

## In the matter of St Margaret, Rottingdean (No. 2)

### Judgment

1. This case concerns two headstones which were removed from the churchyard of St Margaret of Antioch, Rottingdean in June of last year in order to protect them from possible damage or destruction arising out of activities linked to the Black Lives Matter movement. The removal was sanctioned by an interim faculty issued on 15 June 2020, the reasons for which are set out in my earlier judgment: *Re St Margaret, Rottingdean (No. 1)* [2020] ECC Chi 4.
2. The Petitioners are the vicar and churchwardens of the parish. The Archdeacon of Brighton and Lewes has been joined as an Additional Party, as have the heirs-at-law of those memorialised by each headstone. On 30 October 2020, an anonymity order was made preventing disclosure of the identity of any of the heirs-at-law. That order remains in force.
3. The inscriptions include a derogatory racist expression likely to cause offence. One correspondent has asserted that the term in question is not racist, or at least not in the context in which it was originally used: see paragraph 45 below. However, I find that it clearly is, and accordingly the use of that term within this judgment has been kept to a minimum.

#### **Petition**

4. In their petition of 7 December 2020, the Petitioners seek a faculty, broadly summarised as follows:
  - (a) confirming the temporary removal of the headstones in accordance with the interim faculty (and their boarding up which had been authorised by a separate interim faculty a few days earlier);
  - (b) authorising the recutting of the inscription on each headstone such that the offending term is substituted with the expression ‘Music Hall Artiste’;
  - (c) authorising the addition on one of the headstones of a further inscription comprising the details of another family member whose cremated remains are interred in the grave; and
  - (d) permitting the re-introduction of the headstones into the churchyard in the positions they previously occupied.

#### **Background**

5. The village of Rottingdean lies on the Sussex coast within the City of Brighton and Hove. The parish church of St Margaret of Antioch is situated within the Rottingdean Conservation Area and is listed grade II\*. Its Norman nave, tower and chancel date from c1200, and are constructed in flint with stone dressings. The south aisle of 1856 is by Sir George Gilbert Scott, who carried out a restoration of the church as a whole at that date. It

contains particularly fine stained glass, including some designed by Sir Edward Burne-Jones and executed by William Morris.

6. The churchyard is extensive, spreading down the slopes of the hill on which the church is sited. It has been enlarged on a number of occasions and remains open to burials. The churchyard is divided into separate spaces by flint walls with brick dressings, which are grade II listed, as is the lych gate, built in 1897. Several table tombs, including six from the 18th and 19th centuries are also separately listed grade II. Amongst the better known individuals buried in the churchyard are Sir Edward Burne Jones (artist), William Black (novelist), Angela Thirkell (novelist), Enid Bagnold (journalist and author of *National Velvet*), and Gary Moore (rock guitarist with Thin Lizzy).
7. The two headstones, which are the subject matter of these proceedings were both erected in 1963 and were carved by Joseph Cribb (1892-1967) at the Guild of St Dominic and St Joseph in Ditchling, some 8 miles inland of Rottingdean. They were erected over two adjacent graves and bear the following inscriptions (reproduced in full including the derogatory term).

<p>The last curtain call for G H ELLIOTT The Chocolate Coloured Coon who passed peacefully away 19 December 1962 Dearly loved R.I.P</p>	<p>ALICE BANFORD Originally known as LAL CLIFF Coon Singer and Dancer 1884-1962  And her beloved Husband HARRY BANFORD Music Hall Artiste 1883-1973</p>
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8. The headstone of GH Elliott was designed by his widow, Florence May Elliott, and features a proscenium arch with the stage curtains drawn apart. That of Alice Banford is surmounted with scrolls and an open book inscribed: 'All the world is a stage and I one of its players'. A photograph of each headstone appears as an annexe to this judgment. Mrs Elliott died in 1996, and her cremated remains were interred in her husband's grave. The heir-at-law wishes an additional inscription for Mrs Elliott to be included when the headstone is re-cut. There is uncontroversial.

**GH Elliott**

9. George Henry Elliott was born in Rochdale on 3 November 1882. He and his family emigrated to the United States when he was four, where he played various juvenile parts. As a member of the *Primrose West Minstrels* he first blacked up to perform at the age of nine. He returned to Britain in 1901, where he continued to perform on the music hall stage, making his London debut on 10 March 1902 at Sadler's Wells Theatre. He was influenced by Eugene Stratton, who also used to black up, and he sang some of Stratton's songs, particularly *Lily of Laguna*. He made several appearances in television variety shows and was the subject of *This*

*Is Your Life* in 1957. Elliott appeared in three Royal Variety Performances, and made over 100 records. His home in Rottingdean was called *Silvery Moon*, after one of his well-known songs. His first wife was a fellow music hall star who performed as Miss Emilie Hayes. He later married Florence May Street, a celebrated acrobat who performed as 'June' in the Sereno and June Trio.

10. Elliott's stage name was the Chocolate Coloured C\*\*n, and this is how he was billed at variety theatres throughout Great Britain. He performed with a painted brown face and dressed entirely in white: white top hat, white tail-coat which came down well below the knees, white gloves, white tie or cravat, white trousers, white shoes and white cane.

### **Alice Banford**

11. Less is known of Alice Banford. She was invariably billed as a singer and dancer and is only reported to have performed blackface on one occasion in 1914. It may be that the wording for her inscription arose from perceived similarities with Elliott. Their deaths were a few weeks apart and the headstones were fabricated and installed at about the same time.

### **Local unease**

12. The Petitioners helpfully provided a detailed covering letter dealing with matters concerning these graves. This indicates that local concern was first expressed in April 2019 in an email from someone living nearby, to whom I shall refer as 'the complainant' to avoid disclosing their identity. The email states that the complainant's daughter had been visiting the churchyard and read the inscription on Elliott's grave. It continues:

I grew up in England in the 70s and 80s at a time when the word [c\*\*n] was offensive and was used against people like me with Caribbean heritage. Today it is still offensive. I note the grave dates from 1962 ... and relates to a performer who 'blacked up' but that hardly makes the appearance of the word [c\*\*n] on the headstone acceptable, especially today. Please may I have your comments? Is this the first complaint you have had?

13. A further email from the complainant observed that the wording on the headstone might constitute an offence under the Public Order Act 1986, section 5(1) of which reads:

A person is guilty of an offence if he—

- (a) uses threatening or abusive words or behaviour, or disorderly behaviour, or
- (b) displays any writing, sign or other visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

14. This correspondence led to a lengthy period of dialogue involving the vicar, the Parochial Church Council (PCC) and the complainant. It was ultimately agreed that the complainant would petition the Consistory Court for a faculty to have the headstones altered by the removal of the offending word. For reasons that are not explained, the PCC did not feel it could initiate proceedings by issuing a petition itself, but was willing to express its support.

15. However, no petition was issued. It would appear that the complainant was not prepared to pay the faculty fee, nor did they feel, on reflection, that they should be responsible for initiating a court process when not at fault. With hindsight, it might have been wise at this stage for the complainant or the PCC to have put the matter before the Court seeking directions within intended proceedings. Regrettably, an opportunity was lost to address and resolve the matter in advance of the febrile events which were to follow.

## **Black Lives Matter**

16. During the weekend of 6/7 June 2020 public protests animated by the Black Lives Matter movement led to the toppling of a statue of slave-trader Edward Colston in Bristol, and its deposit in the harbour. This attracted widespread coverage in mainstream and social media leading to rallies being held or threatened in other locations, including Brighton. On 11 June 2020, the vicar was alerted to online posts by the People's Republic of Brighton and Hove agitating for the forceful removal of the headstones.
17. As tensions were running high, both nationally and locally, the parish sought from the Court, and was granted, an interim faculty to board up the headstones for their protection, and, shortly thereafter, the further interim faculty permitting their removal for safe keeping. As I stated at paragraph 10 of my judgment at the time: 'The emergency faculty which I authorised this afternoon is a temporary expedient': *Re St Margaret, Rottingdean (No. 1)*. I directed the Petitioners to come forward with a petition seeking a permanent resolution, hence the current proceedings.
18. The temporary removal of the headstones attracted local press coverage critical of the church for yielding to pressure from the politically correct and supporting a 'cancel culture'. On 20 June 2020, the Pie and Mash Squad, a far right group affiliated to the English Defence League, targeted the church exterior with stickers bearing union flags and images of men in black balaclavas pointing guns. The vicar was subjected to abusive emails and telephone calls over several weeks. The majority of the views expressed were critical of the church for removing the headstones.
19. In a separate incident shortly afterwards at St Mary, Henbury, in the Diocese of Bristol, memorials to Scipio Africanus (1702-1720) were vandalised. Written in chalk at the site was the following, suggestive of a causative link with the temporary removal of one of the headstones in Rottingdean:

Now look what you have made me do. Stop protesting. Leav [*sic*] Elliott's grave alone. Put Colston's statue back.

Scipio Africanus was born to unknown parents from West Africa and named after the Roman general who defeated Hanibal. He was the slave of Charles William Howard, 7th Earl of Suffolk, who lived in the Great House in Henbury. These, and other, events have led to a national debate on contested heritage, including very recently proposals from the Secretary of State for Housing, Communities and Local Government for *New Legal Protection for England's Heritage*.<sup>1</sup>

## **Contested heritage**

20. The term contested heritage is a somewhat euphemistic expression applied to memorials and other structures associated with individuals from the past whose conduct is considered abhorrent and inimical to contemporary values and, of particular relevance in faculty cases, to Christian theology and standards of behaviour. Most commonly, the issue arises from property memorialising slave traders or erected on the profits of slave trading.

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<sup>1</sup> [https://www.gov.uk/government/news/new-legal-protection-for-england-s-heritage?utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_source=4fcdecaa-8183-40b0-bd8e-fc30e3b72a65&utm\\_content=daily](https://www.gov.uk/government/news/new-legal-protection-for-england-s-heritage?utm_medium=email&utm_campaign=govuk-notifications&utm_source=4fcdecaa-8183-40b0-bd8e-fc30e3b72a65&utm_content=daily)

21. Historic England is developing a policy with regard to contested heritage, and has produced a *Checklist to Help Local Authorities Deal With Contested Heritage Listed Building Decisions* (Updated 3 December 2020).<sup>2</sup> Its website records the following:

We believe the best way to approach statues and sites which have become contested is not to remove them but to provide thoughtful, long-lasting and powerful reinterpretation, which keeps the structure's physical context but can add new layers of meaning, allowing us all to develop a deeper understanding of our often difficult past.<sup>3</sup>

22. The Cathedral and Church Buildings Division of the Archbishops' Council is also in the process of drawing up its own guidance. I have seen a copy of an early draft as part of a consultation exercise with various stakeholders. It would be improper to quote from a draft document disclosed in confidence; but it would be ungracious not to acknowledge the assistance I have derived from its content in thinking through these complex issues. I therefore propose to set out a general approach to cases of contested heritage in the hope it may assist others, rather like a shipwreck serves as an aid to navigation for more proficient mariners when negotiating uncharted waters.

23. Where questions arise as to the compatibility of a memorial with Christian teaching and doctrine, working through the following questions may help to identify the nature and complexity of the issue and the practical outcomes which are likely to be acceptable to the community at large.

- (1) Who is the legal owner of the memorial?
- (2) What, if anything, does the owner want to happen to it?
- (3) What is the heritage significance of the memorial?
- (4) What is the justification for any change?
- (5) What are the options? For example: (a) do nothing; (b) interpretation and contextualisation; (c) addition or alteration; (d) relocation; (e) removal to storage; (f) disposal to a third party; and (g) destruction.
- (6) Which is the most appropriate option in this instance?
- (7) What are the reasons for the decision at (6)?
- (8) Will a faculty or other authority be required?
- (9) Is the threshold test in *Duffield* likely to be satisfied such that a faculty may be granted by the Chancellor? If not, then a different option may need to be considered.

#### *Legal ownership*

24. The public generally regard the Church of England as a single entity. It is not. As Lord Hope of Craighead stated in the House of Lords' decision of *Wallbank v PCC of Aston Cantlow* [2003] UKHL 37: 'The Church of England as a whole has no legal status or personality' (para 61). Churchyards are in the legal ownership of the incumbent (parish priest); although the responsibility for their maintenance rests with the PCC. There is no over-arching person or body that can direct the removal or alteration of offending memorials. Permissions must be obtained from the appropriate authority which, in the case of parish churches, comes in the form of a faculty from the Consistory Court of the Diocese in question. Parochial clergy cannot authorise the removal of, or alteration to, headstones, nor can they be directed to do so by their ecclesiastical superiors.

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<sup>2</sup> <https://historicengland.org.uk/advice/planning/planning-system/contested-heritage-listed-building-decisions/>

<sup>3</sup> <https://historicengland.org.uk/whats-new/statements/contested-heritage/>

25. Headstones, however, are not treated as part of the churchyard. As a matter of law, they belong, at first, to the individual who commissioned and paid for them (during their lifetime), and thereafter to the heir-at-law of the person (or persons) commemorated. The legal position is now to be found in section 66 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 which reads as follows.

**66 Monuments**

- (1) The consistory court of a diocese may grant a faculty for the moving, demolition, alteration or carrying out of other work to a monument erected in or on, or on the curtilage of, a church or other consecrated building or on consecrated ground, even if the owner of the monument—
  - (a) withholds consent to the faculty, or
  - (b) cannot be found after reasonable efforts to find him or her have been made.
- (2) The monuments in relation to which a power to grant a faculty under this section is exercisable include a monument erected under or affected by a faculty, whenever granted.
- (3) If the court is satisfied that the matter is of such urgency that it would not be reasonable to require the petitioner to seek the consent of the owner of the monument or to take the steps referred to in subsection (1)(b), it may grant the faculty (even though the consent has not been obtained and those steps have not been taken).
- (4) “Monument” includes a tomb, gravestone or other memorial, and any kerb or setting forming part of it; and a reference to a monument includes a reference to a monument erected after the passing of this Measure.
- (5) “Owner”, in relation to a monument, means—
  - (a) the person who erected the monument, or
  - (b) after that person's death, the heir or heirs at law of the person or persons in whose memory the monument was erected.

[Sub-sections (6), (7) and (8) are not relevant to the current proceedings]

26. It can be a time-consuming and laborious process to track down the heir-at-law, which is not the same as next-of-kin. In this instance, the heirs-at-law were unknown at the time the interim faculty was granted. However, due to urgency of the situation, section 66(3) empowered the Court to act notwithstanding the inability to identify or contact them.

*Justification for change*

27. The *Duffield* framework, to which I will return, provides guidelines for determining faculty petitions relating to changes to listed churches which weigh the harm to the significance of the building against the justification for the proposed change: *Re St Alkmund, Duffield* [2013] Fam 158. The balancing exercise is expressed as follows at paragraph 87:

Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building [...], will any resulting public benefit (including matters such as liturgical freedom, pastoral well-being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm?

28. It is the section in parenthesis that is of most importance. It lists examples of possible justifications for change. It is clearly intended to be non-exhaustive, as it starts with the word ‘including’. It may be that there are certain objects in churches, such as memorials or their inscriptions, which are so closely associated with slavery or other forms of oppression and marginalisation of people on the basis of race or otherwise, as to be theologically unacceptable to the Christian faith. This will be a question of fact and degree in each case. But in every instance the burden of proof will be on the proponents of change.

### *Options*

29. Removal or alteration are not the only options where contested heritage is concerned. One option is to do nothing, but it should be a positive decision to leave matters as they stand, reached after discussion and consideration, rather than the outfall of inertia and non-engagement. Other options include interpretation, contextualisation or the addition of explanatory text. Alternatively, an item could be altered in some way or relocated to a different position in the building. Removal to storage, disposal to a third party, or destruction are more extreme options for which the justification must be stronger.
30. Any discussion of changes to contested heritage ought to begin with the least invasive option and progressively move through the more interventionist alternatives in sequence. Ideally, the object in question should be retained and explained through interpretation, dissociating the current custodians of the item from the attitudes prevalent at the time of its introduction. A rush to remove an offending object risks creating sterility and an airbrushing of history. We need to be honest about past wrongs. None of us is without fault. Ours is a fallen world in which sinners are continually called to repentance. The risk in rewriting our history, is that lessons from the past may be forgotten.

### **The considerations in this case**

31. The vicar and PCC have carefully worked through the necessary considerations. They set about locating the heirs-at-law and establishing their wishes. They investigated the lives of Elliott and Banford producing a biographical narrative upon which I have relied. They considered the heritage value of the two headstones and reflected on the various options which were open to them. Applying the framework commended at paragraph 23 above, the situation can be summarised as follows.

#### *(1) Who are the legal owners?*

32. After extensive research, the respective heirs-at-law were located and genealogical documentation was lodged at the registry. I was satisfied on the evidence submitted by the Petitioners as to the identity of the heirs-at-law and by order dated 30 October 2020, I directed that they be joined as Additional Parties. Understandably, the heirs-at-law did not want their identity or whereabouts disclosed to the public and the Court made an anonymity direction, preventing them from being identified. The papers circulated for consultation were redacted to ensure that anonymity was maintained.

#### *(2) What do the owners want to happen?*

33. The views of the heirs-at-law have been canvassed. At least one acknowledged some concern about the wording of the inscription even before the matter was raised by the complainant. The heirs-at-law have all signified their agreement to what is now proposed.

#### *(3) What is the heritage significance of the headstones?*

34. These are well designed and attractively cut headstones which have a pleasing weathered patina. They fit well with their surroundings and contribute to the overall aesthetic of the churchyard setting of this listed parish church. But they have no intrinsic heritage significance in their own right. The Church Buildings Council (paragraph 47 below) remarks that they are, 'not without merit as examples of letter cutting [but] overall of low artistic significance'.

*(4) What is the justification for any change?*

35. The inscription on each headstone includes the word c\*\*n. Although, in context, this is a reference to blackface variety artistes which was in common parlance during the lifetime of Elliott and Banford, referring to their stage personas, the word is derogatory and racist. It evokes degrading stereotypes of people of African heritage. It is likely to cause distress to those visiting churchyard, and there is evidence that it has actually caused offence on at least one occasion. Although the headstones are private property, they are on public view in a Church of England burial ground that remains in use. The racist term offends Christian principles of inclusiveness, equality and acceptance. Those of a younger generation are unlikely to be aware of the music hall context from which the term derives. And since memorials can only be introduced into a churchyard with permission (either the delegated authority of parochial clergy or a faculty from the chancellor), the presence of the term could be seen as being implicitly condoned or approved by church authorities, past and present.

*(5) What are the options?*

36. The PCC's consideration embraced the options outlined at paragraph 23(5) above, as foreshadowed in paragraph 10 of *Re St Margaret, Rottingdean (No. 1)*. The PCC rejected reinstating the headstones unaltered. The problem would remain of ongoing campaigning for intervention. The derogatory term would continue to have the potential to cause offence and distress to visitors. The PCC also rejected reinstating the headstones but with 'a layer of historical interpretation' including some form of 'content warning' at the entrance to the churchyard and/or in the vicinity of the headstones. They point to the way in which museums add explanatory text to exhibits thereby placing offensive terminology in its historic context. However, they observe, correctly, that unlike a museum or exhibition, a churchyard is a place of prayer, reflection and contemplation. Many visitors will be tending other graves and may not be emotionally prepared to encounter historical controversies. Interpretative panels and content warnings may also serve to draw attention to the headstones, which mark the final resting place of private individuals. This may serve as an allurement to those intent on vandalism or worse.
37. The PCC rejected the replacement of the headstones with new ones. Whilst this would preserve the historic integrity of the originals, it would separate them from the graves for which they were created and consign them to museum pieces, or simply scrap. In addition, two modern and unweathered headstones would look out of place and unsightly amongst the others in this part of the churchyard.

*(6) Which is the most appropriate option?*

38. The PCC concluded that refacing and recutting the existing lettering to replace the derogatory term would remove the cause of offence with the least possible damage to the integrity of the headstone. The heirs-at-law, who are the owners of the headstones, consent to this.

*(7) Reasons*

39. I have incorporated the PCC's reasoning into my summary of the options. There may be occasions where the Court disagrees with the approach and reasoning of a PCC, but in this instance, I find myself in full agreement with its clear and considered conclusion, justified with careful and compelling reasons.

(8) *Will a faculty or other authority be required?*

40. It was recognised when the interim faculty was granted that a faculty would be required, confirmatory as to the temporary removal, and prospective as to a long-term solution. No other permissions are required in this instance.

(9) *Is the threshold test in Duffield likely to be satisfied such that a faculty may be granted?*

41. The Petitioners and heirs-at-law seem to be tolerably confident that a faculty will be granted, and they have cause to be. The petition and accompanying paperwork have been painstakingly prepared. However, petitions are subject to public notice and consultation; and the Court is constrained by procedural and substantive law to scrutinise the matter with rigour in determining whether or not to grant a faculty.

### **Churchyard Regulations**

42. The *Churchyard Regulations* for the Diocese of Chichester (Issue 5, April 2020) state that

A headstone is a public statement about the person who is being commemorated. Making the right choice of stone, design and inscription is important not only to the relatives or friends who are going to provide the memorial, but also to the wider community because of the effect which the headstone may have upon the appearance of the churchyard. [...]

Also to be encouraged are fulsome inscriptions which give a flavour of the life of the person commemorated rather than blandly recording a name and dates. Epitaphs should honour the dead, comfort the living and inform posterity. They will be read long after the bereaved have themselves passed away.

43. It has been repeatedly observed, a recent example being *Re St Mary, Woodkirk* [2020] ECC Lee 3, at paragraph 13(iv), that:

... clergy should be astute to refuse the inclusion of words or phrases [in inscriptions] which have the potential to offend Christian doctrine or teaching.

44. Both the *Churchyard Regulations* and the *Woodkirk* judgment post-date the introduction of these headstones by more than half a century, but what is said is no more than a re-articulation of long-standing practice. Inscriptions should be descriptive and uplifting, and not offensive. I cannot conceive of any parish priest considering the term appropriate for a new headstone today. There are some who may think that it ought not to have been considered acceptable in 1963 when the headstones were introduced.

### **Public notice**

45. Public notice of the proposal was given in accordance with Part 6 of the Faculty Jurisdiction Rules 2015. No objections was received at the diocesan registry within the notice period. However, at the time of the temporary removal of the headstones, a retired priest wrote to the registry in the following terms:

Clearly the presence of racism in society is very wrong. Yet trying to re-write history on the basis of subjective thoughts of individuals in 2020 is no way to proceed forward. These headstones are not racist; they are a part of the rich tapestry that makes up the wonderful history of today's Church of England, and should be respected as such.

### **Diocesan Advisory Committee**

46. The Diocesan Advisory Committee was unlikely to be in a position to assist the Court in grappling with the issues raised in this petition which have a national dimension. Mindful that I had sought advice from the Church Buildings Council under r 9.7 of the Faculty

Jurisdiction Rules 2015, the DAC did not offer advice. This was entirely understandable and I am grateful to the DAC for the support and assistance they have given to the parish in recent months.

### **Church Buildings Council**

47. The Church Buildings Council's advice is contained in its letter of 25 January 2021. The substance of the Council's advice is as follows:

It is undisputed that the gravestones to Elliott and Banford contain wording that is now found unacceptable. The Council notes that the grave markers, which are not without merit as examples of letter cutting are overall of low artistic significance. The markers have significance as evidence of the use of racist language in everyday use in the 1960s. As such, the question is whether erasing the wording on the grave marker is erasing this historical evidence. [...]

The Council agrees that there is a need for change due to the offence the wording causes to visitors of the churchyard. [...]

The Council accepts that the case for alteration is well made and, on this occasion, does not object to the refacing and recutting of the grave markers. It also noted that the heirs-at-law wish to alter the wording. However, it must be acknowledged that the alteration of an entire inscription, regardless of its age, quality, or significance, can give the impression of 'erasing' history. The Council does not condone the erasing of history. It therefore advises that the markers are fully recorded photographically and documented before any changes are made.

### **Blackface performers and the C word**

48. There is very little in the Court papers about the precise meaning of the word c\*\*n. The online *Merriam Webster Dictionary* defines it as follows: 'offensive —used as an insulting and contemptuous term for a Black person'. Blackface is a form of theatrical makeup used in the music hall tradition predominantly by non-black performers to portray a caricature of black people. It may have origins in the mummers or folk traditions. The *Black and White Minstrel Show* featured in the BBC schedules until 1978, attracting some 20 million viewers at its peak, notwithstanding that the Campaign Against Racial Discrimination had lobbied for its withdrawal some ten years earlier. Comedian, actor, and anti-racism activist, Sir Lenny Henry, who appeared in the touring stage version, said he regretted his part in the show, which led to a profound 'wormhole of depression'.<sup>4</sup> Blackface characters were withdrawn from the annual Lewes bonfire in 2017, and in July 2020 the Joint Morris Organisation pledged to eliminate full-face black make up from all its groups of Morris dancers.

### **Applying the *Duffield* framework**

49. In determining any petition concerning proposed changes to a listed church, the Court is assisted by adopting the so-called *Duffield* framework. Paragraph 87 of *Re St Alkmund, Duffield* [2013] Fam 158, provides as follows:

- (1) Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?
- (2) If the answer to question (1) is "no", the ordinary presumption in faculty proceedings "in favour of things as they stand" is applicable, and can be rebutted more or less readily, depending on the particular nature of the proposals [...]

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<sup>4</sup> Carol Midgley, 'Lenny Henry on racism and regret', (2015) *The Times*, 6 June.  
<https://www.thetimes.co.uk/article/lenny-henry-on-racism-and-regret-673j707tckk>

- (3) If the answer to question (1) is “yes”, how serious would the harm be?
- (4) How clear and convincing is the justification for carrying out the proposals?
- (5) Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building (see *In re St Luke the Evangelist, Maidstone* [1995] Fam 1, 8), will any resulting public benefit (including matters such as liturgical freedom, pastoral well-being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm? In answering question (5), the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm is to a building which is listed Grade I or II\*, where serious harm should only exceptionally be allowed.

### *Harm*

50. In my assessment, altering the inscriptions on these two headstones will cause no harm to the significance of the church as a building of special architectural or historic interest. The churchyard provides the setting for this grade II\* listed church, but minor work on two of a large number of headstones will have the most negligible impact on the significance of the church. Even the permanent removal of the headstones would not cause such harm. The introduction of two brand new headstones might be visually unattractive, but the intention is to return the original headstones, already weathered, to their previous positions.
51. As to whether there would be harm to the headstones themselves, the Petitioners and heirs-at-law have consulted professional and reputable stonemasons, who have advised that the stones can be refaced and recut without compromising their integrity. This is particularly important in relation to the Elliott headstone due to the artistry in the proscenium stage and curtains.

### *Rebutting the presumption against change*

52. There being no harm, the issue for determination is whether the ordinary presumption against change is displaced. In my opinion it is for the following reasons.
  - (1) The heirs-at-law support the proposal for refacing, recutting and reintroduction. The headstones are their private property and their wishes as legal owners, whilst not determinative, must be afforded very considerable weight.
  - (2) The headstones themselves are, according to the Church Buildings Council, of ‘low artistic significance’.
  - (3) There is nothing in the lives of the deceased to merit censure or disapproval. To the contrary, Elliott and Banford were well regarded music hall performers, and much loved local residents. The underlying matter is simply the inclusion in the inscription of a term which carries an objectively offensive meaning today, even though it may have been culturally acceptable in an earlier era.
  - (4) The churchyard has not been closed by Order in Council and remains open for burials. Those residing in the parish have the right to be buried there irrespective of their religious affiliation: see *St Mary’s Woodkirk* (above). In a multi-racial and ethnically diverse nation, people attending the funerals of loved ones, or visiting their graves, should not be exposed to derogatory and insulting language.
  - (5) Section 63 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 states:  
A person carrying out functions of care and conservation under this Measure, or under any other enactment or any rule of law relating to churches, must have due regard to the role of a church as a local centre of worship and mission.

The mission of St Margaret's is likely to be compromised if it were perceived as condoning the continuing display of racist terminology, notwithstanding it may have been acceptable in the past.

(6) To the extent that the rewording of the inscriptions is considered to be rewriting history, this will be mitigated by the introduction of explanatory material within the church and the careful taking and preservation of photographic and other records.

I make no finding as to the allegation of criminality under the Public Order Act. It is unnecessary to do so for the determination of this petition and the Court did not receive detailed representations on the matter.

53. Were I to have found that a higher level of harm to the significance of the church or its setting would be occasioned by the proposal, then I would have concluded that the public benefit in respect of removing an offensive, derogatory, and racist term which is inimical to Christian doctrine outweighed that harm. I would place reliance on the factors outlined in the foregoing paragraph. I would categorise the objections of the complainant and others to be reasonable and sincerely held, and not the synthetic indignation of woke lobbying.
54. As a final check, and in line with authorities such as *Re St Peter & St Paul, Aston Rowant* [2019] ECC Oxf 3, I ask myself whether the proposal could be achieved in a less harmful manner. Arguably, some form of interpretation or contextualisation could be introduced by placing an explanatory panel beside the respective headstones. But in this case, I do not consider such a suggestion appropriate. The panel, however discreetly designed, would look out of place in the churchyard and would detract from its serenity as a consecrated burial ground. It would be an unwelcome focus for those visiting and tending the graves of loved ones. It would also effectively convert the final resting place of two private individuals to something approaching a museum exhibit. This would not be appropriate. The Petitioners, wisely in my view, have proposed placing interpretative material in the church itself; and that will become a condition of the faculty to be granted.

#### **Postscript: Eric Gill**

55. This matter has not been raised by any of the parties, but it is incumbent on the Court of its own motion to address all potentially relevant considerations. The headstones are the work of Joseph Cribb, a British sculptor, carver and letter-cutter. He was recruited by Eric Gill as his assistant in 1906 and was taught letter cutting and masonry skills by him. Gill himself is a controversial figure and there are conflicting views in respect of the character of the artist and the status of his work.<sup>5</sup> None of the parties, nor the CBC, have invited me to investigate the matter, and it does not appear that there is anything to connect the abuse perpetrated by Gill, with the exemplary character of his student, Cribb. The sins of the master are not to be visited on the apprentice. The remote link with Gill gives no reason for revisiting any of the conclusions expressed in this judgment.

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<sup>5</sup> See Rachel Cooke, 'Eric Gill: can we separate the artist from the abuser?' (2017) *The Observer*, 9 April: <https://www.theguardian.com/artanddesign/2017/apr/09/eric-gill-the-body-ditchling-exhibition-rachel-cooke>

### **Decision**

56. In all the circumstances of this case, I am satisfied on the material placed before the Court that a faculty should pass the seal for the works proposed in the petition. It will be subject to the following conditions:
- (a) That prior to any works being undertaken, a high resolution photographic record of the two headstones be created and copies deposited with the parish, the local records office, the Diocesan Advisory Committee, and the Church Buildings Council;
  - (b) That the stonemasons document the treatment of the headstones in detail and produce a report as a record of the works for deposit with the parish and with any of the bodies listed at (a) above who request it;
  - (c) That the foregoing records, together with all of the research carried out to date, be retained by the parish and the local record office and be made available for anyone interested in researching the lives of Elliott and Banford and their importance in music hall history. The documentation should explain when the headstones were refaced and recut and why.
  - (d) That an interpretative folder or other display be placed in the church on a permanent basis, the specification for which is to be submitted in advance to the Chancellor for approval.
  - (e) That the recutting of the inscription on the Elliott headstone is not to proceed until the additional wording in respect of Mrs Elliott has been approved by the Chancellor. The current proposal is unnecessarily lengthy, does not follow the existing style for the dates, and duplicates RIP. With a little imagination, a more fitting version can be devised;
  - (f) That the works are not to commence until the Court costs have been satisfied in full.
57. Mindful of the public interest (and hostility in some parts) concerning this matter, it would be inappropriate to direct the immediate reinstatement of the headstones. The timing will be decided locally in consultation with the heirs-at-law. I will direct the works to be completed within two years, but as in all faculty cases, there will be liberty to apply for that period to be extended.

### **Costs**

58. Provision will need to be made for the costs of these proceedings. I would hope that the Petitioners and heirs-at-law can agree amongst themselves how they should be apportioned. I will allow the parties 28 days to make written representations on costs.

The Worshipful Mark Hill QC  
Chancellor of the Diocese of Chichester

1 February 2021

ANNEXE

**Warning – the inscriptions on the headstones in these photographs include derogatory racist language likely to cause offence.**

