



BRIEFING MARCH 2019

REVERTER OF A SCHOOL SITE – A RECENT JUDGMENT

On February 7th 2019 the Court of Appeal heard a case between claimant reversioners on the one hand and Oxfordshire County Council (the site trustee) on the other in respect of a school that was moving sites. The court found in favour of the reversioners, for whom LBMW was acting, and the judgement was published on 21st February. The decision overturns the previous High Court judgment in this case and confirms the received view that a school site reverts immediately on its ceasing to be occupied by the school.

BACKGROUND

1. The vast majority of school sites made available under the provisions of the Schools Sites Act 1841 are for Church of England schools with the local incumbent and churchwardens or other church persons or bodies as trustees. However, the Act was entirely capable of being used for non-church schools and such cases occasionally arise.
2. One of them is at Nettlebed in Oxfordshire where the site was provided under the 1841 Act by a private donor to Oxfordshire County Council to hold on trust for the purposes of what we nowadays call a Community School. The conveyance was under section 2 of the 1841 Act and thus subject to reverter as set out in that section.
3. Oxfordshire moved the school to an adjoining site (which it already owned) in 2006 and ceased at that point to use the original site for the school. It did not, however, sell the site until 2007 and thus in accordance with the hitherto accepted understanding of the 1841 Act triggered reverter in favour of the heirs of the original donor.
4. On challenge, Oxfordshire contended that it had been their settled intention to sell the old site and use the proceeds of sale towards the costs of the building on the new site and that in consequence the old site continued to be used for the purposes of the school (ie as an asset held for its purposes) pending its actual sale. Reverter they contended had not been triggered.

THE HIGH COURT

5. The High Court agreed that "use" might indeed include being held pending sale to further the purposes of the trust.

THE COURT OF APPEAL

6. However, this was contrary to the hitherto accepted interpretation of the 1841 Act and indeed to the thinking underlying the Reverter of Sites Act 1987.
7. Consequently, the reversioners appealed and the Court of Appeal has now overturned the judgment of the High Court. The court considered that the issue at stake was whether the land continued after 2006 to be used as the site for a school or for

educational purposes. The purpose of the site was as a site for the school, not to provide a means of reimbursing the County Council for its expenditure on the new school. Once the site ceased to be used for the statutory purpose (in this case as a school) it (as the Act provided) immediately reverted (ie was held by the County Council for the heirs of the original donor). To avoid reverter the land must be being actively used for the education of children, not merely being held as an investment.

THE POSSIBLE AND ACTUAL CONSEQUENCES

8. At first sight this Court of Appeal judgment may seem unhelpful to dioceses and site trustees, as ensuring that a school site is sold before it is vacated requires forethought and can sometimes be troublesome.
9. However, the difficulty with the High Court judgment (as the Court of Appeal recognised) was not only that it flew in the face of the plain ordinary reading of the 1841 Act, of its accepted interpretation to date and of the understanding which had been incorporated into the 1987 Act, but also that it made it very difficult to pinpoint any moment or event when reverter could be indisputably considered to have been triggered. LBMW is confident that this would have led to local arguments on a school moving to a new site or even on its closure, with the normal processes under the 1987 Act and under section 554 of the Education Act 1996 rendered even more subject to delay and objection. This in turn could have led to challenges from reversioners who were aware of their rights and (even when no reversioners appeared) to increased local objections to 554 Orders. This then might have led to an increase in rejected Orders as a consequence of the uncertain status of the land, and a diminution of income into the Uniform Statutory Trusts of dioceses. It would also we believe have led to confusion as to when trustees' duties switched from the charity to the heirs of the original donor and thus to unwitting conflicts of loyalty. Finally, it would have caused imprecision in knowing whether and when capital gains tax had arisen (ie on reverter) and put trustees in a situation of unknowing liability for possible tax.
10. The Court of Appeal has given us clarity and that is surely very welcome.

SOME DETAILED ISSUES AND PRACTICAL ADVICE

11. The Court of Appeal indicated that it accepted that it might be possible to stave off reverter by continuing some "ancillary activities" (as it termed them) on the old site. As it happens this would have been easy at Nettlebed as the two sites were side by side, but no such action was taken. The court suggested that use as "a playground or for meals" should be acceptable to keep reverter at bay until a sale was agreed. Readers will however understand the distinction between that part of a school site owned by the trustees and that part (usually the playing fields) provided by the Local Authority. Clearly continued use of the latter would not hold off reverter on the former. Hence dioceses must be very careful if they consider taking advantage of this method of holding off reverter. Some proper, regular and frequent (we suggest) use must be made of the actual trustee-owned site and preferably of its buildings. Also, the court did not consider the possibility of partial reverter as might occur if only part of the old site continued in use. All in all (despite the helpful view of the court) LBMW advises that it is unwise to rely on partial use after the school has actually moved to hold off reverter. There are better, more secure solutions.

12. First there is always a substantial lead-in time to the removal of a school to a new site. During that period it should be possible to advertise and complete a sale with a suitable provision for the school to remain in occupation until an agreed date for the move (generally the end of a term).
13. If for some reason this really is impracticable then it is possible for trustees to make arrangements for a sale to an intermediary body - perhaps at a nominal value with an agreement for onward sale with overage. There are usually workable options available for this solution which can be put in place in a very short period of time subject to advice from a valuer.
14. Thirdly the LA may be interested in a land swap as between the old site and the new with suitable financial adjustments and valuations recorded as appropriate. This too can be completed rapidly, given goodwill. It would have been a very simple procedure for Oxfordshire to have undertaken since it already owned both parcels of land in its various capacities. Their lack of foresight has cost them dear.

WHAT SHOULD DIOCESES DO NOW?

15. In respect of any imminent or future plans to move a school to a new site, dioceses should ensure that the trustees and the Local Authority work closely together to plan for an agreed sale or exchange of any redundant site before it ceases to be occupied by the school. Careful legal and valuation advice should be taken and **either** (in respect of maintained schools) the statutory processes fully complied with (whether under Schedule 3 to the School Standards and Framework Act or under Schedule 3 to the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013 as appropriate), **or** (in respect of academies) agree up front a similar procedure with the Local Authority, the DfE or the ESFA on a case by case basis.
16. Dioceses should remember that (except in the case of a capital project involving VA capital grant, when an agreement including a contribution to the 10% is usually made with the VA Capital Team) the maximum contribution to which a Local Authority is entitled from any proceeds of sale is in our view limited to **the value of the land** transferred by them to the trustees. Legal advice on specific cases is essential if any greater contribution is expected.
17. Dioceses that have been holding off commencing the process under the Reverter of Sites Act 1987 to identify reversioners should now take advice and make a start. They should also if possible settle the capital gains tax that is likely to have fallen due to HMRC on reverter being triggered. All of this needs project-specific legal advice as the details vary considerably.
18. As to new applications for s554 Orders, we continue to advise waiting until the outcome of our discussions with the Charity Commission about a "batch scheme" for site trusts in each diocese is known. We anticipate this shortly. However, there is nothing to prevent dioceses applying for Orders if they wish to do so.

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