

# MEDIATION IN FACULTY APPLICATIONS

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Mediation is becoming widely used as an alternative means of resolving disputes that have hitherto been decided in court or by arbitration. Mediation typically involves the appointment of a third party neutral who works with the parties to explore with them how they can consensually resolve their dispute. Hallmarks of the process are (i) confidentiality, both in relation to communications between the mediator and each party and in relation to the judge or arbitrator who will hear the case if mediation is unsuccessful, and (ii) the mediator's role as a facilitator of a negotiated agreement rather than an evaluator of the likely prospects of success of the parties.

Mediation is a process encouraged by the Civil Procedure Rules and parties are now expected to consider mediation as a means of resolving their differences before a case comes to trial. As Dyson LJ said in *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 at para 11; [2004] 1 WLR 3002 at 3008:

All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for [alternative dispute resolution].

It is therefore appropriate to consider whether mediation has any role to play where a faculty application is opposed and the petition is destined for a hearing in the consistory court.

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It might be thought that mediation cannot have a role because all faculty applications must come before the chancellor and be decided by him or her in accordance with the faculty jurisdiction. The parties do not have the autonomy of parties to litigation. The chancellor is the one who decides.

It might also be thought that mediation through a formal process is unnecessary because of the role of archdeacons in seeking informally to establish consensus where potentially controversial schemes are put forward. If there is still opposition after the good offices of the archdeacon, what hope is there for resolution through a formal mediation process?

I was recently invited by a chancellor to undertake mediation where objection had been received to a new external lighting scheme proposed for a rural church. The proposal was for the church to be lit from dusk until 10.30 pm and that this would be done with lighting on 2 circuits: one for the tower and south side of the church as far as the south transept and one for the east side and the rest of the south side. Except in relation to the tower, no light was proposed on the north side of the church.

The objector lived in the former vicarage, which was sited to the north east of the church and was accessed through the churchyard. The garden of the former vicarage was contiguous with the churchyard and the east end of the church (which within the village could generally only be seen from the property of the objector and a property of a southerly neighbour) dominated the view from the front of the vicarage. The objector was accustomed to walking in the churchyard at night and was probably the person most directly affected by the proposal. He opposed the petition on the grounds that (i) it would prevent people from experiencing at a reasonable hour of the night the glory of the church in its natural setting against the night sky and (ii) it would cause unnecessary light pollution. The principal focus of his objection was to the lighting of the east wall. He was content that the tower should be lit.

The suggestion for mediation came from the objector and was not opposed by the petitioners (although they did not consider mediation had a great likelihood of success). I

had mentioned mediation to the chancellor previously and he asked me if I was prepared to have a go in this case. As a proponent of the benefits of mediation, it didn't take me long to say yes. Consent to mediation was given by the parties on the basis that what was said during the mediation would not be communicated to the chancellor if no agreement was reached. In lawyers' terms the mediation was to be "without prejudice", that is to say confidential to the parties.

It was first necessary to establish how the process would work. Mediation is a flexible procedure and the process can be designed to suit the nature of the dispute and the wishes of the parties. Following informal telephone conversations with the objector and one of the petitioners it was agreed that the process would include the following: (i) there would be a demonstration of the lighting on the east wall at dusk on an evening in April at which the petitioners, the objector and his wife, the secretary of the DAC, the church architect and the lighting specialists would be present; (ii) the next morning there would be a meeting between the petitioners and the objector and his wife. I was to be present at both meetings. Earlier the same week, following a suggestion by the objector, (unknown to the parties) I also visited the church at night in order better to understand the objector's views.

The lighting demonstration enabled the objector and his wife to see the effect of the lighting. The meeting was conducted informally with all parties walking around the outside of the church together exchanging views and making their points. What came over to me from this was that the church was glorious both unlit and lit in the sensitive way proposed in the scheme – there were 2 equally valid points of view. What also became clear was the nature of the underlying relationships between the parties. This was not hostile, but it was strained and there were underlying misconceptions about attitudes and experiences. A further point that emerged was the drawbacks of the existing security lighting, which produced an extremely strong beam over each of a number of doors and could be set off by passing animals. This concerned both parties.

The next morning I met the vicar and churchwardens and the objector and his wife at the objector's house. The secretary of the DAC also attended for the first part of the meeting. This meeting was more formal than the previous evening. Each side made a statement of their views. Broader issues were discussed, which helped each side to understand the "relationship issues" that existed between them. We gradually edged towards agreement in principle that the objection could be withdrawn if agreement could be reached as to when the lights would be used, a key moment being when the vicar signalled that the petitioners were prepared to discuss this as a compromise. The petitioners also indicated that they were prepared to change the security lighting, so as to make it more in keeping with the proposed lighting scheme and the minimum necessary to accomplish its purpose.

There then followed separate private meetings with each party, during which it was possible to reach agreement on exact timings for the proposed lighting scheme to be operated. The groundwork having been laid in the joint meeting, it did not prove difficult to reach agreement on the precise terms. The objector agreed to withdraw the objection once the PCC had passed a formal resolution in accordance with the agreement as to the times when the lighting would be used. That was done a few days later and the objection was withdrawn.

All this was carried out against the background that only the chancellor could decide whether a faculty to install the proposed lighting scheme would be granted. Having regard to the endorsement of the scheme by the DAC, it was recognised by all that (i) a faculty was likely to be granted if the objection was withdrawn and (ii) it was unlikely that the chancellor would want to stipulate times of operation of the lighting, so that the objector would be relying on the good faith of the PCC not to change its resolution concerning times once the scheme had been installed.

The advantages of this successful mediation were:

- i. a contested consistory court hearing was avoided;

- ii. a conclusion was reached more quickly than would have been the case if a contested hearing had taken place;
- iii. a satisfactory resolution was agreed that would not have been a possible outcome of the consistory court hearing: in particular, the parties were able to agree satisfactory times for operation of the lighting and, as importantly, the alteration of the obtrusive security lighting that did not form any part of the faculty application and was only agreed to be a matter that needed to be addressed during the course of the mediation;
- iv. the objector was able to voice his concerns in a semi-formal atmosphere that enabled him to see that those concerns had been listened to both by me (as the impartial neutral) and, more significantly, by the petitioners;
- v. the parties were able to make concessions for the purpose of obtaining agreement knowing that they would not undermine their case if agreement was not reached;
- vi. disharmony between the parties was decreased and the process went some way to building a more positive relationship between them: one can only speculate as to the harm that would have been caused to the relationships if a consistory court hearing had taken place;
- vii. there was a very substantial saving in costs for the parties (although this was partly possible because the mediation was carried out on a pro bono basis).

I hope that it is possible to see from this example that formal mediation is potentially a very effective tool for dealing with disputes arising in respect of faculty applications. The object of such mediation will usually be to find a way for the application to be put before the chancellor so as to enable it to be dealt with on an unopposed basis, but nevertheless leaving the chancellor with the decision as to whether the faculty is granted or refused. In these circumstances it will often be helpful for the secretary of the DAC (or some other appropriate member of the DAC) to be present during at least part of the mediation process in order to give an indication of what the view of the DAC would be on any agreed amendment to the proposals the subject of the application. The presence of other appropriate professionals or societies might also be desirable in some

circumstances. From such discussions solutions may emerge that have not yet been considered and satisfy the interests of all parties.

Perhaps the most compelling reason for attempting mediation in respect of opposed faculty applications is the prospect that it can have a positive effect on the relationships between the parties. Court hearings of any kind are notorious for their negative impact on relationships – one person is found to be right and the other wrong, polarity of views is engendered and consensus discouraged, arguments are put in ways that undermine the other side and there is little opportunity for discussion or beneficial interaction between the parties. A formal mediation process managed by an experienced mediator on the other hand can have a positive impact on the relationships between the parties by enabling them to discuss and listen to the views of others in controlled, confidential conditions. In many cases, a formal mediation process can give the parties a sense that they have had “their day in court”, that is to say their opportunity to state their views to an impartial third party, who, although not deciding whether the views are right or wrong, has at least listened carefully.