

IN THE CONSISTORY COURT OF THE DIOCESE OF COVENTRY

ST LEONARD: BIRDINGBURY

ON THE PETITION OF ROSIE ANN DOWD-SMYTH

RE: A MEMORIAL TO PATRICIA SMYTH

JUDGMENT

- 1) The Petitioner seeks a retrospective faculty authorising the retention in place of a memorial to her late mother, Patricia Smyth, in the churchyard of St Leonard, Birdingbury.
- 2) Patricia Smyth died in November 2010. She was divorced from her former husband and her only child, Rosie Ann Dowd-Smyth, was living with her then. Miss. Dowd-Smyth was then aged 16. Understandably she was greatly distressed at the time of her mother's death. With the assistance of her aunt she arranged for her mother's cremation and the cremated remains of Patricia Smyth were interred in the churchyard of St Leonard at Birdingbury. However, at that stage Miss. Dowd-Smyth felt unable to address the question of a suitable memorial.
- 3) By August 2015 Miss. Dowd-Smyth felt able to start organising a memorial. She contacted Mr. Withington, one of the churchwardens of St Leonard's, and he recommended contact with a local memorial mason, Paul Timms. Miss. Dowd-Smyth got in touch with Mr. Timms and in liaison with him decided upon the memorial which she wished to have erected on her mother's grave. Miss. Dowd-Smyth was unaware that any particular permission was needed for the memorial. She was also unaware that the Coventry Diocese Churchyard Memorials: Chancellor's Regulations ("the Regulations") only entitle incumbents to give permission for memorials of certain kinds and that the memorial she sought required a faculty.
- 4) Mr. Timms was aware that permission was needed. I accept that he sent to Mr. Withington an application form seeking permission for the memorial together with

a cheque. Mr. Timms did not receive any response and regrettably assumed that this meant that all was in order. Accordingly, he proceeded to fabricate and to erect the memorial which is now in place on Mrs. Smyth's grave. Unfortunately the application form had not been received by Mr. Withington and the first that he and his fellow warden knew of the proposed memorial was when they saw it in position in the churchyard.

- 5) Mr. Timms accepts that he was at fault in installing the memorial without having permission. He has indicated that he will meet such costs and expenses as are caused in putting matters right. In the circumstances I accept that this was an error on the part of Mr. Timms and that he genuinely believed that the application had been received and that all was in order. This was a serious error for a monumental mason to make but I am satisfied that it was a genuine error and not a deliberate attempt to circumvent the rules governing the introduction of memorials into churchyards.
- 6) The petition seeks a faculty authorising the retention of the memorial. The memorial is an oval shaped stone on a rectangular base. The stone is said to be a blue-grey slate but on my site visit it gave the appearance of being black or charcoal grey in colour. The base contains an incised planter trough. At one side of the base is an image of a bumble bee and on the other side a Celtic cross. The bee is associated with Miss. Dowd-Smyth's personal memories of her mother and the Celtic cross reflects Mrs. Smyth's Irish heritage. That heritage is also reflected in the inscription. This bears Mrs. Smyth's name and the dates of her birth and death with the words "I thought her the Queen of the Land" which I understand to be taken from a traditional Irish folk song popularised by the Dubliners group. The memorial differs from those which the Regulations authorise incumbents to permit by reason of its shape; the stone used; the incised trough; and the use of two images.

Procedural Matters.

- 7) Revd Alison Massey, the Rector of Birdingbury, has chosen not to become a party nor to make submissions believing her involvement is best directed to providing pastoral support to all concerned. Mr. Withington and his fellow churchwarden, Mrs. Karen Armbrister, have become parties opponent. Mr.

Timms has declined to become a party but has repeated both his apology for the consequences of his error and his offer to address any financial consequences. There was no response to the public notice.

- 8) The Diocesan Advisory Committee provided advice in which it said that it did not recommend approval. This was because of the type of stone used; the additional imagery; and the shape of the memorial. The Committee said that the memorial was “wholly inappropriate for the setting of this churchyard and historic church”. The Committee also said that the quotation should be marked as such by quotation marks. The Committee’s Notification of Advice refers to the inscription being in gold lettering. That is not the case but I am satisfied that this misunderstanding on the part of the Committee did not affect the thrust of its advice.
- 9) I concluded that it would be expedient to determine the matter on the basis of written representations and an unaccompanied site visit. The parties agreed to that and provided the submissions which I will summarise below.

The Memorial and the Churchyard.

- 10) St Leonard’s church has a Grade II listing. It dates from the late Eighteenth Century and was enlarged in the latter part of the Nineteenth Century. It is in a rural setting and the churchyard is well-maintained. There are a number of old memorials immediately around the church. There is an area of more modern memorials marking the interments of cremated remains alongside the path from the lych gate to the church. The memorial to Mrs. Smyth is in this area. The memorials are not uniform but they are very predominantly square or rectangular; simple in style; and of local stone. The memorial to Mrs. Smyth is or appears to be fractionally larger than most of those around it and differs from them by reason of its shape; the colour of the stone; and the presence of the incised planter trough.
- 11) The impression I formed on my site visit was that the memorial to Patricia Smyth does stand out quite markedly from those around it by reason in particular of its shape; the stone used; and by reason of its apparent slightly larger size. The impression of the memorial being larger than those around it may be something

of an optical illusion because of its shape. It is also of note that the memorials are in an area set aside for the interment of cremated remains. The arrangements which have been made for this at Birdingbury mean that the interments of cremated remains are relatively close together and the memorials are consequently closer together than they would have been the case of burial plots (such as those in other parts of the churchyard).

The Submissions.

- 12) In her submissions (supported by correspondence from her aunt) Miss. Dowd-Smyth explained how the memorial came to be installed without permission. Miss. Dowd-Smyth set out her reasons for wishing to incorporate images of a bumble-bee and of a Celtic cross together with those for the inscription. The Petitioner has apologised for any distress which the installation of the memorial has caused to others explaining that she had not intended to upset anyone and that if she had been told that the proposed memorial was unacceptable she would have willingly modified the design.
- 13) Mr. Withington and Mrs. Armbrister have explained that they do not take issue with the wording on the memorial nor with the images of the bee and the Celtic cross. However, they do object to the shape and type of stone used. They contend that in those respects the memorial is not in keeping with the other memorials in that part of the churchyard. They report that concerns about the appearance of the memorial have been raised with them by at least one resident of Birdingbury.

The Approach to be taken in Principle.

- 14) The Regulations date from the time of my predecessor, Gage Ch, although I made some modest modifications which are immaterial to this petition in 2011. The Regulations authorise incumbents to permit the installation of memorials provided that those memorials meet the criteria set out in the Regulations. They explain that memorials which do not meet those criteria will require a faculty.
- 15) The Regulations provide, at [6.1] that for a faculty to be granted "It will usually have to be demonstrated that there is some substantial reason for permission to be given." It is to be noted that the Regulations explain, at [3.6], that:

The Chancellor encourages imaginative and well-designed memorials. ... This document and its rules aim only to set the minimum acceptable standard in the design for new memorials. They are not intended to discourage originality or high standards of design. As may be seen in the *Churchyards Handbook* and other works on the subject, the employment of suitable craftsmen and letter cutters can produce works of high quality and lively interest, which make a positive and lasting contribution to the churchyard. ...

16) The approach I have taken has been to require a substantial reason to be shown before a faculty will be granted for a memorial which requires a faculty because it falls outside the scope of the Regulations and cannot be authorised by an incumbent.

17) I set out that approach in *St Peter, Church Lawford* [2016] Ecc Cov 3. There I adopted the reasoning I had set out in the Lichfield diocese in the case of *St James, Newchapel* (Lichfield 2012) in the context a proposed memorial to Richie Nickisson. In my judgment in *St James, Newchapel* I had considered the decisions of Mynors Ch in *Re St Mary: Kingswinford* [2001] 1 WLR 927 and of Holden Ch in *Re Christ Church: Harwood* [2002] 1 WLR 2055 and had said:

21) ... permission for a memorial which does not accord with the Chancellor's Regulations will not be given lightly. A powerful reason must be shown before a faculty for such a memorial will be given. In *Re St Mary: Kingswinford* [2001] 1 WLR 927 Ch. Mynors summarised circumstances in which such a faculty could be given thus (at paragraph 38):

"However, at least some non-standard memorials will be approved. This is likely to be for one of four reasons. The first is where a proposal is for a specially designed memorial which may be non-standard, but which is a fine work of art in its own right. Such proposals are indeed to be positively encouraged. The second is where a proposal relates to a category of memorial that may be suitable in some churchyards but not in others, so that it would be inappropriate to issue a general authorisation. There are after all some variations between churchyards in different parts of the diocese and such regional variations are not to be either ignored or suppressed. The third situation where a non-standard memorial may be allowed is where it is of a type, which may or may not be desirable in itself, of which there are so many examples in the churchyard concerned that it would be unconscionable to refuse consent for one more. The fourth reason for approval is where a stone might be aesthetically or otherwise unsatisfactory, but where there are compelling personal or other circumstances suggesting that a faculty should nevertheless be granted.

22) The four potential reasons given by Ch. Mynors are useful as examples of the circumstances where a faculty might be given for a memorial which does not conform to the Chancellor's Regulations. However, they are, in my view, to be seen as illustrations only. As Ch. Holden said it is impossible to identify definitively and in advance all the matters which are capable in particular cases of being a sufficiently exceptional reason to justify the granting of a

faculty. There will be circumstances falling within one of Ch. Mynors's four categories where it will nonetheless be appropriate to refuse a faculty and also circumstances where a convincing and powerful reason of a kind different from those set out by Ch. Mynors will be established and the grant of a faculty will be justified.

- 23) The requirement that there be a powerful reason if a memorial which does not conform to the Chancellor's Regulations is to be permitted is a matter of justice and fairness to those who have erected conforming memorials. There are many families and individuals whose personal preference would be to have a memorial to a departed loved one in a form going beyond the Chancellor's Regulations. In the vast majority of cases such persons accept the approach laid down in the Regulations and erect a memorial conforming to the Regulations. In doing so they put aside their personal preferences and accept a memorial in a form different from that which they would have chosen if given a free hand. In many instances this will involve acceptance of a memorial which they regard as second-best or otherwise unsatisfactory and such acceptance will often be combined with a feeling of unhappiness and distress. Such people would have a legitimate sense of grievance if others (perhaps more articulate or forceful or with more time, money, or personal skills) were able easily to obtain faculties for non-conforming memorials. Fairness to those who have reluctantly complied with the Chancellor's Regulations requires the Court to confine exceptions to cases which are truly exceptional.
- 24) Similarly account must be taken of the legitimate expectations of those who have buried their departed relatives in a particular churchyard and of those who are to be buried therein. Those who have interred departed relatives in churchyards on the footing that the appearance of the churchyard will be maintained in line with the Chancellor's Regulations will have cause to protest if the requirements of the Regulations are lightly set aside. Again those who have paid fees for the reservation of grave spaces have a legitimate expectation that the character of the churchyards in question will be kept in accord with the Regulations.
- 25) Whether a particular reason is sufficiently exceptional to justify the grant of a faculty will be an exercise of judgment in each case. The Court has to take account of the foregoing factors and of the matters said to justify the departure from the Regulations. Account will also have to be taken of the extent of the deviation from the Chancellor's Regulations. The greater the extent of the deviation and the more readily apparent the same is to those visiting the churchyard in question the less likely it will be that a faculty will be granted. Conversely in a particular case where the extent of the deviation is less there is likely to be a lesser impact on visitors and the considerations operating against the grant of a faculty might have less weight though I repeat that in every case a good reason must be shown before a faculty will be granted for a memorial which does not conform to the Regulations.
- 26) Particular issues arise in cases where there are already a number of non-conforming memorials in a churchyard. The mere fact that non-conforming memorials have been allowed in the past or have been erected without faculty is clearly not of itself a justification for a further inappropriate memorial. However, there will be occasions when the extent of previous non-compliance with the Regulations will be relevant. In the passage quoted above Ch. Mynors referred to situations where the number of non-conforming memorials is such that it would be "*unconscionable*" to refuse permission for one more. In my judgment the proper approach is to take account of the number, type,

and appearance of non-conforming memorials in relation to the size and appearance of the churchyard taken as a whole. There will be cases where the non-conforming memorials are so numerous or so dominant that it is simply unrealistic to believe that the objective of preserving the desired appearance of the churchyard can be achieved. That desired appearance being one that is harmonious in appearance and forming a worthy setting for the church. In such circumstances the balance of unfairness changes. It can then become unfair to the Petitioner to refuse a petition for a memorial of a kind akin to those already present in and dominating the churchyard. There is then a risk that the Petitioner's wishes and preferences are being thwarted in pursuit of an unrealistic objective. Moreover, in such cases the risk of unfairness to those erecting conforming memorials contrary to their own preferences is likely to be diminished. "

18) That is an approach I have adopted consistently with slight differences of language in both Coventry and Lichfield¹.

19) The Chancellor's Churchyard Regulations in Lichfield were revised in 2013. The relevant parts now provide that:

42. These Regulations are intended to ensure the application of a consistent approach which is fair to all. A proposed memorial which does not accord with the Regulations can only be authorised by the grant of a faculty. Those seeking permission for a memorial falling outside the Regulations will need to establish that there is a good case for departing from the Regulations in the particular case.

43. Nonetheless, it is not the purpose of the Regulations to suppress quality or individuality in favour of an unthinking uniformity. Churchyards can be enriched by memorials which are outside the norm whether their difference from the norm is in appearance, material, or design. Memorials which display individuality are to be encouraged. They can demonstrate thought and imagination and can contribute to and enhance the appearance of a churchyard. The Church welcomes such proposals and the Chancellor urges clergy and churchwardens to draw the attention of the bereaved to the possibility of individually designed memorials.

44. It is particularly important in such instances that the memorial is well designed and is of the highest quality. It is for that reason that memorials of unusual design can only be permitted after a faculty has been granted. Those considering applying for such a memorial should consult the incumbent at an early stage. If necessary guidance can then be obtained from the Archdeacon or the Registry as to the procedure to be adopted.

20) A number of chancellors have taken a different approach to the operation and effect of their churchyard regulations and some take the view that the approach I have hitherto adopted is inappropriate. In the light of that I have reflected on that

¹ Examples in Lichfield appear at: *Holy Trinity, Eccleshall* (2014) 16 Ecc LJ 121, *Holy Trinity, Eccleshall* (2015) 7 Ecc LJ 390, and *St Michael, Lichfield* [2017] Ecc Lic 3. In Coventry the approach has also been applied in *St John, Berkswell* [2016] Ecc Cov 8.

approach. Is the approach of requiring a “substantial reason” or a “good case for departing from the Regulations” appropriate or, indeed, legitimate?

21) In *St John’s Churchyard, Whitchurch Hill* (Oxford 2014) McGregor Ch was considering an application to authorise a memorial beyond the scope of the “Graveyard Regulations”. The learned chancellor took the view that no burden was imposed on a petitioner in those circumstances over and above that on every petitioner of demonstrating that the faculty should be granted. Thus, at [16] he said:

As is the case with any petition for a faculty, the burden of proof lies on the petitioner to show why a faculty should be granted to authorise the particular proposal set out in the petition.

22) In *St John the Baptist, Adel* [2016] Ecc Lee 8 Hill Ch considered the approach taken in *St Peter, Church Lawford* and in other cases where chancellors have required a good or substantial reason for permitting a memorial which fell outside the scope of the relevant churchyard regulations. Hill Ch said, at [5] that he found such an approach “unhelpful” and that he would adopt the approach of McGregor Ch which in his view “accords with clarity and simplicity”.

23) Hill Ch went on to explain what his practice would be saying that:

6. ... there will be no requirement for petitioners to discharge a higher burden of proof, rebut a presumption, demonstrate a ‘substantial’ or ‘powerful reason’ or show an ‘exceptional’ case. Each petition will be determined on its own merits, the only constraint being the inability of the court to permit something which is contrary to, or indicative of any departure from, the doctrine of the Church of England in any essential matter.

7. The terms and content of the Churchyard Regulations will, of course, be a relevant factor – often highly relevant and doubtless on occasion determinative. But they will be one of the constellation of infinitely variable factors which the court must consider on a case-by-case basis. I anticipate that the same outcomes may well result irrespective of the differing approaches, but as I have the responsibility and privilege of creating clear practices for the Diocese of Leeds, justice requires that I set out in advance which mine will be. There will be no presumptive preference for what is contained in the Churchyards Regulations, nor a bias in favour of the standard, bland or anodyne.

24) Bullimore Ch undertook an extensive analysis of this question in *St Mary the Virgin, Ecclestone* [2017] Ecc Bla 4. This analysis follows and expands on the

analysis of the history and nature of churchyard regulations which Bullimore Ch set out in Appendix 1 “The legal and practical basis of Churchyard Regulations” to his judgment in *St Lawrence, North Wingfield* (Derby 2003) 22 CCC 3. Bullimore Ch explained the general nature of churchyard regulations at [10] – [14]. At [15] – [17] he referred to *St Peter, Church Lawford* and summarised the approach set out there. At [19] Bullimore Ch referred to Hill Ch’s approach as set out in *St John the Baptist, Adel* and said that he found that decision “compelling”. Bullimore Ch set out the reasoning which had led him to this conclusion thus at [20] – [28]:

20 I consider that Chancellor Eyre’s approach exalts the Regulations to too high a position. Such applications are not ‘*contrary*’ to the Regulations; they simply do not fall within the parameters laid down. The use of that word, with its implications of waywardness or opposition or something similar, sets the discussion off on a skewed basis. There is no reference by the Chancellor to the fundamental and important fact that the purpose of Regulations is to create a simple, straightforward and inexpensive method by which permission for a memorial may be given, without the formality and expense of a faculty application.

21 In order for the power to give permission to be delegated to the parish clergy, and to be applied fairly and consistently by different individuals in relation to different churchyards, the Regulations must be detailed, and draw lines, and thus they will seem perhaps overstrict to some. There is no magic for instance in dimensions of a certain size being laid down, as compared with a stone an inch larger in some direction, but if Regulations are to serve their primary purpose, then lines have to be drawn. The clergy must know whether the proposal before them is within their authority to grant. A direction that a memorial must not be ‘too large’ or ‘unwieldy’, would be impossible to administer fairly, and would give rise to differences of view between one priest and another, and in regard to one churchyard and another.

22 As the Regulations are designed primarily to define the scope of or circumstances in which permission for a memorial may be given by the parish clergy, inevitably the Chancellor will wish to ensure that nothing is permitted that will detract from the church building, many of which are listed as buildings of special artistic, architectural and historic merit requiring protection, as part of the national heritage, or be likely to create problems for or with other families with graves nearby, by reason of the size, design, material, or other features of the proposal. That I believe is the limit of good taste or design that can be read into Regulations.

23 Objections to a proposal outside the Regulations, often take the form of arguments that it is too large and extravagant, or too ornamental, or that it does not fit in with other memorials in the churchyard, or somehow ‘shows off’, and boasts of wealth or extravagance. Those arguments will be weighed by the Chancellor in coming to a decision. He or she is not bound to approve a ‘nonconforming’ proposal. Judgement is required in considering the nature of the proposal, the force of objections made (if any), and all the relevant circumstances.

24 Regulations therefore tend to what may be seen as conservative, and lead to what is ordinary, monotonous or bland in the eyes of some. Because the Chancellor

retains the power to authorise ‘non-conforming’ applications, other special or ‘different’ or craftsman–designed proposals may still be authorised. It is vital to grasp that the Regulations do not mark the outer limits of what may be authorised. They are not like Regulations setting out what behaviour is not allowed in a public park or the carriage of a train. They are essentially intended to allow something to happen which otherwise would not be possible, namely a means to provide an inexpensive and informal method of obtaining permission for a specific memorial to be erected.

25 I think most families are happy enough with what the Regulations allow, (although recent experience shows that the denial of photographic representations of the deceased can be a real disappointment). They are largely a matter of practicality rather than laying down artistic limits or what amounts to good taste, which is rather what the approach of Chancellor Eyre suggests. The image of numbers of families being dissatisfied by what they were told they could have, and of increased dissatisfaction if others obtain something more, does not resonate with my experience. Using dissatisfaction by some (despite their reluctant acceptance of the limits in the Regulations), as a justification for compelling adherence by others to the Regulations, save in exceptional cases, seems a rather unsatisfactory basis for being so restrictive. It is not to be assumed that anything ‘outside’ the Regulations somehow falls below an appropriate standard.

26 That does not mean that in giving approval to such a proposal, it is in every respect what the Chancellor would himself choose as a memorial for a member of his or her own family. The Chancellor does not have to ‘like’ the overall design. The memorial is being chosen by the family and is their way of remembering and honouring the deceased. It is ‘their’ memorial, not the Chancellor’s.

27 It will be clear therefore that I too dissent from the view that some particular level of justification has to be shown for a proposal ‘outside’ the Regulations.

28 In further support of this wider approach, I note there is no statutory basis for creating Churchyard Regulations, from which we could discover their intended purpose(s). They are essentially a creation of the Chancellors themselves over the years. There is no reason to suppose that Chancellors as a body or individually have any particular expertise in judging what is good design or good taste, in the matter of memorials. I dare say that in most dioceses the DAC is consulted, and possibly other interested parties, including some representative(s) of memorial masons in the area or nationally, before the final terms of the Regulations are adopted, but I repeat that Regulations relate primarily to the issue of the limits of the authority to be delegated, rather than wider questions of taste and acceptability.

25) That reasoning led Bullimore Ch to the conclusion, at [29] that “it seems to me necessary only that the Chancellor considers a proposal for a memorial outside the Regulations to be suitable, having regard to the size, material, design and so on. In doing that, the Regulations provide a good starting point.” The learned chancellor has applied the same approach in the Derby Consistory Court in *St Bartholomew, Old Whittington* [2017] Ecc Der 4.

- 26) Arlow Ch considered this question in *St Andrew, Buxton* [2017] Ecc Nor 4. Arlow Ch concluded, at [11], that “there is no presumption against memorials which fall outside the regulations” and that the approach of McGregor Ch as cited at [21] above was to be followed.
- 27) A number of matters follow from the analysis which my fellow chancellors have made.
- 28) The first is that Bullimore Ch is clearly right to draw attention to the nature of churchyard regulations. Their primary function is to identify those memorials for which permission can be given by an incumbent without the need for a faculty. Those who seek permission for a memorial which falls outside the ambit of the regulations (in the sense that the regulations do not authorise an incumbent to permit it) are not in some way defaulters or offenders and should not be regarded as such. Such persons are simply seeking a faculty for something which could be authorised by faculty but which is not permissible unless a faculty is obtained. It follows that it is not helpful to talk of such persons being in breach of the regulations or as acting contrary to the regulations. Even the convenient shorthand reference to memorials which do not conform to the regulations is also capable of being misleading. Although somewhat cumbersome it is probably necessary to refer to such applications as being for “a memorial which an incumbent is not authorised to permit under the regulations” or for “a memorial falling outside the scope of the regulations”.
- 29) Next, as there is no statutory basis for the use of churchyard regulations I respectfully accept that it is entirely proper for a chancellor to adopt the approach taken by Chancellors Bullimore, McGregor, Hill, and Arlow. The first question is whether that is the only potentially legitimate or proper approach. If it is not the only proper approach the next question is whether there are good reasons for adopting a different approach.
- 30) As Hill Ch said in *St John the Baptist, Adel* at [7] in practice the same outcomes are likely to result in most cases whichever approach is adopted as a matter of principle. Thus in *St Peter, Croft on Tees* [2015] Ecc Lee 6 Hill Ch’s refusal of the application for kerbs around a grave was heavily influenced by the fact that the

relevant churchyard regulations did not permit such kerbs. In *Holy Trinity, Eccleshall* (2014) 16 Ecc LJ 121 I permitted a memorial of a kind very different from those within the ambit of the Lichfield Churchyard Regulations because of its high artistic quality and notwithstanding objection which was made by reference to those regulations. However, there will be some cases in which the outcome will depend on which approach is taken and the likely similarity of outcome in most cases cannot remove the need to determine whether a particular approach is or is not legitimate. The fact that the approach laid down in *St Peter, Church Lawford* will generally lead to the same outcome as that laid down in *St John's Churchyard, Whitchurch Hill* and vice versa cannot justify the application of the former approach if it is wrong in principle.

31) An approach which created “a bias in favour of the standard, bland or anodyne” (per Hill Ch in *St John the Baptist, Adel*) or which favoured “the ordinary, monotonous or bland” (per Bullimore Ch in *St Mary the Virgin, Eccleston*) would of course be undesirable in the extreme. I do not, however, accept that this is a necessary or even a likely consequence of an approach which requires those seeking permission for a memorial outside the scope of the regulations to show a good or substantial reason. The potential risk can be averted in two ways. The first is by express indication in the regulations that high quality memorials of different styles falling outside the scope of the regulations are to be welcomed. I have already quoted those provisions of the regulations in force in Coventry and in Lichfield which seek to give this indication. The second is by way of the wording and scope of the regulations themselves combined with the nature of the consultation undertaken before any regulations are brought into force (a matter which I will consider further below).

32) In considering whether a particular approach is legitimate regard must be had to the practice and judgments of other chancellors. Despite Bullimore Ch's flattering reference to “Chancellor Eyre's approach” I do not understand the approach I articulated in *St James, Newchapel* and in *St Peter, Church Lawford* to have been novel and I did not intend to set out any new principle. Rather it is apparent that the approach I articulated accords with the approach taken by a number of other chancellors.

33) As the passage from my judgment in *St James, Newchapel* set out above indicates I was there adopting with some modification and expansion the approach which Mynors Ch had set out in *St Mary, Kingswinford*. In his judgment, in particular at [34] and at [44] Mynors Ch made it clear that he had not fallen into the error of regarding those who sought permission for a memorial which was outside the scope of the relevant regulations as being in any way in default or in breach. The learned chancellor deprecated the use of the expressions “rules” or “regulations”. He emphasised that the regulations did not prohibit memorials falling outside their scope but simply required that permission be given (if it was to be given) by the chancellor. Mynors Ch said that those seeking a memorial which was outside the scope of the regulations were “perfectly entitled” to seek a faculty. It was with that understanding of the true nature and effect of the regulations that Mynors Ch explained that one of four reasons (or categories of reasons) was likely to be needed before a memorial falling outside the scope of the regulations would be permitted.

34) I was also continuing the approach which had previously been applied in the Coventry Consistory Court. Thus in *Re St Chad’s Churchyard, Bishop’s Tachbrook* [1993] 1 All E R 208 my predecessor as chancellor of Coventry, Gage Ch, referred to the regulations then in force and said, at 212 c “it will ...only be in exceptional circumstances that I will grant a faculty for monuments which breach these rules.” Gage Ch’s reference to the “breach” of the regulations was infelicitous but it is to be noted that the words I have quoted came at the end of a passage in which there had been a careful exposition of the purpose of the regulations. It was in the context of that exposition that Gage Ch was making it clear that exceptional circumstances were required before a memorial falling outside the scope of the regulations would be permitted. In *Re West Norwood Cemetery (No 2)* George Ch (as he then was) followed this decision of Gage Ch citing it as authority for the proposition that “of course before the chancellor... sanctions a departure from the diocesan regulations, he will normally need to be satisfied that there is something exceptional about the circumstances of the application in question”.

35) A similar approach has been applied consistently in the Manchester Consistory Court. In *Christ Church, Harwood* [2002] 1 WLR 2055 Holden Ch said, at 2057 D:

If, however, a departure from the graveyard regulations is involved, then a formal application must be made to the consistory court, presided over by the chancellor, for an exception to be made to those general rules. Such an exception has to be based on strong grounds. As Gage Ch pointed out in *In re St Gregory, Offchurch* [2000] 1 WLR 2471 when a faculty is sought for a monument which is not in accordance with the graveyard regulations the court has to look for exceptional reasons before granting permission.

36) That approach has been continued by Tattersall Ch. In *St Mary Prestwich* [2016] Ecc Man 1 Tattersall Ch had to consider whether to permit kerbstones around a grave in circumstances where the relevant churchyard regulations provided that these were not permissible without a faculty. Having cited *St Peter, Church Lawford* and *St Mary, Kingswinford* Tattersall Ch said, at [34]:

I accept and adopt the test set out by Mynors Ch and Eyre Ch, namely that there should be a powerful reason to grant a faculty for kerbstones when such are not permitted by the Diocesan Churchyard Regulations.

37) A consistent approach has also been taken in the Chester Consistory Court. In *Christ Church, Wheelock* 15 CCCC 32, (1997) 4 Ecc LJ 766 Lomas Ch explained that permission would be given for memorials falling outside the scope of the regulations if they had “special artistic merit” or if there were “individual circumstances” making it appropriate for a faculty to be granted. So Lomas Ch did not in terms require “a good reason” but he did make it clear that something special was needed before a faculty would be granted for such a memorial. In *Christ Church, Timperley* 23 CCCC 5, (2004) 7 Ecc LJ 496 at [20] and [21] Turner Ch explained that something “exceptional” was needed before a memorial falling outside the scope of the regulations would be permitted. Similarly in *St Hilary, Wallasey* (Chester 2008) Turner Ch said, at [28], that it would only be in “exceptional cases” that a memorial falling outside the scope of the regulations would be permitted and that departures from the regulations “need careful appraisal and formal approval.”

38) In *St Laudus, Mabe* (Truro 2003) 22 CCCC 1 Briden Ch explained the purpose and nature of diocesan churchyard regulations. It was apparent that the learned

chancellor did not regard a person seeking a faculty for a memorial falling outside the scope of the regulations as in any way a defaulter and that he was not falling into the error of talking of breaches of the regulations. Moreover, Briden Ch explained, at [5], that “the Regulations, while setting a standard, do not operate as inexorably as the laws of the Medes and Persians.” Nonetheless, Briden Ch proceeded, at [9], to explain that “in order to justify the exercise of my discretion in the Petitioner’s favour she has to show that there is some good reason for departing from the Churchyard Regulations and granting a faculty.”

39) In *St Helen, Welton* [2017] Ecc Yor 2 Collier Ch summarised, at [4.2.1] the nature of churchyard regulations explaining their nature as a delegation of authority to incumbents and noting that “It is always possible to apply for a faculty for a memorial that falls outside the regulations and outside incumbent’s delegated authority to permit.” Collier Ch then set out, at [4.5.1], his understanding of the relevant test namely whether there were “exceptional reasons” justifying a memorial which was outside the scope of the regulations. In so doing Collier Ch was continuing the approach he had taken as chancellor of Wakefield twenty two years previously. There in *St Paul, Drightlington* (1996) 4 Ecc LJ 525 he had explained that a petitioner seeking a faculty for a memorial outside the scope of the regulations had to show “a good reason for making an exception in her favour.”

40) In *St Paul, Rusthall* [2016] Roc 2 Gallagher Ch approved the approach set out by Mynors Ch in *St Mary, Kingswinford* and summarised the position thus, at [13]:

The starting point for considering a petition for a faculty to issue for a memorial which is contrary to the Churchyard Regulations is that a memorial that does not accord with the Regulations will not be given lightly. A powerful reason must be shown before a faculty for such a memorial will be given.

41) In *St Andrew, Witchford* [2016] Ecc Ely 2 Leonard Ch did not expressly refer to the need for a good reason or exceptional circumstance or the like if a faculty were to be granted for a memorial outside the scope of the relevant regulations. Indeed at first sight his approach could be seen as mirroring that of MgGregor Ch based as it was on the exercise of the chancellor’s discretion. However, in my assessment that would be a misreading of Leonard Ch’s approach. It is apparent

that he approached the case on the basis that his discretion to be exercised with considerable caution and to be heavily influenced by the terms of the regulations. Thus Leonard Ch said, at [27]:

Bearing in mind that I have the power to grant a faculty to allow for a memorial which does not conform to the Regulations, I have to ask myself whether I should exercise it in this case. It is a discretionary relief and I must exercise my discretion carefully and remembering my duty to preserve the churchyard for generations to come.

42) Moreover, that passage is to be read in the context of the preceding paragraphs where Leonard Ch explained the effect and value of the regulations saying, at [19]:

There are many examples in the Diocese and elsewhere of the way in which conformity of memorials within a churchyard greatly enhance their beauty and that of the church itself. I am unable to agree with the PCC that uniformity makes a graveyard less interesting.

43) It is also to be noted that the key factor in Leonard Ch's conclusion as to how his discretion should be exercised appears to have been his assessment at [28] that the proposed type of stone did "not approximate to anything which is permitted within the Regulations."

44) It follows that the approach I have adopted is that which has been followed by a number of my fellow chancellors. It will be apparent that although some fell into the error of referring loosely to proposed memorials being "contrary to" or "in breach of" the relevant regulations there were others who made clear their understanding of the nature of the regulations as a delegation of authority and who emphasised the entitlement of those who wished a memorial outside the scope of the regulations to seek a faculty authorising such a memorial. However, even while doing so they made it clear that a good reason or exceptional circumstances would be required before such a faculty would be granted.

45) The point might be made that those chancellors to whose judgments I have referred above did not have the benefit of considering the alternative approach favoured by Chancellors Bullimore, McGregor, Hill, and Arlow. That qualification cannot be made in the case of Ormondroyd Ch. In his judgment in *All Saints' Churchyard, Bransgore* [2017] Ecc Win 2 the learned chancellor referred to the

“marked differences of approach” between chancellors in different courts illustrating this by reference to the judgments in *St Peter, Church Lawford* and *St John the Baptist, Adel*. Ormondroyd Ch explained, at [14], that he did not need to “resolve this divergence” and that his task was to articulate the approach he would apply in the Winchester diocese.

- 46) Ormondroyd Ch concluded that the nature of the Winchester regulations was such that they could be regarded as identifying those types of memorial which “are considered to be generally unacceptable in the churchyards of the diocese” [18]. In the light of that and in respect of such memorials he said, at [21], that:

The natural starting point when considering an application for such memorials is therefore to refuse permission for them unless some good reason can be shown for a departure from the stance indicated by the regulations.

- 47) At [22] Ormondroyd Ch concluded that there was no legal obstacle to the implementation of such an approach. He expressed his assessment that it had the advantages of fairness to which I had adverted in *St Peter, Church Lawford* and also “the advantage of clarity and consistency of decision making”.

- 48) In the light of that analysis I am satisfied that the approach which I have adopted hitherto is a legitimate and permissible one. Even though legitimate is it an approach which it is desirable to adopt? Are there good reasons for adopting it instead of the alternative approach (an approach which is also legitimate)? I believe that there are two particular reasons why it is desirable to adopt this approach.

- 49) The first reason is that of fairness to those who have subordinated their own wishes to the collective wisdom as expressed in the regulations and who have agreed to install memorials within the scope of the regulations notwithstanding their own preference for a memorial of a different kind. This is the factor which I set out at [23] in *St James, Newchapel*. Bullimore Ch considered this factor in *St Mary the Virgin, Eccleston* at [25] and expressed his disagreement with it as a characterisation or a potential characterisation of the position. The learned chancellor said that it did not resonate with his experience and that he regarded treating dissatisfaction by some as a justification for compelling others to adhere

to the regulations as an “unsatisfactory basis for being so restrictive”. I am very conscious of Bullimore Ch’s considerable experience in these matters. Nonetheless I remain of the view that fairness to those who have reluctantly fallen in with the collective approach does mean that those seeking permission for a memorial outside the scope of the regulations should be required to show a substantial reason why such a memorial should be permitted. I also remain of the view that those in the former category would have a justifiable sense of grievance if those in the latter category were granting faculties without being required to show such a reason. It is of note that in the current case the churchwardens were approached by a parishioner expressing concern at the presence of the memorial to Patricia Smyth. Similarly in *Holy Trinity, Eccleshall* (2014) 16 Ecc LJ 121 objection was made to the proposed memorial by two parishioners concerned that the approach laid down in the applicable regulations should be followed. In part this may be a reflection of the second reason why this approach is desirable, namely the function of churchyard regulations as embodying the collective wisdom of the diocese, but it does demonstrate that the presence of a memorial falling outside the scope of the relevant regulations can cause concern and indeed distress to others. Those others may well be persons who are in the churchyard regularly as worshippers at the church or to visit graves of their family members or for other purposes and who may, therefore, find it difficult to avoid seeing repeatedly the cause of their concern.

50) It is of note that other chancellors have also taken the view that the requirement for a special or good reason to be shown for a memorial outside the scope of the regulations derives from the need for fairness to others including those who have installed memorials falling within the scope of the regulations. Thus Gage Ch said that his stipulation that exceptional circumstances be shown before a faculty authorising a memorial outside the scope of the regulations would be permitted was because this was “the fairest system” (*Re St Chad’s Churchyard, Bishop’s Tachbrook* at 212b). In *Christ Church, Harwood Holden Ch*, at [9], explained the purpose of the regulations as being “to attain a level of equality and fairness across the diocese” and, at [3], he said that it was “the interests of justice and fairness” which required that “conformity to the norms of the regulations” should be aimed at.

51) In *St Helen, Welton* Collier Ch said, at [5.2], that to allow a non-conforming memorial to remain in place in the absence of special circumstances “would be unfair to others who have been prepared to accept and live within the rules.” A similar point was made by Tattersall Ch in *St Mary, Prestwich*, at [32], saying:

I have no doubt that in recent years applicants who may have wished to erect kerbstones around a grave, after discovering that such would be contrary to the Diocesan Churchyard Regulations, have amended their proposals to not include the same. I agree that such is a relevant matter for me to take into account in deciding whether to grant the faculty sought.

52) In *St Hildeburgh, Holyoake* (Chester 2003) 22 CCCC 24 Turner Ch said (albeit in a case where a number of non-conforming memorials had been put in place without permission of any kind), at [15] that there was “obvious force” in the argument that “consistency and fairness to all requires a uniform approach. Those who have complied with the requirements of the regulations may feel aggrieved that others have not”.

53) In *St Mary the Virgin, Eccleston*, at [25], Bullimore Ch characterised the purpose of churchyard regulations as being “largely a matter of practicality” by way of setting out those memorials for which permission can be given by an incumbent without the need for a faculty. Bullimore Ch referred, at [28], to the fact that the relevant Diocesan Advisory Committee and perhaps others, such as monumental masons, are likely to have been consulted before regulations are promulgated. However, this did not, in Bullimore Ch’s view, alter the fact that the regulations would relate “primarily to the issue of the limits of the authority to be delegated, rather than wider questions of taste and acceptability.” In my judgment that characterisation of churchyard regulations understates the rôle they can play as expressing a collective understanding (I would go so far as to say a collective wisdom) with regard to the memorials which are likely in most instances to be either acceptable or unacceptable, appropriate or inappropriate in the churchyards of a diocese. Much will depend on the contents of the particular regulations and on the nature and extent of the consultation involved in their formulation. It is clearly necessary that those chancellors who seek to treat their churchyard regulations as setting down a standard of what will be normally acceptable should ensure that there has been extensive consultation and careful

consideration of the terms of any proposed regulations. However, where that has been done then it is legitimate and in my view appropriate that the regulations can be seen not, of course, as laying down the sole standard of good taste but as representing a considered collective understanding as to what is generally acceptable and appropriate. In those circumstances it is appropriate that a good or substantial reason should be required before a memorial falling outside the scope of such regulations be permitted. Indeed it is desirable that this approach be taken because to do otherwise would be a failure to take account of the value of that collective understanding. This does not, in my view, involve a failure to appreciate the fundamental nature of the regulations as an instrument of delegation detailing those memorials which an incumbent can permit without a faculty. It does, however, accept that regulations which are suitably drafted and which are the result of appropriate consultation can perform an additional rôle and that when they do so it is right that particular weight should be given to them.

54) I have already noted that Ormondroyd Ch explained in *All Saints' Churchyard, Bransgore* that a modified version of this approach would be taken in the Winchester diocese namely that of regarding the regulations as embodying a collective understanding as to those types of memorial which were generally likely to be unacceptable.

55) So in my judgement churchyard regulations are indeed matters of practicality and instruments of delegation but they can properly be seen as more than that. In that regard I would adopt the words of Turner Ch in *St Hilary, Wallasey* at [28] (echoing an analysis he had set out in *Christ Church, Timperley* at [20]):

The Regulations in this diocese substantially reflect those in place across the country. They exist not to promote a drab or mindless uniformity let alone to enforce the personal tastes or preferences of the Chancellor. They serve to create fairness, equality, and consistency of treatment for all. They exist to promote peace dignity and good order in churchyards where it is necessary to balance concerns of the past, present, and future and where there will, inevitably, be a spectrum of views about what is fitting. They have evolved over time, the product of the collective wisdom of a range of people, often informed by bitter experience and they are reviewed from time to time to ensure that they continue adequately to reflect local need. Save in exceptional cases, they need to be followed because of their proven value.

56) It follows that I remain of the view that it is not only legitimate but also desirable that I should continue to require a “substantial reason” before granting a faculty for a memorial falling outside the scope of the Churchyard Regulations and that is the approach which I shall apply to Miss. Dowd-Smyth’s petition.

The Application of that Approach to the Memorial in this Case.

57) It was wholly inappropriate for the memorial to be installed without either the consent of the incumbent or a faculty. I will not dwell on that aspect of the matter. As explained above Mr. Timms has accepted responsibility for this and I am satisfied that this was a genuine error. In addition I do not regard the fact that the memorial has been installed without authority as relevant to the question of whether or not a faculty should be granted. The unauthorised installation does mean that a retrospective faculty is needed if the memorial is to remain in place and is potentially relevant with regard to costs. However, the purpose of my jurisdiction is not to penalise those who have inadvertently acted without lawful permission. Rather my rôle is to ensure that those memorials which are in position are appropriate having regard to the churchyard in question. Accordingly, I will approach this petition by reference to the question of whether or not a faculty would have been granted for a new memorial in the proposed format.

58) Is there a substantial reason for a memorial in the proposed form to be installed? In the context of Mrs. Smyth’s Irish heritage and by reference to the sentimental importance with Miss. Dowd-Smyth attaches to the bumble-bee image there are good and sufficient reasons to allow the inscription and the use of the images of a bee and of a Celtic cross. In that regard I agree with the recommendation of the Diocesan Advisory Committee that the quotation should be marked as such with quotation marks.

59) However, there is no good or substantial reason for the shape of the memorial nor for the type and colour of stone used. It is of note that Miss. Dowd-Smyth does not seek to put forward any special reason why a memorial of such a shape and made of such stone is appropriate. The design and type of stone were chosen by Miss. Dowd-Smyth and her aunt in consultation with Mr. Timms. The impression I get from the written submissions is that Mr. Timms put forward the shape and the type of stone as suggestions which were adopted by the Petitioner

and her aunt. Not only is there no substantial reason for a memorial of this shape and using this stone but there are substantial reasons in the context of the churchyard of St Leonard's why the memorial should not take this form. As I have already explained most of the memorials in this churchyard are of local stones of various kinds and are traditional in design with simple wording. Moreover, the memorial to Mrs. Smyth is at a point in the churchyard where it is close to other memorials. It is not necessary for me to conclude that the memorial stands out "like a sore thumb" and I note that the memorial itself is clearly well-designed and installed. Nonetheless it does strike a discordant note in its setting in this churchyard and even more so in the particular position it occupies in the churchyard. In the absence of this memorial the appearance of the relevant part of the churchyard would be a harmonious one. The memorials there are far from uniform but there is a generally consistency in terms of size, shape, and the types of stone used. The memorial to Mrs. Smyth detracts from that harmony drawing excessive attention to itself and detracting from the general appearance of that part of the churchyard.

60) In those circumstances I refuse the faculty sought. A faculty will issue authorising the removal of the existing memorial. In the light of Miss. Dowd-Smyth's desire to comply with the law and to avoid offence and in the light Mr. Timms's acknowledgement that his error set these matters in train I do not need to consider making a formal restoration order. I will make a separate costs order ordering the Petitioner to pay the costs of this matter. It is clearly right that Mr. Timms should bear those costs together with the costs of removal of the memorial and I anticipate that he will indemnify Miss. Dowd-Smyth in respect of that liability. In the light of Mr. Timms's apology; his frank acceptance of responsibility; and his offer to meet the expenses of putting matters right I do not find it necessary to issue a special citation pursuant to Rule 19.4.

61) As explained above the wording of the inscription is acceptable as are the proposed images. In those circumstances I authorise Revd Alison Massey as Rector of Birdingbury to permit the installation of a memorial bearing the same inscription as the current memorial (but with the addition of quotation marks) and bearing small images of a bumble-bee and of a Celtic cross. The memorial must

be of a shape and size meeting the criteria laid down in the Regulations and must be of a type and colour of stone concordant with the Regulations and suitable for this churchyard. If agreement cannot be reached between Miss. Dowd-Smyth and the Rector then I give permission for the matter to be referred back to me for further directions.

STEPHEN EYRE
HIS HONOUR JUDGE EYRE QC
CHANCELLOR
4th February 2018