

In the matter of St Peter, Terwick

Judgment

1. This is the petition of Eric George Eastman. He seeks a faculty for the erection of a memorial over the grave of his late wife, Jean Ann Eastman, who died on 5 September 2022.
2. Objection has been taken by the incumbent, PCC, and churchwardens, although they elected not to become parties opponent.
3. As the matter was disputed and a site visit would have been inevitable, I convened an informal hearing which took place on the morning of 20 December 2023. I heard from Mr Eastman and one of his sons, Lionel, together with the Reverend Edward Doyle, rector of the parish, **and** Lady Nixon, churchwarden.
4. Prior to the hearing I spent about 20 minutes wandering round the churchyard, examining memorials in the vicinity of Mrs Eastman's grave, and looking at the churchyard more generally. The small church dates from the twelfth century and is surrounded by a well-tended churchyard. It is set in rolling farmland, some distance from any other building in an attractive rural location.
5. The hearing took the form of a moderated conversation. Mr Eastman and his son outlined their reasons for seeking this particular memorial, and Mr Doyle, supported by Lady Nixon, outlined the objections of the PCC. The discussion was frank but measured and I am grateful to all concerned for the thoughtful and constructive approach that was adopted.
6. At the conclusion of the short hearing, I indicated that I was minded to allow the introduction of the memorial and that my reasons would follow. These are my reasons.

Churchyard Regulations

7. Misconceptions abound as the nature and purpose of Churchyard Regulations. I made the following observations in *Re St John the Baptist, Adel* [2016] ECC Lee 8 in the context of the Diocese of Leeds, but they are of more general application:

Delegated authority for the introduction of memorials

3. The nature and purpose of Churchyard Regulations do not seem to be fully understood. As their full title makes plain, they are an instrument of delegation pursuant to which the discretion to permit the introduction into churchyards of certain categories of memorial is devolved from the chancellor to the parish priest. Parochial clergy have delegated authority to allow memorials which fall within the certain specified categories; but they are perfectly at liberty, should they wish, to decline to permit a memorial even though it complies with the Regulations. However, if a priest purports to permit the introduction of a memorial which does not comply with the Regulations, the permission will be a nullity.

[...]

6. [T]here 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 ... [t]here will be no presumptive preference for what is contained in the Churchyard Regulations, nor a bias in favour of the standard, bland or anodyne.

8. Similarly in this diocese, the function of the Churchyard Regulations is to set out certain types and categories of memorials, the introduction of which can be authorised by parochial clergy under delegated authority. Anything outside the Regulations cannot be authorised by an incumbent and a faculty must be sought. As the preamble reads:

It is unlawful for a monument to be introduced into a churchyard without permission. Generally such permission derives from the chancellor in the form of a faculty. However, for administrative convenience and to minimise expense, the chancellor delegates to the incumbent the authority to permit the introduction of a monument provided it is of a type which complies with the detailed provisions contained in these Regulations.

9. In the event that a memorial is introduced into a churchyard without either the delegated authority of the incumbent or a faculty granted by the Chancellor, those responsible for the unlawful introduction must petition the Court for a confirmatory faculty to allow it to remain, which may or may not be granted. Alternatively, a representative of the parish, deanery or archdeaconry may seek a direction from the Consistory Court for its removal. Entirely properly, Mr Eastman has not acted of his own volition, but has followed the proper process, and demonstrated considerable patience while it has taken its course.
10. Until recently, there had been a difference of approach between those Chancellors (me amongst them) who considered petitions for the introduction of a memorial without any presumptions and those who imposed a requirement for a petitioner to plead and prove exceptionality for anything not within the regulations. The Court of Arches in *Re St Giles, Exhall* [2021] EACC 1, recently gave the clearest of steers that the merits-based test, which has long been operating in this Court, is the correct one.

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

11. The issue for decision therefore is whether a faculty should be granted in respect of the specific memorial proposed by Mr Eastman in his petition. It is for him to satisfy the Court on the

civil standard, namely the balance of probabilities. Before moving to a discussion of the merits, I propose to make brief reference to a process of revision which is already in train.

National review of Churchyard Regulations

12. It is widely known that a working party of the Ecclesiastical Judges Association under the leadership of the Right Worshipful Peter Collier KC has been seeking ways of fostering a greater level of uniformity amongst diocesan Churchyard Regulations. Whilst it would be improper and unwise to venture into matters which are currently out to consultation, one development can usefully be noted.
13. The device of delegated authority in this context is now generally recognised as a 'legal fiction'. With that in mind, the working party recommended placing Churchyard Regulations on a clearer and more robust legal footing. A clause was inserted into the Church of England (Miscellaneous Provisions) Measure 2023 which completed its passage through General Synod in July 2023. This will empower Chancellors to make Additional Matters Orders concerning churchyard memorials replicating the current delegated authority procedure. Assuming this Measure achieves parliamentary approval and Royal Assent, it will pave the way for amendments to be made to the Faculty Jurisdiction Rules 2015, such amendments having already been approved in principle by General Synod. In short, this will regularise current practice by allowing individual Chancellors to make Additional Matters Order permitting the introduction of memorials conforming to certain types and categories (ideally with minimal difference between dioceses) provided they have the approval of parochial clergy under a prescribed process.
14. This petition, of course, falls to be determined under the current law notwithstanding this foretaste of what is to come. However, Lady Nixon made some justified comments about the system not being widely understood. I trust that this judgment addresses the misapprehensions she identified and provides an insight into the future direction of travel.

Objections

15. In considering the papers I identified some 11 objections to the petition, with a degree of overlap between some of them. They were all discussed during the hearing, and I address each of them below. For convenience, a sketch of the proposed memorial is reproduced as an annexe to this judgment, beneath which is a photograph that I took prior to the hearing as an *aide memoire*. The Eastman grave is to the right in the foreground.

i. Non-compliance with Churchyard Regulations

16. For the reasons explained above, non-compliance with Churchyard Regulations is not (in itself) a justification for refusing a faculty. In this instance, there was an error in the proposal originally submitted to the incumbent. It was accepted at the hearing that the proposed memorial comes within the types specified in the current regulations, and could have been authorised by Mr Doyle.

ii. Too large and imposing

iii. Overshadow the next door grave

17. I take these two matters together. They are subjective considerations. I would have no hesitation in refusing a faculty for a headstone which was disproportionately large in its context, notwithstanding that it may be within the tolerances of the Churchyard Regulations.

If, for example, it was situated amongst a line of uniformly sized and shaped stones, such that it would be visually intrusive, this might be a ground for refusal, but as the photograph illustrates, that situation does not pertain here.

18. Mr Doyle suggested that the family of the person interred in the neighbouring grave (see photograph) might be put out if a large memorial were erected over the Eastman grave. Whilst this may be a theoretical possibility, Mr Doyle had not consulted them, nor had they objected to the proposal following public notice. Any application for a memorial on the adjoining grave will be determined on its own merits.
19. But is the proposed memorial oversized for its setting? In advance of the hearing, Mr Eastman's son erected a temporary wooden stake with a crossmember at the top illustrative of the height of the proposed memorial. It can be seen on the photograph rising behind the wooden cross. The top of this structure is set at 41 inches (being the combined total of the base (4 inches) and the headstone complete with Celtic cross (37 inches).
20. Mr Eastman sought to address this objection by suggesting that the base could either be omitted completely or sunk into the earth. This would reduce the overall height above ground to 37 inches. This concession was graciously welcomed.
21. I take the view that once ameliorated in the manner proposed, the criticism that the memorial was large and imposing or that it might overshadow the adjoining grave largely fell away.

iv. Precedent

22. The argument on precedent was not rooted in the strict legal doctrine of *stare decisis* but on the simple basis that if this were allowed, then there would be a flood of similar applications which would also have to be permitted. This contention would have carried greater weight had the proposal been for something which fell outside the Regulations, as it had first appeared. Whilst parochial clergy and this Court need to be consistent in their approach to the admission of memorials, each case is fact-sensitive and the position within the churchyard may be a relevant consideration. I do not consider that the precedent argument is a weighty factor in this case, particularly following Mr Eastman's concession on overall height.

v. Negative impact on church and churchyard

23. This too is a subjective matter which raises similar considerations to matters ii. and iii. above, and vii. below. It would appear to have been originally raised when it was believed that the proposed memorial was larger than the dimensions specified in the Churchyard Regulations (which has now been clarified). The objection was not pursued with any rigour by Mr Doyle.

vi. Too ostentatious

24. Mr Doyle accepted that this was an unfortunate choice of word, and generously withdrew it.

vii. No similar headstone in the vicinity or particular section of the churchyard

viii. Out of keeping with country churchyard

25. I take these two matters together. The concept of zoning is a relevant consideration: particular headstones may be acceptable in one part of a churchyard and unacceptable in another. Context is everything. There are relatively few headstones in this part of the churchyard.

Certainly there are no serried ranks of identical stones. There are plenty of examples of crosses in general, and of Celtic crosses in particular, elsewhere in the churchyard. As is common in rural churchyards which have been in use for several centuries there is a vast variation in size and shape. They speak of the tastes of successive generations and are part of the accreted history of the community served by the church. Variety can be a virtue, whereas homogeneity can be stifling. That said, in the vast cemeteries maintained by the Commonwealth War Graves Commission where the uniformity of headstones and strict geometry of layout provides an evocative and moving tribute to those who gave their lives in armed conflict.

26. To put it rather crudely, the question the Court must address is whether the proposed stone will stick out like a sore thumb? Would it be unsightly and out of place? Would it detract from the ambience of contemplative remembrance? And these questions must be judged by context: here a twelfth century country church in a rural setting amidst farmland. Applying the 'sore thumb' test, there is nothing to suggest that the proposed memorial would be out of place or outside the range of acceptable headstones for this particular part of the churchyard, or the churchyard more generally.

ix. 'Sunset Strip'

27. Mr Eastman indicated that this had been intended as a light-hearted reference to the theme song from *77 Sunset Strip* and was suggested by his wife's age at the time of her death. There is nothing wrong in humour or light-heartedness in inscriptions. It can be a source of solace and a means of capturing the essence of a loved one. Spike Milligan's 'I told you I was ill' is a case in point. But it needs to be well-judged and appropriate. Mr Eastman withdrew this element of the inscription at an early stage of the process, and I consider he was right to do so. I would not have authorised it.

x. Health and safety considerations

28. A churchyard is a public place. Incumbents and PCCs must give proper regard to the wellbeing of all who enter, for whatever reason. Their legal duties extend even to those who are not authorised to be there: see the Occupiers Liability Act 1983. Children are known to play in churchyards and can come to harm. Mr Doyle suggested that the cross element of this headstone could become detached and fall on someone causing injury. Mr Lionel Eastman pointed out that the stone came as a single integrated piece and the cross was not a separate element affixed to the top. The prospect of it falling is unlikely. I also note that a reputable memorial mason has been engaged and that the proposed stone will comply with current British Safety standards. I am satisfied that all health and safety considerations have been sufficiently addressed.

xi. Impediment to mowing the grass

29. It was suggested that the stone might have an adverse impact on grass mowing. During the hearing it was established a strimmer is used and it was clear from my observations on site that the churchyard is well maintained. It is hard to see how the design of the proposed memorial might be a greater impediment to mowing than any other headstone.

Diocesan Advisory Committee

30. I directed that advice be sought from the DAC. Its Notification of Advice did not recommend the proposal. The accompanying minute helpfully summarised the issues and arguments on both sides. It concluded:

The DAC shared some of [Mr Eastman's] disagreement with several of the PCC's justification for its objections. While the DAC thought that a well-designed cross could be acceptable in this setting, members felt that the proposed memorial was not particularly attractive and would not contribute to the positive appearance of this churchyard setting.

31. The minute referred to memorials in the shape of a cross being discouraged in the Churchyard Regulations, stating that any which are approved should meet 'a high standard of design'. This proposal was a catalogue memorial rather than bespoke. Whilst noting this valid point, it should also be recorded that high quality funerary sculpture is beyond the financial reach of many. The acceptability of proposals should not be dependent upon the wealth or social status of a deceased's family.

Disposal

32. Adopting the merits-based approach of the Court of Arches in *Re St Giles, Exhall*, which for the avoidance of doubt does not constitute a departure from the approach adopted hitherto in this diocese, I ask myself whether Mr Eastman has satisfied this Court on the balance of probabilities that a faculty should issue. As I indicated at the conclusion of the hearing, I consider that he has and I so order. The faculty will be subject to the following conditions.
- (1) The memorial shall be so designed and erected that its overall height above ground shall not exceed 37 inches. Either the proposed base should be omitted completely or the memorial should be sunk into the ground such that the entire 4 inch base is beneath the surface level of the surrounding ground;
 - (2) The faces of the memorial shall be matt in appearance and neither polished nor mirror;
 - (3) The inscription shall be cut in the stone and not coloured.

Costs

33. As is the practice of the Court, the costs of the petition will be borne by Mr Eastman, as he is the petitioner. This judgment has been lengthier than strictly necessary so as to provide clarity and general guidance for the diocese. I will abate the costs for drafting it so they do not fall disproportionately on Mr Eastman.
34. The PCC indicated in correspondence that it had elected not to lodge a Form 5 and become a party opponent as it was fearful of incurring a liability in costs. As the *Guidance on the Award of Costs in Faculty Proceedings* issued by the Ecclesiastical Judges Association makes clear, a party opponent will only be ordered to contribute towards the court costs if it behaves unreasonably in the conduct of proceedings. Adverse cost awards are very rare in the Consistory Court. The raising of legitimate concerns in an appropriate manner cannot possibly be construed as unreasonable. The PCC's fears were entirely misplaced.

ANNEXE

