Neutral Citation Number: [2019] ECC Roc 4

IN THE CONSISTORY COURT OF THE DIOCESE OF ROCHESTER

Re: SHORNE; ST PETER & ST PAUL

J U D G M E N T ON COSTS

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1. By a petition presented on 24th October 2017, the petitioners, the Reverend Edward Hurst, Vicar, and Miss Sandra Ann Cackett, and Mrs Jaqueline Olid, Churchwardens, applied for a faculty authorising the introduction of mobile antennae and associated equipment into the tower of St Peter & St Paul's Church, Shorne, Kent together with the laying of a sub-main and transmission cables in the churchyard. In addition, and in accordance with the decision in **Re; St Mary, Aldermary 1985 Fam 101 @105**, the proposed licensee, NET Coverage Solutions Ltd ("NET Coverage"), were also named as co-petitioners, and duly had the petition signed on their behalf, by, I understand, Mr Simon Talbot of NET Coverage. There is an argument advanced by, or on behalf of, the party opponent to the effect that NET Coverage were and are not co-petitioners. I am satisfied that they were and are; Mr Talbot signed the petition on their behalf; their name appears on page 1 of the petition, albeit in the box at the bottom of the page, but anyone reading it would realise that NET Coverage were intending to be co-petitioners, especially when the petition is signed on their behalf; and directions were sent out from the Registrar with them being named as co-petitioners. Had the party opponent been in any doubt he could have easily pursued enquires about the status of NET Coverage, from that company, the other petitioners, or the Registrar/court. In any event the issue does not affect what I have to say below.

2. The prayer in the petition was by no means an unusual one, with a faculty being sought to permit the installation of telecommunications equipment and the grant of a licence for a suitable use of part of the church. The procedure surrounding such an application is well established, and was duly followed.

3. The P.C.C. passed an initial resolution on 4th April 2016 to investigate the possibility of a telecommunications installation, and

to seek professional advice in respect of what was proposed, and then, having received and considered such advice, passed a final resolution of approval on 25th September 2017. The D.A.C. by its Notification of Advice dated 19th June 2017, recommended the proposals, subject to certain, standard, provisos. Historic England were consulted raised no objections, as was clear from their letter of 3rd October 2016.

4. As is not unusual in this sort of petition, and as was made clear in the petition, NET Coverage agreed to cover the costs incurred by the petitioners.

5. The public notice required under **Part 6 Faculty Jurisdiction Rules 2015** was dated 3rd August 2017, and provoked a number of objections from various people, one of whom, Mr David South, elected to be joined, as was his right, as a formal party opponent. I do not need to recite Mr South's objections for the purpose of this judgment; suffice to say that they were wide-ranging. Mr South retained Medway Law Ltd, Solicitors, to act on his behalf, and it was Mr Ashby, a solicitor from that company who, from November 2017 or thereabouts, dealt with the matter on Mr South's behalf.

6. By email dated 13th December 2017, Mr Ashby made it clear that Mr South was not prepared to have the petition resolved on written representations.

7. The next thing that happened was that the petitioners, by an email dated 4th January 2018, sought to stay the petition. On 9th January 2018 I made a directions order relating to the petitioners' application. By letter dated 24th January 2018, the application was opposed by Mr South, the party opponent. Accordingly, on 27th February 2018, I gave Directions that; (i) a preliminary hearing was to be listed for the first available date, (ii) all parties were to attend the preliminary hearing, and were to be prepared to identify the issues, and areas of dispute, the evidence required, including expert evidence, and to have their dates of availability etc with them, (iii) any application for an adjournment would be dealt with at the preliminary hearing, (iv) skeleton arguments were to be lodged and exchanged no later than 2 full working days before the preliminary hearing, (v) proposed directions should if possible be agreed etc, (vi) costs would be reserved.

8. On 7th March 2018 the petitioners sought to withdraw the petition. By his email of that date, Mr Talbot of NET Coverage wrote to inform the Registrar that the petitioners had been advised that

they should seek planning approval for what was proposed, and that the recent **Telecommunications Code** which had come into force in December 2017 meant that the proposed sub-licence to be entered into needed amendment. Accordingly, he said, they now sought to withdraw the petition. By this time, a date for the preliminary hearing had been fixed for 20th March 2018.

9. On 8th March 2018, I gave further directions, giving the petitioners permission to withdraw the petition, and ordering them to pay all costs incurred, including costs previously reserved, plus a correspondence fee for the Registrar. I further gave the party opponent liberty to apply in respect of their costs, and preserved the hearing date of 20th March 2018 for this purpose, if required.

10. In the event, by an exchange of emails, the parties sought to vacate the 20th March 2018 hearing, and for a 3 month stay to enable them to negotiate. In the light of this, on 15th March 2018, I gave further directions vacating the hearing fixed for 20th March 2018, and gave the party opponent liberty to apply until 15th June 2018 for his costs. Unfortunately, negotiations must have come to nothing, because by email dated 22nd May 2018, Mr Ashby indicated that Mr South wished to pursue his costs application.

11. There followed an unfortunate delay, before the matter came back before me on 24th January 2019, when I made directions relating to the party opponent's application for costs, and to provide for the filing etc of evidence. I reserved costs. I specifically drew to the attention of the parties the provisions of **Paragraph 5.6 and 5.7 Guidance on the Award of Costs in Faculty Proceedings in the Consistory Court 2011**, and required the party opponent to state all facts and matters relied on if alleging "unreasonable behaviour," and/or in support of any argument for departure from the usual practice. I also drew the party opponent's attention to **Paragraph 9.2**, which deals with the general principle to be applied when a petition is withdrawn.

12. On 8th February 2019, Mr Ashby sent to the Registrar his statement of costs, with attached schedule of work done on documents. He also sent his submissions and evidence in support of the party opponent's allegation of unreasonable behaviour, to which I shall return below. Nothing was received from the petitioners within the time provided, until the email of 1st April 2019 from the P.C.C. secretary, who indicated that nothing had been heard from NET Coverage. The Registrar referred the petition to me, and on 3rd May 2019 I made an unless order, in effect giving

the petitioners one last chance to engage in the process. The Registrar's letter to the petitioners reminded them, as they must have known from the outset, that liability was joint and several, and that therefore both NET Coverage and the parish were potentially liable for any costs order made. In answer to this, Mr Talbot of NET Coverage, sent a short email dated 24th May 2019 to the Registrar stating; "….I can confirm that NET coverage Solutions will pay the Consistory Court and Registry fees……We do not however consider that we should be liable for the party opponent's fees….the party opponent was aware of the process throughout and it was his choice to object to the proposal which was subsequently withdrawn 14 months ago." Such was the extent of the petitioners' submissions.

13. I gave final directions on 30th May 2019 indicating, inter alia, that I was prepared to deal with the costs issue on written submissions provided that all interested parties consented in writing to this course adopted. The relevant consents have been forthcoming in emails from Mr Ashby and Mr Talbot, both dated 18th June 2019. Having reconsidered the matter, I am of the view that it is expedient and appropriate for me to deal with the issue on written submissions.

14. The party opponent's argument is set out in Mr Ashby's documentation referred to in paragraph 12 above.

15. By **Section 60 Ecclesiastical Jurisdiction Measure 1963,** the Chancellor in the consistory court can make an order that a party pay the taxed cost of another party. **Paragraph 3.1 of the Guidance** has this to say about **Section 60**; "The purpose of (the powers given by **Section 60**)…(is) 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 a result of the contested proceedings in the consistory court." These proceedings became contested once the party opponent was formally added.

16. **Paragraph 5.6 of the Guidance**, to which I drew the parties' attention states; "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. 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 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." This is the general rule, which makes clear that whilst the power exists to make a costs order against the petitioners, such is not the norm.

17. **Paragraph 5.7 of the Guidance** goes on to deal with the situation where a costs order might be made, providing as follows; "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." It thus states the principle, and provides general guidance.

18. There are set out in **Paragraph 5.8 of the Guidance** factors which might result in such. The factors are clearly illustrative, and are not exclusive, as is stated. The paragraph provides; "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, (b) in cases which result in a compromise at the hearing, an unjustifiable failure by a party (petitioner 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."

19. Mr Ashby, in his submissions, commences at paragraph 2.1, with a criticism of the petitioners for proceeding when they "were well aware, before they issued the petition…….that there was strong objection to the installation of telecommunications equipment within the church tower." I do not consider this of itself to amount to unreasonableness; if it did any petitioner presenting a petition in the knowledge that it might or could be opposed would be automatically at risk of an adverse costs order. The subsidiary argument contained in paragraph 2.1 to the effect that the petitioners, knowing that the petition was likely to be opposed, should have been prepared from the outset for a possible hearing, likewise, in my judgment, does not amount to unreasonable behaviour in consistory court proceedings. A contested hearing is very much to be regarded as a last resort. The requirements of "front loading" applicable to the secular courts with Pre-action Protocol letters and the like are not appropriate to the consistory court, albeit that the Civil Procedure Rules provide very useful reference points and guidance.

20. In paragraph 2.2 Mr Ashby attacks the petitioners for not having got their funding lines in order before they issued the petition. I do not consider that any criticism here amounts on the facts of the particular case to unreasonable behaviour. NET Coverage had indicated that they would meet the costs of the petition as indeed they have done so to date. Moreover, until a public notice is exhibited, the number of objectors cannot, for certain, be known, and even at that stage whether anyone will seek to be joined as a formal party opponent. Still less will it be possible to know whether or not a full hearing will be required.

21. A stronger argument arises from the confusion over the need for planning permission, and the refusal on the part of the petitioners to engage in discussion (see paragraphs 2.3, 2.4 and 2.5). Bearing in mind the individual and collective responsibility of the petitioners, it was not good enough for Mr Moffat (the PCC secretary) to write the email of 8th November 2017 saying that the petitioners were not prepared to enter into further discussion about the planning permission issue at that stage. If there had been an exchange of information and views at that stage some of what happened later might well have been avoided. Whilst I am not satisfied that it was this alone that caused Mr South to wish to be joined as a party opponent, I find that there was a degree of unreasonable behaviour on the part of the petitioners. My view is

reinforced when I look at the picture as a whole. I may add, that the failure of the petitioners properly to engage in the costs argument has not assisted, save that is perhaps revealing of their practice of passing the buck to whoever is seemingly next in line. This has meant that it has been hard in the extreme to get information and/or decisions from anyone on their side. The individual petitioners have taken almost no part in the correspondence which comes from Mr Talbot of NET Coverage, or Mr Moffat, who was in no position to make decisions, but rather acted as a post-box. I have gained the distinct impression that Mr Talbot lost interest in the matter and did not want to engage in the issues once the petition was withdrawn.

22. The next ground of complaint is set out in paragraph 2.6, and is in part predicated on an incorrect premise, namely that NET Coverage were not a party to the proceedings. Nonetheless, the failure to engage with the party opponent (or with the court) at that juncture amounted to unreasonable behaviour. Whilst it might have been expected that the party opponent would agree to a stay, as proposed (and perhaps he should have done so), once he had made it clear that he did not agree, it was incumbent on the petitioners to react appropriately, and specifically to respond to the letter of 24th January 2018. It was their failure to do so which necessitated me making a further directions order on 27th February 2018. Following this, the petitioners ignored the party opponent's attempts to agree directions (in accordance with my order) for the hearing then fixed for 20th March 2018. The email chain of 7th- 8th March 2018 highlights the unreasonable behaviour on the part of the petitioners, with Mr Moffat replying to Mr Ashby's enquiry as to who for the petitioners was dealing with the hearing set down for 20th March 2018, by saying that he (Mr Moffatt) did not intend to deal with it but rather intended to attend "as an observer," and that he was "waiting to hear from NET how they want to handle it," following which Mr Talbot said that; "NET are seeking clarification on a number of point(s) and we will respond to Andrew (Moffat) and the Diocesan Registry as soon (as) we are able to."

23. In paragraph 2.7, there is criticism of the petitioners for not having engaged in any dialogue about costs. Under normal circumstances it would be wrong for me, for obvious reasons, to investigate what did or did not occur in the course of negotiations. However, here the assertion is that the petitioners were not prepared even to enter into discussions about the question of costs which necessitated the application for costs being made. Since the petitioners have not condescended to put in any meaningful evidence, I see no reason not to accept what the party

opponent says. I am not being asked to look behind the "without prejudice" curtain. I find this to have amounted to unreasonable behaviour on the part of the petitioners. Different considerations apply when I have to consider the complaint that following my order of 24th January 2019 there was a failure on the part of the petitioners to agree costs. I do not know the basis of that failure to agree or what, if any, reasons were put forward for not agreeing. Tempting though it might be to speculate on those reasons (or lack of them), I must and do refrain from so doing, and so do not find that the later complaint is made out.

24. Overall, there was clearly unreasonable behaviour at times on the part of the petitioners in the conduct of this petition. This extends to the timing and manner in which the petition was withdrawn. I appreciate that the then new **Telecommunications Code** might have had an effect on the approach of the petitioners (though any reasons for such are not clear), but the fact is that there was a lack of communication about what was going on. One is left with the impression that this was being used as a convenient excuse for not proceeding. No criticism of itself arises because of that, if correct, but rather out of the failure of the petitioners to keep the party opponent informed about their intentions. This, in turn, must have led to some unnecessary increase in costs. The failure of the petitioners to engage in the costs arguments now before me reinforces that overall impression that I have gained.

25. As must be clear from what appears above, I do not accept or find that the petitioners have behaved unreasonably throughout. Accordingly, I have to make an apportionment. It is impossible, on the information before me, to carry out a detailed assessment into precisely what costs were incurred by the party opponent as a result of what unreasonable behaviour on the part of the petitioners, nor would it be proper for me to attempt such a task. Taking a broad-brush approach, which in the instant case is appropriate and proportionate, I consider that 50% of the party opponent's costs can be attributed to the unreasonable behaviour on the part of the petitioners.

26. The bill submitted on behalf of the party opponent amounts to £4,721.60, inclusive of VAT, which is by no means large. Normally I would send the bill to the Registrar to be taxed, but that would be wholly disproportionate in this case. Accordingly, again adopting a somewhat rough and ready approach, I tax the bill down by 10% ie to £4,249.44, and then award the party opponent 50% of this sum, ie £2,124.72. This the petitioners must pay.

27. The petitioners must also pay the Registry and Court costs of and incidental to the petition, including in respect of directions already made and of this judgment, insofar as these have not already been paid, in the normal way. There shall be a correspondence fee to the Registrar in a sum as I direct.

John Gallagher
Chancellor
23rd July 2019