

## **NOTES FOR THE GUIDANCE OF PARTIES TO CONSISTORY COURT PROCEEDINGS**

### **Public Notices**

Before a Faculty is granted, a Public Notice is published for 28 days in the Parish concerned, usually on a noticeboard inside the church and also on the noticeboard outside the church. Anyone having a lawful interest in the subject matter of the Faculty Petition may give Notice of Objection to the Diocesan Registrar. The persons entitled to give Notice of Objection are:

- (a) any person who is resident in the parish concerned or whose name is enrolled on the electoral roll of the parish but who does not reside in the parish
- (b) the Archdeacon of the Archdeaconry in which the parish is situated
- (c) the Parochial Church Council
- (d) the local planning authority for the area in which the parish is situated
- (e) any statutory amenity society
- (f) any other body designated by the Chancellor of the Diocese for the purpose of the Petition
- (g) any other person appearing to the Chancellor to have a sufficient interest in the subject matter of the petition.

Notice of Objection must be given within 28 days of the date when the Public Notice is published.

### **Objections**

Following receipt of a letter of objection from an interested person (whether as to all or some of the works or proposals) the Registrar will after the end of the period of display of the Public Notice inform the objector in writing that he may:

- (a) leave the Chancellor to take the letter of objection into account in reaching a decision without the objector becoming a party in the proceedings, in which case a copy of the letter of objection will be sent to the petitioners to allow them to comment on it before the chancellor reaches a decision, or
- (b) send or deliver to the Registrar formal written Particulars of Objection in Form No. 5 and thereupon become a party in the proceedings.

The Registrar shall in addition

- (i) inform the interested person that unless he chooses alternative (b) above, he will not be entitled to be heard at any hearing of the matter in open court in the Consistory Court which the Chancellor may decide to hold, nor to make written representations if the proceedings are to be dealt with by written representations, nor will he be a party to the proceedings for the purpose of any order for costs which may be made by the Chancellor under section 60 of the Ecclesiastical Jurisdiction Measure 1963;
- (ii) inform the interested person that if he chooses alternative (b) above he will be entitled

to participate in the proceedings at a hearing in the consistory court or in any disposal of the proceedings and that he will be a party to the proceedings for the purpose of any order for costs which may be made by the Chancellor under Section 60 of the Ecclesiastical

Jurisdiction Measure 1963, and shall send him a brief statement in terms approved by the Chancellor as to the principles which apply to costs in the Consistory Court; and

- (iii) provide the interested person with a copy of Form No. 5 (Particulars of Objection) notifying him that if he chooses alternative (b) above he must send or deliver his completed Form No. 5 to arrive at the Registry within 21 days of receipt of the letter of notification and form from the Registrar and also serve a copy of his completed Form No. 5 on the Petitioners within the same period of 21 days at such address as the Registrar may direct, and
- (iv) further inform the interested person that if no response and no Form No. 5 is received by the Registrar within the period of 21 days as required by sub-paragraph (iii) above, he will be treated as having chosen the alternative course of action in paragraph (a) above and the matter will proceed accordingly.

Where any person has taken the course of action in paragraph (a) above, or is to be treated as having done so under paragraph (iv) above, then the Registrar will, after the expiry of the period of 21 days forward a copy of any letter of objection to the petitioners for comment by them within 7 days and, not later than 7 days after the expiry of the last date for comment, forward to the Chancellor a copy of any letter of objection received, together with any comments received from the Petitioners.

### **Answers to Objections**

Where Particulars of Objection have been lodged at the Registry, the Petitioners may, and shall if required by the Court, lodge an Answer to Objections with the Registrar and serve a copy on each of the Objectors. An Answer to Objections must be lodged within 14 days of Particulars of Objection being received.

### **Pleadings**

Particulars of Objection, Answers to Objections and other notices lodged in the Registry prior to a Consistory Court Hearing are called "pleadings". If any party objects to any pleading of an opposing party as being irrelevant, embarrassing or bad in law, he may, within 14 days after it was sent to him, file in the Registry and serve on the other party a notice of objection to the pleading, and the other party may within a further 14 days after receipt of the notice of objection lodge an amended pleading.

If no amended pleading is lodged within the period of 14 days, the Registrar will refer the matter to the Chancellor, who will appoint a day to decide as a preliminary issue the objection which has been raised.

### **Withdrawal from Proceedings**

The Petitioners may apply to withdraw their Petition at any time. Objectors may also apply to withdraw from the proceedings, but may not be allowed to withdraw at a late stage in proceedings, in view of the costs implications. For example, where an objector applies for leave to withdraw at a late stage, the Petitioners may wish to apply to the Chancellor for an order that the Objector pays some or all of their costs, including the Court costs. Different objectors may wish to

withdraw for different reasons, and may be treated differently as to withdrawal and as to costs.

### **Directions**

Prior to the hearing of the Petition, the Chancellor (or the Registrar if ordered by the Chancellor) may give directions to the parties as to such matters as discovery of documents (i.e. ordering that any documents on which one party wishes to rely are produced to the other party prior to the hearing), the number of expert witnesses to be called by either party, exchange of reports of expert witnesses and any other matter which the Chancellor considers will facilitate the hearing of the case.

### **Hearings**

The hearing date is set by the Chancellor. In addition to informing the parties of the date of the hearing, the Registrar gives notice to the Archdeacon. A Consistory Court is usually, but not always, held in the church concerned. In certain cases the Chancellor may direct, if the parties all agree, that the matter may be dealt with by written representations instead of an oral hearing.

### **Evidence**

Evidence is usually given orally at a hearing. However, the Chancellor may, on the application of a Party, direct that all or part of any evidence is given before an examiner appointed by him or by affidavit; or that a written statement of evidence is given without the attendance of the maker of the statement.

An application to submit a written statement in evidence may be made by or on behalf of any person who is not a party to the proceedings. The Chancellor may give leave for such a written statement to be admitted in evidence without the attendance of the maker of the statement provided that a copy of the statement is lodged in the Registry and a copy delivered to each of the parties to the proceedings not less than 21 days before the hearing.

The Chancellor may, however, on his own initiative, or upon an application by one of the parties, order that the maker of any such written statement shall attend the hearing for cross-examination.

The Chancellor may, on his own initiative, order the attendance at the hearing of a member of the Diocesan Advisory Committee or indeed any other person, if he considers that the person summoned may be able to give relevant evidence and is willing to give it.

An application may be made by the Council for the Care of Churches, within six weeks of receiving notice of a Petition, to give evidence in any proceedings.

If a Petition relates to the demolition or partial demolition of a church, the Council for the Care of Churches, any other person, may apply to give evidence, provided that application is made on the appropriate form (obtainable from the Registrar). Application must be made by the Council within six weeks of receiving notice of the Petition, and by any other person within four weeks of publication in the London Gazette or a local newspaper of a notice of a Faculty Petition relating to the demolition or partial demolition of a church.

In any case where English Heritage has been notified of the proposals, English heritage may, not less than 21 days before the hearing, give notice that it wishes to give evidence, and shall supply a copy of its statement of evidence.

### **Judge's Witness**

The Chancellor may direct the attendance of a member of the Diocesan Advisory Committee, the Council for the Care of Churches or any other person to give evidence at the hearing of any petition for a faculty if it appears to the Chancellor that the person directed to attend may be able to give relevant evidence and is willing to give it.

Where any person has applied or has been directed under the preceding paragraph to give evidence in proceedings for a Faculty, the Registrar shall give to the parties to the proceedings not less than 14 days' notice in writing that the evidence is to be given and of the name and address of the proposed witness and, in the case of a witness directed under the preceding paragraph, of the nature of the evidence required of him.

Evidence given by any such person referred to above shall be subject to cross-examination by the party or parties to the proceedings and any such witness may be permitted to ask questions of the party or parties with the leave of the Chancellor.

### **Disposal of Proceedings by Written Representation**

If the Chancellor considers it expedient to do so and is satisfied that all the parties to the proceedings have agreed in writing, then the Chancellor may order that the proceedings shall be determined upon consideration of written representations instead of by a hearing in court provided that no such order may be made in any case in which the Chancellor is required to hear evidence in open court for the purposes the Care of Churches and Ecclesiastical Jurisdiction Measure 1991.

Where an order has been made by the Chancellor for disposal of the proceedings by written representations, the Registrar shall give notice that:

- (a) the Petitioners shall submit to the Registry and serve on each of the other parties within 21 days of the direction a written statement in support of their case including the documentary or other evidence upon which they wish to rely;
- (b) each of the other parties shall not more than 21 days after the submitting of the Petitioners' statement submit to the Registry and serve on the Petitioners a written statement in reply to the Petitioners' statement and in support of his case including any documentary or other evidence upon which he wishes to rely;
- (c) the Petitioners may not more than 14 days after the submitting of the statement of an opposing party submit to the Registry and serve on such opposing party a written statement in response.

If any party does not comply with any such direction, the Chancellor may declare him to be in default and may proceed to dispose of the case without any further reference to such party.

Any party against whom an order declaring him to be in default is made may at any time apply to the Court to revoke that order, and the Chancellor may as a matter of discretion revoke the order on such terms as to costs or otherwise as may be just.

Notwithstanding the existence of an order that the proceedings shall be dealt with by written representations, the Chancellor may at any stage revoke the order and direct that the proceedings shall be determined at an oral hearing and the Chancellor shall thereupon give directions for the future conduct of the proceedings.

The Chancellor may, whether or not an application is made to the Court by any party, inspect the church or any article or thing the subject of the Petition or concerning which any question arises in the proceedings.

If no order has been made under paragraph (5), the Chancellor shall determine the proceedings upon the pleadings and the written statements and evidence submitted under this rule, and the Chancellor's decision shall be as valid and binding on all parties as if it had been made after an oral hearing.

### **Representation**

Parties to proceedings may represent themselves or may be represented by a barrister or solicitor. If any party wishes to employ a solicitor or barrister, it is recommended that an experienced ecclesiastical solicitor or barrister is employed, owing to the specialised nature of the subject-matter, particularly in a case where points of ecclesiastical law are involved. The Diocesan Registrar will be pleased to supply the names and addresses of ecclesiastical lawyers who may be prepared to undertake such work.

### **Proceedings in Court**

The Petitioners are first required to present their Petition, i.e. to explain the proposals contained in the Petition. The Petitioners should then call their witnesses to give evidence on oath. The Petitioners' witnesses may be questioned by the Chancellor and the Objectors (or their representative). Evidence in the way of documents or exhibits may be produced in the course of the evidence.

When the Petitioners have presented their case, the Objectors are asked to present their case and their witnesses and other evidence. The Objectors' witnesses may be questioned by the Chancellor and the Petitioners (or their representative).

The Chancellor may then call any witnesses whom he has directed to attend, such as the Archdeacon or a member of the Diocesan Advisory Committee. These witnesses may be questioned by the Petitioners and the Objectors or their respective representatives.

### **Judgment**

At the conclusion of the evidence the Chancellor may give his judgment, or he may say that he will give a written judgment soon after the hearing.

### **Order**

After the Chancellor has given his judgment, the Registrar will issue the Faculty, if granted, and in any event will send to the parties copies of any written judgment and order given by the Chancellor.

### **Costs**

As in any court proceedings, costs will be incurred. These fall into two categories:

- (a) costs incurred by the parties and
- (b) the fees of the Registrar and the Chancellor for their work (and their expenses).

If, as often happens, the Chancellor makes no order for the parties' costs (i.e. category (a)), the Petitioners will be required to pay their own witness costs and costs of representative, and the Objectors will have to pay their own costs of representation and witness costs.

With regard to the fees and expenses of the court (category (b)), these will normally be ordered to be paid by the Petitioners, but where this category of work has been increased by an objection which has not been upheld, the Court may order the objector(s) to pay the costs. As an illustration of the amount of these costs, based on the fees prescribed by the Ecclesiastical Judges and Legal Officers (Fees) Order 2017 (which comes into force on 1st January 2018) the court fees payable for a half day hearing would be as follows:

	Chancellor	Registrar
Fee on lodging Petition	49.00	204.00
Half day hearing	321.00	255.00
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Chancellor	370.00	459.00
		370.00
		<hr/>
		829.00

If the case were to last more than half a day and up to a day, the fees would be:

	Chancellor	Registrar
Fee on lodging Petition	49.00	204.00
Day hearing	642.00	510.00
	<hr/>	<hr/>
Chancellor	691.00	714.00
		691.00
		<hr/>
		1,405.00

In addition, the Chancellor may charge for directions, for a preliminary hearing (if necessary), for his time spent in preparing a written judgment and order, and any secretarial expenses incurred. The Registrar's fees and expenses for correspondence and preparation of documents and all other preliminary work will be payable. This could in some cases add considerably to the above costs.

The Chancellor has a complete discretion as to costs, and may order either party to pay the other party's costs. For example, he would normally order the Objectors to pay the Petitioners' costs (including the Court fees and witness expenses, etc.) if he felt that the objections were frivolous or vexatious. If the objections were unsuccessful, but not altogether unreasonable, the Chancellor might still order the Objectors to pay or contribute towards the Petitioners' costs, and would normally require the Objectors to pay at least part of the Court fees. If, however, the Petitioners were the unsuccessful party, the Chancellor would normally order the Petitioners to pay the costs of the successful Objectors, as well as the Court fees and expenses.

Either party may, immediately before the conclusion of a hearing, make representations to the Chancellor about how costs should be dealt with.

## **General Note**

Experience shows that contested Faculty cases can sometimes give rise to animosity between church and parishioners, which may continue for a considerable length of time after a decision has been made on the Faculty Petition. It is desirable that this should be avoided if at all possible. Also, in view of the possible length of the Consistory Court process and the inevitable uncertainty as to the extent of costs which may be incurred by one or more parties, it is recommended that the opposing parties should always endeavour to meet and discuss their differences and try to reach some agreement which may enable them to avoid a Court hearing. The parties may, for example, be able to reach a compromise, which can be submitted to the Chancellor for approval. It may be appropriate in some cases for one or both sides to approach the Archdeacon and seek his help in trying to resolve the issues involved. If in a particular case the Archdeacon feels unable to help, owing to the prior involvement in the matter of the Diocesan Advisory Committee (of which the Archdeacon is a member), or if one of the parties does not feel that the Archdeacon, for the same or another reason, is sufficiently impartial, then the Archdeacon may be able to recommend someone who may be prepared to act as an independent mediator. This may be a layman, ecclesiastical lawyer or perhaps even an Archdeacon in a neighbouring diocese, even when a date has been set for a Court hearing. It is never too late to endeavour to reach agreement.

Copies of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 and the Faculty Jurisdiction Rules 2015 may be accessed from the Peterborough Diocesan Registry web site at [www.peterboroughdiocesanregistry.co.uk/faculties.html](http://www.peterboroughdiocesanregistry.co.uk/faculties.html)

# COSTS IN FACULTY PROCEEDINGS

## A SHORT GUIDE

### Introduction

The purpose of this short guide is to explain to petitioners and objectors why, and when, orders for costs can be, and may be, made by the Chancellor of the diocese in faculty cases.

#### Q.1. What are the costs?

There are two types of costs:

- (i) Court Fees are the Court and Registry fees and expenses which are payable by law<sup>1</sup> in faculty cases whether the petition is opposed or unopposed. These fees are for the time spent by the Diocesan Chancellor and the Diocesan Registrar in respect of the petition. They also cover expenses incurred in the Diocesan Registry.
- (ii) Costs between parties, are the costs incurred by petitioners and objectors themselves when there is a dispute, which has to be determined by the Chancellor, either at a public hearing or upon a consideration of written representations from the parties.

#### Q.2. Who has to pay the Court Fees?

The Church of England administers its own system of control over its consecrated land and buildings, known as the faculty jurisdiction, without any public funding. So the principle is that the cost of administering the system has to be met by those who use it. In practice most unopposed parish petitions are paid for by the Diocesan Board of Finance.

#### Q.3. Does responsibility for the Court Fees depend upon who “wins” a case?

No. Those who seek a faculty (whether the minister and churchwardens or a private individual) are responsible for paying the statutory Court fees where there is any objection. This is so whether or not the petition is successful. If a case is opposed, it is unlikely that an objector will be ordered to pay anything towards the Court fees.<sup>2</sup>

#### Q.4. Can costs be awarded against me if I write one letter of objection?

No, provided that the letter sets out all you wish to say by way of objection and you do not want to make any further representations.

#### Q.5. Can costs be awarded against me if I become a party to enable me to make further representations and to respond to arguments put forward by others in relation to the petition?

If you send in formal written particulars of objection on the form provided by the Registrar then

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<sup>1</sup> Fees Orders made under the Ecclesiastical Fees Measure 1986.

<sup>2</sup> But see Q.7 on “unreasonable behaviour”.



you will become a party. You will not automatically become liable for any costs, but the principles explained in answer to questions 6 to 10 below will apply to you. Please read these answers carefully.

**Q.6. In a disputed case does the “loser” have to pay the other party’s costs?**

As a general rule the parties are expected to meet their own expenses. An award of costs does not depend upon or follow automatically from the “success” of a party to the proceedings. The Chancellor has, however, a discretionary power to make an order that one party pays the whole or part of the other party’s costs where that party has behaved ‘unreasonably’ in the conduct of the case.

**Q.7. What is “unreasonable behaviour”?**

Whether a party has behaved unreasonably will depend upon the facts in a particular case. This has nothing to do with expressing strong feelings on the subject in issue. It is most likely to occur when a party has caused the other party unnecessary expense, for example, by failing to comply with procedural directions from the Chancellor, or failing to provide information in good time, or making no attempt to seek a compromise solution. The fact that occasionally an award of costs may be made in such circumstances is intended to ensure that a sense of discipline is introduced into the proceedings.

**Q.8. Are the principles in relation to costs the same when “conservation” issues are involved?**

Yes. Extensive guidance is available to petitioners as to the role of English Heritage, the Local Planning Authority and the National Amenity Societies (the Conservation bodies) in the booklet referred to in the general note below. Individual objectors ought to study carefully any reports of these expert bodies before deciding whether to take up the time of the Court on any issues considered in those reports. If there is a hearing and a faculty is in due course granted, an individual objector (who lacks expertise and has not called any expert witness to challenge the report of a conservation body) could be held to have behaved unreasonably and be ordered to pay at least a contribution towards the petitioners’ costs.

The involvement of any conservation body usually results in extra work being done by the Registrar. In accordance with the principle explained in answer to Q.3 above any additional fees ordered under the Fees Order will have to be paid by the petitioners.

**Q.9. Do the same principles in relation to responsibility for costs apply to cases dealt with on written representations as to cases where there is a hearing?**

Yes, except that the Court fees fixed by the Fees Order (see note to Q. 1) are lower for cases dealt with on written representations. However, although the parties may wish to have a decision on written representations the Chancellor may decide that a hearing is necessary in order for the evidence to be tested by way of cross-examination. The fixed fees for a hearing will then apply.

**Q.10. Can costs be saved if a party amends a petition or objection or withdraws at some stage in the proceedings?**

Yes. The Chancellor is concerned to ensure that disputes are dealt with in a manner which is as inexpensive as is consistent with a fair and proper resolution of the dispute. The opportunity exists for either party to amend or withdraw if that party considers it appropriate to do so at any stage in the proceedings. If this is a reasonable step to take with a view to saving costs, it will operate in favour of the party concerned when the subject of costs is dealt with at the end of the hearing.

**Q.11. Is there a right of appeal if an order for costs is made against me?**

Yes, with the leave of the appellate court which is the Court of Arches in the Province of Canterbury and the Chancery Court of York in the Province of York.

**General Note**

This guide does not replace, but is additional to the comprehensive guidance contained in the booklet produced in February 2000 by the Ecclesiastical Judges Association entitled "Guidance on the award of Costs in Faculty Proceedings in the Consistory Court".