The Faculty Jurisdiction (Amendment) Rules 2019

Mark Hill QC

Chairman, Ecclesiastical Law Society

I was due to deliver one of this year's ELS London Lectures on Wednesday 8 April 2020 on the subject of Faculty Jurisdiction (Amendment) Rules 2019. With the cancellation of the lecture due to the Covid-19 public health emergency, I thought I would instead circulate a short note on some of the principal changes and innovations – my personal Top Ten.

1. The relevant text

Do NOT read the Faculty Jurisdiction (Amendment) Rules 2019. This way madness lies. They comprise the detailed text of changes to be made to the Faculty Jurisdiction Rules 2015, and require the mental gymnastics of constantly cross-referencing the original. The Legal Office of General Synod has helpfully prepared a composite document comprising the **Faculty Jurisdiction Rules 2015** in their form as amended by the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 and the Faculty Jurisdiction (Amendment) Rules 2019. This definitive text should be one's constant source of reference. Thus, where I refer hereafter to any rule, it is a reference to the Faculty Jurisdiction Rules 2015, as amended with effect from 1 April 2020.

2. Revisions to List A and List B

The one single change which is likely to have the most immediate and widely felt impact are the revisions to Lists A and B which contain specified categories of work that may be undertaken without the need for a faculty: see Part 3 and Schedule 1. Both lists have been expanded, and several categories have helpfully been transferred from List B to List A. The changes generally adopt the suggestions made to the CBC as part of a review, made by archdeacons, DAC officers, chancellors, registrars and others who had a wide experience of how the lists worked – or didn't – in practice. With the expansion of both lists, it is likely that the majority of Additional Matters Orders will now be

revoked as they will have become redundant. It remains open for further Additional Matters Orders to be made should there be particular categories of minor works which the revised lists do not cover.

It is impossible to summarise all of the changes – everyone will have their own favourites – but the following are perhaps worthy of mention.

- **Defibrillators** can now be introduced into non-listed buildings under List A: A1(21), or their churchyards: A7(10); and to listed buildings under List B: B1(12); or their churchyards: B6(5)
- **CCTV and security and fire alarms** may be introduced under List B: B1(10), B1(11)
- Church **noticeboards** can now be introduced under List B: B6(4), in addition to their replacement and alteration
- Like-for-like **repairs to pipe organs** now appear in List B: B4(3)
- The introduction of **hand rails** to steps and paths in the churchyard are also permitted under List B: B6(8)

3. Near misses?

One unintended consequence of the creation of Lists A and B was the curtailment of the court's inherent jurisdiction. Either a proposal fell within one or other of the lists, in which case no faculty was required, or it did not and in consequence a faculty was necessary. Formerly, when each diocese had its own list of minor works or *de minimis* provisions, there was scope for chancellors additionally to declare individual proposals to be so minor that no faculty was required. Local practices developed with varying degrees of formality to achieve this. This residual facility was lost when Lists A and B were introduced, leaving no wriggle room, although in some dioceses it was kept alive through the imaginative use of an Additional Matters Order. The *status quo ante* has now been restored by the introduction of the following text into the pre-amble to Lists A and B in Schedule 1 to the Rules.

> *Applications may be made to the chancellor for directions as to matters not included in List A and B that are of such a minor nature that they may be undertaken without a faculty.*

Notwithstanding the new Lists A and B being more expansive than their predecessors, this modest provision will prove invaluable in saving parishes the trouble and expense of obtaining a faculty for similar minor works which do not quite come within the wording of any of the individual categories.

Some dioceses have developed a Direction pro-forma which can be retained with the church log book and lodged with the DAC and archdeacon so there is a clear record of precisely what has been authorised.

4. Archdeacon's Licence for Temporary Minor Re-Ordering

It was widely felt that the previous maximum duration of 15 months for an archdeacon's licence was unduly short – barely allowing an experimental arrangement for a full liturgical year. That period has now been extended to twenty-four months (r 8.2). Parishes must continue to be wary of the trap whereby the previous position must be restored at the expiration of the licence (r 8.3) unless a petition for a faculty for its permanent retention was submitted to the court not less than two months before the licence expired (r 8(10)), in which case the temporary arrangement may remain until the petition is determined. Parishes often lose sight of this prior deadline, which requires action even earlier than two months before expiry because they cannot petition the court for a faculty without already having consulted the DAC and obtained a Notification of Advice. For an illustration of the practical difficulty see: **Re Christ Church, Armley [2017] ECC Lee 5.**

5. Consultation with Historic England, national amenity societies, CBC and LPA

A major feature of the revisions in the Rules is the 'front-loading' of consultation with the various statutory consultees, which should result in far fewer occasions where the chancellor has to order consultation at the very end of the process before determining the petition. Best practice, particularly with major projects, is still for parishes to consult as early as possible (and certainly before seeking formal advice from the DAC) so the consultee bodies can feed into decision-making in the parish while proposals remain embryonic.

Under the new system, when the DAC is consulted, it must advise intending applicants (generally parishes) as to which of the bodies must be consulted (r 4.3(4), (5)). The criteria for consultation have been revised slightly and helpfully moved from a Schedule into the rules themselves (r 4.5 and r 4.6 respectively). A minor flaw in the Online Faculty System is being corrected so that parishes can themselves initiate the consultation (as r 4.1 prescribes) rather than passing that responsibility to officers of the DAC.

Consultee bodies have 42 days within which to respond (r 4.7(1)) or 21 days in respect of subsequent material changes (r 4.8(2)). Responses received after that time need not (but may) be taken into account by the DAC when considering its advice (r 4.7(3), r 4.8(2)).

6. Content of Notification of Advice

The DAC is precluded from giving its final advice until the relevant provisions of the Rules have been complied with and it has all the information it needs, including responses from consultees received within the timescale outlined above (r 4.9(1)). Although there is still a prescribed form (Form 2) for the Notification of Advice (r 4.9(2)), there are additional requirements for its content which will require more focused decision making by DACs at their meetings and the formulation and recording of reasons in certain instances.

- The Notification of Advice must describe the works or proposals in the manner in which the DAC recommends that they should be described in (i) the petition and (ii) the public notice (r 4.9(3)).

- The Notification of Advice must state which bodies have been consulted.

- If the Notification of Advice recommends works or proposals for approval (or does not object to their approval) in circumstances where a consultee has raised objections (and not withdrawn them), it must include the DAC's principal reasons for doing so despite those objections (r 4.9(9).

This expanded duty to give reasons is innovative and will require additional work by DACs. Over time, a consensus will emerge as to the level of detail which will be required in the reasons and whether each and every point of detail needs to be addressed and rebutted *seriatim*. It is to be hoped that an overly formulaic approach will not be adopted. The extent and detail of the 'principal reasons' will need to be tailored to the facts of each particular case. The more ambitious and controversial the proposal, and the stronger and more widely held the objections, the greater the level of detail necessary.

7. Public inspection of petitions and supporting documentation

Where a petition and supporting documentation are submitted using the Online Faculty System, those documents and the public notice must be available for public inspection online until the petition is determined (r 5.7(2A)). This virtual display replicates the provisions for the *de facto* display of the actual paperwork within the church over the same period (r 5.7(1), (2)). It will be interesting to see the extent to which the public at large choose to pore over the documentation of pending petitions online. It may provide an alternative to Netflix during the Covid-19 lockdown.

8. Determination on written representations

Chancellors may order that proceedings be determined on written representations instead of at a hearing if they consider, having regard to the overriding objective, that it is expedient to do so (r14.1(1)). The requirement for the prior written consent of all the parties has been removed. The chancellor must invite the views of the parties on such a course and take those views into account in deciding whether to make the order (r 14.1(2)).

There is also a like provision for determination on written representations in respect of appeals to the Court of Arches or Chancery Court of York (r 24.6(2), (3)).

9. Additional parties

Express provision is now given in r 5.1(4) for adding a person as a party to proceedings in any circumstances 'where doing so would further the overriding objective'. Hitherto r 19.4 had made such provision only where the court was considering making an order for costs against that person. This puts on a formal footing the existing practice of the court in the exercise of its inherent jurisdiction. See for example, the joinder of the inspecting architect as an additional party in **Re All Saints Buncton [2018] ECC Chi 1.**

10. Waiver of court fees

This item is not to be found in the Faculty Jurisdiction Rules 2015 as amended. However, it is relevant to proceedings in the consistory court and provides a useful tenth and concluding point. The **Church of England (Miscellaneous Provisions) Measure 2020**, amends section 86 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, to enable the Fees Advisory Commission to include

in a Fees Order a power allowing a consistory court to order exemptions from (or reductions in) court fees, and to direct the remission of court fees in whole or in part. Any such order must also include incidental provision requiring the Diocesan Board of Finance to pay the amounts which would be payable were it not for the exemption, reduction or remission. It is anticipated that orders of this type will be sparingly made, in cases where there is evidence of genuine hardship.

Mark Hill QC

8 April 2020