

IN THE CONSISTORY COURT
OF THE DIOCESE OF SODOR AND MAN

IN RE

- [1] AN APPLICATION BY CAPTAIN JAMES STUART McKENZIE
[2] THE ECCLESIASTICAL PARISH OF MAUGHOLD AND SOUTH
RAMSEY

JUDGMENT

delivered on 13 April 2016

Introduction

1. By his application dated 3 December 2013 Captain James Stuart McKenzie [‘the Petitioner’] sought a faculty to erect forthwith and before his death a memorial in the shape of a Buddhist stupa in Maughold churchyard, all of which is consecrated. He contends that the stupa is of a traditional design and material which complies with the sizes and dimensions set out in the Churchyard Regulations. It is proposed that it should contain the following inscriptions:

on the upper plinth:

‘Captain James Stuart McKenzie
1939 – [year of demise]

and on the lower plinth:

‘He wanted green dandelions’

2. The base of the stupa is 36 inches wide and its overall height is 48 inches. It has already been made and photographs of it accompany the application.

3. The application was considered by the Diocesan Advisory Committee [‘DAC’] on 21 November 2013 and such was recommended subject to the following conditions, [a] that the

site was in an appropriate setting, [b] that it was the new churchyard away from the church building, and [c] was not in proximity to other standard headstones.

4. Public Notice of the application was given between 11 February 2015 and 11 March 2015.

5. The Public Notice of the application gave rise to a letter of objection from Mrs A Poole received at the Diocesan Registry on 6 March 2015. Mrs Poole stated:

[a] The dimension of the proposed stupa did not conform to the Rules and Regulations of the Burial Authority in that it was wider than the permitted maximum and that to authorise its erection would create a dangerous precedent;

[b] The erection of any monument on a vacant plot is currently not permitted and would also create a dangerous precedent;

[c] The image of the stupa shown on the Petitioner's application did not appear to have a flat surface large enough for a memorial inscription so that an additional plaque/headstone would be likely to be required; and

[d] If it is intended to inter cremated remains such burial should be in the Garden of Remembrance with all other cremated remains and the proposed stupa would be out of keeping with all other memorials in such garden of Remembrance.

6. By letter dated 31 March 2015 the Diocesan Registrar acknowledged receipt of such letter of objection and invited Mrs Poole to either become a party to the proceedings or to allow the Vicar General to take her views into account without her becoming a party. She elected not to become a party to the proceedings but to ask me to take her views into account and I do so.

7. Having considered the papers on 26 May 2015 I adjudged that it was expedient to determine the proceedings by written representations under Rule 22 of the Faculty Jurisdiction Rules (Isle of Man) 2010 and invited the Petitioner to consider whether he was willing to consent in writing to such a procedure. The Petitioner has so consented and I thus determine this application on the basis of written representations.

Directions and further representations by the Petitioner

8. On 26 May 2015 I also gave further directions if the Petitioner so consented. Such further directions were that the Petitioner should:

`set out in full his reasons for wishing to erect the stupa. In particular he should address the following issues:

- [a] whether I have power or jurisdiction to grant a faculty to erect the stupa before his death;
- [b] assuming I have jurisdiction, why I should, as a matter of discretion, grant him a faculty to erect the stupa before his death;
- [c] why I should not dismiss his application and instead allow his nearest relative to seek the faculty sought after his death;
- [d] the significance and appropriateness of the inscription `He wanted green dandelions`;
- [e] each of the comments made by Mrs Poole, in particular as to:
 - [i] the dimensions of the stupa and
 - [ii] whether, if the intended remains are to be ashes, such stupa is more appropriately placed in the Garden of Remembrance.`

The Applicant`s response to the directions

9. In support of his application the Petitioner made the following general submissions:
- [a] He had been brought up in the Church of England but had followed the Buddhist faith for over 50 years;
 - [b] The Lawn Cemetery in Maughold was maintained by the rate levy on both Maughold and Ramsey ratepayers and he had a right to be buried there;
 - [c] Although he was a little uncomfortable that `one faith should have the power of veto over a memorial on that grave over another faith` he did accept that, whoever is in charge of management, decorum must be maintained in a cemetery;
 - [d] The stupa was not ornate but was based on plain examples found in Borudubur in Java which he had visited twice and found immensely inspirational. It had been sculpted by Ongky Wijana who had undertaken work for Peel Cathedral; and
 - [e] He had widely consulted about his proposed stupa and had received approval from the incumbent, the burial authority, the Archdeacon and the DAC.

10. Dealing with the specific matters raised in my Directions the Petitioner responded thus:

[a] As Vicar General I had authority to grant a faculty and that since there was no provision in the Rules to the contrary I must have jurisdiction to grant a faculty for this memorial before the death of the Petitioner or indeed at any time after the Petitioner's purchase of a burial plot in the Churchyard;

[b] He had determined to make this application in advance of his death because he recognised that to seek a faculty for a memorial which recognised a faith or belief other than Anglican might be controversial and that he could not expect his wife, his next of kin who had supported his endeavours throughout, 'as a staunch Anglican, a former churchwarden, a choir member, a member of the PCC and as synod representative' who wished to have a Christian burial in the same family plot, to fight for a faculty after his death.

[c] He would accept that the stupa should not be erected on the burial plot he had purchased until the interment of his cremated remains but would argue that 'installing it on the plot now, providing the inscriptions are completely covered up, would allow familiarisation.'

[d] The significance of the inscription 'He wanted green dandelions' was to reflect his Buddhist faith. A koan in Zen Buddhism, such as this was intended to be, was 'a succinct paradoxical statement or question used as a meditation discipline' to 'exhaust the analytic intellect readying the mind to entertain an appropriate response on the intuitive level'. He stated that such inscription was not unChristian, was not calculated to cause offence to Christians and if it caused some amusement that was not a bad thing.

11. Dealing with the objections raised by Mrs Poole, the Applicant stated:

[a] The stupa is 4 feet high by 3 feet wide and was constructed from natural stone and in all respects complied with the Churchyard Regulations.

[b] Both the Burial Authority's Regulations and the Burials Act 1986 were silent as to whether a memorial may be erected before death although paragraph 2 of Schedule 3 of such Act provided that the sale of a burial space by an incumbent and churchwardens confers on the purchaser power to make a grave therein and erect a monument thereon. Moreover section 9(7) of the Act stated that the power to erect a monument shall be exercisable subject to the consent of the incumbent and

churchwardens and the Petitioner submitted that such consent has already been obtained.

[c] No plaque or headstone was required because the only inscriptions were on the plinths.

[d] The burial plot has been purchased to accommodate both the Petitioner and his wife who desired a coffin burial underneath an urn containing the Petitioner's cremated remains. If they are to be buried together in a family grave, such cannot be in the Garden of Remembrance. However, he agrees with Mrs Poole that it would be inappropriate for the proposed stupa to be in the Garden of Remembrance because it would be out of keeping with other memorials in such Garden of Remembrance.

Determination

Jurisdiction to grant the faculty sought

12. In determining this application I have considered and had regard to the Delegated Authority for Memorials in Parish Burial Grounds issued by my predecessor Faulds VG on 1 February 2012 [‘the Delegated Authority’] and the Maughold Burial Authority Churchyard and Graveyard Rules and Regulations [‘the Regulations’].

13. The Delegated Authority did not give the incumbent authority to permit the erection of the stupa on the burial plot purchased by the Petitioner and the stupa was not permitted by the Regulations. Accordingly it was necessary for the Petitioner to obtain faculty to erect the same because this court has the power to control the erection of monuments in churchyards.

14. I am satisfied that I have a discretion as to whether I grant the faculty sought but I must exercise such discretion judicially and for good reason.

15. Applications to erect memorials on burial plots are almost invariably made after the death of the deceased and not before.

16. I do not believe that, as a matter of law, my jurisdiction to authorise a memorial is limited to an application made *after* the death of a deceased. I reach such conclusion notwithstanding that:

[a] I do not construe either section 9(7) or paragraph 2 of Schedule 3 of the Burials Act 1986 as permitting the erection of a monument on an empty grave: and

[b] I am unconvinced by the Petitioner's submission that because I have a general jurisdiction to grant a faculty for a memorial I must have jurisdiction because there is no provision in the Faculty Jurisdiction Rules (Isle of Man) 2010 to the contrary.

Accordingly I am satisfied that I have jurisdiction to grant such a faculty for a memorial *before* the death of a deceased.

Should the faculty sought be granted

17. Although initially the Petitioner wished for the *immediate* erection of the stupa on the burial plot [with the inscriptions completely covered up] on the ground that this would allow 'familiarisation', he now concedes that the stupa should not be erected on the burial plot until the interment of his cremated remains.

18. Had this concession not been made I would have unreservedly agreed with Mrs Poole that to allow a monument to be erected on a burial plot which has been purchased from the incumbent and churchwardens but which has not yet been used to inter human remains would set an unwelcome and dangerous precedent.

19. The question thus arises as to whether, in the exercise of my discretion, on the particular facts of this case, I should *now* a faculty for the erection of a stupa on the burial plot purchased as a family grave for himself and his wife when he or his wife dies so that such can then be put into effect by his next of kin.

20. I have not found this decision easy, particularly as I am satisfied that the stupa complies with the dimensions set out in the Delegated Authority and in the Regulations and that it is constructed in appropriate materials.

21. I note that the Petitioner and his wife have different faiths. The Petitioner wishes that his mortal remains are cremated and interred in the burial plot. He states that by contrast his wife would wish to have a Christian burial in the same burial plot.

22. Given that in my view it would be inappropriate for *two* different memorials to be authorised on the same burial plot, the question arises what would happen if his wife were to predecease him and be interred in the burial plot. Although I accept that the Petitioner's wife may have fully supported his endeavours for a stupa to be erected on such burial plot, I do not know what her expressed wishes would be for her burial and indeed whether any current views she may have may change in the future. However, given her commitment to serving the Christian church in a variety of roles I very much doubt that she would wish the stupa to be erected on her grave instead of a traditional Christian memorial.

23. On death, whilst a deceased's personal representatives [whether an executor or administrator] are required to make arrangements for the disposal of the deceased's remains, the question arises to what extent they are required to take account of the wishes of the deceased.

24. In *Williams v Williams* (1882) 20 Ch D 659 Kay J held that although the personal representatives were entitled to take the deceased's wishes into account, they were not bound to give effect to them.

25. Cranston J took a different view in *Borrow v Preston Coroner* [2008] EWHC 1387 (QB) stating that:

'One thing is clear, that in as much as our domestic law says that the views of a deceased person can be ignored it is no longer good law. That rule of common law can be traced back to *Williams v Williams*, where it was said that directions given by a deceased as to the disposal of his body were not enforceable as a matter of law. It is quite clear from the jurisprudence of the European Courts of Human Rights that the views of a deceased person as to funeral arrangements and the disposal of his or her body must be taken into account.'

26. Such an approach was robustly criticised by Peter Smith J in *Ibuna v Arroyo* [2012] EWHC 428 (Ch) who stated:

'I confess that I have some difficulty in a post-mortem application of human rights in relation to a body as if it has some independent right to be heard which is in effect what Cranston J is saying. ... It seems to me that the established law is corrected summarised by Hale J as she then was in *Buchanan v Milton* [1999] 2 FLR 844 which gives the executor the primary duty to dispose of the body. In disposing of the body the executor is entitled to have regard to the expression made by the deceased but is not bound by them. Given that principle in my view there is no room further for any application of any human rights concepts to protect the right of the body to speak from death as it were.'

27. Of these contrasting views I prefer those expressed in *Williams* and *Ibuna* that a personal representative is entitled to have regard to the deceased's previous expressed views as to the disposal of his body but is not bound to give effect to them.

28. In any event none of these decisions suggest that personal representatives are bound to give effect to a deceased's wishes as to any memorial subsequently erected on a burial plot after burial.

29. I have concluded that I should refuse the faculty sought.

30. I do not know whether the Petitioner or his wife will die first and I do not know what views their personal representatives will have about the stupa and whether it should be placed on the burial plot purchased as a family grave.

31. In my judgment to grant a faculty will serve no useful purpose. Opinions as to the desirability of erecting a stupa on this burial plot may change over time. Much will depend on whether the Petitioner's wife predeceases him and whether the Petitioner's wife's personal representative(s), who may be the Petitioner, then consider that it is appropriate that a more traditional memorial, as opposed to the stupa, should be placed on her grave.

32. In this case I cannot ignore the position of the Petitioner's wife. Although I am sure that she has been supportive of her husband's faculty application, I cannot ignore the fact that she is, in the Petitioner's own words, a 'staunch Anglican' who has occupied many positions of responsibility in the church and who, notwithstanding her husband's different beliefs, chooses to be buried in the family grave.

33. Of course it may be that the Petitioner will die first but on his death, his personal representatives may take a different view as to where his cremated remains should be interred and/or whether the stupa should be erected above such cremated remains.

34. For these reasons I refuse the Petitioner's application on the basis that, in the exercise of my discretion I believe that it is premature and unnecessary to grant the faculty sought in advance of the Petitioner's death and that any application should be made after his death by his personal representatives.

35. I have considered the analogy of the discretion exercised by Chancellors to allow the reservation of grave spaces in a churchyard. When there is sufficient space for burials for very many years, faculties for such reservations are readily granted. However, when such space for burials are few, most Chancellors decline to grant a faculty on the ground that fairness is preserved by allowing individuals with a legal right of burial to be buried in the order in which they die until such time as the churchyard is full.

36. In reaching my decision I accept that the use of the churchyard is available to all local ratepayers, irrespective of their beliefs but it is a fact that the churchyard is consecrated ground.

Conclusions

37. I thus dismiss the Petitioner`s application for a faculty.

38. It is thus unnecessary for me to consider whether it is appropriate for a stupa to be erected in this churchyard or whether it is appropriate for such stupa to contain the inscription `He wanted green dandelions`. However, noting that the Delegated Authority stated:

`Inscriptions should be simple, reverent and theologically acceptable. Three principles are to be observed: epitaphs should honour the dead, comfort the living and inform posterity.`

I am bound to express the view, albeit obiter, that such an inscription would not readily be understood to be a koan in Zen Buddhism, does not conform with the three principles set out above and would be likely to mere cause amusement which is not the purpose of such an inscription.

39. However, given that I have refused the faculty on the ground that it is inappropriate to *now* grant the faculty sought in advance of the Petitioner`s death, the appropriate of the stupa in this churchyard and of such inscription will fall to be considered when and if an application for a like faculty is again made after the Petitioner`s death.

40. In accordance with the practice of the court the Petitioner must bear the costs of the determination of his Petition.

GEOFFREY TATTERSALL QC

Vicar General