

18, 25 October 2007

In the Consistory Court of the Diocese of Chichester

CH119/07

Re Icklesham Churchyard

Judgment

The Petitioner, Mr Alan Newell, in person on behalf of his mother-in-law, Mrs Joyce Berwick

The First Respondent, Mr Richard Nice, of Mummery Funeral Directors, Bexhill-on-Sea, represented by Mr Douglas Skilton of Thomson, Snell and Passmore, solicitors

The Second Respondent, the Reverend Albert Cox, in person

1. This case concerns the final resting place of Ernest Robert Berwick in the churchyard of All Saints and St Nicolas, Icklesham. In the light of the particular facts to be related, it is deeply distressing for those concerned.
2. By a petition lodged in the Registry in July 2007, Mr Alan Newell seeks a retrospective faculty on behalf of his mother-in-law, Mrs Joyce Berwick, for the retention of a memorial erected in October 2006 over the grave of Ernest Robert Berwick. It was common ground at the hearing which took place in the church at Icklesham on 18 October 2007 that the memorial with which this Court is concerned does not comply with the Churchyard Regulations at Appendix D to the Chancellor's General Directions Concerning Churches and Churchyards (2001) in a number of material particulars, to the detail of which I shall return later in this judgment. It was also common ground that the Reverend Albert Cox, assistant curate within the benefice of Winchelsea and Icklesham with pastoral care of Icklesham, purported to give his consent for its introduction by signing the application form submitted to him by Mummery Funeral Directors which appears at page 6 of the bundle. He had no authority to do so.
3. The issue for the Court to determine is whether a retrospective faculty should be granted and the memorial permitted to remain. Although there was no separate cross-application for its removal, the hearing was conducted from the outset on the basis that this was the natural corollary of a refusal to permit its retention and the hearing proceeded on that basis. The concept of refusing the faculty but not ordering its removal was not considered to be a tenable alternative. As a secondary issue, however, I invited the parties to address me upon whether, in the event that I ruled against retention of the memorial in its current form, there was some way in which the memorial could be modified to such an extent that a faculty might be granted. With the concurrence of the parties the hearing proceeded on this basis and I heard evidence and submissions on both the primary and secondary issues. I should wish to express at the outset my respect and admiration for the dignity, grace and clarity with which Mr Newell presented his case, despite the evident emotional strain both for him and his family.
4. I turn then to the evidence, all of which was taken on oath. Having first been addressed by Mrs Joyce Berwick who confirmed that Mr Newell had her authority to

speak on her behalf, I heard from Mr Newell. He confirmed the contents of his statement at pages 31 to 32 of the bundle and of his reply to Mr Cox's evidence at pages 44 to 45. He told me of the death of his father-in-law, Ernest Berwick, and of how it fell to him to make the arrangements for the funeral and interment. He told me that he had never before had to perform such a task. The death was sudden and unexpected and he tried to relieve Mrs Berwick of the stress of arranging the funeral because of her grief and generally frail health. He relied upon and trusted those with whom he dealt, Mr Cox and Mr Richard Nice of Mummery Funeral Directors in particular.

5. Mr Newell informed me that Mr Cox had initially declined his request for Mr Berwick to be interred in the churchyard at Icklesham. Due to an innocent misapprehension, Mr Cox believed Mr Berwick to have resided in Bexhill and accordingly not to have a right of burial in Icklesham. Fortunately, Mr Newell made contact with the Reverend Canon Howard Cocks, the incumbent of the benefice of which Icklesham forms part, who swiftly established that Mr Berwick had been resident in the parish of Icklesham and had a right of burial in the churchyard. Accordingly Mr Cox willingly proceeded to conduct the funeral and subsequent interment.
6. Mr Newell told me that the first consideration of the erection of a memorial came after the funeral, perhaps within a few days. He attended the offices of Mummery's in Devonshire Road, Bexhill accompanied by his wife and spoke with Mr Richard Nice. They were given a brochure which they took away to show Mrs Berwick for her consideration. At this stage, they did not know what they were looking for. However, they were able to return to Mummery's within a few weeks and to sit down once again with Mr Nice and point out the memorial which Mrs Berwick had selected from the brochure.
7. Mr Newell is clear that Mrs Berwick had one particular memorial in mind. No other possibilities were identified nor did she suggest a range. Mr Nice, in his evidence to me, confirmed this selection. He clarified to me that when he said in paragraph 3 of his statement (at page 33 of the bundle) that Mr Newell was 'insistent' that this memorial was what the family had in mind, he did not mean to imply that he was forcefully dogmatic that it should be this memorial to the exclusion of all others. He merely wished to convey that Mr Newell was clear in the choice which Mrs Berwick had made. There is no suggestion that Mr Newell was insistent to the extent that he would flout any regulations to achieve the result. I fully accept that this genuinely represents Mr Newell's frame of mind. He told me that Mr Nice responded with words to the effect that he was not sure that Mrs Berwick would be able to have that particular monument in the churchyard: Mr Newell would have to speak to the vicar about what is and what is not allowed. Mr Nice did not inform Mr Newell of the existence of the Directions, nor of their content. He did not suggest any alternative memorials which Mrs Berwick might care to consider.
8. Mr Newell states that he duly went to see Mr Cox. He describes a discussion in the front room of Mr Cox's house when he showed Mr Cox the brochure and pointed out the particular memorial which Mrs Berwick had chosen and for which he sought Mr Cox's view on whether or not it would be permitted. He says that Mr Cox referred to a piece of paper or a leaflet. He was not given a copy of this nor can he identify what it was. He is clear, however, that it was not the pink covered bound

volume of the Chancellor's General Directions then current in the diocese. Mr Newell said that Mr Cox started telling him about small plaques that one could have in the ground (presumably for the burial of ashes) and child graves and about dimensions for the various headstones. None of this, Mr Newell stated, had any relevance to what was proposed. Mr Newell says that Mr Cox, by way of a friendly remark, said words to the effect that if you see some of the monuments in the churchyard, you can have practically anything you like. Mr Newell says that Mr Cox did not see the memorial as a problem and he did not tell Mr Newell that he could not have it. No mention was made by Mr Cox of the Directions. I have summarized Mr Newell's version of these events in a little detail, because, as will be seen when I come to his evidence, Mr Cox denies that any such meeting took place.

9. Mr Newell states that he subsequently returned to see Mr Nice, this time (to the best of his recollection) without his wife. He told Mr Nice that he had seen Mr Cox who did not regard the proposed memorial as a problem. He then says, in his own words, that 'the wheels were put in motion'. I understand that the cost of the work was £2,881.04 inclusive of value added tax.
10. Apparently Mummy's were required to deal with Mrs Berwick directly and they posted to her the application form and accompanying particulars at pages 6 and 7 of the bundle. Mrs Berwick signed it and Mr Newell inserted the date being 4 September 2006. He thought that the form was otherwise unsigned, but accepted in evidence that it may already have borne Mr Nice's signature. This is likely as his signature is dated 1 September 2006, but in my opinion nothing turns on the dates upon which these signatures were added.
11. The application form included the following declaration, directed to the Reverend Albert Cox who is named at the head of the form:

We have read the General Directions of the Chancellor of the Diocese concerning Memorials in Churchyards and claim that you have power under those Directions to permit the introduction of the proposed monument into the churchyard.

This was signed by Mrs Berwick. Mr Newell fully accepted that this assertion was false. He recognises that neither he nor Mrs Berwick had seen the Directions let alone read them. They did not even know that such a document existed. It had not been mentioned to Mr Newell either by Mr Nice or by Mr Cox. Had they been read it would have been self-evident that the claim that Mr Cox had power to permit the introduction of the proposed monument did not bear scrutiny. With admirable integrity, Mr Newell took full responsibility for the fact that Mrs Berwick applied her signature to this false declaration. He was with her at the time, had dealt with all the arrangements and did not read the application form as thoroughly as he ought to have done. He accepts that the Directions include the following text in bold type and enlarged font:

The incumbent has no authority to permit the erection of a memorial which does not comply with these regulations.

Any memorial which does not comply with these regulations (whether or not the incumbent has purported to give his authority) may be removed by order of the consistory court.

Mr Newell informed me that had he fully read the application form he would have asked what the Directions were and then obtained a copy and read it. He says that Mrs Berwick would then have chosen a memorial which conformed with the

Directions. In his words, 'one that was suitable would now be in'. This, he said, would have been no trouble at all.

12. Mr Newell explained that Mr Berwick had loved colour; and that the inscription on the headstone was part of the lyrics of a song which was a particular favourite of his, and were also words taken from a memorial book. He presented a petition with some 835 signatories, 100 of whom were from Icklesham with others from further afield, including at least two clergy from London. He indicated that Meridian News had covered the story when the matter first arose, and that a poll had produced a majority of 92% in favour of the retention of the memorial. I understand that Mr Newell had asked the media not to cover the hearing, which I consider to be a proper and dignified course to have adopted.
13. Mr Newell described an event when artificial flowers were removed from Mr Berwick's grave and placed on a bonfire in the churchyard. This caused Mrs Berwick and her family unnecessary distress. He further described how the family ceased placing artificial flowers on the grave once they had been informed that this was not permitted, and that they also removed other objects such as freestanding angels, cherubs and nativity scenes as soon as they were asked to because they too were not permitted. There is no intention of putting them back. The grave is tended regularly, with fresh flowers, those that are wilting being removed each Sunday. The flowers are very plentiful and currently cover the entirety of the grave, being visible from quite a distance across the churchyard. Mr Newell states that the grave is better kept than many others in the churchyard, and that several people when visiting the graves of their loved ones have commented on how beautiful it looks. He emphasises that Mrs Berwick had no intention of breaking the rules and states that she will be devastated were the removal of the memorial to be ordered.
14. Mr Newell sought to express Mrs Berwick's views on the secondary issue concerning the retention of part only of the memorial and I deal with this aspect of his evidence separately below.
15. The next witness was Mr Richard Nice who was joined in these proceedings as First Respondent. In reality he was a representative respondent on the part of Mummery Funeral Directors, a trading style of the Co-Operative Group (CWS) Limited. Mr Nice, and more particularly the Co-Operative Group, were represented by Mr Douglas Skilton, a solicitor, acting both for his corporate and his personal client. Also present, but not testifying, was a more senior manager from the Co-Operative Group. Mr Nice's evidence comprised his written statement on pages 33 to 34 of the bundle and a limited amount of oral evidence. He was subjected to some rigorous questioning from the court and dealt responsibly and professionally with a high level of criticism, much of which related to systemic failings on the part of his employer as opposed to his personal conduct. He is to be commended for the manner in which he accepted blame for certain matters and for the sincerity of his expressions of regret. This did much to redress the unfortunate tone of earlier correspondence, such as appear at pages 48 and 52 of the bundle.
16. Mr Nice described meeting Mr Newell on 31 May 2006 to make arrangements for Mr Berwick's funeral which took place on 13 June 2006. He states:

‘After the funeral, in line with the normal practice of Mummery, I provided Mr Newell with a brochure containing details of the memorial masonry services provided by Funeralcare’.

His statement is not clear as to whether this was on the day of the funeral or on a later occasion at his offices, as Mr Newell suggests, but I do not think anything turns on this. He then speaks of Mr Newell calling into Mummery’s branch office at Bexhill to make the arrangements for installing the memorial. He explained to Mr Newell that the memorial which Mrs Berwick had chosen would not normally be allowed in a churchyard. He continued, at paragraph 3:

‘... I was not in possession of a copy of the Chancellor’s General Directions but I had seen an extract during my training in 2002 and was broadly aware of the type of memorials permitted in churchyards.’

He suggested that Mr Newell went to speak to the incumbent to establish exactly what would be permissible.

17. Mr Newell returned a few days later, possibly on 28 August 2006, to say that he had spoken to the vicar who had agreed that the memorial chosen by the family could be erected. He said that the vicar had been shown the illustration of the proposed memorial from the brochure. At paragraph 4 he says:

‘On the understanding that the Church had approved it I agreed to go ahead with the memorial order.’

An advance payment was then made, the total being the sum I have already stated. Mr Nice then signed the application form and posted it along with a letter: he says it went to Mr Newell, although in reality it was probably to Mrs Berwick. On receipt of the form signed by Mrs Berwick, he sent it to Mr Cox along with the details including measurements and a photograph. This document is to be found at page 36 of the bundle. This was returned signed by Mr Cox. Mr Nice states at paragraph 5:

‘I was satisfied at this stage that the permission of the Church had been given for the introduction of this memorial.’

At paragraph 7 of his witness statement he states:

‘Whilst I signed the application form on behalf of Mummery believing that I had read the churchyard regulations, had we been furnished with a copy, or given information on how to obtain one, it would have been obvious that the incumbent did not have the authority to give permission for this memorial, and I would have questioned his decision. I recommended that our client seek advice from the Church, and I accepted in good faith the advice that was given and the permission that was granted.’

18. I questioned Mr Nice about a list which had been supplied to me by the Chichester Diocesan Advisory Committee comprising undertakers and funeral directors in the Diocese of Chichester, each of whom had been sent a complete copy of the Chancellor’s General Directions Concerning Churches and Churchyards (the pink covered bound volume) when they were revised and reissued in April 2001. Mummery Funeral Service appears twice on that list, once at its Devonshire Road address and the other at Ninfield Road, both in Bexhill-on-Sea. Mr Nice informed me that he was not working for Mummery at the time but that he had no reason to doubt that they were sent. I appreciate that this list had not been disclosed to the parties in advance of the hearing, but Mr Skilton did not request an examination of the list nor did he seek to question the inference that two copies of the Directions had been sent to Mummery’s, one to each of its business addresses in Bexhill. A more senior manager from the Co-operative Group was present at the hearing from

whom Mr Skilton could have taken instructions. Mr Skilton did not indicate that his client was in any way embarrassed by this documentation nor did he seek any time to consider his corporate client's position or to obtain leave to adduce rebuttal evidence.

19. In these circumstances I consider that I am entitled to find as a fact that Mummery's had been provided with two copies of the Directions, and ought still to have been in possession of either or both at the material time. I do so find, and I believe that such finding is reinforced by the assertion in paragraph 3 of Mr Nice's witness statement that he had seen an extract during his training in 2002.
20. I therefore find it unfortunate and regrettable that Mr Nice put his name to the following: 'had we been furnished with a copy [of the Directions], or given information on how to obtain one, it would have been obvious that the incumbent did not have the authority to give permission for this memorial'. The fact that he did is to my mind symptomatic of systemic failures on the part of Mummery's for which Mr Nice had the distinct misfortune of having to answer at the hearing.
21. Despite putting his signature to the same declaration as Mrs Berwick (reproduced verbatim above) Mr Nice accepted that he had not read the Directions with any degree of thoroughness. At best he gave them some momentary attention during the course of his training some four years prior to the events in question. This may only have been the second occasion that he had made use of such an application form. He accepted that even if he had once read the two passages in bold and large font referred to in paragraph 11 above, he had forgotten about them by the time he signed the application form. He accepted in questioning from me, that they were clear, unambiguous and sufficiently prominent to act as a warning. He said that Mummery's did not at the time have a copy of the Directions available at their Devonshire Road premises for regular referral, but that they now keep a copy of the new Directions, which were revised in Easter 2007.
22. Mr Nice candidly accepted without any shirking of responsibility that if he had done his job properly then Mrs Berwick would have chosen an alternative memorial which conformed with the Directions. He also accepted, with deep and sincere regret, that an enormous amount of unnecessary distress had been occasioned to the Berwick family in consequence of his actions. The statement which he signed that he had read the Directions was at best misleading, and more probably false. Further, on no reading could he legitimately claim that Mr Cox had power under the Directions to permit the introduction of the particular memorial proposed.
23. Mr Nice gave evidence about what, if any, changes could be effected to the memorial and, to the extent that he had authority to do so, the willingness of Mummery's to reimburse Mrs Berwick for any wasted expenditure. I deal with these aspects separately below.
24. Mr Albert Cox was next to give evidence. He confirmed the contents of his witness statement at page 42 of the bundle. The events concerning him declining to authorize the burial of late Mr Berwick in Icklesham churchyard were in accord with what was described by Mr Newell. Canon Cocks, whose statement at page 41 of the bundle was admitted into evidence without challenge, also confirms this sequence of events.

25. The recollection of Mr Cox and Mr Newell as to the arrangements for Mr Berwick's funeral also coincided. However, there was a stark disagreement as to whether, and in what location, and in what terms, there had been any discussion as to the introduction of a memorial into the churchyard. This was the subject of sharp questioning by Mr Cox of Mr Newell and by Mr Newell of Mr Cox. I have already summarised Mr Newell's version. Mr Cox's, briefly, is as follows. On the day of Mr Berwick's funeral and interment and shortly after its completion, Mr Newell approached Mr Cox and raised the matter of erecting a memorial. He replied that it might be possible to do so, but that he would have to make a formal application. He recalled pointing to a particularly striking granite obelisk at the east of the church erected in the nineteenth century and stating that something of that style would not now be permitted. He accepted that Mr Newell may have called at his home to collect some CDs but said that he had not visited at any time subsequent to the funeral, and certainly not for the purposes of the conversation which Mr Newell alleges. His current curacy is his first post within the Church of England, his previous ministry being in Africa where the legalities, so he tells me, were more lax. He says that he had not seen a copy of the Chancellor's General Directions but that he was aware that there were permitted sizes for headstones, gravestones and tablets. He had heard that there was a prohibition of artificial flowers. He said that he took on trust the declarations by funeral directors and stone masons made on application forms for the introduction of memorials, and that in the past the proposed memorials, to the best of his knowledge, had always conformed with the Directions of which he was now more fully aware.
26. There is an irreconcilable difference between the recollections of these two witnesses. Mr Newell, not without emotion, indicated that he could not possibly have spoken to Mr Cox immediately following the interment because his primary concern was the comforting of his wife and her mother and leading them away from the graveside. He says that numerous witnesses would confirm this. Mr Newell feels particularly hurt and aggrieved that Mr Cox, an ordained priest, should seek to deny their meeting and what took place. He felt able to describe the interior of Mr Cox's house and to picture in his mind the precise sequence of events in Mr Cox's living room. Mr Newell is adamant as to what took place. His distress at Mr Cox's refusal to accept his recollection was evident.
27. Doing the best I can, having observed the witnesses give their evidence and having considered the surrounding circumstances, I am inclined to the view that Mr Newell's recollection is more reliable than Mr Cox's. Mr Newell was dealing with wholly unfamiliar matters which are more likely to imprint themselves on his memory, whereas for Mr Cox this was just part of ordinary parish life of no particular consequence at the time. Secondly, Mr Newell's evidence dovetails with that of Mr Nice as to the sequence of events, placing the need to confer with Mr Cox at a date separate from, and subsequent to, the funeral. I am therefore satisfied that a meeting did indeed take place as Mr Newell asserts and I reject Mr Cox's evidence to the contrary. I find as a fact that the proposed memorial was discussed and, although Mr Cox may not have given his approval in quite the way Mr Newell suggests, he neither said nor did anything overtly to suggest that the proposed memorial was unsuitable or would not be approved.
28. I am further satisfied that Mr Newell acted in good faith when he returned to Mr Nice stating that Mr Cox had given his approval (since that is what he believed) and

that Mr Nice himself acted in good faith in subsequently pursuing the written application.

29. However, these findings of fact by themselves are insufficient to determine the petition in favour of the petitioner. Mr Nice, both in his evidence and through his solicitor, asserts that it is not part of his role as a funeral director to question the Church's authority, by which I take him to mean the incumbent or priest-in-charge. He would not have proceeded in the absence of permission, and he believed that such permission had been given first through the intimation communicated via Mr Newell and secondly by Mr Cox's signature on the application form. However, as I have already noted, set out in bold and in a large font is the following:

The incumbent has no authority to permit the erection of a memorial which does not comply with these regulations.

Any memorial which does not comply with these regulations (whether or not the incumbent has purported to give his authority) may be removed by order of the consistory court.

Even if Mr Nice did not remember these words from his cursory acquaintance with the Directions during the course of his training, he ought to have. Further, and more importantly, Mummery's ought to have taken proper steps to ensure that all of their staff were apprised of the content of the Directions and these passages, prominently enlarged and emboldened in the text of the original, in particular. They were not equipped properly to discharge their duties without a meaningful knowledge of the Directions.

30. Whilst one might be disposed to look with a degree of sympathy upon the erroneous statement made by Mrs Berwick, Consistory Courts cannot and should not readily overlook such false assertions when made by professional funeral directors who are expected to have a full and proper understanding of the faculty jurisdiction and the nature and extent of the authority delegated to parish priests. Were they to introduce a non-compliant memorial into a municipal cemetery they would be subject to censure; likewise with memorials into consecrated ground which is subject to the faculty jurisdiction.
31. Issues concerning the introduction of memorials into consecrated churchyards have been the subject of frequent consideration in the Consistory Courts of both Provinces. Chancellor Peter Collier QC, who has considerable experience as chancellor of a number of dioceses prior to his present appointment in York, had occasion to review the relevant law and practice when he delivered a judgment in the Consistory Court of Wakefield in the case of *Re St Paul, Drighlington*, noted at (2007) 9 Ecc LJ 239, a transcript of which was made available to the parties and their representatives at the hearing. Collier Ch identified a number of principles recognisable from the earlier authorities to which he made reference. These appear at paragraph 25 of his judgment as follows:
- (i) The churchyard was created in the past for the community both present and future.
 - (ii) The incumbent and PCC are responsible as trustees for preserving and maintaining that community asset.
 - (iii) Parishioners have a right of burial in the churchyard but the plot in which they are buried remains in the ownership of the incumbent. Indeed in due course the plot may well be reused for a further burial.
 - (iv) Permission is required to erect any monument over a grave. The granting of that permission falls to the Chancellor of the Diocese. The Chancellor can and usually does delegate the giving of permission to the incumbent within guidelines issued by the

Chancellor. The incumbent has no authority to give any permission for anything falling outside the guidelines. Any purported permission outside the guidelines will in fact be a nullity.

(v) Any memorial which is erected belongs to the person who erected it during their lifetime and thereafter to the heir at law of the person in whose memory or honour the monument was erected.

(vi) In recent years, for the reasons set out in *Re St Mary Westham*¹ there has been a clear and distinct turning away from permitting kerbs in churchyards unless there are exceptional circumstances. This has often created tension between the bereaved and the church authorities, whether in the person of the incumbent or of the legal officers. Their different perspectives were encapsulated well by Chancellor Lomas in *Boughton St Matthew* (2002) 21 Consistory and Commissary Court Cases, Case 30, where the concept of “creating God’s own garden” over the grave of a loved one was being advanced by a petitioner. The Chancellor said “The historical description of a churchyard was ‘God’s own acre’ – a very different concept.”

32. Having outlined the above principles, which are of general application and which I adopt without hesitation, Collier Ch continued:

26. I have a responsibility to keep the balance between those two perspectives and to ensure that whilst those who have been bereaved must be given the opportunity to grieve their loss and to express what might be either their thanksgiving for a life well lived or their sorrow at one tragically cut short, that can never be at the expense of the wider community interest in the proper management of the whole churchyard both for now and for posterity.

27. I understand that very often bereaved people do not appreciate that their desire to grieve and remember and to do so in a way that seems to them to be not only appropriate but essential is in fact making the overall management of the churchyard very difficult. They are focussing on the present whilst others are looking to the future. It is also the case that when asked off the cuff about this conflict ordinary members of the public are likely to side with the bereaved as they will not have had the broader issues explained to them.

33. In this case the principle identified by Collier Ch at (iv) above is of direct application. Mr Cox did not have delegated authority to permit the introduction of this particular memorial and, in consequence, his purported consent is a nullity. None of the parties argued against this proposition although Mr Newell emphasised with some force the apparent unfairness which results to a person such as Mrs Berwick who, acting in good faith, believed that the consent of ‘the Church’ had been sought and obtained. Messrs Donaldson Dunstall, a local firm of solicitors briefly retained by Mr Newell until their professional fees proved prohibitive, wrote to the Archdeacon of Lewes and Hastings on 6 June 2007 alleging that Mr Cox had ‘ostensible authority’ to give consent such as to give rise to an estoppel on the basis that the Berwick family had acted to their detriment in reliance upon the giving of apparent consent. The solicitors’ letter appears at pages 9 and 10 of the bundle.

34. The estoppel argument was not pursued at the hearing but since two of the parties were unrepresented I ought properly to deal with it. I reject it for three reasons: first on the general point of principle declared by Collier Ch to which I have already made reference; secondly upon the express wording of the Directions in terms of the warning which I have reproduced in this judgment; and thirdly upon the erroneous declaration made by Mrs Berwick on the application. In these circumstances there can be no estoppel. Whether Mrs Berwick has a remedy against Mummery’s in contract or tort and, if so, what is the recoverable loss, are matters on which the Consistory Court ought not to express a view.

¹ (1999) 18 CCCC 29, Edwards Ch.
CH: 932687_1

35. Having established that Mr Cox's purported consent was a nullity, the question therefore is whether the Consistory Court, which (unlike the incumbent or priest-in-charge) does have a discretion to permit the introduction of a memorial of any type whether or not it conforms with the Directions, should exercise its discretion to permit this particular memorial to be retained in these particular circumstances. This discretion, self-evidently, must be exercised judicially and having regard to all the circumstances of the case.
36. The features of this memorial which do not conform with the Directions can be summarised as follows:
- i. it is fabricated of white marble, a material not permitted;
 - ii. it is highly polished, an appearance not permitted;
 - iii. it has black painted lettering, a feature not permitted;
 - iv. it has a colour ceramic photo plaque bearing a likeness of Mr Berwick, an addition not permitted;
 - v. it has kerbstones, which are not permitted;
 - vi. it has blue chippings within the kerbstones, which are not permitted;
- Whilst the inscription lacks a Christian message of resurrection, this is not expressly covered in the Directions and I leave it out of account.
37. The Diocesan Advisory Committee, at the invitation of the Court provided its views on the memorial by way of a letter dated 17 September 2007, which appears at page 43 of the bundle. Point 1 is particularly salient:
- 'It was felt that a stone of this particular type threatens to change the character of this quintessentially English churchyard. It was felt that it is visually noisy in character and could make it difficult for others with loved ones buried nearby to properly express their grief. While understanding the needs of the family of the departed loved one, it makes it unfair on those families who have abided by the Chancellor's General Directions.'
- The Archdeacon of Horsham, who is a member *ex officio* of the Diocesan Advisory Committee, attended the hearing on the Committee's behalf and assisted the Court by supplementing the contents of the letter. He dissociated himself from point 3 of the letter in which the Committee sought to blame the stonemason. The Archdeacon was right to be embarrassed by this: it is not within the remit of the Committee to apportion blame, and it would have been better for this passage to have been omitted. However the Archdeacon stated that from his experience he would expect funeral directors to be familiar with the Directions so as to be able to guide bereaved families.
38. The Archdeacon indicated that the Committee was aware of the grief of the relatives and their feelings but was also aware of the grief and feelings of others who came to churchyards whose character needs to be preserved as a place of unusual solace and peace and a sense of unity – as distinct from uniformity. He spoke of problems where one family's expression of grief impacts upon that of others. If one family expresses itself in a highly individual way, others may wish to do likewise and very soon the churchyard becomes 'visually noisy' to borrow a phrase from the Committee's letter, thus making it difficult for others coming to graves elsewhere in the churchyard. Over time the character and calm atmosphere can erode, while other people who are law-abiding in their adherence to the Directions might feel a legitimate sense of grievance. He stated that although due weight should be given to the numerous signatories to the petition which Mr Newell presented to the Court,

regard must also be had to the unexpressed feelings and sensitivities of those who had felt constrained to follow the Directions and had tempered their own personal wishes accordingly.

39. The parochial church council of All Saints and St Nicolas, Icklesham considered the matter and, at the invitation of the Court, submitted its observations in the form of a letter from Mrs J Thompson, its secretary, dated 19 August 2007, to be found at page 63 of the bundle. Mrs Thompson kindly attended the hearing but was not required to give any additional evidence beyond the terms of her letter which reads as follows:

The Parochial Church Council regret that the Berwick family were badly advised by all parties at a difficult time. We are extremely concerned for the pastoral impact that this whole affair is having and will have on the parish.

As the family sought and was given permission for the memorial to the late Ernest Robert Berwick, the Parochial Church Council support the family in their retrospective application for the Faculty.

Mr Cox stated that he chaired the parochial church council and that the decision was unanimous and one which coincided with his own opinion.

40. Against this background, this Court needs to determine whether or not a retrospective faculty should be granted. Here both the parochial church council and Mr Cox support the application, as do a considerable number of the general public as far as may be ascertained by the signatures on the petition and the Meridian poll. Mrs Berwick is largely blameless in the flawed process which led to the introduction of the monument. The current proceedings are distressing and debilitating and a refusal of a faculty would be very difficult for Mrs Berwick and her family to bear. Against this, however, is the fact that, irrespective of the non-compliance with various aspects of the Directions, this memorial is singularly inappropriate for its setting within the churchyard of this historic parish church. It is aesthetically intrusive and dominates an otherwise tranquil sacred space on the border of this rural community. Though towards the edge of the churchyard, it can be seen from some distance away and is readily observable from the path to the main entrance to the church. The marble is garish and the kerbstones and chippings are the only ones of their type in the churchyard and strike a distinctly discordant note. There is one other grave in the churchyard which appears to have a raised border, of which there is a photograph at page 26 of the bundle. It has no headstone and the edging seems to have been made of wood. In consequence, though not complying with the Directions, it is substantially less obtrusive, nor is there any application before the Court for its removal. I invited the parties to identify any other graves which I should take into consideration during the course of my site inspection, but they identified none.

41. Whilst I am very sympathetic to the impact that this decision will have on Mrs Berwick and the rest of her family, and whilst I understand the pastoral considerations which animate the present parochial church council in its decision to support the retention of the memorial, this Court is entitled to, and indeed should, take a more detached and longer term perspective. This memorial, if retained, would continue to dominate the churchyard for generations to come, long after the membership of the current parochial church council has been replaced. Regard must be had to the history of our church buildings and their environs as well as to their future. Regard must also be had, but this could never be classified as a determinative feature, to the precedent which would be set not merely within the parish, but

throughout the diocese and in the Church of England generally where Churchyard Directions exist in broadly similar form.

42. Mr Newell did not advance any particular arguments for the retention of this memorial *per se*, save in relation to the inscription which I have already mentioned and to which I shall return. Indeed, on the contrary, he said that had Mrs Berwick been aware of the Directions at the time, she would have selected a memorial which complied with the Directions, not that she would have petitioned for a prospective faculty for one which did not. The key issue from her point of view (and she made an interjection during the course of the proceedings to this effect) is that the memorial had been erected after prior consultation with Mr Cox, and therefore it should remain. It is advanced as a point of principle. Whilst I fully acknowledge the distress which will be caused by the compulsory removal of the current memorial a year after it was erected and some eighteen months after Mr Berwick died, and whilst I recognise that Mrs Berwick proceeded in good faith in the honest belief that permission had been granted, this particular memorial is so far outside what is acceptable that even these powerful pastoral considerations are insufficient to justify the exercise of the Court's discretion in the petitioner's favour. It follows that this application must be dismissed and an order made for the removal of the memorial.
43. There remains the secondary issue as to whether this Court might of its own motion authorise a faculty for a memorial in some modified form. I raised this with Mr Newell. First, dealing with the photo plaque, he readily conceded that Mrs Berwick would be content for this to be removed and she confirmed this. I enquired of Mr Nice whether this could be achieved without damaging or defacing the headstone and he expressed his professional opinion that it could.
44. I then raised with Mr Newell the possibility of removing the kerbstones and blue chippings then turfing over the grave, leaving the headstone standing. This seemed momentarily to find favour with Mr Newell but was vocally opposed both by Mrs Berwick and by Mr Newell's wife. I asked Mr Newell the direct question of how Mrs Berwick would face the stark choice between the removal of the memorial in its entirety or the retention simply of the headstone. He replied, tearfully, that she would rather see the whole memorial removed. I enquired of Mr Nice whether the suggested modification could be achieved without compromising the integrity of the headstone and he said that it could, although some further concreting might be needed to the base. He indicated that Mummery's would be agreeable to bearing the cost of these works. I returned to this subject during submissions, having afforded Mr Newell the opportunity of reflecting on what might be regarded as a 'compromise' solution. He remained of the view that the retention of the headstone alone was not what Mrs Berwick wished. She wished to retain the memorial as it was (albeit conceding the removal of the photo plaque) and would rather see it removed than for it to remain in a modified and reduced form.
45. Hearings in Consistory Courts are stressful and intense, particularly for unrepresented parties. Occasionally with an opportunity for reflection their views may change. Having concluded that this petition must be dismissed and the memorial removed, I am prepared to afford Mrs Berwick a further six weeks within which to consider the alternative raised in the hearing, as outlined above. I would be content to authorise a faculty permitting the retention of the headstone even though it does not comply with the Directions (being of white marble) and has an inscription which

might not otherwise be allowed. This would be on condition that the photo plaque were removed and that the kerbstones and blue chippings were also removed with the grave re-turfed to create a level surface with the surrounding churchyard. This work would be carried out by Mummery's at their own expense and Mummery's would reimburse to Mrs Berwick the difference in cost between that for the erection of the single stone and that for the memorial as was in fact erected. In the case of disagreement as to the sum involved, then the matter will be remitted to me for determination.

46. If after six weeks Mr Newell has not written to the registry confirming Mrs Berwick's agreement to the course outlined above, which is in the nature of a generous concession to her (although she may not see it in this light) the memorial will have to be removed in its entirety at the expense of Mummery's. In the event that it is not removed within a reasonable time thereafter, I authorise the Archdeacon of Lewes and Hastings to take all steps necessary to procure its removal.
47. Mr Skilton conceded in closing submissions that the Consistory Court has power to order Mummery's to reimburse Mrs Berwick for the entire costs of the fabrication and erection of the memorial in the event that its removal is ordered. I consider that such concession to have been properly made. I also consider that in the circumstances it is a power which ought to be exercised in this instance having regard to the respective culpability of those concerned. In the event that the sum of £2,881.04 is not reimbursed within 21 days of the removal of the memorial then Mummery's will be debarred from carrying out work in consecrated burial grounds in the Diocese of Chichester which are subject to the faculty jurisdiction until further order. I trust that this drastic step will not be necessary and that there will be no repetition by Mummery's of the cavalier and lax practice which caused immeasurable and wholly avoidable distress to the Berwick family.
48. Equally, Mr Cox has not covered himself with glory. His knowledge and application of the Directions fell well short of what is expected of clergy of the Church of England. Whether it gives rise to proceedings under the Clergy Discipline Measure 2003 is not for this Court to determine. However, to mark the disapproval of this Court and to ensure best practice hereafter, I hereby revoke for a period of twelve months from the date of this judgment the delegated authority given to Mr Cox under Appendix D to the Chancellor's General Directions Concerning Churches and Churchyards (Issue 2) dated Easter 2007. During this period applications for the introduction of memorials into the churchyard of the parish church All Saints and St Nicolas, Icklesham shall be determined by the incumbent of the benefice, Canon Howard Cocks, if he is willing and able to act, otherwise by the rural dean.
49. Finally with regard to the costs of this petition, I heard submissions from Mr Skilton to the effect that they should be borne by the parish, by which I presumed him to mean the parochial church council. This submission was flawed in a number of respects, not least the fact that the council was never a party to the proceedings. Mr Skilton could not point to any fault on the council's part. When informed that court costs are conventionally borne by the petitioner, he declined to make a formal application that Mr Newell or Mrs Berwick pay those costs, and rightly so in my opinion. These proceedings have been necessitated by the conduct of Mummery's compounded to some degree by a lack of care on the part of Mr Cox. I have given serious consideration to Mr Skilton's submission that the additional costs of having a

hearing as opposed to a determination on written representations should be borne by Mr Newell since it was he alone who insisted on such a disposal. On reflection, I have declined to make such an order. The matter needed to be ventilated and I do not consider in the circumstances of this case that declining to consent to a determination on written representations can properly be classed as unreasonable conduct. The proper order, it seems to me, is that the court costs will be borne as to 75% by the Co-Operative Group (CWS) Limited and as to 25% by Mr Cox. There will be no order for *inter-partes* costs.

The Worshipful Mark Hill
Chancellor

25 October 2007