

ECCLESIASTICAL JUDGES ASSOCIATION

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

**Issued for use in the Diocese of St Albans with effect from 17 June 2024
In substitution for the previous Guidance of the Ecclesiastical Judges
Association (January 2011)**

1. Purpose of Guidance

- 1.1 The Church of England operates a system of control over its consecrated land and buildings,¹ known as the faculty jurisdiction. 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.² This revised Guidance, issued by the Ecclesiastical Judges Association,³ aims to provide clarification of the principles upon which costs are awarded in the consistory court.⁴
- 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;⁵
 - (b) any objectors, whether an individual, Historic England, 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 anyone becoming involved in the faculty process to have an understanding of why, when, and on what principles orders for costs might be made.

2. Executive Summary

- 2.1 In summary, the relevant principles are as follows:
 - i. those seeking a faculty are responsible for paying the **court fees** incurred in dealing with the application, whether or not a faculty is granted;
 - ii. other parties, such as objectors, will only be ordered to contribute to the **court fees** if they have behaved unreasonably in the conduct of the proceedings;

¹ It also extends to most other buildings licensed for Church of England worship.

² 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.hmccourts-service.gov.uk/infoabout/fees/whywecharge.htm>). Under the analogous modern secular system contained in Town and Country Planning legislation, fees have to be paid in order to obtain planning permission and additional costs have to be borne by an applicant if there is an appeal or a public inquiry.

³ With some minor modifications authorised by the Chancellor.

⁴ The Court of the Bishop of the Diocese, presided over by the Diocesan Chancellor.

⁵ A faculty is a legal permission which is granted by the Consistory Court. An application for a faculty takes the form of a petition.

- iii. parties to the proceedings will generally be expected to bear their own **legal costs** should they chose to instruct lawyers;
 - iv. parties will only be ordered to contribute towards another party's **legal costs** if they have behaved unreasonably in the conduct of the proceedings;
- 2.2 Different principles apply in relation to appeals, about which separate guidance has been issued and should be consulted. See paragraph 9.1 below.

3. General Introduction

- 3.1 Ecclesiastical law requires a faculty to be obtained before alterations, additions, removals or repairs are made to the fabric, ornaments, or furniture of a church, or works are carried out in the churchyard. The primary responsibility for applying for a faculty rests upon the minister and churchwardens⁶, 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.
- 3.2 The overriding objective in the Consistory Court is that the parties should have disputes dealt with justly, which includes ensuring that the parties are on an equal footing; saving expense; dealing with cases in ways which are proportionate to the importance of the case and the complexity of the issues; and ensuring that cases are dealt with expeditiously and fairly.⁷
- 3.3 Parties should keep the proceedings under review, and consider whether, in the light of the evidence served (particularly expert evidence) they should withdraw some or all of the proposals, or some or all grounds of opposition, as the case may be. In appropriate cases there may be scope for mediation or other forms of Negotiated Dispute Resolution (formerly ADR).
- 3.4 The cost of administering the faculty system is covered by the payment of faculty fees. In many dioceses, some of the faculty fees⁸ for petitions presented by parishes are borne by the Diocesan Board of Finance rather than directly by each parish. For example, some pay the standard issue fee⁹ for all petitions, but if the matter becomes contested or is otherwise more complicated, any additional fees are the responsibility of the parish. In a few dioceses the Diocesan Board of Finance makes no contribution, and the entire costs are borne by the parish.
- 3.5 Court fees are fixed by statutory Fees Orders made annually by the Fees Advisory Commission,¹⁰ subject to approval by the General Synod of the Church of England and laying before Parliament. The fees cover all the stages of faculty proceedings including the costs of convening a hearing and, whether or not there is a hearing, preparing a judgment.

⁶ Canon F13.

⁷ Faculty Jurisdiction Rules 2015, as amended, r.1.1

⁸ Or at least the initial issue fee for proceedings which are uncontested.

⁹ The fee for issuing proceedings in the Consistory Court i.e. submitting a petition for faculty.

¹⁰ See section 84 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.
<https://www.legislation.gov.uk/ukcm/2018/3/contents/enacted>

- 3.6 Court fees are normally paid by the party petitioning for a faculty.¹¹ This is the case whether a petition is opposed or unopposed, and whether it is determined at a hearing or upon written representations. Further court fees are incurred when a matter proceeds to a hearing or a determination on written representations because of the additional work undertaken by the Registry and the Diocesan Chancellor. Usually the court fees when there is a hearing will exceed those for a determination on written representations.
- 3.7 Separate from the court fees are the costs incurred by individual parties¹² on legal advice and representation. Unless the Chancellor makes an order to the contrary, each party is responsible for paying the costs of any barrister or solicitor it chooses to engage.
- 3.8 A party will not normally be ordered to pay another party's legal costs. The exception is when one party has acted unreasonably either (a) in carrying out works without permission which have made the proceedings necessary or (b) in the way that party has conducted its case in the consistory court and this has increased the costs incurred by another party. Such conduct is generally referred to by the shorthand expression 'unreasonable behaviour', the meaning of which, in this context, is discussed below.
- 3.9 The general principles applicable to costs incurred in opposed proceedings were set out by the Court of Arches in *Re St. Mary the Virgin, Sherborne*,¹³ and these form the framework on which this Guidance is based.

4. Court fees

- 4.1 Section 84 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 empowers the Fees Advisory Commission to make annual Fees Orders prescribing fees payable for the individual items of work under the faculty jurisdiction.¹⁴
- 4.2 These so-called statutory fees are automatically payable in the prescribed amounts. They are generally paid by the petitioner, whether or not a faculty is granted. Parishes should budget for the inclusion of these court fees in the overall costs of a project, particularly one which is likely to be controversial. Objections may lead to additional work for the Registry and, if so, the petitioner is likely to have to bear any resulting additional costs.¹⁵
- 4.3 However, where there has been unreasonable behaviour¹⁶ by another party to the litigation, the Chancellor may order some or all of the court fees to be paid

¹¹ The exception is when another party has behaved unreasonably, in which case an order may be made requiring that party to pay some or all of the court fees. See below.

¹² This will include the minister and churchwardens and, if the petition is opposed, an individual or individuals, or a body such as Historic England or a national amenity society, or occasionally a local association.

¹³ [1996] Fam 63 at p 70; [1996] 3 WLR 434 at p 438; [1996] 3 All ER 769 at p 774

¹⁴ See the current Ecclesiastical Judges, Legal Officers and Others (Fees) Order. New Orders are made annually.

¹⁵ *Re St Peter, Frimley* [2022] ECC Gui 2. For this and other Consistory Court Judgments, see <https://www.ecclesiasticallawassociation.org.uk/index.php/judgements/most-recent-judgments>

¹⁶ The meaning of which is discussed below.

by that other party.¹⁷ The order may be made directly against that party but more usually the entirety of the court fees are ordered to be paid by the petitioner, subject to reimbursement, whether in whole or in part, by the party which has been found to have behaved unreasonably.¹⁸

- 4.4 There is provision under r 19.4 of the Faculty Jurisdiction Rules 2015 for someone who is not already a party to proceedings and who is alleged to be responsible, or partly responsible, for an act or default in relation to the proceedings to be made a party to those proceedings. This is done by a special citation which must include a statement that the court is considering making a costs order against that person and the grounds on which it is alleged that person is responsible for the act or default alleged.
- 4.5 A person entitled to an exception from or reduction in Civil Court fees may apply to the Registrar for a reduction in or exemption from Consistory Court fees.¹⁹

5. Legal costs of the parties

- 5.1. The Chancellor's power to make orders in respect of costs is to be found in section 26 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, under which the Chancellor may order:
- (a) that a party pay some or all of the taxed costs of another party;²⁰
 - (b) order any party to give security for costs.
- 5.2. These powers serve as a reminder that the faculty jurisdiction is a court process which (in part at least) is adversarial, rather than administrative. They are **not** intended to deter people or bodies 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.²¹
- 5.3 Costs will not be ordered against those who simply write a letter of objection, even if this causes the petitioners to incur additional expense.

6. Security for Costs

- 6.1 If there is a concern that a party may be unable to pay a costs order at the conclusion of proceedings, the court may order that party to give security for costs.²² The order can be made at any stage in the proceedings provided the court is satisfied, in all the circumstances of the case, that it would be just to make such an order. The order may be made on the application of a party,

¹⁷ It will be borne in mind that in the absence of unreasonable behaviour, some of the Court fees would still have been incurred.

¹⁸ *Re St Peter and St Paul, Scrayingham* [1992] 1 WLR 87, [1991] 4 All ER 411, York Cons Ct; *Re St Peter, Chailey* [2019] ECC Chi 2

¹⁹ Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2023, Article 16. Any such order must also include incidental provision requiring the Diocesan Board of Finance to pay the amounts which would be payable were it not for the exemption, reduction or remission.

²⁰ 'Taxed', in this context, means assessed as to reasonableness by the registrar of the consistory court, subject to a right of appeal to the Chancellor: section 26(3), (4) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.

²¹ *Re St Bartholomew, Leigh* [2021] ECC Swk 6; *Re Jesus College, Cambridge* [2022] ECC Ely 5.

²² This requires a petitioner to pay into court an amount assessed by reference to the likely court costs as a condition for allowing the proceedings to continue.

supported by written evidence, or on the court's own initiative. If the court makes such an order, it will determine the amount of the security, and it will direct the manner in which, and the time within which, the security must be given.

- 6.2 The power to order security for costs may also be used by the Court as a means of deterring frivolous petitions or objections. However it should not be used if the effect of the order would be to deny access to the court to an impecunious petitioner with a potentially meritorious claim,²³ or where an objector might have difficulty in raising any security.²⁴

7. Unreasonable behaviour

- 7.1 It is sometimes thought that a party who is unsuccessful has automatically behaved unreasonably in bringing its case or in opposing the other party's case. That is not the position. Something more must be shown.
- 7.2 Whether a party's behaviour has been unreasonable is a matter for the Chancellor to determine based upon the specific facts and circumstances of the particular case.²⁵ It is impossible to give a definitive list of types of behaviour likely to be considered unreasonable. However, the following examples are offered as illustrative of the concept:
- (a) failing to request or supply additional information when reasonably necessary causing additional correspondence or delay;
 - (b) causing a hearing for directions or a final hearing to be unnecessarily extended or adjourned due to a lack of preparation or the late production of evidence;
 - (c) raising, after the delivery of the court's judgment, matters not contained in the original objection in consequence of which a decision has to be revisited.²⁶
 - (d) in cases which result in a compromise at the hearing, an unjustifiable failure by a party (petitioner or objector) to engage with the other party at an earlier stage in the process about a compromise solution whether through ADR or otherwise;
 - (e) excessive delay in informing the other party that a particular item in the petition, or a particular point of objection, is being withdrawn, or is not being pursued;
 - (f) late compliance with any direction of the court as to the exchange of information or provision of statements of evidence or expert reports by a specified date, which has disadvantaged the other party in preparation for or at the hearing;
 - (g) pursuing an argument which is misconceived, frivolous, vexatious or without any reasonable basis,²⁷

²³ See, also Part 25 of the Civil Procedure Rules 1998.

²⁴ See *Re St James, Kidbrooke* [2016] ECC Swk 13.

²⁵ Compare: DLUHC/MHCLG *Planning Practice Guidance*, 6 March 2014 <https://www.gov.uk/guidance/appeals> and see *Re St George, Hanworth* [2016] ECC Lon 3. See also *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269.

²⁶ As in the case of *Re St Andrew, Bainton (No 2)*, York Cons Ct, September 2008.

- (h) pursuing issues which are not usually matters to be determined by the Consistory Court, such as the traffic implications of an extension to the church, for which planning permission has been granted, or whether the PCC should be spending its money in other ways.
- (i) unlawful or inappropriate conduct, for example a stonemason introducing a monument into a churchyard which did not conform with the Chancellor's Churchyard Regulations or a priest wrongly purporting to authorise it;²⁸ or a church architect, minister, churchwardens or church council proceeding with works without the authority of a faculty;²⁹ or a funeral director mistakenly interring the remains of a Roman Catholic in the Anglican section of a municipal cemetery necessitating an exhumation.³⁰

8. Injunction and Restoration Orders

- 8.1 The Consistory Court has jurisdiction to issue injunction and restoration orders to prevent works being carried out without faculty approval or to reverse works which have been undertaken unlawfully. Each case will turn on its own facts, but generally work undertaken without prior faculty approval is highly suggestive of unreasonable behaviour, and costs are therefore likely to be ordered to be paid by the person or persons at fault.

9. Costs on appeal

- 9.1 This document is addressed to the fees and costs involved in the Consistory Court in contested and uncontested cases. Different principles apply in the appellate courts, namely the Court of Arches and the Chancery Court of York. These will be the subject of separate guidance issued by the Provincial Registrars of Canterbury and York.

²⁷ See by way of example an unreasonable 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: *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, Aveley* (1997) 4 Ecc LJ 770, Chelmsford Cons Ct.

²⁸ See *Re Woldingham Churchyard* [1957] 1 WLR 811, [1957] 2 All ER 323, Southwark Cons Ct; *Re St Alban, Wickersley* [2019] ECC She 3; *Re Christ Church, Brampton Bierlow* [2021] ECC She 6; and *Re Icklesham*, 25 October 2007, Chichester Cons Ct.

²⁹ *Re All Saints, Hooton Pagnell* [2017] ECC She 1 (district church council); *Re All Saints, Bunton* [2018] ECC Chi 1 (church architect); *Re St Bartholomew, Brighton* [2020] ECC Chi 2 (churchwardens, architect and contractor); *Re St. Michael, Michaelchurch Escley* [2020] ECC Her 1 (vicar and churchwardens) See also *Re St Thomas à Becket, Framfield* [1989] 1 WLR 689, [1989] 1 All ER 170, Chichester Cons Ct, in which architects were criticised for supervising works for which no faculty had been obtained

³⁰ *Re William Nooney, deceased* [2020] ECC Bri 3.

FREQUENTLY ASKED QUESTIONS

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 in faculty cases whether the petition is opposed or unopposed. These fees are for the work undertaken by the Diocesan Chancellor and the Diocesan Registrar and to cover expenses incurred in the Diocesan Registry.
- (ii) Costs between parties are the costs incurred by petitioners and objectors when there is a dispute, liability for which has to be determined by the Chancellor either at a hearing or upon a consideration of written representations.

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. The principle is that the cost of administering the system has to be met by those who use it. In many dioceses, 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 whether or not the petition is successful. If a case is opposed, an objector will not be ordered to pay any part of the Court fees unless the objector acted unreasonably.

Q.4 Can costs be awarded against me if I write a letter of objection and do not submit a Form 5?

No. The letter is taken into account by the Chancellor in deciding the outcome of the faculty proceedings, but there is no potential liability to costs.

Q.5 Can costs be awarded against me if I become a party which enables 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 (Form 5) then you will become a party. You will not become liable for any costs unless you behave unreasonably (see below).

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

As a general rule, the parties are expected to meet their own legal costs. An award of costs does not depend upon or follow automatically from the success of a party to the proceedings. The Chancellor has 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, or failing to provide information in good time, or making no attempt to seek a compromise solution, or pursuing arguments against the weight of unchallenged expert evidence, or raising wholly irrelevant issues, or undertaking work without faculty approval.

Q.8 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 statutory Court fees are generally lower for cases dealt with on written representations.

Q.9 Is there a right of appeal if an order for costs is made against me?

Yes, but only with the permission of the Chancellor or of the Appellate Court.