

IN THE CONSISTORY COURT OF THE DIOCESE OF ST EDMUNDSBURY AND  
IPSWICH

In re Orford, St Bartholomew

DECISION ON COSTS

1. The petitioners in this case have submitted that the party opponent should make a contribution to the costs of this case.
2. In June I ruled that a confirmatory Faculty should pass the seal in relation to the unlawful installation of heating/lighting chandeliers. There had been a hearing at which evidence was called by the petitioners and been subject to some challenge by the party opponent.
3. In an undated submission the petitioners sought a contribution to their costs criticising the party opponent's behaviour. They summarize their criticisms:
  - i) The failure to enquire as to the proposed works between February and November 21st 2022;
  - ii) The original objection being out of time;
  - iii) The serial disregard of the Chancellor's reasonable Directions as to timeliness;
  - iv) The repeated disregard of the Chancellor's Directions in relation to focus on the Duffield principles;
  - v) The irrelevant and wholly disproportionate insistence of the Opponent from first and (doc f24 paras 9-10) to last (closing remarks para 136) on punishment and prosecution of the PCC; vi) The resulting impossibility of achieving a compromise in the face of those persisting threats;

- vii) The Opponent's failure to submit any evidence of his first ground of complaint, namely the heritage value of the lighting;
- viii) The Opponent's failure to answer any of the reasonable, and Duffield-related questions raised by the Petitioner in relation to; a) the Organ point, i.e, the lack of objection to it, compared to the objection taken to the heating and lighting; see para 33 of the Judgment, b) the cost of the Opponent's proposed 3-stage solution and c) the future of the Church should the Opponent succeed; (John Bevan's witness statement at para 4e-f made it clear that all 12 of the PCC would be likely to resign as a body, were there to be an adverse finding, not merely the Churchwarden, as referred to at para 14f of the Judgment).
- ix) The failure to make clear that the Opponent intended to call no live evidence until after the Petitioners had closed their case at the hearing, in breach of a specific direction;
- x) The insistence, unnecessarily as it turned out, on a live hearing as opposed to the paper hearing the Petitioners had advocated from the start;
- xi) The failed attempt, in disregard of the Chancellor's directions, to turn the case into a test case but raising a large number of questions on non-relevant issues, and;
- xii) Finally and importantly, on 14/3/23 the PCC accepted the advice of the CBC as to improving the wiring. That was adopted in our skeleton argument at para 5d, dated 16/11/23. This proposed resolution was specifically rejected by the Opponent in his statement of 6/10/23 at chapters 7 & 8, but was approved and accepted by the Chancellor, in precisely the terms we had offered many months earlier, at paras 40 and 42a of the Judgement. In our submission, this refusal to accept a reasonable and sensible resolution is directly and centrally relevant to the issue of costs, as it would be in a civil case.

4. The party opponent, in submissions dated 3 July vigorously refuted each of these and concluded:

The Party Opponent has spent considerable time and effort being a messenger and source of missing historical and architectural information to the Diocese and the Court due to the failures of the Petitioners and DAC. I am not making any application for my costs because it would be the parish who ultimately would have to pay, as they will for the PCC's amelioration works.

5. In an email to the Registrar dated 8 July the petitioners then wrote:

“a) The Petitioners accept that we should pay the Court Costs.

b) In so far as the Opponent's main objection to the Faculty failed, and some or all of the Procedural Costs have been incurred as a result of his unreasonable and unsuccessful attempt to turn the Process into a test case, the Petitioners submit that they should not be liable.”

6. I take from that that the petitioners now accept that the Court Costs will have to be paid by them, but that some of the costs of the hearing and some or all of the preparatory costs (that is, costs incurred by the Registrar in dealing with matters) should be paid by the party opponent.
7. I have considered my powers to apportion costs as set out in ‘Guidance on the award of costs in Faculty proceedings in the Consistory Court’ issued by the Ecclesiastical Judges Association in 2011. I have also, at the petitioners’ written request, considered Chancellor Etherington KC’s guidance on costs dated July 2016. In particular the petitioners invite me to consider paragraphs 3 and 5.2-5.4 of the EJA’s guidance and paragraphs 7 and 8 of Chancellor Etherington’s guidance.
8. Paragraph 3 of the EJA’s guidance deals with S 60 of the Ecclesiastical Jurisdiction Measure which deals with;
  - a. security for costs
  - b. an order that any party pay Court fees
  - c. an order that one party pay the taxed costs of the other party.
9. In my Judgment none of those are relevant and I do not need to consider them.
10. Paragraphs 5.2 -5.4 of the EJA’s guidance read as follows:

## 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.

Paragraph 5.6 reads as follows:

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.**

(Emphasis added)

11. Chancellor Etherington's guidance reads as follows:

7. I am unlikely to order that an objector pays or contributes to court fees, unless there is clear evidence of some sort of unreasonable behaviour from the objector that has unnecessarily added to the procedural costs prior to the hearing.

8. Where any party (including any objector) has behaved in such a way as to place an unreasonable burden on the amount of correspondence required from the Registrar, I may ask such person to pay an additional amount towards the Registrar's costs. This includes where the person has failed to respond to the Registrar's requests within the time permitted.

### Discussion

12. I have to decide whether the behaviour of the party opponent was clearly 'unreasonable' in the way he conducted the oral hearing and in causing extra 'procedural costs', in the additional burden of correspondence that the registrar had to deal with.

13. The EJA guidelines on 'unreasonableness' are as follows at paragraph 5.7:

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.

14. I have also been assisted by the characterization of pornography by Supreme Court justice Potter Stewart: "I know it when I see it" (Jacobellis v. Ohio, 1964).

15. I reject the petitioners' submissions about the party opponent's behaviour as being 'clearly unreasonable'. They may have been frustrated by his behaviour in failing to meet some deadlines and in not making his intentions clear regarding how he was to run his case and what evidence he was to call and how, but he is an architect and not a lawyer. I firmly reject the assertion that he failed properly to deal with the 'Duffield' issues during the case.

16. The petitioners assert that the party opponent should pay some of the 'procedural costs'. I have, however, seen no evidence submitted by the petitioners in relation to any increase in procedural costs or increased correspondence costs caused by the unreasonable or other behaviour of the party opponent. The petitioners assert:

That failure to comply with the Court's Directions has resulted in many hours of extra work by the PCC in re-reading and re-scheduling, but more importantly has resulted in repeated requests by us to the Registrar which must have involved him in extra work in dealing with the Opponent's timetabling failures.

No evidence has been submitted to me to substantiate that assertion.

17. The very full submissions by the party opponent and the nature of the oral hearing which enabled further evidence to be lead from a number of witnesses by the petitioners was most helpful in assisting me in reaching the decision I did. Even if there had not been an oral hearing I would have had to make a site visit to the Church to make an assessment of the chandeliers, so very few extra costs were in fact caused by having an oral hearing. Any delays caused by the party

opponent in fact assisted the petitioners in their case as they could submit evidence from a longer period of the use of the new lights.

18. Accordingly I make no order for costs

### Conclusion

19. In my judgment it is clear that the behaviour both of the petitioners and the party opponent throughout this process has been motivated by a genuine and profound affection for St Bartholomew's not just as an important building but as an important part of their lives and the lives of the wider community, parishioners or not. I hope that differences can be put aside and both parties can work together for the work and mission of the church in Orford and beyond.

18<sup>th</sup> July 2024

Justin Gau  
Chancellor