

## COMMENT

### Revisiting the *Rustat* case

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### Introduction

In May 2021, Jesus College Cambridge submitted to the Diocese of Ely a ‘faculty petition’ – that is, a formal request to alter the fabric of an ecclesiastical building – asking for permission to remove from the west wall of the college chapel a large memorial to Tobias Rustat, ‘because of Rustat’s known involvement in the transatlantic trade in enslaved Africans’.<sup>1</sup> On 23 March 2022, following hearings the month before, Hodge Dep Ch provided a written judgment in which he denied the application. The college, he said, had not provided a convincing case that the removal of the monument was ‘necessary to enable the Chapel to play its proper role in providing a credible Christian ministry and witness to the College community’, and such a case was needed to outweigh the ‘considerable, or notable, harm’ that would result from the removal ‘to the significance of the Chapel as a building of special architectural or historic interest’.<sup>2</sup>

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<sup>1</sup> D Hodge QC, ‘Judgment’, *Re The Rustat Memorial, Jesus College, Cambridge* [2022] ECC Ely 2, <<https://lawandreligionuk.com/wp-content/uploads/2022/03/Re-the-Rustat-Memorial-Jesus-College-Cambridge2022-ECC-Ely-2.pdf>>, accessed 5 October 2023. See also his much shorter ‘Summary of Conclusions’, <<https://lawandreligionuk.com/wp-content/uploads/2022/03/Re-the-Rustat-Memorial-Jesus-College-Cambridge-Summary.pdf>>, accessed 5 October 2023.

<sup>2</sup> Judgment, para 6.

The judgment is, inevitably, presented as a balancing act. It weighs the arguments for removal against the arguments for retention. It will be my contention, however, that the processes of weighing were, in this case, imbalanced. In the presentation of the case to the court, in the questioning and discussion that took place at the hearings, and above all in the written judgment handed down, there are signs that the wrong things were weighed, and the right things weighed wrongly. Whether the final decision was right or wrong, the process that led to it was misshapen, and there is urgent need for a rebalancing of such processes if such failures are to be avoided in future.<sup>3</sup>

### **Frameworks for judgment**

Hodge Dep Ch’s judgment sits within three concentric frameworks. The first is the faculty system itself. In general, English buildings of ‘special architectural or historic interest’ are protected in law: ‘listed building consent’ is required before repairs or modifications can be undertaken.<sup>4</sup> In the Church of England and several other denominations, however, listed buildings ‘whose primary use is as a place of worship’ are exempt from this process, and are instead subject to church-based equivalents.<sup>5</sup> The Church of England was granted such an ‘ecclesiastical exemption’ on the grounds that its faculty system already provided an equivalent level of protection. Decisions made within the faculty system are similar to those made in the secular system, but

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<sup>3</sup> For a similar case for rebalancing see T Sutton, ‘Contested Heritage and the Consistory Courts’ (2023) 25 Ecc LJ 171–191, <<https://doi.org/10.1017/S0956618X23000030>>, accessed 5 October 2023.

<sup>4</sup> Historic England, ‘Listed Buildings’ (undated), <<https://historicengland.org.uk/listing/what-is-designation/listed-buildings/>>, accessed 5 October 2023.

<sup>5</sup> Department of Culture, Media and Sport, *The Operation of the Ecclesiastical Exemption and Related Planning Matters for Places of Worship in England: Guidance* (2010), available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/77372/OPSEEGuidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/77372/OPSEEGuidance.pdf)>, accessed 5 October 2023.

should be made with ‘due regard to the role of a church as a local centre of worship and mission’.<sup>6</sup>

The second framework governing the approach of the consistory court in *Rustat* is rooted in the ‘*Duffield* guidelines’, named after a 2013 case heard by the Court of Arches (the appellate court for faculty cases in the Province of Canterbury). Under those guidelines the consistory court that determines a petition for a faculty must ask how serious any ‘harm to the significance of the church as a building of special architectural or historic interest’ would be, and must ask

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?

The harm to the building caused by the proposed work must be weighed against the public benefit the work generates: ‘the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted’.<sup>7</sup>

The third framework informing the court’s determination of the case is provided by the Church of England’s guidance on *Contested Heritage in Cathedrals and Churches*. This is statutory guidance – that is, guidance that ‘*must* be considered with great care’ by the court in cases of contested

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<sup>6</sup> See Judgment, para 81. Proposed changes to cathedrals are subject to a slightly different process, under the Care of Cathedrals Measure 2011, <<https://www.legislation.gov.uk/ukcm/2011/1/enacted>>, accessed 5 October 2023; the criteria employed are similar.

<sup>7</sup> *Re St Alkmund, Duffield* [2013] Fam 158, para 87, <<https://www.ecclesiasticallawassociation.org.uk/judgments/reordering/duffieldstalkmund2012appeal.pdf>>, accessed 5 October 2023. For a discussion of the operation of these guidelines in contested heritage cases, see Sutton, ‘Contested Heritage and the Consistory Courts’ (note 4).

heritage.<sup>8</sup> Historic England, the body responsible for guidance in the secular planning system, explains the phrase ‘contested heritage’ in these terms:

Our buildings, monuments and places sometimes bring us face to face with parts of our history that are painful, or shameful by today’s standards. We recognise that there are historic statues and sites which have become symbols of injustice and a source of great pain for many people.<sup>9</sup>

The Church of England’s guidance sets this in a church context. The process of making judgments about contested heritage should support

the mission of the Church by helping churches to be places of welcome and solace for all people. At its heart is the fourth Mark of Mission, which enjoins everyone in the Anglican Communion ‘To transform unjust structures of society, to challenge violence of every kind and pursue peace and reconciliation.’<sup>10</sup>

Necessarily, then, the court’s judgment of the proposal to remove the Rustat memorial involved a balancing act. On the one hand, the court had to weigh any harm to the architectural and historic significance of a listed building. On the other, it had to weigh the benefits to the worship and mission

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<sup>8</sup> The Church Buildings Council and the Cathedrals Fabric Commission for England, *Contested Heritage in Cathedrals and Churches* (2021), available at <[https://www.churchofengland.org/sites/default/files/2021-06/Contested\\_Heritage\\_in\\_Cathedrals\\_and\\_Churches.pdf](https://www.churchofengland.org/sites/default/files/2021-06/Contested_Heritage_in_Cathedrals_and_Churches.pdf)>, accessed 5 October 2023, p. 4 (my emphasis); see also *A Brief Guide to Contested Heritage in Cathedrals and Churches* (2021), <[https://www.churchofengland.org/sites/default/files/2021-05/A\\_Brief\\_Guide\\_to\\_Contested\\_Heritage\\_in\\_Cathedrals\\_and\\_Churches.pdf](https://www.churchofengland.org/sites/default/files/2021-05/A_Brief_Guide_to_Contested_Heritage_in_Cathedrals_and_Churches.pdf)>, accessed 5 October 2023.

<sup>9</sup> Historic England, ‘Contested Heritage’ (undated), <<https://historicengland.org.uk/whats-new/statements/contested-heritage/>>, accessed 5 October 2023.

<sup>10</sup> *Contested Heritage in Cathedrals and Churches* (note 9), 7, quoting Anglican Communion, ‘Marks of Mission’, <<https://www.anglicancommunion.org/mission/marks-of-mission.aspx>>, accessed 5 October 2023.

undertaken in that building, and in particular to its ability to be a place of welcome for all people.

### **A strange balance**

It is worth acknowledging straight away that there is something very odd, from a theological point of view, about weighing the harm to a building against the benefit to pastoral care and mission. Hodge Dep Ch describes being met on his arrival at the college with ‘home-made placards reminding me that “Churches are people not marble”<sup>11</sup> – and it is not hard to see the force of the protestors’ point. There were moments in the proceedings where the strangeness of this comparison came to the fore – as when Roger Bowdler FSA, a former director of listing at Historic England, said that the college’s ‘approach to the monument is akin to scapegoating’ (para 71). Language that we might normally expect to be applied to beings capable of registering that they are being ostracised and made to bear guilt is here applied to several metric tonnes of carved stone.

To make theological sense of this comparison, however, it is necessary to understand how the architecture and history of the building and its monuments are themselves significant to the people who use the building – to their worship, their pastoral care, and more broadly their flourishing. Hodge Dep Ch’s judgment recognises this, quoting the words of Singleton Ch in an earlier case:

churches ... constitute a tangible and spiritual history which touches everyone including the people of the past, the present and the future ... They connect us to each other and to those who went before us and to those yet to come by our mutual and continuing appreciation and enjoyment of their beauty and history ... Within the church the

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<sup>11</sup> Judgment, para 14; subsequent paragraph references will be given in the text.

preservation and development of beauty and history is undertaken to the glory of God.<sup>12</sup>

From this point of view, one might expect that arguments for and against any proposed change in a church building would be framed primarily in terms of their likely impact on ‘the people of ... the present and the future’, and that arguments about artistic and architectural significance in the abstract would need contextualising by such considerations of human impact in order to be taken seriously. One might, more broadly, expect a church court to be able to demonstrate greater facility in discussing matters of *pastoral* care, worship, welcome and inclusion than in discussing matters of architectural history. As we shall see, however, quite the opposite is true in the *Rustat* case.

### **Valuing the memorial**

A great deal of expertise and a great many words were brought to bear during the *Rustat* case in establishing the historical and architectural significance of the monument.<sup>13</sup> It is not just individual experts who spoke; numerous august bodies weighed in:

- (i) Historic England,
- (ii) The Ancient Monuments Society
- (iii) The Society for the Protection of Ancient Buildings,
- (iv) The Georgian Group,

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<sup>12</sup> *Re All Saints, Hooton Pagnell* [2017] ECC, para 20, <<https://www.lawandreligionuk.com/wp-content/uploads/2019/07/Re-All-Saints-Hooton-Pagnell-2017-ECC-She-1.pdf>>, accessed 5 October 2023, cited in Hodge’s judgment at para 5.

<sup>13</sup> Strictly speaking, the assessment is of the impact of any alteration to the monument upon the historical and architectural of the whole building, rather than upon the monument itself. See *Re St John the Baptist, Penshurst* [2015] Court of Arches, para 22(d), <[https://www.ecclesiasticallawassociation.org.uk/judgments/reordering/penshurststjohnthebaptist2015\(appeal\).pdf](https://www.ecclesiasticallawassociation.org.uk/judgments/reordering/penshurststjohnthebaptist2015(appeal).pdf)>, accessed 5 October 2023.

(v) The Church Buildings Council, and

(vi) The Church Monuments Society.

All of these have long experience in assessing historical and architectural significance and in communicating such assessments in contested cases.

The discussion of historical and architectural value pursued in this case is of a distinctive kind, when one tries to locate it amongst the many different forms taken by scholarly discussions of such matters. Throughout the case, architectural value was discussed in terms largely abstracted from the human histories amongst which the objects in question were produced and within which they have been received and understood. Architectural value was presented as if it were a matter that could be objectively determined, with no hint of subjectivity. It was presented as a matter for dispassionate judgment and calmly applied reason.

No questions were raised about the origins and development of this scale of values, nor about whose interests its maintenance might serve, nor about its relationship to the chapel's proper purpose as a house of worship – even though, as Hodge Dep Ch himself notes at one point, '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' (para 5).<sup>14</sup>

This is crystallised at one point in the judgment (para 73), when the evidence of Roger Bowdler is summarised; Bowdler is (as I mentioned above) a former director of listing at Historic England.

Dr Bowdler accepted that his expertise lies in assessing historical significance in listing matters rather than in matters of worship (a point Dr Bowdler had acknowledged at page 21 of his report, where he had

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<sup>14</sup> Hodge is quoting, with altered punctuation, from John Owen's judgment in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1. See Hodge's judgment, para 81.

said that as his document was ‘concerned with matters of heritage significance’, he would avoid comment on the ‘pastoral and missional context’). Mr Gau described the manner of Mr Hill’s cross-examination, with some justification, as ‘unhelpful “hair-splitting”’. I suspect that the reason for this was because it was very difficult to challenge Dr Bowdler’s reasoned opinions.<sup>15</sup>

The court, in its handling of this side of the case, shows that it is used to receiving and interpreting this kind of evidence. Diocesan consistory courts like this are, after all, well used to hearing faculty cases, and so well used to receiving representations of this kind on behalf of buildings and monuments. It is, it seems, clear to the court what counts as expertise in relation to such evaluation, and where such expertise is to be found. By long usage, it has come to seem objective and all but unchallengeable.

### **A false framing**

Matters are quite otherwise with the case for the monument’s removal, based as it is upon the claim that the continued presence of the monument represents ‘a serious obstacle to the Chapel’s ability to provide credible Christian ministry and witness to the College community and a safe space for secular College functions and events’ (para 3).

It becomes clear from the way that case was presented, the testimonies and arguments that supported it, the questions and counter arguments that were launched against it, and in the terms in which – reflecting on all this material – Hodge Dep Ch expressed his judgment, that the court had much less facility in handling this side of the argument. In part, this was simply a matter of the stark imbalance in the support that was brought to bear: there

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<sup>15</sup> Mark Hill QC, as he then was, represented Jesus College during the proceedings, and Justin Gau represented the majority of the parties opponent.



was on this side little of the well-oiled, well-funded, well-recognised machinery of institutions and individual expertise that we saw contributing to the discussion of architectural and historical value. In part, though, it speaks of something deeper: a lack of competence in handling questions about the impact of contested heritage on churches' and chapels' ability in the present to be places of 'welcome and solace for all people'.

This lack of competence can be seen in the emergence, over the whole course of the case, of a false framing of the question that faced the court. The first element of this false framing is a simple misdirection of the court's attention. The Church of England's contested heritage guidelines are very clear that the handling of such cases

is not about judging people in the past by the standards of the present, but about how items of contested heritage and wider issues of under-representation affect our ability to be a Church for all in the 21st century.<sup>16</sup>

The focus of discussion should be the impact of a piece of material culture on a church or cathedral's ability to be a place of welcome and solace to all, and how this should best be addressed, not on whether an individual deserves to be expunged from the historical record.<sup>17</sup>

In terms of attempting to justify a physical intervention such as altering or removing a memorial what needs to be proven is not principally that a memorial is to somebody (or perhaps donated by somebody) whose views or actions we would now condemn, but rather that the presence

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<sup>16</sup> *Contested Heritage in Cathedrals and Churches* (note 9), 7; this and the following two extracts from this guidance are quoted in Hodge's judgment, para 28.

<sup>17</sup> *Contested Heritage in Cathedrals and Churches*, 13.

of the memorial has a demonstrable negative impact on the mission and ministry of the church or cathedral.<sup>18</sup>

Repeatedly, however, Hodge Dep Ch – reflecting the arguments made by the parties opponent, as well as to a certain extent the claims made by the college – goes beyond the necessary discussion of the nature and extent of Rustat’s involvement in the trade in enslaved Africans, and draws our attention precisely to the question of how Rustat himself should now be judged. In his overall summary of the case he makes this central. He draws attention to Rustat’s ‘undoubted qualities of duty and loyalty to his King, and his considerable charity and philanthropy’ (para 8) and hopes that ‘when Rustat’s life and career is fully, and properly, understood, and viewed as a whole, his memorial will cease to be seen as a monument to a slave trader’ (para 7).

Hodge Dep Ch goes on to express his hope that Rustat’s involvement in the trade in enslaved Africans ‘can be acknowledged and viewed in the context of his own time’ (para 8). This is the second element in the production of the false framing. The first element is the directing of the court’s attention away from the impact of the memorial in the present and onto the condemnation or exoneration of Rustat himself. The second is the insistence that Rustat cannot be judged by today’s moral standards. After all, as Hodge Dep Ch says, quoting L.P. Hartley, ‘The past is a foreign country; they do things differently there’ (para 7). Lawrence Goldman, one of the parties opponent, put things more strongly: ‘it is intellectually and morally illegitimate to convict figures from the past for transgressing principles that we now uphold’.<sup>19</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> I am leaving aside here the question of whether it is quite so simple a matter to say that Rustat’s actions were morally acceptable in his own day. There is a brief discussion in para 17 (‘Wider attitudes to slavery in Britain’) of the ‘Extracts from the expert historians’ joint statement’ appended to Hodge’s judgment, and a similarly brief discussion in A Taylor, ‘False Narratives and the Rustat Memorial Judgment’, *Fulcrum*, 6 May 2022, <<https://www.fulcrum-anglican.org.uk/articles/false-narratives-and-the-rustat-memorial-judgment/>>, accessed 5 October 2023.

The third element in the false framing of the case follows close upon the second. Instead of judging Rustat by the standards of the present, we are directed instead to look upon him simply as one more fallible human being – a fellow sinner. In the judgment, it seems that Rustat’s involvement in the trade in enslaved Anglicans can be fairly treated as just one more example of human sin – a reminder, in fact, that we are all sinners (para 9). (Araba Taylor has called this ‘the “all sins matter” defence’.<sup>20</sup>) The Rustat memorial, Hodge Dep Ch says (para 8)

may be employed as an appropriate vehicle to consider the imperfection of human beings and to recognise that none of us is free from all sin; and to question our own lives, as well as Rustat’s, asking whether, by (for example) buying certain clothes or other consumer goods, or eating certain foods, or investing in the companies that produce them, we are ourselves contributing to, or supporting, conditions akin to modern slavery, or to the degradation and impoverishment of our planet. I acknowledge that this may take time, and that it may not prove easy; but it is a task that should be undertaken.

Contemplating such imperfection might be uncomfortable, but that discomfort is an unavoidable part of looking open-eyed at our fallen world. Hodge Dep Ch goes on in para 9 to say

I bear in mind also that whilst any church building must be a ‘safe space’, in the sense of a place where one should be free from any risk of harm of whatever kind, that does not mean that it should be a place where one should always feel comfortable, or unchallenged by difficult, or painful, images, ideas or emotions, otherwise one would

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<sup>20</sup> Taylor, (note 21).

have to do away with the painful image of Christ on the cross, or images of the martyrdom of saint.

Leaving aside the rather important difference between images that memorialise those who suffered and images that memorialise those who profited from others' suffering, it is clear that the discomfort envisaged here is quite generic. It is a discomfort that might be produced in any sensitive observer, faced with any historical image of sin and suffering whatsoever.

When we put all of these elements together, they give a very definite framing of the question facing the court. That question, it seems, concerns a generic observer in the present, and what they are to make of sins committed in a time long past – a 'foreign country' of different laws and different mores. The distance between the observer and the object of their contemplation is such that the primary connections envisaged between them are found in their common humanity and their common fallibility. The observer is envisaged as someone who might approve or disapprove of the past figure, and who might be made more or less uncomfortable when contemplating their sins – but only because any example of painful actions in the past might prompt such difficult but necessary reflections in a reasonable observer in the present.

Hodge Dep Ch expresses very clearly his hope that, in Rustat's case, this distanced, sober, and quite generic reflection might lead to forgiveness (para 9):

Whenever a Christian enters a church to pray, they will invariably utter the words our Lord taught us, which include asking forgiveness for our trespasses (or sins), 'as we forgive them that trespass against us'. Such forgiveness encompasses the whole of humankind, past and present, for we are all sinners; and it extends even to slave traders.

## Missing the real story

As I have already noted, the Church of England's statutory guidance is clear that the emphasis in cases of contested heritage should *not* fall on whether a figure from the past is to be condemned or forgiven. The emphasis should fall on the pastoral and missional impact of this heritage in the *present*. In the words of a more recent case, about a different memorial, the proper focus is not 'moral judgments about the character' of the person memorialised, but 'the impact of the memorial upon the function of the worshipping community that serves God and the community in this place today.'<sup>21</sup>

In order to assess this impact well, a quite different framing is needed from the generic and ahistorical one that dominated the majority of discussion in this case, and which played such a large part in the *Rustat* judgment. Ben Fulford, in a blog post written shortly after that ruling was published, identified precisely what is missing from it:

There is no consideration of the legacies of slavery and colonial rule either globally, in the UK or in Cambridge, nor of the connections linking that past to present structural inequalities affecting the lives of black people in the UK, including in Higher Education. There is no inquiry after the intergenerational effects of slavery and colonial rule in the racialisation and situations of those who come to study and teach in our elite institutions and their pedagogy. There is no thought about the significance of such questions for the meaning of this memorial, in this position, for black people or other minorities.<sup>22</sup>

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<sup>21</sup> *Re St Peter, Holy Trinity and All Saints, Dorchester* [2022] ECC Sal 4, paras 52–53, <<https://lawandreligionuk.com/wp-content/uploads/2022/08/In-the-Matter-of-Dorchester-St-Peter-Holy-Trinity-and-All-Saints-2022-ECC-Sal-4.pdf>>, accessed 5 October 2023.

<sup>22</sup> B Fulford, 'Memory, the Cross and the Rustat Memorial', *Unfinished Theology*, 3 April 2022, <<https://unfinishedtheology.home.blog/2022/04/03/memory-the-cross-and-the-rustat-memorial/>>, accessed 5 October 2023.

In a recent article in this journal, Araba Taylor speaks in similar terms of the judgment's

resolute refusal to acknowledge that any of its sequelae are still infecting today's body politic, let alone the Body of Christ. It also sets slavery clearly in the past – as in, over and done with.<sup>23</sup>

In other words: the problem considered in the Rustat case is not a crime long past, upon which people in the present can only look back as distanced observers. It is, rather, the way in which the trade in enslaved Africans has shaped, and has *gone on shaping*, the world in which we live, including the worship that now takes place in Jesus College Chapel, Cambridge.

This is true materially. The trade in enslaved Africans decisively shaped distributions of wealth around the world, and across several societies, creating and exacerbating massive and unjust inequalities that have been maintained fiercely, and often violently, in the two centuries since. Britain may eventually have ended this trade, but if true repentance includes an effort to repair what has been broken, Britain's repentance from the trade must be judged partial, grudging, and still very much incomplete. Reparation was certainly paid, and in vast quantities, but it was paid only to the 'owners' of enslaved people, rather than to the enslaved people themselves.<sup>24</sup> The material inequalities that the trade produced were left to fester, and they still mark the world within which the worshipping life of Jesus College Chapel now takes place.

It is also true culturally. In order to produce the kind of culture in which Rustat could, without moral qualm, engage 'in perfectly legal

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<sup>23</sup> A Taylor, 'The Case of the *Rustat* Memorial – Does *Duffield* Pose all the Right Questions?' (2023) 25 *Ecc LJ* 38–51, at 45–6, <<https://doi.org/10.1017/S0956618X22000679>>, accessed 5 October 2023.

<sup>24</sup> For details, see the data gathered by the Centre for the Study of the Legacies of British Slavery, <<https://www.ucl.ac.uk/lbs/>>, accessed 5 October 2023.

investment in a perfectly legal trade’ (para 44), people had to learn to deny the full humanity of Black Africans. Patterns of imagination and evaluation had to grow and spread that would make this profitable trade morally excusable. But those racist patterns of imagination and evaluation have long outlasted the trade that they excused.<sup>25</sup> They have proved to have very stubborn roots indeed, and they are still very much an active force in British society today – and, again, this legacy shapes the world within which the worshipping life of Jesus College Chapel now takes place.

We are considering, then, a history that has continuing effects in the present, effects which have very different impacts upon Black people from those which they have upon White people. It is this ongoing history and its present impact that are missing from the false framing that dominates the *Rustat* ruling.

Even the Church of England’s *Contested Heritage* guidance equivocates at this point. It acknowledges that ‘The effects of enslavement continue to impact the lives of many UK ethnic minority communities’ – but that sentence continues

...to whom, at best, these objects may be reminders of an ‘overcome’ past, a horror from which we celebrate our extrication; 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.<sup>26</sup>

Neither side of the ‘at best’, ‘at worst’ contrast expressed in the above passage points unambiguously to the fact that race-based oppression and

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<sup>25</sup> See W Jennings, *The Christian Imagination: Theology and the Origins of Race* (New Haven CT, 2010), ch. 1.

<sup>26</sup> *Contested Heritage in Cathedrals and Churches* (note 9), 11; quoted in the *Rustat* judgment, para 28.

disenfranchisement are ongoing and active forces in the world today – although the same guidelines do acknowledge elsewhere that ‘Systemic and targeted discrimination is still faced by UK minority ethnic communities today’.<sup>27</sup>

Rustat’s memorial matters not because it is one more example of the generic sinfulness of human beings, but because it is a memorial to one of the men who helped create this specific history of ongoing harm. The historians advising the court agreed that ‘[i]t is beyond dispute that, between 1663 and 1691, Rustat was involved with companies ... that traded in enslaved people; in both cases, this involvement was as an investor, a lender, and an “Assistant”. There is no doubt that Rustat was fully aware that these companies were involved in trading in enslaved people.’<sup>28</sup> Investments like his were not an accidental feature of the trade in enslaved Africans; they were the very motor that created it, and drove it to all the depths that it reached. That trade was created by the expectation of profit, and sustained by its realisation: it was, above all, a creation of commerce. In investing in this trade, Rustat and men like him were not simply skimming something from the surface of a horror that would have existed without them. They were providing its *raison d’être* – and, by so doing so, helping to power something that is still having devastating effects in the present.

Hodge Dep Ch, in para 129 of his judgment, notes the Church of England’s *Contested Heritage* guidance’s insistence that decisions in cases like this should draw upon ‘robust, inclusive research to understand as much as possible about the heritage in question’. In this case, that research rightly included an assessment of the extent of Rustat’s involvement in the trade in enslaved persons, and of the truth of the claims being made about him in the present. Such investigation is clearly vital, and the outcome of the case should

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<sup>27</sup> Ibid.

<sup>28</sup> See the ‘Extracts from the expert historians’ joint statement’ included as an appendix to Hodge’s judgment, para 1.



indeed be shaped by it. What is lacking, however, is a proper acknowledgment of why Rustat's involvement in this trade, if it is deemed to be significant, matters in the *present*.

What is at stake in this case and others like it is not the reactions of an unmarked or neutral observer discomfited by evidence of past mores. What is at stake is the experience of Black people who, day by day, are still navigating the ongoing and poisonous effects of this very specific history. What is at stake is the question of whether, in order to worship in this college chapel, they should be required to sit beneath a monument that celebrates one of the people whose investment helped create the continuing trauma in which their lives continue to be entangled.<sup>29</sup>

The 'safe space'<sup>30</sup> that is needed is not a space free from generic discomfort. It is not a space free from anything that might make one acknowledge and wrestle with the pervasive brokenness of the world. It is, rather, a space that does not require people who experience the ongoing trauma of racism to be exposed to – as an unavoidable and now inevitable accompaniment of their worship – a celebration of the people who funded their abuse.

As the Archbishop of Canterbury said, a few weeks after the Rustat judgment was handed down:

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.<sup>31</sup>

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<sup>29</sup> This false framing is also visible in this case in the posing of the question, If the Rustat memorial is to go, what about memorials to Cranmer? (paras 44, 47). That question only works to undermine the case against removal if one takes that case to be about the impact of any difficult history upon a generic observer in the present.

<sup>30</sup> Cf. para 9 of the judgment.

<sup>31</sup> '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 5 October 2023.

## The place of testimony

I noted above that the assessment of the architectural and historical significance of Rustat's memorial was informed by weighty institutions, drew upon acknowledged experts, and was conducted in language that communicated sober objectivity – and that all of this was a familiar part of consistory court cases.

I also claimed that the other side of the proceedings, the consideration of the *present* impact of the memorial, was not handled by the consistory court in this case with anything like the same competence and assurance. This is not, it must be stressed, because there is any lack of expertise that could have been drawn upon to substantiate and elaborate the claims I have made about the ongoing effects of the trade in enslaved Africans, the traumatic impact of racism upon people today, and the specific ways in which those impacts are felt in Anglican worship and in institutions of Higher Education. Those are matters that have been widely and deeply studied, on which there is a large and growing scholarly literature, and in which it is not hard to find experts more than capable of explaining the general claims to a court audience, and leading those audiences through their relevance to particular cases.<sup>32</sup> The problem – and it is a systemic one, rather than being limited to any one person or group – is that recourse to such expertise has not become a habitual part of the Church of England's deliberations in this area (nor, indeed, in any other). Recourse to such expertise could provide a foundation for this side of the court's inevitable balancing act no less weighty, and no less objective than the expertise regularly brought to bear on 'matters of heritage significance'.

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<sup>32</sup> I am most familiar with discussions of the Higher Education context. Amongst many other sources, see D Reay, M David and S Ball (eds), *Degrees of Choice: Class, Race, Gender and Higher Education* (Stoke on Trent, 2005); S Ahmed, *Being Included: Racism and Diversity in Institutional Life* (Durham NC, 2012); and J Arday and H Mirza (eds), *Dismantling Race in Higher Education: Racism, Whiteness and Decolonising the Academy* (Cham, 2018).

Nevertheless, precisely because this side of the case involves speaking about the impact of contested heritage on real people in the present, it properly also includes personal testimony. In most consistory court cases, such testimony will be received and responded to in writing; the *Rustat* case was unusual in that it involved a hearing in which such testimony was also presented orally. Perhaps the central example of personal testimony in the *Rustat* case was that given by the Master of Jesus, Sonita Alleyne. In her written submission to the court, quoted in Hodge's judgment, she testifies that:

Every time I go into the Chapel as a black woman, who is descended from slaves, whose ancestors were the lucky line that survived the slave plantations of Barbados, I feel like I am giving a false impression that everything is fine. It is not.<sup>33</sup>

In order to do their job well, the church's courts need to hear and to value such properly subjective testimony, because they need to understand the specific forms of pain caused by the objects that they are considering. And they need to hear this testimony, not as providing questionable examples of what any reasonable person might be expected to experience in this space, but as evidence of the particular impact that such heritage has on those caught up in the ongoing effects of that heritage.

Some of those who spoke in favour of retaining the monument criticised the emotional nature of the case made for removing it. Goldman asked the court to be 'honest, accurate, and entirely without sentiment in examining and detailing the life, and indeed the crimes, of historic figures' (para 108), Bowdler of 'a regrettable lack of objective balance' in the college's case (para 71). It is not clear whether Hodge Dep Ch is echoing those comments when he describes the Master's testimony as 'highly emotive' (para 43), and the College's case overall as 'powerful, and emotive'; those

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<sup>33</sup> Judgment, para 55, quoting para 35 of Alleyne's submission.

comments do not come with an explicit evaluative gloss. The overall impression given by his judgment is nevertheless that he is considerably more comfortable when handling the ‘reasoned opinions’ of a witness like Boulder than the emotive testimony of a witness like Alleyne.

One might wonder whether a response ‘entirely without sentiment’ is really more objective – that is, more truly adequate to the reality – than an emotive one, when the objects in question are actions that produced the history of enslavement and its ongoing legacy of racism. In this context, however, the more important point is that, in order to answer the question mandated for it by the Church of England’s guidelines, the court needs to receive, and to give due weight, to testimonies that convey the subjective impact of contested heritage in the present. However sober, objective and calm its deliberations, it needs to receive, and to know how to respect and value, emotive testimony.<sup>34</sup>

### **The way forward**

The trying of the *Rustat* case involved a false framing, focused on the question of how a generic observer in the present might appropriately respond to uncomfortable actions in a history long past. It missed the real story, of the ongoing legacy of enslavement, and the present impact of the Rustat memorial upon the specific people whose lives are still being harmed by that legacy. As a result, it did not give due place to the testimony of those who feel that harm most keenly. It showed itself highly competent in assessing the artistic and historical significance of the memorial (at least for a certain rather abstract sense of ‘significance’). It showed itself considerably less competent in

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<sup>34</sup> Since the present piece was written, the judgment in another contested heritage case has provided a clarification of what it means for someone to have ‘sufficient interest’ in such a case, such that their views ought to be accorded weight in the court’s deliberations. *In Re Redcliff, St Mary* [2023] ECC Bri 1, paras 7–12 <<https://lawandreligionuk.com/wp-content/uploads/2023/06/In-Re-St-Mary-Redcliffe-2023-ECC-Bri-1.pdf>>, accessed 5 October 2023.

assessing the impact of the memorial on the chapel's ability to be a place of welcome and solace to all.

If the Church of England is to ensure that the consideration of contested heritage is handled more fairly than this in the future, there are several lessons to be learnt.<sup>35</sup>

First, there is a need for appropriate training. This is not simply a matter of generic 'diversity training'. Something much more specific is needed. Trevor Cooper, in an analysis of the Church of England's guidance on contested heritage published before the *Rustat* case, notes that it takes consistory courts into new territory:

the guidance requires the need for change to be evaluated not in terms of change allowing activities which were physically impossible before, but at least partly in the light of attitudes and reactions to the contested object – for example, the painful feelings it may provoke in some people, or the high regard in which others might hold the same object – and their consequences. This is a very significant shift in the notion of need.<sup>36</sup>

Those involved in these courts will need to learn how best to handle the evidence and arguments pertinent to this unfamiliar kind of assessment, and how to avoid false framings of the question before the court. In particular, they will need to learn how to centre not the perspectives of supposedly generic and distanced observers, but the testimony of those Black people (and members of other communities harmed by the histories from which contested heritage comes) whose welfare is most directly at stake.

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<sup>35</sup> For another account of the changes needed, see Sutton (note 4).

<sup>36</sup> T Cooper, 'Contested heritage – A Review of the Church of England Guidance', *Law & Religion UK*, 21 January 2022, para 5.3, <<https://lawandreligionuk.com/2022/01/21/contested-heritage-a-review-of-the-church-of-england-guidance/>>, accessed 5 October 2023.

Second, more thought needs to be given to the eliciting and sensitive handling of such testimony (whether received in writing or orally), as it conveys the subjective impact of contested heritage in the present. Many of those who testify to the impact of racism upon their lives are used to being disbelieved, to being accused of exaggeration, and to being dismissed as overly emotional.<sup>37</sup> They have good reason to fear that their testifying about the reality of racism will lead to their being treated in dismissive and patronising ways that echo the very racism that they are describing.<sup>38</sup> These are well-documented and well-understood phenomena, and church courts ought to be adept at avoiding them. Those courts need to consider how to provide a safe space within which such testimony can be elicited and received – not so as to avoid asking the necessary questions, but so as to hear the evidence that they need, and so as to avoid inflicting further and quite unnecessary suffering.

Third, there is a need to redress the serious imbalance that we have seen between the formidable array of well-established institutions that can be brought to bear on determining the architectural merit of contested heritage, and those that can help the court understand the present impact of that heritage. There is, as I have said, no lack of expertise available on this latter side: the history and impact of racism have been and continue to be very widely studied; there are any number of individual experts and research centres devoted to this study. The question is, rather, how those involved in contested heritage cases can get better at accessing, understanding, and evaluating such appropriate expert input, and how, over time, the forms of evidence and argument upon which it draws can become as familiar to those

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<sup>37</sup> For one study in an American context, see D Motro et al., ‘The “Angry Black Woman” Stereotype at Work’ (2022) *Harvard Business Review*, 31 January, <<https://hbr.org/2022/01/the-angry-black-woman-stereotype-at-work>>, accessed 5 October 2023.

<sup>38</sup> For discussion of this in a different legal setting, see D Renton, ‘Culture of Disbelief? Why Race Discrimination Claims Fail in the Employment Tribunal’, *Institute of Race Relations*, 24 January 2013, <<https://irr.org.uk/article/culture-of-disbelief-why-race-discrimination-claims-fail-in-the-employment-tribunal/>>, accessed 5 October 2023.

courts as are, at present, those associated with expert assessments of heritage significance.

Finally, the Church of England's statutory guidance on *Contested Heritage in Cathedrals and Churches* needs to be strengthened. It already clearly indicates that the task is not to judge people in the past by the standards of the present, but to assess the impact of contested heritage upon the worshipping community today. It needs to do much better, however, at pointing out that, for many, the history represented by contested heritage is very far from 'an "overcome" past, a horror from which we celebrate our extrication', but an ongoing reality, and a source of daily harm. It already recommends 'robust, inclusive research to understand as much as possible about the heritage in question',<sup>39</sup> but it could do better at insisting that such research should go beyond the artistic and historical significance of the heritage and the nature of the events surrounding its production, to consider the ongoing legacies of this history, and the differential impacts that those legacies have on people in the present, and especially the harm that they continue to inflict upon Black people.

The *Rustat* case has demonstrated all too clearly that the Church of England's consistory courts have learning to do if they are to keep the focus of their attention where it should be: on the role played by our contested material heritage in the ministry and mission of the church, on the lives and testimonies of those who are most directly harmed by this heritage in the present, and on the need for the Church, as it pursues its ministry and mission, 'To transform unjust structures of society, to challenge violence of every kind and pursue peace and reconciliation.'

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<sup>39</sup> *Contested Heritage in Cathedrals and Churches* (note 9), 8; cf. 19, 21.

<[https://www.churchofengland.org/sites/default/files/2023-08/rjr3\\_digital-final-version.pdf](https://www.churchofengland.org/sites/default/files/2023-08/rjr3_digital-final-version.pdf)>, accessed 5 October 2023. I am grateful to Philip Petchey for detailed feedback on that version.





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