this case, the petitioner did not feel that those concerns were of importance and was content to lodge a new petition. However, as the petition sought to explain, the petitioner is not averse to applying for a set aside order and makes one if that is considered desirable. The petitioner has no objection to paying an additional fee if that is properly chargeable. However, a set aside application is made on the basis that doing so would be without prejudice to her ability to have her further petition considered in the event of a refusal as anticipated by *Cheshunt*."

**The Issues**

18. The first issue is whether it is permissible to consider a second petition seeking the same relief – the exhumation from Brookwood Cemetery for reinterment in Conistone – as has already been the subject of the judgment of the Consistory Court. I have to consider whether when a petition is refused by the Court, an alternative to an appeal to the Court of Arches is for the petitioner to submit a fresh petition. This largely turns on whether *res judicata* and related principles apply in the Consistory Court or whether (as submitted) *Re Cheshunt Cemetery (No 2)* is authority for what is said to be a 'surprising' approach that *res judicata* has no application and an unsuccessful petitioner may simply reapply.

19. If it is not permissible, the second issue is whether it is appropriate in this case to set aside the first judgment on the grounds that it is just and expedient" under rule 20.3(1)

of the Faculty Jurisdiction Rules. If it is, then there is plainly jurisdiction for me to consider the second petition.

20. In those circumstances, I then need to consider whether to grant a faculty as sought in the second petition taking into account the petitioner's submissions on the *Blagdon* test.

***Res Judicata***

21. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK* [2013] UKSC 46; [2014] A.C. 160 Lord Sumption reviewed the modern approach to *res judicata* which he described as a "portmanteau term which is used to describe a number of different legal principles with different juridical origins". A number are relevant to this petition.

    a. His first principle was that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This "cause of action estoppel" precludes a party from challenging the same cause of action in subsequent proceedings.

    b. He also refers to the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. The third principle is not relevant.

    c. His fourth principle is that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: issue estoppel.

    d. His fifth principle was first formulated in *Henderson v Henderson* (1843) 3 Hare 100, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

    e. He also refers to the general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of these principles.

22. In *Johnson v Gore-Wood & Co* [2002] 2 AC 1 Lord Bingham said:

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more,

amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

23. *Arnold v National Westminster Bank pl*c [1991] 2 AC 93 held that:

    a. cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
    b. cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
    c. except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which
        i. were not raised in the earlier proceedings or
        ii. were raised but unsuccessfully.

    If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised. However issue estoppel does not operate where a party can show materially altered circumstances and that an inflexible application of the principle would cause injustice.

24. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims.

25. The values which underpin these principles are in two ancient Latin maxims best translated as "it is in the public interest that there should be an end to litigation" and

"no-one should be vexed twice in the same matter". These are two matters of public policy which applies in English common law and to judicial proceedings. They do not apply to internal disciplinary proceedings because they are not judicial proceedings and do not determine legal rights or disputes: *Christou v Haringey London Borough Council* [2014] QB 131. However they do apply to all other domestic courts. The leading textbook on the subject, *Spencer Bower & Handley, Res Judicata*, para 2.01 states: "A res judicata is a decision on the merits, pronounced by a tribunal which is judicial in the relevant sense" and at para 2.05 observes that "Every domestic tribunal, including any arbitrator or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order, or statute, is a 'judicial tribunal' for present purposes, and its awards and decisions conclusive unless set aside." This would plainly encompass the Consistory Court and so there would need to be a good reason not to apply these principles to judgments in the faculty jurisdiction.

26. I do not agree with the submission that the Consistory Court's function in granting a faculty has more in common with an administrative decision-maker dealing with a permission application than a court determining legal rights or adjudicating a dispute. Under section 7(1) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 "the consistory court of a diocese has jurisdiction to hear and determine—(a) proceedings for obtaining a faculty to authorise an act relating to land in the diocese, or to something on, in or otherwise appertaining to land there, for which a faculty is required". In any event *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 held that the principle applied to decisions of planning inspectors. Where a statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of *res judicata* applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions. This is not universally applied in public law such as immigration claims but event there an earlier decision is treated as final and binding unless there is some legal justification for departing from it (such as fresh evidence which meets the *Ladd v Marshall* test or a material change in circumstances: *Abidoye v Secretary of State for the Home Department* [2020] EWCA Civ 1425).

27. For these reasons I am satisfied that the principles of *res judicata* and the rule against abuse of process apply in the Consistory Court. Where the cause of action is the same, a second petition falls within the *res judicata.* It is impermissible to present a new petition for a faculty to carry out the same works as has already been determined in a judgment on a previous petition.

28. I am satisfied that this conclusion is consistent with the reasons given in the order of the Arches Court in *Re Cheshunt Cemetery (No 2)*. What was proposed for the second petition was not an application that had already been determined by the Consistory Court but a petition for a different faculty. That also explains why the Arches Court indicated that

the first step would be to request the Consistory Court to set aside the refusal decision under rule 20.3(1)(a), with a view to reconsideration on the basis of their revised proposal to re-inter the deceased in unconsecrated space within the same cemetery. There may have been potential grounds to set aside the first judgment on the just and expedient basis and that would have avoided any issue estoppel arising even in the different second petition. The fact that the second petition was anticipated to be for a different faculty explains why the Arches Court said that a further petition could be submitted even if the Consistory Court refused an application to set aside. It was not a case of applying for precisely the same outcome on different or additional grounds as in the present petition, but a petition for something that was materially different.

29. Therefore I cannot consider the fresh petition unless it is just and expedient to set aside the Judgment of the Deputy Chancellor.

**Application to Set Aside Judgment**

30. Mr Baldwin submits that the Consistory Court should be slow to hold that the principle of finality, as it applies to set aside applications, should be imported into Consistory Courts in the form that it exists in secular courts. He points out that under the Civil Procedure Rules a judgment can be set aside only where a party has not been able to participate, such as orders made on the court's own motion, orders made without notice and default judgments.

31. In broad terms under the CPR the secular court may set aside or vary a default judgment or one obtained in the absence of a party if they have some good reason and normally where they have acted promptly and have a real prospect in the claim. There is no general power to set aside a judgment because the party wants to try again on different grounds.

32. Rule 20.3(1) of the Faculty Jurisdiction Rules is much simpler and grants the court a general power to set aside any judgment or order subject only to doing so where it appears to the court to be "just and expedient". This is obviously sensible where the majority of petitions are decided on the papers without a hearing. This grants a wide discretion to the Consistory Court to set aside a judgment. However that discretion must be exercised judicially and in accordance with legal principle. It does not permit a petitioner to relitigate where it would be unjust to do so.

33. The petition submits that it would be just and expedient to set aside the judgment of the Deputy Chancellor because:

    a. The petitioner's first petition was submitted without the benefit of legal advice when this is a complex petition.

b. During the appeal time limit I (acting as Chancellor) gave an informal indication that a new petition could be considered rather than an appeal noting the precedent in *Re Cheshunt Cemetery No 2*.
c. The petition concerns a matter of great importance to the petitioner and her family.
d. No prejudice to other parties as the refused petition was unopposed and the petitioner has the support of her joint next of kin. It is a "declined permission" rather than a "lost dispute".
e. There is no intention to abuse or clog up court.
f. The decision to prefer a further petition to an appeal is a recognition that findings of fact on new grounds are for the judge of first instance (see *Re St Peter and St Paul's Church, Chingford* [2007] Fam 67 at para 52) and that it would be disrespectful to the Consistory Court to seek to advance more developed grounds at appeal and thus deprive it of its rightful jurisdiction in the diocese.

34. There is no guidance in rule 20.3(1) about what is just and expedient. The words echo the "just and convenient" test in s.37(1) of the Senior Courts Act 1981 which reenacted similar provisions in statutes of 1873 and 1925. That expression means "just, as well as convenient" (Day v Brownrigg (1878) 10 Ch. D. 294) and indicate a wide discretion which must be exercised in accordance with principle and any restrictions established by judicial precedent and rules of court (*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334). Similarly it must be just as well as expedient to set aside a judgment and should only be done in accordance with principle including taking into account the public policy behind the principle of res judicata and the avoidance of abuse of process.

35. It seems to me that the categories of grounds to set aside a judgment of the Consistory Court are not closed or limited but include where there is new evidence meeting the *Ladd v Marshall* test which would have had a material effect on the decision, where the judgment has been obtained by fraud or wrongfully, where there has been some error on the part of the Registry or where a petitioner did not have a proper opportunity to present evidence or submissions on a petition. I do not think that it would normally be just to set aside a judgment on the ground that a party disagreed with the conclusion of the court. The appropriate route for a party which considers that the Consistory Court has made an error of fact or law is to appeal.

36. It is not a ground to set aside a judgment because a party submitted a petition without the benefit of legal advice. Even complex petitions are normally made without legal advice or representation and the Consistory Court is well used to reaching just decisions on cases where the petitioner (and any other party) is acting in person. Neither do I regard it as a reason to set aside a judgment that the Court gave an informal indication that a new petition could be considered rather than an appeal as suggested in *Re Cheshunt Cemetery No 2*. An informal procedural indication does not bind the Court as to

the appropriate procedure, but even less can it bind the substantive outcome of any procedural step that is subsequently taken. The petitioner and her advisers knew the circumstances of the proposed new petition whereas the Court only had a partial view of the relevant factors. The grounds for the application to set aside were only fully set out in the further submissions.

37. I accept that the petition concerns a matter of great importance to the petitioner and her family. Many petitions are important to the petitioners and indeed to the church and the community. I do accept that important findings of fact on new grounds are best made by the judge of first instance rather than on appeal. The importance of the matter, assessed objectively, may not be a ground to set aside by itself, but is a factor to be taken into account when assessing whether a judgment should be set aside.

38. It is significant that no prejudice would be caused to other parties as the refused petition was unopposed and the petitioner has the support of her joint next of kin. Prejudice or lack of prejudice is a common factor in exercising a judicial discretion. I accept that this is a "declined permission" rather than a "lost dispute" and that one of the two significant policies behind *res judicata* is that the party who won the dispute should not be vexed by the same litigation.

39. I accept that there is no intention to abuse or clog up court. However abuse of process is not a subjective matter requiring intent. The bringing of a petition on new grounds may, without more, amount to abuse if the court is satisfied that the new grounds should have been raised in the earlier proceedings if they were to be raised at all. However there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. Where there is no 'other party' as in an unopposed petition, there is no harassment. I must make a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case. This broad, merits test of whether a second claim is abusive has much in common with the wide discretion to set aside the previous judgment if it is 'just and expedient' to do so.

40. The new petition does not raise substantially different grounds from before although they are explained in much more detail and it gives the Christian context of the ongoing spiritual harm. The petitioner says that a committal to God as discussed in Bishop Christopher's paper has not taken place for the children of the deceased. They feel they have "abandoned him in the place and time at which he was suddenly taken." The petitioner describes her brother's spiritual wound as the most severe as he was severely ill in hospital until well after the funeral. He suffered PTSD after visiting Brookwood Cemetery and cannot face going there again. He explains the failure to apply to rectify the mother's "mistake" in burying Mr Tennant quickly, locally and without his teenage

children present to spare "her feelings of guilt for rushing things". The children seek a committal and farewell in Conistone as a healing and to resolve over 50 years of unresolved grief.

41. Bishop Christopher Hill noted (C Hill, *A Note on the theology of burial in relation to some contemporary questions*, (2004) 7 Ecc LJ 447) that:

> "The permanent burial of the physical body/the burial of cremated remains should be seen as symbolic of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their 'journey'), entrusting them in peace for their ultimate destination, with us, in the heavenly Jerusalem. This commending, entrusting, resting in peace does not sit easily with 'portable remains', which suggests the opposite: reclaiming, possession, and restlessness; a holding on to the 'symbol' of a human life, rather than a giving back to God. The risen Lord in St John's Gospel says enigmatically to Mary Magdalene: 'Do not hold/cling to me' (John 20 v.l7). In general, therefore, the reluctance to agree to faculties for exhumation is well grounded in Christian theology and eschatology. It is also right generally from the point of view of the mourner, who must learn to let go for their psychological and spiritual health."

42. I accept that the permanence of this burial took place without the petitioners personally commending Mr Tennant to God, although strictly the committal would have taken place on their behalf at his Christian burial. This is a case in which 50 years have passed and yet the children have not been able to "let go for their psychological and spiritual health" and that is causing ongoing suffering. Dr Gordon, the petitioner's psychologist in California, reports on 19 September 2023 that it would be "psychologically healing" for the children, as adults in their 70s, "to be able to bury their Father and reunite in a way that could not happen as children".

43. In deciding whether to set aside, I focus on the question whether, in all the circumstances, the petitioner is misusing or abusing the process of the court by seeking to raise an issue which could have been raised before or whether it is just to set aside to allow new reasons to be adduced. Those additional reasons put forward in the second petition include that most of the 56 year delay was to avoid distressing the petitioner's mother by highlighting her mistake. It still does not fully explain why the application was not made in the years soon after 2008 when Mrs Tennant died but I accept that this is a family living with historical turmoil. It is now clear that this is not a case of an unexplained and recent change of mind as it appeared to be on the evidence before the Deputy Chancellor. It is not one in which the exhumation is sought for the convenience or comfort of the living. I accept that there is long-lasting and severe psychological harm which could be alleviated by a second committal which was not emphasised in the first petition.

44. In circumstances where there is no 'other party' to suffer prejudice or harassment from a second petition, the potential for abuse of process is reduced. Although it will be a rare case where a judgment will be set aside and still more unusual where the *Ladd v Marshall* tests for new evidence or material are not met, I accept that this will reduce ongoing spiritual and psychological harm to the petitioner's brother and his siblings. In those circumstances although the first judgment is unimpeachable in its application of the legal principles on the evidence as presented to the Deputy Chancellor, it does seem to me to be just to set it aside so I can consider the second petition on its merits.

**Conclusion on the Second Petition**

45. I must consider the matter afresh applying the *Alsager* and *Blagdon* legal principles as in the judgment of the Deputy Chancellor, but taking into account the new evidence and material. I do not agree that where family members are unable to attend a funeral or committal takes this case outside of the *Blagdon* principles, but I do take those facts into account when applying the text of exceptional circumstances for making an exception to the norm that Christian burial is final.

46. Having regard to *Re St. Andrew Cherry Hinton* [2022] ECC Ely 6 I have considered the justice of refusing to grant a faculty which prevents a distressed and damaged family from visiting the grave of their father. As Chancellor Leonard KC said: "Burial on consecrated ground is not only to place a loved one back into the care of the church until the Day of Judgment, but also to allow the living to visit the grave of a departed relative or friend and seek solace in so doing". *Re St. Margaret Ormesby* [2024] ECC Nor 5 is a recent case in which exhumation was granted as the petitioner suffered psychological harm and distress including nightmares and flashbacks when visiting the grave. In *Re St. Bartholomew Naunton Beauchamp* [2019] ECC Wor 5 a faculty for exhumation and scattering of ashes in accordance with the deceased's wish was granted because without it the petitioner would be unable to "let go" and recover her "psychological and spiritual health" as alluded to by Bishop Christopher.

47. I am satisfied that the long delay in applying for the faculty is now largely explained by the family's reluctance to distress their mother who suffered from mental health illness after their father's death. It does not indicate that Mrs Tennant was content for her husband to rest in Brookwood but that she was still distressed and guilty at the mistake in rushing to hold a funeral without his children being able to say goodbye. I can understand why they may have tried to cope with the *status quo* in the years after her death, but it has recently become imperative to try to resolve the spiritual and psychological harm particularly from the petitioner's brother's being unable to visit the grave. These are exceptional circumstances where a family is suffering psychological harm that may be healed and resolved by a Christian committal in a churchyard where Mr Tennant can be laid to rest with his ancestors and away from the place where such a

distressing and sudden death took place.

48. For these reasons I grant a faculty as sought. The conditions on the grant of the faculty are that the exhumation takes place on a date which will allow the deceased to be reburied as soon thereafter as is practically possible. The exhumation must be carried out discreetly and out of public sight and the burial arranged in the proposed family plot at St Mary's Conistone arranged with any necessary permissions from the Parish and/or the Diocese of Leeds.

**ANDREW BURNS KC**