
The Charity Law & Practice Review

CASE NOTE

FRASER & FRASER v CANTERBURY DIOCESAN BOARD OF FINANCE & ANOTHER: THE HOUSE OF LORDS INTERPRETS THE SCHOOL SITES ACT 1841

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A recent decision of the House of Lords² (Lords Hoffman and Walker of Gestingthorpe plus Lords Nicholls, Hope and Brown) has overruled two previous decisions and introduced a new subtlety into the interpretation of the School Sites Act 1841.

The 1841 Act had the simple, social object of encouraging landowners to donate sites for schools for the poor by giving back to the grantor or his estate the right to recover the land if at any time it ceased to be used for the purpose. It has given rise to a number of reported cases over the years. It might be thought surprising that questions of the interpretation of a mid-nineteenth century statute should still require a decision in the 21st century, but of course many of the schools which were founded in the years immediately following the Act are only now being closed. In addition, the Act has been given a fresh lease of life by the Reverter of Sites Act 1987. The 1987 Act provides that, instead of obtaining the legal estate by operation of law, the grantor's estate is entitled, if the school trustees have not

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² Neutral Citation [2005] EWHL 65. Appearances in the House of Lords were as follows:
For the Frasers: Christopher Nugee QC and Caroline Furze instructed by William Blakeney.
For the Board: Christopher McCall QC and Vivian Chapman, instructed by Furley Page.
The purchaser of the school site (for whom Brachers are acting) did not take part in the hearing.
The House of Lords allowed an appeal from the Court of Appeal [2004] EWCA Civ 15 allowing an appeal from Mr Justice Lewinson [2003] EWHC 1075 (Ch).

obtained title by adverse possession prior to the 1987 Act's coming into force on 17th August 1987, to the proceeds of sale of the former school. The premises are held by the trustees, from the date when reverter would otherwise have taken place, on trust for sale from the grantor's estate, and the charitable trusts contained in the original grant are terminated.

St Philip's School, Maidstone, was a Church of England Primary School founded by a deed of grant made under the 1841 Act in 1866. The deed conveyed the site to the minister and chapel wardens of St Philip's as trustees on trust to permit the premises and all buildings erected on them *'to be forever hereafter appropriated and used as and for a school for the education of children and adults of the labouring manufacturing and other poorer classes in the Ecclesiastical District of Saint Philip Maidstone aforesaid and for no other purpose'*. When the Education Act 1944 came into effect the school became a voluntary school, and in 1952 the Minister of Education, made a scheme which, among other things, appointed the Canterbury Diocesan Board of Finance ('the Board') the trustee of the trust.

Over the years the school came to be conducted as a normal Church of England primary school for children of 5 to 11 years of age, with no barrier to the admission of pupils from more affluent families or from outside what had become the ecclesiastical parish of St Philip. In 1995 the decision was taken to close the school, and the Board sold the premises for £121,000 to a private company which wished to use it as a special school.

The intended closure of the school was advertised, and members of the grantors' families came forward to assert their right to the proceeds of sale. The Board did not accept that they were entitled, so they started legal proceedings. Simon and Nathan Fraser are well-known genealogists. Their business makes them uniquely placed to undertake the task of tracing the descendants of those who made grants of land under the 1841 Act. In this case they acquired the rights of the grantor's family and took over the proceedings as Claimants in their place.

The Particulars of Claim raise a number of complex issues. It was decided at an early stage, however, to ask the court to determine, as a preliminary issue, whether or not the legal estate in the premises had reverted by operation of law 12 or more years before the 1987 Act came into force, i.e. by 17th August 1975. An affirmative answer would establish that the Board had a possessory title to the premises at the time of the sale in 1995, no trust for sale would arise under the 1987 Act and the Frasers' claim would fail. The question turned on the meaning of s 2 of the 1841 Act and in particular the particular occasions which would give rise to a reverter.

Section 2 of the 1841 Act enables a landowner to make a grant of up to an acre of land ‘as a site for a school for the education of poor persons or for the residence of the schoolmaster or schoolmistress, or otherwise for the education of such poor persons in religious and useful knowledge’. It then provides for an immediate reverter to the grantor’s estate upon the land’s ‘ceasing to be used for the purposes in this Act mentioned’.

The Board was encouraged by the decision of the Court of Appeal in another case where the Frasers were suing the Board: *Fraser & Another v Canterbury Diocesan Board of Finance*³ (*Fraser No. 1*). In *Fraser No 1* the Frasers were claiming the proceeds of sale of another former school in Kent which had been founded under the 1841 Act and of which the Board was the trustee. The deed of grant had specified that the school should be conducted as a Church of England school in a particular parish. In 1874 it had become a ‘provided’ school, i.e. a ‘state’ school. This meant that it lost its Church of England character. It continued as a state school in the same premises until it closed in 1992. The question was whether reverter had taken place in 1874. The Court of Appeal decided that it had reverted in 1874, that the Board had acquired a possessory title before the 1987 Act came into force and that therefore the Frasers’ claim failed.

In reaching that decision the Court of Appeal held that the correct interpretation of the relevant part of s 2 of the 1841 Act was that reverter takes place when the premises cease to be used for the purposes specified in the deed of grant, not the much wider purposes set out at the beginning of s 2 itself. Reliance was placed on two earlier decisions at first instance concerning grants for Church of England schools. In the old case of *AG v Shadwell*⁴ the premises granted specifically for use as a day school ceased to be used for that purpose but remained in use as a Sunday school, one of the purposes for which a grant could be made under s 2 of the 1841 Act. Warrington J held that reverter had taken place because

‘you must read ‘the purposes in this Act mentioned’ as meaning such of the purpose as are applicable to the case in question, namely the purposes to which the land was devoted by the grantor’.

The former school in the more recent case of *Habermehl v AG*⁵ had ceased to be a Church of England school when the premises were leased to the local authority in 1876 and, like the school in *Fraser No 1*, became a provided school. Rimer J held that reverter took place at that point.

³ [2001] Ch 669.

⁴ [1910] 1 Ch 92.

⁵ [1996] EGCS 148.

In the present case, Lewison J at first instance held that reverter had not occurred before the 1987 Act came into effect. The Court of Appeal (Potter and Arden LJ and Wilson J) overturned that decision and, following the reasoning in *Hebermehl* and *Fraser No 1*, held that reverter had occurred before the relevant date, thereby defeating the Frasers' claim. The House of Lords allowed the Frasers' appeal and held that *Hebermehl* and *Fraser No 1* were wrongly decided, on the basis that Warrington J's decision in *Shadwell* had been misread. The decision at first instance was re-instated. The fact that there was a breach of trust in allowing the use of the school for pupils other than those specified in the deed of grant - there was evidence that some pupils came from comparatively well-off sections of society - did not mean that it had ceased to be used for the purposes specified in the Act. On the contrary, the evidence was that the school had remained open to 'poor persons' throughout its life.

It is certainly encouraging to note that the House of Lords has decided that 'the purposes in this Act mentioned' does not have to be interpreted artificially to mean 'the purposes mentioned in the deed of grant'. However, the *Shadwell* decision remains slightly slippery. The effect of its being upheld is that 'the purposes in this Act mentioned' does not mean 'all' or 'any' of those purposes, but only such of those (statutory) purposes are 'applicable to the case in question'. To decide which of the statutory purposes applies it is therefore necessary to consider the purposes set out in the deed of grant and gauge to which of the three wider purposes in s 2 of the Act they should be allocated.

Thus, at first sight, land settled by deed on trust for use as a site for a school of any description will revert when the property ceases to accommodate a school for poor persons; a site intended for a teacher's house will revert when it ceases to be used as a residence for a school master or school mistress; and a site given under the Act on trust for any other educational purpose will revert when it ceases to be used for the education of the poor in religious and useful knowledge. The boundaries are still not entirely clear, since sites were often given for more than one of the statutory purposes, and on subsequent reorganisation one of the purposes (e.g. the teacher's house) may be lost or moved to a different site. There is also a question whether the third purpose requires both religious and useful knowledge to be provided or whether these are alternatives, allowing a gift of land for use as a site for a Sunday school in a poor area to be used for (say) vocational training of the unemployed.

In the present case, however, the Frasers and the Defendants now have to start again with a court of first instance to obtain determination of the remaining questions arising on the Particulars of Claim.