

Chancel Repair Liability

A Law Society Submission

October 2006



The Law Society

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

© The Law Society 2006

Chancel Repair Liability

Summary

1. 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:
 - a) 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 - c) the historical documents recording who is liable are irretrievably deficient
 - d) the result of recent publicity has been to concentrate attention upon the risks for property owners, encouraging precautions which are less than fully effective
 - e) 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
 - i) 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
 - l) 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.

2. 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 land² 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.³ If the property which carries the liability is sub-divided, the owner of every part of it is responsible.⁴ 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

¹ A succinct draft statutory provision was appended to the Law Commission report, referred to below.

² 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.

³ 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.

⁴ 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.

⁵ 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.
10. 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).⁷
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

⁶ 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”,⁸ 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

⁸ 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] 1 AC 546.

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

¹¹ 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.

¹² *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.¹⁴ 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.
26. 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

¹³ In the *Aston Cantlow case* it exceeded £95,000.

¹⁴ 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

¹⁵ *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).

¹⁶ 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).

¹⁷ *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.¹⁸ 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.

¹⁸ 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 it 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

¹⁹ Aged over 15 or 16, depending on the date.

²⁰ The latest year available.

²¹ 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.

²² This would have the advantage of reliefs and exemptions already established in appropriate cases.