28 August 2014

In the Consistory Court of the Diocese of Chichester CH 34062/13

In the matter of St George, Crowhurst

Judgment on Costs

1. At the conclusion of the hearing of this matter on 30 June 2014, I suggested that the Petitioners pause and reflect before making any application for costs. I was mindful that a process of mediation was under way and that in all boundary disputes, the parties have to continue to live together long after the caravan of litigation has moved on. The Petitioners decided to make an application and written submissions were received under cover of a letter dated 8 July 2014. Accordingly it falls for me to determine it. In giving leave to the Objectors to withdraw their Notice of Objection, I specifically reserved the Court's jurisdiction on the issue of costs. For reasons which will become apparent, I have not considered it necessary to solicit representations from the Objectors.

2. I referred the Petitioners to the *Guidance on the Award of Costs in Faculty Proceedings*, produced by the Ecclesiastical Judges Association and available on the Chichester Diocesan website. They chose to make no reference to it in their written submissions.

3. The Petitioners seek no 'party and party' costs. However they ask the Court to order that the Objectors pay some or all of the Court Fees. In relation to this, the *Guidance* says as follows:

> *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.*
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> *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.*

4. The onus on the Petitioners, if they are to persuade the court to take the unusual course of ordering Objectors to make a contribution towards the Court Fees, is to satisfy the court that there is clear evidence of (1) unreasonable behaviour on the Objectors' part and (2) that such unreasonable behaviour has unnecessarily added to the procedural costs.

5. Having considered the Petitioners' written submissions, I struggle to understand the basis upon which they allege that the Objectors have behaved unreasonably. I quote verbatim from their submissions:

> Following the decision in the St Peter and St Paul case, the Objectors should be liable for the court costs from the time they lodged an objection to the time of its withdrawal. As demonstrated by the height of the redundant papers in front of the Chancellor they had clearly generated a vast amount of unnecessary work and their conduct had been patently unreasonable.

6. I assume that this is a reference to *Re St Peter and St Paul, Scrayingham* [1992] 1 WLR 187. However I cannot see how, in this instance, the conduct of the Objectors (even if it were

considered unreasonable) made any material difference to the costs of the proceedings. A good proportion of the multi-faceted case was devoted to the issue of the obligation to maintain the wall which the Petitioners asserted should fall on the Objectors. This was abandoned when the case was opened at the final hearing on 30 June. Indeed the Petitioners so marshalled their 'evidence' that their case was likely to have failed up until the moment it was shored up by the oral testimony of Mr Whittick adduced with the leave of the Court at the final hearing. I can see no instance of unreasonable behaviour on the part of the Objectors which has unnecessarily added to the costs. The one exception to this is the application to withdraw the concession which was dismissed. In this regard the Objectors were ordered to pay the costs of and occasioned by that application, assessed in the sum of £798.60 which I gather has already been paid in full.

7. It is suggested by the Petitioners that they suffered an injustice at the hands of the Court because of the adjournment of proceedings on 10 September 2013. Complaint is made that 'the Court without any prior notice or warning to the Petitioners, had permitted Counsel for the Objectors to file additional submissions and evidence under the guise of a 'Reading Note'. The suggestion that in some way the Court was complicit or underhand in the late filing of submissions or evidence is unworthy. The court at no stage gave permission for these matters to be adduced. The Petitioners' solicitor is well aware of this because at the hearing on 15 May 2014 he specifically made reference to these items on the basis that their status and admissibility had NOT been ruled upon at any earlier hearing and he invited the court to make a ruling. This accords with what was said by the PCC secretary to the registrar in a letter date-stamped 16 December 2013: 'we would like please the status of [the] reading note to be determined and, if the additional arguments and evidence it introduced are to be admitted, then confirmation that our evidential response to [counsel] may also stand'.

8. It is now said that the First Petitioner wished to proceed on 10 September 2013 without the evidence of Mr Whittick. However, were he to have made a formal application to do so, it would almost inevitably have been refused, since the Objectors wished to cross-examine Mr Whittick and they not been informed in advance of the Petitioners' intention not to call him. To deny them that right would have given them powerful grounds to appeal the determination to the Court of Arches. In any event, it will now be readily apparent from the judgment in this case that the petition would have been dismissed had it not been for the evidence of Mr Whittick, not merely his witness statement but his additional oral testimony. So the adjournment on 10 September 2013 ultimately saved the Petitioners the additional expense of having to start fresh proceedings and pursue them to judgment.

9. It should be recalled that events moved swiftly and informally on the morning of 10 September 2013 and the 'game-changer' was the unexpected concession made by Counsel for the Objectors that the panel fence had not been erected on the Objectors' land. This concession having been made, I enquired whether the respective parties would see merit in adjourning the matter to seek an amicable mediated settlement. Both said they did and on that basis the proceedings were stayed with the concurrence of the Petitioners and the Objectors. The fact that a settlement proved illusory and that after some months both parties sought to have the stay lifted does not detract from the consensual nature of the stay which was imposed on the proceedings.

10. Finally, the Petitioners say that 'if the paid officers of the Court feel that a charitable concession is appropriate then the Court has the power to mitigate its fees'. The only

paid officers of the court are the registrar and the registry clerk and the Petitioners have not pointed me to any authority empowering me to disallow or otherwise mitigate their fees. The criticism of these paid officers seems to be that they were aware that the Petitioners did not intend to call Mr Whittick and failed to advise them of the imprudence of such a course. However, the registrar had advised the Petitioners that he could not offer legal advice to litigants and both he and I had counselled the Petitioners to engage the services of a specialist ecclesiastical solicitor. I anticipate that the time expended by the registrar and registry clerk in these proceedings will be significantly in excess of that for which recovery will be made by way of court fees. The Petitioners have not particularised any reason to justify why the registrar or registry clerk should be penalised.

11. The Petitioners, wisely in my opinion, have not invited me to waive any part of my fees. They may have intended to do so in the mistaken belief that I was a paid officer of the court. Even if the chancellor were a paid officer of the court (which, since he exercises a judicial function he is not) I can see nothing in the submissions of the Petitioners to justify such a course.

12. Perhaps it would help if I added a few words of general advice to others in the diocese likely to be petitioners in complex cases. First, they must budget for the costs of a contested hearing. Secondly they should at least consider engaging a specialist ecclesiastical lawyer: acting in person, or engaging the services of a non-expert on a *pro bono* basis is generally a false economy. Thirdly there is a long-standing duty on parties to work together within the litigation process. Rule 1.4(1)(2)(a) of the Faculty Jurisdiction Rules 2013 post-dates the issue of this petition but constitute a re-statement of the previous position. It talks of the court 'encouraging the parties and any other persons concerned in the proceedings to co-operate with each other (i) in the conduct of the proceedings, and (ii) in resolving, as far as possible, matters that are in dispute between them'.

13. I was concerned to note that the solicitor who acted for the Petitioners on 15 May 2014 and again on 30 June 2014 (but who strangely took himself off the record at all other times) refused to speak to the First Objector in the precincts of the court on 15 May on the basis, so he said, of historical hostile animus between the two men. I have refrained from naming the particular solicitor either within the substantive judgment or this separate determination on costs to save him personal and professional embarrassment. However, it seems to me that if a solicitor has personal reasons which prevent him from communicating with a litigant-in-person, the proper course is to decline to accept the instructions, rather than to accept them and then place himself in breach of his duty to the court.

14. In all the circumstances, I can see no reason in this case to depart from the general rule as fully rehearsed in the *Guidance* that the court fees arising in this petition will be borne by the Petitioners, save and excepting those in relation to the hearing on 15 May 2014, which have been assessed and paid by Objectors. The fees will include a correspondence fee for the registrar.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Chichester

28 August 2014