

LICHFIELD DIOCESAN REGISTRY
GUIDANCE AS TO CHURCH AND CHURCHYARD OWNERSHIP

- 1) The question of ownership of ecclesiastical, or church, property is complex and arcane, with many aspects dating back to pre-Reformation times. However it is a question which can arise currently in situations as to planning applications, grant applications, chancel repair and compulsory purchase. There is rarely a conveyance of the land as such since many churches are of ancient foundation so that deeds have long since been lost. PCCs have a statutory duty of maintenance under the Parochial Church Council (Powers) Measure 1956; the PCC is a body corporate but it has no legal interest in the building itself; the popular understanding that the freehold of the church is vested in its incumbent is a helpful understanding but the confusion explained below as to the difference between freehold and legal title makes it difficult for bodies which seek to lend money in the form of grants etc. CPO matters have been dealt with in statutory provisions and no longer cause difficulty. Chancel Repair is the subject of a separate note.
- 2) The Bishop's *parochia* was his diocese, and he and his clergy lived together in his Cathedral, receiving the tithes of the people of the diocese into a common fund for the support of the bishop and his priests and the churches as well as other suitable works of piety and charity. The starting point of the complexity is that in olden times, but arising out of Saxon custom (and giving a result not followed on the continent!), the Bishop of a diocese had the absolute right to sanction the creation of new churches at least in the sense of a church not being able to be used for public worship without consecration, and, in the days of a mono-faith country, this meant complete control. Before creating a new, remote church, the Bishop, and sharing his *cure of souls* with his priest, he would require the endowment of the benefice (the living) with land and tithes for the maintenance of the priest (whom he would then licence to the benefice) as a condition of consecration (this was the position after the Constitution of Othobon, 1240, and was given statutory force in the time of Richard II).
- 3) The land and tithes formed 'rectorial glebe', and in fact formed the 'rectory'. The tithes referred to here are the great tithes (such as grain). The ecclesiastical property of a parish will thus include the church and churchyard, the tithes and the parsonage house and glebe. The church and churchyard would be held for the use of the parishioners for the purpose of attending church services and for their burial in the churchyard.
- 4) Until the divisions into parishes, the bishop or (possibly the abbot of a monastery would be the owner of such property), but then in the parochial system we now know, the parson (from *persona ecclesiae*, or personification of the church) became a representative owner. However that ownership was essentially inalienable.
- 5) The position is succinctly and helpful explained in the case of Re consecrated land in Camomile Street [1990] 3AER 229: '*Technically, the freehold, the life estate, in consecrated land or consecrated buildings is in the incumbent (though the fee simple itself is an abeyance), ... Neither the incumbent ... are beneficial owners. They are owners on behalf of the parishioners . . . In reality both consecrated and unconsecrated land and chattels are parish property held for the benefit of the parish church and its congregation*': By virtue of his incumbency, the incumbent has control of the fittings and decorations of the church and the keys of the church belong to him.
- 6) The concept of the freehold being 'abeyance', which was originally described in Rector and CWs of St Gabriel Fenchurch St v City of London Real Property [1996] P 95, is difficult to understand. In past eras, there were multiple levels of ownership, but we are now more or less attuned to dealing only with the freehold estate in fee simple and leaseholds (which are fixed term interests in land). In former times, there were other forms of ownership such as copyhold, and a life interest in the freehold was possible (in which it was death or cession from the benefice which terminated the interest, rather than the effluxion of a fixed period). The consequential lack of beneficial ownership is another anachronism, but this reflects the concept that the property is held in a representative capacity for the parish, or rather the parishioners.

- 7) So it is the *fee simple* which is in abeyance, not the *freehold*: the freehold is vested in the Rector. It is not, in truth, a legal estate at all, but instead it is a *qualified* fee and is not a *fee simple*. The fee simple is always in abeyance, but during a vacancy the freehold is in abeyance too; the corporation sole represented by the incumbent when the benefice is filled continues to hold the interest – it does not vest in the Bishop.
- 8) The owner of the freehold interest has the right to take proceedings to recover possession or to prevent damage etc. It has been held that in a vacancy in a benefice the PCC may take proceedings for the protection of the church and churchyard, in the absence of action by a lay rector (see St Edmondsbury [1973] 3 AER 902.
- 9) Notwithstanding any of the normal rights of ownership, the owner of a consecrated church or churchyard cannot convey or create any legal estate in the property without authority. He does not have the full capacity of owner, and his right to create interests is entirely pursuant to statute: he cannot dispose of the land because the effect of consecration is to render the land inalienable; he can only create a lease under Faculty through the Pastoral Measure. There is a statutory power to remove the effect of consecration and the consequent prohibition on the grant of legal estates through the Mission and Pastoral Measure (by what used to be called 'redundancy').
- 10) The rectory and its land and tithes was obviously a valuable commodity, and monastic houses and collegiate and ecclesiastical bodies began to acquire them, and were said appropriate its financial benefits. The Registry has a list of Rectories, recognised as such by the Church Commissioners, who have a statutory responsibility for determining which benefices fall into which category (Pastoral Measure 2011). A benefice may now be a rectory or a vicarage; and a rectory may be impropriate or appropriated.
 - a) Rectory: A benefice where the whole of the '*great tithes*' (corn, hay and wood) and glebe was always attached for the maintenance of the minister is a rectory. (This is not the same as a Team Rectory at all). The Rector has the freehold of the church.
 - b) The appropriator body was the rector of the parish and the parson was the vicar. If the body holding the rectory was ecclesiastical, the proprietorship of the rectory was said to be appropriate. Where the grant had been to a secular person, or more commonly perhaps, when an original ecclesiastical body was stripped of its rectory by the Crown at the dissolution, the rights were passed by the Crown (for valuable consideration) to lay rectors and the benefice was said to be impropriate.
 - c) Vicarage: an ecclesiastical rector could, and a lay rector was obliged, to appoint a vicar to perform the ecclesiastic responsibilities of the parish; the vicarage was then permanently endowed with '*small tithes*' (of products such as honey, chickens and fish) to secure the maintenance of the vicar
 - d) Some places did not have endowment and were held as perpetual curacies, (which were abolished in 1969).
 - e) Modern Benefices: However if the church has been *consecrated* in modern times (since the Church Building Acts 1818 et seq, but now also under the Consecration of Churchyards Act 1867, or the New Parishes Measure 1943) then the ownership will be in the incumbent even if there is a Rector. (This is because the land was conveyed to the Commissioners (or more recently, to the Diocesan Board of Finance) under legislation which vested the land in the incumbent of the benefice for the time being (on consecration)). If the land is still unconsecrated it is likely that the land remains in the ownership of the body to whom it was conveyed.
- 11) With that in mind, the ownership of a church or churchyard can be ascertained.
 - a) If there is a Rector and the Rector is the incumbent, then the owner is the Rector.
 - b) If there is a Vicar then the ownership is still vested in the (lay) Rector.
 - c) If there is no Rector, as in a modern benefice creation, then the Incumbent will be the freehold owner.

- 12) Glebe land and the great tithes were able to be sold, but with the benefit of the income from the property came the burden of chancel repair. Separate guidance has been prepared on that subject, but from that, a lay rector can be identified (often with enormous time and difficulty) from:
 - a) The first and second schedules of the Record of Ascertainments (copies of which we hold for many parishes) *in which the lands affected can be identified, and which result in an apportioned liability, but equally, several ownership*
 - b) The Record of Ascertainments *which only deal with lands where the land and the tithe rentcharge had merged under the 1836 Act; if there had been merger prior to 1836 then such land might conceivably be shown to carry liability*
 - c) Land or corn rents allotted under an Inclosure Award or private Inclosure Act in lieu of rectorial rights
 - d) Land formally charged with the chancel repair liability under a Special Apportionment or Deed of Charge under the Tithe Act 1839
 - e) Land forming rectorial glebe
- 13) It follows from the above that the Rector may in fact be more than one person, and indeed may be many people holding interests jointly or severally.
- 14) This system does not help for modern purposes such as planning or grant aid. If a certificate of ownership has to be given for either a planning application or an application for a grant from a public body, it is important that accurate information is given. In both instances there are criminal penalties for passing on incorrect information.
- 15) Unfortunately there is no single answer which fits all cases. The following steps should be taken in order to try to find out who the Rector is:
 - a) Check at the land registry. If the land is registered the register will identify precisely who is the legal owner of the land. (For most consecrated churches it will be the Incumbent of the benefice of xxx; but it may be the Diocesan Trust or, occasionally, another body).
 - b) If the land is unregistered, check the Muniment Room to see what documents the Registry holds. Check with the Commissioners Church of England Records Centre. Check the Parish file in the Registry. (Ask the parish whether they have any information about any Rector having maintained the Chancel) This may show a conveyance under the Church Building Acts or later equivalents such as the New Parishes Measure, which would mean that the Incumbent is the owner of the benefice. If the benefice is vacant then the corporation sole continues and the notice ought to be served on the Benefice of xxx c/o the Registrar.
 - c) If the land is unregistered and no documents are held, but the building / land is known or believed to be consecrated church then check the list of Rectories/Vicarages. If this shows the benefice is a Rectory (not a Team Rectory) then this would mean that it is safe to assume that the Rector is the owner. However, ascertaining *who* is or are the owner is a much more complicated task. Learned books have been written on the subject in the context of seeking to identify lay rectors in order to enforce liability for repairs, and the same process has to be followed for the purpose of ascertaining ownership. It follows that checks have to be made against:
 - i) The Record of Ascertainments – the Registry
 - ii) Tithe maps and apportionments – the Joint Records office
 - iii) Records which might identify medieval glebe (though the chances of finding this are fairly remote) – parish records
 - iv) Inclosure awards – the Joint Records office
 - v) National Archives and Joint Records offices as to various other ways in which rectorial glebe can be identified
- 16) The Diocesan Registry will assist in this matter but depending on the circumstances may need to charge for advice given. The Registry will advise as to what form of certificate of ownership it would be able to give depending on the evidence that can be obtained.
- 17) For the purposes of serving the requisite notices under the Planning Acts (for planning applications), s65 of the Act defines the 'owner' three ways : first as the 'estate owner in respect

of the fee simple' – for that purpose there is no such person, because the fee simple is in abeyance; secondly as a tenant with not less than 7 years unexpired term remaining on a lease (which, if a lease has been granted under Faculty is an easy matter to determine; third as a party entitled to an interest in minerals which is a qualified duty which only exists for mineral applications. Consequently the Rector or Incumbent will never need to be served.

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