

**IN THE CONSISTORY COURT OF THE  
DIOCESE OF ELY**

**IN THE MATTER OF ST ANDREW'S CHURCH WITCHFORD AND IN THE  
MATTER OF A PROPOSED HEADSTONE FOR THE LATE TOM SCOTT**

**BACKGROUND**

1. Clara Scott has petitioned for a faculty to erect a headstone which in its design and material falls outside the Churchyard Regulations 2004 ("the Regulations"). This is the first time that I have had the opportunity to consider a petition for the erection of a headstone which falls substantially outside the guidance given in the Regulations. That is because Clara Scott, no doubt guided by Canon Brampton, has followed the appropriate procedure.
2. I received the Petition on 2<sup>nd</sup> June 2016 and responded on 6<sup>th</sup> June as follows  

“This application is clearly in contravention of the Churchyard Regulations and is bound to require me to think carefully about it. Before I give any judgment upon the Petition, the Petitioner should be asked whether she consents to me deciding this matter on the papers and whether there is any other evidence she wishes me to consider. The Petitioner should be told that she has the right to a hearing if she so wants but should be advised of the cost implications.”
3. Mrs Scott does not require a hearing but has provided me with further information which I have taken into account in this judgment.
4. I have become aware that in the Diocese generally there are a number of headstones that have been erected and which do not conform to the Regulations. In each case there should have been a petition for a faculty. I make comment about that later in this judgment.

## THE PETITION

5. Mrs Scott petitions to erect a headstone in the churchyard at St Andrew's Church Witchford, a Grade II\* Listed building, to her husband, Tom Scott, who died at the tragically young age of 44, leaving his wife and two children. Because he was a large man, the grave covers two plots.
6. She would like the headstone to be:
  - (a) In blue pearl polished granite, in accordance with the deceased's wishes.
  - (b) The base width is to be 60 inches, the plinth to be 14 inches high and the headstone a further 48 inches high taking it to 62 inches in total.
  - (c) The proposed inscription reads:

Treasured memories of a loving husband and father  
Tom Scott  
Passed away 9<sup>th</sup> March 2015  
Aged 44 years.

The days go by without you  
And each one is the same  
My mind is filled with thoughts of you  
In tears I call your name  
They say that time's a healer  
And that life has to go on  
But my life will never be the same  
Now the one I loved has gone  
Clara, Tom and Sharna  
Love you forever  
XXX

7. The DAC did not recommend the proposal and identified that the memorial fell outside the Churchyard Regulations as to both the colour of the granite and the desire to have it polished. They expressed concern about the number of memorials within the churchyard which fell outside the Regulations.
8. At a meeting of St Andrew's Church PCC on 1<sup>st</sup> February 2016 they recognised that the type of stone fell outside that which could be authorised by an incumbent. In

discussion some expressed the view that it was a shame that all graveyard memorials had to be uniform as it made the churchyard “less interesting”. The PCC voted unanimously to support the application for a faculty.

9. The PCC were not aware of the proposed wording on the stone. Canon Brampton decided that it was beyond her remit to allow it because it is neither simple nor of Christian significance. She would prefer something simpler.
10. JG Cross, Monumental Masons, have written in support of the application. They compare the blue granite with other black granite stones which they describe as a very stark colour. They suggest that the reflective qualities of the blue pearl polished granite is less invasive than black polished granite. They suggest that honed blue granite would make imperfections in the granite extremely noticeable and, over time, would show stains and finger marks.
11. In a letter dated 22<sup>nd</sup> February 2016 Mrs Scott wrote that there are a number of headstones in the churchyard, including those of members of her extended family, which are finished in polished stone. It was her husband’s desire, as it is hers, to have the same stone as other members of the family. She has supplied photographs which show a number of stones in various shades of blue and black marble. I note that some of the stones have carved upon them, dice, a horse, a sports car, a tractor, a photograph of the deceased in a glass frame, a motorcycle and the emblem used by the drink manufacturer Guinness which name is inscribed on the stone under a representation of a toucan with a beer mug balanced on its nose, an emblem used by Guinness in some of its advertising material.

### **THE CHURCHYARD REGULATIONS**

12. The Churchyard Regulations were last amended in 2004 by my predecessor. They are in line with the Regulations in force in the other dioceses and are based on guidance provided by the Council for the Care of Churches. That guidance has not changed in any significant respect and I have seen no need to amend the Regulations.

13. The preamble to the Regulations reads:

This document aims to clarify the legal position with regard to churchyards, and, in particular, respecting the erection of memorials in them. It also aims to ensure that the distinctive character of a churchyard is maintained in the context of its setting around the parish church.

14. In that part headed “Erection of memorial in Churchyards” it sets out that:

The erection of any memorial in a churchyard...is a privilege and not a right. Bereaved people are frequently under the impression that they have actually bought the plot of land in which their loved one is buried. This is not so; they have simply paid for the work involved in the burial itself, and for a small part of the cost of the general maintenance of the churchyard. The whole churchyard remains in Church ownership.

15. Under the heading “The rationale for the Regulations” it states that:

Churchyard Regulations (and they are very similar right across the country) represent the collective wisdom over many years of Chancellors and Diocesan Advisory Committees for the Care of Churches.

They are in some respects different from the regulations which govern civil cemeteries. This is at least in part because of the different settings of the two types of graveyard. A churchyard almost always surrounds a church building; memorial stones which may be entirely suitable in an urban cemetery setting will frequently look quite out of place when close to a Grade 1 or 2 Listed building. In granting Faculties for churchyard memorials, the Chancellor has to consider not only the wishes of the bereaved family, but also his responsibility for the maintenance of an appropriate setting for a parish church for the next 200 years and more.

16. These statements underline the importance of maintaining traditional values within the churchyard and ensuring that the churchyard and the memorials therein reflect the church around which the churchyard lies. A churchyard lies on consecrated ground. That provides an important distinction to parts of those cemeteries provided by local authorities where the ground has not been consecrated and where more latitude may be shown to the design of headstones.
17. There is a common misconception that ownership of the grave vests with the deceased or the family of the deceased. Whilst property in the headstone lies with the person who paid for it, the freehold of the land making up the churchyard and, therefore, a

grave within it is vested in the incumbent, see Jones v. Ellis (1828) 2 Y & J 265. There is no right to erect a monument in a churchyard except by permission granted by a faculty. However the Chancellor delegates his power to permit the incumbent to approve a memorial so long as it is erected in accordance with the Regulations.

18. The Chancellor has power to approve by the grant of a faculty a memorial which falls outside the Regulations. In doing so the Chancellor has the responsibility to ensure "...the maintenance of an appropriate setting for the parish church for the next 200 years or more." Fashions and styles change frequently but my responsibility is to preserve the churchyard in such a way that will be accepted over generations. That requires me to lean towards orthodoxy rather than bend to fashion. In his judgment in Re Christ Church, Harwood [2002] 1 W.L.R. 2055 at p.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."

19. These words have been quoted in many judgments and most recently by the Chancellor of Durham in Re the churchyard of Quarrington Hill, Re the petition of Christine Dalby [2016] ECC Dur 1, and I cannot improve upon them. There are many examples in the Diocese and elsewhere of the way in which conformity of memorials within a churchyard greatly enhance their beauty and that of the church itself. I am unable to agree with the PCC that uniformity makes a graveyard less interesting. However the Regulations allow for different stones to be used, but not stones of a type or colour which will jar with the overall look of the churchyard.
20. The Regulations deal with the type of stone to be used:

Traditional stones are normally to be used; recommended are Forest of Dean, Hornton Blue, Ketton, Nabrasina/Roman Stone, Portland, and York (limestones), Northumberland (sandstone), and Welsh Black and Westmoreland Green slates. No coloured or mottled granites are permitted under these regulations, nor any granite darker than Karin grey, nor marble, synthetic stone, nor plastics. Although the stone may not be polished nor finished in any way to give the effect of polished stone, the surface may be suitably prepared for an inscription.

21. It follows that there is scope for various different stones to be used. From time to time I may be asked to agree to the use of a stone which is very similar to those which are approved of by the Regulations and in respect of which I have no difficulty granting a Faculty. The restriction on polished stone is to allow the stones to weather in the way which so enhances a churchyard.
22. The Regulations set out the maximum and minimum dimensions of the memorials. The headstone is to be no more than 4 feet high measured from the surface of the ground and no more than 3 feet wide and 3 inches thick (or thinner if constructed of slate). These measurements have not been chosen at random. They take account of the size of the burial plot and they take account of safety. Headstones are heavy objects and there have been examples of stones toppling causing injury and death to those on whom they fall. The higher the stone, the more likely it is to become loose and unstable.
23. The Regulations specify that any inscription should be simple and reverent, and preferably (but not necessarily) they should be of Biblical or Prayer Book origin.
24. Whilst this application does not include any proposal to place any designs on the headstone, the Regulations state that:

Memorials in the shape of an heart or book are not permitted other than by Faculty; nor are photographs, portraits, kerbs, railings, chippings or glass shades.

Motifs and pictures are not normally allowed on headstones; if such are to be incorporated, however, they are normally to be of clear Christian significance....No advertisement or trademark shall be inscribed on a headstone.

25. It follows that almost all, if not all, the 46 headstones which Mrs Scott has photographed are not in conformity with the Regulations and in each case there should have been a petition for a faculty.

#### **A COMPARISON BETWEEN THE PETITION AND THE REGULATIONS**

26. The Petition for a memorial to Mr Scott fails to conform in any particular with the Regulations:
- (a) Blue pearl is not a permitted stone, nor is it close in colour, texture or appearance to any stone which is permitted by the Regulations. It is of polished granite; the polishing of granite is not permitted by the Regulations.
  - (b) The base width is 2 feet wider than the Regulations allow and the height of the headstone is 1 foot 4 inches higher than the Regulations permit.
  - (c) The proposed inscription is neither simple nor reverent.
27. Bearing in mind that I have the power to grant a faculty to allow for a memorial which does not conform to the Regulations, I have to ask myself whether I should exercise it in this case. It is a discretionary relief and I must exercise my discretion carefully and remembering my duty to preserve the churchyard for generations to come.
28. I regret that I am unable to accede to the petition. The type of stone does not approximate to anything which is permitted with the Regulations. I note the family's wish that Tom Scott's headstone be of a similar type to those of his relations, but those stones ought not to have been erected in the first place without a faculty being granted, and no applications were made. In my judgment, although I can understand that Mrs Scott will feel aggrieved that she is denied the same stone as others only because she has gone about the application in the right way by petitioning for a faculty, I cannot allow this application only because others have flouted the Regulations in the past.

29. With respect to the representations made by JG Cross on the petitioner's behalf, it displays a worrying ignorance of the Regulations which apply in an area in which he provides his services. He compares the proposed stone favourably with polished black granite. However the Regulations do not allow for the erection of memorials in black granite, whether polished or unpolished.
30. As to the dimensions of the headstone, I am sympathetic to a wider than usual headstone and am willing to grant a faculty for the headstone being up to 60 inches in width. However I will not permit the height of the stone to rise above 48 inches from the surface of the ground, whether or not a plinth is used.
31. As to the wording on the headstone, in Part B of the petition Canon Brampton described it as "over sentimental and not of Christian significance". I respectfully agree with her. It does not conform to the Regulations. I appreciate that these words are no doubt dear to the heart of Mrs Scott and have been chosen after much thought on her part and I appreciate that a refusal to allow her to use these words may be thought to be unfeeling on my part.
32. It is not uncommon for the Regulations that apply in each diocese to be strictly interpreted by the Chancellor. By way of an example taken from a different diocese, the Chancellor of the Diocese of Chichester refused to allow a two word epitaph, "free spirit", because, although the two words appeared together in various passages in the Bible, they
- "...do not convey anything of Christian belief nor the hope in the resurrection as is appropriate in a consecrated burial ground." (See (In the matter of St Andrew's Fairlight and in the matter of a proposed headstone for the late Vicky Crammond, 16<sup>th</sup> October 2014))
33. The Churchyard Regulations for that diocese are in similar terms to the Ely Regulations. They do provide this useful further advice:

Epitaphs should honour the dead, comfort the living and inform posterity. They will be read long after the bereaved have themselves passed away. A memorial stone is not the right place for a statement about how members of the family feel about the deceased nor how they would address him or her were



they still alive. Passages of scripture, which have a timeless quality, are to be preferred.

34. It follows that I will not permit the inscription in its present form. I have no doubt that, were Mrs Scott to ask for Canon Brampton's help in coming up with more suitable words, she will provide it. I am sure that something can be formulated which will convey the love in which he was held and which will honour his memory and inform others of the life that he led.
35. In the circumstances I will formally stay the order of this court for two months to allow time for a variation of the application to be lodged. If there is no application for a variation, then a headstone can be erected which conforms to the Regulations, having received Canon Brampton's agreement that it does so conform, save for the permission I have granted for the stone to be up to 60" wide, and the petition will otherwise stand dismissed.

#### **EXISTING HEADSTONES WHICH DO NOT CONFORM WITH THE REGULATIONS**

36. As I have identified, the churchyard at St Andrew's contains many headstones that breach the Regulations and which should not have been erected without an application for a faculty having been made. Having seen the photographs it is inevitable that in respect of almost every headstone I, or my predecessor, would not have granted a faculty. I have had the records checked back to 2002 and there have been no petitions lodged in respect of headstones in this churchyard.
37. By virtue of s.13(5) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, the court may of its own motion issue a restoration order requiring the party which owns the headstone to remove a headstone which does not comply with the Regulations and for which no faculty was obtained:

Where at any time...it appears to the consistory court of a diocese that a person has committed, or caused or permitted the commission of, any act in relation to a church or churchyard in the diocese...which was unlawful under ecclesiastical law, the court may make an order (a "restoration order")

requiring that person to take such steps as the court may consider necessary...for the purpose of restoring the position so far as possible to that which existed immediately before the act was committed.

38. In such circumstances I would permit a replacement stone to be erected which conformed to the Regulations or whose design was subject to a successful petition for a faculty. This has been done in other dioceses where the faculty jurisdiction has been disregarded.
39. In my judgment the emotional distress which would result were I to require the headstones to be removed could not justify such a course, particularly in cases where many years may have passed since the headstone was erected. I do not intend to take such action of my own volition in respect of offending headstones in this graveyard or elsewhere which are already in place. However I would consider any application for a restoration order by an Archdeacon or by any other person appearing to have a sufficient interest in the matter (see §16.1 of The Faculty Jurisdiction Rules 2015). That would include an incumbent.
40. Further I intend to take steps after consultation to ensure that the Regulations and faculty system are adhered to.
41. In future if any headstones are erected in contravention of the Regulations and without a faculty, I will in appropriate cases invoke my power to remove the offending headstone. It remains the duty of incumbents to bring the Regulations to the attention of the family of the deceased and to warn them of the consequences of not adhering to the Regulations or of erecting a memorial without a faculty where one is required.

#### **THE RESPONSIBILITIES OF INCUMBENTS**

42. As I have already set out, the freehold of the churchyard is vested in the incumbent. As a result the incumbent has important responsibilities to safeguard the churchyard as established by Canon Law F13.2:

The like care shall be taken that the churchyards be duly fenced, and that the said fences be maintained at the charge of those to whom by law or custom the liability belongs, and that the churchyards be kept in such an orderly and decent manner as becomes consecrated ground. (my emphasis)

43. In In re St Margaret's Eartham [1981] 1 W.L.R. 1129 the then Chancellor of the Chichester Diocese refused to grant a confirmatory faculty in respect of a plaque which had been installed in the church by order of the incumbent and without a faculty having been granted. The Chancellor failed to see any excuse for his actions. On appeal the Dean of the Arches said (at p.1133G):

“The history of this matter makes it necessary for me to emphasise that a faculty is always necessary before a memorial tablet is placed in a church... Incumbents have a responsibility to prevent breaches of this rule.”

44. There is reason to believe that many incumbents have been ignoring their responsibilities in respect of headstones which do not conform to the Regulations, or at best have been turning a blind eye. I appreciate why this may be happening:

- (a) The incumbent will be dealing with relatives consumed by grief and with whom it may be difficult to have a conversation about what they intend to erect as a headstone. However, the regulations require a minimum of six months to elapse between death and approval of a headstone by the Chancellor or incumbent. It follows that there is time in which to manage grief.
- (b) There are known examples within the dioceses where incumbents have been placed under physical or mental pressure by the relatives and next of kin. I appreciate that the incumbent will continue to live at a known address and within the community,

45. Every memorial in a churchyard requires a faculty; the Regulations allow the Chancellor to delegate authority to the incumbents in respect of those headstones which comply with the Regulations with a consequent financial saving to the family of the deceased. However the corollary of that is that the incumbent must inform the family of the need to petition for a faculty where the proposed headstone does not comply. Existing memorials within a churchyard which do not comply with the Regulations do not provide a precedent for a further breach of the faculty jurisdiction.

46. A failure by the incumbent to follow this procedure and prevent a headstone being erected in contravention of the faculty jurisdiction would require me to consider fining the incumbent so as to mark the failure.
47. The faculty system is capable of providing support to the incumbent. It takes any decision away from the incumbent and passes it to the Chancellor. It may protect the incumbent from displays of anger or frustration on the part of the grieving family and allow the incumbent to give appropriate guidance and support to the family whilst they petition the Chancellor. The incumbent can rely on the peril that he or she may face of being fined for a failure to adhere to the faculty jurisdiction to justify the course to be taken of applying for a faculty.
48. It follows that it is essential that the incumbent follows the procedure set out the Regulations:
3. Once the memorial is agreed in principle, the individual should then make formal application to the Incumbent on the standard diocesan form. This will include the full particulars of the design of the proposed memorial, cross, or alteration, including a description of the materials to be used, its measurements, shape, base, colour, and decoration, and the style, layout and lettering of the proposed inscription.
  4. If the proposed memorial falls within the powers delegated to the Incumbent, she or he may give consent to it; such consent shall normally be in writing. This permission must be obtained before placing an order with a stonemason.
  5. If the proposed memorial does not fall within the Incumbent's delegated powers to grant, the applicant may (as indicated above) petition the Chancellor for a Faculty to erect it.
49. If the incumbent follows this process, there ought to be no possibility of error. If there is any doubt about whether a memorial falls within the Regulations, advice can be sought from the Archdeacons or the Registry.
50. There are some cases where the incumbent discovers that a memorial has been erected in the churchyard without any permission being sought. The incumbent must report

that immediately to his or her Archdeacon and the Registry. The stone will normally be removed and there will be costs to be paid by the family of the deceased.

51. I will be looking at other ways, in consultation with, amongst others, the Archdeacons, to support the incumbents in what can be a particularly difficult area of ministry. This will include considering what steps can be taken to inform the monumental masons and funeral directors who serve the diocese of the Regulations and to remind them of the financial consequences to them of permitting a headstone to be erected without a faculty where it does not conform to the Regulations.

His Honour Judge Leonard QC  
Chancellor of the Diocese of Ely  
21<sup>st</sup> September 2016