

Has the bell really tolled for chancel repair liability?

Anne Ebersson examines the current position on chancel repair



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'From midnight on 12 October 2013, certain overriding interests would lose their overriding status and so it was up to the person/Crown/Church Commissioners, with the benefit of such rights, to ensure that they registered their interests.'

With the coming into force of the Land Registration Act 2002 in October 2003, the question of overriding interests was re-visited for the first time for many years.

So what are overriding interests?

Overriding interests are third-party interests in land that can bind a purchaser or chargee of that land, even though the rights are not mentioned in the register of title of registered land or in the deeds of unregistered land, and even though a purchaser or chargee does not know about them.

Overriding interests include more common and well-known interests such as persons in actual occupation but there are also such rights as mines and minerals, manorial rights and chancel repair liability.

Manorial rights stem back to the 19th century, which, after many legal changes, resulted in the lord of the manor retaining overriding interests. Potentially the most valuable part of a manorial right is that relating to mines and minerals. The owner of these rights could derive financial gain from the extraction of sand, clays, stone and minerals from the land. Gold, silver, coal and petroleum products would belong to the Crown, but their extraction could require access through the areas of mines and minerals included in the retained manorial rights. The effect on mineral rights was recently highlighted by the publicity surrounding fracking, as demonstrated by the attempted registration of notices on land in South Gloucestershire, which resulted in residents threatening the Lord

of the Manor and the notices being withdrawn.

Among the largest owners of mineral rights, in addition to the Crown, are the Church Commissioners, and there are also private individuals and companies who own such rights and who will be seeking to protect those rights with notices registered at the Land Registry.

So what's changed?

It was decided to include in the 2003 Act provisions that, from midnight on 12 October 2013, certain overriding interests would lose their overriding status and so it was up to the person/Crown/Church Commissioners, with the benefit of such rights, to ensure that they registered their interests prior to that date. The overriding interests that lost their overriding status as at midnight on 12 October included manorial rights and chancel repair liability. The Act as originally drafted did not have this provision for chancel repair included and this was provided for in the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003, which was made on 14 September 2003 and came into force on 13 October 2003. The Order extended the overriding status of the chancel repair liability under s70(1)(c) of the Act for a transitional period of ten years, both on first registration under s1 to the Act, and on registered dispositions under Schedule 3 to the Act. The Order does this by inserting a new para 16 at the end of Schedule 1 of the Act and a new para 16 at the end of Schedule 3 of the Act.

The provisions were inserted in the Act to create greater transparency for anyone buying or mortgaging

property and land. The Act came into force on 13 October 2003 and so there has been ten years for all concerned to put their house in order and register their interests. With time running out, there has been a flurry of activity in the recent past with the Church Commissioners, Lords of the Manor and private individuals submitting applications to the Land Registry to register notices to protect their interests. This has resulted in the Land Registry sending out thousands of notices advising property owners that applications have been made to register notices against their titles protecting what were overriding interests. It is important to remember that these notices being registered are not to protect new rights; they are being registered to protect rights that already exist and which the owner of the rights does not want to lose.

Chancel repair liability

One overriding interest that was highlighted by the Act was chancel repair liability and this was, for many,

the first time that they became aware of this worrying potential additional liability to consider when purchasing or mortgaging a property. Chancel repair liability is the liability to repair

went to the House of Lords and ended, sadly, with Mr and Mrs Wallbank selling their farm to pay for the chancel repair and their legal fees incurred in fighting the claim.

With the Wallbank case fresh in every conveyancer's mind, as was inevitable, a search company started to offer searches to identify if the property you were to purchase or mortgage was in an area with potential chancel repair liability.

the chancel of a church or pay for the repairs. As with a number of overriding interests, this liability is an ancient liability believed to date back many hundreds of years to Henry VIII.

At the same time as the Act was coming into force, a Mr and Mrs Wallbank were being pursued by the Parochial Church Council of Aston Cantlow for a claim for chancel repair liability. *Aston Cantlow v Wallbank* [2003]

With the Wallbank case fresh in every conveyancer's mind, as was inevitable, a search company started to offer searches to identify if the property you were to purchase or mortgage was in an area with potential chancel repair liability. This is despite the fact that records had previously been thought to be very badly kept and prior to this case, carrying out a chancel repair liability

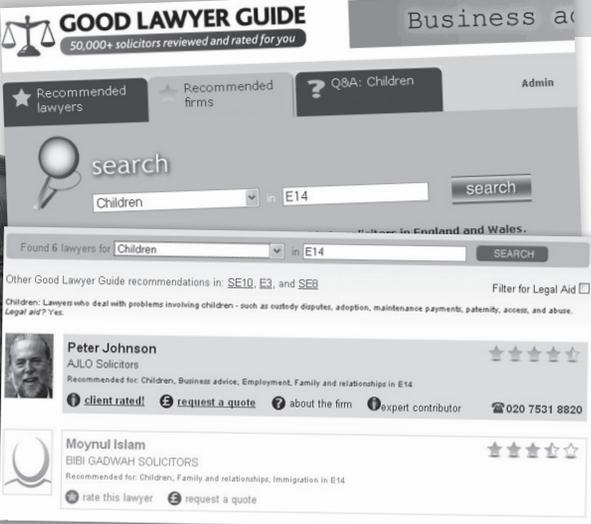


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search was very difficult to do. The new chancel repair liability searches have become part of the standard conveyancing procedures, as has the inevitable indemnity insurance policy which follows the result of a positive search result. Despite the Wallbank case, and the subsequent searches and insurance policies, there has not been the flood of claims that some thought would follow.

Chancel repair liability has generally only been associated with freehold land and it is unclear

registered land may protect the interest by entering a notice on the register of title with registered land. With unregistered land, a caution against first registration may be registered. The right to enter the notice either with registered or unregistered land on a register of title did not end on 12 October. A notice may continue to be registered at any time even after 12 October 2013, until there has been a registrable disposition of the land for valuable consideration.

If a property is sold or transferred after 12 October 2013, for nil

including the nature and effect of notices; the duty to act reasonably; applying for unilateral notices and agreed notices; and cancellation and removing of notices from the register.

- Cautions against first registration including the nature and effect of cautions against first registration; the duty to act reasonably; and applying for a caution against first registration.
- Details the position of interests not protected by notice or caution against first registration before 13 October 2013.

The practice guide can be found at on the Land Registry's website at www.legalease.co.uk/practice-guide-66

The Land Registry has issued a new Practice Guide 66 dealing with the specific topic of overriding interests losing automatic protection in 2013. This gives a good introduction to the protection of those overriding interests that lost their overriding status.

Is indemnity insurance an answer?

Indemnity insurance will still remain an option for home owners to cover potential liability if their property is not to be sold, and some lenders will no doubt wish this insurance to be put in place on any re-mortgage. Indemnity insurance will probably also now become available to anyone purchasing with a notice registered on the title, although the terms of such insurance and the potential premiums remain to be seen.

The debate on the continuing need for indemnity insurance for lenders will no doubt continue, but it must be considered that whilst a lender may not be bound by chancel repair liability, their borrower may still remain subject to the liability unless and until there has been a disposition for value and a notice has not been registered on the title. The lender must therefore consider its position on re-sale and whether, if it were to exercise its power of sale through LPA Receivers, it can sell free from the liability and, if not, what the consequences would be for a future sale.

The potential windfall profits for those who have retained rights has highlighted the problems/gains arising in the more mundane area of chancel repairs. Perhaps midnight on 12 October was in fact the witching hour. ■

Aston Cantlow v Wallbank & anor
[2003] UKHL 37

whether the liability extends to owners of leasehold land. The Law Commission has looked at this point in some detail including in para 2.9 Law Commission Liability for Chancel Repairs (1985) Law Com No. 152 and in its Working Paper 86: Transfer of Land – Liability for chancel repairs. In the 1985 Report the Law Commission stated that 'it is possible, but not certain, that tenants, as distinct from freeholders, of the rectorial land can be liable'. It would appear that their conclusion in the Working Paper was that 'some tenants in some cases may be subject to the liability to repair, and it seems that if there are such cases the tenant is liable to the exclusion of his landlord'. However, it should be remembered that even if a tenant is not directly liable, the landlord could include provisions in the lease to the tenant putting the burden of the liability on the tenant.

What happens now?

When the Act was introduced it made provision that certain overriding interests would lose their overriding status at midnight on 12 October 2013. This included chancel repair liability; but that is not the end of the story.

Anyone entitled to the benefit of chancel repair liability that affects

consideration then the liability would continue. If, for example, a property is transferred as a gift, then the liability would continue. However, if a notice has not been registered, then a purchaser of a property for valuable consideration would, once they are registered on the title, be free of the liability. If a notice has been registered on the title then a buyer takes subject to the liability.

The requirement of sellers to disclose overriding interests to buyers remains, but it is advisable to take a cautious approach on a purchase and ensure that the most up to date version of a title is considered and any Land Registry priority searches are carried out.

Other considerations

The Land Registry has issued a new Practice Guide 66 dealing with the specific topic of overriding interests losing automatic protection in 2013. This gives a good introduction to the protection of those overriding interests that lost their overriding status and provides full details of:

- Interests already protected by entries in the register.
- Entry of unilateral notices or agreed notices in the register of title