

Chancel repair liability

We have largely avoided the issue of the enforcement of liability for chancel repairs on the grounds that it is exclusively a matter for the Church of England and the Church in Wales. In view of recent developments, however, we thought a note might be helpful – though this is one of the rare occasions on which we ought to remind readers that, while we take care to make sure that the material in Circulars is as accurate as we can make it, ***this note does not constitute legal advice.***

Though the liability of lay rectors for chancel repairs was originally one at common law, Parliament made a conscious decision to confirm its validity by passing the **Chancel Repairs Act 1932**; and that Act, as amended by the **Land Registration Act 2002**, is the current law. The **Land Registration Act 2002 (Transitional Provisions) (No.2) Order 2003** provides that chancel repair liability will continue to be an overriding interest for a period of ten years from **13 October 2003**. The issue came to the fore largely as a result of the judgment in ***PCC of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank & Anor* [2003] UKHL (26 June 2003)**.

Each Church of England parish is a charitable trust of which the members of the Parochial Church Council are the trustees *pro tem* – which means that they are under an obligation as a matter of charity law to act in the best interests of the trust. The policy of English Heritage has been that it will not provide grant aid to a PCC in respect of repairs to the chancel of a church where there is a lay rector who is responsible for its repair. However, with effect from **1 April 2013** responsibility for grants for places of worship is to be taken over by the Heritage Lottery Fund (HLF); and HLF has made the following statement about its policy in relation to enforcement:

"One of these key alterations to the grants repair scheme to be introduced from 01/04/2013 will be the way in which we assess financial need. Whilst we will still look at the value for money applications offer, we will no longer follow the highly detailed financial needs assessment model as currently used. *Neither will we continue with the blanket policy that considers chancel repairs where there is a lay rector to be outside the scope of grant aid.* Instead, we will take account of the financial needs of the applicant with regard to future development plans for the long-term sustainable use of the building. We will also be realistic about their ability to fund-raise, and therefore we will not encourage the PCC to pursue chancel repair liability on occasions *where it is evidently unreasonable for them to do so.*" [emphasis added].

To lose potential grant as a result of failing to register an interest with the Land Registry and/or refusing to enforce the liability might conceivably be regarded as a breach of trust; however, the change of policy from 1 April 2013 will presumably lessen the likelihood of that happening.

In August the BBC reported that the Charity Commission had told the PCC of St Eadburgha's, Broadway, that it would not be obliged to enforce chancel repair liability; however, the BBC quoted a spokesperson for the Commission as follows:

"The advice was given based on the particular facts of this case and not as a matter of general precedent, since the circumstances relating to decisions of PCCs about registering or enforcing chancel repair liability will vary considerably from case to case. We are not endorsing the decision itself, nor are we granting trustees permission to do something beyond their existing powers, we are simply providing additional assurance that the trustees' decision was reasonable given the charity's circumstances."

The carefully-balanced opinion of the Legal Advisory Commission of the General Synod, *Enforcement of chancel repair liability by PCCs* dated October 2007, is still on the *Legal opinions and other guidance* section of the Church of England website – and presumably still stands, at least for the moment. It is somewhat guarded as to how a PCC that does not propose to register or enforce liability should proceed:

“15 ... [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.”.

The decision about St Eadburgha’s was not accompanied at the time by any kind of written statement from the Charity Commission either on the Internet or elsewhere (the priest-in-charge, Shellie Massey, kindly confirmed the accuracy of the BBC’s report in an e-mail); but the Commission has now posted *Parochial Church Councils and chancel repair liability* which sets out its current thinking.

The Commission concedes that it is not expert in this area of the law and suggests that

“...PCCs should read the opinion of the Legal Advisory Commission of the General Synod for further information. **Key questions and answers** are also available on the Church of England’s website. A PCC may wish to consult its diocesan registrar and/or take its own professional advice. Diocesan websites can also offer valuable guidance”.

The Commission does, however, set out a useful framework for trustee decision-making which, in the Commission’s opinion, should help PCC members to act in accordance with their legal duties. Under the Commission’s framework PCC members must:

- *act within their powers*, which means:
 - *only making decisions which advance, or support activities that advance, their charity’s purpose for the public benefit;*
 - *using the correct procedures*, which may be those set out:
 - under the general law
 - specifically in the charity’s governing document
 - under the established rules and procedures for dealing with issues of the kind under consideration;
- *act in good faith and only in the interests of the charity;*
- *adequately inform themselves;*
- *take into account all relevant factors* (their ‘duty of consideration’) and
- *disregard any irrelevant factors;*
- *make decisions that are within the range of decisions that a reasonable trustee body would make;* and
- *avoid conflicts of interest* (eg where members of a PCC *themselves* live in properties which are subject to chancel repair liability).

The Commission concludes by pointing out that the decision about whether or not to register and enforce chancel repair liability is ultimately a matter for the trustees of the PCC in question and that PCCs are able to take that decision without involving the Commission. *However*, the Commission is

prepared to offer advice to individual PCCs **under s 110 of the Charities Act 2011** and suggests that that can provide additional reassurance for PCC members that they have acted correctly and in accordance with their duties by protecting them against the possibility of any subsequent legal challenge to their decision. The Commission says that it is

“... willing to consider providing such advice where PCCs consider there is a real likelihood of their decision being challenged and they are able to present us with a substantive case explaining how they have reached their decision”.