

# A year in the life

*Amanda Bottaro explains the effect of forthcoming changes in legislation and why property lawyers need to keep a close eye on the approach taken by parish councils*



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**M**any practitioners will be aware that the law relating to chancel repair liability is due to change in October 2013 and may have optimistically assumed that it will no longer be relevant after this date. Perhaps regrettably, this is not entirely the position.

Here we explain the historical background to chancel repair liability, the effect of the forthcoming changes in legislation and why property lawyers need to watch closely the approach being taken by parish councils over the next 12 months to register chancel repair liability.

### **What is chancel repair liability?**

Chancel repair liability arises from ancient rules that allow certain churches to claim the cost of repairing the church chancel (the eastern part of a church, which usually contains the altar) from those who own land previously owned by the church. The liability does not attach to all churches; it generally affects those owned by the Church of England or the Church of Wales, which pre-date the Reformation.

The historic basis for chancel repair liability derives from the payment of 'tithes' to the mediaeval church in question by the inhabitants of surrounding land, or those using the church land, with an attendant obligation on the church to use the tithes in order to meet the cost of repairing the chancel.

The current anachronistic situation has arisen due to the abolition of the right to receive tithes, without the abolition of the associated obligation to contribute toward the cost of chancel repair.

### **Who is affected by chancel repair liability?**

Chancel repair liability attaches to the 4,000,000 acres or so of former 'glebe land' or monastery land; the later subdivision of the land has the effect of extending the liability to all of the freehold owners of the land in question, regardless of its value, or whether the purchaser knew of the risk of liability. However the liability is joint and several and allows the church to pursue any one of those affected for the whole of the amount, leaving that unfortunate person to pursue any others similarly liable for their contributions. The amount that the church may claim is that which is necessary to keep the chancel in repair.

It is estimated that there are over 5,000 parishes in England and Wales that are still affected by chancel repair obligations. One of the problems is that liability is difficult to establish. Prior to the advent of the chancel repair insurance industry, it was customary for solicitors to carry out chancel repair searches only when purchasing land known to be formerly owned by the church, or with tell-tale names

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such as 'Glebe Cottage', 'The Old Rectory' or 'Abbey Farm'. In recent years, the flourishing chancel insurance industry has devised low-cost checks that reveal only whether a property is located within a parish with potential liability. These checks allow for insurance to be put in place on this basis; this is generally cheaper than further investigation regarding the potential liability, which may not be conclusive and, if revealed, are likely to make the property impossible to insure.

**The Wallbank case and calls for change**

There have been several calls for the abolition of chancel repair liability, especially since the widespread publicity resulting from the 2003 decision of the House of Lords in *Aston Cantlow v Wallbank* [2003].

Mr and Mrs Wallbank inherited Glebe Farm in 1970, and were aware at the time that part of the farm land was affected by chancel repair liability attaching to the nearby church of St John the Baptist in Aston Cantlow. In 1994, the Wallbanks received a demand for £95,000 from their local parochial church council (PCC) and, while they did not contest their liability, they argued against it on the basis that it was 'unfair and arbitrary'.

At first instance, the court found in favour of the PCC, and the Wallbanks appealed on the basis that chancel repair liability was an anachronism incompatible with the Human Rights Act 1988. The Court of Appeal found in favour of the Wallbanks and overturned the first instance decision, on the basis that chancel repair liability was indeed an arbitrary form of taxation operating in a discriminatory manner. However, the Church of England, understandably keen to establish the modern

application of the law relating to chancel repairs, duly appealed to the House of Lords. Unfortunately for

of affected land. The Wallbanks were consequently liable to pay repair costs of £186,000, as well as legal costs of £220,000. This

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the Wallbanks, the House of Lords overruled the Court of Appeal and considered that PCCs are able to enforce the liability against owners

decision led to the Wallbanks selling Glebe Farm.

*Wallbank* also clarified the extent of the repairing obligation; it extends beyond

**Effect of the changes brought about by the Land Registration Act 2002**

Current Position	After 13 October 2013
<i>Registered Land</i>	<i>Registered Land</i>
<p>Chancel repair liability is an overriding interest not requiring registration; binds owner of land purchased prior to 13 October 2013 even if not registered.</p> <p>PCCs have been advised by Church to register a unilateral notice at the Land Registry noting the liability prior to 13 October 2013.</p>	<p>Chancel repair liability loses its 'overriding interest' status: registration is required to enforce liability against future purchasers after 13 October 2013. Purchasers paying valuable consideration for the land after this date will acquire the property free from liability if the liability has not been protected by registration.</p> <p>PCCs may still enter unilateral notices after 13 October 2013 provided that the property in question has not changed hands after 12 October 2013.</p> <p>Owners of land on 12 October 2013 continue to be bound by any existing liability until a sale to a third party after this date.</p>
<i>Unregistered Land</i>	<i>Unregistered Land</i>
<p>Liability binds owner of land purchased prior to 13 October 2013.</p> <p>All PCCs advised by Church to register a caution against first registration prior to 13 October 2013.</p>	<p>A PCC may register a caution against first registration after 13 October 2013 only if there has been no change in ownership after 12 October 2013.</p> <p>A purchaser paying valuable consideration for unregistered land after 13 October 2013 will acquire the property free from liability if no caution has been registered by a PCC.</p>

an obligation to make the chancel wind and watertight, and to put the chancel into substantial repair.

### **The Land Registration Act 2002 and 13 October 2013**

Much of the opposition to chancel repair liability stems from its status as an 'overriding interest', which means that the liability binds the property even if there is no record of

This does not mean the end of chancel repair liability: it will only cease for those who purchase affected land after 12 October 2013 and who register the transfer before a PCC attempts to register the liability. Those who continue to own affected land on 13 October 2013 retain the liability (whether or not protected by a notice registered by the local PCC);

then the property may remain bound by chancel repair liability even if the liability has not been registered. Land transferred as a gift or an inheritance will retain any unregistered liability in these instances.

The loss of overriding status means that there will no longer be an obligation on landowners to disclose chancel repair liability to the Land Registry as a disclosable overriding interest on registration. However the knowledge of an actual liability (as distinct from a potential liability revealed by a search) must still be disclosed, as an applicant for first registration is obliged to certify that there are no rights affecting the property not set out in the title documents.

### *Once registered, chancel repair liability will last indefinitely.*

its application at the Land Registry or in the property's deeds. However, this is due to change in October 2013, when the current transitional law relating to chancel repair liability, brought in under the Land Registration Act 2002, comes to an end. The new regime requires PCCs to register any such liability at the Land Registry before 13 October 2013, in order to avoid losing overriding interest status and to bind successors in title.

the liability will only cease where land is transferred to a third party prior to registration of the liability. Once registered, chancel repair liability will last indefinitely.

The effect of the changes brought about by the Land Registration Act 2002 are set out in the table on p19.

It should be noted that properties transferred for no consideration may retain liability: if such a transfer is made after 12 October 2013

### **The Church's current approach: a rush to register liability?**

Are parochial church councils rushing to register chancel repair liability prior to the October 2013 deadline? Guidance recently circulated by the General Synod of the Church of England encourages PCCs to register any liability of which they are aware. However this guidance also looks at whether there are circumstances in which a PCC may decline to investigate whether it is entitled to the benefit of chancel repair liability, and in the event that it is so entitled, decline to either register or enforce the liability. The conclusion of the General Synod is that chancel repair liability constitutes an asset of a PCC, and as a charity, the PCC is obliged to act in its best interests by taking reasonable steps to investigate, register and enforce the liability. Should a PCC fail to do so, not only may its members be in breach of their fiduciary duties to the charity (and personally liable

### Summary

With about 12 months to go until the Land Registration Act changes kick in on 13 October 2013, the position on chancel repair can be summarised as follows:

- With effect from 13 October 2013, chancel repair liability will not affect purchasers of properties where liability has not previously been registered.
- Chancel repair liability will continue to affect existing owners of affected properties after 13 October 2013, whether or not liability has been registered.
- Practitioners should remain alive to whether PCCs are taking steps to register chancel repair liability in the run-up to 13 October 2013 and may wish to advise clients to take out a suitable insurance indemnity policy, which should obviously be before PCCs have registered liability.
- The government has no plans to abolish chancel repair liability. It remains to be seen whether political pressure and the potential availability of Heritage Lottery Funding for church repairs, or other situations where the Charity Commission rules that it would be unreasonable to pursue individual households (such as in the recent Broadway case), may lead to fewer PCCs seeking to register liability.

for any loss caused), but the PCC may render itself ineligible for alternative funding for the repairs from alternate sources; a view endorsed by English Heritage.

Nonetheless, the Church recognises that enforcement of the right may not always be required in cases which would lead to what the Church terms 'pastoral fallout', ie where it is likely to alienate parishioners and members of the public. It is difficult to think of circumstances where the action of registering chancel repair liability against affected properties would not create adverse publicity for the Church, given the potentially devastating effect on the value of the affected land, with the potential for open-ended financial liability against it, following registration. That adverse publicity was certainly of little assistance to the Wallbanks.

It appears that some dioceses may be recommending a compromise solution by advising PCCs to write to those affected to let them know that this may be the case, and advising them to look into the possibility of insurance.

The Church recommends that where a PCC is disinclined to enforce chancel repair liability in a particular instance, it should seek the consent of the Charity Commission for this course of action; if granted, the PCC will be protected against the consequences of its (in)actions. The Charity Commission recently advised the PCC in Broadway, Gloucestershire that it would be reasonable not to enforce chancel repair liability against 30 local residents who received letters from the Church setting out their chancel repair liability relating to the twelfth-century church of St Eadburgha's in Broadway. The Charity Commission stressed that this exemption does not set a precedent and that any future requests will be considered on their own merits.

**Loss of overriding status for other 'sunset' rights**

The loss of overriding interest status brought about by the Land Registration Act 2002 on 13 October 2013 also applies to the other so-called 'sunset rights'. These are generally other ancient obligations which are no longer capable of creation. They include franchises (a form of mediaeval grant from the Crown); manorial rights (rights to hunt, shoot or fish on a particular piece of land

of the transfer. If the land is unregistered, the owner will remain bound by the rights until first registration, unless protected by a caution prior to the date of registration.

**The government's position on chancel repair liability**

There has been much comment about the archaic and potentially inequitable effect of chancel repair liability following the *Wallbank* case, and calls for its abolition. The Law Commission

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which pre-date the Norman conquest); Crown rents (liability attaching to affected freehold land to pay rent to the Crown); non-statutory rights relating to embankments, sea or river walls (proprietary liabilities which have arisen by grant, prescription, custom or tenure), and rights to payments in lieu of tithe (also called 'corn rents').

Any such sunset rights already registered are not affected, so where the register indicates (for example) that land is 'formerly copyhold' and that the relevant manorial rights are reserved, the obligation still binds the land and any further registration is unnecessary. If the applicant cannot produce satisfactory evidence of the relevant right to the Land Registry, the registered proprietor's consent is required to the registration. If the rights are not registered by 13 October 2013, as with chancel repair liability, they do not cease to exist, but any purchaser after 12 October 2013 will acquire the land free from the interest if not registered prior to registration

recommended its abolition as long ago as 1985, and a Law Society submission in 2006 recommended urgent action.

Despite this apparent momentum toward abolition, an online petition in 2008 elicited a response from government that the liability 'has existed for several centuries and the government has no plans to abolish it'. It considered that the loss of overriding status 'strikes a fair balance' between affected landowners and the Church. The government may be reluctant to challenge the interests of the Church of England and, to a lesser extent, the insurance industry, by going on to recommend that parties may mitigate the risk with 'relatively inexpensive insurance'.

It appears that without further legislation, the end of chancel repair liability is not yet completely in sight, and the chancel insurance industry will continue to benefit until its abolition. ■

*Aston Cantlow v Wallbank*  
[2003] UKHL 37