



THE CHURCH
OF ENGLAND

**GUIDANCE
ON THE AWARD
OF COSTS IN
FACULTY
PROCEEDINGS
IN THE
CONSISTORY COURT**

Revised and Reissued January 2011

**ECCLESIASTICAL JUDGES
ASSOCIATION**

ECCLESIASTICAL JUDGES ASSOCIATION
GUIDANCE ON THE AWARD OF COSTS IN
FACULTY PROCEEDINGS IN THE CONSISTORY COURT

Revised and Reissued January 2011

1. Purpose of Guidance

- 1.1 The Church of England has for centuries operated a system of control over its consecrated land and buildings. This is known as the faculty jurisdiction and applies to both listed and unlisted churches and their contents. It is separate and distinct and, in many respects, more comprehensive than the controls imposed by the secular planning legislation.
- 1.2 The faculty jurisdiction receives no public funding, so that the cost of administering the system has to be met by those who use it.¹ This revised Guidance, issued by the Ecclesiastical Judges Association, aims to provide clarification of the principles upon which costs are awarded in the consistory court.
- 1.3 The guidance is directed to:
- (a) any parish or private individual or body seeking a faculty whether the petition is opposed or unopposed;
 - (b) any objectors, whether an individual, English Heritage, a national amenity society, a local planning authority or any other body participating in a contested faculty case in the consistory court.
- 1.4 The overall purpose of the guidance is to enable all persons becoming involved in the exercise of the faculty jurisdiction to have an understanding of why, when, and on what principles orders for costs are made. It is a revised version of the previous guidance which was issued in February 2000 and replaces that document in its entirety.

2. General Introduction

- 2.1 Ecclesiastical law requires a faculty to be obtained before alterations, additions, removals or repairs are made to the fabric, ornaments, or furniture of the church, or works are carried out in the churchyard. The primary responsibility for applying for a faculty rests upon the minister and churchwardens², but others may petition for a faculty and frequently do so, for example for the introduction of memorials, or the placing of items such as scaffolding in the churchyard temporarily to facilitate works to an adjoining building.
- 2.2 The cost of administering the faculty system in unopposed cases, where there is no public hearing in the consistory court, is covered by the payment of faculty fees. In many dioceses the faculty fees for petitions presented by parishes are borne by the Diocesan Board of Finance rather than directly by each parish. Faculty fees in all other cases are payable by the individual or body presenting the petition.
- 2.3 Whenever it is necessary for the Chancellor to hold a hearing in the consistory court the costs of doing so are not covered by any arrangement with the Diocesan Board of Finance, nor are they covered by the standard faculty fee payable by an individual or body in an

¹ The principle of litigation being largely paid for by litigants is no different from that of the civil and family courts which are funded to 80% of their cost through court fees. See: <http://www.hmcourts-service.gov.uk/infoabout/fees/whywecharge.htm>).

² Canon F13.

unopposed case. As a matter of policy the cost of and incidental to holding a hearing is covered by a system of court fees fixed by Fees Orders made by the Fees Advisory Commission under the relevant Ecclesiastical Fees Measure.³ These are reviewed annually and the Fees Order has to be approved by the General Synod of the Church of England and is laid before Parliament before it comes into force.

- 2.4 If a formal objection is lodged to a petition and either a hearing is convened or the Chancellor decides to determine the dispute upon written representations by the parties, the amount of the court fees will be arrived at by reference to the fees laid down in the Fees Order in force for that year.
- 2.5 In addition to the court fees, there may be the costs of legal representation for the parties, usually the minister and churchwardens and, if the petition is opposed, an individual or individuals, or a body such as English Heritage or a national amenity society, or a local association. Unless the Chancellor makes an order, each party is responsible for paying the costs of any barrister or solicitor it chooses to engage, although in certain circumstances the Chancellor may make an order for one party to pay some or all of another party's costs of legal representation.
- 2.6 This Guidance explains the principles which are applied in practice in the consistory court in respect of the making of any order for the payment of court fees or costs between parties.

3. The power to make an order in respect of costs

3.1 Section 60 of the Ecclesiastical Jurisdiction Measure 1963 enables the Chancellor in the consistory court

- (a) at any stage in the proceedings to order any party to give security for costs;
- (b) to make an order that any party shall pay court fees;
- (c) to make an order that a party pay the taxed costs of another party.

The purpose of these powers is, first, to cover the cost of administration of the court in respect of the particular faculty matter (the court fees); secondly, to give a discretion to the Chancellor to protect a party pursuing a petition or an objection from the risk of being unable, if successful, to recover any costs awarded against a party with no or minimal financial resources (security for costs); thirdly, to give the Chancellor a discretion on the facts of a particular case to order one party to pay the whole or part of the costs incurred by the other party as the result of the contested proceedings in the consistory court.

- 3.2. The availability of these powers is intended to ensure that a sense of discipline is introduced into the proceedings. This discipline is not intended to deter people from exercising their right to object to the grant of a faculty, nor to deter the minister and churchwardens, or others, from pursuing their application even though it is contested. The fact that costs will be incurred and that the Chancellor will have to deal with the subject of costs at the conclusion of the proceedings should, however, operate as a discipline towards saving costs, for example, by narrowing the issues which are in dispute and limiting the amount of paperwork to be handled through the Registry prior to a hearing. The powers also enable the Court to ensure that the Registrar is properly compensated for his work in dealing with the case and that his expenses are covered.

4. Unopposed proceedings where a hearing is held

- 4.1 A hearing may be held in the consistory court, even where no objection has been lodged. The hearing may be required by law as, for example, in certain cases where demolition is proposed,⁴ or the Chancellor may decide to hold a hearing, for example, where the petition

³ See section 63 of the Ecclesiastical Jurisdiction Measure 1963, as amended.

⁴ Section 14, Care of Churches and Ecclesiastical Jurisdiction Measure 1991.

is for a faculty to sell an item of value belonging to the church and the justification for doing so needs to be scrutinised. Another possibility is that the Diocesan Advisory Committee does not recommend the proposal, but the petitioners are exercising their right to seek to persuade the Chancellor to grant a faculty, in which case a hearing may be necessary to examine the arguments in depth.

- 4.2 In any such case the prescribed court fees will be payable by the petitioner or petitioners as being a necessary consequence of the request for a faculty. An order for payment of the court fees will be made at the end of the proceedings, whether or not the faculty is granted. The order may include the costs of the Archdeacon who has intervened in the proceedings at the Court's request, although there is statutory provision for such costs to be borne by the Diocesan Board of Finance,⁵ which may enforce a costs order made in the Archdeacon's favour.

5. Opposed proceedings where a hearing is held

- 5.1 The general principles applicable to costs incurred in opposed proceedings were set out by the Court of Arches in *Re Abbey Church of St. Mary the Virgin, Sherborne*⁶ both in relation to (a) court fees and (b) costs between parties. These principles are the basis for the points made in the following paragraphs.

(a) Court Fees

- 5.2 These costs arise as part of the process of obtaining a faculty and should be budgeted for by prospective petitioners in estimating the overall cost of the works for which a faculty is to be sought. As a general rule the petitioners will be ordered to pay the court fees even when they are successful in obtaining a faculty in opposed proceedings. They may also be ordered to pay the costs of witnesses attending to give evidence at the request of the court such as a witness on behalf of the Diocesan Advisory Committee or the Church Buildings Council, or the costs of any person such as the Archdeacon who intervenes in the proceedings to assist the court. However, the Chancellor has a discretion to be exercised on the facts in each case. The determination of the award of costs is separate and distinct from the decision as to whether a faculty should be granted or not.
- 5.3 An order that the whole or part of the court fees, or particular court fees, should be paid by an objector or objectors is unlikely to be made, unless there is clear evidence of "unreasonable behaviour" by an objector or objectors, which has unnecessarily added to the procedural costs prior to the hearing (see also paragraph 5.6 below).
- 5.4 Any opposed proceedings are likely to give rise to a considerable amount of correspondence between the Registrar and the parties in connection with the conduct of the proceedings. In assessing whether any part of the correspondence fee allowed to the Registrar at the conclusion of the proceedings (under the discretion contained in the Fees Order) should be paid by an objector or objectors, illustrative examples of what the Chancellor could regard as unreasonable are:
- (a) additional correspondence resulting from the failure of an objector or objectors to ask within a reasonable time after notification of the petition for further details of the proposal if, in the objector's opinion, the petition and accompanying documents did not give sufficient information to enable the objector to have a full understanding of the impact the proposal would have on the character of the church;
 - (b) additional correspondence and consequential delay caused by the failure of an objector or objectors to reply within a reasonable time to requests.

⁵ Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 16(4).

⁶ [1996] Fam 63 at p 70; [1996] 3 WLR 434 at p 438; [1996] 3 All ER 769 at p 774.

5.5 The Chancellor could also consider that the conduct of the case by an objector, for example, in attending a hearing for directions with inadequate information, thus resulting in an unnecessarily extended hearing, or the need for an adjournment, was unreasonable behaviour justifying the making of an order in respect of part of the court fees incurred at that hearing or several hearings. Other examples of conduct which may give rise to an adverse costs order include:

- (a) raising, after delivery of judgment, matters not contained in the original objection in consequence of which a decision is revisited.⁷
- (b) unlawful conduct, for example a stonemason introducing a monument into a churchyard which did not conform with the Chancellor's Churchyard Directions or the priest purporting to authorise him so to do.⁸

Any additional costs incurred by an objector as the result of the petitioners' conduct would be dealt with under the costs between parties (see paragraph 5.6 below) as the petitioners already have responsibility for the court fees in the first instance. Similarly, any adjournment during the course of the final hearing of the petition caused by lack of preparation of an objector or objectors could also be regarded as unreasonable and result in an order that the objector or objectors pay part of the court fees relating to the hearing.

(b) Costs between parties

5.6 The Chancellor has a discretionary power to make an order that one party should pay the whole or part of the legal costs of another party, subject to an assessment of reasonableness as to the amount claimed. This means that the petitioners could be ordered to pay the whole or part of the objectors' costs, or the objectors could be ordered to pay the whole or part of the petitioners' costs. However, the general practice in the consistory court is that the parties are expected to meet their own legal expenses. This means that the Chancellor will generally not make any order in respect of costs as between the parties. An award of costs does not depend upon nor follow automatically from the "success" of a party to the proceedings. This is because it is important that all the issues for and against the grant of a faculty are fully examined. Neither petitioners nor objectors should, as a general rule, be penalised simply because they are unsuccessful in the whole or part of their case.

5.7 Costs may, however, be awarded between parties when unreasonable behaviour is held to have occurred. "Unreasonable behaviour" as a criterion for an award of costs is a test to be applied to the way in which a party has behaved in the sense of conduct of that party's case in relation either to procedural matters or the substantive issues in dispute. Whether a party has behaved unreasonably will depend upon the facts in a particular case. "Unreasonable" is a word in ordinary use. It will be necessary to have regard to the picture as a whole in reaching a decision about an award of costs.⁹

5.8 Procedural factors which might result in a finding of unreasonable behaviour and an award of part of the costs against another party (petitioner or objector) are, for example, but not exclusively,

- (a) an unjustifiable failure by a party to seek to ascertain or to provide relevant facts prior to the hearing which is consequently unnecessarily extended in duration by exploration of such facts at the hearing,

⁷ As in the case of *Re St Andrew, Bainton (No 2)*, York Cons Ct, September 2008.

⁸ See *Re Woldingham Churchyard* [1957] 1 WLR 811, [1957] 2 All ER 323, Southwark Cons Ct; *Re St Mark, Haydock (No 2)* [1981] 1 WLR 1167, Liverpool Cons Ct. See also *Re St Thomas à Becket, Framfield* [1989] 1 WLR 689, [1989] 1 All ER 170, Chichester Cons Ct, in which an architect was criticised for supervising works for which no faculty had been obtained, and *Re St Peter and St Paul, Scrayingham* [1992] 1 WLR 87, [1991] 4 All ER 411, York Cons Ct. Note also *Re Icklesham*, 25 October 2007, Chichester Cons Ct.

⁹ Compare: DCLG Circular No 03/2009 *Costs Awards in Appeals and other Planning Proceedings*, Annex- Parts A, B and D.

- (b) in cases which result in a compromise at the hearing, an unjustifiable failure by a party (petitioners or objector) to engage at an early stage in consultation with the other party about a compromise solution, so that costs have been unnecessarily incurred by the other party in preparing for an opposed hearing;
- (c) excessive delay in informing the other party that a particular item in the petition, or a particular point of objection, is being withdrawn or not being pursued so that costs have been unnecessarily incurred by the other party in preparing to deal with the matter at the opposed hearing;
- (d) late compliance with any direction of the court as to the exchange of information or provision of statements of evidence by a specified date, which has disadvantaged the other party in preparation for or at the hearing.

6. Disputes relating to architecture, history, archaeology, etc: general principle

6.1 Differences of opinion in relation to the likely effect of a proposal for which a faculty is sought will give rise to issues to be determined by the Chancellor, usually involving an examination of the history of the particular church, its architectural features, or its archaeological significance, or other matters. Presentation of relevant evidence and argument in relation to such matters by those with appropriate expertise will be most unlikely ever to be regarded as “unreasonable”, whatever the outcome of the case. The position may be different where new evidence and argument are raised at or shortly before the hearing without having been previously canvassed. Whilst it would be reasonable for the other party to respond to that new evidence and argument at the hearing, the question of the reasonableness of the late introduction of new evidence or argument would be considered in relation to costs at the end of the hearing.

7. Individual private objectors

7.1 There is a distinction to be drawn between parishioners and others, who are individual objectors, and bodies such as the local planning authority, or any national amenity society, appearing as an objector in the proceedings.

7.2 If individual objectors do not have expertise themselves, nor do they call their own expert evidence, but pursue an argument on architectural, historical or other grounds based solely on unsubstantiated personal opinion, which conflicts with the weight of expert opinion available to the court, then the Chancellor may regard such behaviour as “unreasonable” and may order the objectors to pay the whole or part of the costs of the petitioners.¹⁰ Similarly, where individual objectors pursue issues which are properly matters to be determined by the local planning authority and not the Consistory Court, such as the traffic implications of an extension to the church for which planning permission has been granted, this could be regarded as “unreasonable behaviour” resulting in an order that part of the petitioners' costs be paid by the objectors.

8. Opposed proceedings dealt with by written representations

8.1 Save where he is required by law to hear evidence in open Court,¹¹ the Chancellor has a discretion to determine opposed proceedings upon consideration of written representations. This not only requires the consent of all parties in writing, but it has to be a case where the issues do not, in the Chancellor's view, necessitate cross-examination of the evidence of the petitioners or of any objector. If they do, then he will order a hearing in open court, notwithstanding that the parties have requested that the matter be disposed of

¹⁰ See by way of example *Re All Saints, North Street* (1999) 5 Ecc LJ 486, York Cons Ct; and *Re St Peter, Oundle* (1996) 4 Ecc LJ 764, Peterborough Cons Ct. See also *Re St Michael, Avelley* (1997) 4 Ecc LJ 770, Chelmsford Cons Ct.

¹¹ Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 17(4).

by written representations. In that event the principles set out in paragraphs 5 to 7 above will apply, Court fees are payable under this procedure in accordance with the same principles as are set out in paragraph 5.2 to 5.4 above.

- 8.2 The general principle that parties are expected to meet their own expenses applies under this procedure, as in cases where there is a hearing (see section 5 above). The Chancellor has, however, a discretionary power to award costs between parties, if he is satisfied that there has been unreasonable behaviour in relation to procedural matters prior to the time when he commenced his determination of the proceedings on the basis of the written representations. Thus, for example, late compliance with any direction of the court as to the exchange of information or the provision of a written statement or any document relied upon, resulting in undue delay, could result in an award of part of the costs against the other party.

9. Opportunities to amend or withdraw from the proceedings

- 9.1 It is an overriding objective in the Consistory Court that the parties should have disputes dealt with in a manner which is as inexpensive as is consistent with a fair and proper resolution of the dispute. Parties should keep the proceedings under review, and consider whether they should withdraw some or all of the proposals, or some or all grounds of opposition as the case may be. If after receipt of formal objection the petitioners wish to withdraw their petition they will be allowed to do so, but will be responsible for the court fees up to that date. If on receipt of the petitioners' answer to the objection the objector decides not to proceed with the objection, with the result that the proceedings are concluded, the petitioners will be responsible for the court fees up until that date and it is highly unlikely that there will be any order as to costs between the parties. Any application to amend a petition or an objection will be dealt with on its merits, but provided it is aimed at clarifying or narrowing the issues in dispute, it is unlikely that it will give rise to any order as to costs between the parties.

- 9.2 When a petition is withdrawn or amended (and likewise when opposition to it is withdrawn or amended) the general principle that parties will meet their own expenses will also apply, unless there are procedural factors relating to the conduct of either party, which the court regards as amounting to "unreasonable behaviour" on the particular facts of the case justifying an award of all or part of the costs against the other party.

10. Appeal

- 10.1 As in the case of any decision made by a Chancellor an appeal may be brought, with leave, to the Court of Arches or the Chancery Court of York, against an order for costs made in the consistory court.
- 10.2 There is a complete discretion as to the award of costs in the appellate court,¹² but the general principles applicable to costs of hearings in the appellate court are set out in the judgment in *Re Abbey Church of St Mary the Virgin, Sherborne*.¹³ Where an appeal is concerned with the grant or refusal of a faculty, the appellate court costs will normally be payable by those who seek the faculty, irrespective of how the appeal is determined. This is subject to the same considerations with regard to unreasonable behaviour discussed above. However, the position with regard to costs between the parties is different in the appeal court, and the unsuccessful party will generally be ordered to pay the successful party's legal costs. These principles were restated by the Court of Arches in *Re Holy Trinity, Eccleshall* (July 2010).

Notes

¹² Faculty Jurisdiction (Appeals) Rules 1998, r 16(1)(c).

¹³ [1996] Fam 63; [1996] 3 WLR 434; [1996] 3 All ER 769.

- (1) General information on the faculty jurisdiction can be found in Chapter Seven of M Hill, *Ecclesiastical Law* (Third edition, Oxford University Press, 2007), in particular paragraphs 7.79 to 7.82 which deal with costs in faculty proceedings.
- (2) Guidance should be sought from the Diocesan Registrar in case of doubt or difficulty.