

CONSISTORY COURT OF THE DIOCESE OF ROCHESTER

re St Mary, Fawkham

Introduction

1. The petitioner, Mr Dave Clark, wishes to instal a memorial over the grave of his late wife Janet, who was interred in the churchyard of this church in March 2023. As the proposed memorial falls outside the Churchyard Regulations, it requires a faculty. The PCC did not support the proposal and the DAC did not recommend approval. The petitioner is content that I should deal with the petition without a hearing, taking into account his written submissions.

The proposal

2. The proposed memorial is a conventional headstone with kerbs. The proposed inscription is entirely unobjectionable, both in content and in visual style. The proposed stone is polished paradiso granite. This stone might be described as a swirling mixture of pink, grey, red and black colours in a strongly-defined tortoiseshell-type pattern.

Views of the PCC and DAC

3. The PCC voted by 12 votes to 2 against the proposed memorial. This was on the basis that:
 - the proposed memorial did not fit in with the setting of the churchyard;
 - the kerbstones did not comply with the Churchyard Regulations;
 - the colour of the chosen stone was not in keeping with the majority of headstones in the churchyard; natural weathered stone would be in keeping and would be acceptable;

- there is only one other headstone in the churchyard with a similar, although not identical stone.

The PCC did also note that there are other memorials in the churchyard which did not comply with the Churchyard Regulations; and it agreed that the kerbstones would not in fact hamper the maintenance of the churchyard.

4. The DAC does not recommend the grant of a faculty, for the following reasons:
 - the Churchyard Regulations do not allow for polished memorials or kerbstones;
 - the proposed paradiso granite would not be in keeping with the majority of headstones in the churchyard;
 - pastoral difficulties may arise by recommending a memorial which did not adhere to the Churchyard Regulations, and it might set a difficult precedent for future memorial installations.

The petitioner's response

(a) The petition

5. The petitioner, having seen the DAC advice, nevertheless wished to press the petition unchanged. Public notices were displayed, with no response.
6. The petitioner was unhappy that the process appeared to encourage responses in opposition, but not responses in support of the petition. He therefore submitted a petition, signed by a number of people who put their names to a statement saying:

“Petitioner Dave Clark asks for your support in his application to install a churchyard memorial to his late wife, Janet, at the Church of St Mary, Fawkham.

The memorial would be in polished paradiso granite (a multicoloured granite with a pink/red appearance) with kerbstones, with the following inscription incised in black –

[proposed inscription]

We, the undersigned, are in full support of this request.

We feel it is in no way detrimental to the look or feel of the village churchyard. It is a tasteful and fitting tribute to a long-term resident of Fawkham. This style and colour of tribute can be seen in several other churchyards within the diocese.”

7. This is by no means the first time that a consistory court has been provided with such a petition. (Rather confusingly, such petitions have historically not been called “petitions”, perhaps to avoid confusion with the originating process in the consistory court which is also called a petition. Unhelpfully, especially in a case such as this one, they have instead been called “memorials”.) There is law, binding on me, on their admissibility as evidence. This is set out as follows, in Halsbury’s Laws of England, vol 34, para 1087, fn 13:

“Supporting or opposing memorials or petitions purporting to be signed by petitioners as to which there is no proof of the signatures or evidence of the representations made to those who sign are inadmissible: *Rector and Churchwardens of Capel St Mary, Suffolk v Packard* [1927] P 289; *Re Christ Church, Chislehurst* [1947] 1 All ER 146 at 150–151, [1973] 1 WLR 1317 at 1321. This statement of the law was approved by the Court of Arches in *Re Bentley Emmanuel Church, Bentley* [2006] Fam 39 at [26].” [the *Chislehurst* citation should read [1974], not [1947]]

8. It is notable that this extends to both supporting and opposing petitions (as I will call them). Of course, when there is opposition to a proposed faculty, the court is bound to enquire whether the person opposing is an “interested person” for the purposes of Part 10 of the Faculty Jurisdiction Rules. For these purposes, an individual will be an “interested person” if they are one or more of the following: any person who is resident in the ecclesiastical parish concerned; any person whose name is entered on the church electoral roll of the ecclesiastical parish concerned

but who does not reside there; or any other person or body appearing to the chancellor to have a sufficient interest in the subject matter of the petition (Rule 10.1(a), (b) and (h)).

9. I am sure that Mr Clark would wish to know that, in the event that someone opposed the proposed faculty, that person has satisfied me that they were someone whose views could be considered by the court – an “interested person”. Likewise, on grounds of parity of reasoning and fairness, I am unable to consider the supportive views of those who have not established that they are an “interested person” (I take that test to be encompassed in the phrase “proof of the signatures” in the paragraph cited from Halsbury’s Laws above). In addition, while I have (and have set out *in extenso* above) the paragraphs to which the signatories have subscribed, I have no evidence as to what representations, or other representations, were made to those who signed the petition.
10. I must conclude that the petition is inadmissible as evidence as a matter of law. If I were wrong about that, I would conclude that I could place very little if any weight on it when considering the relevant legal test in deciding whether to grant a faculty.

(b) *Further written submissions*

11. The petitioner has submitted further material for me to consider, including a letter with letters from his children supporting the proposal, and photographs of memorials apparently from other churchyards in the diocese. The strength of his feeling on this matter emerges clearly from this material; it is plain that to him and his family, the colourfulness of the proposed stone would reflect the colourfulness of his late wife’s character.
12. It does raise certain matters on which I should record that I have turned my mind.
 - a. It is not right to say, as the petitioner does, that the PCC was unable to reach a decision on the proposed memorial; in fact, of the 15 members voting, 12 were opposed and only two were supportive. That is a very significant level of opposition amongst the members of a democratic body.

- b. The fact that similarly highly-coloured memorials appear in some other churchyards in the diocese can only be of the most minor relevance, if any. They may have been permitted under previous versions of the Regulations; they may have been the subject of their own faculty petitions, taking into account their own local circumstances; or they may have been installed without lawful authority. The court is only likely to be swayed by such considerations if other examples were so prevalent that a refusal of a faculty in the individual case would be an affront to justice. There is no evidence that that is the case here.
- c. It is not right to say, as Mr Clark does, that this would be “a personal family headstone ... not for the benefit of others”. As recently observed by Hill Ch in *Re All Saints, Darton* [2022] ECC Lee 2, it must be remembered that churchyards and burial grounds are public spaces, used by, and serving, the community. One of the consequences of choosing an Anglican burial ground for an interment is that there is generally less freedom of choice when it comes to the erection of headstones or memorials than is afforded in municipal cemeteries.

Consideration

13. As noted by Hodge Ch in *Re All Saints, Calverton* [2021] ECC Oxf 7,

“In considering the suitability of a proposed memorial, the court should bear firmly in mind the threefold purpose of a grave memorial, which is to honour the dead, to comfort the living, and to inform posterity about the deceased. The first purpose infuses the other two and must be considered in the Christian context of the setting of a Church of England graveyard to which members of the public have access. Such cases are always sensitive, both to the facts, and to the personalities involved, and they involve reconciling legal principle with personal wishes in a public context which is distinctively Christian. In particular, the court must have regard to the longer-term view and the wider public aspect in ways which may be less apparent to the family

of the deceased, who will inevitably be caught up in their personal bereavement. What may be permitted in the unconsecrated parts of a local authority cemetery may not be appropriate in the setting of a Church of England graveyard.”

14. Following the dicta in the judgment of the Court of Arches in *Re St Giles, Exhall* [2021] EACC 1, the court does not require a petitioner to satisfy any exceptionality test before a faculty for a memorial would be granted. The court said, at paragraph 11.8:

“We consider that the right approach is the merits-based one. Clearly, any Regulations in place for the parish or diocese concerned will be part of a matrix of relevant considerations, but we do not think that consideration of a faculty petition should start with a presumption against allowing a memorial outside the parameters of the Regulations [...]”

15. I comment only that the burden of proof, as always, lies on the petitioner to persuade the court to grant a faculty; to that limited extent, there is a presumption, or default position, that no faculty will be granted. The petitioner simply has to satisfy that burden of proof by establishing, to the usual civil standard of the balance of probabilities, that there is a good reason why the faculty should be granted.
16. Both the PCC and the DAC appear to suggest that the mere fact that the proposal is outside the Churchyard Regulations is a reason why a faculty should not be granted. This is to misunderstand the position. There is no right in law to any memorial at all; any memorial must be authorised by the court. Under the system currently in place, there is in effect a delegation of authority to the incumbent to permit a memorial which complies in all respects with the Churchyard Regulations. If a proposed memorial does not so comply, the person concerned cannot take advantage of the delegated authority; and must petition for a faculty. It would arguably be wrong for the fact of non-conformity with the Regulations to be both

(a) the reason why a faculty must be applied for, and (b) a reason to refuse a faculty once it has been applied for. Some might say that that would smack of Kafka.

17. That is not to say, of course, that the reason why a memorial does not comply with the Regulations is irrelevant. Broadly, the more egregious the departure from the Regulations, the more justification would be required before the burden of proof is discharged. And the court will always want to be alive to particular issues concerning the individual churchyard concerned, which is why the views of the PCC are relevant. Again, as Hill Ch observed in the case cited above, “a merits-based approach includes the consideration of wider pastoral concerns which might arise from the grant or refusal of a faculty.” This reflects the views which both the PCC and DAC have expressed, that permitting the proposed memorial would create pastoral difficulties in the future.
18. In the present case, there are three aspects of the proposed memorial which the PCC and DAC have commented on in their opposition: the colour, the polished finish and the inclusion of kerbstones. The PCC does note that the memorial will be as far away from the church as it is possible to be; this would mitigate the visual impact of the memorial in the context of the church itself, although perhaps not in the context of the churchyard. It is clear from all the material I have seen that it is the proposed colour of the stone which is the aspect of the proposed memorial which is most important to Mr Clark; it is the only aspect of the proposal which is mentioned in his and his children’s letters to me.
19. The PCC also notes that the proposed memorial, including kerbstones, would not hamper the maintenance of the churchyard. Nevertheless, its view, supported by the DAC, is that kerbstones should not be permitted. This is commonly the position across the Church of England, notwithstanding that historically they may have been more common. Many of the petitioner’s photographs of kerbs around graves clearly show unauthorised and “DIY” kerbs; for so long as they remain, they cannot be taken as any sort of precedent or indication that kerbs will be permitted.

20. Neither the petitioner nor any of his children put forward any good reason why kerbstones should be permitted as part of the memorial; indeed, one of the children refers expressly to just a headstone. The same observation holds true of the polished finish on the proposed stone.

Disposal

21. I have balanced carefully what the petitioner has told me against the views of the PCC and the DAC. I am persuaded that there is a sufficiently good reason to permit a headstone in the proposed material of paradiso granite: I accept that the colour of this particular stone has significant resonances for this particular family. This cannot be taken as a precedent in future cases, which will turn on their own facts.
22. However, he has not sought to persuade me that there is a good reason for the proposed kerbstones; nor has he sought to persuade me that there is a good reason for the stone to be mirror-polished or polished beyond a good smooth finish. I cannot find that there is a good reason to permit those features of the proposed memorial. A faculty shall therefore issue, permitting the introduction into the churchyard of a memorial in the proposed stone. The faculty shall be subject to the conditions that:
- a. there shall be no kerbstones installed on the grave, either at the time of installation of the headstone or at any time thereafter;
 - b. all surfaces of the headstone shall be matt in appearance, and not polished or reflective;
 - c. the inscription shall be as proposed in the petition; it is to be incised and may be coloured black but no other colour; and
 - d. all items on the grave not authorised by faculty shall be removed either before or at the time of installation of the headstone, and the grave shall be kept free of such items thereafter.

The petitioner must provide a copy of the faculty to the monumental mason before any work is undertaken to create the headstone.

23. The petitioner shall pay the costs of the petition. It is a further condition of the grant of the faculty that such costs must be paid before the headstone is installed.

David Willink
Chancellor

18 July 2024