

IN THE CONSISTORY COURT
OF THE DIOCESE OF SODOR AND MAN

RE: THE PARISH OF MALEW AND SANTAN
RE: REGINALD CHARLES KELLY DECEASED

JUDGMENT
Delivered on 4 February 2020

Introduction

1. Reginald Charles Kelly [‘the Deceased’] died on 28 March 2015 and on 10 April 2015 was interred in grave G55 in the Churchyard of St Lupus Kirk Malew in the Parish of Malew and Santan. The Churchyard is split into two very distinct areas – that immediately surrounding the Church which contains some very old graves, and an area over the A3 main road between Cross Four Ways and Castletown referred to as the Kirk Malew 1935 Churchyard. Plot G55 is in the 1935 section.
2. By an Application dated 7 February 2019 Mrs Marjorie Kelly [‘the Applicant’], the Deceased’s widow, sought a faculty for the erection of kerbs to the Deceased’s grave. Footings for the kerbs have already been laid without a faculty first being obtained. A memorial to the Deceased is in situ.
3. It is intended that the footings will be covered with black material to match the existing memorial.
4. The grave is situated in a line of graves in Row G, which runs from the ‘Douglas’ end of the Churchyard marked by a stone wall to the middle path of the Churchyard. The middle path is shingle whilst paths between grave plots are grassed.
5. The line of graves immediately opposite Row G have, for the main part, kerbs delineating the whole plots. Some of these are single plots, some are multiple plots. Most of the graves in the line of graves immediately behind row G (ie with their memorials backing onto the Deceased’s memorial) have kerbs delineating the whole of the plots, again whether they are single or multiple.
6. Row G itself is, for the most part, laid to grass. Only two plots other than the Deceased’s plot have kerbs. One large plot is at the beginning of the row adjacent to the path, the other is a single plot approximately 8 single plot widths away from the Deceased’s plot as one heads towards the middle path.
7. Row G has occupied plots adjacent to the Deceased’s plot and what appear to be vacant plots a few plots beyond the Deceased’s plot when heading towards the wall, although these plots may have been reserved.
8. The Churchyard is administered by the of the Parish of Malew and Santan.

9. The Application stated that the dimensions of the kerbs would be restricted to allow for access and egress to the burial plots beyond G55.
10. The Application was supported by Reverend James McGowan, the Vicar of Malew and Santan but with qualification. Revd McGowan, by letter dated 3 February 2019, stated that he was aware of the potential objections. He stated in terms:

'The nature of the objection which has been verbally brought to my attention against the installation of the kerb surrounds the fact that the installation of a standard set of kerb surrounds would reduce the width of the footpath and make maintenance of this section of the burial ground difficult.

Mrs Kelly bought plot G55 in 2010, on her application it clearly stated that the applicant would not seek to install a kerb surround on the grave as the grave had been designated a lawn grave. However, as the photographs will show, kerbs have since been permitted to [sic] on other graves in row G also designated as 'lawn graves'.

The grave deed that Mrs Kelly has states that the grave plot is '8 foot [sic] long; when in fact she was sold a reduced plot due to the fact that when the churchyard was originally laid out in the 1930s errors were made and row G gradually tapers off. Mrs Kelly was not aware of this when she bought the grave. The Kelly family intended to use the grave as an ashes plot, and so the reduced size was suitable for them. Neighbouring graves have also been used in recent years as ashes only plots.

The Kelly family propose to install reduced kerbs on their family plot in order to make it clear where the grave is. This is a particular concern as the row narrows and it isn't particularly clear which sections are footpath and which are graves. The installation of kerbs as proposed would clearly mark this out, and would leave three foot wide path over which a lawnmower could freely pass.'

The Application

11. The Diocesan Advisory Committee [hereinafter 'the DAC'] held a meeting on 6 March 2019 to consider the Application. The proposal was for the kerbs to be restricted to 80 inches in length by 48 inches in width to allow for a 36 inch path for digger access for burials.
12. The DAC 'recommended the works or proposal for approval by the Court' by a Notification of Advice dated 22 March 2019.
13. Thereafter there was a delay as the Applicant had not displayed Public Notice of the Application. This was finally done on 26 September 2019 with the Applicants being recited as the Applicant and Mr Orry Mitchell as Churchwarden for the Parish.

Objections

14. An objection letter was lodged by Mr A A Kelly on behalf of Churchyard Services dated 2 October 2019 and received by the Registrar on 4 October. As I understand it, Churchyard Services supply maintenance and gravedigging services to the Churchyard.

15. The main objections to the kerbs can be summarised as follows:-

- (a) The administrators of the Churchyard, the Churchwardens of the Parish, have decreed that there shall be no kerbs, such decisions having been made in 1987 and confirmed later in March 1995. Therefore, there should be no kerbs in the Churchyard after 1987.
- (b) Prior to 1970 an incorrect measurement was used in relation to Row G resulting in a gradual narrowing of the path. In practical terms, this will mean that a measurement of less than 12 inches at the end of the grass path nearest the wall.
- (c) A number of families have wanted to install kerbs in Row G and have accepted that this is not possible because of the convergence of the rows.
- (d) Mrs Kelly signed a burial plot application form accepting the terms and conditions which included no kerbs.
- (e) Allowing Mrs Kelly's application would result in past decisions being revisited.
- (f) No machinery could operate on the path.
- (g) Movement of funeral parties during burials would become problematic.
- (h) Whilst kerbs have been placed around a grave on Row G several years ago, there was no permission to do so. The family concerned have emigrated.

16. The objections were made in a business-like manner and raised practical issues from a groundsman's perspective. Whilst Mr A A Kelly understood the Applicant's wish to install kerbs, he nevertheless made his points succinctly.

17. The Registrar wrote to Mr A A Kelly by letter of 15 October. In compliance with Rule 10 of the Faculty Jurisdiction Rules (Isle of Man) 2016 she asked Mr A A Kelly whether he wished to become a party to these proceedings. Understandably he has declined given the costs warning in that letter. Nevertheless, I will take his views into account when deciding this Application.

18. A copy of the letter containing the objections was sent to the Applicant who responded as follows:

'I will agree to whatever decision the Attorney General [sic] makes.

We would agree to shorten the plot on R C Kelly's grave and have a smaller kerb there.'

Relevant Legal Principles

19. In *Freckleton, Holy Trinity [1994] 1 wlr 1588* Bullimore Ch noted that the right to be buried in a churchyard does not include a right for the personal representatives, the next-of-kin or anyone else to erect a memorial to the deceased and a memorial placed in a churchyard without permission granted by or on behalf of the Diocesan Chancellor constitutes a trespass.

20. As to what may be permitted in a churchyard, in *Re Christ Church Harwood [2002] 1 WLR 2055* Holden Ch said, at page 2056:

'The overall beauty and tranquillity of a churchyard is only as good as its component parts 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 forever, to be placed in a churchyard. There cannot be a carte blanche situation where a family of the deceased has sole right to decide what is, and what is not, appropriate by way of memorial because.... the family do not own the land in question in which the remains are placed, or on which the memorial is meant to be placed.'

21. The above cases have been relied upon in this Diocese, particularly in the case of *Re Katherine Frances Frankland-Davies Deceased*, decided by The Worshipful Geoffrey Tattersall QC in May 2017.
22. I apply those decisions to the installation of kerbs, since I am of the view that the same principles apply.

Determination

23. I visited the Churchyard on 9 January 2020 to inspect the area myself and to examine Row G, the adjacent rows and the Churchyard in general. I noted that there were many plots with kerbs in different materials such as marble or concrete. Within the curtilage of each plot, different materials had been used such as gravel, paving stones, concrete slabs etc. Some graves were very simple, others very intricate with ornaments adorning the graves either within the plot or on the kerbs themselves.
24. Row G, however, along with Rows most recently used for interment, is mainly laid to grass as set out above. Those rows laid to grass with only memorials to each deceased are far neater and uniform than the rows with kerbs.
25. It is also evident from even a cursory view that the row facing Row G and Row G itself converge as the grass path progresses towards the 'Douglas' end of the Churchyard towards the wall. This does not appear to be the case in other rows where the path between plots retains its width.
26. I made a rudimentary measurement of the width of the path at the grave with kerbs nearest the middle path and the measurement between the concrete footings at the Deceased's plot and the plot immediately opposite. The width at the beginning of the grass path was about 94.5 cm (36 inches) whereas the width at the Deceased's plot was about 67.5 cm (26 inches) – a considerable and significant narrowing in the context of a path which will carry pedestrian traffic visiting graves, workmen and their tools and pall bearers carrying coffins for interment. As mentioned above, the path continues to narrow beyond the Deceased's plot heading towards the wall.
27. It also has to be remembered that the concrete footings will be overlaid by other materials which in turn will further narrow the path.
28. The grave diagonally opposite to the Deceased's plot has ornate urns decorating the kerbs immediately adjacent to the grass path. These have the effect of making negotiation of the narrow space even more challenging.
29. As to the coverings of the grave, within the curtilage of the kerbs, I saw many untidy and unkempt examples of graves which had been left to the elements and to the

ravages of time. Whichever material was used, if not tended, the grave had become untidy. In one instance the concrete had collapsed entirely leaving an unsightly void.

30. I understand Mrs Kelly concedes to reduce the length of the kerbs to allow the path to remain at 36 inches.

Findings

31. I find the following:

- (a) The decision has already been made by those administering the Churchyard that there shall be no kerbs presumably to allow more efficient mowing of the areas between memorials and to allow for the very evident convergence of Row G with the opposite row. Having made that decision, it would be anomalous to then allow kerbs and it would have to be an exceptional, almost unprecedented circumstance to allow that rule to be overturned.
- (b) The Applicant accepted that kerbs would not be allowed when she bought the plot in 2010. To allow her to renege on that contract would potentially overturn all of those contracts agreed by others in Row G.
- (c) Those rows which have no kerbs are neat and tidy, in contrast with the numbers of graves which have not been attended to and have deteriorated within the boundary of kerbs.
- (d) There is one grave with kerbs near to the Deceased's plot in Row G (as mentioned by Mr A A Kelly) post-dating the decision not to allow kerbs, but it was confirmed to me on site by one of the Churchwardens that this was erected without permission and steps (ineffectual so far because the Estate administrators cannot be traced) have been taken to try to contact the family to remove the offending kerbs and the slab covering the plot. Flouting of the rules in that instance cannot mean that the rules can therefore be relaxed.
- (e) If the rule is relaxed for the Applicant, then it will have to be relaxed for others.
- (f) The reason for the kerb being installed is not clear in the Application. The only indication is in the Reverend McGowan's letter when he states that the Kelly family intends to install reduced kerbs *'in order to make it clear where the grave is. This is a particular concern as the row narrows and it isn't immediately clear which sections are footpath and which are graves.'* I reject that reasoning because the kerbs on the opposite row are almost continuous, thus delineating where the path is, and in any event, if the kerbs are shorter, part of the Deceased's grave plot will be used as path.
- (g) I have to say that I was not impressed by the fact that the footings to the kerb have been installed at the full length. The monumental mason involved is local must have known of the local terms and conditions, and yet installed the footings knowing that the path would be narrowed to a significant degree.

- (h) As the plots in Row G converge, any kerbs which are allowed beyond the Deceased's plot will have to become increasingly shorter. Thus relaxing the rule for the Applicant will have the effect of seeing kerbs of varying lengths as the plots become nearer the wall. This will undoubtedly make the Row G look strange.
- (i) Anything which makes the groundsmen's task more challenging will have a direct effect on the cost of maintaining the Churchyard. The rate may have to increase, causing cost to the taxpayer. The contract Churchyard Services has negotiated with the Parish will depend on the lawned area remaining lawn.
- (j) From an aesthetic point of view, the grassy area between the memorials without kerbs are far neater than those areas with kerbs. The kerbed graves are not uniform, are likely to be untended and therefore unkempt and in some instances are unsightly.
- (k) Flowers, urns etc are sited near to memorials in the grassy areas, confining the number and style of ornaments. The whole impression is one of calm and order where the lawned areas have been maintained.
- (l) Surely in these times, applying concrete, marble or man-made products to significant areas of what should be pasture/grassland should be discouraged.

Decision

- 32. Whilst I note that a significant number of the graves in the Churchyard have kerbs, nevertheless the decision was taken by the authorities that kerbs would not be allowed after 1987 in Row G. I can see no compelling reason to depart from that decision. For all of the reasons set out above, I dismiss the Applicant's application and, for complete transparency, I reject the revised plan for kerbs of reduced length.
- 33. Whilst I understand that the Applicant now wants kerbs to mark out her Husband's plot, she agreed not to install them when the plot was purchased and is therefore bound by that contractual agreement.

Order

- 34. Given that the footings for the kerb have already been laid, I order that the footings for the kerb are removed within 42 days of the date of this judgment.
- 35. I also order that the Applicant shall make good the grass area damaged by the kerb footings within 42 days of the date of this judgment.
- 36. In the event that the kerb footings have not been so removed from the churchyard within 42 days of the date of this judgment and/or the grass area has not been made good, the Archdeacon or any person acting with his authority shall remove the footings and/or make good the grass area and the Applicant must bear all costs of such removal and making good. The Archdeacon shall notify the Applicant by letter sent by first class post that the footings are being so removed and/or the grass area made good and shall give her seven days' notice of such works.

37. If the kerb footings are removed by the Archdeacon or any person acting with his authority, they shall be stored at a location specified by the Archdeacon (and the Archdeacon shall give the Applicant notice of such location in writing) for a period of 56 days from the date of removal. During this period the Applicant can collect the footings or arrange for their collection.
38. After the expiry of such period of 56 days the footings shall be disposed of as the Archdeacon sees fit, if the footings have not been collected.
39. In accordance with the practice of this Court the Applicant shall pay the Court and Registry fees and expenses being the costs of the determination of this Application. The costs shall be assessed by the Deputy Vicar General and shall be paid by the Applicant within 28 days of being sent the Notice to Pay.

HAZEL F SMITH
Deputy Vicar General of the Diocese of Sodor and Man