Neutral citation number: [2022] ECC Ely 5

Faculty application *– Costs – Grade I listed Cambridge College Chapel – College applying to remove the C 17th Rustat Memorial from the west wall of the Chapel to a specially created exhibition space within the College – Faculty refused – Parties opponent applying for costs – Whether the College behaved unreasonably in the conduct of the proceedings – Whether any unreasonable behaviour has caused the parties opponent to incur additional costs unnecessarily – No order as to costs*

Application Ref: 2020-056751

IN THE CONSISTORY COURT OF

THE DIOCESE OF ELY

Date: Sunday, 5 June 2022

Before:

THE WORSHIPFUL DAVID HODGE QC, DEPUTY CHANCELLOR

In the matter of:

THE RUSTAT MEMORIAL, JESUS COLLEGE, CAMBRIDGE

Application determined on written representations

Mr Mark Hill QC (instructed by Mr Stuart Jones of **Birketts LLP**) represented the petitioner, Jesus College, Cambridge

Mr Justin Gau (instructed directly) represented 65 of the parties opponent

Professor Lawrence Goldman, another party opponent, appeared in person

Another two parties opponent were neither present at the hearing nor represented

The following cases are referred to in this judgment:

Re Gibson's Settlement Trusts [1981] Ch 179

Re St Mary the Virgin, Sherborne [1996] Fam 63

JUDGMENT ON COSTS

Introduction

1. In a written judgment handed down on 23 March 2022 and bearing the neutral citation number [2022] ECC Ely 2 I dismissed a faculty petition by Jesus College, Cambridge to remove the C17th memorial to Tobias Rustat from the west wall of the Grade I listed College Chapel. I now have to determine applications by the parties opponent for an order that the College pay, or contribute to, their costs of successfully opposing the petition. All the parties have agreed that I should do so on consideration of their written representations, instead of by way of a hearing, pursuant to rule 14.1 of the Faculty Jurisdiction Rules. I consider that it is expedient to do so having regard to the overriding objective in Part 1 of the Rules of dealing with this case justly and, in particular, saving expense, dealing with the issue of costs proportionately, and ensuring that it is dealt with expeditiously and fairly.

2. The court has received: (1) written representations from Mr Justin Gau (of counsel), representing 65 of the parties opponent, dated 8 April 2022; (2) emails from Professor Lawrence Goldman to the Registry dated 4 and 8 April 2022; (3) Mr Mark Hill QC's written response, dated 22 April 2022, on behalf of the College, to the parties opponent's application for costs, with supporting documents; (4) Mr Gau's written reply to the College's submissions dated 6 May 2022, with supporting documents; (5) emails from Professor Goldman dated 27 April and 3 and 8 May 2022; and (6) post-judgment email exchanges on the issue of costs. In an email to the Registry, dated 12 May 2022, the College's solicitor states that after having considered the replies from the parties opponent to the College's response to their costs applications, the College is content to rely on Mr Hill's written response to the applications, and does not propose to add a further rebuttal. He confirms that

the College is content for me to determine the costs applications on the papers before me, and does not consider that a hearing is necessary.

3. In this further judgment I will refrain from reproducing the more tendentious of the written representations I have received. I have borne them firmly in mind; but in a consistory court judgment which may attract more general interest than such judgments usually excite, I have no wish to inflame firmly, and genuinely held, feelings any more than is strictly necessary. As I have previously observed (at paragraph 127 of my substantive judgment), in any case involving contested heritage no-one should regard the decision that is ultimately reached as representing either a victory for one view or a defeat for the other. For those who wish to move quickly to the heart of my decision on costs, they should proceed straight to paragraphs 20 and following (although, once again, I would invite readers to consider the whole judgment for a full understanding of the nature, and substance, of the arguments that have been advanced before me).

General approach to costs

4. In contested civil proceedings in the secular courts, subject to the court's overarching discretion, the general rule (enshrined in rule 44.2 of the Civil Procedure Rules) is that the unsuccessful party will be ordered to pay the costs of the successful party. That general rule does not apply in contested faculty proceedings in the consistory court. That court's power to make orders in respect of costs is to be found in s. 26 of the *Ecclesiastical Jurisdiction and Care of Churches Measure 2018*, under which the Chancellor may order that a party is to pay some or all of the taxed (or assessed) costs of another party. This gives the Chancellor a discretion, on the facts of the particular case, to order one party to pay the whole, or part, of the costs incurred by the other party as a result of contested proceedings in the consistory court. Written Guidance, originally issued by the Ecclesiastical Judges Association (the **EJA**) in February 2000, and revised and reissued in January 2011, aims to clarify the principles upon which costs are awarded in the consistory court so as to enable all persons who may become involved in the exercise of the faculty jurisdiction to have an understanding of why, when, and on what principles orders for costs may be made. The current Guidance is in the course of being revisited and re-written by a small working party of the EJA (of which both Mr Hill QC and I are members); but any new Guidance which may be issued after it has been endorsed by the EJA is not intended to effect any change in the existing practice with respect to costs but merely to restate the existing position in (hopefully) a more helpful and user-friendly way. Paragraph 2.5 of the current Guidance states: *"Unless the Chancellor makes an order, each party is responsible for paying the costs of any barrister or solicitor it chooses to engage, although in certain circumstances the Chancellor may make an order for one party to pay some or all of another party's costs of legal representation."* Paragraph 3.2 of the current Guidance states that the power to make an order for costs *"... is intended to ensure that a sense of discipline is introduced into the proceedings. This discipline is not intended to deter people 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. The fact that costs will be incurred and that the Chancellor will have to deal with*

the subject of costs at the conclusion of the proceedings should, however, operate as a discipline towards saving costs, for example, by narrowing the issues which are in dispute and limiting the amount of paperwork to be handled through the Registry prior to a hearing." In summary, parties to contested faculty proceedings will generally be expected to bear their own legal costs; and a party will only be ordered to pay, or to contribute towards, another party's legal costs if they have behaved unreasonably in the conduct of the proceedings. The determining factor is the extent to which any unreasonable behaviour by a party has unnecessarily resulted in additional costs being incurred. Because it is important that all the issues for and against the grant of a faculty are fully examined, it is right that parties should not, as a general rule, be penalised simply because they are unsuccessful.

5. For the jointly represented parties opponent, Mr Gau submits that the proposed new guidance should be adopted where appropriate. For the College, Mr Hill QC points out that whilst the revision of this Guidance is in train, it still remains in the form of a working draft which is yet to receive the approval of the EJA Standing Committee or the EJA as a whole. It has not yet been placed into the public domain; and it did not come into existence until after the hearing of this matter had been concluded. (This latter point is not strictly correct: an early version of the new revised Guidance had been drafted, and had already been revised by myself, and then by Mr Hill, shortly before the start of the substantive hearing of this faculty application.) Until such time as any revised version is adopted, Mr Hill submits that consistory courts should continue to apply the 2011 Guidance. Mr Gau's application for costs makes no reference to any specific part of the 2011 Guidance (or to any specific part of the current version of the new revised Guidance, which he contends should be applied). I agree with Mr Hill that it is the current Guidance to which this court should have regard when determining the present applications for costs. Since the proposed new revised Guidance is intended merely to be a distillation of existing law and practice, however, this makes no difference to the outcome of these applications for costs. The general principles applicable to costs incurred in opposed faculty proceedings were set out by the Court of Arches in *Re St Mary the Virgin, Sherborne* [1996] Fam 63; and these form the framework on which both the current, and the proposed new revised, Guidance are based.

6. The current Guidance addresses the issue of court fees at paragraphs 5.2 to 5.5 and the separate issue of costs between parties at paragraphs 5.6 to 5.8. Paragraphs 5.6 and 5.7 read as follows:

> *5.6 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.

5.7 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.

Paragraph 5.8 supplies a non-exhaustive list of examples of procedural factors which might result in a finding of unreasonable behaviour and an award of part of the costs against another party (whether the petitioner or an objector).

7. Paragraph 6.1 of the current Guidance is headed *"Disputes relating to architecture, history, archaeology, etc: general principle"*. It reads:

6.1 Differences of opinion in relation to the likely effect of a proposal for which a faculty is sought will give rise to issues to be determined by the Chancellor, usually involving an examination of the history of the particular church, its architectural features, or its archaeological significance, or other matters. Presentation of relevant evidence and argument in relation to such matters by those with appropriate expertise will be most unlikely ever to be regarded as 'unreasonable', whatever the outcome of the case. The position may be different where new evidence and argument are raised at or shortly before the hearing without having been previously canvassed. Whilst it would be reasonable for the other party to respond to that new evidence and argument at the hearing, the question of the reasonableness of the late introduction of new evidence or argument would be considered in relation to costs at the end of the hearing.

8. The Diocese of Ely has issued a short guide, in a form approved by the Chancellor on 17 March 2014, explaining to petitioners and objectors why, and when, an order for costs can, and may, be made by in faculty cases in the form of a series of questions and answers. So far as material, this reads as follows:

Q.6 Can costs be awarded against me if I am not a party to the faculty proceedings?

Yes, but only if that person is alleged to be responsible for an act or default in consequence of which the proceedings were instituted. Such circumstances are unlikely to arise with any regularity and that person would be given an opportunity to address the court in writing or by attending the court before any award of costs was made against him/her.

Q.7 In a disputed case does the 'loser' have to pay the other party's costs?

As a general rule the parties are expected to meet their own expenses. An award of costs does not depend upon or follow automatically from the 'success' of a party to the proceedings. The Chancellor has, however, 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.8 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. The fact that occasionally an award of costs may be made in such circumstances is intended to ensure that a sense of discipline is introduced to the proceedings.

Q.9 Are the principles in relation to costs the same when 'conservation' issues are involved?

Yes ...

The parties opponent's application for costs

9. For the jointly represented parties opponent, Mr Gau recognises that costs in consistory courts are usually borne by the parties. In this case, he submits that the College has behaved unreasonably at every stage; and he applies for the College to pay the costs of the parties opponent (which are put at some £42,300). Mr Gau reminds the court of the duties of the petitioners under rule 1.3 of the Faculty Jurisdiction Rules (the parties' duty to help the court to further the overriding objective of enabling the court to deal with this case justly); and he submits that the petitioners have, in particular, ignored their duties under rule 1.2 (b) (to save expense) and 1.2 (d) (to ensure that the case is dealt with expeditiously and fairly). Mr Gau relies on the following matters:

(1) Unreasonable behaviour in the conduct of the litigation as a whole

At the conclusion of the recusal hearing held on 6 August 2021, Mr Stuart Jones (the solicitor for the College) is said to have conceded that it had *'an uphill struggle'* for the petition to be granted. It appears that no attempt was ever made realistically to engage in that, or indeed any, sort of struggle. This failure of will, or simply the deliberate failure to engage, are said to characterise the attitude of the College to this case. Attempts to settle the case were ignored and then rebuffed. Attempts to settle the issue of costs were rebuffed. The College is said to have even attempted to claim that the first petition they had drafted and submitted to the Registry was not, in fact, a petition. In truth, these petitions were a mess, and no attempt has ever been made to correct them, or to correct the false narrative shared with the members of the College. The impression given is that the College did not need to bother engaging properly with the amenity bodies, the parties opponent, or the wider community. Unlike Oriel

College, Oxford, who were faced with a similarly *'knotty problem'*, the College failed to set up an independent Commission of Inquiry to deal with this but appointed members of College to a Group that had formed a fixed view and was wholly unwilling to consider any other view. Attempts made to assist the petitioners were ignored. Advice was offered about the usual way of drafting a petition, including the drafting of a robust statement of significance, the drafting of a statement of needs, and the tracing of Rustat's heirs at law. This latter evidence was obtained by the parties opponent, who also encouraged the heirs to liaise with the College. These approaches were ignored by the College, which started to engage with the process of tracing the heirs at law only a few weeks before the date for the exchange of evidence.

(2) The first petition (dated 10 December 2020)

In the course of correspondence relating to costs, the College has attempted to argue that this document is not a petition. This was clearly a petition; and it was admitted to be such by the Dean in cross examination, who agreed that the College believed this to be a petition. The Dean also spoke of his experience of applying for faculties in the past. The parties opponent responded to the invitation to object to this petition. The Registry may have made a mistake, but no attempt was made by the College to correct any error. Attempts by counsel for the College to suggest that the parties opponent had *'jumped the gun'* by answering some sort of draft document were wholly undermined by the court's inquiry at the outset of the hearing about which petition the court was supposed to be determining.

(3) Failure to disclose information

Emails to the Master and to Dr Mottier were brushed off or ignored. No attempt was made to share any information that might have informed the Legacy of Slavery Working Party (the **LSWP**) in its decision-making or, more significantly, the Deputy Chancellor. It is said to be abundantly clear that the petition was submitted with inadequate information, and that it relied upon an interim conclusion of a Group whose membership was wholly biased in terms of its analysis of the evidence, and who had formed a fixed and immovable view about the monument that they expected the court simply to agree with. The repeated failures to engage, and to disclose information, led to extensive correspondence; and the late disclosure of such information led to costs being incurred in having a further directions hearing and the late instruction of an expert historian by the parties opponent.

(4) Failure to carry out the most basic steps to obtain a faculty correctly

The parties opponent had outlined the documents needed to be provided to a court to obtain a faculty (see above). The Church of England's contested heritage guidance requires a *'robust Statement of Significance'*. There was no statement of significance served with the first petition. In terms of the Statement of Significance served with the second petition, astonishingly there was no mention of the memorial. The guidance from the Church of England (at section 3a on page 18) could not be plainer:

> *Insufficient understanding of the significance of the object and the need for change, if the research is deficient in depth and quality … is likely to lead to distress and recriminations, as well as the possibility of the refusal of any proposed interventions.*

(5) The 'false narrative'

This is said to be the most serious aspect of the College's unreasonable behaviour. Hitherto, the College has had a proud reputation for academic and intellectual excellence. By misleading the students and the fellows about the source of Rustat's gifts to the College, it attempted to obtain a faculty by crafting evidence to support a submission under issue 5 of the *'Duffield'* guidelines knowing full well that the College had no answer to the issue of *'harm'*. Mr Gau submits that the LSWP shared information with the whole student body that gave a wholly false impression that the College had benefitted from the proceeds of slave trading. No attempt was ever made to update the interim report before this petition was filed. No attempt was made by the petitioners to go away and reconsider their petition in the light of the true evidence. This issue was first raised with the Master on 18 November 2020. In particular, the ante-penultimate paragraph of Mr Andrew Sutton's email to the College dated 19 February 2021 summarises the entire case in seven lines. It was ignored. Paragraph 129 of the substantive judgment (beginning: *"This present case provides an object lesson in the potential dangers of failing to undertake 'robust, inclusive research to understand as much as possible about the heritage in question' ... before reaching any decision on a proposed course of action ..."*) is said to be the most trenchant criticism of a petitioner in faculty proceedings, particularly one represented by one of the most well-respected firms of ecclesiastical law specialists, and one of the foremost leading counsel, in this country. The College created a '*false view'* and gave a *'false picture'* to those people whose pastoral concerns it claimed to represent. The repeated criticism of the College at paragraph 47 of the judgment is also said to weigh heavily.

(6) The witnesses

(a) Dr Mottier

Described by the court as an *'underwhelming witness'* Dr Mottier is said to be a witness who, in fact, attempted to mislead the court. Initially she stated in her witness statement that the reason the College's expert evidence was not disclosed was because of the fear of plagiarism. Professor Goldman gave his considered view that this was incorrect in written submissions for the hearing on 8 January 2022. Professor Goldman's view was adopted, and more robustly adapted, by the parties opponent both in the submissions made during the hearing of 8 January 2022 and in Mr Gau's cross-examination of Dr Mottier. She plainly realised that her evidence on this point was, indeed, absurd and so she adopted a different tack, stating in her oral evidence that she had been given *'legal advice'* not to reply to the parties opponent with the evidence they were seeking. On being taken to the correspondence in cross-examination with regard to this assertion, she changed her evidence again, to explain that the expert evidence had only been obtained (by curious coincidence) only very shortly before her witness statement had to be filed. To express three mutually contradictory statements in evidence is manifestly unreasonable. She chaired the LSWP, and her attitude spoke volumes about the determination of that group to justify their recommendations without adequate research having been undertaken.

(b) The Dean

The Dean was rightly criticised for his change of opinion with regards to the siting of the memorial in paragraph 42 of the judgment. This change of stance (demonstrated by comparing the two petitions) would not have been obvious had the College succeeded in its

attempt to remove the first petition from the bundle (which was made possible by the College's agreement to prepare the court bundles). In the same way as Dr Mottier, the Dean's change of stance demonstrated the College's intention to achieve its aims by allowing the court to be misled. The Dean's attempt to justify the removal of the memorial, in answer to a question from the Deputy Chancellor's at the end of his evidence, is said to have *"demonstrated that the difficulty of mistaking an open question with a bandwagon is that it is painfully easy to fall off"*.

(c) Mr Vonberg

Mr Vonberg was a witness who was neither independent not impartial. An attempt to shoehorn him into the evidence as an appropriately qualified expert was rightly ignored.

(d) The Bishop of Ely

It was never clear why the Bishop of Ely was called to give evidence. He could only comment on the evidence that he had been told about by the Master and the Dean. In short, he was required to make comments on information gleaned as a result of the 'false narrative' propagated by the petitioners.

(7) Expert evidence

The College instructed an expert historian to assist the court. The expert it instructed was not just a fellow of the College, but one who had attended meetings of the LSWP as a member. Whilst purporting to produce *"the fullest possible picture of Rustat's life"* he singularly failed to do so. He reported with accuracy on the hard evidence he had uncovered, yet he made not one mention of any aspect of Rustat's life, save for his small investments in two companies trading in Africa. His full report adopted, or suggested, a new position by the College: that any investment in these sorts of companies was morally reprehensible. Such behaviour reflected the closed mind of the College and its single-minded effort to remove the memorial come what may. The College never obtained, or alternatively never disclosed, any expert evidence about the quality of the memorial or its importance to the Chapel. From the outset, the College was made aware of the importance of the memorial and the harm that would be caused by moving it. The parties opponent had, from January 2021, obtained an expert report. During the course of the litigation, the College, through its solicitors, offered to compile and print off the court bundles. This offer, as it turns out, is said to have amounted to an attempt to claim that Dr Bowdler was not an expert, albeit without making any formal objection to his evidence being used. The College's solicitors did this by persistently filing Dr Bowdler's evidence in a section of the court bundles separate from the other experts' reports. Mr Gau submits that it is disappointing that the College thought that this was a reasonable way to behave. To add insult to injury, never having obtained (or disclosed) any expert evidence, the College insisted on cross-examining Dr Bowdler. It appeared to be an attempt to humiliate an internationally renowned expert in his field rather an attempt to assist the court. In truth, the College had no evidence to undermine Dr Bowdler's evidence. To treat him in the way the College did was wholly unreasonable.

(8) The College's change of stance

In its written submissions, dated 24 January 2022, the College had asserted that *'no harm'* would be caused by the removal of the memorial. This required the parties opponent to

advance extensive oral and written submissions and to call an expert witness. The College's submissions in relation to this were finally altered to a much more realistic stance in Counsel's final oral submissions (as noted in paragraph 88 of the judgment). This change of stance exemplifies the way the College has conducted this litigation. It has refused to co-operate with the parties opponent, it has refused to accept the abundantly obvious, it has propagated a false narrative amongst those for whose pastoral care it claims to be concerned, it has issued a petition on incomplete conclusions, and it has withheld evidence from the parties opponent until the last minute.

(9) Behaviour afterwards

Mr Gau submits that before the publication of the court's substantive judgment, the College, quite inappropriately, posted on its website a robust rejection of the clear evidence that the College had spread a 'false narrative'. The evidence, even by that stage, was clear. To mislead people logging on to the College website is said to be reprehensible, and unworthy of a college within the University of Cambridge. Since the publication of the court's judgment, the College has posted on its website a rejection of the judgment: *"the widespread opposition to the presence of his memorial in the College Chapel is the result of [Rustat's] involvement in the slave trade and not any false narrative allegedly created by the College about the sources of Rustat's wealth"*. Mr Gau says that it is wholly unreasonable and improper to use such a public space to reject the judgment of the court. The Master and other members of the College have sought to undermine the court's judgment by conducting interviews with the media. These behaviours on the part of a hitherto respected academic institution are said to undermine confidence in the process of the court and are wholly unreasonable. If the College wishes to appeal this case they should argue it with proper diligence in the Court of Arches and not in the court of public opinion.

10. In an email to the Registry, dated 4 April 2022, Professor Goldman states that if costs were to be awarded against the College, he would wish to claim costs and expenses totalling £1,646, for his time, accommodation and fuel in matters connected to the hearing in Cambridge, calculated on the basis of a charge of £300 per day (which was his approximate earnings at the time he retired from formal university work two years ago). In a further email dated 8 April, Professor Goldman formally associates himself with the case made for the award of costs to the parties opponent represented by Mr Gau. In addition, Professor Goldman wishes to add his own arguments concerning the College's unreasonable conduct in this case (which he now understands to be a pre-condition for a grant of costs in cases of this type before the consistory courts), as follows:

(1) To seek permission to move such an important funerary memorial, crafted by Grinling Gibbons, placed in the Grade I listed chapel where Rustat himself is buried, and kept there for over 300 years, was always likely to be *"a vain quest"*. It was not reasonable to request moving such a piece when alternative ways of dealing with its controversial nature were, and still are, open to the College. If executed properly, these alternatives would have the support of the parties opponent.

(2) The plan to move the memorial to a ground-floor room in East House in the grounds of the College was also unreasonable as the room was singularly ill-suited for the purpose of

housing and displaying a monument of that size, weight, and significance. It was unreasonable of the College to seek a faculty from the diocese before it had made suitable alternative arrangements for the housing of the Rustat monument elsewhere.

(3) It was also unreasonable for the College to apply for a faculty before it had finished its research into the extent of Tobias Rustat's involvement with the Royal African Company and the slave trade in general. In the event, the objectors have discovered that his financial dealings and gains from these investments were much smaller than first thought.

(4) It was unreasonable of the College, acting in its pastoral role, to have fed its students a 'false narrative' about Rustat's life and engagement with slave-trading. Before disturbing and inciting the students, as an academic institution it should have made sure it was in full command of the facts, and presented them accurately.

(5) Having done that, it was unreasonable of the College to come before the court without direct evidence of the pastoral harm it claimed was being caused by the retention of the Rustat memorial in the Chapel. This claim was central to its case, was asserted by college officers, but was unevidenced throughout the proceedings.

(6) The College also behaved unreasonably in failing to share the research of one of its fellows into Rustat's dealings until very late in the proceedings (in December 2021). The research had begun three years prior to this and should have been made known to the parties opponent, and been made available, much earlier. It necessitated the hurried search for another expert historian, Dr Graham, over Christmas and New Year 2021-2022, in which Professor Goldman was centrally involved.

On these grounds, Professor Goldman considers that the College has behaved unreasonably.

The College's response

11. For the College, Mr Hill QC does not resist an order that the College be responsible for the court fees incurred in this matter, to be assessed. As to the incidence of the legal costs, the College does not pursue an order that the parties opponent should pay its costs of the recusal hearing on 6 August 2021, or of the application to vacate the hearing date on 8 January 2022 (notwithstanding that the parties opponent's arguments were rejected at both). However, Mr Hill submits that the two applications for costs should both be dismissed.

12. Mr Hill points out the inter-partes costs jurisdiction is sparingly exercised, and the current EJA Guidance envisages an order being made in relation to a specific element of a party's costs where another party's unreasonable behaviour has led to unnecessary costs being incurred. Mr Hill characterises the current application as novel, and probably unprecedented, because it seeks payment of the entirety of the costs of the parties opponent. There is no alternative claim for a proportion of the costs to be paid, or for the costs of a specific element of the proceedings. The parties opponent contend that the College's *"behaviour from start to finish has been wholly unreasonable"*. Mr Gau's application is expressly pursued on an *'all or nothing'* basis. Mr Hill strenuously resists it for each and all of the following reasons:

(1) The petition was properly brought

There is nothing in the lengthy and careful judgment to suggest that there was anything unreasonable in lodging and pursuing the petition. It was dismissed on the basis that, upon a detailed analysis, the evidential threshold had not been discharged. It was not dismissed summarily, but after a thorough consideration of the evidence and careful oral and written submissions. The petition failed on the merits, notwithstanding that it had the support, amongst others, of the Church Buildings Council. The Diocesan Advisory Committee did not object to the temporary removal of the monument from the Chapel.

(2) The College consistently complied with the overriding objective

Mr Hill finds it surprising that the application for costs raises alleged non-compliance with the overriding objective. Mr Hill asserts that Mr Gau took the unusual step of interrupting his (Mr Hill's) closing submissions when he came to paragraph 22 of his speaking note, stating that he (Mr Gau) no longer pursued his assertion that the College had deliberately flouted the overriding objective (which had appeared at paragraph 3 of Mr Gau's opening note). (My own contemporaneous note records that Mr Gau intervened to point out that he had not raised that point.) Mr Hill submits that it is improper to seek to raise a matter which was expressly abandoned in order to bolster the current application for costs; and he also relies upon paragraphs 22 and following of his speaking note. In his reply submissions, Mr Gau describes Mr Hill's account of his (Mr Gau's) intervention as *"a deliberate misrepresentation of the facts"*, asserting that he had only been correcting Mr Hill's submission that this claim had been made in paragraph 3 of Mr Gau's closing written submissions when in fact it had been made in his historical written submissions. I am prepared to accept that, in the heat of oral submissions, and towards the close of the hearing, there was a genuine misunderstanding between counsel about what each of them was saying.

(3) Unreasonable behaviour in the conduct of the litigation as a whole

The College solicitor's passing remark about an *'uphill struggle'* was no more than a recognition that there is a heavy presumption against change where listed buildings are concerned, particularly those with a grade 1 listing. The College collated and filed its evidence which was properly directed to the *Duffield* framework. Any implied professional criticism of Mr Jones is without foundation. It is said to be unfortunate, and regrettable, that the objectors filed reams of paperwork, including a highly emotive and combative written submission, settled by counsel, at a time when the proposal was still at the consultation stage. This was some six months before the objectors elected to become parties opponent. It resulted in the proceedings being out of kilter from the start, something from which they never recovered. This premature intervention was not the fault of the College, which consistently attempted to deal with matters in a proper, and orderly, manner. At the consultation stage, the College was yet to engage legal representation. The opening salvo of those who later became parties opponent was a full frontal attack on the College, questioning its integrity, rather than addressing the substantive issues to be determined. It is now suggested that *'advice was offered'* by the parties opponent on drafting a petition, but only a cursory reading of the written objections is necessary to see that they were not couched in advisory terms; and the attempt to recast those objections for the purposes of this costs application is said to be inappropriate. The consultative documentation that was made

available in December 2020 was intended to elicit comment upon which the College would reflect. The petition itself was lodged in May 2021. Chancellor Leonard QC differentiated between the two (in his recusal judgment) by referring to the December document as an application and the May 2021 document as the petition. The *'Application for Directions'* settled by Mr Gau in February 2021 explicitly accepted and averred that the no petition had then been lodged. The unusually combative tone of the written objections to the petition, settled by Mr Gau, was replicated in the application that the Chancellor should recuse himself (which was rejected in terms highly critical of the parties opponent: see paragraph 31 of his judgment) and in the application to vacate the February 2022 hearing (which was also rejected with similar criticisms: see paragraph 32 of my judgment of 18 January 2022). This is where the ad hominem attacks are said to be found. They are said to have been rejected in unambiguous language by Chancellor Leonard QC. Whilst this tone significantly improved for the substantive hearing, Mr Gau's costs application has reverted to the combative rhetoric exhibited during the interlocutory stages. The general tone taken by the parties opponent in their submissions to the court has made it very difficult for the College to engage in any meaningful way. This was not assisted by the fact that communications between the College and the parties opponent have frequently found their way into the media. This is said to have hampered building up trust with the parties opponent. As a result, having undertaken significant engagement during the period of the initial consultation, the College became increasingly reluctant to be drawn into further correspondence. Attempts to settle the case were not rebuffed. The College was justifiably concerned that anything further that it wrote would also be leaked to the press. There was no guarantee that the confidentiality of 'without prejudice' discussions could be maintained with in excess of 60 litigants in person, even if represented by a core group. It was becoming increasingly clear to the College that some at least of the parties opponent were litigating this case through an orchestrated media campaign, and it was better to let the Court simply come to its decision. As events transpired, it is highly unlikely that any accommodation could ever have been reached: the difference of opinion on the removal of the memorial was unbridgeable. Mr Jones's open offer to Mr Perrott (by email dated 8 November 2021) to discuss alternative locations for the memorial (other than East House) did not lead to any engagement from the parties opponent. The allegation that the College failed to trace Rustat's heirs at law is simply wrong: The College engaged a professional genealogist (Ms Sam Kimber), whom they first contacted in May 2021. Ms Kimber responded on 3 June 2021, explaining the process that she would follow and her estimated costs. The College responded on 21 June saying that the costs were high and it would need to take advice as to whether to proceed. The College subsequently wrote on 25 August requesting a report, setting out the work required and the costs involved, in a form that would be acceptable to the court. The final version of the report was completed in November 2021.

(4) <u>The first petition</u>

Mr Hill submits that it is difficult to reconcile Mr Gau's submissions with those contained in paragraph 2 of his Objection to the Petition that: *"... no petition has been submitted to the Registry. The Objectors are in the impossible position of objecting to a petition that does not yet exist."* This is reiterated later in the document: *"... there is, indeed, no petition at all at the time these objections are drafted"*. Whatever the parties opponent say now, their counsel clearly did not treat the December document as a petition, and he said so expressly in the

Objection that he drafted at the time. Contrary to the submission to the contrary in paragraph 12 of the application, the document at page 119 of the hearing bundle is not a petition but a public notice (in Form 4B). Further, on or about 25 February 2021, the parties opponent invited the court to give directions with regard to the *"proposed petition"*, but the Registry declined to do so on the basis that there was no petition (and thus no faculty proceedings) at that time.

(5) Failure to disclose information

It is the practice of the consistory court to give directions for the filing and service of evidence. The College carefully followed those directions, in accordance with a timetable to which the parties opponent had given their consent. The issue of the expert evidence was dealt with at a preliminary hearing and should not be reopened. The parties opponent were granted the indulgence of the court notwithstanding their oversight in not instructing an expert historian earlier. The allegation in paragraph 13 of the costs application that the LSWP was *"wholly biased"* and *"had formed a fixed and immoveable view about the monument"* is false and unsupported by any findings of the Deputy Chancellor. All of the documents referred to in paragraph 13 of the costs application are correspondence written before any individuals became parties opponent. They identified themselves as alumni who were corresponding with the College about the proposals made in December 2020. The College received communications from 318 alumni in 2021 regarding its proposals, both positive and negative, and it responded to all of them. This can hardly be described as unreasonable conduct. The expert report of Dr Edwards had nothing to do with the LSWP. The parties opponent are said to have confused the work of the LSWP, which was undertaken to facilitate a discussion within the College about the legacy of slavery, with the research undertaken by Dr Edwards specifically for presentation to the court as expert evidence. The timing of Dr Edward's research was in response to matters raised by the parties opponent and could not be undertaken until the National Archives had reopened following the pandemic. This research was prepared for this litigation in accordance with the directions given by the Deputy Chancellor and the timetable, which had been set with the concurrence of the parties opponent. Mr Hill cannot understood how it can be argued that compliance with the court's directions is somehow unreasonable. There was no *'late disclosure'* as alleged by the parties opponent.

(6) Failure to carry out the most basic steps to obtain a faculty correctly

Mr Hill states that it is not unknown for petitioners to overlook certain requirements of the faculty jurisdiction. The College was not legally represented at the time of the December 2020 consultation. The guidance on contested heritage was not issued until May 2021, therefore postdating any alleged breach in December 2020 when the consultation documents were circulated. However, a statement of significance was served with the May petition (pages 20-22 of the hearing bundle) complying with both the Faculty Jurisdiction Rules and the Church Buildings Council's Guidance.

(7) The 'false narrative'

The parties opponent place much reliance upon a so-called false narrative. It should be remembered that:

(a) The petition was never pursued on the basis that such part of Rustat's wealth as was given to the College was derived from the profits of slave trading. To the contrary, it was Rustat's role as a slave trader, viewed at the end of his life, and as commemorated by his memorial, which formed the basis of the College's concerns.

(b) The suggestion that the proposal was animated by '*tainted money'* was never part of the petitioner's case. All the information which the College distributed to the student body was fair, accurate and balanced.

There is no direct evidence that information provided by the College, including from the LSWP, gave a *'wholly false impression that the College had benefitted from the proceeds of slave trading'*. The criticism made by Mr Gau (and recorded in paragraph 41 of the judgment) was based on a single email from a Jesus College Student Union representative dated 19 December 2021, who did not identity as a member of, or claim to represent, the LSWP. This was not sent by the College, nor seen by the College, and was certainly not approved by the College. Mr Gau is then said to quote selectively from emails sent by other students, which are said to support his contention. If one reads all of the emails (at pp 785-847 of the hearing bundle) one is said to find that they express and make a variety of views and statements. Mr Hill disputes that the LSWP presented incorrect facts about Rustat. To the contrary, its November 2019 interim report clearly stated that Rustat had obtained much of his wealth from sources other than the slave trade; and then goes on to state, as its key conclusion (at p.10):

> *The facts of Rustat's involvement both with the College and in the slave trade are not in doubt; they have been widely known for years, and are discussed both in scholarly studies of the Royal African Company and the University Library, and in his entry in the Oxford Dictionary of National Biography. Further archival research might supply more detail about his finances and the precise degree of his involvement in the management of the Royal African Company; but we can be clear that Rustat had financial and other involvement in a slave trading company over a substantial period of time, including at the time when he donated to the College. This involvement has never been fully acknowledged by the College, and current accounts of Rustat's life on the website and in the College history do not mention it.*

This assessment was subsequently supported by the expert report produced by Dr Edwards, and was substantially affirmed by Dr Graham (the expert historian appointed by the parties opponent). The parties opponent produce no evidence that the College stated that Rustat made most of his wealth from the slave trade or that his donations to the College were sourced from profits from the slave trade. The Deputy Chancellor commented (in paragraph 130 of his judgment) that if the College did not know that a false narrative was spreading unchecked, then it cannot have been as much in touch with the views of its students as it claims. Mr Hill submits that it must be remembered that the emails which contributed to this finding were sent to the Registry, and not to the College; and that they were not seen by the College itself until the bundle was circulated shortly before the hearing. The College did not actively create a *'false view'* or give a *'false picture'*. At worst what the College is accused of is not being aware of the misreading of the evidence and reports which it had circulated and then failing to correct this misreading. Unreasonable conduct justifying a costs order would

require substantially more than this, such as a deliberate intent to mislead. No such intention existed here; and none was found by the Deputy Chancellor.

(8) The witnesses

Mr Hill submits that there is nothing in the criticisms of the various witnesses to suggest that the College itself acted unreasonably in relation the proceedings. The fact that Dr Mottier was found to have been underwhelming is not proof of unreasonable behaviour by the College. The fact that the Dean changed his view as to the re-siting of the memorial is indicative of open-mindedness and a willingness to consider fresh evidence and changes of circumstance. The criticism of Mr Vonberg seeks to look behind the Deputy Chancellor's finding (at paragraph 58 of the substantive judgment) that *"I am satisfied that Mr Vonberg is appropriately qualified, as an architect accredited in building conservation, to express an opinion on such matters. I reject Mr Gau's submission to the contrary".* Architects regularly give evidence in support of parochial petitions based on their professional expertise. The Bishop of Ely shares a cure of souls with the Dean and he is the Visitor to the College. Where a principal issue for the court was the extent to which the mission and witness of the Church of England are compromised by the presence of the memorial, it would have been surprising if he were not to give evidence.

(9) Expert evidence

Mr Hill makes the following points with regard to the expert evidence:

(a) The College took the reasonable view that the matters concerning Rustat that were agreed in the Joint Report were sufficient to satisfy the evidential threshold in consequence of his roles with, and investment in, companies that traded in enslaved people. That was all the petitioner needed to prove. The Deputy Chancellor took a different view and one more narrowly focused on following the money. The petitioner's conduct in this regard cannot be categorised as unreasonable.

(b) Dr Bowdler's evidence was not in the proper form for an expert's report, and the party opponent's list of witnesses did not differentiate between witnesses of fact and experts. Each party had permission to rely on two experts. The parties opponent relied on Professor Biggar as an expert, and they later added Dr Graham (an historian), so Mr Hill says that it looked as if Dr Bowdler was being presented as a witness of fact. Hence clarity was sought as to which section of the bundle was the most appropriate. As it happens, Professor Biggar's report was withdrawn on the afternoon before the hearing and was not relied upon by the parties opponent. Dr Bowdler was treated with respect and courtesy. The allegation that he was *"humiliated"* is strenuously resisted. Mr Hill explains that it became necessary to cross-examine Dr Bowdler in order to rebut the novel, and unexpected, contention, advanced by Mr Gau and put in clear terms to each of the College's principal witnesses, that there was a category of *"Duffield experts"* who give evidence on the application of the *Duffield* questions, performing an exercise which rightly vests in the Chancellor. Dr Bowdler roundly rejected this contention, and he confirmed that there was no such field of expertise; and this was accepted by the Deputy Chancellor. All Dr Bowdler could testify to were heritage issues within his expertise. He accepted he was not familiar with the *Duffield* framework and had simply answered a series of questions given to him to answer. He accepted that these questions were shortened, or attenuated, versions of the actual *Duffield* questions.

Significantly, he accepted that he could not comment on the issue of justification, namely the pastoral and missional context. These responses were helpful to the College's case and took away a plank of the argument advanced by the parties opponent.

(10) Change of stance

It was perfectly tenable for the College to contend, in the alternative, that there would be no harm to the significance of the Chapel as a building of special architectural or historic interest; but that if there were, it would be significantly less than that claimed by the parties opponent who, for the most part, had spoken of the harm to the memorial itself, rather than harm to the significance of the Chapel. The fact that counsel for the College made a concession in closing submissions to assist the court, after all the evidence had been heard, is a matter to be applauded, not criticised. There was nothing unreasonable in this.

(11) Behaviour afterwards

There is nothing improper in how the College has conducted itself since the hearing. But even if there were, it cannot be said that it has added to the costs incurred by the parties opponent.

13. Mr Hill concludes his principal submissions in response to those of Mr Gau by emphasising that the Deputy Chancellor rejected the petition on its merits after a full hearing, during which no time was wasted. None of the Deputy Chancellor's findings constitute evidence of unreasonable conduct which has led to the incurring of unnecessary costs. The application for costs is made on an '*all or nothing'* basis. It therefore fails.

14. In the event that the parties opponent seek to amend their application and pursue, in the alternative, a claim for a partial contribution towards their costs, the College would expect to be afforded the opportunity of responding in writing. The parties opponent have demonstrated no causal nexus between the particular elements of costs claimed and any provable instance of unreasonable conduct. Without prejudice to the specificity of any future representations, the College will contend that:

(1) The parties opponent cannot claim any costs incurred prior to the issue of the petition (May 2021).

(2) The parties opponent cannot claim any costs incurred prior to their becoming parties opponent (July 2021).

(3) The parties opponent cannot claim any costs in respect of the recusal application, or of the application to adjourn the hearing, as neither succeeded.

(4) The parties opponent cannot claim the costs of Professor Nigel Biggar as they elected not to rely on his evidence.

(5) The secretarial support is unparticularised.

(6) The pupil travel and accommodation are irrecoverable. The College was not notified that she had been retained, nor of the basis of her retainer.

(7) Mr Emmison withdrew as a witness and the College generously agreed that Mr Farley could adopt his witness statement and give evidence in his place. They cannot both claim for attendance at the hearing.

(8) The College provided a room and meals for the parties opponents, including their experts. They did so without charge. These matters are irrecoverable.

(9) There is no breakdown of the hours claimed by the individual parties opponent, and there is an element of double recovery with regard to Mr Emmison and Mr Farley.

15. Without thereby intending him any disrespect, Mr Hill deals with Professor Goldman's separate application by way of postscript. In relation to the generality of the application, he repeats and adopts the foregoing submissions. As to the individual grounds enumerated by Professor Goldman, Mr Hill responds, in the order in which they appear in his email of 8 April 2022, as follows:

(1) It cannot be said that the petition was unreasonable because it was a *'vain request'*. It had the support of the Church Buildings Council and others. It was a proper petition to bring.

(2) It cannot be said that East House was *'singularly ill-suited'*. It had the support of the Church Buildings Council, the Society for Protection of Ancient Buildings, and Historic England, which are generally regarded as conservative organisations. None of the parties opponent came up with an alternative location within the College which might be more suitable than East House.

(3) This case was never about financial profits derived from slave trading, but the commodification of human beings through the slave trade in which Rustat was unquestionably involved, as conceded in the Joint Expert Report. It was not unreasonable to petition on this basis.

(4) The College did not set out consciously to pursue a false narrative. It was very careful in putting out complete and neutral statements. It is regrettable that an individual student, over whom the College had no control, misstated one matter; and this only became known to the College when the bundles were prepared shortly before the hearing.

(5) The College took the view that it did not wish to subject its students to the intense media pressure of giving evidence in these proceedings or to expose them to any risk of harm. It elected instead for the Dean to speak to these issues, drawing on his direct conversations with a range of students in his pastoral care. This may have been a misjudgment, but it was certainly not unreasonable, as events on the eve of the hearing, and subsequently, have borne out.

(6) Dr Edwards was commissioned to provide an expert report in accordance with the timetable set by the court with the concurrence of the parties opponent (including Professor Goldman). He produced his report within the agreed time frame. There is nothing unreasonable in this.

Finally, Mr Hill asserts that the daily rate of £300 claimed by Professor Goldman is excessive because he has been retired from university teaching for two years and has therefore sustained no loss of earnings.

The parties opponent's reply

16. Mr Gau begins his written reply to Mr Hill's submissions by citing the whole of paragraph 129 of my substantive judgment. Mr Gau states that it was to be hoped that the College *"would chose to reflect on such an excoriating assessment of its behaviour"*. To the contrary, it chose not to inform either the parties opponent or the Registry that it was not going to appeal the decision of the Deputy Chancellor. Instead it chose to use a public relations company to issue a press release; and it subsequently decided to submit numerous articles to the press, authored by the Master and the Dean, criticising the court's decision. They did so by creating a *'fresh false narrative'*, namely that the **Church** had failed in its decision-making with regard to the Rustat memorial. In the course of this *'fresh false narrative'*, the College has deliberately attempted to misrepresent the behaviour of the Deputy Chancellor and the parties opponent, and choosing to defame either the parties opponent or their counsel. Contrary to the College's submissions, its behaviour subsequent to the judgment is demonstrative both of its contempt for the process of this court and of its wholly unreasonable behaviour to the parties opponent throughout the course of its attempt to remove the memorial. The represented parties opponent believe it is important that examples of this are brought before the court to show clearly that what has happened since the judgment is a continuing course of behaviour that has applied throughout. Mr Gau cites statements attributed to the Master and the Dean in editions of the Guardian published on 26 March, 12 and 14 April 2022, the Times on 12 April 2022 and the Church Times on 5 May 2022.

17. Mr Gau makes the following points by way of reply to Mr Hill's submissions:

(1) It will *"intrigue"* both the Chancellor and the Deputy Chancellor that the parties opponent's application that the former should recuse himself *"failed"*. However, this is said to be further evidence of the College's *"persistent and baffling ability to propagate false narratives"*.

(2) The College has misread, or deliberately failed to understand, paragraph 5.7 of the EJA's Guidance on Costs. Nowhere does it state: *"The inter-partes costs jurisdiction is sparingly exercised and the Guidance envisages an order being made in relation to a specific element of a party's costs where another party's unreasonable behaviour has led to unnecessary costs being incurred."* The College goes on to claim: *"This application is expressly pursued on an 'all or nothing' basis. It is strenuously resisted…"* Costs are at the discretion of the Deputy Chancellor; and it is for him to decide how much of the parties opponent's costs should be repaid due to the College's unreasonable behaviour. The College's persistent and deliberate misinterpretation of applications is said to have bedevilled this process. The parties opponent again commend the *"thoughtful"* new draft Guidance on costs to the Deputy Chancellor.

(3) Claiming that *"the petition was properly brought"*, the College now attempts to relitigate the claim it so comprehensively lost without lodging an appeal by praying in aid the support of the Church Buildings Council and the Diocesan Advisory Committee. It neglects to reflect that their support was obtained by the generation of a 'false narrative' to the College's students.

(4) In response to the claim by the College that it was unaware of the material that had been sent to the Registry in support of its claim until the bundles were prepared shortly before the February hearing, Mr Gau submits that this shows a surprising lack of interest in the material on which the College was relying on and this is rather hard to reconcile with the fact that the parties opponent were very much aware of it. In fact, the materials relating to supporters were circulated by the Registry to all the parties on 24 November 2021, some two months before the bundle was circulated. To enter litigation without having read the papers is demonstrably unreasonable behaviour. To continue with such litigation once the true position has been discovered is also unreasonable behaviour.

(5) The College maintains its criticism of the parties opponent's research but this is said to have been wholly vindicated by the experts. Dr Mottier's evidence was robustly criticised by the Deputy Chancellor, whose conclusions the Master has attempted to brush away in her media campaign.

(6) Mr Gau describes Mr Hill's response to the parties opponent's submissions accusing the College of unreasonable behaviour as an attempt to *"smear"* the behaviour of the parties opponent. The College's solicitors are said to have repeatedly refused to disclose when they were first instructed by the College. Mr Gau submits that Mr Hill's response amounts to a belated admission that the College has failed to comply with the overriding objective. This is said to provide the third explanation for this. Dr Mottier first claimed that this was due to fear of plagiarism, then that it was because the College was advised not to engage with the parties opponent on legal advice. This final excuse - the general tone taken by the parties opponent in their submissions to the court, and the fear that they would leak any discussions to the press - should also be rejected. Mr Gau disputes that the submissions drafted on behalf of the parties opponent contained any ad hominem attacks or that they were of a hectoring or combative tone. No specific examples of this have been given; and even if there were some suggestion that this was the case that should not have presented any obstacle to the College engaging with the parties opponent. Mr Gau characterises Mr Hill's assertion that this was *"not assisted by the fact that communications between the petitioner and the parties opponent frequently found their way into the media"* as *"fanciful"*; first, there is no evidence produced to support this and secondly this point was not made in any of the College's witness statements or oral evidence. The only time this was raised in correspondence with the College's solicitors was shortly before the February hearing when the subject of disclosure of information (not correspondence) to the press was raised and this was firmly rebutted by Mr Farley on behalf of the parties opponent. There is no evidence of the parties opponent "*leaking"* information to the press or that *"some at least of the parties opponent were litigating this case through an orchestrated media campaign"*. This again was not the case and it is another fanciful suggestion. Mr Gau suggests that perhaps the key point is the view of the College that *"the difference of opinion on removal was unbridgeable"*, a view which sustained the College's unreasonable refusal (for over a year before the February hearing) to

enter into any meaningful discussions. Without a dialogue it makes compromise impossible. The parties opponent also bring to the court's attention the College's press release of 12 April 2022 (which, it is said, remains on the College website) as showing the true attitude of the College to the hearing and the judgment and its continuing unreasonable behaviour towards both the court and the parties opponent. This asserts that the LSWP'S *"findings, as well as the position taken by the College, were misrepresented by others in court"* and that *"we believe this judgment is fundamentally wrong"*. The published allegation of misrepresentation of the LSWP findings and the position of the College *"by others in court"* is said to be a deeply serious one, which the Master has declined to clarify, appearing *"to take the view that it is in order for her to make an allegation, refuse to substantiate it and leave it openly on the record (which it still is)"*. Leaving aside the other issues to which this may give rise, the view of the parties opponent is that it is evidence of the continuing unreasonable (and some might say unacceptable) behaviour of the College, which has been endemic to its handling of the issues. Finally, on this aspect of the case, Mr Gau says that no evidence was provided at any stage of the hearing about the College's engagement with the professional genealogist.

(7) Mr Gau characterises Mr Hill's submissions about the 'false narrative' as an attempt to undermine the Deputy Chancellor's judgment (much as the College and its public relations company have attempted in their media campaign). If the College believes that the judgment is flawed, the place to argue that is in the Court of Arches, not in a costs application, let alone in the media.

(8) In relation to expert evidence, Mr Gau submits that the College now accepts that it quite deliberately moved Dr Bowdler's statement from the expert section to the lay witness section of the hearing bundle. No explanation was ever given for this at the time, despite repeated requests. That is plainly unreasonable behaviour.

(9) The College attempts to justify its last-minute change of stance, which should have been conceded before the hearing. Much time is said to have been wasted in pointless cross examination, an exercise criticised by the Deputy Chancellor.

(10) Although the College claims not to have behaved improperly, what it has done, in its media campaign, is to demonstrate the wholly unreasonable way that it has always approached this petition. To criticise the proceedings with unsubstantiated ad hominem attacks is to assume *"power without responsibility"*.

In conclusion, Mr Gau submits that there should be no further time and energy wasted on more written or oral submissions in this case, and that the Deputy Chancellor should decide this costs application on the written submissions.

18. In an email, dated 27 April 2022, Professor Goldman contests the claim, which he says should not stand, that he was a party to any concerted press campaign regarding the Rustat memorial in the College Chapel. He explains that he had come late to this case, blissfully unaware that a faculty could be contested in the consistory court. As a concerned alumnus, and an opponent of the proposed actions over Rustat of both the University and Jesus College, he had been in contact with friends and other concerned individuals at various times in regard to the College's proposed actions, and he was certainly glad to see, and to

assist, media focus on the College's proposed course of action. But he was not a party to any *'orchestration'*, and he does not believe that there ever was any *'orchestrated media campaign'*. It was simply a matter of concerned individuals coming together haphazardly, over a period of time, to contest the petition in the best way they could. It was only much later, towards the end of 2021, that it was suggested by the Registry that, if he so wished, Professor Goldman could indeed become a formal party opponent in law.

19. In an email, dated 3 May, Professor Goldman responds to Mr Hill's submission that he has sustained no loss of earnings. He explains how he is still very actively involved in university work and as an author, having 'retired' only in the sense that he has ceased formal university teaching in Britain. Time spent on the Rustat case has been time spent away from his other work. He also substantiates his claim to only five days of his time at a rate of £300 per day, which he rightly describes as *"modest in comparison with the rates for leading London solicitors, who charge nearly twice that per hour"*. In a further email, dated 8 May 2022, Professor Goldman adopts the response to the court of the other parties opponent, represented by Mr Gau, for the purposes of his own application for costs. He adds: *"If the test to be applied is 'unreasonableness', then I take the very strong view that it is unreasonable of Jesus College and its Master to contest both the judgment itself and the validity of the hearing and the whole legal process to which we all voluntarily submitted. This is a further and flagrant example of the unreasonable conduct of the petitioners."*

Analysis and conclusions

20. I should begin by acknowledging and recording that the court, and the general public, owe a great debt of thanks to all of the parties opponent and to their counsel. Without their interest in this case, the College's proposals might not have received the level of attention and scrutiny which the court has given to this case. If the touchstone for the award of costs were the extent, and the significance, of the disinterested contribution that a party has made to the outcome of a case, then I would have had no hesitation in making an award of costs in favour of the parties opponent. However, that is not the criterion: Because it is important that all the issues for, and against, the grant of a faculty are fully examined, it is right, and in the public interest, that parties should not, as a general rule, be penalised simply because they are unsuccessful. Thus, a party to faculty proceedings, whether a petitioner or a party opponent, will only be ordered to pay, or to contribute towards, another party's legal costs if they have behaved unreasonably in the conduct of the proceedings, and such unreasonable behaviour has unnecessarily resulted in additional costs being incurred by that party.

21. I begin with the following general observations which have informed my response to these costs applications:

(1) This faculty application was the first case of its kind to seek the removal of a significant item of contested heritage associated with the trade in enslaved people. There was therefore no precedent to assist the parties in their approach to the conduct, or the likely outcome, of this faculty application.

(2) This application concerned a college chapel rather than a parish church, with the special features I identified at paragraph 121 of my judgment.

(3) Contested heritage is a complex area which may arouse strongly held feelings and divergent views and attitudes.

(4) The College's initial decision-making processes and consultation pre-dated, and so were not informed by, the publication, in May 2021, of the CBC Guidance on Contested Heritage.

(5) In one sense, it might be said that the College brought this whole affair upon itself by embarking, through the LSWP, upon an investigation into Rustat's involvement in the trade in enslaved people and then publicising the College's interim findings about this. The argument might be advanced that the College should have left well alone. In answer to a question from the court at the end of his evidence about his experience of the Rustat memorial when he was attending the College, Mr Amatey Doku said that he could not *"... remember looking at it or reading the inscription. I may have done when I first arrived or when I was here; but, in a sense, I wouldn't have had any understanding of the broader issue relating to Rustat even if I had glanced at it."* Mr Gau advanced no argument along these lines; and he was right not to do so. The fourth Mark of Mission enjoins everyone in the Anglican Communion: *"To transform unjust structures of society, to challenge violence of every kind and pursue peace and reconciliation."* Paragraph 2 b of the CBC's Guidance on Contested Heritage reads: *"Those in positions of responsibility in churches and cathedrals should not assume that because reports of people feeling unwelcome have not reached them, this means that no such problem exists: pro-active effort is required to engage people. The onus is on all members of the Church to be truly welcoming in how we seek to share our beliefs with all people, of whatever background."* The church (and the College) are right to be pro-active in identifying, and addressing, potential sources of injustice in our society.

(6) The court's decision not to permit the removal of the memorial has proved to be controversial. The College firmly disagrees with it, and it considers the court's decision to be wrong; and it has vociferously expressed that view in the media. But the College is not alone in that view: some 160 individuals (led by a former Archbishop of Canterbury, and including the Dean of Manchester, who is a fellow member of the Legal Advisory Commission of the General Synod of the Church of England, and my own former deputy chancellor in the Diocese of Oxford) were signatories to a letter to the Church Times expressing their disappointment at the decision to retain the Rustat memorial in the College Chapel and their grave concern for what this will mean for the Church of England. In an email to diocesan chancellors and their deputies, Mr Gau has reported that one of the signatories to that letter had written to him to say that they did *"not need to read a 108 page judgment to know that it was wrong"*; but I am confident that others will have carefully considered the full judgment before putting their signatures to this letter. On the other hand, the writer of a letter published in The Times recorded that at the start of this case she had very much been minded to agree with the College's petition to remove the Rustat memorial from the wall of the College Chapel; but that having followed the proceedings *"avidly"* and, *"most importantly"*, having read the ruling in full, she had *"absolutely no doubt that the judgment was entirely correct"*. This was never a case where the outcome of the faculty application was clearly, or easily, ascertainable, one way or the other. The case required the evidence to be tested in court, and

for the court then to reach an evaluative decision in the light of its assessment of the totality of that evidence.

(7) In one sense, Mr Gau is correct to say that if the College believes that the judgment is flawed, the place to argue that was on appeal to the Court of Arches, and not on this costs application, let alone in the media. But the Master, the Dean, and others at the College, and elsewhere, are entitled to exercise their right to freedom of expression under article 10 of the Human Rights Convention to disagree with, and to criticise, the court's judgment. Even robust criticism cannot possibly be viewed as an impermissible challenge to the authority, or the impartiality, of the ecclesiastical judiciary. As with any judge, it comes with the territory.

(8) Such post-hearing behaviour cannot properly be regarded as unreasonable conduct so as to attract an adverse costs order in consistory court proceedings. Were it capable of doing so, it would mean that a party who had acted reasonably up to the point of judgment would be at risk of a finding of unreasonableness on the basis of their conduct thereafter. In any event, such post-judgment behaviour cannot have resulted in additional costs being incurred by another party. Although the court cannot anticipate all possible future eventualities, as at present advised, I consider that post-judgment behaviour could only be of possible relevance to an application for costs against an unsuccessful party to faculty proceedings where it tends to show that that party's conduct of the actual faculty proceedings has been motivated by some improper, or collateral, purpose or motive.

(9) It is important to appreciate the context in which the 'false narrative' about the source of Rustat's wealth arose. It did so in the context of the pastoral and missional benefits that the College asserted would result from the removal of the memorial, and in the context of the inscription that Rustat had drafted, which refers to his *'industry'*. It therefore became relevant for the court to consider wherein Rustat's *'industry'* lay, and whether it extended to his investment in companies that had been engaged in the trade in enslaved people, in order to determine whether it could properly be viewed as objectively offensive to people who might read the inscription: compare paragraphs 56, 104, 129 and 132 of the judgment.

(10) Whilst in one sense the consistory court's power to award costs against a party to faculty proceedings can be characterised as *"punitive"*, in the sense that it is triggered by, and is a response to, a finding of unreasonable behaviour on the part of the paying party, it nevertheless remains compensatory in character since a causal connection must still be demonstrated between the unreasonable behaviour in question and any additional costs thereby unnecessarily incurred by the receiving party.

22. With those general observations in mind, I turn, finally, to the parties opponent's applications for their costs. Having carefully considered, and weighed, all the competing submissions and arguments, I am in general agreement with the submissions advanced by Mr Hill. I reject the criticisms of the College's behaviour advanced by Mr Gau and Professor Goldman. I find that: (1) there has been no unreasonable conduct on the part of the College; and (2) the unreasonable behaviour asserted on its part has resulted in no material increase in the costs incurred by the parties opponent. I therefore refuse the applications for costs. I do so with some measure of regret because of the invaluable assistance that the represented parties opponent, their counsel, and Professor Goldman have all provided to the court; but this is

tempered by the fact that they must have appreciated that they would not be able to recover their costs from the College, even if successful in their opposition to the faculty petition, unless they could succeed in demonstrating that some unreasonable conduct on the part of the College had resulted in them incurring additional costs unnecessarily. Since I am in general agreement with the counter-submissions of Mr Hill, in response to the submissions of both Mr Gau and Professor Goldman, I shall state my reasons briefly, and without addressing individually all of the many points that they have raised (although none of these have been ignored).

23. First, I am satisfied that the College acted entirely properly in bringing this matter before the court in the first place. This was a paradigm example of a significant item of contested heritage, associated with the trade in enslaved people, which, in the absence of any precedent to assist the College in its approach, inevitably, and properly, became the subject of consistory court proceedings. Secondly, I am satisfied that the College did not act at all unreasonably in the way in which it approached, and conducted, this inevitable litigation. I acquit the College of any breach of its duty to help the court to further the overriding objective of enabling it to deal with this case justly, whether by ignoring its duties to save expense, or to ensure that the case was dealt with expeditiously and fairly, or otherwise. Thirdly, whilst I am prepared to accept that some mistakes may have been made in the way in which the College approached this litigation, this is not infrequently the case when one applies the wisdom of hindsight to high profile, and highly sensitive, cases such as the present; and, if anything, any mistakes have tended to work to the benefit of the case advanced by the parties opponent rather than causing them to incur costs unnecessarily. Fourthly, whether or not there was any justification for that perception – as to which I expressly make no findings - I am satisfied that the College came to entertain the belief that some, at least, of the parties opponent were litigating this case through an orchestrated media campaign, and that it would be better to let the proceedings take their course and for the court simply come to its decision. I reject the submission that it was unreasonable for the College to refuse to enter into any meaningful dialogue with the parties opponent. As events have transpired, I find that it is highly unlikely that the parties to these faculty proceedings could ever have reached any accommodation that would have been acceptable to them all because the difference of opinion on the removal of the Rustat memorial was totally unbridgeable, and there was no realistic prospect of ever achieving any satisfactory compromise. In large part, that is the product of the memorial's monumentality and its significance, both in itself and to the parties. In response to an invitation from Mr Gau, I should at this point also record that the College have not satisfied me that anyone in court deliberately misrepresented the findings of the LSWP, or the position taken by the College, during the course of the court hearing. Fifthly, this was not a case where the College was pursuing arguments against the weight of unchallenged expert evidence. At paragraph 58 of my judgment I expressly accepted that Mr Vonberg was appropriately qualified, as an architect accredited in building conservation, to express an opinion on such matters as the significance of the Rustat memorial to the Chapel, the process of removing it, and the suitability of the proposed new location, even though I went on to acknowledge that he was nowhere near as well qualified as Dr Bowdler to speak to heritage and listing matters in general, and funerary monuments in particular. Whilst, at paragraph 73, I acknowledged that there was some justification for Mr

Gau's description of the manner of Mr Hill's cross-examination of Dr Bowdler as *"unhelpful hair-splitting"*, in my judgment it was neither unreasonable nor humiliating; and, in any event, it occupied less than half an hour of the three day hearing. I accept Mr Hill's explanation that he considered it to be necessary to cross-examine Dr Bowdler in order to rebut *"the novel and unexpected contention"*, advanced by Mr Gau, and put in clear terms to each of the College's principal witnesses, that there was a category of *"Duffield experts"* who give evidence on the application of the *Duffield* questions, performing an exercise which rightly vests in the court. Whilst some criticism can properly be directed at the College for its delay in making available the full extent of its evidence about Rustat's life, and for the slanted emphasis of Dr Edwards's report, I accept the College's belated explanation of the difficulties caused in accessing some original relevant source materials by the closure of the National Archives as a result of the pandemic. In any event, when, also belatedly, the represented parties opponent came to instruct their own independent expert historian, the two experts were quickly able to agree a joint statement which obviated the need for either of them to attend the hearing to give oral evidence (thereby vindicating the court's decision to reject the parties opponent's application to adjourn the February court hearing which, if successful, would have meant that the court's substantive judgment would still have been awaited). This was a good example of both parties fulfilling their duty to the court to further the overriding objective of enabling the court to deal with the case justly. Sixthly, apart from one very minor, and rapidly remedied, lapse at the very end, the court hearing was conducted with great courtesy, and co-operation between the parties, which ensured that it finished comfortably within the originally allotted three days, and did not extend into the fourth day which had been set aside should this have proved necessary. Seventhly, as Mr Hill observes, the petition was dismissed on the basis that, after a detailed analysis of the evidence, the court found that the College had failed to discharge the applicable evidential threshold. It was not dismissed summarily but on the merits, after an extremely thorough consideration of the evidence, and after careful written and oral submissions. Eighthly, I am satisfied that the parties opponent have demonstrated no causal connection between any particular element of the costs they have incurred and any particular instance of alleged unreasonable conduct.

24. Had I acceded to the parties opponent's application for costs, I would have held that any order could, in principle, extend to costs incurred prior to the formal issue of the petition, and in response to the public notice in Form 4B dated 10 December 2020, which invited objections to the College's then proposals by no later than 9 January 2021. I recognise that the Faculty Jurisdiction Rules contain no provision corresponding to rule 44.2(6)(d) of the Civil Procedure Rules, which expressly recognises that the court's discretion as to costs extends to *"costs incurred before proceedings have begun"*. However, I consider that the consistory court's jurisdiction to order a party to pay some, or all, of the taxed costs of another party extends to costs incurred before faculty proceedings have commenced, so long as these are necessarily and properly incurred for the purposes of attaining justice in those proceedings. Costs incurred in responding to a Form 4B notice, even if displayed or circulated prior to the issue of faculty proceedings, are potentially capable of answering this description: compare, in the civil jurisdiction, *Re Gibson's Settlement Trusts* [1981] Ch 179. In principle, therefore, I would have rejected Mr Hill's submissions that the parties opponent cannot claim any costs incurred prior either to the issue of the effective petition (in May

2021) or to their becoming parties opponent (in July 2021). I also agree with Mr Gau that the court's discretion as to costs extends to awarding parties opponent only a specific part of their costs of faculty proceedings even though they have asked for all of them, provided the petitioner has been given a proper opportunity to address the basis of such an award. However, had this become necessary, I would have agreed with Mr Hill's submission that the parties opponent cannot claim any costs in respect of their recusal application, or of their application to adjourn the hearing, as neither application succeeded. Although Chancellor Leonard QC withdrew from the case, he did not do so on the basis advanced before him by the parties opponent; and I suspect that his withdrawal would have followed in any event once the College made it clear that it was proposing to call the Bishop of Ely as a witness (albeit in his capacity as the Visitor to the College). Although I allowed the parties opponent to rely on the evidence of an expert historian, they should have sought a direction permitting this at the original directions hearing. I would also have agreed with Mr Hill's submission that the parties opponent cannot claim the costs of Professor Biggar as they elected not to rely upon his evidence.

25. Whilst I have rejected the application for costs, I do not consider that it was unreasonable for Mr Gau and Professor Goldman to make their applications. I therefore consider that the costs of those applications should fall to be treated as part of the costs of the petition generally I agree with Mr Gau's concluding observation that there should be no further time and energy (or costs) wasted on any more written or oral submissions in this case.

26. For these reasons, I order that:

(1) the College, as petitioner, is to be responsible for all the court fees incurred in this petition, to be assessed by the Registrar, including all additional fees incurred in the interim and the final hearings as well as the judgment fees, as specified in the applicable Ecclesiastical Judges, Legal Officers and Others (Fees) Order; but that

(2) there is otherwise to be no order as to the costs of these faculty proceedings.

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David R. Hodge

Deputy Chancellor Hodge QC

Deputy Chancellor of the Diocese of Ely

Chancellor of the Dioceses of Blackburn and Oxford

The Feast of Pentecost or Whitsunday

5 June 2022