

LICHFIELD DIOCESAN REGISTRY
GUIDANCE RE CONTESTED OR CONTROVERSIAL FACULTY CASES

1. All Faculty cases are proceedings within the Consistory Court, which is an ancient part of the English common law Court system. The Judge of the Court is the Chancellor of the Diocese and his Deputy; the Registrar acts as associate or clerk to the Court and deals with all administrative aspects of a case.
2. The Consistory Court procedures are governed by the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 and the Faculty Jurisdiction Rules 2015 (the Rules). Like other Courts the Consistory Court is required to apply the overriding objective (Rule 1) to manage cases justly. Parties to Faculty proceedings should pay particular attention to this obligation in all aspects of their involvement in proceedings.
3. **The Registrar:** The Registrar is retained as the Bishop's legal secretary and Registrar to the Diocese, but also as the Registrar to the Bishop's Official Principal, the Chancellor of the Diocese. The Chancellor's judicial jurisdiction is exercised wholly independently of the Bishop and Diocese, and the Registrar must therefore act neutrally in all matters which are or are likely to proceed in the Consistory Court. The Registrar is not therefore able to advise the Archdeacon, or the Incumbent, Petitioner or Objector about their cases as *their* solicitor. The Registrar will advise as a Court Officer : neutrally. This inability particularly relates to the *merits* of their cases rather than to procedural matters. The Registrar will always advise as to procedures.
4. The Registrar will also assist on matters relating to the subject of the case, where this is possible whilst maintaining neutrality. The dividing line on this is very difficult to set out. It may change as a matter progresses. The acid test is that if the Registrar could not give the same advice to both sides, it would probably be on the wrong side of the line. It is vital that all parties who come before the Consistory Court have confidence that the Registrar and Chancellor are not siding with one party or the other, and that they have not pre-judged the issues involved. Justice must be done, and must seem to be done. (The original legal case law authority for this well known maxim used the word 'be seen' but this was corrected to 'seem' a few years' later – law students have had to ponder what the difference is for generations!)
5. The simple rule applied is that we will not 'descend into the arena' to help a party fight the issues of the case. If it is clear that there is a dispute we will recommend that if legal advice is required, it must be given by another lawyer.
6. Of course many of the issues involved are specialist ecclesiastical matters where lawyers, for the most part, are inexperienced. Advice might therefore be given by registrars from outside the diocese. These can be searched for on the Ecclesiastical Law Association website. Similarly, chancellors of other dioceses are often barristers in private practice and are able to

advise sometimes on the basis of direct public access. However any lawyer instructed is likely to charge a fee for their advice.

7. An example of a situation in which the Registry must be careful is that a party cannot expect to impart information confidentially to the Court in the sense that another party cannot be told it. The Court does sometimes receive information as part of a case which it does not seek to publicise, and will sometimes publish an anonymised judgment to protect that confidentiality. (For example evidence about children or mental health). But it cannot guarantee this : justice has to be transparent to the public, if it is to be true justice. Specific guidance should be sought from the Registrar in advance if such material is being considered for submission (and the Registrar should not be told the detail of the material until it is asked for).
8. Sometimes, information is accidentally given to the Registrar which is obviously not intended to be given to the other party. If possible the Registrar will then indicate that whilst it is on the Court file it will not be imparted to the Chancellor or the other party; but it may be that the nature of the information is such that this is not possible and that either it must be imparted to both Chancellor and other party, or that the Registrar should withdraw from the case because of the knowledge thus imparted. However these cases are very difficult.
9. It is sensible to remember that the Court has a broad jurisdiction flowing from the Chancellor's overall jurisdiction as Official Principal for the Bishop as chief pastor of the diocese. His role is not simply to deal with an adversarial process (as applies in civil courts); he must adopt an inquisitorial jurisdiction to protect consecrated churches and churchyards.
10. We cannot act as go-betweens in relation to parties.
11. **Petitions:** Most matters begin by a Petition being lodged. A Petition is an application form. The Petition is in a prescribed form, form 3; but there are some other forms in use within the Diocese for certain types of case – private faculty causes, such as requests for exhumation or reservation of grave spaces. Some types of application (injunction and restoration orders, and Interim Faculty applications) are commenced by different forms; they are dealt with in separate Guidance Notes).
12. Costs can be awarded in all kinds of faculty case; separate guidance is issued as to costs.
13. Until recently, Petitions were hard copy paper documents. The Consistory Court is now happy to handle cases based on digital applications. For parochial cases (that is, cases launched by a parish, PCC Churchwarden and/or Incumbent), this will be done through an Online Faculty System; before the Petition is released to the Registry, it will be reviewed by the Diocesan Advisory Committee (the DAC), which gives advice to the Petitioner and to the Chancellor. For private petitions the forms can be emailed to the Registry or sent as paper copies.
14. When the Petition is first lodged with the Registry, it will be checked to ensure that the Registry understand what it is about and that all necessary documents have been lodged. In particular the Registrar will check the Schedule and the Notice, and may require additional Notice to be given.

15. **Schedule:** The Petition must set out the works or proposals which are intended. This wording is put into a Schedule, but it is important that it succinctly and concisely describes what is intended. It should not set out a justification for the works etc, just a description. The description should be sufficient to enable a reader to understand what is intended – so there should be a narrative (for example, *the removal of the existing heating system and its replacement with a new boiler and radiators together with associated pipework...*), and a specification (*...as shown on the plan numbered A123 RevA and the specification prepared by XYA Heating Limited dated 1.1.19*). The wording should be reviewed after any DAC advice is given, or consultation with amenity bodies, before the petition is lodged with the Registry by being submitted, so as to ensure that it is up to date.
16. **Notice:** After the DAC has advised, the Petition is then lodged with the Registry and is advertised. Lodging used to involve sending a hard copy petition to the Registrar. Nowadays on the OFS it takes the form of pressing the button to 'submit' it to the Registrar. For non-OFS petitions, such as private petitions lodging the petition will either be sending a hard copy or sending a digital copy of the Petition to the Registrar.
17. For parochial petitions, and some private faculty matters (such as the introduction of a memorial), advertisement of the Petition will normally involve a public notice being displayed; for other private matters, such as exhumations and grave space reservations, the notice is not necessarily public but would take the form of a special notice served on other family members who might wish to express a view on the proposal.
18. The form of the public notice is prescribed. It has to be completed by the petitioner, using the same form of words for the works or proposals intended as is used on the Petition. If the wording is not regarded as sufficient to describe the proposals, the Registrar will give directions as to rewording it.
19. The Notice is displayed for 28 days. If it is defaced or removed the period must start again.
20. For parochial petitions, it is always to be displayed at the parish church. If it relates to the parish church's churchyard, it is simply displayed at the parish church. But in addition to display at the parish church, it should be displayed:
 - a. If it relates to any *other* church, at that other church;
 - b. if it relates to any churchyard of another church, then at that other church;
 - c. if it relates to a detached churchyard or to a consecrated area of a local authority or private cemetery within the parish, then at that place.
21. Notices at a church have to be displayed inside the church on a notice board or in a 'prominent' position, and on a notice board or 'prominent' position outside the church *where it can be read by the public*. (Display in a locked porch, for example, is insufficient).
22. Notices for a detached burial place are to be on a notice board or in a 'suitable' place there *where it can be read by the public*. In such cases the requirement for display *inside* the parish church is removed.

23. So Notice for a new memorial in a detached cemetery would be displayed both at the cemetery and outside the parish church; Notice relating to works at a mission church that is within the jurisdiction would be displayed inside and outside both of the mission church and the parish church.
24. Particular care might need to be taken in relation to any churchyard which had several access points meaning that a person might not see it; the Registrar might well direct publication at each access point.
25. As well as displaying a Notice, a petitioner in a case involving a change to any church or building must display the Petition, the designs plans photographs and all other documents that are before the Court, from the moment the petition is lodged until final determination. Display is in the church or building or another place advised to the public in a notice displayed inside and outside the church. This might be the vicarage or a church hall. The Notice in form 4A requires this to be stated in that document as well, but it is important that display continues throughout the case.
26. For private petitions, display is inside the building to which it relates, and outside. Despite this laxer requirement, the Registrar will require a Notice relating to a churchyard issue to be displayed at the churchyard concerned *and* at the parish church (applying Rule 6.4) unless there is a reason not to do so.
27. The Notice, once displayed, is returned to the Registrar, with a certificate to confirm display, showing the period of display and all the places where it has been displayed – this can be provided by scanning it in and emailing it.
28. There are some emergency situations and rare cases where other factors mean that the Chancellor may direct that a petition may proceed without any public notice (for example cases involving security of churches).
29. The Chancellor may give a direction for additional Notice, in any case. This might include Notice to an amenity body not previously consulted, Notice in a newspaper, or Notice on the diocesan website. (Rule 9). Such cases might be cases of particular importance locally or where especial controversy might be expected. It might be expected therefore that for a petition relating to churchyard clearance, given the fact that people tend to visit churchyards occasionally and perhaps as infrequently as once a year, that publication in a newspaper would be directed.
30. Notice on the web site is compulsory if a petition relates to the
 - a. *demolition* of a listed building (which might be a structure such as a tomb, rather than a building in the conventional sense);
 - b. the *demolition* of an unlisted building (or structure) in a conservation area;
 - c. or any *alteration* of a grade I or II* building, in a manner which would affect its character as a building of special architectural or historic interest;

d. or the *alteration* of the exterior of a grade II building, in a manner which would affect its character as a building of special architectural or historic interest.

31. The Registrar will give administrative directions under Rule 6.4 to ensure that the Petition is ready for consideration by the Chancellor if this is required. These directions can deal with problems over the wording of the schedule, whether display of the Notice should be in additional places or for a longer period (to ensure that it comes to the attention of potential objectors). Such directions are commonly given in cases involving churchyard reordering, where it is well known that people concerned may visit only infrequently. The Registrar may direct that Notice of a Petition which relates to a particular person's interests should be given to that person: for example in relation to an exhumation; the Chancellor may give additional directions. In private faculty cases such directions will result in additional cost to the Petitioner.
32. **Objections:** An objection can be made by any person who falls into the list of 'interested persons' under Rule 10.1. The objection is lodged within the Notice display or service period; though it is possible to object out of time with permission from the Court. All that is required is a letter or email explaining the basis on which the person claims to be an interested person, and a brief statement of the grounds of the objection. The definition of an 'interested person' includes a resident of the relevant parish, a person whose name is on the electoral roll of the parish, and any other party who can demonstrate a 'sufficient interest' in the case. Objectors claiming the last basis should set out their claim clearly so that the Chancellor can consider whether the claim is valid. (Note that the PCC, the Archdeacon, the local planning authority, relevant national amenity societies and some other bodies are also regarded as interested persons.) If the objection is lodged 'out of time' an explanation of the reason for delay should be given and the Chancellor will be asked whether or not he is willing to give permission.
33. The Registrar will then send the objector a notice inviting the objector to become a party opponent by serving more detailed particulars of objection in Form 5 within a 21 day period or alternatively simply to say that they wish their original letter to be taken into account by the Chancellor. The notice is accompanied by procedural explanations.
34. A Party Opponent is a formal party to the proceedings. The Form 5 objection is a formal pleading of the objector's case. It should be detailed. The Petitioner may serve a formal pleading known as a Reply within a 21 day period.
35. If the objector does not serve a Form 5 pleading, the Registrar will invite the Petitioner to comment on the original letter of objection.
36. **Unopposed Petitions:** if no objections are received or if no Form 5 is served by an objector, the Petition is regarded as unopposed. The vast majority of petitions are unopposed. The Chancellor may simply decide to allow the Faculty to be issued on the basis of the papers before him.
37. If the Chancellor is not content to grant the Faculty on the basis of the information he holds at that point, he can give directions as to how to dispose of the case. The Chancellor cannot

refuse the Petition at this point without either hearing the Petition in Open Court or directing that it should be determined after written representations.

38. **Directions and hearings:** The Chancellor (or sometimes the Registrar) may give directions for the resolution of a Petition either on the basis of the documents held by the Registry or at a hearing convened for the purpose of considering that matter. Directions are dealt with in Rule 11, and can cover many different aspects of the case depending on what kind of issues are involved. The object is to enable the Parties to understand what issues the Court thinks will be relevant to the final determination, and how the Court wishes the Parties to provide information on those issues.
39. In many cases, these directions will simply be for the case to be resolved after further, written, representations (Rule 14). This method is only available if all the parties agree, but also only if the issues between them are suitable for resolving the dispute. In appropriate cases the Registrar will ask the parties whether they agree to a written determination at an early stage in the case. It may not be appropriate where there are serious factual disputes that can only be resolved by cross examination in open court.
40. Written Representation is commonly used in unopposed cases, where the Chancellor simply wishes to hear more from the Petitioner as to the justification for the case. The directions would usually be for the Petitioner to lodge a full statement of its case (that is, everything that they wish the Chancellor to know about before making a decision, and answering any objections that have been made) within a period of 28 days; followed by each objector (if any have become formal Parties Opponent) giving a full statement of its case within a period of 21 days; followed by a final comment from the Petitioner (that is commenting on matters raised by the Party Opponent, rather than comment that raises new issues) within 14 days.
41. In some instances, the Registrar may direct a party to provide additional details of its case, if something is unclear; but parties should make sure that their cases are set out with clarity, for consideration by a judge who will not necessarily have any background understanding beyond what is set out on the pleadings and supporting documents.
42. In some cases the Chancellor may ask for an informal hearing – a ‘chambers’ hearing, to enable a party to explain the case further. This is unusual nowadays.
43. The requirement for consent means that a party can insist on a formal hearing. Formal hearings are in Open Court. The Chancellor will be robed as a judge of the Court and any lawyers who appear would also be robed. The procedure is almost identical to that in any other Court, and the Court is customarily laid out in the traditional style of a court room. Rules of evidence and procedure are similar (but not identical) to those in the civil courts. It is costly for all parties. In some cases it is the only way in which a matter can be determined, and parties should not be dissuaded from Court hearings simply because of the time and cost involved. The Registrar or Chancellor will give directions designed to ensure that Court time is not

wasted. Parties can therefore expect that they should co-operate with each other and that they may be ordered to:

- a. Provide particulars of any parts of their written cases which are unclear;
- b. Disclose documents which relate to the issues between them (unless they are privileged) and possibly other documents specifically required by another party;
- c. Identify what witnesses they intend to call and on what subjects they will give evidence, possibly with limitations to avoid repetition;
- d. Provide formal witness statements (with a signed statement of truth) for each witness who is to give evidence (which would then stand as that witness' evidence in chief at the hearing) (see Rule 11.4);
- e. Identify any issues on which expert evidence is required (see Rule 11.5);
- f. Attempt to minimise the need for multiple witnesses by exchanging evidence and talking to each other to narrow issues, and preparing and serving a statement of common ground;
- g. Help the Court assess the likely duration of the case in terms of hours and days of Court sitting time.

44. The Registrar will also give directions for the preparation of a 'bundle of documents' for use at the hearing. It is very important that at any hearing, all those present have easy access to the same documentation, which needs to be available in good quality, paginated, indexed, hard copy form, in lever arch files. An electronic pdf version will also be required. The Registrar will decide which party should have the task of preparing this, or whether the Court will undertake the task, and how many bundles are required.

45. The Court will aim to fix a date for the trial of the case, and possibly a further directions hearing before that date to check readiness for the hearing. The date time and place for a hearing will be decided after consultation with the parties, but is usually at a church or church hall in the parish concerned; some hearings are held in the evening and some at weekends. Notice of the hearing is given to all parties and to the Archdeacon, Church Buildings Council, DAC and other bodies when required (Rule 11.3).

46. Parties should be aware that evidence will be taken on oath and that hearings may involve detailed cross examination on their evidence, as well as submissions as to legal matters. The Petitioner would normally be invited to open their case to the Chancellor and then to call their witnesses (each being cross examined in turn by the Parties Opponent); the Parties Opponent would then call their evidence in the same way; at the end of this the Parties Opponent would close their case with any submissions on the proceedings following which the Petitioner would close its case.

47. Parties should also be aware that the time spent by the Registry in preparing a case for trial or for determination by written representations or informal hearing will be charged to the Petitioners. The Court can be asked to direct that another party should bear that cost. The time

will include not only time spent in the hearings, but also time spent in corresponding with parties or in telephone calls, and in reading material that is relevant to the case. This is why the Registry will aim to give directions designed to minimise the time that the Court will have to spend on the case.

48. **Service of Documents:** rule 17 governs this. Various methods are permissible: personal service on the person, delivery to their usual or last known address, or their solicitor, first class post to those places, document exchange, electronic *if the person has indicated they accept electronic service*, or by an approved method (eg newspaper advertisement or substituted service on a person known to be in contact with the person).
49. Where service is required *before* a certain time, the process of service must be completed by that time – so that a letter sent by first class post is presumed to arrive on the *second day after* posting; an item delivered must be delivered before 4.30pm on a business day (or will be presumed to have arrived on the next business day).

NIALL BLACKIE

JOINT REGISTRAR OF THE DIOCESE OF LICHFIELD

18 JANUARY 2019

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