DIOCESAN OFFICE

CHANCEL REPAIR LIABILITY

GUIDANCE PACK

Including:

- 1. National Archives Leaflet 33 Chancel Repair Liability.
- 2. Legal Advisory Commission Opinion October 2007.
- 3. Nicholas Thomas, Solicitor's Memo re: Legal Advisory Commission Opinion October 2007.
- 4. Law Society Submission Chancel Repair Liability.
- 5. Diocesan Memo December 2005 setting out steps outlined by Nicholas Thomas for investigating Chancel Repair Liability.
- 6. List of Chancel Repair Liability Related documents held by Diocese for the parishes listed.
- 7. Church Commissioners' List of Accepted Liability 15 November 2005 and updated 22 July 2009.
- 8. English Heritage Letter 23 November 2006.
- 9. High Court case 15 February 2007 Wallbank standard for chancel repair now "in substantial repair" not "wind and watertight."
- 10. Diocesan Memo August 2010 with Nicholas Thomas' Interim Report and advice on Chancel Repair Liability by Mark Hill QC.

Document 1

NATIONAL ARCHIVES LEAFLET 33 CHANCEL REPAIRS LIABILITY



Chancel Repairs

Legal Records Information Leaflet 33

1. The Law relating to Chancel Repairs

This leaflet aims to provide guidance on how to establish possible chancel repair liability in relation to land and property in England and Wales from records held by The National Archives. It is based on explanatory notes issued in 1971 by the former Tithe Redemption Office. It is *not* a statement of law. The subject of chancel repairs is dealt with in general works on tithes and on ecclesiastical law, such as P W Millard, *The Law relating to Tithes* (third edition, London, 1938). It received particular attention in *The Report of the Chancel Repairs Committee* (House of Commons Sessional Papers 1929-30 VII 373), and articles in *Law Times* (12 and 19 April 1947, and 28 October, 11 November and 25 November 1955).

In November 1985, a Law Commission report on liability for chancel repairs (HC 39 Law Comm 152) included a draft new Chancel Repairs Bill which recommended the abolition of chancel repair liability within ten years. No such Bill has yet become law.

The House of Lords ruling in the case of Wallbank v Parochial Church Council of Aston Cantlow and Wilmcote with Billesley, Warwickshire, in June 2003 highlighted the need for the law to be clarified. In response, the government made a Transitional Provisions Order covering chancel repair liability, which took effect when the Land Registration Act 2002 came into force on 13 October 2003.

The Transitional Provisions Order preserves the status of chancel repair liability within the land registration system for a period of ten years. This means that for ten years from 2003, chancel repair liability will remain an interest that binds successive owners of a property even though it is not protected by an entry in a register kept by the Land Registry. After the 10-year period, however, the liability will only bind new owners of registered land if it is protected by an entry in the land register.

The principal statutes on the subject are:

- Welsh Church Act 1914
- Chancel Repairs Act 1932 (confined to the provinces of Canterbury and York)
- Tithe Act 1936.
- Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003
- Ecclesiastical Dilapidations Measure 1923 (repealed by the Church of England (Miscellaneous Provisions) Measure 2000)

Policy questions on matters arising from the Tithe Acts cannot be handled by the National Archives. Neither the National Archives nor the Board of Inland Revenue can give advice on questions of liability in individual cases.

It might be advisable to address general enquiries relating to individual chancels in England (excluding Monmouth) to the Diocesan Authority of the diocese in which the church is situated: contact addresses for diocesan authorities are available at www.cofe.anglican.org/location/ or in Crockford's Clerical Directory, which also shows in which diocese a church is situated. In the case of a chancel in Wales or Monmouth, such enquiries should be addressed to the Representative Body of the Church in Wales, 39 Cathedral Road, Cardiff.

2. Chancel Repairs: an introduction

Chancel repair liability is an ancient interest benefiting some 5,200 pre-Reformation churches in England and Wales.It allows the Parochial Church Council to require owners of former rectorial land to meet the cost of repairing the church chancel. Under the Land Registration Act 1925, chancel repair liability is classified as an overriding interest in registered land. This means it has been protected even without being registered.

Because the chancel of a church was the area where the rector (the parish priest) officiated, the nave being the area where the congregation assembled for worship, the duty of repairing the chancel of an ancient parish church fell on the owner of property attached to the rectory. Such rectorial land was and is not necessarily situated in close proximity to a church building. Over time, that duty became more particularly associated with the rectorial tithes.

Such tithes as had not previously been commuted to corn-rents or allotments of land under the Enclosure Acts and other legislation, were either merged in the land or commuted to tithe rentcharge under the Tithe Commutation Act 1836. The *Digest of Tithes Commuted 1757-1835*, a copy of which is on the open shelves in the Map and Large Document Reading Room, is a useful means of establishing whether tithes had been commuted before the passing of the Tithe Commutation Act 1836. It gives an indication of the overall effect of any relevant enclosure award and refers to corn rents as well as tithes.

In cases where rectorial tithes and tithe rentcharge were merged, liability continued to attach to the ownership of the land: deeds of merger are in <u>TITH 3</u>. Some records relating to the apportionment of liability for chancel repairs from 1847 until 1920 are in IR 97.

Where rectorial tithes were commuted to tithe rentcharge, liability for chancel repairs attached to the tithe rentcharge. As far as spiritual rectors were concerned, their liability was for the most part transferred to parochial church councils by the Ecclesiastical Dilapidations Measure 1923. Until the Chancel Repairs Act 1932 transferred jurisdiction to County Courts, legal proceedings to enforce liability for repairs could be brought in ecclesiastical courts.

Following the Tithe Act 1936, which extinguished all tithe rentcharge, it was necessary to establish liability for chancel repairs that had previously attached to the ownership of rectorial tithe rentcharge and to any vicarial tithe rentcharge that exceptionally fell into the same category. There still existed in 1936 a substantial amount of rectorial tithe rentcharge in the ownership of ecclesiastical corporations, universities and colleges and other corporate bodies as well as private persons (commonly known as lay rectors). The liability continues in the case of ecclesiastical corporations, certain universities and colleges, the owners of merged land and the owners of land in which tithe rentcharge was constructively merged by the operation of the Tithe Act 1936, section 2l. In all other cases where there was liability in respect of the ownership of tithe rentcharge, the liability was extinguished and compensation was paid by the tithe-owner to the appropriate ecclesiastical authorities. This compensation took the form of an issue of stock, which was deducted from the amount which otherwise would have been issued to the titheowner.

3. Determining Chancel Repair Liability

There is no single central register which can be used to identify all chancel repair or other liabilities or restrictions attached to land and property in England and Wales. Enquirers are strongly recommended to check the deeds, the Land Registry and current landowners for relevant information.

The formal record which sets out the proportionate liability of all the tithe-owners in a parish to

contribute to the repair of the chancel of the church of an ancient parish is called the Record of Ascertainments. A search in the records of ascertainment will help to identify the likelihood of liability in respect of a given property as well as the proportion of the total cost to be paid in respect of each liable property. The actual amount to be paid cannot be known until repairs are carried out and their cost established.

Records of ascertainment are so-called because, by the Tithe Act 1936, Seventh Schedule, Part I, the Tithe Redemption Commission was directed to ascertain:

- (a) the rentcharges agreed or awarded on the original commutation of tithes to which chancel repair liability attached;
- (b) which of those rentcharges ceased, before 2 October 1936, to be subject to chancel repair liability; and
- (c) the identity and aggregate amount of the residue of such rentcharges. This residue is called 'the apportionable amount of rentcharge liability'.

The Tithe Redemption Commission was then required to ascertain the proportion which each separate rentcharge in the residue bore in relation to the 'apportionable amount'.

The records of ascertainments are in The National Archives record series IR 104

The Record of Ascertainments may state

either that no liability attached to the ownership of tithe rentcharge;

or that such liability did exist and that it was borne solely or in certain proportions by named persons or corporate bodies or by the owners of specified lands.

4. Making a Chancel Repairs search

It is first necessary to know the name of the Church of England (or Church of Wales) parish in which the property concerned was situated at the time of the Tithe Commutation Act 1836. The term civil parish was legally defined only in 1889. Ecclesiastical parish boundaries are marked (though not particularly easy to trace) on the one-inch Ordnance Survey maps from the 1840s onward; they are much more clearly marked on the tithe index maps in IR105. If you are still uncertain, it may be necessary to make enquiries of the church authorities or the local council.

Once you know the name of the parish, check the index to the records of ascertainments (IR 104/107 and 108). This should show whether a Record of Ascertainments for the parish exists, and give some preliminary information about the existence of liability. If there is no entry in the index, there is no Record of Ascertainments. All the abbreviations entered in the index (see below) are explained in the front of the volumes IR 104/107 and 108:

- D/N Declaration of no rentcharge liability at commutation
- R/A Record of Ascertainments showing liability as at 1 October 1936
- R/AN Record of Ascertainments showing cessation of liability
- R/AN (Cty) in Composite County Record, showing cessation of liability
- S.A. Special Award (for which see IR 106)
- L Liability on land

If the name of the parish is annotated D/N, R/AN or R/AN (Cty) in the index, there is no record of ascertainments in IR 104; this does not necessarily mean, however, that there is no chancel

repair liability, merely that none is recorded in documents held by the National Archives. You may wish to obtain a copy of the index entry for your records.

If the name of the parish is annotated R/A, R/A (L) or R/A (SA) in the index, there *is* a Record of Ascertainments. You should identify the relevant volume from the IR 104 series list and examine it.IR 104 is arranged in county volumes, in alphabetical order of county and then alphabetically by parish. Note that Hampshire was formerly known as Southampton and appears in the list between Somerset and Staffordshire. Parishes subject to extraordinary tithe rentcharge are indexed separately at the end of IR 104/108.

5. What does a Record of Ascertainments show?

A typical first page of a Record of Ascertainments gives the following information (this example is taken from IR 104/28).

County: HERTFORD

£

Chancel: ST MARY, WATFORD

- 1. The apportionable amount of rentcharge liability (ie the residue of the £856s. d rentcharges to which the liability originally attached) is 4 11
- 2. That residue consists of:
 - (a) Rentcharges in respect of which stock was to be issued under the Tithe Act 1936 and which were not vested in any of the corporations or bodies mentioned in (b) below
 - (b) Rentcharges in respect of which stock was to be issued issued under NIL the Tithe Act 1936 but which were vested in certain corporations or bodies (specified in the proviso to section 31(2) of the Tithe Act 1936)
 - (c) Rentcharges specified in the First Schedule to the Record of NIL Ascertainments (these were rentcharges owned by the landowner, as described in section 21 of the Tithe Act 1936)
 - (d) Rentcharges specified in the Second Schedule to the Record of 184 9 1 Ascertainments (these were rentcharges merged or extinguished under the Tithe Acts 1836-1925 in the land to which section 1 of the Tithe Act 1839 applied)

in entry against paragraph 2(a) only, any lighility in respect of the ownership of tithe

If there is an entry against paragraph 2(a) only, any liability in respect of the ownership of tithe rentcharge will have been discharged for all time by an issue of stock paid to the Diocesan Authority or, in Wales or Monmouth, to the Representative Body of the Church of Wales.

Liability under 2(b) continues to be borne by a corporate body: this may be the Church Commissioners (as successors of either the Ecclesiastical Commissioners or Queen Anne's Bounty) or a university or college. If the Record of Ascertainments contains only an entry under paragraph 2(b) and one body only is named, then that body is responsible for the whole of the liability covered by the Record; if more than one body is named, then the liability devolves upon the bodies in proportions which are determined as explained below (paragraph 9).

Cases occur in which entries are made not only under paragraph 2(b) but also under paragraph 2 (c) or 2(d) or both 2(c) and 2(d). A more elaborate calculation of the proportionate sum will then be necessary.

If on the first page of the Record of Ascertainments there is an entry against paragraph 2(c) or 2 (d) or both 2(c) and 2(d), then the ownership of certain land (usually, but not necessarily, within the ancient parish) carries with it liability for the repair of the chancel of the church to which the Record relates. To discover which lands are subject to this liability and to what extent, the lands

856 4 11

need to be identified (either on a map or from the description in the Record of Ascertainments) and the relative liability computed from the relative extent of the lands.

6. Identification of liability on a map

Wherever there are entries under paragraph 2(c) or 2(d), the Record of Ascertainments includes schedules giving particulars of the land concerned. The First Schedule relates to paragraph 2(c) and the Second Schedule to paragraph 2(d).

Typical straightforward entries in the First and Second Schedules are set out as follows (again from IR 104/28):

1. Name of Tithe District	2. Number in Instrument of Apportionment referring to plan or (if no apportionment was made) description of lands	3. Amount of Rentcharge				
	•	£	s.	d		
Watford	1898	2	11	0		
	1934	2	11 5	0		
	1941	1	5	0		
	[followed by many other numbers]					
	From Altered Apportionment dated 30 th September 1844					
	W915 ^a	1	15	0		

There may be only one or two entries of this kind or there may be several pages of them.

The numbers in the second column normally refer to tithe plot numbers on the original tithe map. To identify the location of such plots, you should consult the tithe map in IR 30. It is important to remember that most of the tithe maps are in manuscript and may look very unlike modern Ordnance Survey maps, so the identification of lands by reference to a tithe map is not always simple. Furthermore, river courses, roads, field boundaries and other landmarks may well have changed since the tithe map was made. It is often helpful to have a large-scale Ordnance Survey map to compare with the tithe map.

Once you have identified the relevant tithe plot number(s), check the Record of Ascertainment to see if the plot(s) are listed there.

If tithe rentcharges were apportioned before 1936 then not only the original tithe map but at least one or more other maps may need to be consulted in order to obtain a precise representation of the lands listed in the Schedules to the Record of Ascertainments. The District Record Maps (IR 90), although made for other purposes, show the boundaries of many tithe areas on twentieth-century Ordnance Survey maps and these maps will often be found of assistance, although they do not depict all areas covered by mergers.

In cases where tithe plots were divided as a result of a later altered apportionment, a separate charge will have been placed upon each of these divisions. The divisions are usually distinguished in the altered apportionment and on the altered apportionment map by the use of prefixes or suffices to the root or parent plot number eg A18, B18; 321a, 321b, 321c; W915^a in the Watford example above. The Record of Ascertainments records the altered plot number and

the divided charge, with the date of the instrument of altered apportionment by which the altered plot was created (30 September 1844 in the Watford example). Altered apportionments are bound up with the original apportionments in IR 29; maps showing the lands affected by altered apportionments are sometimes laced up with the altered apportionment in IR 29 and sometimes attached to the original tithe map in IR 30.

The First Schedule sets out those lands which were not subject to a formal merger, but which were in the same ownership as the tithe rentcharges issuing out of them between 26 February 1936 and 2 October 1936. Such lands were treated in the same way as lands in which there had been a formal merger. All the lands set out in the First Schedule may be identified by reference to the original tithe map (IR 30) or a later altered apportionment map (in IR 29 or IR 30).

Lands set out in the First Schedule may, however, have become further divided in ownership since 1 October 1936, when tithe rentcharge was extinguished. Some information about divisions made after 1 October 1936 may be obtainable from the Orders for Apportionment (IR 94) and the District Record Maps (IR 90). The District Record Maps, although made for other purposes, show the boundaries of many tithe areas on twentieth-century Ordnance Survey maps. It is important to note that no divisions which were made after 1 October 1936 are included in the Record of Ascertainments and only those divisions are included that were the consequence of a formal altered apportionment under the Tithe Acts 1836-1925.

References to 'Farm' apportionments are to cases where two or more tithe fields were jointly charged with one rentcharge, whether by the original apportionment or by reason of a reapportioned rentcharge (Tithe Act 1936, section 47(1)). Where there is a large number of such fields, the number of one tithe field only is given in the schedules to the Record of Ascertainments, with a reference to 'other tithe fields jointly charged with this rentcharge'. These 'other tithe fields' can be identified in the original tithe apportionment (IR 29). The important point here is that where there is a 'farm' charge, however it arose, there is no separate liability in respect of each tithe field, but a single liability for the whole group of tithe fields. Consequently the owner of any one 'field' or part of a 'field' is liable for the whole, though if there are other owners in the area subject to the rentcharge he will have the right of contribution from them.

7. Identification of liability by description

The preceding paragraphs have dealt with the relatively simple cases, which are by far the most numerous, where the lands can be identified on a tithe map. But many Records of Ascertainments contain in the Second Schedule other cases where the only means of identification is afforded by a description. This happens because the tithe rentcharge was merged before tithe apportionment. Typical entries of this more complicated character are as follows:

2. Gross amount of tithe rentcharge awarded by Instrument confirmed to each of the following persons of bodies in lieu of the tithes issuing out of land in their ownership the area of which is set out under their respective names:

John Beil	£ s. d
2a. 2r.2p.	0 6 6
Alwyn Gibbs	0 0 0
970a. 1r. 24p.	86120
Rachel James	
3a. 1r. 1p.	0 140

Liability attaches to the ownership of any part of the land in which a tithe rentcharge has been merged. In such cases the formal tithe records (apart, possibly, from the deed of merger itself in

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TITH 3) will not help to identify the land, though it is possible that the relevant tithe file (containing the correspondence of the Tithe Commissioners in IR 18) may in some cases be of assistance. For the most part, however, identification is a matter of local knowledge and/or local enquiry.

8. Calculation of individual liability

When the tithe area or areas burdened with a liability for chancel repairs have been identified and it is desired to answer the question 'What is A's liability?', all that is involved is a simple arithmetical calculation. Paragraph 3 of the Record of Ascertainments gives the proportionate liability for each penny of the tithe rentcharge shown in the Schedules in respect of each tithe area involved - in the Watford example, the proportionate liability is given as 1/205499. An area with a rentcharge of £1 5s 6dwill therefore carry with it a proportionate liability of 306/205499: 306 is arrived at by adding 240 (the number of old pence in £1), 60 (the number of old pence in five shillings) and 6 pence. The appropriate fraction in respect of any area will be used to compute the proportion of the total expenditure required to carry out repairs to the chancel. The resulting amount will be that to be demanded of the owner of the area. Assuming repairs to cost £5,000, therefore, the amount to be demanded in this example would be £63.85. The Record of Ascertainments makes it possible to determine the proportions in which liability is to be borne, but not the amount to be demanded at any particular time. There is no means of foretelling what the actual amount to be demanded will be on any occasion when repairs are required.

9. Chancels in Wales and Monmouth

The position in regard to chancels of churches in Wales and Monmouth in the matter of Records of Ascertainments, though not identical, is similar to that in the case of the provinces of Canterbury and York. Section 28 of the Welsh Church Act 1914 preserved the liability of any lay impropriator to repair an ecclesiastical building, but since the churches in Wales were transferred to the Representative Body of the Church in Wales (section 8), the responsibility for enforcing any liability, whether under a Record of Ascertainments or otherwise, will be the concern of that Body and not of a Parochial Church Council as in England. The Chancel Repairs Act 1932, which provided for proceedings in the County Courts, is not applicable to Wales and Monmouth.

10. Where liability has ceased

In all counties in England, and some in Wales, there are numerous cases where the Record of Ascertainments is to the effect that all liability has ceased to exist. Most of these relate to parishes of which the spiritual rector was relieved of his obligations by the Ecclesiastical Dilapidations Measure 1923. The effect of the Record in most of these cases is to place the entire liability for chancel repairs upon the Parochial Church Council, who are responsible for the repair of the rest of the church. Similar Records have been made in other types of case, for example where the fabric has been destroyed and the church has not been rebuilt or where the whole of the rentcharges to which liability attached had been redeemed before 2 October 1936, or where the parties liable had compounded for their liability before then.

Most Records of the kind arising from the operation of the Ecclesiastical Dilapidations Measure 1923 are to be found in composite Records relating to more than one parish in a county. The other cases where liability has ceased will, however, usually be the subject of Records relating to individual parishes.

11. Other sources of liability

The Records of Ascertainments deal solely with the liability, if any, which attached to the

ownership of the tithe rentcharge. They do not deal with parishes where tithe rentcharge was never created, nor do they necessarily cover the whole liability in a parish. Examples of situations where liability may exist but is not documented in the Record of Ascertainments are:

- where all the tithes in a parish were converted into corn rents;
- · where the tithes in part of a parish were converted into corn rents and the rest were commuted into tithe rentcharges;
- where under an Enclosure Act lands were allotted in lieu of tithes;
- where the tithes (and not tithe rentcharges) were merged in land under the Tithe Acts;
- where rectorial glebe land has passed into lay hands

The question is sometimes asked whether it is possible to compound for liability to repair a chancel. So far as the provinces of Canterbury and York are concerned, the position was governed by the Ecclesiastical Dilapidations Measure 1923, but this did not cover Wales and Monmouth.

12. Reference works

No list of Records of Ascertainments has been published but, subject to certain qualifications, such a list would correspond to the list of tithe apportionments given in a Return of All Tithes Commuted and Apportioned 1887 (House of Commons Sessional Papers 1887 LXIV 239). This list does not, however, include those parishes where tithe rentcharges were merged before apportionment and for which there are Records of Ascertainments. (Where all the tithes of the parish were merged, there is neither a tithe apportionment nor a Record of Ascertainments). It should be noted that in this Return townships, hamlets etc are shown under the parish of which they formed part, or in which they were situated, at the time of commutation. In all cases the parish and the county are as they were at that time, and no cognisance is taken of later developments, for example the creation of new civil parishes and boroughs; former detached parishes transferred from one county to another (eg a number of cases formerly in Durham but now in Northumberland); transfers from one local authority to another; or the realignment of county boundaries in 1974. The Return must, therefore, be treated with some caution. The Return does not include all cases where corn rents were converted into tithe rentcharge and have therefore been taken into consideration in preparing Records of Ascertainments.

There is no comparable guide to parishes where liability may exist in respect of corn rents or lands allotted in lieu of tithe. A Parliamentary Return of Enclosure Awards deposited or enrolled with Clerks of the Peace, was made in 1904 (House of Commons Sessional Papers, 1904 (50) LXXVIII 545).

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Document 2

OPINION FROM THE LEGAL ADVISORY COMMISSION REGARDING THE REGISTRATION AND ENFORCEMENT OF CHANCEL REPAIR LIABILITY BY PAROCHIAL CHURCH COUNCILS

OCTOBER 2007

REGISTRATION AND ENFORCEMENT OF CHANCEL REPAIR LIABILITY BY PAROCHIAL CHURCH COUNCILS

- 1. This Opinion addresses the question whether there are any circumstances in which a parochial church council ('PCC') can properly:
 - (a) decide not to investigate whether it is entitled to the benefit of chancel repair liability; or
 - (b) having established that it is entitled to the benefit of such liability, decide not to register or enforce such liability.

Background

- 2. In response to the decision of the House of Lords in *PCC of Aston Cantlow v Wallbank*¹, which upheld the enforceability of chancel repair liability, the Lord Chancellor made the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003², under which chancel repair liability was to continue to be an 'overriding interest' (and thus enforceable against land owners even though not registered at HM Land Registry) for ten years from the coming into force of the Land Registration Act 2003 on 13th October 2003.
- 3. Additionally, the 2003 Order allowed an application to be made before the end of the ten-year period, without a fee being charged, for registration of a 'caution' against first registration of unregistered land and for the entry in the register of a 'notice' in the case of registered land, in respect of chancel repair liability relating to a particular piece of land. The caution or notice will give priority to the PCC over the interest of the first registered proprietor or anyone taking from him or anyone taking from a registered proprietor. But even if the liability is not registered within the ten-year period, it will still be enforceable after the expiration of that period against the owner of the land until he or she disposes of it: it would only be his or her successor in title who would take the land freed from the liability; and it will still be possible to register a caution or notice after 12th October 2013 (albeit subject to payment of a fee) if the land subject to the liability has not changed hands.
- 4. In the light of this position, PCCs which believe themselves to be entitled to the benefit of chancel repair liability are encouraged to register their interest at HM Land Registry in order to be able to enforce it against subsequent purchasers from the current owner(s) of the land in question.

The fiduciary duties of PCC members

5. As explained in the Commission's opinion 'Parochial Church Council: Legal Position of Members', PCCs are charities³ and are accepted as such by the Charity Commission. Their members are in a position analogous to that of a trustee of

¹ [2004] 1 AC 546

² SI 2003/2341

³ See eg Lord Scott in Aston Cantlow, [2004] 1 AC 546 at 589.

trust property, being subject to a number of 'fiduciary' duties. One of the most basic of those duties is to act in the best interests of the PCC. That duty has a number of consequences. One is that they are under a duty to protect and preserve the PCC's assets. Another is that they are not free to give effect to obligations of a purely moral nature.⁴

6. Members of a PCC who act in breach of these fiduciary duties may be required to make good any loss which the PCC has incurred as a result of that breach, out of their own personal resources. They may also face an inquiry by the Charity Commission and, in consequence, exposure to the exercise of the Commission's protective and remedial powers (including the possibility of their removal from office).

Analysis

- 7. Under the Chancel Repairs Act 1932 the right to enforce chancel repair liability is vested in the PCC of the parish concerned where there is one or, if there is no PCC, in the churchwardens of the parish.⁵ The right to enforce chancel repair liability therefore effectively represents an asset of the PCC.
- 8. Prima facie, the fiduciary duties referred to in paragraph 5 above accordingly require a PCC (a) to take reasonable steps to investigate whether a liability to repair exists in relation to any church within their parish and (b) if it does, to register and enforce that liability.
- 9. The duty to protect the assets of a charity does not require charity trustees to expend more in protecting an asset than the asset is likely to be worth: such a position would plainly be inconsistent with the underlying duty to act in the charity's best interests. Thus there is in principle scope for a PCC to argue that it need not investigate the existence of an entitlement to chancel repair liability where the costs of doing so would be disproportionate in relation to the likelihood of any liability being identified. (As noted above, there is usually no charge for registration itself.) However, in most cases it would seem doubtful whether in practice the costs of investigating the position would ever be so high as to enable this argument to be advanced with any credibility: in many cases the position can be clarified relatively easily (by reference to Enclosure Acts and Awards or Records of Ascertainments). Nevertheless, there may be cases of this nature if the liability has not been enforced for a century or more and the land subject to the liability is unknown, with the consequent possibility of a multiplicity of owners.
- 10. There is, however, more scope for recognising that PCCs may not always be required to <u>enforce</u> chancel repair liability, again by reference to general principles of trust law.
- 11. In Harries v Church Commissioners⁶ it was held that the normal duty to invest the funds of a charity in a way that produced the maximum financial return consistent

⁴ Re Snowden [1979] Ch 528

⁵ See in particular the definition of 'responsible authority' for the purposes of that Act contained in s.4(1).

^{6 [1993] 2} All ER 300

with commercial prudence could be displaced in two types of situation. The first was "when the objects of the charity are such that investments of a particular type would conflict with the aims of the charity". The second was "when holdings of particular investments might hamper a charity's work either by making potential recipients of aid unwilling to be helped because of the source of the charity's money or by alienating some of those who support the charity financially". The latter situation was suggested to be "comparatively rare"; and it was said that when it arose "the trustees will need to balance the difficulties they would encounter, or likely financial loss they would sustain, if they were to hold the investments against the risk of financial detriment if those investments were excluded from their portfolio. The greater the risk of financial detriment, the more certain the trustees should be of countervailing disadvantages to the charity before they incur that risk". \(^{7}\)

- 12. Although these principles were expressed in the context of charity trustees' duties as regards investment, in principle they would seem equally applicable in the context of the duty to protect a charity's assets. But in practice the first of them would not seem to have any potential application in relation to chancel repair liability, since there appears to be no inherent incompatibility between registering or enforcing that liability and the objects of a PCC as declared in s.2 of the Parochial Church Councils (Powers) Measure 1956.
- 13. As to the second principle referred to in the *Harries* case, there would seem, in principle, to be scope for arguing that the registration of a notice or caution, and more particularly the <u>enforcement</u> of chancel repair liability could, in the circumstances of the particular PCC concerned, hamper the PCC's work, either by adversely affecting its ability to pursue its object of promoting in the parish the pastoral mission of the Church⁸ or by alienating potential financial support. (For example, even registering a caution⁹ or notice against all the owners of houses on a newly built estate in the parish¹⁰ could alienate people from the church and thus cause both pastoral and financial damage to its mission in the parish because the notice or caution would be a 'blot' on the owners' titles. And actually enforcing liability in those circumstances could give rise to considerable alienation.) That analysis may be supported by the statement of Lord Scott in the *Aston Cantlow* case¹¹ that

⁷ [1993] 2 All ER 300 at 304 per Sir Donald Nicholls VC

⁸ Under s.2 of the 1956 Measure the functions of a PCC include "co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical".

Simply registering a caution against first registration where the title to the land subject to the right to chancel repair liability is not yet registered may not have any adverse impact, since it would not necessarily come to the notice of the owner of the land; but if it did come to light, the fact that it had been done without notice to the owner could in itself give rise to ill-feeling.

As the law stands, the decision in *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417 means that chancel repair liability is enforceable jointly and severally. In *Aston Cantlow* Lord Scott expressed doubt whether the case was correctly decided and pointed out that it was open to question in the House of Lords; but that view was not endorsed by any other member of the House and Lord Hobhouse expressly dissociated himself from it.

^{11 [2004] 1} AC 546 at 591. However, none of the other four Law Lords expressed support for Lord Scott's view.

"The PCC could have decided not to enforce the repairing obligation. They could have so decided for a number of different reasons which, in particular situations, might have had weight. ... They might have taken into account excessive hardship to Mr and Mrs Wallbank in having to find £95,000. Trustees are not always obliged to be Scrooge."

- 14. In deciding to what extent the principle referred to in the preceding paragraph could apply, the PCC in question would need to carry out a balancing exercise of the kind referred to at the end of the passage quoted from the Harries case in paragraph 11 above; and the greater the amount of the chancel repair liability, the greater the pastoral or financial damage that would be needed for the PCC to be able to say that it was acting properly in deciding not to enforce it. Whether the party subject to the liability was an institutional body might have a bearing on the question, in that enforcement against such a body might be less likely to give rise to adverse financial or pastoral consequences. Another consideration would be the possible adverse effect that declining to enforce a right to chancel repair liability could have on the PCC's ability to fund necessary repairs or to obtain funding for them from other sources such as English Heritage. The date the liability had last been enforced and whether the landowner had knowledge of the liability before acquiring the land might also be relevant considerations, in so far as they might influence perceptions of the PCC's behaviour and thus the pastoral impact of a decision to register a notice of it or enforce it.
- 15. Having weighed these and other relevant considerations carefully, since the application of the principle described in paragraph 13 above to the facts of a particular case is not straightforward, a PCC would be well advised to seek legal advice before forming a view that it would not wish to register a notice of, or enforce, a liability to which it is entitled.
- 16. Additionally, the Commission strongly recommends that if a PCC considers, after careful consideration of the principle described above, that it would be contrary to its interests to enforce chancel repair liability to which it is entitled, or to register notice of it, the PCC should seek formal advice from the Charity Commission on whether not enforcing the liability would be consistent with the fiduciary duties of its members. Under s.29 Charities Act 1993 the Charity Commission has power to give the 'charity trustees' of a charity (an expression which extends to the members of a PCC whether or not it is registered as a charity) its "opinion or advice on any matter affecting the performance of [their] duties as such"; and charity trustees who act in accordance with such advice are deemed to have acted properly. There is therefore a simple and effective way for a PCC to obtain protection against the consequences of a decision not to enforce chancel repair liability or not to register notice of its rights, provided of course that the Charity Commission is satisfied that the PCC's decision is consistent with the fiduciary duties of its members.

Compounding chancel repair liability

17. PCCs will wish to bear in mind the possibility of 'compounding' any chancel repair liability to which they are entitled – ie of agreeing with those who are

- subject to the liability that it be formally extinguished in return for the payment of a capital sum.
- 18. Section 52 of the Ecclesiastical Dilapidations Measure 1923 contains a procedure for the formal compounding of chancel repair liability, involving the payment of a capital sum to the 'diocesan authority' 12. That capital sum must be invested in the name of the diocesan authority and its income applied by that body, after consultation with the PCC, in insuring the chancel against loss or damage by fire, in maintaining and repairing the church of which the chancel forms part (and not only the chancel itself), together with its churchyard and (if there is any surplus) in forming a fund for the extraordinary repair, improvement or enlargement of the church or churchyard.
 - 19. However, the possibility may exist in some cases of a non-statutory arrangement, in the form of a legally enforceable agreement between the PCC and those subject to the liability under which the PCC agrees not to enforce the liability, again in return for the payment of a capital sum. Whilst such an arrangement would not involve the formal extinguishment of the liability, the effect would in substance be the same in that it could no longer be enforced.
- 20. The potential difficulty with such a non-statutory arrangement is that, if liability for chancel repair is joint and several¹³, so that it can be enforced against <u>any</u> of those subject to it, an agreement of the kind referred to in the previous paragraph may, in law, be of limited protection to the party who has entered into it: the PCC could in theory (in the absence of any provision to the contrary in the agreement) subsequently enforce the liability against any other parties who were also liable for chancel repair, for the full amount of the liability, and those parties could subsequently exercise their right of indemnity to recover a contribution from the party to the agreement. Thus an agreement of this kind may only be appropriate where either (a) all the parties subject to the liability join in the agreement or (b) the PCC expressly agrees that, if others who do not join in the agreement are also liable, the PCC will not seek to enforce the liability against them.
- 21. Subject to that important caveat, the circumstances in which a non-statutory arrangement of the kind described in paragraph 19 above may be appropriate include where the question of chancel repair liability has been raised in relation to a conveyancing transaction in the parish as a result of a search and there is doubt as to whether or not the liability exists. The cost of investigating the position fully may be beyond the fees that the purchaser is prepared to bear and an agreement not to enforce any possible, but unascertained, liability by payment to the PCC of an appropriate sum may be preferable to all parties to making a similar payment to an insurance company. Whereas an insurance policy would be good only for the sum insured and for the period of cover (generally not more than 20 years), the advantage to the purchaser of dealing direct with the PCC in such a case is that the protection would be permanent and financially unlimited.

That is, the diocesan board of finance or other body acting as trustee of diocesan property
 See footnote 10 above.

- 22. Even so, the obligation upon trustees to protect and preserve the PCC's property must always be borne in mind. It is therefore essential that, before any non-statutory arrangement of the kind described in paragraph 19 above is entered into, proper advice is received as to the value of the PCC's right to enforce chancel repair liability. PCCs contemplating such an arrangement should therefore seek appropriate professional advice, including as to the amount of the capital payment to be made. Prima facie that should be no less than the sum which would be payable on a formal compounding under the 1923 Measure, that is, a sum reasonably sufficient to provide for the cost of future repairs and to insure the chancel against loss or damage by fire subject only to a possible discount if the existence of the liability has not been clearly established. However, it is unlikely that the landowners will be induced into compounding unless there is some real benefit to them. In these circumstances the PCC and diocesan authorities may feel that an informal arrangement is preferable to receiving no payment at all coupled with the continuing need to enforce the liability on future occasions.
- 23. Any capital sum received under a non-statutory arrangement of the kind described in paragraph 19 above would be subject to the terms of the agreement. It is most likely that a lay rector providing what may well still be a very substantial sum will effectively require the content of aspects of the 1923 Measure to be included in the agreement namely that the capital be vested in the diocesan board of finance, with only the income being used to repair and insure the chancel and the church, but with power for resort to be had to the capital in cases of grave emergency. If the PCC is responsible for the investment of the capital sum, it will need to take appropriate advice as to how to invest it. The fund would be likely to appear in the PCC's accounts as a restricted fund.
- 24. In the light of these different possibilities and the fiduciary duties that lie upon members of a PCC, a PCC which proposes to enter into a non-statutory arrangement of the kind described in paragraph 19 above would be well advised before doing so to seek confirmation from the Charity Commission (in the form of an order under s.26 Charities Act 1993) that the proposed agreement is one into which the PCC can properly enter, on the basis that the terms proposed are expedient in the interests of the PCC. Only if such confirmation is received can the PCC be sure that its members will not individually be held liable to make good any loss that may afterwards be found to have been incurred.

October 2007

Document 3

NICHOLAS THOMAS' MEMO RE: LEGAL ADVISORY COMMISION

OCTOBER 2007

This memorandum is an attempt to assist Parochial Church Councils in the Diocese of Rochester in their decision making process on the question of investigation, registration and enforcement of Chancel Repair Liability. It is based upon the learned Opinion of the Legal Advisory Commission of October 2007.

It is essential that every Parochial Church Council reads and considers that Opinion in full. This memorandum is not intended to replace it, but to advise how to act upon it.

- 1. There can no longer be any excuse for a Parochial Church Council not to investigate whether they have Lay Rectors with Chancel Repair Liability. They must go through the process of investigation even if that investigation reveals no Lay Rectors or reveals that it is impossible to find out if there are Lay Rectors.
- 2. Having concluded their investigations the PCC now have to carry out the balancing exercise referred to in paragraph 14 of the Opinion to see if the points raised in paragraph 13 and the second principle in paragraph 12 apply.
- 3. Although the Opinion is by its very nature general, there can be no general guidance as to how to operate under the Opinion. Each individual PCC needs to consider the Opinion and to consider the results of their own enquiries. The reason for this is that everybody's enquiries and results will be different and every Parish in the Diocese is different.
- 4. I would advise that on considering the results of their investigations the PCC ask themselves four questions:-
 - (i) What percentage of Chancel Repair Liability exists?
 - (ii) How many parties are subject to that Liability?
 - (iii) Are any of the parties institutions or large individual landowners?
 - (iv) What would the effect of non-registration and enforcement be on other fund raising activities, particularly English Heritage?
- 5. For the reasons referred to above, each individual PCC will have to make its own decision and it is quite likely that two PCCs could come to a different decision on similar facts. This is because no two Parishes in the Diocese are the same. Clearly if the results showed a 2% Chancel Repair Liability shared amongst 75 people on a housing estate a decision that the registration and enforcement of the notice would be likely to give rise to adverse financial or pastoral consequences is more persuasive than a decision where 10% Chancel Repair Liability falls on two large landowners.
- I advise that when the PCC ask themselves the question, they then make a decision and record very carefully in the Minutes why that decision was reached. If the PCC reach the conclusion that they do not intend to register and enforce, it would then be prudent for them to take legal advice. The cots of that advice would have to be borne by the individual PCC who would no doubt wish to obtain an estimate before giving instructions. If PCCs wish I would be willing to give that advice upon presentation of the facts that they have received and their reasons for the decision that they make. If having considered my opinion they still do not wish to register and enforce, then I would be prepared to write the appropriate letter under Section 29 of the Charities Act to the Charity Commissioners asking them for their

opinion or advice on this aspect of the PCCs performing their duties. The Commissioners will need to know the detailed facts and the detailed reasoning for the request to make the decision.

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Document 4

LAW SOCIETY SUBMISSION

OCTOBER 2006

Chancel Repair Liability
A Law Society Submission
October 2006



113 Chancery Lane London WC2A 1PL www.lawsociety.org.uk

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Chancel Repair Liability

Summary

- The ancient liability of certain landowners to pay for, or contribute towards, the repair of the chancel of the parish church needs urgent reconsideration. Our analysis suggests:
 - this is a liability which is of random application, is without monetary limit and has no real connection with the enjoyment of the property owned by the person who has to pay
 - b) a landowner is liable even if the property was acquired in good faith and in complete ignorance of the liability
 - c) the historical documents recording who is liable are irretrievably deficient
 - the result of recent publicity has been to concentrate attention upon the risks for property owners, encouraging precautions which are less than fully effective
 - the official move to address the problem, by an Order made in 2003, is unsatisfactory because, even when it takes effect in 2013, it will be many years before it is fully effective and there are some technical doubts about its effect
 - f) further, the effect of the Order may discriminate against certain landowners, unfairly increasing their potential liability
 - g) where liability is established, the effect on the value of the burdened property is detrimental if unpredictable, and may make the property unsaleable
 - h) how the liability affects leasehold and commonhold properties is unknown, and it may impose unfair burdens on shared ownership social housing
 - the liability does not necessarily support those churches which are most in need, and its limitation to work on the chancel may in practice not allow satisfactory repairs to be done
 - j) liability only applies to some of the parish churches of the Church of England and the Church in Wales, and not to other places of worship
 - k) it is unsatisfactory that compulsory payments to these churches should be required from those of other denominations and faiths, or of none
 - the churches in question are amongst the most ancient and can collectively be regarded as a valuable part of the country's historical and architectural heritage. Public funding on that basis is appropriate.

- There are two practical reasons why urgent action is needed. First, the
 expense of house purchase and other land transactions is being increased,
 without concomitant benefit. Secondly, there is the danger that properties
 with an identified liability to pay for chancel repairs will become unmarketable.
- 3. For these reasons, which are expanded below, we consider that chancel repair liability should be repealed. This is a reform which has been proposed previously.¹ The liability should be replaced by public funding, although interim arrangements may be required.
- 4. For historical reasons, the owners for the time being of certain freehold land in England and Wales are liable to contribute towards, or to pay for, repairs to the chancel of a parish church of the Church of England or the Church in Wales. In England, payment is due to and enforced by the parochial church council, and in Wales by the Responsible Body of the Church in Wales. It can be demanded whenever repairs are required; the liability is perennial.
- 5. The liability is personal to the landowner; once a payment has been required that liability does not pass to the new owner if the land changes hands. If the property which carries the liability is sub-divided, the owner of every part of it is responsible. Each is normally liable for the full amount, but is entitled to recover contributions from others who are also liable.
- 6. There is no restriction on the amount of the liability, and it may be that a demand can exceed the value of the property of the owner who is charged. The liability applies whether or not the landowner was aware of it when acquiring the property. The landowner has no control over the timing of any demand for payment, and the frequency simply depends on the need for repairs. Where a property is subject to chancel repair liability, this unquantifiable contingent liability must make valuation of the burdened property extremely uncertain.
- 7. The residential property market has become increasingly risk-averse, with conveyancers advising buyers to act with caution. This has led to increased expenditure on investigations, and there is the danger that, in this sector of the market at least, the higher profile of the risks presented by chancel repair liability could render a property unsaleable once it is known to be liable.
- 8. A landowner may commute his liability, by making a payment to a fund held by the Diocesan Board of Finance. ⁵ This procedure is said to be slow and

A succinct draft statutory provision was appended to the Law Commission report, referred to below.

References to "land" should be understood to include all landed property, i.e. they include all land, both urban and rural, to whatever use it is put, and the buildings on the land.

Although this technically means that a neither mortgagee, nor a person to whom it sells in exercise of its power of sale, is liable to pay any earlier demand, the value and saleability of property may be prejudiced once liability has been established.

In Wales, responsibility may be apportioned between the responsible landowners. On figures given to the Law Commission, this has resulted in the recovery of less than 30% of repair costs in over 70% of parishes.

Ecclesiastical Dilapidations Measure 1923, s.52.

- expensive, although there are also complaints that the income from the funds which may be applied to repair any part of the church in question, not only the chancel can be too small to be useful.⁶
- 9. There are other forms of chancel repair liability, principally from arrangements made when tithe rentcharges were replaced with tithe redemption annuities by the Tithe Act 1936. Certain ecclesiastical and educational bodies were fully compensated and left with the liability, instead of suffering a deduction from their compensation in exchange for being exonerated. This paper is not concerned with this form of chancel repair liability, but only with liability which derives from land ownership. Accordingly, the repeal of the chancel repair liability which is being considered here would not affect those payments to be made by those ecclesiastical and educational bodies.
- There is doubt whether or how chancel repair liability affects the owners of leasehold property. The Law Commission was unable to trace any case deciding that the liability attached to leasehold land; the query remains. It is, however, possible that the contractual terms of many leases would have the effect of transferring the burden of making any payment from the freehold/landlord to the tenant.
- 11. The uncertain position of leasehold property could pose particular problems in the case of shared ownership, generally used for social housing. The "staircasing" provisions operate to transfer the beneficial ownership by stages from the social landlord to the occupying tenant. However, it may be that chancel repair liability could exclusively fall on the landlord, even when the tenant already has a substantial interest in the property.
- 12. Necessarily, the effect of chancel repair liability on commonhold property is unknown, because that form of ownership is only just being adopted. A commonhold unit is freehold, but it is of the essence of this new form of ownership that one commonhold unit will often be built on top of another, so that in effect both occupy the same area of land.

History

- 13. The history of this liability is merely of interest as a matter of background. It may be ascertained from Legal Records Information Leaflet 33, Chancel Repairs (available at www.catalogue.nationalarchives.gov.uk/Leaflets/ri2251.htm) or Law Commission Working Paper No 86 (1983), the relevant parts of which are reproduced as an appendix to the Law Commission report Liability for Chancel Repairs (1985). The commission report Liability (1985). The commission rep
- 14. Before issuing its report, the Law Commission consulted, suggesting that the liability be phased out. The consultation showed that those concerned with conveyancing favoured abolition of chancel repair liability with as little delay

The Law Commission was told of two parishes in the Diocese of Guildford for each of which the annual income was 18p.

⁷ Law Com. No. 152.

- as possible; PCCs whose churches benefited from payments favoured retention. The opinion of other respondents, including those in the Church, was split.
- 15. In 1982, the General Synod of the Church of England passed a resolution approving the principle of phasing the liability out over a period of, say, 20 years. The Law Commission in its report was particularly concerned with "the conveyancing trap", meaning the impossibility of accurately ascertaining when liability exists before contracting to buy a property. The Commission recommended that chancel liability be abolished after a 10 year transitional period.
- 16. The liability was again brought to prominence by the report of the case of Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank.⁹ The House of Lords, reversing the Court of Appeal's decision, held that enforcing the liability did not contravene the Human Rights Act.

Records of liability

- 17. There has never been a comprehensive register of liability for chancel repairs. In many, but not all, cases there are Records of Ascertainment prepared under the Tithe Act 1936. They are held by the National Archives. Searching involves knowing the name of the ecclesiastical parish in which the property was situated at the time of the Tithe Commutation Act 1836. (Presumably, any later re-drawing of the parish boundaries can make this difficult.) If a Record of Ascertainment exists for the area in question, it may record that there was no liability, or that there was a liability. Liability may also arise in other ways, e.g. under private Act of Parliament.¹⁰
- 18. Sometimes, but not frequently, there is a reference to liability in the deeds of a property, 11 and prior to arrangements under the Land Registration Act 2002 there were occasionally records at the Land Registry.
- 19. It may therefore be that, because of the deficiencies in the records, someone acquires land in complete ignorance of a potential liability to pay the cost of chancel repairs. Nevertheless, that is no defence to a claim for payment and they are fully liable.¹²

Present practice

At the request of the Law Society, the Law Commission had re-started its work on this topic in 1981 after a landowner who knew nothing of his liability had to pay a demand for £10,000.

⁹ [2004] I AC 546.

¹⁰ Chivers & Sons Ltd v Air Ministry [1955] Ch 585.

The Law Commission was told of one parish where the deeds referred to a liability even though it had been redeemed. The result was time and money wasted on fruitless enquiries.

Hauxton Parochial Church Council v Stevens [1929] P 240,

- 20. The recent publicity has caused conveyancers who are advising people acquiring land to consider and advise upon the possibility of chancel repair liability. Save in certain specific areas of England and Wales conveyancers need to consider whether it is appropriate to make enquiries in each individual case. Cases of liability are very infrequent, but when there is a demand it can be for a substantial sum.¹³
- 21. A commercial searching service has been established. However, it necessarily suffers from the limitations imposed by the incompleteness of the records. A routine search, described as a low cost screening report for which the charge is £10 plus VAT only addresses the question whether the property falls within a parish where there is chancel repair liability. Even within a parish where the liability exists, the search report does not address the question whether the liability definitely affects the land in question.
- 22. While a firm negative response (no chancel repair liability) is helpful, it is immediately apparent there are severe limitations with the service it is possible to offer. A property may be within a parish where there is some liability, although it does not affect that particular land, or the parish may be one for which there is no record. We understand that, as a result, a substantial number of search results state that the possibility of liability cannot be ruled out. That does nothing to offer any certainty.
- 23. A more comprehensive search of National Archive records relating to a particular property can be commissioned, at a cost of at least £100. It is also possible to conduct a search personally, which may take about a day.
- 24. The suggested solution in case of uncertainty is to insure against liability. More than one company offers specialist cover. In one case, the cost of cover for 25 years varies depending on the size of the property. It starts at £59.88 (rising to £99.88) for residential property and £155.88 (rising to £555.88) for commercial property. That cover does not, however, extend to the insured's successor in title; extended cover is available at higher premiums.
- 25. The policies indemnify the insured against what might have to be paid for chancel repairs (subject to a financial limit). But they do not cover any loss in value of the property resulting from the discovery of a liability not previously known. Nor do they cover damage by terrorism, although there is no reason to believe that this would exclude the property owner's liability to pay for repairs to the chancel.
- Where a property buyer wants insurance cover against a prospective liability, it is a matter for negotiation whether the premium is paid by the seller or the buyer. No consistent practice has yet emerged in the market. The effect is

In the Aston Cantlow case it exceeded £95,000.

We understand that the search data has been compiled from an analysis of the records of ascertainment. We are not clear whether it has been possible to incorporate records from other sources, e.g. private Acts of Parliament, nor whether the effect of redeeming liability is noted. The effect of a deed of relinquishment executed by the Parochial Church Council of the City of Wells, renouncing the right to claims for chancel repairs, has been noted.

- either to increase the cost of the property to the buyer, or to reduce its value to the seller.
- 27. Unsurprisingly, one policy is subject to the express condition that the insured knows of no record indicating that a liability exists. It seems unlikely that any insurance would be available for a property which whose owner has had to make a chancel repair payment, even though there is the prospect of further demands in the future.
- 28. There is a clear danger that when more claims of liability are registered by the Land Registry, those properties will become uninsurable. The result could well be that prospective purchasers faced with a clear notification of future liabilities, advised that there is no limit on the amount payable and that there can be repeated demands, and unable to obtain insurance will not be prepared to accept the risk. It is foreseeable, therefore, that continued chancel repair liability could make those properties unmarketable.

2003 Order

- 29. The consultation paper which preceded the Land Registration Act 2002 recommended that chancel repair liability be retained as an overriding interest, 15 but it was dropped, presumably as a result of the Court of Appeal's decision in Aston Cantlow &c v Wallbank. Following the House of Lords' reversal of that decision, an order was introduced to make the liability an overriding interest for 10 years. 16 In a written answer, Lord Filkin, for the Government in the House of Lords, 17 said,
- The order provides that, for a period of 10 years from the coming into force of the Act on 13 October 2003, chancel repair liability will remain an interest that binds successive owners of land even though it is not protected by an entry in a register kept by the Land Registry.
- 30. It has been assumed in some quarters that the 2003 order will finally solve the difficulties in 2013. This is not the case; the order is unsatisfactory for a number of reasons.
- 31. The conclusive nature of registration no liability can be enforced unless it is registered only takes effect once the property has changed hands *after* 12 October 2013. An appreciable number of properties remain in the same ownership for many years; for them, the uncertainty will persist.
- 32. Church authorities are not compelled to register against all the properties in a particular parish which may be liable. Any such partial registration is intrinsically unjust to those property owners against whose land there is registration. If they receive a claim at present, they are entitled to contribution

Land Registration for the Twenty-first Century, para. 5.37. It was previously an overriding interest under the Land Registration Act 1925, s.70(1)(c).

Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003. Ruoff & Roper Registered Conveyancing suggests, intriguingly, that there is a "nice question" whether that order was intra vires (para 10.039).

House of Lords Hansard, 14 October 2003, col WA111.

from other liable land owners. If that liability to contribute is cancelled by non-registration, the order and the registration does not merely preserve their liability, it increases it.

- 33. The Order addresses the difficulty which arises from the defective records. But it leaves the liability in place, so it does nothing to solve the problems caused by the unpredictable and unlimited liability.
- 34. There are also technical objections which may be raised. There can be no occasion to raise such arguments until the liability ceases to be an overriding interest in 2013, and therefore they cannot be tested until then.

The Land Registration Act does not make an unprotected interest void (Ruoff & Roper Registered Conveyancing, para 42.003). Rather, lack of protection by the registration of a notice will, after the liability ceases to be an overriding interest, make it lose priority over a registered disposition for valuable consideration (Land Registration Act 2002, s.29). The effect of this is far from clear. In context, priority normally has one of two meanings: either the order in which transactions are to be implemented, or the order in which charges are to be satisfied. Neither of these seems to apply. When chancel repair liability actually results in a claim against the owner, there is no transaction to be registered, and there is no charge. It therefore seems likely – although, necessarily, there is no authority – that lack of protection on the register will have no effect on the enforcement of any claim.

Maintaining parish churches

- 35. Presumably, chancel repair liability makes a valuable contribution to the maintenance of some parish churches, and because of the ancient origin this charge the majority of them are likely to be among the oldest. Unfortunately, the Church Commissioners' Policy Unit is unable to say how much money is collected from landowners for the repair of chancels as the figures are not collated centrally.
- 36. It is nevertheless a funding source which can be inefficient and inequitable. It may be impractical to separate the need to repair the chancel of the church from the need to repair the rest of the fabric. This can lead to difficulties in enforcing this liability if there is no money for the other repairs. The enforcement can lead to local disputes, and if the landowner with a liability is a prominent member of the local congregation, the PCC may be reluctant to enforce it. As between different parish churches, chancel repair liability may not benefit the one in greatest need nor the one making the greatest contribution to the community.
- 37. Although chancel repair liability originated as a religious obligation, before the foundation of the Church of England, it would today be better regarded as a contribution towards maintaining the national's architectural and historic heritage. To impose the exclusive liability to repair part of a parish church on someone who is not an Anglican, simply because they own a particular property, is a powerful contemporary argument for abolition. There is no comparable private obligation to repair the places of worship of other denominations or other faiths. From Church of England statistics, the percentage of the adult population¹⁹ on C of E electoral rolls were:

1930	13.00 %
1980	4.92 %
2002 ²⁰	3.01 % ²¹

The cause of multi-culturalism, and inter-faith harmony, would be advanced by the Church of England abandoning this anomalous and capricious charge.

- 38. The Church of England's recently launched drive for funds to maintain its churches emphasises that is can ill afford to sacrifice any source of income, and it may be that outright abolition of chancel repair liability, without more, would be contrary to the Human Rights Act. This argues for substituting a more equitable and appropriate form of funding.
- 39. Contributions to the maintenance of many historic churches already come from English Heritage, funded from general taxation. An increase in this provision would be appropriate, because there is an established mechanism

Aged over 15 or 16, depending on the date.

The latest year available.

This figure is increased by the inclusion of those on the electoral roll of the diocese in Europe.

for assessing priorities and arrangements for professional architectural supervision.

40. If an appropriate increase in the money allocated to English Heritage for this purpose cannot immediately come from established taxation sources, consideration should be given to arrangements to spread the burden over the whole property market for a transitional period, until it was assimilated into the general public expenditure arrangements. This interim levy might, e.g. take the form of a small addition to stamp duty land tax.²² or a small levy on Land Registry fees. Spreading the burden in this way would add little to the cost of property – and indeed might reduce it if search fees and insurance premiums were made unnecessary – and avoid the market distortion which can result from chancel repair liability.

This would have the advantage of reliefs and exemptions already established in appropriate cases.

DIOCESAN MEMO DECEMBER 2005 SETTING OUT STEPS OUTLINED BY NICHOLAS THOMAS IN HIS 1ST TALK FOR PARISHES TO INVESTIGATE CHANCEL REPAIR LIABILITY





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"Proclaiming the Word and Work of God"

December 2005

To: Churchwardens

cc: Archdeacons

Chancel Repair Liability

I hope that all of those who attended the talk at the Diocesan Office on Chancel Repair Liability given by Nicholas Thomas on 1 December found it helpful. For those who were not able to attend, Mr Thomas stressed the importance of PCCs appointing an individual or group to make attempts to find out whether any land within their parish has Chancel Repair Liability, before deciding whether to register this right with the Land Registry before 2013. He gave a useful summary of the steps to take as follows:

1. Find the Land

- (a) Enclosure Awards
 - > Public Record Office
 - Domestic Records, Information Leaflet 86
 - hhtp://catalogue.pro.gov.uk/Leaflets/ri2193.htm
 - > County Records Office
- (b) Tithe Act 1936
 - > Record of Ascertainment paragraphs c & d
 - Tithe Maps
 - District Record Maps
 - Original Tithe Apportionments
 - National Archives
 - http://catalogue.nationalarchives.gov.uk

(c) Other Sources

- Memorials in the Chancel
- Local History Books
- > Parish Archives
- > Diocesan Archives
- Former or Long Serving Church Officers
- > Former Incumbents

2. Take Time

- Be thorough
- > Record carefully enquiries made and results found

Registration by the PCC

- Presumption to register
- Pastoral damage limitation exercise
- > Take legal advice on results of investigations
- Minute carefully decisions made and reasons
- > REGISTER

I would suggest that we request Nicholas Thomas to return in, say, 18 months time to meet again with the parishes and discuss any difficulties encountered in carrying out this exercise, as well as to discuss the next stages.

I enclose an amended list of parishes which you will see has been updated since the talk, showing the parishes for which we hold Records of Ascertainments or related documents (although please bear in mind that if your parish is not listed here it does not mean that no record exists elsewhere). I also enclose a copy of the Church Commissioners' letter dated 15 November 2005 setting out a list of chancels in Rochester for which both the Commissioners and the Dean and Chapter are responsible, in case you did not receive this.

Geoff Marsh

Assistant Diocesan Secretary

Document 6

LIST OF CHANCEL REPAIR LIABILITY – RELATED DOCUMENTS HELD BY DIOCESE FOR PARISHES LISTED



ST OF PARISHES TO DATE WHERE THE DIOCESE HOLDS RECORD OF ASCERTAINMENTS (OR RELATED DOCUMENTS) (Non-listing here does not mean that no Record exists elsewhere)

Birling, All Saints (Duplicate TRCN) Brenchley, All Saints Bromley, St Peter and St Paul Chalk, St Mary (TRCR) Cobham, St Mary Magdalene (TRCN) Cudham, St Peter and St Paul East Malling, St James (TRCR) Gillingham, St Mary Magdalene Hadlow, St Mary Hoo, St Werburgh (EDMN) Horton Kirby, St Mary Kemsing, St Mary (TRCN) Leigh, St Mary Meopham, St John the Baptist Northfleet, St Botolph Pembury, St Peter Ryarsh, St Martin Seal, St Peter and St Paul (EDMN) Shipbourne, St Giles (TRCN and EDMN) Shorne, St Peter and St Paul Stoke, St Peter Sutton-at-Hone, St John the Baptist Tonbridge, St Peter and St Paul Tudeley, All Saints (and Capel St Thomas a Becket (TRCN) Wateringbury, St John West Malling, St Mary the Virgin Westerham, St Mary Wilmington, St Michael and All Angels Wrotham, St George (EDMN) Yalding, St Peter and St Paul (EDMN)

Tithe Redemption Commission Record only

Tithe Redemption Commission Notice only

- (TRCR)

- (TRCN)

- (TRCN)

- (TRCN)

- (EDMN)

October 2005 Updated December 2005

PARISHES WHERE CHANCEL TRUST FUNDS EXIST BUT THE DIOCESE HOLDS NO RECORD OF ASCERTAINMENTS

East Farleigh Parish Church Edenbridge, St Peter & St Paul (EDMN) Erith, St John Grain, St James (only Tithe Act 1936 Notice) Rainham, St Margaret Yalding, St Peter and St Paul (EDMN)

Ecclesiastical Dilapidations Measure Notice only - (EDMN)

Document 7

CHURCH COMMISSIONERS' LIST OF LIABILITY ACCEPTED 15 NOVEMBER 2005 AND UPDATED 22 JULY 2009



THE CHURCH OF ENGLAND CHURCH COMMISSIONERS

Mrs Nikki McVeagh Rochester Diocesan Office St Nicholas' Church Boley Hill ROCHESTER Kent MET ISL

Alan Guthrie-Jones
Pastoral Division

15 November 2005

Dear Mrs McVeagh

Chancel Repair Liability: Rochester Diocese

Many thanks for your letters of 12 October and 8 November. I am sorry that you have had to wait so long for a reply but we are having to recheck each and every liability in dealing with queries like yours in the light of developments arising from the Aston Cantlow case.

I enclose a list of chancels in Rochester for which both the Commissioners and the Dean and Chapter are responsible. I spoke to Sue Malthouse at the Chapter Office about this and she was content that I showed the Chapter chancels in my list.

I gather that you are away from the office at present but please give me a ring if I can offer any further thoughts that might help with your forthcoming talk. There have been many developments in this field in the recent past. I have had a brief chat with Geoff Marsh today about this.

I am sending a copy of this letter to Sue Malthouse.

Yours sincerely

Alan Guthrie-Jones

CHANCEL ACCOUNTS ALL Chancels within the Diocese of ROCHESTER

Chancel Ref.	. Chancel Name	CC %	D & C x
25570	ST MARY CRAY	44.50	0.00
27252	OTFORD ST BARTHOLOMEN	65.36	0.00
31593	EYNSFORD ST MARTIN	0.00	100.00
33220	FARNINGHAM ST PETER AND ST	0.00	57.61
36308	DARENTH ST MARGARET	100.00	0.00
36477	WILMINGTON ST MICHAEL	100.00	'0.00
39020	SHORNE ST PETER AND ST PAU	0.00	70.99
40360	LAMBERHURST ST MARY	0.00	93.00
40753	AYLESFORD ST PETER	0.00	99.89
42362	WEST FARLEIGH ALL SAINTS	0.00	100.00
42568	ORPINGTON ALL SAINTS	44.50	0.00
43556	BROKLEY ST PETER AND ST PA	0.0	0.00-
45243	HOO ST WERBURGH	0.00	91.20
46028	STROOD ST NICHOLAS	100.00	0.00
46186	HALLING ST JOHN THE BAPTIS	0.00	30.19
51600	SHOREHAM STS PETER & PAUL	100.00	0.00
63352	FRINDSBURY ALL SS	99.58	0.00
63563	SUTTON AT HONE ST JOHN	100.00	0.00
67132	WEST PECKHAM ST DUNSTAN	100.00	0.00
67366	ALLHALLOWS AT HOO	0.00	100.00
71939	DARTFORD HOLY TRINITY	100.00	0.00
75418	STOKE ST PETER	50.43	0.00
80444	MEOPHAM ST JOHN THE BAPTIS	0.00	65.81
1738	DOWNE ST MARY	44.50	0.00
96642/31	ROCHESTER CHAN INS	0_00	100 00



RECEIVED
24 BJL 2009

Mrs N S McVeagh Legal Liaison Officer Rochester Diocesan Office St Nicholas Church Boley Hill ROCHESTER ME1 1SL Alan Guthrie-Jones Special Projects Manager

COMMISSIONERS

Pastoral and Closed Churches Department

THE CHURCH OF ENGLAND

Our ref: 14485/31

CHURCH

22 July 2009

Dear Nikki

Rochester Chancels

As promised all too long ago, I enclose a copy of a cd which sets out our present position on both Commissioners' and Dean and Chapter chancels in Rochester. I cannot at this stage vouch for the 100% accuracy of this material because we have not finalised all our checking. This might take some years. We are also in discussions with a number of other Departments here (including our Legal Office and Property Investments Department) as to what the Commissioners' policy on chancels affected by land should be by October 2013 when the key provisions of the Land Registration Act 2002 come into effect. So this letter has to be without prejudice to our right to vary any acceptances of chancel liability.

You will be aware of the broad provisions of the Land Registration Act 2002 but, in the briefest terms, any tithe liabilities coming under Categories 4 (c) and (d) of the Tithe Redemption Commission's Records of Ascertainments and any pure land (i.e. non-tithe based) liabilities will need action under the 2002 Act. PCCs will need to take steps to identify the land to which the liability relates and then to either (a) enter a caution (of chancel repair liability) against the first registration of unregistered land; or (b) enter notice of the liability against the land in the case of registered land. This should be done by 13 October 2013 and the Land Registry will not charge a fee.

If the liability is not registered by 2013, liability is still enforceable against the then owner of the relevant land until he or she disposes of the land. It is only a successor in title who is freed from the liability unless in the interim the liability has been registered (for a fee) post October 2013.

To summarise the basic contents of the material on the cd, the summary sheet for each case is a snapshot of our current position per case. The notes' box is important, and aims to flag up in particular where further PCC action is needed under the new(ish) provisions of the Land Registration Act.

Any case where supplementary action is needed (where it relates to the work of the Tithe Redemption Commission) has a supporting schedule aimed at helping PCCs identify the land they need to register the liability against. In other words, it is a copy of

Church House, Great Smith Street, London, SW1P 3AZ

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Website: www.ccpastoral.org

our TRC records for the case in question.

There are a few cases (such as Strood St Nicholas) where action is needed before 2013 where there is no supporting paperwork. This is because the liability is based on "pure" land, and not tithe-related land.

You may want to invite the relevant PCCs to contact the National Archives Office at Kew (see http://www.nationalarchives.gov.uk.) with regard to establishing whether they can help plot the relevant tithe field numbers against a modern map with a view to the PCC seeking to register the liability against the land. If PCCs do not take steps to register these liabilities, then the ability to enforce these elements (only) of the liabilities will no longer be open to PCCs where there is a change of ownership of the subject land after October 2013.

Another suggestion is that PCCs contact the County Records Office to see if they can help.

I hope that this helps.

Kind negards

Yours sincerely

Alan Guthrie-Jones







INVESTOR IN PEOPLE

PLEASE NOTE: with effect from 27 April 2009
Registered Office address changed to
Diocesan Office (as below)



Nikki McVeagh LL.B (Hons), LLM E-mail: nikki.mcveagh@rochester.anglican.org (Mon,Tues 8.30am to 3.30pm) Direct Dial No: 01634 560004

Our Ref: NM/ps

September 2009

To: Churchwardens of parishes where the Church Commissioners/Dean and Chapter of Rochester Cathedral accept Chancel Repair Liability (CRL):

St Peter Aylesford

St Margaret Darenth

Holy Trinity Dartford

St Peter and St Paul Downe

St Martin Eynsford

St Peter and St Paul Farningham

All Saints Frindsbury

St John Baptist Halling

All Saints Allhallows

St Werburgh Hoo

St Mary Lamberhurst

St John Baptist Meopham

All Saints Orpington

St Bartholomew Otford

St Peter and St Paul Shoreham

St Peter and St Paul Shorne

St Mary Cray

St Peter Stoke

St Nicholas Strood

St John Baptist Sutton-at-Hone

All Saints West Farleigh

St Dunstan West Peckham

St Michael and All Angels Wilmington

You may recall that in November 2005 there was a letter from the Church Commissioners setting out the extent of CRL that they and/or the Dean and Chapter of Rochester Cathedral accepted for certain parishes, and a further copy is enclosed.

The Church Commissioners have now updated their position on CRL and sent us a CD including each parish for which they and/or the Dean and Chapter hold responsibility. I am enclosing the relevant information for your parish, together with a copy of the Church Commissioners' covering letter.

Diocesan Office, St. Nicholas' Church, Boley Hill, Rochester, Kent ME1 1SL Tel: 01634 560000 Fax: 01634 408942 e-mail: enquiries@rochester.anglican.org

You will see that the Church Commissioners have set out action lists for parishes, and you will no doubt wish to consider these alongside the researches which parishes such as yourselves with actual or potential CRL should now be carrying out. The date for registering CRL is October 2013. If you have not yet started your investigations you may like to refer to the National Archives Leaflet 33 on CRL which can be found at:

www.catalogue.nationalarchives.gov.uk/Leaflets/ri2251.htm

You may also wish to consult the solicitor who has been assisting parishes with CRL, Nicholas Thomas of Blain Boland & Co, The Green, Neston Road, Willaston, NESTON, Cheshire CH64 1RA, Tel: 0151 327 1301.

e-mail: Nicholas.thomas@blainboland.co.uk.

Nikki McVeagh (Mrs)

Legal Liaison Officer

Document 8

ENGLISH HERITAGE LETTER 23 NOVEMBER 2006







Mrs McVeagh, Legal Liaison Officer

Diocese of Rochester

Diocesan Office

St Nicholas Church

Boley Hill

Rochester ME1 1SL

Our ref:

PRP/332 pt 2

Your ref:

NM/ps

Telephone

020 7973 3707

Fax

020 7973 3249

23 November 2006

Dear Mrs McVeagh

CHANCEL REPAIR LIABILITY

Thank you for your letter dated 23 October 2006 which was forwarded to me by our South East regional office.

Under the Repair Grants for Places of Worship scheme English Heritage and the Heritage Lottery Fund do not offer grants for repair works to a chancel where there is a known chancel repair liability. Following the House of Lords decision about Aston Cantlow in Warwickshire in June 2003, we understand that the repair liability of lay rectors is confirmed and that an individual lay rector can be held liable for all of the cost of works, even where more than one lay rector exists. We would not expect the grant scheme to cover repair liabilities which did not lie with the applicant.

We understand that the Church of England nationally is advising dioceses and parishes that the liability of lay rectors should be enforced and registered in line with the Land Registration Act 2002 (as amended). Voluntary non-enforcement would seem to go against this principle. Furthermore, it would store up a potential extra burden on an already overloaded grant scheme if a policy of non-enforcement were coupled with one of non-registration of liability.

We make no distinction between institutional and other lay rectors where the liability is split. In cases where the liability is split between the PCC and one or more lay rectors, we would of course treat as potentially eligible the PCC share of the repair costs. In your example, a parish with liability divided between the Church Commissioners, who hold 93% and at least 30 other lay rectors who hold the remaining 7% between them, we would not consider making a grant to the parish, since we would expect the Church Commissioners and the other lay rectors to be able to cover the costs. However, if 93% of the liability was held by the PCC and 7% by other (private) owners, EH/HLF would assess whether the parish had a grant requirement on 93% of the cost of the necessary repair works.





We would not consider an application from a lay rector (or lay rectors jointly) under the *Repair Grants for Places of Worship* scheme. This is for two reasons. Firstly, we can only offer grants to the owner of the place of worship, which must be a formally constituted religious organisation using the building for worship. Lay rectors would not fulfil this ownership criterion. Secondly, and just as important for us, lay rectors would not be able to satisfy the contract conditions, which guarantee religious use of the building, public access and maintenance.

Yours sincerely

1.E. Weston

Tania Weston Grant Programmes Manager Advice & Grants Team

E-mail: tania.weston@english-heritage.org.uk

cc. Jane Stribbling, Casework Officer, South East region Charlotte Dodgeon, Programme Co-ordinator, Heritage Lottery Fund



Document 9

HIGH COURT CASE 15 FEBRUARY 2007 WALLBANK – "WIND AND WATERTIGHT" NOW "SUBSTANTIAL REPAIR"

Case leaves lay rectors with higher bill

by Shiranikha Herbert Legal Correspondent

A LAY RECTOR'S chancel-repair obligations went further than an obligation merely to put the chancel into wind- and watertight repair, the High Court ruled on Monday. It was an obligation to put the chancel into substantial repair.

In a claim brought by the Parochial Church Council of Aston Cantlow and Wilmcote with Billesley in Warwickshire, Mr Justice Lewison ordered the lay rectors Gail and Andrew David Wallbank to pay the sum of £186,969 plus VAT in respect of the cost of repairs to the chancel of the Church of St John the Baptist, Aston Cantlow in the diocese of Coventry.

Mr and Mrs Wallbank own land that is classified as rectorial land, making them lay rectors of the parish with liabilities under the Chancel Repairs Act 1932. In 1994, the PCC tried to recover the sum of £95,260.84 from the Wallbanks as the estimated cost of chancel repairs. The Wallbanks launched a legal challenge, alleging that the chancel-repair liability was a breach of their human rights.

After hearings in the High Court and the Court of Appeal, the House of Lords unanimously ruled that the chancel-repair obligations of lay rectors did not operate in an unfair or arbitrary way, and did not amount to a breach of their human right to peaceful enjoyment of their possessions. Mr and Mrs Wallbank were therefore held to be liable to pay for chancel repairs.

The sole issue for determination by the High Court in the current proceedings was the extent of the Wallbanks' liability for the repair of the chancel steps. A church architect, John Jones, had been appointed as joint expert instructed by both parties. He produced a report listing the works required, and those works were costed by a jointly instructed quantity surveyor.

Mr Jones said that all the items listed were necessary except for internal decoration of the walls and ceiling. He said that temporary repairs would not be sufficient, and that it was for the person carrying out the repairs to decide how they should be done.

Mr and Mrs Wallbank said that the church was behaving unfairly, and that Mr Jones had recommended too good a job — a Rolls-Royce service. They disputed the scope of their liability, which they contended was not unlimited, and was limited to keeping the chancel wind- and watertight.

The judge, however, rejected the Wallbanks' contentions, and said it was not the law. The obligation was to put the chancel in substantial repair without ornament.

The judge allowed all the items

claimed except for £25,000 for contingencies, because he was not satisfied that that was necessary, and £3500 for the costs of the surveyor's report.

The amount payable now was considerably more than the amount claimed in 1994, because of the deterioration of the chancel since proceedings began.

Obliged to pay: Andrew and Gail Wallbank outside the High Court after losing their legal fight against liability for chancel repairs



Religious Obligations

The Parochial Church Council of Aston Cantlow and Wilmcote with Billesley, Warwickshire -v- A and G Wallbank [5 February 2007] High Court

The Message:

A property owner was required to pay substantial sums to a Church Council for the repair of the chancel of its parish church.

The Case:

Mr and Mrs Wallbank were the owners of Glebe Farm in the Parish of Aston Cantlow. They were amongst the lay rectors of Aston Cantlow, which meant that they owned property that had once belonged to the rector of the Parish. The Cantlow case has become synonymous with the issue of chancel repair liability with the Wallbanks' battle to resist the imposition of liability on them, as lay rectors, to pay for the repair of a chancel of the parish church. Their argument that the imposition of such a liability on them was incompatible with the Human Rights Act 1998 went all the way to the House of Lords, where they lost. The Wallbanks were, therefore, liable for the chancel repair.

Following the House of Lords' decision, the task for the High Court in this case was to assess the amount for which the Wallbanks were liable in respect of the chancel repair.

The Wallbanks' principal argument was that a lay rector's liability was limited to keeping the chancel wind and watertight. The High Court analysed the common law and legislation, which referred to "the sum required to put the chancel in proper repair". The Court concluded this was inconsistent with Wallbanks' position.

Having rejected Wallbanks' interpretation, the Court's task was to determine the sum that appeared to the Court to represent the costs of putting the chancel in proper repair.

The Court considered that "proper repair" necessarily meant more than simply wind and watertight. On the joint instructions of the parties, a member of RIBA was appointed to provide a report on the chancel's condition. He did not believe that temporary repair was a satisfactory solution and the costs for the repair of the chancel were estimated by a surveyor at over £215,000 plus value added tax.

Whilst the Wallbanks did not in principle dispute the report, they argued that a "Rolls-Royce job" was recommended when a more limited works programme would have been enough. The Wallbanks said that the Church ought to act in accordance with its own teaching and "temper the wind to the shorn lamb". They argued that the liability for chancel repairs was anachronistic and unfair. What was a liability once intended to keep the chancel in a state in which the incumbent could celebrate the Holy Office has become a means of keeping up parts of the national heritage to high standards at the expense of a few landowners.

However, the Court stated that it must apply the law as it finds it. Also the Wallbanks did not propose an alternative scheme of works. The Court disallowed part of the costs but gave judgment against the Wallbanks in the sum of almost £187,000 plus any VAT together with the Parochial Church Council's costs.

This case highlights an issue that is currently causing some controversy in the property industry, namely the potential liability of certain property owners because of the location of their properties to contribute towards the repair of the chancel of parish churches.

Document 10

DIOCESAN MEMO AUGUST 2010 WITH NICHOLAS THOMAS' INTERIM REPORT AND ADVICE ON CHANCEL REPAIR LIABILITY BY MARK HILL QC

Memo

To:

Churchwardens of Pre-Reformation Churches

Ref: NM/ps

CC:

Archdeacons

Deputy Diocesan Secretary

From:

Legal Liaison Officer

Date:

31 August 2010

Chancel Repair Liability (CRL)

I have recently been receiving news of several difficulties being encountered by parishes as they carry out their investigations into CRL.

I therefore requested Nicholas Thomas of Blain Boland Solicitors, who has been assisting parishes in their CRL investigations, to consider all of these issues and write an Interim Report on CRL which is now attached. Where as a parish you have appointed someone to make CRL investigations, please could you ensure a copy of this Memo is forwarded to them.

A number of parishes (23) have contributions to CRL from the Church Commissioners, and I wrote to you about this in September 2009. Please could I draw your attention to paragraph 9 of Nicholas' Interim Report and request that you let me know if you would like to attend a Diocesan Workshop.

Further, as many of you may know, we have been awaiting advice from Mark Hill QC who has been instructed by Nicholas Thomas over a very technical point that had arisen in relation to Section 1 of The Tithe Act 1839. Had the argument raised been successful then it would have severely limited Lay Rectors' liability and put in doubt the necessity for registration of CRL with the Land Registry. Mark Hill has, however, rejected the validity of the argument, so we are now back in the situation where the advice is that parishes should continue to carry out their investigations with a view to registering before October 2013, or making an application to the Charity Commission under s.29 Charities Act 1993, as some parishes have already done. Nicholas Thomas has included in his Interim Report a précis of Mark Hill's Opinion, and this is also being put on the Diocesan website.

I would reiterate what Nicholas has said in paragraph 10 of his Interim Report, that the Diocese is keen to assist parishes, in particular regarding any media interest provoked by registration, and to that end I will be arranging a further meeting in November for CRL parishes at the Diocesan Office involving Nicholas Thomas to ensure parishes act together in this regard. I will be in contact with you again after the summer.

Pan Sreele

Nikki McVeagh

Interim Report

Chancel Repair Liability

This is an interim report based upon the consideration of the results of the enquiries and investigations that have arisen from parishes in the Diocese of Rochester who may have lay rectors.

It should be read in conjunction with the two previous presentations I have given and the handouts distributed on those occasions. It should especially be considered with the memorandum I produced on 4th December 2007 which arose after the learned opinion of the Legal Advisory Commission and addressed the PCCs' decision making process.

1. Liability

At the outset it is worth repeating that the Chancel Repair Liability ("CRL") which is being considered is that which attaches to land. That land is identified by reference to the Record of Ascertainments as has previously been explained in the two lectures. The liability continues until 13th October 2013 whether or not the land is sold. If the land is sold after 13th October 2013 the liability is extinguished unless a notice of the liability has been entered by the parishes on the land register appertaining to the land in question.

Liability can be enforced without registration, but after 13th October 2013 only if the landowner acquired the land before that date.

Not all liability is land-based. It is only land-based liability with which we are concerned currently. Some CRL vests in various ecclesiastical foundations and that liability remains.

There is no obligation upon a lay rector, even the Church Commissioners, to disclose land which has the liability. It is up to the parishes to investigate. Not to take any steps to investigate would, in the light of the Legal Advisory Commission's report, be reckless.

2. Whether or not to register

This decision vests with the PCC. They must decide and they must minute their reasons. I would particularly refer back to my memorandum of 4th December 2007 on this point.

The members of the PCC should remember that if their individual PCC is registered as a charity then they are trustees of a charity. If it is not actually registered then they still have the same duties as trustees of a charity. If they decide not to register, the **ONLY** safe course of action is for them to apply under the Charities Act 1993 for formal advice under Section 29 of that Act that the decision not to register is reasonable in the circumstances.

If a PCC makes a decision not register without that approach or seeks Charity Commission consent which is rejected, then they are at risk and must make that decision with their eyes open.

Nobody can safely advise a PCC to decide not to register when a proper facility exists through the auspices of the Charity Commissioners to endorse or reject that decision.

3. Grounds for permission not to register

Again I would refer to my previous memorandum. Everybody is very much on a learning curve, but so far it has become apparent that the Charity Commissioners do treat each application individually. They do not accept that they are creating a precedent. However, at least two parishes with a small percentage of CRL have obtained consent under Section 29 not to register. Percentage of liability is therefore something that the Charity Commissioners do take into account.

The Charity Commissioners have also rejected the argument that registration is adverse to the object of the charity i.e. that registration would have an adverse effect upon promoting the mission of the church. This is notwithstanding the comments of the Legal Advisory Commission.

An argument yet to be tested, but one which may well have merit, is that the costs of registration exceed the benefit. Obviously this argument becomes more difficult to sustain the higher the percentage of liability, but it must be worth serious consideration. Such an application would need to be supported with a lot of detail and costings. I have seen one application that failed but I suspect (and here I mean no disrespect whatsoever to those who drafted the application) that the wording of the application was not perhaps as pertinent to the ground of the application as it might have been. Even that parish would not be precluded from applying again. Somebody is going to have to consider making a test application on this point.

4. Consequences of not registering

- (a) Loss of income to meet repairs.
- (b) Potential loss of other funding from bodies like English Heritage.
- (c) Action for breach of trust.

None of these consequences would arise if a Section 29 consent were given.

5. Actions for breach of trust

This is a very difficult area upon which to advise but broadly there would seem to be two possible groups who could bring a claim:-

- (i) The Charity Commissioners if the breach were reported to them. They do have statutory authority to take action against trustees who commit a breach of trust. Whether they would do so remains to be seen.
- (ii) A Beneficiary. These are also difficult to define but could well include a disgruntled parishioner who felt that the PCC's inaction had caused loss to the parish. It could be a reason for a troublemaker or someone with a grudge to give the parish a hard time.

6. Who will be liable?

PCC members who made the decision, but possibly future PCC members aware of the decision who took no steps to change it. One obvious consequence of this is that people could be reluctant to join PCCs.

7. Chancels currently needing repair

There is no need to register before taking action. A demand could be made from a lay rector now. Obviously the parish must be able to prove the lay rector's liability. If the lay rector refused payment, then an action lies in the County Court.

If a PCC is seeking to enforce against a lay rector either before or after registration it must comply with the provisions of the Chancel Repairs Act 1932. Before any work has been undertaken to the Chancel the PCC must serve upon the person they believe to be liable to repair the Chancel (i.e. the lay rector) a notice in a form prescribed by the Civil Proceedings Rules and Practice Directions of the County Court. The notice has to do certain things:-

(a) It must state:-

- (i) the responsible authority by whom the notice is given (i.e. the PCC);
- (ii) name the Chancel alleged to be in need of repair (i.e. which church is being referred to);
- (iii) the repairs alleged to be necessary; and
- (iv) the grounds on which the person to whom the notice is addressed is alleged to be liable to repair the Chancel (this means that the notice should show why it is that the recipient is a lay rector).
- (b) The notice then has to call upon the recipient to put the Chancel in proper repair.

After a period of one month from the date on which the notice is served (and the court has rules about how service is to take place) the PCC may then, if the Chancel has not been put in proper repair, bring proceedings against the lay rector to recover the sum required to put the Chancel in proper repair.

There is a proviso that the PCC can at any time after the notice has been served apply to the court to satisfy the court that the Chancel is in such urgent need of repair that the PCC may bring proceedings before the expiration of a month and also start to commence to repair the Chancel without prejudicing their claim. Clearly a Chancel would have to be in very bad condition for this to have a chance of success as the period of one month is not very long.

8. Choosing to enforce against some lay rectors only

Liability within a particular area is joint and several. So if field no. 1 has x percent liability and there are 10 houses on it, each house is liable for the full 10 percent, not x/10 percent. It is possible, therefore, to choose against which part of the land to register or against which lay rector to make a claim now. A lay rector could seek indemnity from other jointly liable lay rectors.

9. Chancel Repair Liability of the Church Commissioners

Parishes with contributions to CRL from the Church Commissioners need to check their Record of Ascertainments. Any part of the liability shown in paragraphs (a) and (b) of the Record of Ascertainments is not land based and requires no further action. However, if those parishes have liability shown in paragraph (c) or (d) then, even if hitherto the Church Commissioners have accepted liability for that element, action is required. The land must be identified following the procedure advised in previous presentations, and if it still belongs to the Church Commissioners the parish should register. If it does not belong to the Church Commissioners the parish will have to decide how to proceed as referred to in paragraph 2 of this paper.

If parishes with substantial Church Commissioners' liability have not previously attended any presentations where the procedure for identifying land disclosed in a Record of Ascertainments has been explained, then I understand that another Diocesan Workshop will be arranged to explain these practicalities.

10. Adverse consequences of registration

- (i) Parishes must be sure of their facts. If there is any doubt that land is liable because of vague boundaries then no registration should be attempted against that parcel. No trustee could be criticised for not registering where there was reasonable doubt.
- (ii) If an application to register is made the landowner will have an opportunity to challenge it, so accuracy of information is essential.
- (iii) A dispute which the Registry could not resolve would be adjudicated upon by the Land Registry Tribunal. It has powers to order costs against unsuccessful parties.
- (iv) Pastoral fallout. This is the greatest concern and indeed is probably behind the feelings of those parishes who feel they do not want to register because it would have an adverse effect upon their ministry and mission. Where there is concern about pastoral fallout, before any registration takes place the parish should be ready with a press release in case of adverse reaction. I am sure that the Diocese will not leave individual parishes exposed. I would strongly urge that a press release is prepared at a Diocesan level. It might even be the case that any reaction to registration is directed toward the Diocese who should handle the concern at Diocesan level to minimise the adverse effect locally. Although registration has to be a parochial decision, the Diocese needs to be seen to be behind the parishes on the point and that of itself could minimise pastoral damage.

The Advice of Mark Hill Q.C.

Mr. Hill was asked to advise whether the contribution of a lay rector was limited to the amount of rentcharge payable from out of the tithe field based upon an interpretation of the Tithe Act 1839.

His conclusion was that there is little direct authority on the point, but he did not accept that it was accurate to accept such a limitation for the following reasons:-

- 1. A Record of Ascertainments is not there to limit the amount of liability but to indicate what liability particular parcels of land have.
- 2. The limitation is unworkable because it is unclear whether it is limited to an annual rentcharge value or an accumulated annual value over an unspecified number of years before a demand for payment was made.
- 3. The view has been rejected by the Law Commission.
- 4. The case of Wickhambrook PCC -v- Croxford dating back to 1935 states that liability is not so limited although Section 1 of the 1839 Act was not actually under consideration.
- 5. It is a misreading of the 1839 Act to interpret it this way.

Mr. Hill felt that unless there was a test case on the specific point the idea of limitation was misconceived.