

Chancel repair liability

A recent case has highlighted the continuing risk to property owners of Chancel repair liabilities, ancient rights for the Church to require property owners to contribute to the cost of repairs to the Chancel of their parish church.

What is a chancel repair liability?

In medieval times liability for repair of the Chancel (the eastern end of the church) fell upon the Rector who was able to levy a tithe tax on members of the parish, as well as receiving income from land belonging to the Church, known as the glebe. Much of the income came from letting out the glebe land for farming, housing etc.

Following the dissolution of the monasteries by Henry VIII much of the glebe land was sold off, but liability for Chancel repairs still attached to the land. A great deal of former glebe land, much of it no longer associated with the Church, remains potentially liable for Chancel repair costs to this day.

Problems

The case of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another* [2003] ALL ER (D) (360) made it all the way to the House of Lords. The defendants were freehold owners of former glebe land, with potential liability to pay the cost of repairs to the Chancel. In 1994 the Parochial Church Council ("PCC") served notice under the Chancel Repairs Act 1932 calling upon them to repair the Chancel. The defendants disputed their liability, and proceedings were then successfully commenced against them to recover the sum of £95,260 (the cost of repairs at that time).

The Wallbanks appealed, and their appeal was allowed in the Court of Appeal

citing the Human Rights Act 1998, a particular section of which related to the actions of public authorities. It was held by the court that the PCC constituted a public authority for the purposes of the Act. The PCC's subsequent appeal to the House of Lords was allowed, stating that a PCC was not a public authority for the purposes of the Act. The liability to repair the Chancel was therefore enforceable.

Subsequent to this judgment, the question of the extent of the repair liability then also fell to be determined in court. The defendants' submission was that their liability was only to keep the Chancel wind and water tight, but in 2007 the Chancery Division of the High Court ruled that the liability was in fact to put the Chancel in substantial repair.

After some fifteen years, the unfortunate saga for the Wallbanks finally reached its conclusion in October 2009 when their property was sold, in order to pay for both the costs of repairs (which in the intervening period had risen to some £200,000) as well as their legal costs, estimated to be in the region of £250,000.

Continued overleaf...



Happy Christmas!

Welcome to our Christmas edition of *The Detail*.

We have included with our newsletter at this time of year our Christmas Challenge so I do hope that you will have a prize winning go. Hopefully you will not find it too difficult and it will provide some amusement over the festive period.

Best Wishes, Adam Chivers

Is my property affected?

It is a common misconception that Chancel repair liabilities only affect rural properties, or those in the immediate vicinity of a church. Because glebe lands were in some cases fairly extensive, it is possible that where the land has subsequently been redeveloped (eg for housing) there may be properties that are some considerable distance from the church situated on former glebe land. Furthermore there are many urban areas that include land formerly part of medieval settlements, which have become absorbed within large towns and cities as these have expanded.

There are some properties that, by virtue of their name or location, should place any prospective owners on notice of potential Chancel repair liability. Properties with names such as Glebe Cottage or the Old Rectory are obvious examples (the Wallbanks' house was called Glebe Farm) as are any properties within the vicinity of a pre-Reformation church (approximately a third of English parishes contain such a church). However, even properties that are located a considerable distance from the church may still be affected.

When purchasing a property it is possible to carry out screening searches at nominal cost that would identify whether it is located within a parish with a potential chancel repair liability. These searches do not confirm if a property is or is not affected, only that it might be. It is then possible for a detailed search to be carried out, although it is more common (and usually cheaper and quicker) instead to take out indemnity insurance



against the possibility of receiving a repair bill. It is important, however, to take a pragmatic approach since in densely populated areas, where a chancel repair liability falls on a large number of people, the theoretical liability falling on each property owner is likely to be very small indeed.

Legal reform

Currently a Chancel repair liability is known as an overriding interest, which does not need to be noted at the Land Registry. However after October 2013 all such liabilities, which have not by then been registered, will cease to bind a purchaser of the property (but will continue to bind existing owners until the property is sold). In the meantime, however, in the wake of *Wallbank* the Legal Advisory Commission (advisers to the Church of England) have issued guidance suggesting that PCCs have an obligation to investigate whether parishioners could be billed for chancel repair works: (1) citing members' fiduciary duties as charity trustees to act in the best interests of the PCC; and (2) pointing out that they are not free to give effect to obligations of a purely moral nature. Whether many will actually go as far as issuing claims against their parishioners, with all the attendant bad publicity, is another matter. However the issue nevertheless remains a very live one.

*For further advice please contact
Simon East on direct dial 0117 9234013
or by email at sre@meadeking.co.uk*

Sentencing Update

New sentencing guidelines for Magistrates Courts include recommendations for environmental and health & safety offences that are likely to have an impact on defendants. The Sentencing Guidelines Council has underlined that these types of offence are likely to be serious, especially with the Court having power to fine up to £2000 and/or imprison defendants for nearly all health & safety offences.

The latest definitive guidelines set out the following list of factors which are particularly relevant for sentencing in health & safety/ environmental offences:

- Deliberate or reckless rather than careless conduct
- Offending behaviour prompted by financial motive (such as cost cutting)
- Repeated or continuing breach
- Failure to respond to advice
- Ignoring employee concerns
- Unlicensed activities
- Previous similar offences
- Obstructive attitude to

investigating authority

- Scale of potential/actual harm from offence
- Extent of damage
- Extent of clean up needed

Mitigation factors include:

- Isolated lapse
- Genuine and reasonable lack of understanding of regulations
- Co operation with investigation
- Voluntary steps to remedy the problem.

For company defendants, the magistrates are advised to set a fine which will have “real

economic impact”, but without provoking the effect that the company goes out of business unless this is the intention of the fine level set. For large companies, the starting point should always be towards the top of the scale before the various aggravating and mitigating factors are considered. This guidance is designed to ensure that more large company sentences are referred for consideration in the Crown Court, where the fine limits are completely unrestricted.

For directors prosecuted personally, the Magistrates are to consider disqualification as well as any other penalty.

Magistrates have long struggled with the correct level of sentence to apply where the defendant is a successful business with a large turnover, and under this guidance corporate defendants can expect to see much heavier penalties imposed for regulatory crimes. This is a good time to dust down your Health & Safety Policy and supporting procedures, and consider whether any of your other compliance measures require review and updating.

For further advice and assistance please contact Judith Kelly on 0117 926 4121 or by email at jhk@meadeking.co.uk

A new route out of bankruptcy?

A recent decision of the Court of Appeal, *Official Receiver v McKay* [2009] BPIR 1061, may have created a new ground for annulment of bankruptcy orders.

Section 282 (1) (b) of the Insolvency Act 1986 empowers the Court to annul an order if it at any time appears that, 'to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the court.'

Until now such annulments could only proceed if all proven and unproven debts were repaid. However in McKay the Court of Appeal reconsidered the wording of Insolvency Rule 6.211 in the context of s.282 (1) (b), which so far as

material, provides that 'all bankruptcy debts which have been proved must have been paid in full.'

It was held that where the only proven debt against a bankrupt's estate had been withdrawn by the creditor, the court was empowered under s 282(1)(b) of the Insolvency Act 1986 to annul the bankruptcy order on the basis that the proven debt no longer existed at the time the annulment order was made, without needing to investigate whether the proven debt had been fully paid or expunged.

In McKay the petitioning creditor (through her insurers), after proving the debt of the petitioned amount withdrew the claim and agreed to discharge the costs and expenses of the bankruptcy estate. The trustee in bankruptcy applied to the court for directions as to whether an annulment order under s 282(1)(b) of the 1986 Act could be made given that the only known debt within the bankrupt estate had been withdrawn. The Court of Appeal held that such an order could be made.

It remains to be seen if this will become common practice but it seems likely that withdrawal of proof of debt could become a new route to annulment of bankruptcy orders.

For further advice and assistance please contact Keith Mahoney on 0117 926 4121 or by email kwm@meadeking.co.uk

The adjudicator and his role

Adjudicators are frequently engaged in construction disputes as a means of providing a speedy resolution of an issue in dispute. Unlike judges an adjudicator can take the initiative and carry out his own investigation of the parties.

A party to an adjudication is entitled to place before the adjudicator those documents that he chooses. There is no equivalent to the obligation in court proceedings to disclose documents whether they are of assistance to the disclosing party or not. Frequently parties to adjudications will consciously decide not to disclose documents even though they are clearly relevant.

What if the adjudicator requests disclosure of a document and the party receiving the request refuses to provide a copy on the basis that it may harm his case to do so?

The recent case of *Balfour Beatty Engineering Services (HY) Limited v Shepherd Construction Limited* [2009] EWHC (2218) (2CC) considered a matter where the adjudicator made just such a request only to have it refused.

Having received this rebuff he took a robust view and drew an adverse inference against the party refusing to provide him with the relevant document.

HHJ Akenhead decided that it was entirely legitimate for an adjudicator to draw such an inference. He could not be criticised for doing so even though it was suggested in the case that to compel a party to produce a document when there was no legal obligation to do so could constitute a breach of that party's human rights.

The moral is clear. For any party involved in an adjudication it is a dangerous policy to decide consciously not to disclose a relevant document particularly if he is requested to do so by the adjudicator. To do so runs the risk of the adjudicator drawing an adverse inference from the failure to provide disclosure. Before deciding to embark on an adjudication a referring party might do well to bear in mind that the widespread practice in adjudications of concealing documents that may be harmful is potentially dangerous.

For further advice and assistance please contact Phil Burbidge on 0117 926 4121 or by email at pjb@meadeking.co.uk



Meade King recommended

Meade King Solicitors were again recognised in the 2010 publication of “Chambers Guide to the Legal Professional”. The publication comments that *“The firm is renowned for its focused and responsive approach to servicing its clients’ needs”*.

Head of Litigation Adam Chivers is a *“well-renowned litigator. His particular areas of strength include arbitration and professional negligence claims”*.

Chambers reports that *“This firm continues to win praise for its contentious work”* Keith Mahoney, one of the top ten insolvency lawyers in the South

West Region, is considered by market commentators as a *“tenacious litigator”*.

The recognition of Meade King’s lawyers by Chambers adds to earlier recommendations in this year’s “Legal 500”, which recognised our specialist practitioners Edward Langford of the commercial property team and Keith Mahoney of the insolvency department.

New lasting powers of attorney forms

A lasting powers of attorney (LPA) gives you peace of mind and enables you to appoint a person you trust to look after your property and financial affairs and health and welfare if needed. The LPA was introduced on 1 October 2007 to replace Enduring Powers of Attorney. Unlike its predecessor the LPA was a lengthy and complicated 25 page document which cost £150 to register.



On 1st October 2009 the format of LPAs changed considerably. It is now simpler, cheaper and more straightforward to choose someone to make decisions on your behalf if you lose capacity.

The need for change

The original LPA forms were heavily criticised and the Office of the Public Guardian now admit that the old forms

were “too long and too easy to get wrong”. The OPG is keen to encourage people to take steps to protect themselves in the event that they lose capacity.

“An accident or illness that robs you of your ability to make decisions is traumatic enough without having legal worries to contend with too. This is a straightforward solution, now all the more simpler, that makes sure the legal system protects and helps people rather than hindering them, exactly as it should do.”

Justice Minister Bridget Prentice.

Not only have the OPG reduced the length of the forms from 25 pages to around 11 pages they have also reduced the fee for registering an LPA from £150 to £120.

Unfortunately the new forms, published by the Office of the Public Guardian (OPG) website on 1 October 2009 were incorrect. The OPG realised their error and have subsequently rectified it. Despite the fact that the error on the new form was an error by the OPG they will not register any LPA which uses the incorrect form and it is down to the applicant to correct their mistake and obtain the right form. If anyone is concerned that they have inadvertently used the wrong form please contact us and we will be happy help.

How we can help

Whilst the new documents are more straightforward they still require a great deal of care and attention to ensure they are completed properly. A simple mistake could cause the document to become invalid and there are a number of procedures which must be followed to ensure the document is properly executed.

If you are interested in finding out more about LPA's please contact Samantha Piper or Clare Hesbrook on 0117 926 4121 or by email at sjp@meadeking.co.uk and csh@meadeking.co.uk

Employment law roundup 2009–10

Meade King



Through the recession and continuing difficult economic climate the Employment Tribunals and Courts have been increasingly busy with significant decisions on holiday pay and sickness and all types of discrimination.

Work & families

Children

The Department of Children, Schools & Families has published a new guide on employing children under the school leaving age. This sets out key legal provisions and best practice advice. Visit http://publications.everychildmatters.gov.uk/eOrderingDownload/child_employment09.pdf

Maternity & paternity entitlements

- The Government plans to increase the Statutory Maternity Pay (SMP) period from 39 to 52 weeks. Consultation begins shortly, though this is likely to prove an unwelcome proposal.

- At present fathers are entitled to just two weeks paid paternity leave.

The Government has confirmed its intention to allow fathers (of children due on or after 3 April 2011) to benefit from up to 6 months additional paternity leave if the mother returns to work after the first 26 weeks. If taken during the 39 week maternity pay period fathers will be able to claim up to 3 months paid leave at the same rate as SMP.

Limit on weekly wage

- From 1 October 2009 *The Work and Families (Increase of Maximum Amount) Order 2009 [SI 2009/1903]* increases the maximum amount of a week's pay from £350 to £380 for the purpose of calculating certain statutory payments,

such as statutory redundancy payments and basic awards for unfair dismissal.

National minimum wage

- On 1 October 2009 the National Minimum Wage (NMW) increased from £5.73 to £5.80 an hour for workers aged 22 and over; from £4.77 to £4.83 for 18 to 21-year-olds; and from £3.53 to £3.57 for 16 and 17-year-olds.
- The NMW Regulations also changed the law so that tips can no longer be used to top up wages to meet the NMW. The Department for Business, Innovation and Skills has published a 'Code of Best Practice' on tipping and service charges.

Statutory grievance & dismissal procedures

Repeal of the statutory procedures

The *Employment Act 2008* repealed the statutory Grievance and Disciplinary &

Dismissal Procedures from 6 April 2009, replacing them by the new ACAS Codes of Practice. Whilst there may still be sanctions imposed on either party for their failures to comply with the Codes the regime of the 'automatically unfair' dismissal, automatic extensions of the time limits for bringing claims (following the grievance), and the risk of up to a 50% uplifts or reductions on awards of compensation has overall been removed and there is some sense of a return to normality. The conduct of the parties can again be assessed on the question of reasonableness and it will be a matter for the Tribunal to decide whether any non-compliance with a provision of the Code is unreasonable.

Dismissal cases

Redundancy

Unlike the former compulsory statutory dismissal procedure the new ACAS Code of Practice does not apply to redundancies, a common sense approach. Employers still do not have a free hand, must follow a fair consultation process and observe the well-established principles of fairness. In most cases the Tribunals are concerned less with why there is a redundancy but whether there is a genuine redundancy. The questions of a fair selection assessment remain a significant source of dispute.

Constructive dismissal

Under the principles in *Norton Tool* in cases of actual dismissal an employee who is dismissed without notice can be compensated in full for their notice period and without any reduction for alternative earnings. However this year in calculating the amount of the compensatory award due to a constructively dismissed employee (ie those who resign without notice) the Court of Appeal held that Tribunals must offset any earnings the employee has gained from alternative employment during the notional notice period.

Discrimination cases

Age

UK legislation that allows employers to dismiss employees on their 65th birthday has been upheld by the High Court as lawful, providing the correct procedures are followed. Age Concern in the *Heyday* case had sought to challenge the UK law by claiming that it breached the European Equal Treatment Framework's directive. Whilst the ECJ upheld that it is for the UK courts to decide whether forced retirement is capable of being justified, as a proportionate means of achieving a legitimate aim, the Government announced that it will bring forward its review of the state retirement age to 2010.

Employers will have to be exceptionally careful regarding the use of long service rewards in the context of age discrimination claims.

Religion & belief

The recent case of *Nicholson v Grainger plc* on appeal held that an employees strongly held belief in the need to protect the environment and climate change is capable of being a 'belief' that would attract the full protection of the law regarding discrimination on the grounds of religion or belief. A key factor in this case was that the Claimant had a settled belief which governed the way in which he lived his life. The concern in this case is that it leaves some uncertainty as to how far this concept could be stretched, e.g to those with extreme unpalatable political views.

The judgment seemed to anticipate this in setting out the test as to what is covered in that the belief "must be worthy of respect in a democratic society, be not incompatible with human dignity or conflict with the fundamental rights of others." This clearly leaves us with some difficult assessments ahead.

Disability

Boyle v SC Packaging Ltd 2009 appears to make proving a disability easier. Under the DDA the proper test as to whether a Claimant's medical condition is likely to have a substantial effect if medical treatment ceases is whether "it could well happen" not whether "it is more probable than not."

X v Mid-Sussex CAB held that volunteers who work without contracts as unpaid workers for charities are not protected by the Disability Discrimination Act or the EU Framework Directive. The EAT, held that the Directive was not intended to protect volunteers in the Claimant's position and they further declined to make a reference to the ECJ on the point.

Sex

In addition to the numerous equal pay claims pursued in 2009 the Equality & Human Rights Commission (ECHR) have revealed that women working full time in the finance sector earn 55% less per year than their male counterparts. There is a 28% gap overall. The ECHR have published their recommendations for narrowing the gap.

Lap dancing expenses

Statistically 41% of lap dancing clubs directly target employers in their marketing. 86% of clubs in London offer discreet receipts so that the employees can claim the entertainment back as an expense. The Equalities Minister this year said that lap dancing clubs should not be considered a legitimate business expense stating "it is wrong, both in excluding women in the workplace, but is also part of a larger industry of exploitation of women and selling sex." The Treasury are to issue guidance.

Another statistic that emerged from these findings and other research is that 20% of men admit to accessing pornography at work. Apart from the obvious potential difficulties of the worker accessing illegal sites, creating unauthorised accounts, dedicating time to matters unrelated to work such activities also leave employers vulnerable to claims of sex discrimination and harassment.

Pensions

The Pensions Act 2008 obliges employers to automatically enrol all staff, including agency workers, into a pension scheme, to maintain the staff's membership and to provide the Pensions Regulator with information as to how they will meet the obligations if required.

Holidays

The *Stringer* case raised a number of technical legal arguments about the compatibility of the UK Working Time Regulations as against the European directives and highlighted the numerous practical difficulties for employers in respect of holiday entitlements in the context of sickness absence. The case has attracted much media attention and has been through the High Court and to the ECJ and back. It now seems that whilst employees will have a choice as to whether to take paid leave whilst on sick leave the employer cannot insist that the holiday entitlement is exhausted during sick leave. Furthermore, if the employer does not allow leave to be carried forward and as a result deprives the employee of the holiday entitlement it risks a claim for breach of the WTR.

Employment tribunal statistics

ET statistics for 2008/09 show significant increases on the 2007/08 figures for certain types of claims:- cases of unfair dismissal were up by 29%; breach of contract up by 31%; redundancy pay up by 48% and redundancy failure to inform and consult up 150%.

Looking ahead

2010 will see the introduction of the Equality Bill and further implement the provisions of the Safeguarding Vulnerable Groups Act. Further ahead again there will be the changes to the paternity leave provisions, and additional protection for agency workers including a new right to equal basic working and employment conditions with comparable permanent employees. The Government is presently consulting on its proposals to implement the Agency Workers Directive and the new law will come into force in October 2011.

It is and will be as important as ever to keep abreast of employment law developments and employers should ensure that the staff contracts and businesses' policies and practices are compatible with all such developments, particularly bearing in mind too the increasing number of claims being pursued.

For further advice and assistance on all aspects of employment law please contact Nicola W Hughes on 0117 926 4121 or by email at nw@meadeking.co.uk