

17, 22 March 2011

In the Consistory Court of the Diocese of Chichester

CH 193/09

In the matter of St Mary Magdalene, Bolney

Judgment

1. By a petition dated 18 January 2010, Mrs Mary Brazil seeks a faculty for the introduction of an upright headstone to mark the grave of her late husband, Tom Brazil. Following his death on 5 May 2004, he was buried in a plot in the cemetery of the church of St Mary Magdalene, Bolney. The grave is currently unmarked. It is well tended, although I noticed on my visit some artificial foliage which ought to be removed in accordance with diocesan policy. The proposed headstone featured two prancing horses on either side of a rectangular slab bearing Mr Brazil's name and dates etc together with a short two line inscription.
2. The proposal had been considered by the Parochial Church Council on 18 November 2009, which declined to approve the request. The PCC, including its chairman, the Reverend Keith Littlejohn, priest-in-charge, were not confident that what was proposed fell within the class of headstone in relation to which parish priests have delegated authority to permit under the Churchyard Regulations. Mrs Brazil was advised, entirely properly, that were she and her wider family unhappy with the decision they could contact the diocesan registrar and petition for a faculty, which is what has happened. Mrs Brazil retained a solicitor, Mr John Castle of Castles Solicitors in Hurstpierpoint, to pursue the petition and to represent her at a hearing which took place in the church on 17 March 2011. He informed me during the hearing that he was familiar with the practice and procedure of the consistory court, but showed little evidence as it will be my misfortune to relate in the course of this judgment.

Procedural background

3. The procedural history of the petition is complex and there have been various delays. When the petition was initially lodged by Mr Castle on Mrs Brazil's behalf in the latter part of 2009, it was undated and the section dealing with PCC consideration had not been completed, nor was it accompanied by a PCC minute. It was returned to Mr Castle for these matters to be addressed, and duly resubmitted under cover of a letter dated 18 January 2010.
4. On 21 January 2010, the petition was referred to the Diocesan Advisory Committee pursuant to rule 14 of the Faculty Jurisdiction Rules 2000 (SI 2000/207). The DAC considered the petition at its meeting on 11 February 2010 and communicated its advice by letter dated 17 February 2010. The salient part of the letter reads as follows:
‘Members noted that Mr Brazil had a lifelong passion for things equestrian and therefore would not wish to object to the proposals in this instance. It was noted that there was obviously a space left for a future inscription and the Committee

suggested that the last two lines of the present one might be better at the bottom, thus including both people who are to be commemorated.’

5. The papers were referred to me in March 2010 and on 1 April 2010 I made directions indicating that because the proposal fell outside the Churchyard Regulations and did not have the support of the PCC, it would be for Mrs Brazil to show a special case and I allowed her 28 days within which to make written representations, in the absence of which her petition would be dismissed. These directions were communicated to Mr Castle by letter dated 7 April 2010.
6. After some delay, explained by Mrs Brazil having to move house in consequence of a road widening scheme, Mr Castle wrote to the registry on 12 May 2010. This letter was predicated on the false assumption that the advice of the DAC was in some way determinative of the petition. The letter also suggested that Mrs Brazil would be agreeable to moving the inscription to the bottom of the headstone as the DAC had suggested. I interpose to comment that this was a surprising statement since it would appear that the headstone may already have been fabricated. A photograph bearing the date 20 November 2009 depicts the headstone with its lettering complete, and this may therefore have been the case when Mr Castle’s letter was written.
7. By letter dated 14 May 2010 the diocesan registrar alerted Mr Castle to his misapprehension as to the nature and status of the DAC’s advice and reminded him of the necessity for Mrs Brazil to make written representations in support of her petition. There was a holding reply from Mr Castle on 1 June 2010 saying he would await written instructions from his client.
8. Nothing further was heard from Mr Castle until 9 September 2010 when he wrote to the registry enclosing a letter dated 2 September 2010 from Mr Michael Cox of Michael Cox Associates, Chartered Town Planners and Development Consultants. That letter, addressed to Mr Castle rather than the registry, adopted a somewhat combative tone and made representations concluding ‘it is my contention that [the] proposed memorial complies with the Regulations and accordingly any petition for a faculty is unnecessary’. It would appear that Mr Cox, similarly unversed in the law and practice of the faculty jurisdiction, had assumed that the content of the advice emanating from the DAC in some way brought the proposal within the classes of headstone covered by the Regulations. He was gracious enough to acknowledge this error in the course of his evidence before me, and he also accepted that a parish priest is at liberty to refuse to exercise his delegated authority even in relation to a compliant proposal, and to require a putative petitioner to seek a faculty.
9. After a regrettable delay at the registry, the papers were referred to me on 21 October 2010 and I made directions the following day. Noting that the petition stood dismissed in consequence of my order of 7 April 2010, I indulged the petitioner by allowing her until 12 November 2010 to file written submissions whereupon the petition would be reinstated. I made consequential directions as to evidence from the PCC and invited the petitioner to consider whether she consented to the matter being determined on written representations in accordance with rule 26(1) of the Faculty Jurisdiction Rules.

10. Under cover of a letter from Mr Castle dated 10 November 2010, written representations were sent to the registry. These were in Mrs Brazil's name but were stated to have been prepared by Mr Cox. They were accompanied by a bundle of photographs of the graveyard but, unfortunately, not of the headstone that apparently had already been fabricated. A little surprisingly, perhaps, Mr Castle's letter concluded: 'Mrs Brazil's view is that she would like the matter determined at a hearing'. Rule 26, which permits the disposal of a petition swiftly and cheaply on written representations if the chancellor is satisfied that it is expedient to do so (which I was), can only be implemented if the parties have agreed in writing to such a course. This petition being formally unopposed, the only party is Mrs Brazil, and in the absence of her written agreement a hearing became inevitable with the attendant costs and procedural formality for all concerned.
11. I sought to expedite the matter so that it might be resolved before Christmas but finding a convenient date proved elusive. On 1 December 2010, Mr Littlejohn, as chairman of the PCC, filed and served a letter making observations on Mrs Brazil's written representations. By letter dated 7 January 2011, Mr Castle wrote to the registry complaining, somewhat unfairly, that Mr Littlejohn's statement did not appear to take the matter forward. Again Mr Castle was under a misapprehension: he seemed to think that it was for the PCC to substantiate an objection whereas, in truth, the burden of proof lay on his own client to satisfy the consistory court that a faculty should be granted in her favour. Mr Castle was reminded of this by letter dated 11 January 2011 from the registrar, which included a question as to whether Mrs Brazil still wanted a court hearing. Mr Castle replied (by letter which clearly bears the wrong date of 7 January, being that of his original letter) confirming that Mrs Brazil wished to proceed with the determination of the petition.
12. The papers were referred to me at the end of January 2011 and I made further directions on 17 February 2011 requiring the hearing to be brought on as soon as possible. I ordered Mrs Brazil to pay £400 into court as security for part of the costs of the hearing and prescribed a timetable for the exchange of witness statements and documents. The security was duly given. On 10 March 2011 the petitioner's documentation was presented in the form of a witness statement from Mr Cox together with a bundle of appendices, and on 9 March 2011 that of the PCC in the form of Mr Littlejohn's letter and a paginated bundle of relevant correspondence. In the absence of any submissions on the law, I asked that the registry clerk supplied copies of a number of recent decisions on cases of this type so that they could be read and assimilated in advance.

The hearing

13. The hearing took place in the parish church. Prior to its commencement I had made an unaccompanied visit to the site of the grave of Mr Brazil so as to see it in context. Mrs Brazil was represented by Mr Castle. He called Mrs Brazil and Mr Cox as witnesses. I also heard evidence from Mr Littlejohn and from Charles Gordon-Seymour, one of the churchwardens. I did not require any of them to give evidence on oath as I had no reason to doubt their honesty and integrity.
14. The evidence of Mrs Brazil was highly unsatisfactory. This was through no fault on her part but resulted from a decision of Mr Castle to limit her evidence in chief to some

vague reference to a letter from Mr Rod Mason, a monumental mason, addressed to Mr Gordon-Seymour, being left in the church. Despite repeated suggestion and encouragement from me, Mr Castle steadfastly declined to adduce from Mrs Brazil any relevant evidence germane to the matters which I needed to determine. He was adamant that this was how he wished to run his client's case. I warned him that it might result in a meritorious petition being refused, but he was clear that he did not wish to put any more evidence before me. Had Mrs Brazil been a litigant in person I would have intervened to assist her, but (for the time being at least) I deferred to the tactical decision taken by her solicitor.

15. Mr Castle next called Mr Cox who adopted his written statement as his evidence in chief. Somewhat unfortunately, Mr Cox's evidence focussed on a dissection of the Churchyard Regulations in a spirited attempt to persuade the court that the proposal came within them and therefore the PCC was somehow at fault in not permitting the introduction of the headstone in the first place. At the third time of asking, I persuaded him that the role of the consistory court was to consider the merits of the petition before it, irrespective of the earlier assessment of the PCC. That the design might have been within the Regulations or nearly so was merely one of a constellation of factors which the court had to consider.
16. Mr Cox travelled well beyond his witness statement and informed the court that a rearing or prancing horse is a well known heraldic device. He pointed out that it appears on the crest of Kent County Council. But he singularly failed to persuade me that a prancing horse, or even a pair of them, constituted a 'crest'. He did not persist in his suggestion that it constituted an 'emblem'.
17. By reference to the decision of Petchey Ch in *Re St Luke, Whyteleafe* (3 March 2011, Southwark Consistory Court, unreported) Mr Cox made some general observations as to how a headstone should blend with its environs and other funerary structures close by. I do not think that any of these observations were contentious.
18. In answer to questions from me, he opined that it had been 'imprudent' of Mrs Brazil to have the headstone cut and inscribed before a faculty had been granted. He did not dissent from my use of the term 'presumptuous'. He told me that he had arranged for the photograph of the headstone (Appendix 3 to his statement) to be taken in the stonemason's yard and that this had happened in the last couple of weeks as he was in the process of completing his statement. Mr Cox also indicated that the lower two lines of the inscription could be removed with relative ease and, if desired, re-cut in a lower position on the stone. He stated that Mrs Brazil would be prepared to proceed on that basis but her preferred option would be to leave the words as they are.
19. Mr Cox indicated that he had been led to understand that the headstone was cut and inscribed by the stonemason after a telephone call authorising him to do so. The suggestion was that it was Mr Gordon-Seymour who had made the call. He conceded that he had no evidence of this, and that it was entirely hearsay. He further accepted that in all the documentation he had seen emanating from the PCC, the parish priest and the churchwarden he had seen nothing which signified consent or approval of the design: indeed the contrary, it showed clear, consistent and unwavering opposition.

20. Mr Littlejohn was afforded the opportunity of questioning both Mrs Brazil and Mr Cox but, wisely in my view, declined to do so.
21. I then invited Mr Castle to seek leave to recall Mrs Brazil. He refused. I adjourned for a few minutes suggesting, as I rose, that Mr Castle might care to reflect on the manner in which he was advancing his client's case. Following the adjournment, Mr Castle sought my leave which I readily gave.
22. Mr Castle asked a few questions from which I learned that at first Mrs Brazil had wanted a polished marble headstone but had been told by the stonemason that it had to have a matt finish. She spoke in a very confused way about correspondence with the diocese. She said that horses had meant a lot to her late husband, hence their inclusion, but that the inscription mattered much less. It had only been added because the stonemason suggested that the headstone looked incomplete without it. Mr Brazil loved horses, as did his family. They were gypsies and had been raised with horses. It was part of their tradition. They believed in the sanctity and lifelong commitment of marriage although they were not churchgoers.
23. At this point, Mr Castle concluded his questioning. I decided to take the unusual step of intervening. I sensed that there was relevant material that had not been adduced and I was not prepared to allow a petitioner to be prejudiced in the presentation of her case by any failing, oversight or tactical error on the part of her solicitor.
24. I asked Mrs Brazil about her background. She told me that she and her late husband hailed from the Guildford area but had been based in or around Bolney for some 35 years. There were three children of the marriage, all still based in the area. Although none was present for the hearing, they were all supportive of the petition. Mr Brazil had kept and sold horses. He rode them and drove them. They were his passion and his business. He had a horse and cart for carrying logs.
25. I pressed her as to why she had decided to seek a headstone for her husband in 2009, nearly five years after he had died. Mrs Brazil, became very emotional. Through her tears, she said if I wanted to know the truth she would tell me. With that came a cascade of testimony, which was moving, cogent and persuasive. She spoke how, having been from a travelling community she had settled in a permanent home but had been forced to abandon it in consequence of a road widening scheme. She could no longer live in the home they had shared. She had to burn all her husband's clothes; it is not their custom to give away the clothes of the deceased. It took quite some time and only when that was complete did she sense her late husband's passing, and thus did not feel the need for a headstone. Until then she felt he was still with her. Her beliefs, she said, were different from those of other people.
26. Mrs Brazil felt she had never been accepted in Bolney. People had told her that she would not be welcomed and she never came to feel welcome or accepted, despite her children growing up in the area and attending the local school and, on occasions, the church. Her children decided that Mr Brazil should be buried in Bolney and made the arrangements. She would rather he had been taken back to Guildford and buried there. I

sensed a genuine regret that she had acceded to her children's wishes and this – in large measure – animated her wish to erect a headstone and to choose a design which was redolent of her husband's passion during his life. What she wanted was the inclusion of some representation of horses: she was not concerned about the inscription which she was perfectly happy to have removed.

27. Mrs Brazil was under the impression that the stonemason, Mr Rod Mason, had sought and obtained from Mr Gordon-Seymour permission to erect the headstone and relying on that had sourced the stone and had it cut. Mr Castle did not call Mr Mason to give evidence nor did he produce any documentation to support this contention. As I have already mentioned, Mr Cox very fairly conceded that there was nothing in the paperwork suggestive of any consent or even encouragement from Mr Gordon-Seymour or anyone else on behalf of the PCC.
28. Mr Littlejohn gave evidence as a judge's witness, pursuant to rule 25 of the Faculty Jurisdiction Rules 2000. He spoke with dignity, compassion and restraint. He said that his instinct is to help the bereaved as much as is possible. The PCC considered the application from Mrs Brazil, and his instinct, as chairman, was to say yes. However the PCC had to discharge its functions responsibly. The design was considered under paragraph 6.12 of the Chancellor's General Directions. He felt that the design was too radical, and too much of a discontinuity. It was not of an emblem, crest or badge (as envisaged by the Regulations) although he accepted he had none of the knowledge of heraldry which Mr Cox had drawn on in his evidence.
29. More particularly, he indicated that there had been several written applications on different forms but the particular one considered by the PCC at its meeting (exhibited at page 18 to his bundle of papers) included a very crude drawing. I respectfully agree. The sketch is not attractive and the two creatures on either side resemble, to my eye at least, badly drawn piglets. Mr Littlejohn was less pejorative, but his concern was that the finished work would show an equal lack of artistic merit and would be singularly inappropriate in the churchyard.
30. Mr Littlejohn also noted that the inscription ("Forever in Our Thoughts – Always in Our Hearts") did not sit happily with paragraph 6.13 of the Directions which say that the wording should interest and inspire the reader and be reverent and seemly avoiding the bland. He felt, and the PCC concurred, that they could not be confident that the proposed headstone met these criteria. He was mindful that he and the PCC are stewards of the churchyard and not owners. They try to be careful to act within the law and the practice of the diocese.
31. Mr Littlejohn was careful not to speak on behalf of the churchwardens or the PCC as a whole but he noted that both churchwardens and a good many PCC members were present for the hearing. I indicated that they would doubtless indicate if they dissented from any opinion he expressed. He told the court that his personal view was that he would be happy for the headstone to be erected. Having heard the evidence of Mrs Brazil and seen the photograph of the headstone for the first time he thought it appropriate, although he was less happy about the inscription. He would prefer something with a more overtly Christian message, or perhaps nothing at all. I sensed no

unease from the body of the church from these utterances and gained the impression that Mr Littlejohn was expressing an opinion held by all who had been present to hear the latter part of Mrs Brazil's testimony and who had seen the photograph of the proposed headstone.

32. I next heard from Mr Gordon-Seymour. I exercised my discretion to do so since a serious allegation had been made concerning him and justice required that he be given the chance to answer it. He was adamant that at no time had he informed Mr Rod Mason that he (or indeed the PCC) was agreeable to the proposed design. Everything he said and wrote went the other way. I have no hesitation in accepting Mr Gordon-Seymour's evidence. He struck me as a careful and particular individual who undertook his responsibilities diligently and accurately. I am pleased to record that in his closing submissions, Mr Castle expressly withdrew the criticism of Mr Gordon-Seymour. In my judgment he was entirely right so to do.
33. Mr Gordon-Seymour made the point that had the photograph of the proposed headstone (apparently taken on 20 November 2009) been made available to the PCC, it might well have taken a different view. He pointed me to an email (dated 10 August 2009, at page 15 of the PCC's bundle) in which he tried to elicit more details of the proposed design. This was chased by a further email of 7 September 2009. There is a slightly better sketch of the prancing horses amongst the papers, but it is regrettable that the PCC was not informed at an earlier stage that the headstone had already been fabricated. If the date on the photograph is accurate (and I am reluctant to speculate too much) the strong likelihood is that the stone had been cut prior to the PCC meeting on 18 November 2009. I find it hard to believe that the headstone came into being in the 48 hours immediately before the photograph was taken.

Adjudication

34. So after that over-lengthy recitation of the troubled procedural history and of the evidence placed before the court during the hearing, I come to consider the merits of the petition. First, since it formed such a large part of Mr Cox's evidence both in writing and during the hearing, I must consider whether the proposed headstone complied with the General Directions. In my judgment it did not for precisely the reasons advanced by Mr Littlejohn in his evidence. I further note that Mr Gordon-Seymour's email to Mr Rod Mason of 19 November 2009 makes express reference to paragraphs 6.2, 6.10, 6.11 and 6.13 of the General Directions as well as paragraph (v) of Appendix D. The suggestion that Mrs Brazil was in some way disadvantaged by not knowing the basis upon which the PCC declined to consent to the introduction of the memorial is without foundation. The further suggestion that the opinion of the DAC somehow brought the proposal within the terms of the Regulations is equally flawed and, in the course of his evidence, Mr Cox properly abandoned this contention. Clearly there is a degree of subjectivity in making evaluative assessments of proposals, however the approach of this parish priest and PCC was exemplary and can serve as a paradigm for others in the diocese. Where there is dubiety, the proper course is to err on the side of caution and decline to permit the headstone whilst, at the same time, informing the applicant of the right to petition for a faculty, as happened here. The reverse approach of being overgenerous in the interpretation of the Regulations might expose the priest and PCC to costly remedial

sanctions as happened in the unfortunate case of *Re Icklesham Churchyard* (25 October 2007, Chichester Consistory Court, unreported).

35. But even if (contrary to my finding) this proposal had come within the scope of the Regulations that would not have given Mrs Brazil any right to introduce the headstone. The parish priest's discretion is unfettered. A faculty would still be required which would be determined on its merits. What view should the court take of the fact that Mrs Brazil appears to have commissioned the fabrication of the headstone prior to obtaining a faculty? Mr Cox applied the term 'imprudent' to this occurrence but, rightly in my judgment, suggested that it was not undertaken in open defiance of the authority of the court because she did not proceed to have it installed.
36. The Dean of the Arches dealt with this matter in a reasoned determination refusing permission to appeal the decision of Bursell Ch in *Re St Michael's and All Angels, Sandhurst Churchyard* (17 March 2009, Oxford Consistory Court, unreported). The Dean considered that the chancellor, at first instance, may have put the matter too highly when he stated that the fact that the memorial had already been made cannot enter into the exercise of his discretion whether to grant a faculty. The Dean noted that in secular planning law the fact that unauthorised development has taken place can be taken into account in certain circumstances, sometimes in favour of, and sometimes against, granting planning permission and he referred to *South Buckinghamshire DC v Porter (No 2)* [2004] UKHL 33 at paras 45-57: see *Re St Michael's and All Angels, Sandhurst Churchyard* (31 May 2010, Arches Court of Canterbury, refusal of permission to appeal, unreported).
37. In this instance, perhaps unusually, the prior fabrication of the disputed headstone has been advantageous in that it has allowed both the court and representatives of the parish to see with better clarity exactly what is proposed. It is regrettable that the photograph was not made available to the parish priest and PCC at an earlier stage, and that Mr Mason declined the repeated invitation of Mr Gordon-Seymour to supply details of the proposal with greater specificity in advance of the PCC's consideration of the matter.

Conclusion

38. Despite the heroic attempt of Mr Cox to convince the court that the proposal fell within the Regulations, I am satisfied that it did not. The decision of the PCC cannot be criticised. On the contrary, the PCC is to be commended for the thorough and sensitive manner in which it dealt with the application and communicated its decision. That being so, the single issue for the court is whether in the exercise of its discretion it should permit the introduction of the headstone, either in the form set out in the petition, or with the excision of the inscription with which Mrs Brazil indicated in evidence she would be content. The discretion of this court is unfettered by the Regulations whose purpose is solely to define the scope and extent of the delegated authority vested in incumbents and priests-in-charge.
39. I have come to the clear conclusion, based on the evidence I have heard and read, that a faculty should be granted in this instance. I have particular regard to the following:
 - i. in her sincere and moving oral testimony, Mrs Brazil persuaded me of the meaning for her of the design and its resonance with the life of her late husband. These were

- sound and compelling pastoral considerations which, unfortunately, had not emerged at an earlier stage in the process;
- ii. in terms of dimension and material, the proposed headstone conforms with the Regulations and is in keeping with others in the immediate vicinity;
 - iii. the design, in its finished form, is more attractive than the rough sketches suggested and, in my judgment, would constitute an appropriate memorial, complementing those around it yet remaining suitably individualistic;
 - iv. the design, though not complying with the Regulations, nonetheless has the express support of Mr Littlejohn and Mr Gordon-Seymour and I feel confident that I can infer that it now has (or would have) a similar measure of support from Mr Gordon-Seymour's fellow churchwarden and from the PCC as a whole. This is not the case of a garish headstone being foisted upon an unwilling PCC;
 - v. the design equally has the support of the DAC, whose aesthetic, artistic and pastoral judgment carries considerable weight in this court.
40. I will therefore order that a faculty pass the seal on the following conditions, none of which I consider contentious:
- i. that the following words 'Forever in Our Thoughts – Always in Our Hearts' (which for convenience I have referred to in this judgment as 'the inscription' in contradistinction to other descriptive wording on the headstone) be removed. Mrs Brazil informed the court that she was content with this and Mr Cox assured the court that the lettering could be excised with relative ease. This section of the headstone is to be left blank. Mrs Brazil is to be at liberty, should she so wish, to cause an alternative inscription to be added with a Christian message provided the same is approved in writing by Mr Littlejohn in advance of the installation or by further order of the court. I anticipate that Mrs Brazil will be content for the stone to be otherwise blank as had been her original intention;
 - ii. prior to the installation of the headstone, Mrs Brazil is to remove all artificial foliage from the grave and is not to re-introduce any other artificial plants, flowers or shrubs. This is to ensure compliance with diocesan and parochial policies and represents parity of treatment with those who tend other graves in the cemetery;
 - iii. the headstone is not to be installed until the order for costs at paragraph 41 herein has been satisfied in full.

Costs

41. In all faculty petitions the costs fall to be borne by the petitioner unless unreasonable conduct can be demonstrated by another party to the proceedings. Here there is no other party, the petition being formally unopposed. Additional costs were incurred in convening a hearing but this was necessitated solely because Mrs Brazil through her solicitor insisted on one. It is arguable that the compelling evidence of Mrs Brazil would not have emerged but for the hearing in open court, although I cannot help thinking that a properly prepared witness statement would have covered these matters. The payment of £400 by way of security for costs will go some way towards defraying the court costs and correspondence fees of the registry. The total amount due will be calculated by the registry and an invoice sent to Mrs Brazil for the balance. It will be apparent from the tone and content of this judgment that I do not consider that Mrs Brazil has been well served either by Mr Castle or by Mr Cox and I trust that they will consider my conclusions in deciding what, if any, professional fees they charge in this matter.

42. In concluding the hearing, I referred to an experience of catharsis emerging as I heard from the witnesses, particularly Mrs Brazil and Mr Littlejohn. I trust that this judgment brings matters to a conclusion and that Mrs Brazil may now be left to mourn her late husband in peaceful dignity.

The Worshipful Mark Hill QC
Chancellor

22 March 2011