

IN THE CONSISTORY COURT OF THE DIOCESE OF LICHFIELD

ECCLESHALL: HOLY TRINITY

PETITION OF GILLIAN MURTAGH

JUDGMENT

- 1) Mrs. Gillian Murtagh petitions for a faculty to erect a memorial to her late husband, Peter Murtagh. The proposed memorial takes the form of an upright stone of honed granite bearing a simple inscription with kerb surrounds. The inscription and the use of honed granite in this churchyard would not of themselves require a faculty. However, the Churchyard Regulations specify that an incumbent may not authorise the erection of a memorial with kerb surrounds and it is for that reason that Mrs. Murtagh seeks a faculty. For the reasons set out below I have decided that it is not appropriate to grant such a faculty and the Petition is dismissed. A memorial taking the form of the proposed upright stone may be erected without further application.

- 2) As explained below the Diocesan Advisory Committee has recommended approval of the petition. The Parochial Church Council and Mr. Warren Griffiths have written letters of objection but neither the Council nor Mr. Griffiths wished to become parties opponent and so I will proceed on the basis of taking their letters into account.

- 3) This matter was originally considered by the Deputy Chancellor. She decided, rightly, that the case was suitable for determination on the basis of written representations and Mrs. Murtagh has consented to that course. Mrs. Murtagh has provided her comments on the letters of objection. The Deputy Chancellor directed that the Parochial Church Council provide any expansion of its original letter which it wished to make and an explanatory note has been provided. That note does not raise any new issues of principle. Although Mrs. Murtagh's comments pre-date the explanatory note her comments cogently set out her position in respect of the arguments which have been raised. This matter has been referred to me for determination because pressing and urgent calls on the Deputy Chancellor's time mean that she will not be able herself to decide the matter in the near future. The Petition was presented in April 2014 and it is

important that a determination be made sooner rather than later. In those circumstances I have not thought it fit to trigger another round of comments on the further material.

- 4) I have been provided with a number of photographs showing the immediate vicinity of Mr. Murtagh's grave and also showing the wider churchyard. This is also a churchyard with which I am familiar having had occasion to visit it when considering other petitions relating to proposed memorials.

The Applicable Principles.

- 5) I set out my understanding of the approach to be taken in respect of cases where a faculty is sought for a memorial which is contrary to the Churchyard Regulations but where the churchyard in question already contains other non-conforming memorials in my judgment given in April 2012 in the case of the proposed memorial to Richie Nickisson in the churchyard of Newchapel, St James. The relevant parts of my judgment stated:

- 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. “

6) It is those principles which I will apply to the current case.

The Competing Contentions.

7) The Diocesan Advisory Committee has recommended approval. The minute of its discussion of this matter records that the Committee’s members “*decided that the proposals might be supported as there was a precedent for them in the immediate vicinity*”.

8) The Parochial Church Council’s opposition is essentially on two grounds. The first is to point out that the churchyard of Holy Trinity already contains a considerable number of memorials and has something of a crowded appearance. The introduction of a further memorial with kerbs will add to that crowded appearance and will do so in a sensitive location (the location of the proposed memorial a point which I will consider more fully below). The second reason relates to the fact that the presence of memorials with kerbs makes the maintenance of the churchyard as a whole more difficult. In this regard it is important to note that the Parochial Church Council’s concern is not as to maintenance of the particular grave and memorial but as to the impact on maintenance of the churchyard as a whole.

9) Mr. Griffiths lives in a house overlooking the churchyard and is one of those who assist with the maintenance of the churchyard. He echoes the concerns which the Parochial Church Council raise as to the practical impact of kerbed memorials on the maintenance of the churchyard. Mr. Griffiths makes the telling point that

following reflection on the disadvantages of kerbed memorials he replaced those which formerly surrounded his grandparents' grave in this churchyard with an upright stone. Mr. Griffiths says that although there are kerbed memorials in the vicinity of Mr. Murtagh's grave and elsewhere in the churchyard there are also memorials in the form of upright stones. Mr. Murtagh says that "*the overwhelming majority of the memorials are upright stones*". That assessment accords with my own impression derived from the photographs and my previous visits to this churchyard.

10) Mrs. Murtagh says that the use of kerbs will match the memorials in the vicinity of her husband's grave. She goes as far as to say that "*any non-kerbed memorial would look out of place and not be in keeping with the churchyard.*" In addition she explains that she has made arrangements with the masons who are to provide the memorial to ensure that there is regular and appropriate maintenance. In commenting on the objections Mrs. Murtagh contends that the objectors and by implication this Court should take account of the fact that the use of kerbs is her personal choice and preference.

Analysis.

11) I am conscious that the use of kerbs on the memorial is Mrs. Murtagh's personal preference and that she believes that it is the most seemly way of commemorating her late husband. Clearly that personal preference is something which I have to take into account but I cannot attach any great weight to it. As Holden Ch explained in *Re Christ Church: Harwood* [2002] 1 WLR 2055 (at 2056):

"It is inevitable, and entirely understandable, that those who are mourning will be preoccupied with the loss of their loved one, will wish to memorialise him or her as fittingly as they can, and will not centrally be concerned with the impact of what they propose on the environment of the burial ground, or even on other gravestones near to the site of "their" grave. The overall beauty and tranquillity of a churchyard is only as good as its component elements allow it to be. The rights and interests of private individuals, of the worshipping congregation, of all parishioners, of the local community, and of the Church and society at large all have to be considered in permitting a memorial, which is likely to last for ever, to be placed in a churchyard. There cannot be a *carte blanche* situation where the family of the deceased has sole right to decide what is, and what is not, appropriate by way of memorial, not least because, ... that family does not own the land in which the remains are placed, or on which the memorial is meant to be placed."

- 12) Mrs. Murtagh places considerable weight on her contention that a kerbed memorial is the most fitting type of memorial at this location and that any other type of memorial would look out of place. To some extent that is a question of perception but I have already explained that my own perception of this churchyard accords with that of Mr. Griffiths. There are a number of kerbed memorials including several in the vicinity of Mr. Murtagh's grave but the predominant type of memorial is an upright stone and the memorial on the grave immediately adjoining that of Mr. Murtagh is an upright stone. It is correct that a kerbed memorial would not look out of place at this location but Mrs. Murtagh overstates the position in saying that a non-kerbed memorial would look out of place. In the context both of the churchyard as a whole and of this particular part of it a memorial in the form of an upright stone would fit in perfectly well.
- 13) The existence of other kerbed memorials (and accordingly of memorials which do not accord with the current Churchyard Regulations) is not of itself a good reason for authorising a further kerbed memorial. Moreover, it will be apparent that my perception of the churchyard as a whole is that this is not one of those cases where the number of other kerbed memorials is such that a refusal of this Petition would amount to an artificial exercise in pursuing an illusory goal of conformity to the Regulations and by so doing amount to injustice to Mrs. Murtagh.
- 14) In considering that question it is to be noted that of the nearby memorials to which Mrs. Murtagh draws attention none is more recent than 1966 (being the Davies memorial which appears to have been installed in 1966 albeit with an additional interment and inscription in 1986). I have no reason to doubt the assertion from Mr. Griffiths that a consistent policy of resisting the introduction of memorials with kerbs has been operated at Eccleshall for a number of years.
- 15) The nature of the churchyard as a whole and the location of the proposed memorial are relevant in other respects as well. The Parochial Church Council is right to say that the churchyard has something of a crowded appearance because of the number of memorials and their proximity to each other. In that context the efforts of the Parochial Church Council to minimise an increase in the crowded effect are legitimate and are to be supported. The Parochial Church Council is right to take the view that a kerbed memorial is more likely to increase

the impression of crowding than a single upright stone would. As to the location of the proposed memorial the relevance of this is that it is close to the Bishop's Path through the churchyard. This is to be the site of a new Area for the Burial of Cremated Remains. In my judgment of March 2013 I refused a petition from the Vicar and churchwardens of Holy Trinity seeking permission for that Area for the Burial of Cremated Remains to take the form of a series of individual plaques along the edges of the Bishop's Path. In refusing that petition I indicated that any memorialisation in the proposed area should take the form of a single collective memorial with no plaques or memorials at the points of individual interment. I did so at least in part because of the need to avoid adding to the crowded or busy appearance of this churchyard. It follows that the Parochial Church Council's concern in respect of that appearance is one which this Court has previously expressed itself.

- 16) I have no doubt that Mrs. Murtagh's assertions that she will maintain this memorial and that she has put in hand arrangements to ensure that this will happen are true. However, it seems to me that Mrs. Murtagh is missing the point of the objection on maintenance grounds. The objection is not directed primarily to maintenance of the particular memorial but to the effect which the presence of a kerbed memorial has on the ease of maintenance of the churchyard as a whole. There is real force in this argument. The maintenance of the churchyard of Holy Trinity is carried out by volunteers. The presence of kerbed memorials makes that maintenance a more complicated exercise. It is right to point out that there are already a number of kerbed memorials and so those maintaining the churchyard have to take account of the effect of those. Nonetheless, it is legitimate for the Parochial Church Council and Mr. Griffiths to say that the presence of a further kerbed memorial will add to the difficulties involved in maintaining the churchyard in a way which a single upright stone would not.
- 17) The burden is on Mrs. Murtagh to show a good reason for departing from the Churchyard Regulations and allowing a non-conforming memorial. In my judgment she has failed to do so. Her personal preference and the presence of a number of other kerbed memorials are not sufficient reason when seen in the light of the predominance of memorials in the form of upright stones and of the Parochial Church Council's legitimate desires to minimise exacerbation of the

crowded appearance of the churchyard and to resist the introduction of
memorials which increase the difficulties of maintenance in this churchyard. It
follows that the Petition is to be dismissed.

STEPHEN EYRE
CHANCELLOR
20th December 2014