Dear Clergy PCC Secretaries and Church Wardens

Chancel Repair Liability

1) We are writing an open letter to all those of incumbent status, to all PCC Secretaries and to all Church Wardens to draw your attention to the issue of Chancel Repair Liability (which for ease of reference we will refer to in this letter as “CRL”). This letter is to be posted on the Diocesan Website, and will be mentioned in visitations by Archdeacons this year. This a complex, indeed arcane, matter to which your PCC should give attention as soon as possible; our suggestion is that it should be discussed at a PCC meeting, and that the decisions taken should be minuted, preferably with a summary of the reasoning, for future reference. We would suggest that this discussion be spread over (at least) two meetings, to allow the subject to be introduced, and then for views to be formulated before final decisions are taken. Assuming that after reading the advice in this letter, the church is one where liability is likely, and that the PCC accepts our advice that the situation should be investigated, then the period in which the PCC must investigate and make its decisions is just short of 18 months. This is easily sufficient for the work to be undertaken, though we do not underestimate the complexity of the work!

2) Unfortunately, the Registry feels that it cannot offer to act for PCCs in relation to actual registrations of the liability, because it is almost inevitable that many clients of the Registrar’s firm (FBC Manby Bowdler LLP) would be found to be liable, creating obvious conflicts of professional and business interest for the Registrar. The firm may well be instructed already or in future by clients to object to registrations. The PCC should therefore seek such legal advice as it requires from another practice. The purpose of this letter is to advise on the background and the ecclesiastical complexities, so that PCCs and indeed any legal advisors advising PCCs have some practical guidance for their work in this difficult and unusual area of law. Our approach is to set out a summary of the background, and then to deal with some obvious questions that arise. We hope that it will be helpful to all concerned. Whilst the matter is considered to lie outside the diocesan retainer we have indicated to the Archdeacons that we will continue to advise them as to these issues so that they can in turn advise you; as and when points of general interest arise, we will try to ensure that they are put onto the website.

Background and brief summary of the basis of CRL:

3) (To give a detailed summary would be beyond the scope of this letter; some abbreviation has been effected to allow the story to be told conveniently rather than with full academic rigour). The
CRL is a benefit that can be relied on by a PCC to support the cost of repairs to parts of some churches. It is a burden that attaches to land holdings; these were likely to have been farm land or forestry originally, and they may now form open farm land, or may now be the location of houses or commercial premises. If a Parish has the benefit of a land based CRL it means that a PCC can currently recoup the whole or a proportion of the costs of repairs to the chancel of the church from a "Lay Rector" who has now become the owner of the land affected.

4) The origins of the CRL lie in pre-reformation times. The rationale was that the priests; sat in and used the Chancel for ecclesiastical duties, whilst the parishioners occupied the Nave. The obligation to repair the church Chancel fell on the priest of the parish, whilst the obligation to repair the Nave fell on the parishioners. In order to fund the liability to repair, and to provide a living for the Rector, the benefice was endowed with lands, and the parishioners were obliged to pay tithes.

5) During the medieval period, the lands, and the rights to receive the tithes, were frequently transferred to institutions such as religious houses (eg monasteries). The institution would then become the Rector, and is known as a Lay Rector, but to enable it to perform the ecclesiastical functions locally, it would arrange for a Vicar to say the daily offices etc at the church. (We get the word "vicarious" from this.) (Incidentally, though, there is an urban myth that churches with a Rector today cannot have the benefit of CRL, for this reason; we stress, it is a myth.) When the religious houses were suppressed in 1539, the lands and tithe entitlements were taken in by the Crown and then sold on, often to different types of institutions, or to private land owners. When the Church land was sold or transferred to such owners these ‘Lay Rectors’ assumed responsibility for chancel repairs upon the transfer of the property. In subsequent sales or transfers (eg through inheritance) the responsibility for CRL passed with the proportions of the land passed onto the successor owners by the Lay Rector. Accordingly, the property which originally carried the burden of CRL may now be split into many different ownerships. Some owners will be institutions, such as Universities or Cathedrals; some will be farmers; some will be industrial conglomerates; and some will be householders. Until one researches the land ownership, one cannot be certain whether the parties liable are wealthy or not.

6) Under the Chancel Repairs Act 1932 a Parochial Church Council has the power to serve a demand on its Lay Rectors for the costs of the repair of the Church chancel. In the event that the owner fails to pay, the PCC can enforce the demand through the Courts. Knowledge of the existence of the liability has tended to be lost over the years for a variety of reasons; amongst PCCs, simply because the CRL issue only arises every couple of generations or so when the Chancel has to be repaired; and amongst landowners for similar reasons, or because the liability is set out in ancient documents, long since lost, or sometimes because although it is known to exist, the landowner does not want to alert the PCC to it!

7) Landowners have taken care to minimise their risk, and because of the potential for the enforcement of the CRL, it has been normal practice over recent years for purchasers of land in places that are perceived as being likely to have such liabilities to be advised to insure against the potential liability. (Obviously, however, there are people who own land who were not advised of the potential, and did not obtain insurance.) There are other landowners who will have known of the potential and who will have negotiated a lower price for the land in view of the liability, and have therefore taken financial advantage of their knowledge. It has to be said that in the famous Wallbank case, the liability was not hidden at all – it was plainly stated in the title deeds.

8) A legal case a few years ago has led to a change in the law, and as a result of the Land Registration Act 2002 (Transitional Provisions) Order 2003, in order for a PCC's interest in a CRL to continue to bind successors to the present owners, the CRL has to be registered at the Land Registry, before 13 October 2013. The CRL has to be registered against the property which is burdened by the CRL. If after 13 October 2013 a purchaser buys land against which a CRL is not registered, the purchasers will take free of the liability. The PCC will have lost the legal right to recover the cost of chancel repairs from the Lay Rector and his successors. That legal right is an asset in the hands of the PCC.
9) (This letter concerns land based CRL; there are some other liabilities for CRL which are not land based (see categories A and B below); if these are found to exist, the PCC does not have to register anything.)

10) As a Charity the PCC has a duty to safeguard and maximise its assets, and collect in all income that is due to it including monies that would be due under the CRL. As trustees, all PCC Members have a fiduciary duty of stewardship of the PCC’s assets including any CRL. The PCC is obliged to protect the valuable rights that the benefit of CRL confers on the PCC, whether or not it has exercised those rights in the past. The Church of England’s Legal Advisory Commission has issued an opinion that each PCC is under an obligation to enquire whether there is any CRL affecting its Parish Church. Added impetus was given to the registration of CRL by an Interim Statement issued by English Heritage indicating it would not give grants for repairs to the extent that a third party (i.e. a Lay Rector) was legally obliged to pay for them; this is something that ought to be considered very carefully – we have no idea whether, politically, they will stick to that line once the registration deadline has passed, and whether, as a result there would be a permanent obstacle to funding.

11) If, notwithstanding these factors, a PCC resolve that having carefully considered their responsibilities they do not intend to pursue registration of CRL against property owners, such a decision might still give rise to personal liability on the part of the members of the PCC for breach of fiduciary duty, and so it should be approached with real caution. The PCC members should therefore take careful note of this responsibility. One of the purposes of this letter is to assist PCCs in their exercise of this task. You will see that at the end of the letter details of the relevant party at the Charity Commission are given, so that the PCC can then write to seek advice and an opinion that would confirm that the Commission would not hold them personally responsible.

12) We are very conscious that some PCCs have approached the Registrar for guidance as to the cost implications of the work required to effect a registration, and as to whether pastoral mission or moral considerations can be taken into account. Our advice is that neither cost nor pastoral mission or moral considerations can be fully relied on to set aside the fiduciary duties, although such considerations may affect the manner in which the duty is exercised. Yet, if the potential recovery was shown to be very small, and the cost of registration disproportionate, that might be a valid reason for deciding not to proceed with the whole exercise. We are not, however, prepared to advise on the point at which that balance is to be struck: only the Courts or the Charity Commissioners are in a position to give such guidance. Because of the expense of Court action, an approach to the Commissioners may be the more appropriate route; however we are bound to say that the Commissioners response to a request put to them have not been particularly helpful (though this is not a good reason not to approach them; it may be that if more PCCs ask the question, they will decide to give some useful guidance, and there is some evidence that in the recent past, the Commissioners have been helpful in cases outside this diocese).

13) We have mentioned above that the liabilities may in fact now rest with persons who, by reason of insurance, or wealth, are well protected against the cost of the CRL. Until research is done, we feel that it is impossible to dismiss the potential CRL simply on grounds of pastoral mission or moral considerations.

Does your Church have the benefit of a CRL?

14) As a general rule, CRL only affects Churches built before 1840 or which have been rebuilt after 1836 on the site of an earlier Church. There are many instances of a Church being rebuilt in the nineteenth century on a former Church site. It is therefore important to ascertain whether a Church was in existence at the time of the Tithe Commutation Act 1836.

15) Conversely, any Church not in existence at the time of the 1836 Act (or built since then on the site of such a Church) is unlikely to have a Lay Rector responsible for CRL and therefore such PCC’s do not have to consider the matter further.

16) The first question for a PCC is therefore to research the origins of its church. This is unlikely to be a problem for any PCC. (It should be noted that many parishes that now exist were formed out of larger older parishes. It is highly likely that land in such new parishes may be burdened with the CRL in respect of the older parish.)
If our church is of the right era, where do we go next?

17) Unfortunately, there is no central register of parishes with the CRL. In order to assist: PCCs, we have prepared a list of parishes (attached) where the potential for CRL is reckoned by us to be likely. This list is a useful starting point, but is certainly not exhaustive. It is formed from information that was passed to the Registrar in January 2012, by the Church Commissioners.

18) If the origins of your church are old enough, but the parish is not on the list, you must research further. The main place to carry out research is in the National Archives at Kew (Ruskin Avenue Kew Surrey TW9 4EU telephone 0208 876 3444). Their web site, www.nationalarchives.gov.uk gives practical guidance on this subject. You may find information more locally, from Inclosure Awards or Tithe Maps in the County Records Offices; both of these sources often refer to awards to a Lay Rector making the position very clear. The Commissioners’ information supplied to us exists because they are a responsible party in many instances because of their own substantial land holdings, and sometimes through non-land based matters; where they had a share in liability they took a copy of the 1936 Record of Ascertainties and kept them, but if in a particular parish the Commissioners were not liable at all, they did not keep a copy of the Record, so that absence from the list does not mean that others were not liable, and we know therefore that our list is incomplete. You should also check your own parish records which may show evidence that repairs to the chancel were in fact made with the benefit of payments from lay rectors in the past — if the liability existed, it may well still subsist.

19) At the very least you should look at the Record of Ascertainties for your parish. Where parishes are listed on the attached list, we have a copy of the Record and can supply it to you if the PCC secretary will send a stamped addressed envelope to us and a letter to indicate which parish is concerned. However, you may well feel that the spreadsheet attached is sufficient for your purposes if your parish feature on it, because the information from the Records is there. In particular, you can see the total charge, the penny rate, and the split between the 4 categories we deal with in the next section; but we have also given an approximate indication of the number of parcels in category C and D.

What do the Records of Ascertainment tell you?

20) These Records of Ascertainment were prepared by the Tithe Redemption Commission. They show how the liability to repair is now to be split. In essence, a given cost for a repair of, say, £100,000.00 would fall to be divided between the 4 categories shown in the proportions set out.

21) Each affected Parish has such a Record of Ascertainment and an example is attached. You will see that there are 4 categories of land under section 2 of the first page. There is a total at the top of the page. In the example the total is £373/16s/11d. At the foot of the page, this is shown as a penny rate: in this example, 89,723. (for those who cannot recall ‘old money’ there were 240 pence to the pound and 20 shillings to the pound!). The bill would be divided by 89,723. In approximate terms, for every penny of liability on the Record, for this parish, the party concerned would pay £1/2s/2d towards the £100,000.00 bill. (Of course, every single parish will have different amounts and different proportions between the 4 categories; also there will be a different number of parcels of land making up the important category D).

22) Categories A (rent charges for which stock was issued to the Diocesan Authority) and B (rent charges borne by other corporate bodies such as Church Commissioners (as successors to Ecclesiastical Commissioners and Queen Anne’s Bounty) or sometimes a university or college in its corporate capacity, or a Cathedral Chapter (not necessarily by Lichfield Chapter!)) do not require ANY action at all by the PCC, since they do not give rise to a land-based liability. The liability will continue.

23) The work that the PCC will have to engage in relates to category C and D. The first page of the Record shows a summary total. In this example the £20/8s/8d liability forms approximately 5 percent of the overall CRL and would be the responsibility of the owners of burdened land.
24) Under category C, if the liability is shown as tithe/land merged in glebe land, then it became the responsibility of the PCC under the 1976 Endowments and Glebe Measure. No further action is required by the PCC. However, it is understood that if the land has ceased to be owned as such then the liability continues and registration is permissible.

25) The Category D total is made up from individual sums in the following pages of the Record (in this example, Schedule 1 and 2 are only one page each), each sum relating to a parcel of land identified by number. In the example, the £20/8s/8d category D liability is split between 25 parcels. The smallest parcel (2490) bears 9d of liability, and so, on a proportionate basis, would pay around £10.00 of the overall notional repair bill.

26) The parcel numbers relate to the Tithe Map, which is the next document to consult. You should prepare a copy of the Tithe Map itself – preferably photographic but the records office concerned will have their own rules. When working on this, it would be sensible to have a modern large scale Ordnance based plan to work from, because you will need to accurately record the boundaries of the land from the old manuscript Tithe Map onto the modern Ordnance survey. You should prepare a copy map for your parish identifying each liable parcel.

27) This may be a task that could be undertaken by a surveyor who will no doubt wish to charge for his professional time, but the cost of the modern Ordnance based maps (whether paper or digital) is not insignificant.

Identifying the current owners:

28) Having worked out the parcels of land, the next stage is to identify the present owners. Much of the land in this country is now registered with the Land Registry, but by no means all land is so registered; and it is particularly the case that land that has been in the same family for a long time is likely to be unregistered.

29) The first step is to carry out an Index Map search at the Land Registry. You supply a copy of the Ordnance plans to the registry identifying on each plan a single parcel of land to be searched against (eg edged in red on the plan), and the Registry will provide a list of Title Numbers that are comprised within that parcel. There is a fee for each title identified – it is £5.00 per title. In built up areas this will be significant because each house built on a field that was once one parcel will now be in a separate title – if say an acre of land now has 20 houses on it, that fee alone will be £100.00! The Registry will identify on the plan which land is unregistered.

30) If the Owner is the Church Commissioners, it seems that they will do the registering voluntarily in most cases. We recommend communication with them direct to ensure that they are in fact aware and will be registering.

31) There is however a complication in respect of Church Commissioners’ Land that may have been sold “free from incumbrances” or “with exoneration” from CRL. It seems that this has happened in the past; if the researches demonstrate this, then the Commissioners recommend that the registration should be made by the PCC so as to protect against future owners of the land, but it is understood that the Commissioners will undertake to indemnify the present owner of the land.

32) Assuming however that the land is in other ownership, if you are given a Title Number, you should then apply for Official Copy Entries of the title, and for the Title Plan; the cost of this is £8.00 per title: an additional £160.00 for the 20 houses suggested above.

33) If the land is shown to be unregistered you will have to rely on local knowledge. Ask around; someone is bound to know the owner’s name and address! In fact you do not need the owner’s name to make the registration.

34) Since the Registrar’s legal practice has many thousands of land owning clients in this diocese, we do not feel that we could sensibly start to act for an individual PCC until the ownerships had been ascertained owing to the risk of identifying a conflict and having to cease to act for the PCC part way through a matter.
Making the Registration
35) This part is free of charge at the Land Registry. You supply the Land Registry with the evidence to support the case that the land was the subject of the CRL (this evidence would be the Record of Ascertaintment, the copy of the Tithe Map, your Ordnance based transcription of the Tithe Map and the Index Map search and Official Copy Entries and Title Plan, together with a statutory declaration as to the truth of the submission). They will then make the registration of a Notice against the title to the land “that the land is subject to a liability to repair the chancel of St xxx at XXX in the Diocese of Lichfield”.

36) It should be noted that there is an objection procedure in case the landowner disputes your claim.

37) With unregistered land, you register a caution against first dealings; if, then, someone attempts to purchase the land, your registration secures priority at that point.

Compounding liability:
38) Once registered you can then sit back and wait until the Chancel needs repair. It is only then that you need to enforce the liability. You will need to keep a record though of which title numbers the registration was made against, and against which unregistered lands’ cautions were entered: this will be needed by future generations as and when work is carried out.

39) The Registrar’s understanding (and even this is a moot point in some circles) is that (to use the example Record) an owner of one part of parcel 2490 would be jointly and severally liable for the contribution of that parcel to the repair bill; but would have no liability for the contributions of other parcels.

40) You may decide that it is worthwhile attempting to negotiate the release of the liability in exchange for the payment of a “compounded” sum. There is a statutory process that is safe to use but which is cumbersome and viewed by the Law Commission (in 1985) as being “to all intents and purpose a dead letter”. Some have suggested a non-statutory process for negotiation on an individual basis and through which one might assess the amount that your parish might need to raise for chancel repairs and when, in the future that might be needed; a calculation can then be made as to a fair sum at “present monetary values” that might be demanded for the release of the liability. The problem in relation to non-statutory compounded payments is that unless one brings in all those potentially liable, there is a risk that compounding the liability with one party may inadvertently and unintentionally release all the other parties too. This would not be a good idea, and great care is needed before proceeding on that path. Frankly we do not recommend it.

Can we decide not to register?
41) The Registrar is not comfortable about advising any PCC that it may balance the potential benefit of registering and enforcing a CRL against the factors such as mission pastoral or moral considerations. Our reasons for this conclusion are that the decision as to whether or not to enforce the liability does not need to be made at this stage. However, we are setting out the arguments we have heard, with our comments, so that individual PCCs can make this decision themselves. (In this area particularly, we feel that we should not advise because of the risk of conflict of interest as between a PCC as a client and client landowners)

42) Cost: Perhaps the best reason for not registering, in some but not all cases, is the cost of the exercise. Whilst the actual registration is free of charge, putting together the evidence will cost a fair sum. We have shown above that a one acre parcel with 20 houses on it would cost £260.00 to research; the cost of Ordnance based plans on which to record information has to be added to this. You may have many acres to consider. In one parish known to the Registrar, the total land holding affected is 4,000 acres. Almost all of that area however is rural and not built on even today, but in some places, particularly those where modern towns have grown up, the probability of finding ‘fields’ of houses is really significant. If the proportion of the liability that is within category D is very small, and is split between many parcels which are themselves split, the cost might be disproportionate. In the example we have given, of parcel 2490 we do not know how big the parcel is, nor whether it is in one ownership of a multiplicity of ownerships: but on any view, the cost of registration seems disproportionate against the £10.00 return! But the relationship would be very different if the parcel were still in one ownership, or if the proportion of liability was high. The total of the land based liabilities in our example would give rise to a contriburion of over
£5,000.00 towards the total liability; one might take a different view on that size of potential return; obviously every single parcel will raise different cost/benefit considerations. This can only be considered on a case by case basis. Some parishes will no doubt have fewer parcels, where each parcel has a higher proportion of the overall liability and where, therefore, the maths shows that the Registration would not be an exceptional cost. Hence our inability to advise sensibly. All we can really say is that in many places, probably the vast majority, registration would not be disproportionate in terms of cost.

43) On the other hand, we understand that it has been suggested in some circles that the cost/benefit analysis could never be such as to remove the responsibility to register. We do not agree, but cannot advise as to where the threshold lies.

44) Of course one factor not taken into account in our example is the total overall cost of the repairs – we have taken a notional, but significant sum. If the cost were much higher, the cost/benefit would be different. Equally, the CRL continues into perpetuity – the exercise is not simply one set of costs in one generation, so that the analysis we have done is not perfect. Furthermore, the current state of repair of the chancel may be so good that the liability is highly unlikely to arise for many years – so that the cost/benefit of expending money today has to be set against a cost in decades’ time: the present value of the future monetary cost could well be very low.

45) General Alarm: The registration of a CRL against properties in the Parish might be viewed as a step which could cause alarm to property owners particularly if they were unaware of their liability, or that they might experience complications on house sales. It is also said that such registrations might adversely affect the PCC’s ability to pursue its object of mission in the Parish. The potential adverse publicity which registrations may attract may alienate potential financial support for the Church going forward. The Legal Advisory Commission has indicated that it accepts that these factors might give rise to real problems for PCCs, and suggests a ‘balancing exercise’ between the amount that might be recouped and the value of the damage to its mission. Unfortunately no guidance is given as to how one effects that balance. The basis for the concession would be the legal case of Harries v Church Commissioners [1993] in which it was held that there are situations in which assets may conflict with the aims of the charity, and that to hold them would be inappropriate. The view that the Registrar takes is that the case is helpful, but not a complete answer, because in that case the simple solution was to sell the holding in the shares that were involved; the case did not allow the shares simply to be given away. Failing to register is more like giving shares or assets away. In any event, how can a blanket decision not to register be made, when for some there may be no realistic prospect of harm being caused to mission (because they do not support and will never support the Church of England) or fund raising, and for some, their insurance would mean that they would suffer no loss? Our view is that – leaving aside cost - the asset should be protected by the Registration, and the PCC should do all it can to explain to third parties its duties and how they have arisen.

46) The reason that we put forward as to why these considerations should not prevail is that it is the decision to repair that gives rise to the liability, not the registration of the CRL. If, at the time that enforcement of the CRL is required, there is a hard case to be considered, then that can be addressed at that time. The directions of the Commissioners can be obtained as to whether it is reasonable in light of the circumstances then pertaining. The important point is that by registering today, the PCC enables itself to consider that position in the future. It may be that by then the property is owned by a wealthy party; it may be that the person has the insurance to pay the liability. It may be that different views would be taken as to individuals at that time. If no registration has been made the PCC would miss out on the ability to make the claim against people who have the wherewithal to make the payments.

47) Charity Commission: The Charity Commission (entirely separate from the Church Commissioners) have been made aware of the Legal Advisory Commission’s advice to the Church Commissioners and PCCs. It can give advice to PCCs under s110 of the Charities Act 2011 as to whether the PCC needs to register a CRL. The PCC should approach the Commission (Kate Waring) at Charity Commission Direct PO Box 1227 Liverpool LS69 3UG. It is interesting that one Registrar has been advised by the Commission that not every instance in one instance, they said a formal opinion was not needed where the liability was 0.02% of the total liability – this bears out the example given above. However, they refused to give that Registrar any indication of
where the threshold is set! It may well be that the Commissioner would give advice to a PCC as to
whether it was worthwhile registering. We think that this will be particularly so with parishes where
the non-Church Commissioner liabilities are a small proportion of the overall, or where the
individual number of registrations to be pursued is unrealistically high.

48) Our recommendation would be that if having investigated the liabilities, the cost of registration
seems to be disproportionate, or if there is a real feeling that even registration would be damaging
to mission, then at that point an application should be made to the Commissioners.

Conclusion
49) We do hope that this letter, although lengthy, will give a reasonable level of information to enable
work to be undertaken by individual PCCs.

Yours faithfully

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