

Neutral Citation No: [2023] ECC Oxf 10



Faculty – Churchyard Regulations – Grade II listed medieval village church (restored in 1865) – Proposal for memorial falling outside the Churchyard Regulations to commemorate the deceased’s late wife – Limestone ledger 24 inches (610mm) wide and 32 inches (810mm) long laid at the base of an existing headstone – Minister, churchwardens and PCC supporting the proposal – DAC recommending the proposal for approval – Objections received from a longstanding friend of the deceased and her husband who are neither resident in the parish nor on the church electoral roll – Objectors not electing to become parties opponent – Standing of objectors – Confirmatory faculty granted – Future lessons*

Petition No: 11005

IN THE CONSISTORY COURT
OF THE DIOCESE OF OXFORD

Date: Sunday, 31 December 2023

Before:

THE WORSHIPFUL DAVID HODGE KC, CHANCELLOR

In the matter of:

St Lawrence, Toot Baldon

THE PETITION OF:

KEITH ROGERS

This is an unopposed faculty petition determined on the papers and without a hearing.

There were objections to the petition from a longstanding friend of the deceased and her husband (who were neither resident in the parish, nor on the church electoral roll) who did not elect to become parties opponent.

The following cases are referred to in the judgment:

Re Christ Church, Harwood [2002] 1 WLR 2055

Re Christ Church, Spitalfields, Spitalfields Open Space Ltd v The Governing Body of Christ Church Primary School [2019] EACC 1, (2019) 21 Ecc LJ 261

Re St Denys, Stanford in the Vale [2019] ECC Oxf 1

Re St Giles, Exhall [2021] EACC 1, [2021] PTSR 1622

Re St James, Shaftesbury [2019] ECC Sal 1

Re St John the Baptist, Berkswell [2021] ECC Cov 6

Re St Mary, Great Chart [2022] ECC Can 2

Re St Nicholas, Leicester [2023] ECC Lei 1 & 2

Walton v The Scottish Ministers [2012] UKSC 44, [2013] PTSR 51

JUDGMENT

Introduction and background

1. The church of St Lawrence, Toot Baldon, in the Archdeaconry of Dorchester, is a Grade II* listed church in south-east Oxfordshire. Originally built in the late 12th and the 13th centuries, it was restored in 1865 by Henry Woodyer, when the chancel was almost entirely rebuilt. To the south of the church, the churchyard contains a listed memorial, a listed cross, and a group of three listed chest tombs (all listed as Grade II).

2. By a petition, dated 10 September 2023, Mr Keith Rogers, a resident of the parish, seeks a confirmatory faculty authorising the erection of a memorial to his late wife, Mrs Jacqueline Anne Rogers (1950-2019), whose cremated remains were buried in the new part of the churchyard on 23 April 2019, within the grave of Mrs Rogers's late mother, Mrs Evelyn Mary Watson (1921-1998). The memorial is of unpolished, grey Hornton limestone, 3 inches (75mm) x 24 inches (610mm) x 32 inches (810mm), with incised lettering bearing the inscription:

Cherished Memories of
Jacqueline Anne
Rogers
1950-2019
You gave us so much laughter
A life well lived and loved
Thank you for so many
Good memories
Beloved wife of
Keith

The memorial was installed with the prior authorisation of the Team Vicar (as the minister of the church) even though it is not permitted by the current (2016) Churchyard Regulations for the Diocese of Oxford. The effect of the grant of a confirmatory faculty would not be to

retrospectively legalise what was done, but to bring the installation within the four walls of the law for the future.

3. Mr Rogers originally completed an application form on 30 April 2022 seeking authorisation from the minister of the church of St Lawrence to introduce a monument ledger stone into the churchyard commemorating his late wife. In it, he acknowledged both that he had been given a copy of the current (2016) Churchyard Regulations for the Diocese of Oxford and that he understood them. He also confirmed that he understood that the only monument or ledger stone that might be introduced was one falling entirely within the Regulations, and also one that was as described in the attached schedule. This clearly stated that the proposed memorial would consist of a 3 inch (75mm) high tablet of Hornton limestone 24 inches (610mm) wide and 32 inches (810mm) long, which was to be laid at the base of the existing standing headstone, which had been installed in 1999, to commemorate Mrs Rogers's late mother, and which was also 24 inches in width. On the same day (30 April 2022), the Team Vicar (as the minister of the church) purported to authorise the installation of this memorial ledger stone. An email sent on 9 June 2022 by the minister to the stonemason (Mr Eric Marland) retained by Mr Rogers (which was copied to Mr Rogers) confirms that: *Keith [the petitioner] and I met towards the end of April and completed the application together (see attached) and Keith gave me a cheque for the fee. I am very happy with the design for the memorial tablet which you sent through mid-April. So please go ahead with the installation of the memorial tablet when you are ready.* Unfortunately, this memorial exceeds the dimensions permitted under the 2016 Regulations; but the minister had failed to appreciate that this was the case. Now that this error has come to light, as a result of a complaint raised by a couple visiting the churchyard (Mr and Mrs Derbyshire), Mr Rogers seeks to rectify the situation by bringing this application for a confirmatory faculty before the court.

4. The email from the visitors to the churchyard is dated 20 June 2023 and was sent to the Registry by Mrs Sally Derbyshire and her husband, Mr Roger Derbyshire. They live in the village of Berrick Salome, also in south-east Oxfordshire, which lies some seven miles to the south-east of Toot Baldon. The email reads:

We are contacting you in order to understand the rationale behind the approval process for a ledger stone recently installed in the churchyard at St Lawrence, Toot Baldon, Oxfordshire.

The stone we refer to is in memorial of Jacqueline Anne Rogers 1950 - 2019, who was interred with her mother Evelyn Mary Watson 1921 - 1998. It was put in place about 3 weeks ago.

Our query is that the size of this ledger stone is not compliant with the guidance given in the *Diocese of Oxford Churchyard Regulations 2016* (which we understand to be the current regulations applying to this churchyard). We would like to understand on what grounds this stone, which clearly contravenes the size limit of 18 x 18 inches, was given approval.

The stone measures approximately 32 x 24 inches and we attach a photo which we think will adequately illustrate the rationale behind our query.

This is the first of the photographic images which I reproduce at the end of this judgment. The email continues:

We strongly believe that the Churchyard Regulations serve an important role in maintaining the overall character of our churchyards. As regular visitors we attach an additional photo which sadly we believe shows that

this ledger stone is out of keeping with the overall character of the churchyard at St Lawrence, Toot Baldon, Oxfordshire.

A ledger stone which was compliant to the Regulations would be very much more in keeping with the lovely overall character. This is, we believe, why we have such Regulations.

This is the second of the photographic images which I reproduce at the end of this judgment.

5. The petition is accompanied by two letters, both addressed: *'To Whom It May Concern'*. The first, dated 25 August 2023, is signed by the petitioner and his two adult children. This letter mirrors the terms of a later statement dated 15 October 2023 (cited at paragraph 10 below). The second is dated 31 August 2023 and is signed by the deceased's sister and her brother-in-law. It reads:

We have been briefed about a complaint from a visitor regarding the size of the gravestone for [Mrs Rogers's] grave. All procedures were followed, the vicar approved the design, and therefore we cannot understand how anybody can justify challenging due process. We fully support what has been done and we would ask that the committee who are considering this dismiss it as a case without any foundation or merit.

6. The petition has the full support of the Parochial Church Council. The relevant extract from the minutes of their meeting, held on 4 September 2023, records (under item 7) as follows:

Memorial Stone [The minister] said that she had signed an approval form for a tablet to be placed in front of the memorial to Evelyn Watson in Toot graveyard. In doing so she had not noticed that the tablet was much larger than the diocese stipulates, being 81 x 41 cm not the approved 46 x 46cm. Following a complaint to the diocese, the family has now put in a retrospective application which needs PCC approval before being sent to the diocese. Having weighed the emotional and financial cost to the family, the PCC decided not to object but stressed that this was a one-off decision given the circumstances and would not set a precedent.

I note that the memorial is in fact 81 x 61 cm.

7. The proposal also has the full support of the minister. Her written consent, dated 10 September 2023, records that there is no other, similar memorial in the vicinity of the grave, which is about 50 yards away from the church; and that it will not hamper the *'cutting of grass or the maintenance of the churchyard'*. The minister comments that the petitioner has *'... spent a considerable amount of money and emotional energy on making a fitting memorial to Jacquie – I would not wish to see this overturned'*. In response to question 3: *Have you any comments to make about the proposed inscription?*, the minister writes:

Keith's wife Jacquie died unexpectedly after a short illness, in the year before Covid. Keith has naturally struggled with her death and found the journey through his grief exacerbated by the restrictions of lockdown. It was in this context that he tried to follow Jacqui's wishes regarding her resting place and to get a memorial stone erected in her memory. Jacqui wanted her ashes placed in her mother's grave at Toot, but as you can see from the attached photo, her mother's memorial stone had no room for an inscription for Jacqui or for Keith when his time comes. Keith initially asked a local stonemason to turn Evelyn's memorial stone around and

inscribe the wording you see on the current tablet on the other side of Evelyn's upright memorial stone. The wording is very important to Keith and his children as it captures all of their thankfulness and joy in Jaquie's life among them. However, a family friend was very upset that Evelyn's stone had been turned around and that the wording for Jacque's inscription was too small for the inscription to be read. So, Keith asked the local stonemason to slice off Jacque's inscription and restore Evelyn's memorial stone to its original position. Keith then contacted the stonemason who had made Evelyn's memorial stone (Eric Marland) and commissioned him to make a memorial tablet remembering Jacqui to lay on top of the grave; Keith asked for the same wording to be used for this tablet and for it to be legible.

In answer to question 4: *What is your view about its suitability in the churchyard in relation to the fabric of the church?*, the minister writes:

As you can see from the photographs, whilst the memorial tablet is large it is in keeping with the churchyard. It does not impede the mowing of the grass. The PCC, when discussing this application, were very happy with the 'look' of the memorial tablet, commenting positively on the craftsmanship of the memorial tablet. The PCC commented that they wished to accept this application because of the aesthetic of the memorial tablet and the pastoral situation around its installation. However, they would see this as a special case and would not accept large memorial tablets in the future.

8. The Diocesan Advisory Committee's Notification of Advice, dated 21 September 2023, recommends the installation of this memorial for approval by the court, without any conditions, notwithstanding that it falls outside the Churchyard Regulations. The DAC advise that the installation is not likely to affect either the character of the church as a building of special architectural or historic interest, or the archaeological importance of the church, or any archaeological remains existing within the church or its curtilage.

9. On 20 October 2023, there was an email exchange between Registry and the minister about the display dates for the public notice. The minister reported that the public notice *'first went up'* on 14 October, and that she would take it down on the 10 November. The Registry pointed out that the 28 days would end on 11 November, so the minister could take the notice down on 12 November. As the Registry were concerned that the incorrect expiry date had been inserted, they asked the minister if she could amend the public notice as soon as possible so as to make it clear to any potential objectors precisely when the notice would expire. The minister confirmed that she would do so. However, it appears that the expiry date for objections was changed to 14 November.

10. On 15 October 2023 the petitioner and his two adult children wrote to the Registry confirming their agreement to the proposal that the application should be determined on consideration of written representations, and attaching the statement they wished to submit in support of the application. This reads:

It is with great sadness that I am compelled to write in response to the complaint raised about the size of my late wife's headstone. It has taken 4 years and considerable expense to ensure a fitting and everlasting tribute was placed in her memory.

My late wife passed away on 6 April 2019. Since this time we have taken due care and consideration to design a headstone that met the requirements of all parties concerned. Great effort and time has gone into considering the wording, design and longevity of the headstone. We sought the appropriate approval of the Vicar in liaison with the stonemason (evidence of communication in this regard is attached). At no time were any objections raised. We were not notified at any stage of the new headstone size limitations introduced in 2016.

Eric Marland is a well-established and highly experienced stonemason. He carved the headstone for Evelyn Watson, my late mother-in-law. We specifically sought Eric's expert craftsmanship to ensure Jacqueline's headstone would be designed to his high standards.

We sourced the correct limestone: which is in keeping with the original Church masonry. Equally, we spent time considering the wording on the headstone and its overall appearance. We considered the wishes not only of myself, but of the wider family and friendship group.

My late wife is buried in a family burial plot, which was acquired prior to 2016. It seemed appropriate that the headstones of my late wife and mother-in-law should be matching. The headstones are in proportion to the size of the plot and do not exceed this.

We followed all processes to ensure the headstone was approved at every stage and would be in keeping with the requirements of the Church. At no stage had we wanted to impact on the surrounding grave plots or the aesthetics of the graveyard. It is unfortunate to hear that it may have caused concern to another visitor to the graveyard. If changes were to be made to the headstone this would be at significant cost. Equally the emotional impact of having to replace the headstone is considerable and should not be underestimated.

11. Mr and Mrs Derbyshire responded to the public notice by email to the Registry sent on Sunday 12 November. Their email included a photographic image of the public notice. This had originally invited any objections by 10 November, but the handwritten figure '10' has been overwritten with the figure '14' so as to read '14 November 2023'. Mr and Mrs Derbyshire's response sets out their understanding that this *'should be submitted by 14 (or 10?) November 2023, although since no date when the notice was first displayed is specified this is unclear from the notice'*. The response continues:

3. Reason for Interest

3.1. Neither Sally nor Roger Derbyshire is on the Electoral Roll of St Lawrence, Toot Baldon. We are both on the Electoral Roll of St Helen's Church, Berrick Salome.

3.2. Our reason for interest is that Sally Derbyshire was a great friend of the late Jacqueline Anne Rogers (Jackie). She has known Jackie since 1973 (when she was 14 years old – Jackie was 23) and shared many memories together. She remained a very dear friend up to Jackie's sad departure in 2019.

3.3. Sally played a key role in organising the Thanksgiving Service for *The Life of Jackie Rogers* (23 April 2019), which included eulogies from her goddaughter Harriet Hayward and Alice Derbyshire (both our daughters). Her husband Roger Derbyshire was the organist at the service.

3.4. During the period November 2020 to May 2021 Sally was asked by Keith Rogers to help him select a suitable memorial stone for Jackie. We provide a timeline in section 5 giving the details of our involvement, and which we hope gives a more complete picture in which to assess the current solution [*sic*]. Because of this previous involvement we have a natural interest in the final solution.

4. Our Position

4.1. We feel strongly that the proper process of completing the memorial stone for Jackie Rogers has not been followed. Sally is a regular visitor to Jackie's grave and has been able to observe at first hand each stage of this lengthy and convoluted process, which of course is still not concluded. This has led to additional grief to her over and above the loss of a dear friend.

In addition we were quite shocked by the initial reversal of Evelyn Watson's stone. Evelyn was also a close friend of ours. We are pleased that her beautiful memorial stone is now back in the original position, facing the grave, as Jackie, her daughter, and next-of-kin, would have wished.

4.2. We do feel that the current ledger stone is out-of-keeping with the surrounding memorial stones in the graveyard. In addition it detracts from Evelyn Watson's attractive memorial stone, in particular by being directly attached. A compliant ledger stone appropriately distanced from Evelyn's stone would avoid both of these issues.

4.3. We are not raising a formal objection to this non-compliant memorial stone. If this is truly what Keith Rogers, as next-of-kin, wishes to put in place to commemorate Jackie, we do not wish to create any more upset. We would, however, like to understand why the inscription to Jackie could not have been placed on a fully compliant ledger stone. We are surprised that Eric Marland, the stonemason, did this work without the sign off of a faculty, particularly since he himself had highlighted the need for such permission in his correspondence with us.

4.4. We believe strongly that Jackie would have been surprised by a memorial stone that was non-compliant to the regulations. We are of the opinion that that the regulations are in place to mitigate against an out-of-keeping memorial stone such as is now in place. Jackie, as an artist, and as someone who put a lot of thought into the design of the headstone for her mother, Evelyn Watson, would, we believe, be quite upset at the outcome that has now presented itself.

4.5. We are aware that this grave was specified for the eventual burial of three people – Evelyn Watson, Jackie Rogers, and in due course Keith Rogers. We are unclear whether this non-compliant ledger stone leaves sufficient space for the eventual addition of an inscription for Keith Rogers. If not, then will a second ledger stone be required? If, however, the current ledger stone for Jackie was indeed compliant with the Churchyard

Regulations, it would leave space for a second (compliant) ledger stone for Keith to simply be added to the memorial. It does appear to us that this is a problem that will arise in the future and is perhaps better addressed at this point in time.

4.6. We believe that the final decision should rest with the Church Authorities, taking into account all the relevant facts and background details, which we hope to have added to in this response.

The timeline begins with the late Mrs Rogers's memorial service on 23 April 2019, and continues up to the formal response submitted by Mr and Mrs Derbyshire on 12 November 2023. It covers the removal of the late Mrs Evelyn Watson's memorial stone, its reversal after a new inscription had been added to it, the removal of that additional inscription and the restoration of the headstone to its original position, and the installation of the non-compliant ledger stone.

12. No other objections have been received in response to the public notice of this petition.

13. Pursuant to my directions, on 21 November the Registry wrote to Mr and Mrs Derbyshire as follows:

Your response to the public notice has been referred to the Chancellor. He is prepared to treat this response as having been submitted within time as it was received before the date for objections (14 November) stated in the public notice. However, his provisional view is that you are not *'persons interested'* in this petition for the purposes of rule 10.1 of the Faculty Jurisdiction Rules 2015 (as amended). However, this may not matter because you state that you *'are not raising a formal objection to this non-compliant memorial stone'* and that you *'believe that the final decision should rest with the Church Authorities, taking into account all the relevant facts and background details'*.

Please confirm by return email that you would not wish to be considered as a formal party opponent to these proceedings. Subject to that, the Chancellor would propose that I should send your response to the petitioner for his comments before he determines this petition. We will keep you informed of the eventual outcome.

14. Mr and Mrs Derbyshire responded by email on 23 November as follows:

Our reason for responding to the faculty petition was so that there was openness and transparency about the background leading up to this petition. In essence to facilitate *'Procedure 10.3. - (1) (b) 'leave the chancellor to take the letter of objection into account in reaching a decision without becoming a party to the proceedings'*.

Although naturally we do feel we are *'persons interested'* (as suggested by 10.1. - (1) (h)) we do understand the position of the Chancellor and respect his judgement.

We do, however, trust that this position does not prevent the Chancellor from taking into account the relevant facts and background details that we attempted to outline in our initial response.

We realise that our position is perhaps a little unusual - we are not formally objecting to the faculty petition but we do in particular want the Chancellor to make a final decision that takes into account the future addition of a

memorial inscription for Keith Rogers. What we wish to avoid in the future is any further upset that could be caused by yet another major change to Jackie Roger's memorial stone when an inscription to Keith Rogers is eventually required.

15. As foreshadowed by the Registry's letter to Mr and Mrs Derbyshire, their response of 12 November was forwarded to the petitioner. The response from him, and his two adult children, on 1 December is that: *'We feel we have already put forward our views regarding the memorial for Jackie. We understand the ultimate decision is with the Chancellor and the Diocese and as such we put our trust in this process.'*

16. The minister has also submitted an email which she has asked the Registry to pass on to me. This follows on from a recent pastoral visit she made to the petitioner to catch up with him regarding his faculty application. Because of the personal nature of some of the minister's comments, and out of respect for the petitioner's privacy, I do not reproduce the contents in full. It is sufficient to record that the minister found the petitioner to be *'very distressed and worried by the whole process'*, and to be finding this public debate about the arrangements for his late wife's memorial stone very difficult. As Keith's vicar and pastor, she wants me to be aware of the effect that this whole process is having upon the petitioner. The minister has consulted with the churchwardens (who have seen and approved her email) and they, and the minister, would like *'to add our support to Keith's application and share our thoughts on the matter with the Chancellor which might mitigate some of Sally and Roger's concerns'*; and help to provide *'a broad understanding of Keith's application and the issues surrounding it'*, as follows:

Firstly, the Church Wardens and I are aware that Keith has already gone to some trouble to accord with Sally's wishes and removed the inscription from the back of Evelyn's stone; and that Keith has gone to some expense to find the stone mason that created Evelyn's stone so that Jacqui's memorial stone would match Evelyn's in style and effect. It was not the fault of either Keith or Eric (the stonemason) that the stone used for Evelyn's memorial was not available during lockdown, hence the slight difference in colour between the two stones. Sally and Roger are mistaken in saying that the two stones are attached, the ledger stone has merely been placed flush against the upright stone. Moreover, the PCC have discussed the *'look'* of the ledger stone and have voted that it is in keeping with the churchyard at Toot and it does not impede the maintenance of the churchyard in any way.

Secondly, I take full responsibility for the non-compliance of Jacqui's memorial stone to the churchyard regulations. Neither Keith nor Eric were at fault in this, it was simply my mistake for not paying attention to the dimensions of the ledger stone as described in Keith's original application. In retrospect I should have asked questions of Eric and Keith before I signed it off.

Finally, Sally and Roger are correct in thinking that Keith would like his name to be added to Jacqui's memorial stone when the time comes. His intention is that the inscription will simply be his name and his dates. There is plenty of room on the current ledger stone for this.

17. Against that unhappy background, I turn to the applicable law.

The applicable law

18. There is no right to erect a memorial over any grave without either the permission of the diocesan chancellor, pursuant to a faculty, or the permission of the incumbent minister where the chancellor has delegated authority to that incumbent to grant permission for memorials under churchyard regulations. In principle, the introduction of any item into a consecrated Church of England churchyard requires a faculty; but it is conventional for chancellors to make schemes of delegation, usually by means of what are termed '*Churchyard Regulations*', although these have no formal basis in statute. If a memorial does not wholly conform to the specifications set out in the applicable churchyard regulations, the incumbent will lack any delegated authority to permit that memorial, and it will be necessary to apply to the chancellor for a faculty. A Working Party set up by the Standing Committee of the Ecclesiastical Judges' Association has recently been looking at the many variations in the churchyard memorial regulations across the different dioceses of England with a view to bringing them more up to date, and also eliminating unnecessary differences of detail; and their report is the subject of ongoing discussions within various interested bodies.

19. The Churchyard Regulations made by my immediate predecessor, as Chancellor of the Diocese of Oxford, on 8 November 2016, apply to this churchyard. By regulations 26 and 27, the maximum permitted dimensions for a ledger stone are 460mm (18") in length and 460mm (18") in width; and a ledger stone must be laid so that its upper surface is flush with the ground. The memorial installed by the petitioner to commemorate his late wife clearly exceeds these dimensions by a substantial margin: it is not a '*near miss*'. However, regulation 4 g of the Oxford Churchyard Regulations expressly recognises that any '*reference to a matter being permitted or not permitted applies only for the purposes of these Regulations; and it does not prevent any monument or ledger being introduced or removed under the authority of a faculty or other order issued by the Consistory Court*'. In passing, I should observe that this memorial would also exceed the longest permitted dimension of 450mm for a cremated remains tablet proposed in the Report of the Working Party into Churchyard Memorial Regulations set up by the Standing Committee of the Ecclesiastical Judges' Association. That report notes that ledger stones are provided for in many dioceses, although they not allowed under delegated authority in the Diocese of York; but that there are quite wide variations in size.

20. Until June 2021, case law disclosed two competing approaches to applications for a faculty where there had been non-compliance with the relevant Churchyard Regulations: one required '*exceptional*', '*powerful*' or '*substantial*' reasons for departing from the Regulations; the other simply asked whether the proposed memorial was '*suitable*'. In *Re St Giles, Exhall* [2021] EACC 1, [2021] PTSR 1622 the Arches Court of Canterbury (Morag Ellis QC, Dean, Chancellor Turner QC and Chancellor Arlow) considered these different approaches and how churchyard regulations should be used in decision-making. At paragraph 11.8, the Arches Court considered the right approach to be a '*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 ...

21. The Arches Court cited with approval the approach articulated in a number of first-instance judgments. I would summarise this approach as follows:

(1) As is the case with any faculty petition, the burden of proof lies on the petitioner to show why a faculty should be granted to authorise the particular proposed memorial.

(2) The terms and content of the applicable churchyard regulations will, of course, be a relevant factor – often highly relevant, and doubtless, on occasion, determinative. But they will only be one of the constellation of infinitely variable factors which the court must consider on a case-by-case basis.

(3) The court should approach the suitability of the proposed memorial 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 doctrines of the Church of England in any essential matter.

(4) Mere non-compliance with the regulations, of itself, can never be the only basis on which to refuse a faculty petition. It is necessary to consider whether the particular memorial in question is inherently desirable, or at any rate not undesirable, whether or not it complies with the standards of the regulations.

The Arches Court noted that this section of their judgment was not essential to the determination of the appeal in the case that was before them; but they expressly stated that they intended it *‘to be of assistance to chancellors, clergy and all others involved in administering the faculty jurisdiction in relation to memorials in consecrated churchyards’*.

22. In *Re St Mary, Great Chart* [2022] ECC Can 2 (in the Diocese of Canterbury) the petitioner wished to install a replacement memorial on his parents' grave. The design included images of a dove, a stairway to heaven, and two swans. The inscription included a verse of poetry written by the petitioner's daughter; and it ended with an x (the symbol of a kiss). There was an objection that the proposed design would not be in keeping with that part of the churchyard where the memorial would be located; and that this might set a precedent for future headstones with designs that were out of kilter with that section of the churchyard. The PCC were supportive of the petition, as was the incumbent; and the DAC had also recommended the design for approval by the court. The Commissary General (Robin Hopkins) granted a faculty for the proposed design of the memorial, subject to a condition relating to the inscription. In the course of his judgment (at paragraph 11), the Commissary General recorded that in assessing the appropriateness of the proposed design, in particular in light of the points of objection, he had derived assistance from the principles discussed in a number of other decisions of the consistory courts of other dioceses. So far as relevant to the instant petition (where there was no issue as to the proposed inscription), the Commissary General highlighted (on a non-exhaustive basis) the following examples of such principles and decisions:

(1) There is no right to erect a monument in a churchyard except by permission granted by a faculty (though this is often delegated to the incumbent minister). Headstone wording and imagery must be consistent with the consecrated status of churchyards; and they must be appropriate, not only from the perspective of petitioners, but also (as far as can reasonably be assessed) for future generations. In *Re Christ Church, Harwood* [2002] 1 WLR 2055 at page 2056, Chancellor Holden put it this way:

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

(2) Where a proposed design is contrary to the applicable churchyard regulations, the fact that there are other memorial headstones in the same churchyard that are also contrary to those regulations will not be a sufficient justification without more. On the other hand, the presence of other headstones that similarly fall outside the relevant regulations is a relevant consideration.

(3) It is appropriate to give weight not only to the views of the PCC and the incumbent, but also to pastoral considerations.

In giving reasons for his decision, the Commissary General noted (at paragraph 13 (vi)) that whilst he had given weight to the objectors' concern about the risk of the instant faculty setting a precedent for others in this churchyard, each petition for the introduction of a new or replacement headstone would be assessed on its own merits, including by reference to the proposed design, and its positioning in relation to the church and to other headstones. The grant of the faculty in that case did not mean that a faculty would necessarily be granted for other comparable proposals in future.

23. There is one final authority to which I should refer. That is the decision of my predecessor, Chancellor McGregor, in *Re St Denys, Stanford in the Vale* [2019] ECC Oxf 1. The petitioner wished to re-locate the headstone at the grave of her son by a small distance sideways, so that it would be aligned with what she believed to be the centre of the head of her son's grave. The vicar and the churchwardens objected on the grounds that: (1) realigning the stone would make it stand out amongst other stones in the churchyard with which it would not be in line; (2) headstones were aligned with those in rows behind them *'for dignity, and creating an orderly environment'*; (3) the petitioner had agreed in writing to the headstone being aligned with the stones behind; and (4) allowing the petition would be seen as creating a precedent. The Chancellor did not consider that the first and fourth objections carried much weight; but the second and third objections did; and so he refused to grant a faculty. The vicar was entitled to require such uniformity of alignment of monuments as he thought fit, within the parameters of the churchyard regulations; and the petitioner had agreed in writing to the monument being placed where it was, even if there had been a mistaken understanding on her part. The court had a discretion whether to grant the faculty sought by the petitioner to re-align her son's headstone. The onus was on the petitioner to persuade the court that it should do so; and she had not discharged that burden.

24. At paragraph 15 Chancellor McGregor said this:

I consider that the second objection – headstones are aligned with those in rows beyond them *'for dignity, and creating an orderly environment'* – is a significant matter. A parish is entitled to maintain a certain standard of uniformity and order in a churchyard; and an incumbent is entitled to determine how that should be achieved in terms of the alignment of monuments. Tom's headstone is aligned with the headstones in the rows behind it. I consider that it is legitimate for the incumbent to require monuments to be aligned in that way as he says, *'for dignity, and creating an orderly environment'*.

At paragraph 17 the Chancellor did not consider that the fourth ground of objection – that allowing the petition would create a precedent – carried a great deal of weight:

I can see that allowing Tom's headstone to be re-aligned in the way proposed could result in other parishioners seeking to align monuments in a different way from that which the vicar is willing to approve. But, as the vicar recognises, each case falls to be considered on its merits and at least

so far as the law is concerned, a decision on the facts of one case is not determinative of other cases with different facts.

Analysis and conclusions

25. I am satisfied that it is just and expedient, in furtherance of the overriding objective of the Faculty Jurisdiction Rules 2015 (as amended), to determine this faculty petition on consideration of written representations. This will save expense, and enable it to be dealt with proportionately, expeditiously and fairly. The issue in this case is whether the petitioner has demonstrated that it is desirable – or, at any rate, not undesirable - to permit this particular memorial to remain in this churchyard even though it greatly exceeds the dimensions permitted for a ledger stone prescribed by this diocese’s churchyard regulations (which, in this respect, do not differ materially from those of other dioceses). Not without some hesitation, and after anxious, and prayerful, consideration, I have concluded that it is; and that I should grant the petitioner’s application for a confirmatory faculty authorising the installation of this particular memorial to mark his late wife’s grave. Essentially, I do so because this petition has the full support of the minister, the churchwardens, the PCC, the DAC, and the petitioner’s family, and for powerful pastoral considerations; and despite what I assess to be the moderate degree of resulting harm to the dignity and orderly environment of this churchyard.

26. I must first consider the standing of the objectors, Mr and Mrs Derbyshire. Strictly, the sufficiency of their interest to object to this petition does not fall for decision because, in their initial letter of objection, they state that they are *‘not raising a formal objection to this non-compliant memorial stone’* and that they *‘believe that the final decision should rest with the Church Authorities, taking into account all the relevant facts and background details’*. They have since made it clear that *‘we are not formally objecting to the faculty petition but we do in particular want the Chancellor to make a final decision that takes into account the future addition of a memorial inscription for Keith Rogers’*. They also trust that their lack of standing does *‘not prevent the Chancellor from taking into account the relevant facts and background details that we attempted to outline in our initial response’*. Mr and Mrs Derbyshire have not elected to become parties opponent; and I propose to take their observations, and representations, into account when reaching my decision irrespective of their formal standing to object to this faculty petition. Nevertheless, since I have identified the sufficiency of their interest as a potential issue, I consider that I should address it.

27. Mr and Mrs Derbyshire are neither resident in the parish, nor do their names appear on the church electoral roll. They are not regular attenders at church services at St Lawrence, but worship in their own parish (where their names do appear on the church electoral roll), some seven miles away. They are not relations of the deceased; and there is no evidence that they ever paid for, or contributed to the cost of, her memorial. Their interest in this faculty petition is that they are visitors to this churchyard, and Mrs Derbyshire was a great friend of the deceased, having known her since 1973, and remaining very dear friends up to Mrs Rogers’s sad passing in 2019, sharing many memories together, and playing what Mrs Derbyshire describes as *‘a key role’* in organising the thanksgiving service for her life on 23 April 2019. The objectors are clearly not *‘interested persons’* within the meaning of any of paragraphs (a) to (g) of rule 10.1 (1) of the Faculty Jurisdiction Rules 2015 (as amended); but they feel that they are *‘interested persons’* within paragraph (h), which comprises *‘any other person or body appearing to the chancellor to have a sufficient interest in the subject matter of the petition’*.

28. My researches have disclosed surprisingly little authority on the scope of the persons having *‘a sufficient interest in the subject matter of the petition’* for the purposes of FJR 10.1 (1) (h). The most recent authoritative decision would appear to be that of the Court of Arches (Charles Geoge QC, Dean, and Chancellors Tattersall QC and Pittaway QC) in *Re Christ Church*,

Spitalfields, Spitalfields Open Space Ltd v The Governing Body of Christ Church Primary School [2019] EACC 1, (2019) 21 Ecc LJ 261. There the Court unhesitatingly allowed an appeal by Spitalfields Open Space Ltd, holding that it did have a sufficient interest to take part in the proceedings. At paragraph 48, the Court of Arches said this:

In our view it is right in the faculty jurisdiction to treat each case where sufficiency of interest arises on its own merits, and as a question primarily of fact and degree. In that way vexatious busy-bodies with insubstantial interests can be guarded against (as did Chancellor Tattersall in *Re St Michael and All Angels, Isel*, noted at (2011) 13 Ecc LJ 248 ...). On the other hand, given that the secular courts have adopted an increasingly liberal approach to standing in recent years, we see no reason to insist on some form of proprietary interest, nor need consistory courts be instinctively hostile to public interest groups, including those recently incorporated. On further reflection we consider that this court's *obiter* remarks concerning use of shell-companies at para 44 of the abuse appeal judgment ... may have been too widely expressed.

29. Further recent guidance is to be found in the decision of Deputy Chancellor Rees KC in *Re St Nicholas, Leicester* [2023] ECC Lei 1. The church in that case had a growing reputation as a safe place for LGBTQIA+ people of faith. The parish priest and an assistant churchwarden petitioned for the introduction of a new altar frontal, the design of which took the form of a Progress Pride image with a white cross upon it. There were nine objections to the petition, and sixteen letters and emails in support of it. None of the objectors were '*interested persons*' within the meaning of FJR 10.1 (1) (a) to (g). The Deputy Chancellor therefore had to decide, as a preliminary matter, whether any of the objectors had a sufficient interest in the subject matter of the petition under rule 10.1 (1) (h). He determined that three of the objectors had a sufficient interest, namely, a regular attender at the church (who was not on the church electoral roll) and two priests, who had raised liturgical and doctrinal issues in their objections. One of the two priests was a priest in the Diocese of Leicester, and the other was a member of the General Synod and of the Archbishops' Council of the Church of England. In a later, supplementary judgment ([2023] ECC Lei 2), the Deputy Chancellor indicated that he would reconsider whether the first of the three objectors had a sufficient interest in the light of further evidence that had been made, and should become, available.

30. The actual facts of that case are miles away from those of the present. But what is of relevance is the reliance that the Deputy Chancellor placed (at paragraph 9) upon observations from the judgment of Lord Reed, in the Supreme Court, in *Walton v The Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51 (at paragraph 92) drawing a distinction between '*the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates*'. At paragraph 94, Lord Reed also explained that:

In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.

31. I bear this guidance in mind. I approach the issue of Mr and Mrs Derbyshire's standing to object to this faculty petition on its own merits, and as a question primarily of fact and degree. I consider that the nature of the relief sought on this petition – a confirmatory faculty authorising the retention of a non-complaint churchyard memorial – is of critical importance to the issue of sufficiency of interest since FJR 10.1 (1) (h) is expressly directed to '*a sufficient interest in the subject matter of the petition*'. Because of Mrs Derbyshire's longstanding friendship with the person commemorated by the memorial I cannot regard her as a '*mere*' – still less as a '*vexatious*' – '*busybody*'. Nevertheless, I cannot regard the status of a longstanding, and dear, friend, or the making of regular visits to the churchyard, as conferring sufficient interest to entitle that person formally to object to a non-compliant churchyard memorial, however grateful the relevant authorities may be to such a person for having brought that non-compliance to their attention. Without formally deciding the point, I recognise that the following classes of person, in addition to those resident in the parish, and those whose names appear on the church electoral roll, *may* all have a sufficient interest to object to a petition of the present kind, namely: (1) a close relative of the person commemorated by the memorial, (2) the owner of another memorial in sufficient proximity to the memorial in question, and (3) a person who has been refused permission for a similar, non-compliant memorial. But I cannot regard a regular visitor to the churchyard, or a longstanding friend of the person commemorated by the memorial, or a combination of these two, as having a '*sufficient interest*' in a petition for a confirmatory faculty authorising the retention of a non-complaint memorial. As I have said, the issue does not strictly arise for my decision; and, in any event, I will take the observations, and representations, of Mr and Mrs Derbyshire into account when reaching my decision on this petition, irrespective of their formal standing to object to it.

32. I agree with Mr and Mrs Derbyshire that:

(1) The Churchyard Regulations serve an important role in maintaining the overall character of churchyards in the Diocese of Oxford.

(2) This memorial is out of keeping with the overall character of this churchyard.

(3) A memorial that complies with the Regulations would be very much more in keeping with the neighbouring memorial stones, and with the lovely overall character of this churchyard. I consider that this memorial stone looks out of place in the churchyard, as the attached photographic images show.

(4) Any final decision on this faculty petition should take into account the future addition of a memorial inscription commemorating the petitioner. It is important to avoid any further upset that may be caused by any future material changes to this memorial stone when an inscription to Mr Rogers comes to be required, following the interment of his remains in this grave plot.

33. However, I do **not** agree with Mr and Mrs Derbyshire that:

(1) Mere non-compliance with the Churchyard Regulations should be a determining factor (if that is what they are suggesting). Such non-compliance is certainly a part of the matrix of relevant considerations; but it is clear from the authorities that consideration of a faculty petition seeking authorisation of a non-compliant memorial should not start with any presumption against allowing a memorial outside the parameters of the Regulations.

(2) This memorial detracts from Mrs Watson's '*attractive*' memorial stone, in particular by being directly attached. Apart from the sole issue of its size, I consider that this memorial stone is attractive, and is in keeping with memorials elsewhere in this churchyard. Certainly, I consider it to be more attractive, and more in keeping, than the existing standing memorial to Mrs Watson, as the second of the photographic images at the end of this judgment shows. According to the

minister: (a) the two stones are not attached, the ledger stone having merely been placed flush against the upright stone; and (b) the PCC have discussed the 'look' of the ledger stone, and they have determined that it is in keeping with the churchyard, and does not impede the maintenance of the churchyard in any way.

(3) Due process was not observed in seeking approval for this memorial, at least so far as the petitioner and his stonemason are concerned. They had duly sought, and received, written authorisation for this memorial from the minister. The error in approving the memorial was her fault (as she openly and readily admits), taking full responsibility for the non-compliance with the Churchyard Regulations. The Team Vicar has expressly confirmed to the court that neither the petitioner nor his stonemason were at fault in this; it was simply her mistake for not paying due attention to the dimensions of the ledger stone, as described in the original application. In retrospect, the minister accepts that she should have asked questions of the petitioner and his stonemason before she signed the application off.

(4) This memorial may cause any further upset when an inscription to the petitioner is required following the interment of his remains in this grave plot. The minister has explained that although he would like his name added to his late wife's memorial stone when his time comes, Mr Roger's intention is that the inscription will simply consist of his name and dates; and there is plenty of room on the current ledger stone for this.

(5) The inscription to Mrs Rogers could have been placed on a fully compliant ledger stone (if that is what Mr and Mrs Derbyshire are implying when they question why this could not have been done). When commenting about the proposed inscription (in the attachment accompanying the petition dated 10 September 2023) the minister explains that: *'The wording is very important to Keith and his children as it captures all of their thankfulness and joy in Jaquie's life among them.'* A compliant ledger stone would have been too small for such an inscription.

34. I have already made it clear that I consider that the continued presence of this memorial causes a moderate degree of harm to the dignity and orderly environment of this churchyard. That is clear from the second of the photographic images at the end of this judgment. Had I been invited to approve this memorial before it was created and installed, I would have declined to do so. Normally, that would be fatal to any application for a confirmatory faculty made after the event because of the court's rightful reluctance to sanction conduct contrary to due process in order to avoid rewarding those who take matters into their own hands or try to steal a march on the court's administration of the faculty system. However, in the exceptional circumstances of the present case, I am satisfied that the petitioner has demonstrated that it is desirable – or, at any rate, not undesirable - to permit this particular memorial to remain in this churchyard even though it greatly exceeds the dimensions permitted for a ledger stone prescribed by the Churchyard Regulations. This is for the following reasons:

(1) This is not a case where the petitioner has sought deliberately to subvert the faculty process by taking matters into his own hands, or tried to steal a march on the court's administration of the faculty system. He and his stonemason had done all they could to comply with due process. The mistake was entirely that of the minister concerned.

(2) This petition has the full support of the minister, the churchwardens, the PCC, the DAC, and the petitioner's family. Crucially, I am entitled to infer, from their Notification of Advice, that the DAC entertain no concerns (as they have expressed on previous occasions) that permitting this single, non-compliant memorial may have any adverse consequences for the maintenance of good order in this churchyard in line with the Churchyard Regulations. The DAC have also advised me that this proposal is not likely to affect the character of the church as a building of special architectural or historic interest.

(3) I am satisfied that this is an entirely one-off decision, which will have no adverse precedential implications. Any future petition for the introduction of any further non-compliant memorial will fall to be assessed on its own merits; and the grant of a faculty in this particular case does not mean that a faculty will necessarily be granted for any similar memorial in the future. Indeed, that is most unlikely.

(4) This is a case where there are powerful, and compelling, pastoral considerations, identified by the minister (with the approval of the churchwardens, and endorsed by the PCC), for granting this confirmatory faculty. The petitioner has been through a lot, and has suffered much distress and worry, since his late wife sadly passed away on 6 April 2019; and a caring and compassionate, Christ-like church should not seek to re-set the clock and require him to return to the drawing-board in terms of commemorating his late wife.

35. In my judgement, therefore, the petitioner has discharged the burden (which lies upon him) of demonstrating why a faculty should be granted authorising the retention of this memorial stone commemorating his late, and much-loved, wife. Although the general prohibition against such a memorial, contained within the applicable churchyard regulations, is a highly relevant factor, it is not determinative, but is only one of the constellation of infinitely variable factors which the court must consider on the exceptional, and unhappy, facts of this particular case. Mere non-compliance with the applicable churchyard regulations, of itself, can never be the only basis on which to refuse such a faculty petition. It is necessary to consider whether the particular memorial is inherently desirable – or, at any rate, not undesirable – where it lies within this churchyard, even though it fails to comply with the requirement of the applicable churchyard regulations. Having regard, in particular, to pastoral considerations, I have concluded that it is at least not undesirable, for the reasons I have given.

Disposal and lessons for the future

36. For these reasons, the court will grant the petitioner's application for a confirmatory faculty authorising the installation of this memorial commemorating his late wife's grave. In the usual way, I charge no fee for this written judgment; but the petitioner must pay the costs of this petition.

37. I emphasise that this decision should not be taken as setting any precedent for any future application for a faculty for the installation, or retention, of any other memorial in this churchyard which falls outside the scope of this diocese's churchyard regulations, or for any memorial of a similar size in any other churchyard within this diocese.

38. In conclusion, I would invite the ministers of churches within the Diocese of Oxford, and others charged with authorising churchyard memorials under the delegated powers conferred by the Churchyard Regulations, to read this judgment, and to bear in mind the following lessons for the future:

(1) Before authorising any churchyard memorial, the minister should ensure that it complies fully with all the requirements of the Churchyard Regulations currently in force. By regulation 9, *'The minister must decline to authorise the introduction of a monument or ledger stone or any other matter which does not comply with the provisions of these Regulations.'*

(2) If in any doubt, the minister should either decline the application or refer it either to the Archdeacon or to the Registry (for referral to the Chancellor). See regulations 8, 10 and 11, as follows:

8. The minister may, in his or her discretion, decline to authorise the introduction of a monument or ledger stone or other matter provided for

in these Regulations despite the fact that what is proposed complies with the provisions of these Regulations.

...

10. The minister may, if he or she considers it expedient, refer an application for authorising a monument or ledger stone or other matter provided for in these Regulations to the archdeacon; and where the minister does so, the archdeacon may exercise the functions of the minister under these Regulations.

11. Any question as to the interpretation or application of these Regulations is to be determined by the Chancellor of the Diocese.

The Chancellor appreciates the pressure under which ministers are working; and he is always ready to assist them in their work.

(3) An understandable wish to be helpful to those suffering from a recent bereavement may sometimes backfire, with unhappy consequences for the bereaved, as exemplified by the unfortunate circumstances of the present case.

(4) When interring human or cremated remains into an existing grave, it is always sensible to give consideration to the question of how the deceased is to be commemorated: whether any existing memorial has sufficient space to accommodate the desired inscription, and, if not, how such commemoration may take place, and how the desired inscription is to be recorded. The difficulties that arose in the present case, where there was insufficient space on the existing headstone to accommodate the desired inscription, are not unique. Similar difficulties arose in *Re St John the Baptist, Berkswell* [2021] ECC Cov 6, where insufficient room on the existing headstone for a further inscription led to a faculty application for permission to replace that headstone with a new one, which did not conform to the churchyard regulations.

(5) When interring human or cremated remains into an existing grave, it is also sensible to consider whether there is sufficient room to accommodate their spouse or partner, and how they too might be commemorated. In *Re St James, Shaftesbury* [2019] ECC Sal 1, the petitioners wished to have the cremated remains of their mother exhumed from the grave of her parents in one part of the churchyard and reinterred with the remains of the petitioners' father in another part of the same churchyard. He had expressed a wish to be buried with his wife, but the petitioners felt there would be difficulties in interring their father's ashes into the grave containing the remains of their mother and her parents. Chancellor Arlow could find no special reasons for allowing exhumation, and she dismissed the petition. It would be possible to inter the ashes of the petitioners' father in the existing grave where his wife's remains were interred, thereby fulfilling his wishes. Although there was insufficient space on the existing memorial to add the petitioners' father's name and dates of birth and death, the petitioners could lay a plaque in memory of their father on the grave, or else replace the existing memorial with a new one containing inscriptions in respect of the four people whose remains were interred in the grave.

David R. Hodge

The Worshipful Chancellor Hodge KC

The Sunday After Christmas Day

31 December 2023

I: The grave



II: The grave in context

