
Contested Heritage and the Consistory Courts

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This article distinguishes contested heritage on consecrated land from the wider secular contested heritage debate. The evolving property law position on contested heritage and consecrated land is analysed in the context of recent consistory court judgments including the controversial decision concerning the memorial to Tobias Rustat at Jesus College, Cambridge. The current application of the ecclesiastical exemption, the statutory guidance on contested heritage from the Church Buildings Council and the Cathedrals Fabric Commission and the Duffield framework are considered together with strong criticisms made by the Archbishops' Commission for Racial Justice. The article suggests that because issues of contested heritage and the legacies of enslavement have not been properly considered in a timely way by the Church of England, individual consistory court cases have become focal points for wider debates beyond their remit. The article argues that the current resolution process for disputes over contested heritage is untenable in the longer term. Statutory guidance needs to be revised and the faculty process, in particular the Duffield framework, needs to be adapted to address racial justice and mission and worship. Practical advice is offered to individual religious communities seeking to consider contested heritage in their own buildings in the meantime.

Keywords: contested heritage, Duffield, ecclesiastical exemption, faculty, memorial, Rustat

INTRODUCTION

Amidst the secular debates over contested heritage, the consistory courts have been endeavouring to find a way forward for similar issues concerning memorials in churches. Much has been written on the controversies over statues such as those of Edward Colston and Cecil Rhodes in public settings, but less on the disputes involving sacred land.¹ The most notable contribution to date has been the comment piece on the Rustat memorial by Araba Taylor,

1 For commentary, see D Pocklington, 'Index-Contested Heritage', *Law and Religion UK*, 14 June 2021 (as updated), available at <<https://lawandreligionuk.com/2021/06/14/index-contested-heritage/>>, accessed 31 October 2022 and F Cranmer, "'Why is it so much agony to remove a memorial to slavery?': the Rustat judgment' (2022) 188 *Law and Justice* 21. For a pre-Rustat overview, see T Cooper, 'Contested Heritage: A Review of Church of England Guidance', 21 January 2022, available at <<https://lawandreligionuk.com/2022/01/21/contested-heritage-a-review-of-the-church-of-england-guidance/>>, accessed 19 November 2022.

in the pages of this *Journal*.² The current Government's policy of preferring retention and explanation rather than removal for contested heritage raises different and additional issues when land is used for religious purposes. At the macro-level there exists a tradition of special protections for and a theology of sacred space. At a micro-level the long-standing ecclesiastical exemption provides alternative oversight to listed building consent for consecrated land through the faculty system and consistory courts.

This article will analyse the evolving property law position on contested heritage and consecrated land following the recent consistory court judgments concerning memorials in *Re Dorchester St Peter, Holy Trinity and All Saints*,³ *Re St Mary's Church, Barnes*,⁴ and most importantly *Re The Rustat Memorial, Jesus College Cambridge*.⁵ *Re St Margaret, Rottingdean* also holds significance, not least because Chancellor Hill KC defined contested heritage in a consistory court as:

... 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 and erected on the profits of slave trading.⁶

The *Rustat* case has attracted the most controversy. Deputy Chancellor Hodge KC described the 'inevitable litigation' as 'a paradigm example' of contested heritage for which there was an 'absence of any precedent'.⁷ Before the case was heard, the Cathedrals Fabric Commission for England and the Church Buildings Council had published new statutory guidance, *Contested Heritage in Cathedrals and Churches*.⁸ Applying that guidance and the pre-existing *Duffield* framework from the Court of Arches of Canterbury, commended by the guidance, the Consistory Court of the Diocese of Ely made a controversial decision to refuse

2 A Taylor, 'The Case of the Rustat Memorial—Does *Duffield* Pose All the Right Questions?' (2023) 25 *Ecc LJ* 38–51.

3 *Re Dorchester, St Peter, Holy Trinity and All Saints* [2022] *ECC Sal* 4.

4 *Re St Mary's Church, Barnes* [2021] *ECC Swk* 10.

5 *Re The Rustat Memorial, Jesus College Cambridge* [2022] *ECC Ely* 2.

6 *Re St Margaret, Rottingdean* (No.2) [2021] *ECC Chi*, para 20. This case concerned a faculty for the recutting of headstones in the open churchyard that contained racist language. Historic England define contested heritage as 'historic objects, structures, buildings or places where the associated stories or meanings have become challenged', see <<https://historicengland.org.uk/advice/planning/planning-system/contested-heritage-listed-building-decisions/>>, accessed 14 November 2022.

7 *The Rustat Memorial* (Costs Application) [2022] *ECC Ely* 5, para 23.

8 Church Buildings Council and Cathedrals Fabric Commission for England, *Contested Heritage in Cathedrals and Churches*, May 2021, <<https://www.churchofengland.org/resources/churchcare/advice-and-guidance-church-buildings/contested-heritage/>>, accessed 30 October 2022.

a faculty to move a memorial to a College benefactor, Thomas Rustat, from Jesus College Chapel.⁹ Jesus College expressed disappointment and shock at the outcome but chose not to appeal, in part because of the costs of doing so.¹⁰

The *First Biannual Report of the Archbishops' Commission for Racial Justice Commission* strongly criticised the decision in *Rustat*,¹¹ describing the statutory guidance as 'inadequate and incomplete' and the wider consistory court process as 'wanting'.¹² Writing in the pages of this *Journal*, Taylor has also been highly critical of the decision, arguing that the consistory court is able to prioritise 'property over people' where a building is listed.¹³ This article will explore these criticisms. It will also consider the impact of recent cases on the faculty process, the existence of the ecclesiastical exemption and the level of expectation placed on individual religious communities to resolve contested heritage issues. *Dorchester, St Peter*¹⁴ was decided after *Rustat*¹⁵ and a faculty was granted for the removal of a memorial to an adjacent museum with a replacement memorial and notice of explanation in the church. In the concluding paragraph of the judgment, Chancellor Arlow commended the parish for 'more than' discharging their duties under section 35 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 to 'have due regard to the role of the church as a local centre of worship and mission' and for providing an example of 'grace, patience and transparency' in their conduct through the 'lengthy process'.¹⁶ This article seeks to identify what a similar path might look like for other religious communities in the future as they address obligations raised by their own contested heritage.

THE ECCLESIASTICAL EXEMPTION

The broad regulatory picture of the secular policy of 'retain and explain' has been discussed by Harwood, Dobson and Sawtell in their recent volume, *Contested*

9 *Re St Alkmund, Duffield* 2 WLR 854, *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2.

10 S Alleyne, 'The Church of England promised to tackle racial injustice. Why is it defending a slave trader's memory?', *The Guardian*, 14 April 2022. 'Church must drive change on racial injustice and contested heritage', <<https://www.jesus.cam.ac.uk/articles/church-must-drive-change-racial-injustice-and-contested-heritage>>, accessed 13 December 2022.

11 *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2.

12 *First Biannual Report of the Archbishops' Commission for Racial Justice*, Spring 2022, <<https://www.churchofengland.org/sites/default/files/2022-06/ACRJ%20First%20Report%20-%20Spring%2022.pdf>>, accessed 2 November 2022, 7. Following the publication of the Archbishops' Anti-Racism Taskforce Report in April 2021, *From Lament to Action*, the Archbishops' Commission for Racial Justice (ACRJ) was established in 2021 to monitor implementation of the 47 recommendations from the Taskforce and 'establish ways of building on them in order to drive effective lasting change within the Church of England'. Slavery was one of the key areas for further work identified by the Taskforce.

13 Taylor (note 2), 39 and 50.

14 *Re Dorchester, St Peter, Holy Trinity and All Saints* [2022] ECC Sal 4.

15 *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2.

16 *Re Dorchester, St Peter, Holy Trinity and All Saints* [2022] ECC Sal 4, para 72.

Heritage, Removing Art from Land and Historic Buildings.¹⁷ Listed status continues to be extended to some controversial memorials and planning law changes ensure that the demolition of statues, memorials and monuments in England requires permission under the Town and Country Planning Act 1990.¹⁸ Amongst these changes there continues to be special provision for sacred land. New provisions exclude from existing permitted development rights the demolition of statues, memorials and monuments that have been in place for ten years or more. But they do not include those ‘within a cemetery, on consecrated land, or within the curtilage of a place of public worship’.¹⁹ Such special considerations relate to long-standing privilege. Peter Edge observes that the ‘ability’ of a religious community to designate a place as ‘sacred’ has been regarded as one of ‘keystones’ of religious liberty and that the ‘permanence’ and use of such spaces has led to ‘clashes’ with ‘legal actors’ that regulate land use.²⁰ Edge regards the ecclesiastical exemption as a method of law recognising the ‘community interest’ and ‘engaging with religious organisation as representatives of the community’.²¹ Edge describes the faculty system of the Church of England, which applies to both listed and unlisted churches, as the ‘paradigm’ of an ‘internal regime’ for the control of places of worship.²²

The existing ecclesiastical exemption is remarkable in its breadth. The Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010 made under section 60 (1) and (2) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides the mechanism for ecclesiastical buildings being used for ecclesiastical purposes to have exemption from listed building consent and conservation area consent systems where the denomination has in place proper internal procedures for listed ecclesiastical buildings and unlisted buildings in conservation areas.²³ At present, this extends to the main Christian denominations, but any

17 R Harwood, C Dobson and D Sawtell, *Contested Heritage, Removing Art From Land and Historic Buildings* (Somerset, 2022).

18 Town and Country Planning (Demolition—Description of Buildings Direction) 2021, Town and Country Planning Act 1990, s 57.

19 Town and Country Planning (General Permitted Development etc) (England) (Amendment) Order 2021, s 11(2).

20 P Edge, ‘The Construction of Sacred Places in English Law’ (2002) 14(2) *Journal of Environmental Law* 161–183 at 161.

21 *Ibid.*, 178.

22 *Ibid.*, 179.

23 Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010 (SI 2010 No 1176). For context of the ecclesiastical exemption, see M Hill, *Ecclesiastical Law* (Oxford, 2018) para 7.09, K Last, ‘The Privileged Position of the Church of England in the Control of Works to Historic Buildings: the Provenance of the Ecclesiastical Exemption from Listed Building Control’ (2002) 31 *Commonwealth Law Review* 205, and C George, ‘Do we still need the faculty system?’ (2020) 22 *Ecc LJ* 281–299.

denomination or faith group may apply to the Secretary of State.²⁴ Article 5 of the Ecclesiastical Exemption Order makes specific reference to the Church of England's faculty system. In *Duffield*, the Court of Arches acknowledged that the ecclesiastical exemption is important to the Church and its existence depends on the faculty jurisdiction meeting the guidance issued by the relevant department of state.²⁵ It is helpful to draw out two key points from the accompanying guidance.²⁶ First, equivalence of protection is essential. Internal procedures are to be 'as stringent as procedures required under the secular planning system'.²⁷ As noted in *Duffield*, 'equivalence' does not necessarily mean the same result as the secular system.²⁸ Second, the system is supposed to reduce the burden on the planning system, but also to reflect 'the particular need of listed buildings in use as places of worship to be able to adapt to changing needs over time to ensure their survival in their intended use'.²⁹ The guidance refers to adaptations needed to 'continue to serve' local communities and to changes required to 'meet the needs of today's worshippers and other users'.³⁰

All the cases considered in this article were listed and fell to be decided within the faculty jurisdiction of the Church of England because of the ecclesiastical exemption.³¹ St Peter's, Dorchester is a Grade I listed parish church, St Mary's, Barnes is a Grade II* listed parish church and as they are 'for the time being used for ecclesiastical purposes' they are within the faculty jurisdiction exercised by the consistory courts of Salisbury and Southwark, respectively.³² Jesus College Chapel is a peculiar rather than a parish church.³³ However, the Grade I chapel also fell within the ecclesiastical exemption, and thereby jurisdiction of the consistory court of the Diocese of Ely, because the

24 Planning (Listed Buildings and Conservation Areas) Act 1990, s 60(6)(b) and para 15 of the Guidance.

25 *Re St Alkmund, Duffield* [2013] 2 WLR 854, para 37, '... the Church of England does not have the faculty jurisdiction in order to benefit from the ecclesiastical exemption; it only has the ecclesiastical exemption because it is the Government's understanding that the faculty jurisdiction does, and will continue to, provide a system of control that meets the criteria set out in the guidance issued. ... That exemption is of importance to the Church as it permits it to retain control of any alteration that may affect its worship and liturgy.'

26 Department for Culture, Media and Sport, *The Operation of the Ecclesiastical Exemption and Related Planning Matters for Places of Worship in England Guidance*, July 2010. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/77372/OPSEEGuidance.pdf>, accessed 20 November 2022.

27 *Ibid*, para 9.

28 *Re St Alkmund, Duffield* 2 WLR 854, para 39.

29 Department for Culture, Media and Sport (note 26), para 7.

30 *Ibid*, para 1, states 'We recognise that, in order to survive and continue to serve their local communities, listed churches might need to adapt to meet changing liturgical preferences, and to meet the needs of today's worshippers and other users'.

31 Ecclesiastical Exemption (Listed Buildings and Conservation Areas (England) Order 2010.

32 Planning (Listed Buildings and Conservation Areas) Act 1990, s 60(1).

33 *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2, para 116. See also P Barber, 'What is a Peculiar?' (1995) 16(3) *Ecc LJ* 299–312, and B Steinberg, 'The Peculiar of the University of Cambridge' (2013) 15(1) *Ecc LJ* 59–68 at 63.

College had previously elected to include it on a list of places of worship under section 38 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.³⁴

All three cases reflect aspects of the competing tensions of equivalence of protection and adaption to change. This is most apparent in *Rustat*, where Deputy Chancellor Hodge KC acknowledged both the importance of the ecclesiastical exemption to the Church of England in permitting the Church to keep control over proposed alterations to a listed church building that may impact worship, mission or liturgy and the equivalence of faculty jurisdiction to listed building consent.³⁵ As part of the explanation of the ecclesiastical exemption, in the most striking paragraphs of the judgment, the Deputy Chancellor takes a broader approach saying ‘... a church (or a college chapel) is a house of God and a place for worship: it does not belong to conservationists, to the state, or to the congregation, but rather to God’.³⁶ It is in the context of this statement that the rest of the judgment must be read and the response to the contested heritage and racial justice issues considered.

THE CHURCH MEMORIALS

The three memorials in question were different in nature but raised similar problems. *Rustat* and *St Peter’s Dorchester* were both petitions for faculties to remove and relocate original memorials. *St Mary’s Church, Barnes* was a successful petition to introduce a new memorial.³⁷ The inside of most churches and chapels are a maze of memorialisation and those memorials will not always be in their original places.³⁸ Under section 66(5) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 a monument is owned by the person who erected it and, after they have died, the heirs ‘of the person or persons in whose memory the monument was erected’. Nevertheless, a consistory court may grant a faculty with respect to the monument even if the owner withholds consent or cannot not be found to give consent following reasonable efforts.³⁹ The memorial at Jesus College was introduced into the Chapel during the funeral of Tobias Rustat (1608–1694). It is in a highly prominent, elevated position on the west wall and given its size very striking. Rustat was a major benefactor of the College. He had commissioned the memorial and the inscription himself and displayed it in

34 Ibid, paras 5 and 116.

35 Ibid, para 5.

36 Ibid, para 5. See Edge (note 20), 164 for divine rights and property rights.

37 *Re St Mary’s Church, Barnes* [2021] ECC Swk 10.

38 ‘So we find in many churches both inside and out a rich panoply of decoration linked either to the gospel itself or to the stories of those who followed Christ and contributed to the building up of his church.’ *Parish of Beverley, St Mary* [2021] Ecc Yor 2 per Chancellor Peter Collier KC at para 17.

39 Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 66(1).

his home prior to his death.⁴⁰ Part of the inscription refers to ‘the estate he gathered’ ‘by God’s blessing, the King’s favour and his industry’ and his many works of charity.⁴¹ The issue of the extent of his investment in enslavement and what, if any, connection that had to his gifts to the College was central to the petition. The marble memorial is a significant artistic work, probably from the studio of Grinling Gibbons.⁴² Counsel for the opponents highlighted the age and weight of the monument, describing it as ‘the only funerary monument of its type and quality in Cambridge and possibly the whole country’.⁴³ The College was criticised, probably unreasonably, for a lack of effort in locating Rustat’s heirs at law and the Deputy Chancellor proceeded on the basis that the monument’s owner withheld consent.⁴⁴

The memorial in *Dorchester, St Peter’s* was a large eighteenth century neo-Classical wall monument in remembrance of John Gordon (c. 1728–1774) who died in Dorchester as he passed through on his journey from London to Jamaica. The memorial describes him as having ‘resided many Years in universal esteem’ in Jamaica. Gordon’s significant involvement in enslavement is clear from the inscription praising his bravery and character in ‘quelling a dangerous Rebellion in that Island’.⁴⁵ The ‘[r]ebbellion’ was found to be a historically significant reference to an uprising known as ‘Tacky’s Revolt’ in 1760. Unlike the Rustat memorial, the St Peter’s memorial contains offensive racist language. No owner for this memorial had been located, but some of Gordon’s descendants had indicated a variety of views on its future but none opposed the petition.⁴⁶

In the *St Mary’s* case the successful faculty petition was for permission to erect a new monument commemorating eighteenth century members of the Hoare family to replace one destroyed by a church fire in 1978.⁴⁷ New memorials within a church can only be allowed in cases of ‘exceptionality’.⁴⁸ The Hoare

40 *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2, para 117: ‘Unusually for a church monument, this memorial was not erected by others in Rustat’s honour but was fabricated at his direction during his lifetime . . .’.

41 For discussion of the wording, see Taylor (note 2), 50; S Hunter, ‘Dunking, Breaking, Moving, (Re) Making . . . : Thoughts on the Inherent Contests of Heritage, and on *Rustat*’, *Law and Religion UK*, 26 March 2022, <<https://lawandreligionuk.com/2022/03/28/dunking-breaking-moving-remaking-thoughts-on-the-inherent-contests-of-heritage-and-on-rustat/>>, accessed 10 February 2023, and P Glazebrook, *Jesus College, History and Personalities* (Cambridge, 2015) 45.

42 Information leaflets on ‘Jesus College Chapel’ and ‘Tobias Rustat’ provided by the Chapel on 27 October 2022.

43 *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2, para 101.

44 *Ibid.*, para 119. Chancellor Hodge KC noted that this had made no difference to the outcome

45 *Re Dorchester, St Peter, Holy Trinity and All Saints* [2022] ECC Sal 4, para 38. A photograph of the memorial is appended to the judgment.

46 *Ibid.*, paras 6–8 and 25.

47 *Re St Mary’s Church, Barnes* [2021] ECC Swk 10.

48 Hill (note 23), para 7.130. C Mynors, *Changing Churches* (London, 2016), 313. Note that racial justice was a factor for the parish in the choice of subjects for new stone carvings of pioneering women in *Parish of Beverley, St Mary* [2021] ECC Yor 2.

family paid for the original chapel at St Mary's, built in 1777, which sat above the family burial vault. The contested heritage issue for this monument was (1) whether there were indirect links between the historic wealth of those family members and enslavement and, if there were, (2) whether this had relevance to the faculty application. Current family members were strong advocates of the new memorial, arguing that to refuse permission would be 'obliterating a family memorial and a facet of local history...'.⁴⁹

ECCLESIASTICAL LEGACIES OF ENSLAVEMENT

The 2021 Report from the Archbishops' Anti-Racism Taskforce, *From Lament to Action*, argued that 'while history should not be hidden' nor should we 'unconditionally celebrate or commemorate people who have contributed or benefitted from the tragedy that was the slave trade'.⁵⁰ The same report also noted that the Church of England had taken 'little action' to address the legacy of enslavement since its apology in 2006 at the General Synod for its historic involvement.⁵¹ Church property was identified as an area in need of research by Historic England in their 2020 report, *The Transatlantic Slave Economy and the Built Environment*.⁵² There have been notable steps forward recently. In January 2023 the Church Commissioners published an extensive report into assets held by the Queen Anne's Bounty, which was a predecessor fund to the Church Commissioners' endowment.⁵³ This research shows that in the eighteenth century sizeable funds were invested in the South Sea Company which profited from enslavement and that significant gifts were received from benefactors who had or were likely to have had links to enslavement (including Edward Colston). The Church Commissioners have apologised for their predecessor fund's links with transatlantic chattel slavery.⁵⁴

The comment piece on *Rustat* by Araba Taylor includes discussion of mission, worship and the mind of the Church and asks why it is that so many in the

49 *Re St Mary's Church, Barnes* [2021] ECC Swk 10, para 26.

50 The Archbishops' Anti-Racism Taskforce Report (2021), *From Lament to Action*, 53, <<https://www.churchofengland.org/sites/default/files/2021-04/FromLamentToAction-report.pdf>>, accessed 22 November 2022.

51 *Ibid.*

52 M Wills and M Dresser, *The Transatlantic Slave Economy and England's Built Environment: A Research Audit*, Historic England Report Series No 247-2020, July 2020.

53 *Church Commissioners' Research into Historic Links to Transatlantic Chattel Slavery*, January 2023, <https://www.churchofengland.org/about/leadership-and-governance/church-commissioners-england/who-we-are/church-commissioners-links?mc_cid=d409b4696e&mc_eid=UNIQID>, accessed 12 January 2023.

54 The accompanying press release announces that there will be a new impact investment fund with a particular commitment to communities affected by historic slavery, grant funding, further research on legacies of slavery and continuing work on responsible investment. See <<https://www.churchofengland.org/media-and-news/press-releases/church-commissioners-publishes-full-report-historic-links>>, accessed 12 January 2023.

Church are not ashamed of the history of colonialism. Taylor argues that '[p]eople simply feel that slavery is a historical event which has nothing to do with them', despite research showing '[w]e were, very much, a part of it'.⁵⁵ Taylor refers to the significant numbers of British 'slave-owners' who received compensation payments on abolition according to the UCL Centre for the Study of Legacies of British Slavery.⁵⁶ The UCL Centre's work is worthy of further attention because, in addition to the compensation records Taylor refers to, it also provides us with one specific window into some links between individual churches and physical legacies of enslavement. The Centre's original work digitised the 1830s compensation records.⁵⁷ Now the database also allows us to search the legacies of those who claimed the compensation in the 1830s and increasingly those that had earlier involvement. This extends to ecclesiastical property such as church monuments and plaques and other specific additions such as a clock, pulpit or building projects. For example, David Lyon (MP for Bere Alston 1831–1832⁵⁸) was awarded compensation for hundreds of enslaved people and left a physical legacy which included remodelling St Mary's church near his home in Goring, Sussex.⁵⁹ In the *St Peter's* and the *Rustat* cases the wording of the memorials was questioned. This is, of course, reflected in other monuments on the database with those who enslaved, for example, described as living a 'whole life' exhibiting 'a singular and uniform pattern of universal benevolence' with their 'only object to do good' and be 'just and generous to all' serving in 'public character'.⁶⁰

Elsewhere specific churches and cathedrals have taken steps to explore their own contested heritage with significant exhibitions in Bath Abbey, Bristol Cathedral and St Paul's Cathedral.⁶¹ Taken together, the research of the Church Commissioners, the research available via databases such as the UCL Centre for the Study of the Legacies of British slavery, and the work of individual churches and cathedrals, show without doubt that contested heritage on consecrated land exists and needs to be considered with wisdom and integrity.

55 Taylor (note 2), 45.

56 Ibid. For the online database, see: <<https://www.ucl.ac.uk/lbs/>>.

57 N Draper, *The Price of Emancipation, Slave-Ownership, Compensation and British Society at the End of Slavery* (Cambridge, 2010); C Hall, N Draper, K McClelland, K Donnington and R Lang, *Legacies of British Slave-Ownership, Colonial Slavery and the Formation of Victorian Britain* (Cambridge, 2014).

58 Known for the case of *Mallalieu v Lyon* [1859] 1 WLUK 72.

59 UCL Centre for the Legacies of British Slavery, <<https://www.ucl.ac.uk/lbs/person/view/23533/#physical-summary>>, accessed 2 November 2022.

60 UCL Centre for the Legacies of British Slavery, <<https://www.ucl.ac.uk/lbs/physical/view/1995968553>>, accessed 2 November 2022.

61 All God's Children Exhibition, Bristol Cathedral, 22 August to 21 October 2022, <<https://bristol-cathedral.co.uk/whats-on/agec>>, accessed 31 October 2022; Empire, Monuments and Slavery Exhibition, Bath Abbey, 26 May to 30 September 2021, <<https://www.bathabbey.org/whats-on/memorials-empire-and-slavery-exhibition/>>, accessed 31 October 2022; St Paul's Pantheons Project, <<https://pantheons-st-pauls.york.ac.uk/>>, accessed 1 November 2022.

STATUTORY GUIDANCE ON CONTESTED HERITAGE

In response to the *From Lament to Action Report*,⁶² the Church Buildings Council and the Cathedrals Fabric Commission for England published joint statutory guidance for contested heritage in May 2021 pursuant to their powers given by section 3(3)(a) of the Care of Cathedrals Measure 2011 and section 55(1)(d) of the Dioceses, Mission and Pastoral Measure 2007 (hereafter ‘the Guidance’).⁶³ There was significant consultation ahead of publication with key stakeholders in the Church of England and the heritage sector including key amenity bodies. This Guidance was used for the first time in *Rustat* and *St Peter’s*. Whilst it is undoubtedly a positive step to have guidance now available, these cases have highlighted some weaknesses in relying upon it for solutions.

The Guidance covers specific objects which mark in a ‘tangible form’ ‘people or events connected with racism and slavery’. It covers memorials including statues and glass and acknowledges the existence of additional issues such as archives and buildings for the future. It does not cover incorporeal property such as advowsons.⁶⁴ The purpose of the Guidance is to provide a practical framework for addressing individual cases and to ‘aid rather than pre-empt decision making’.⁶⁵ It is not about judging individuals from the past. The focus is on ‘the impact of the piece of material culture on the church or cathedral’s ability to be a place of welcome and solace to all’ together with ‘how this should best be addressed’ rather expunging individuals from ‘the historical record’.⁶⁶ The Guidance acknowledges that ‘... at worst, for these objects to remain in place with no discussion or interpretation could be taken to imply that the oppression and disenfranchisement they evoke for many in affected communities is socially and theologically acceptable to the Church’.⁶⁷ There is a clear context and framework of steps to consider the impact of the object on the whole church team, congregation and wider community including visitors and tourists. This requires assessments of the tangible objects, the need for change, the options for change, the seeking of relevant permissions for the required options and the recording and communicating of decisions.

62 Archbishops’ Anti-Racism Taskforce Report (note 50).

63 Church Buildings Council and Cathedrals Fabric Commission for England, *Contested Heritage in Cathedrals and Churches*, May 2021, <<https://www.churchofengland.org/resources/churchcare/advice-and-guidance-church-buildings/contested-heritage>>, accessed 30 October 2022 (hereafter ‘Guidance’). For pre-*Rustat* commentary on this Guidance, see Cooper (note 1).

64 For advowsons see, for example, the Hyndman family: Draper, *The Price of Emancipation*, 1 and Draper, *Legacies of British Slave-Ownership*, 56; <<https://www.ucl.ac.uk/lbs/person/view/2146630428> and <https://www.ucl.ac.uk/lbs/cultural/view/2135897455>> and <<http://www.simeons.org.uk/hyndmans-trust-history>>, accessed 31 October 2022. On advowsons more generally, see T Sutton, ‘Advowsons and Private Patronage’ (2019) 21(3) *Ecc LJ* 267–288.

65 Guidance (note 63), 8.

66 *Ibid.*, 13.

67 *Ibid.*, 11.

Responsibility is left with individual church communities to identify, research, address and find consensus on these issues if they choose to do so. Whilst there is a recommendation in the guidance to be pro-active, there is no obligation or duty to address contested heritage issues in the context of faculty applications as part of the life of the Church.⁶⁸ This is a much more limited approach than that being developed in the context of the net zero guidance under the Faculty Jurisdiction (Amendment) Rules 2022.⁶⁹ Arguably a major project, such as a church re-ordering, should include consideration of contested heritage as an automatic part of the process. There is also the question of provision of resources to follow the Guidance. Contested heritage issues raise theological and political questions and require accurate historical research. The Guidance acknowledges that '[i]nsufficient or insubstantial interpretation of contested heritage based on poor-quality research, can be worse than no interpretation at all'.⁷⁰ The excellent work carried out in Bath, Bristol and St Paul's in recent years with extensive funded research and managed consultation is beyond the capacity of ordinary churches relying on volunteers. The difficulties and expense of undertaking this work are clear from the recent cases. The correct interpretation of historical research on the career and finances of Thomas Rustat as presented by leading historians was at the heart of the case. The controversial conclusion that Deputy Chancellor Hodge KC reached on the historical evidence, that '... members of the College, and especially its students, have not been given a true picture of Rustat's financial life; and that the false picture they have been given contributed to the College's perception, and concerns, that the continued presence of his memorial in the chapel is having a demonstrably negative impact upon its mission and ministry'⁷¹ was the decisive point of the case. In *St Peter's*, the petitioners' efforts to research the life of John Gordon extended to consulting a Professor of History of African American Studies at Harvard and author of a book on Tacky's Rebellion.⁷² The Guidance was also referenced in *St Mary's, Barnes*, where it was clear from the judgment that to add to the historical evidence from the petitioners the Chancellor had been researching the history of Hoare's Bank.⁷³ Most parishes simply will not have the resources or the skills to make this degree of historical research a viable possibility on their own.⁷⁴

68 Ibid, 19.

69 Faculty Jurisdiction (Amendment) Rules 2022, r 2.

70 Guidance (note 63), 18.

71 *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2, para 129.

72 *Re Dorchester, St Peter, Holy Trinity and All Saints* [2022] ECC Sal 4, para 11. V Brown, *Tacky's Revolt* (Harvard, 2022) 148.

73 *Re St Mary's Church, Barnes* [2021] ECC Swk 10, para 10. The new memorial was allowed subject to 'appropriate interpretative material' being made available, para 35.

74 It is possible that plans for new resources announced in the press release accompanying the recent *Church Commissioners' Research into Historic Links to Transatlantic Chattel Slavery* (notes 54 and 55) may be of assistance here.

The Guidance offers a framework for communities to reach initial conclusions, but ultimately the most difficult decisions will be made following a faculty application. The faculty process is the fourth stage of the steps described by the Guidance, but little substantive comment is made. The Guidance says that once a decision by a community has been reached on ‘a proposed course of action’ then ‘the Church of England’s existing statutory processes are well suited to dealing with these issues’ beginning with a Statement of Significance and a Statement of Needs.⁷⁵ On the contrary, it has proved to be a struggle to deal with these completely new types of disputes being under a faculty process which did not evolve with these contested heritage issues in mind. As the wider Church proves slow in addressing the general legacy of enslavement, these individual consistory court cases have become the focus points of wider debates. The faculty process and in particular the *Duffield* framework needs to adapt and evolve to reflect issues of racial justice in contested heritage cases in the context of mission and worship. In Taylor’s comment piece on the outcome of *Rustat* in an earlier issue of this *Journal*, she suggests that the *Duffield* framework ‘could be considered to be unfit for purpose where the heritage concerned is contested heritage’.⁷⁶

THE DUFFIELD FRAMEWORK

In *St Peter’s* and *Rustat* the consistory courts used the so-called *Duffield* framework to try to resolve objections to the faculty application for the proposed changes. This framework was set out by the Court of Arches in *Re St Alkmund, Duffield* in 2013 when it revisited the earlier Bishopsgate questions.⁷⁷ At the time the Court noted the dangers ‘of imposing an unduly prescriptive framework on what is essentially a balancing exercise’ and the framework offered has proved workable and flexible.⁷⁸ Hill observes that ‘its universal adoption’ in recent years has ‘made it the normative means’ to reach conclusions on faculty petitions for listed church buildings.⁷⁹ The *Duffield* framework asks the following questions:

- (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

75 Guidance (note 63), 18.

76 Taylor (note 2), 47.

77 In *Re St Alkmund, Duffield* [2013] 2 WLR 854. The case concerned the moving of a Victorian chancel screen within a Grade I listed church.

78 *Ibid.*, para 87.

79 Hill (note 23), para 7.72.

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 ... Questions 3, 4 and 5 do not arise.

(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 ... will any resulting public benefit (including matters such as liturgical freedom, pastoral wellbeing, 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.⁸⁰

The matters listed as possible justifications for change under public benefit under Question 5 are broad. In *St Margaret Rottingdean (No. 2)*, Chancellor Hill KC observed that the list is not exhaustive and made the suggestion that it may be that there are objects in churches that ‘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’.⁸¹ In that case Question 1 had been answered in the negative and so only the ordinary presumption against change needed to be rebutted. The Chancellor indicated that had the answer to Question 1 been yes, he would have reached the conclusion ‘that the public benefit in respect of removing an offensive, derogatory, and racist term which is inimical to Christian doctrine outweighed that harm’.⁸² There is certainly more potential to use Question 5 of the *Duffield* framework to address individual cases of memorials and monuments with respect to racial justice in the context of public benefit if the circumstances of the case support doing so. This would be a new step but not one outside the remit of the ecclesiastical exemption given the impact of racial justice issues on worship and mission. It is regrettable that the Guidance gave no further encouragement to the balancing work of the consistory courts and

80 *Re St Alkmund, Duffield* [2013] 2 WLR 854, para 87.

81 *Re St Margaret, Rottingdean (No. 2)* [2021] ECC Chi 1, para 28.

82 *Ibid*, para 53. *Re St Peter and St Paul Olney* [2021] ECC Oxf 2 concerning a faculty for the creation of an educational area about the life on John Newton at the church where he is buried is another case where Question 1 was answered in the negative and then the ordinary presumption against change rebutted. For full discussion, see D Pocklington, ‘Contested Heritage: Reverend John Newton (1725–1807)’, *Law and Religion UK*, 29 May 2021, <<https://lawandreligionuk.com/2021/05/29/contested-heritage-reverend-john-newton-1725-1807/>>, accessed 1 November 2022.

racial justice on this point. Taylor is quite right in her suggestion that the Guidance needs to be revised.⁸³ Another possibility exists too. Writing in the pages of this *Journal* prior to the Faculty Jurisdiction (Amendment) Measure 2022, in the context of net-zero, Humphreys observed that the current faculty system was ‘not set up with carbon reduction in mind because it significantly pre-dates the recent widespread realisation of the urgency of the climate crisis’.⁸⁴ The faculty rules have now been comprehensively amended and a duty to have due regard to the net zero guidance added.⁸⁵ The difficulties faced in recent case law on contested heritage suggests that it might also be beneficial to consider appropriate adjustment to faculty rules, as set out below, to facilitate recognition of issues of racial justice.

ST PETER’S, DORCHESTER

In *St Peter’s*,⁸⁶ the Salisbury Consistory Court had a much simpler matter to deal with than the Ely Consistory Court did in *Rustat* when it came to applying the *Duffield* framework. The *St Peter’s* petition was to remove the fixed memorial to Gordon to the adjacent museum, repair the wall, and erect a replacement memorial. The petition was formally unopposed but objections and concerns that had been expressed were taken account of. The petition was dealt with by written representations.⁸⁷ In an accessible, well-structured judgment Chancellor Arlow considered the memorial, the background to the petition, and the consultation and advice before applying the *Duffield* framework. Some public submissions tried to extend to contested heritage issues beyond this memorial in this church, but the judgment itself was specific. Unlike *Rustat*, there was no dispute over Gordon’s involvement in enslavement and the memorial did not have notable artistic value.⁸⁸ The significance of the memorial was in its record of an uprising of enslaved people that does not appear to have been referenced elsewhere.⁸⁹ Unlike the *Rustat* case, the memorial explicitly refers to enslavement and contains highly offensive language. The existing *Duffield* framework was applied.⁹⁰ On the first question it was held that the proposals would result in harm to the

83 Taylor (note 2), 48.

84 J Humphreys, ‘The Role of the Faculty System in Achieving Net-Carbon Emissions by 2030’ (2021) 23 (1) *Ecc LJ*, 50–66, at 51, 58 and 64.

85 The Faculty Jurisdiction (Amendment) Rules 2022.

86 *Re Dorchester, St Peter, Holy Trinity and All Saints* [2022] ECC Sal 4. For comment, see D Pocklington and F Cranmer, ‘Contested Heritage: Further Considerations in *Dorchester, St Peter*’, *Law and Religion UK*, 5 September 2022, <<https://lawandreligionuk.com/2022/09/06/contested-heritage-further-considerations-in-re-dorchester-st-peter/>>, accessed 1 November 2022.

87 Faculty Jurisdiction Rules 2015, r 14.1.

88 *Re Dorchester, St Peter, Holy Trinity and All Saints* [2022] ECC Sal 4, paras 37–39.

89 *Ibid*, paras 34–35.

90 *Re St Alkmund, Duffield* [2013] 2 WLR 854, para 87.

significance of the church as a building of special historical interest.⁹¹ On the third question, the harm that would be caused was regarded as ‘less than substantial’ because of much of the significance of the memorial came from its historical importance. Its presence there was an ‘accident of history’ as Gordon did not come from Dorchester.⁹² On the fourth key question, asking ‘how clear and convincing’ the justification for the proposals is, the petitioners relied upon the presence of the memorial creating ‘a significant obstacle to the church’s ability to provide credible Christian ministry and welcome’ damaging the ‘pastoral life of the church’.⁹³ The celebratory ‘language of acclamation of the violent quelling of a rebellion’ and the offensive language were particularly important.⁹⁴ Again this was different to the *Rustat* memorial. Chancellor Arlow noted that the petitioners were not relying ‘upon moral judgments about the character of John Gordon to justify removal’ and that they had no objection to him continuing to be commemorated in the church with a different plaque.⁹⁵ The intention was to direct visitors to the museum for the original memorial. Given the removal was justified by the memorial’s impact on the functioning of ‘the worshipping community that serves God and the community in this place today’, the Chancellor accepted that retaining the memorial presented a ‘significant barrier to the fulfilment of that calling’.⁹⁶ On the final question, the Chancellor held that the ‘substantial’ public benefit from the proposals would outweigh the harm caused by them.⁹⁷ In this particular case covering up the memorial, relocating the memorial in the church and contextualising the original memorial were insufficient.⁹⁸ There were a few broader observations—such as any ‘suggestion of a blanket requirement for the removal of memorials’ linked to the slave trade being described as ‘dangerous’.⁹⁹ However, overall the facts that: (1) the petition was formally *unopposed*, (2) the expert historical evidence available was undisputed, (3) clearly offensive language was used on the original memorial, (4) the artistic merit of the memorial was small, (5) the memorial was not a ‘grave-marker’, (6) there was a lack of a local connection, and (7) the museum next door was fortuitous, all facilitated a practical conclusion in this case reached using the *Duffield* framework. The outcome here is no final answer to the wider issues of contested heritage on consecrated land because the

91 *Re Dorchester, St Peter, Holy Trinity and All Saints* [2022] ECC Sal 4, para 41.

92 *Ibid*, para 43.

93 *Ibid*, para 45.

94 *Ibid*, para 47.

95 *Ibid*, para 52.

96 *Ibid*, paras 53–54.

97 *Ibid*, para 69.

98 *Ibid*, paras 61–65.

99 *Ibid*, para 59.

continued existence of any monument to Gordon in the church remains deeply offensive to many people.¹⁰⁰

THE RUSTAT MEMORIAL, JESUS COLLEGE CAMBRIDGE¹⁰¹

The same *Duffield* framework was used in the very different dispute over the memorial to Tobias Rustat. This petition attracted considerable opposition and there was a substantive hearing over three days.¹⁰² Counsel for the petitioners had begun by attempting to keep to the objective facts of permission for what was optimistically described as ‘a relatively minor change’ to the chapel and avoid ‘general excursus’ into wider issues including ‘culture wars, “wokeism”, virtue-signalling or “cancel culture”’, but this was not to be.¹⁰³ Counsel for the majority of the opponents likened the petition to ‘an unfortunate desire on the part of the College to get rid of an elderly and unpopular relative, albeit one who had been hugely generous towards the College in the past’.¹⁰⁴ The petition was for a faculty authorising the removal of the memorial from the College chapel and the conservation of the memorial within a new exhibition space in the College.¹⁰⁵ The decision to petition for a faculty followed an interim report published by the College’s Legacy of Slavery Working Party in 2019.¹⁰⁶ The petition described the memorial as casting a ‘huge shadow’ over the chapel which functions as a centre for welfare and pastoral support for the College. The memorial was described as ‘incongruous’ with that function and ‘a barrier to the sense of inclusion’ sought. The most striking parts of the petition were the individual student impact statements. Counsel for the opponents argued that these should be discounted because students had been misled by inaccurate historical evidence about Rustat.¹⁰⁷

The Deputy Chancellor began his consideration of the *Duffield* framework by acknowledging the wider role and reach of a university college chapel compared with a parish church.¹⁰⁸ On the first *Duffield* question it was held that the removal of the memorial would cause harm to the significance of the chapel as a building

¹⁰⁰ Taylor (note 2), 42, 46–47 and 49.

¹⁰¹ *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2.

¹⁰² For the second of two earlier procedural hearings, see *The Rustat Memorial, Jesus College, Cambridge* [2022] ECC Ely 1. There were 65 parties opponent represented by Counsel, another party opponent, Professor Laurence Goldman appeared in person and another two parties opponent were not represented or present.

¹⁰³ *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2, para 86.

¹⁰⁴ *Ibid*, para 97.

¹⁰⁵ For the full petition see: <<https://www.jesus.cam.ac.uk/sites/default/files/inline/files/210510%20RUSTAT%20FACULTY%20APPLICATION.pdf>>, accessed 2 November 2022.

¹⁰⁶ Jesus College Legacy of Slavery Working Party Interim Report, November 2019, <https://www.jesus.cam.ac.uk/sites/default/files/legacy_slavery_working_party_interim_report_27_nov_2019.pdf>, accessed 2 November 2022.

¹⁰⁷ *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2, paras 102–103.

¹⁰⁸ *Ibid*, para 121.

of special architectural or historic interest.¹⁰⁹ This led directly to the third question which asks how serious that harm would be. The Deputy Chancellor found that the resulting harm would be ‘notable’ or ‘considerable’.¹¹⁰ Considerable significance was said to attach to the artistic and historic interest of the memorial and its elevated place within the chapel was said to reinforce ‘its intrinsic significance’.¹¹¹ Unlike *St Peter’s*, the Deputy Chancellor took the fourth and fifth *Duffield* questions together.¹¹² He emphasised that removal in a Grade I setting where serious harm would occur ‘should only exceptionally be allowed’.¹¹³ He found that the chapel’s role in both its Christian ministry and in the wider life of the College did not make it necessary to remove the memorial. The public benefit in terms of pastoral need, mission and worship would not outweigh the harm to the building. Contextualisation in an exhibition space was not the best solution.¹¹⁴ The judgment shows that the turning point in the decision process was the view the Deputy Chancellor took of the historical evidence. The sharp criticism of the historical analysis undertaken by the College and what was described as a ‘false picture’ and ‘false narrative’ given to the student body meant there was insufficient evidence to show public benefit. In the summary paragraphs of the judgment the Deputy Chancellor goes as far as to express the hope that when Rusat’s life is ‘fully, and properly, understood, and viewed as a whole’ the memorial will ‘cease to be seen as a monument to a slave trader’.¹¹⁵

The later parts of judgment also offer some lengthy broader statements on contested heritage. These represented some issues that had been raised in arguments by the opponents and some issues that the Deputy Chancellor discerned as relevant given the interest in the case. On historic investment in companies that traded enslaved people he expresses the view that such investment should not necessarily result in removal of memorials ‘commemorating life and industry’ else ‘the walls of our college chapels, and of churches throughout this country, would be stripped of many fine, artistically or historically significant, memorials’.¹¹⁶ The judgment notes that at the time investment in enslavement was ‘entirely lawful’ ‘however utterly reprehensible we now rightly recognise this to have been’.¹¹⁷ Along the lines of the Deputy Chancellor’s previous judgment, as Chancellor of the Diocese of

109 *Ibid.*, para 122.

110 *Ibid.*, para 123.

111 *Ibid.*, para 123. The Consistory Court sat in the Chapel in the presence of the memorial. Both parties saw the striking positioning of the memorial as a factor which supported their own view of the petition.

112 *Ibid.*, para 124.

113 *Ibid.*, para 125.

114 *Ibid.*, para 126.

115 *Ibid.*, para 7.

116 *Ibid.*, para 131.

117 *Ibid.*, para 131.

Oxford in *Re St Peter and St Paul, Olney*, there is a call to embrace the existing heritage and harness it as a method to open discussion of historic enslavement and current injustices.¹¹⁸ In the summary of the judgment the Deputy Chancellor commends the path of using the memorial as a ‘vehicle to consider the imperfection of human beings and to recognise that none of us is free from sin; and to question our own lives as well as Rustat’s. . .’.¹¹⁹ In the final paragraph of the summary he emphasises the importance of forgiveness.¹²⁰

The refusal of the faculty petition has been met with a very mixed reaction.¹²¹ Following the hearing the parties opponent unsuccessfully applied for costs on the basis that the College had ‘behaved unreasonably at every stage’.¹²² The broader advice on contested heritage has caused much offence and provoked criticism of both the judgment and the consistory court system. Arguably, if the wider Church had been faster and more focused and committed to addressing the broader issue of racial justice, contested heritage and the legacy of enslavement, then this case would not have been heard in the context that it was, and it would not have become the focal point for external disagreement. The limitations of the current law were acknowledged by the Archbishop of Canterbury in his press statement following the case.¹²³ The Consistory Court of Ely should have been enabled to address the specific issue about the specific monument raised in this case without being forced to take a lead and express opinion on wider contested heritage issues far beyond its remit and expertise.

ARCHBISHOPS’ COMMISSION FOR RACIAL JUSTICE

In the *First Biannual Report from the Archbishops’ Commission for Racial Justice* there were many strong criticisms of the decision in *Rustat*.¹²⁴ The ‘calls for forgiveness’ as a ‘demonstration of Christian values’ were described as ‘frankly

118 *St Peter and St Paul Olney* [2021] ECC Oxf 2.

119 *Re The Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2, para 8.

120 *Ibid*, para 9.

121 For example, ‘Jesus Christ forgave Tobias Rustat judge argues and so must Jesus College’, *Church Times*, 23 March 2022 and ‘Church of England prefers marble to people’, *Church Times*, 22 April 2022 and Letters to *Church Times*, 1 April 2022.

122 *Re The Rustat Memorial, Jesus College, Cambridge* [2022] ECC Ely 5, para 9. It was found that there had been no unreasonable conduct by the College and that the unreasonable behaviour asserted had not materially increased the parties opponents’ costs, para 22.

123 ‘Monuments to slave-traders do not belong in places of worship . . . I have no doubt that the law was followed in this instance and that the Church of England’s contested heritage guidance was used. But if we are content with a situation where people of colour are excluded from places of worship because of the pain caused by such memorials, then clearly we have a lot further to go in our journey towards racial justice.’ From *Contested Heritage and Racial Justice: Statement by the Archbishop*, 12 April 2022, <<https://www.archbishopofcanterbury.org/about/anglican-communion-fund/news/contested-heritage-and-racial-justice-statement-archbishop>>, accessed 19 November 2022.

124 *First Biannual Report of the Archbishops’ Commission on Racial Justice* (note 12).

deeply offensive' and the Commission noted that the proceedings had acted to 'add to the pain of those affected by the monuments'.¹²⁵ The Commission observes that '[i]t would seem to many who have followed this case that it ended where such things often do, with those most affected by virtue of their ancestry, being asked to continue to carry the burden of the grievous wrong done by slavery to those from whom they are descended'.¹²⁶ The potential of the case is seen as far reaching, presenting 'a systematic challenge which requires a response' if the Church's 'commitment to racial justice is not to be undermined'.¹²⁷ Aspects of the consistory court system that many of the readers of this *Journal* have connections to is criticised in the strongest of terms. The Commission argues that heritage issues have been put before the interest of mission and Christian worship and that the 'balance needs to be redressed'.¹²⁸ Concern is expressed that the case will have 'deadening effects' upon other communities seeking to address contested heritage. The Commission suggests the practical step of urgently reviewing and strengthening the Guidance on contested heritage. The adversarial nature and off-putting costs of the consistory court system are criticised. The Commission also expresses concern about the lack of diversity within the consistory court system and recommends diversity training for judges together with specific training on 'the theology of racial justice and the implications for ministry of monuments to slavery' and the introduction of expert 'assessors' to assist judges.¹²⁹ The section of the Commission's report on contested heritage finishes with a strong warning that there is 'continuing racial injustice here'.¹³⁰

CONCLUSIONS

Ecclesiastical lawyers do need to pay heed to the warning given. Reform of consistory courts has been discussed elsewhere in the pages of this *Journal*.¹³¹ There is no question that there is a need for diversity. The process requirements of the ecclesiastical exemption must require safeguards on diversity within the faculty system. Some of the broad observations in the judgment in *Rustat* went beyond what was needed or appropriate to decide the property law issue in that case.¹³² It is unfortunate, but understandable for

¹²⁵ *Ibid.*, 23.

¹²⁶ *Ibid.*, 24.

¹²⁷ *Ibid.*, 23.

¹²⁸ *Ibid.*, 23.

¹²⁹ Assessors would assist 'where specialist knowledge, not least of the lived experience of diverse communities and of the history of those communities within these Islands and beyond, would be of assistance'. *Ibid.*, 24.

¹³⁰ *Ibid.*, 24.

¹³¹ For example, C George KC, 'Do we still need the faculty system?' (2020) 22 *Ecc LJ* 281–299.

¹³² For example, on forgiveness in para 9 and modern injustices in para 133.

reasons of cost, that the public disagreement with the decision on the part of the petitioners did not result in clarification through an appeal to the Court of Arches. The *Rustat* case will now stand as the first and key decision on contested heritage in an ecclesiastical setting and there can be no doubt that it will deter consideration of contested heritage in other church settings.¹³³ However, it is also the case that the consistory courts have been left to solve individual contested heritage issues using unsuitable frameworks when these issues should have been first addressed elsewhere in the Church in the context of proper consideration of the links between the Church and enslavement and the theology of racial justice. As the issues of contested heritage have not been adequately considered in a timely way by the wider Church and the guidance issued has been incomplete and unclear, the consistory court cases have been framed as arenas for debates beyond their remit causing further hurt. This is a pattern that is set to repeat itself with efforts on the part of churches to consult about change being presented as new disputes in the media.¹³⁴ As Taylor correctly observes, '[t]he problem of memorials and their interpretation is not going away anytime soon'.¹³⁵

The *Rustat* memorial remains in place at Jesus College with signage on the floor in front of it and a leaflet available to contextualise it. The leaflet sets out that Rustat 'had financial and other involvement with the Royal African Company, a slave trading company, over a substantial period of time, including when he donated to the College'. The Church Buildings Council and Cathedrals Fabric Commission Guidance remains as is and the case stands but the real underlying disagreement is unresolved. The *St Peter's* case has permitted the move of a piece of the original piece of contested heritage but probably largely because of the offensive language immediately apparent in the wording, and the fact the petition was formally unopposed.

The current position is not tenable in the longer term. Wider analysis such as that of the *First Biannual Report from the Archbishops' Commission for Racial Justice* and the earlier critical comment piece from Taylor, have shown clearly what an important issue this is for the mission of the Church.¹³⁶ The contested heritage Guidance should be revisited and strengthened for situations where consultation does not provide an agreed way forward. The establishment of the new Contested Heritage Committee by the Church Buildings Council is to be welcomed and must act as a driving force. Research needs to be facilitated and resourced for

133 The significance of the case as 'the first of its kind' without precedent was acknowledged in the ruling on costs. *Re The Rustat Memorial, Jesus College, Cambridge* [2022] Ecc Ely 5, para 21.

134 King Charles the Martyr in Falmouth is the most recent church to attract attention over the petition related to the memorial to Thomas Corker in October 2022. See for example 'Slave trader memorial in Cornwall church "clashes with Christianity"', <<https://www.bbc.co.uk/news/uk-england-cornwall-63312252>>, accessed 20 November 2022.

135 Taylor (note 2), 50.

136 *First Biannual Report of the Archbishops' Commission on Racial Justice* (note 12); Taylor (note 2).

churches. The balance of the *Duffield* framework should evolve to take proper account of the impact of racial justice on worship and mission. The faculty system could be amended to make specific provision for contested heritage in the way that it has for net-zero considerations. Faculty applications should be accompanied by an explanation of how the applicants have had due regard to newly strengthened guidance. For a church community addressing their own contested heritage, and their duty to have regard to the church as a local centre of worship and mission, the current position is difficult. If they wish to petition to do anything other than contextualise a piece of contested heritage, they will need to invest considerable resources of their own in research and consultation, and make a realistic assessment of the balancing act that the consistory court will carry out given the heritage and character of their own church and the exact nature of the memorial in question, both artistic and historical. Few petitions beyond those that relate to objects that display offensive language look likely to succeed currently and a parochial church council considering a petition might be best advised to wait for inevitable change. At the present time, the ecclesiastical exemption is not facilitating any difference in outcome to that in a secular setting notwithstanding the very different issues of worship and mission that exist when such contested heritage sits on sacred land.