

## LEGAL ADVISORY COMMISSION OF THE GENERAL SYNOD

### 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*<sup>1</sup>, which upheld the enforceability of chancel repair liability, the Lord Chancellor made the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003<sup>2</sup>, 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 13<sup>th</sup> 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 charities<sup>3</sup> and are accepted as such by the Charity Commission. Their members are in a position analogous to that of a trustee of 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.<sup>4</sup>

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<sup>1</sup> [2004] 1 AC 546

<sup>2</sup> SI 2003/2341

<sup>3</sup> See eg Lord Scott in *Aston Cantlow*, [2004] 1 AC 546 at 589.

<sup>4</sup> *Re Snowden* [1979] Ch 528

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.<sup>5</sup> 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 enforce chancel repair liability, again by reference to general principles of trust law.
11. In *Harries v Church Commissioners*<sup>6</sup> it was held that the normal duty to invest the funds of a charity in a way that produced the maximum financial return consistent 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*".<sup>7</sup>
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

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

<sup>6</sup> [1993] 2 All ER 300

<sup>7</sup> [1993] 2 All ER 300 at 304 per Sir Donald Nicholls VC

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 enforcement 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 Church<sup>8</sup> or by alienating potential financial support. (For example, even registering a caution<sup>9</sup> or notice against all the owners of houses on a newly built estate in the parish<sup>10</sup> 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* case<sup>11</sup> that

*"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.

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<sup>8</sup> 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".

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> [2004] 1 AC 546 at 591. However, none of the other four Law Lords expressed support for Lord Scott's view.

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’<sup>12</sup>. 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 several<sup>13</sup>, so that it can be enforced against any 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

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<sup>12</sup> That is, the diocesan board of finance or other body acting as trustee of diocesan property

<sup>13</sup> See footnote 10 above.

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.

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.

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