The Charity Law and Practice Review

EDUCATION MATTERS

Debra Morris[1]

Two cases of interest, both relating to school closures, have been reported in 1994. The first, *Marchant v Onslow,*[2] concerned interpretation of provisions relating to reverter of school sites. In the second case, *Gunning v Buckfast Abbey Trustees Registered*[3], the issue of interest to charity lawyers was who may bring charity proceedings. Details of the new Inland Revenue concession concerning the Reverter of Sites Act 1987 have also been announced and will be outlined.

Marchant v Onslow

Before looking at the case itself, it may help to provide some background information concerning the Reverter of Sites Act 1987.

School Sites Act 1841

In the early 19th century, before the provision of schools by the state, schools were generally endowed from private sources. In order to facilitate and thus encourage private landowners to donate land for this charitable purpose, the School Sites Act was passed in 1841. This provided a simplified and cheap form of conveyance for sites of up to one acre for schools and school teachers' houses out of a landowner's estate or manor. Under this Act, conveyances included the proviso that if the land ceased to be used for the purposes for which it had been granted it would immediately and automatically revert to the grantor. Further Acts were passed which both explained and extended the provisions of the 1841 Act, and the right of reverter was retained.[4]

The exercise of the right of reverter has, in the past, given rise to complex problems, concerning the nature of the interest of the trustees once the site ceased to be used for the specific charitable purposes. These problems were caused by conflicting provisions in the Law of Property Act 1925. This may cause particular problems if no reverter claim is actually made, which is not inconceivable if the trust was set up

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1 Debra Morris - Lecturer in Law, University of Liverpool PO 147, Liverpool L69 3BX. Tel: (0151) 794 2825. Fax: (0151) 794 2829.

2 [1994] 2 All ER 707.

3 (1994) *The Times*, 9th June.

4 Similar Acts were enacted in order to encourage the donation of sites for the provision of churches, and libraries and museums. See Places of Worship Sites Act 1873 and Literary and Scientific Institutions Act 1854.

many years ago. The land would then be difficult to sell until the trustees acquired good possessory title to it.

Many voluntary schools still occupy sites conveyed under these Acts, and may be discontinued at some time in the future, so the difficulties remain. In 1981, it was estimated that the number of voluntary schools within the Act and still on their original sites probably exceeded 2,000.[5]

The Charity Commissioners used to take the view that the legal estate in the land vested automatically in the reversioner on the discontinuance of the school use, thus allowing the trustees in certain circumstances to obtain a title by adverse possession. The Commissioners then made many schemes on the basis of that possessory title. This view was assumed to be correct by Danckwerts J in *Re Ingleton*,[6] although the point was not argued before him. However, in 1979, Whitford J in *Clayton's Deed Poll*[7] decided that upon the property ceasing to be used for the purposes specified in the grant, then the grantees held the property in trust for the reversioner. A trustee cannot obtain a title by long possession against his or her own beneficiaries.[8] The trustees were therefore burdened with an express private trust with an untraceable beneficiary. This would result in the sterilisation of valuable areas of land.

Following this decision, the Commissioners decided not to make any more schemes where the statutory reversion had taken effect.[9] This led to a `.... partial but substantial stalemate in regard to the establishment of new schemes..'[10]

Then, in 1984, two test cases were tried together before Nourse J: *Re Rowhook Mission Hall, Horsham* and *Re Ladypool Road Old National School, Birmingham*.[11] In the *Rowhook* case, there was a grant of land made in 1874 upon trust for use as a school, but subject to section 2 of the 1841 Act. The land ceased to be so used in 1904, but the trustees remained in possession until 1979 with no adverse claim being made by the successors of the revertee during the whole of the time. In the *Ladypool* case, a grant of land on similar conditions was made in 1865, and in 1938 the land ceased to be so used but the trustees remained in possession until 1980 when the land was compulsorily acquired, and thus the question in that case related to entitlement to compensation.

In the *Rowhook* case Nourse J decided[12] that the effect of the 1841 Act was to vest in the trustees a fee simple determinable on the land ceasing to be used for the stated purpose, and that the trustees in possession were not trustees for the revertee but held

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5 *Property Law - Rights of Reverter.* Law Commission Report No. 111, para 9.

6 [1956] 2 All ER 881.

7 [1979] 2 All ER 1133.

8 Limitation Act 1980 s.21.

9 *Property Law - Rights of Reverter.* Law Commission Report No. 111, para 63.

10 [1984] 3 All ER 179 at 183 per Nourse J.

11 [1984] 3 All ER 179.

12 Following *A-G v Shadwell* [1910] 1 Ch 92.

the property on the original trusts and were therefore able to acquire a possessory title against the revertee.

In the *Ladypool* case, because the property ceased to be used for school purposes after the 1925 property legislation came into effect, it was necessary to consider what effect, if any, sections 3(3) and 7(1) of the Law of Property Act 1925 had upon the problem. Nourse J, accepting that section 7(1) not only preserved the trustees' determinable fee simple but also the proviso for a reverter, held that section 3(3) had no effect because it related to a person `entitled' to require a legal estate to be vested in him or her, and not to a person such as a revertee where the legal estate vested automatically.

Nourse J expressly declined to follow the decision in *Clayton* and therefore the two conflicting decisions remained.

Where the identity of the person entitled in reverter was known it made little difference whether or not the legal estate switched to the revertee automatically. However, the difference between the two views became more significant where the revertee was unascertained. If the traditional view in *Rowhook* is followed, the trustees could obtain good possessory title after twelve years. In such a case, the trustees would hold the legal estate on the original trusts which had failed and therefore a cy-près scheme could be sought. If the view in *Clayton* was followed, as a trustee cannot obtain a title by adverse possession against his or her beneficiaries, after the reverter the trustees would become trustees of a private trust. As such trustees, they will have all the usual responsibilities without any funds with which to meet them.

Reverter of Sites Act 1987[13]

The Reverter of Sites Act 1987 was passed in order to solve these problems so as to facilitate the management and sale of land originally conveyed upon such conditions as outlined above. Section 1 provides that on land ceasing to be used for the purposes for which it was conveyed under the School Sites Acts, no right of reverter arises, but the land becomes vested in the trustees on a statutory trust for sale. The trustees then hold the land, or the proceeds of sale, as trustees for the revertee. These provisions have retrospective effect in the sense that where reverter has occurred prior to the entry into force of the Act, the legal estate is nevertheless deemed to have been held, since reverter, on trust for sale. In most instances, the original conveyance will have created a charitable trust, but the trust for sale will usually be a non-charitable one for the benefit of the person who would, before the Act, have enjoyed the benefit of the reverter. Under the statutory trust for sale the trustees are able to manage the land and to sell it without the Commissioners' consent since the trust is not charitable. Provided that the overreaching provisions are complied with,[14] any purchaser can claim good title.

Once the trust for sale arises, the trustees may apply to the Charity Commissioners under section 2 to establish a scheme which extinguishes the rights of beneficiaries,

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[13] See D Evans, `Reverter of Sites Act 1987' [1987] *Conveyancer* 408.

[14] Law of Property Act 1925 s.2(1).

but they must first take steps to ascertain the identity of the revertee.[15] If after three months they have failed to trace the revertee, they may make the application. The scheme will require the trustees to hold the property on trust for the charitable purposes specified in the Commissioners' order - purposes as similar in character as is practicable to those for which the land was previously held, but the Commissioners are given a broad discretion. For example, when a local school closes, the Charity Commissioners may, when defining the purposes of the original grant, give weight to the fact that the original trust was for the benefit of the young people of the locality, rather than being required to have regard exclusively to the educational nature of the original trust. This may mean that if the local children now attend a new school in a nearby town, it may be appropriate for the original site to be used as a Youth Club.

The scheme must provide that any person who would have been a beneficiary under the trust for sale, who has not consented to the scheme and who makes a valid claim to the trustees within five years of the making of the Commisioners' order, shall be paid an amount equal to the value of his or her rights at the time of their extinguishment.[16] The Commissioners are also required to give notice of, and invite representations on, their proposed scheme, and by section 4, once the order is made it too is to be publicised, and it is subject to a right of appeal to the High Court.

Although the Act has simplified matters to some extent, difficulties, some of which have been referred to by the Charity Commissioners,[17] still exist.

Marchant v Onslow

Under the 1841 legislation, it was not clear whether the land reverted to the grantor (or his or her successors) or to the grantor's neighbouring land. At the time that the original legislation was enacted, it was probably expected that sites provided under the Act would always constitute small parts of landowners' existing estates and, moreover, it was not anticipated that those estates would be later broken up.[18] If that were the case, it would not matter whether the site reverted to the ownership of the grantor or was rejoined to the grantor's neighbouring land. In *Re Cawston's Conveyance*[19] the Court of Appeal held, in relation to a site which had clearly never formed part of a larger estate, that the land should revert to the successors of the grantor. There are also cases[20] to suggest that, where a site was granted out of a larger estate, the land reverts to the owners of the rest of the estate rather than the representatives of the grantor.

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15 Specific publicity requirements are set out in section 3.

16 Reverter of Sites Act 1987 s.2(4).

17 See *Charity Commissioners Report* 1988 paras 78-83

18 *Property Law - Right of Reverter.* Law Commission Report No. 111, para 29.

19 [1939] 4 All ER 140.

20 *Dennis v Malcom* [1934] Ch 244; *Attorney-General v Shadwell* [1910] 1 Ch 92.

The 1987 Act does not alter the identity of the persons to whom the site reverts. It merely transfers the rights of reverter from the site to the proceeds of sale of the site. The Act therefore does not assist in ascertaining to whom the rights revert. This was confirmed in the case of *Marchant v Onslow.*

In *Marchant* a piece of land was conveyed in 1848 pursuant, to the Schools Sites Act 1841, to the vicar and churchwardens of a parish as trustees for use as a school. The land was continuously used as a school until July 1984 when the school was closed. The land was sold by the plaintiffs as trustees, in accordance with section 1 of the Reverter of Sites Act 1987. They continued to hold the proceeds of sale (around £80,000) on trust for the person who would have been entitled to ownership of the land by virtue of the reverter arising under section 2 of the 1841 Act.

The issue before Mr David Neuberger QC, sitting as deputy judge of the Chancery Division, was whether the rights reverted to the successors in title to the grantors of the conveyance, or to the successors in title to the grantors' land of which the site in dispute once formed part.

It was held that the question was to be determined by interpreting section 2 of the 1841 Act, which `is not a satisfactory piece of drafting'. The answer was that, as a matter of impression, section 2 requires a school site to revert and be rejoined to the grantor's neighbouring land. This view may be open to question, since it seems to conflict with dicta in previous cases which suggest that reverter is to the original grantor, not to his or her land.[21] However, this could be regarded as obiter dicta of Mr David Neuberger QC, since here on the facts, the evidence seemed to suggest that at the time of the conveyance the land was freestanding. Again, as a matter of impression, Mr David Neuberger QC considered that if there was no land to which the site could be rejoined, then it should revert to the original grantor. Therefore, on the facts of this particular case, the rights reverted to the successors in title to the grantors of the conveyance.

Since the successor was ascertainable it was held that, when the school closed and the successor had come forward following the advertisement procedures laid down in section 3 of the 1987 Act, the trustees now held the proceeds of sale on trust for the successor.

Tax Considerations and Reverter

Once land given for educational purposes ceases to be used for that purpose, and section 1 of the 1987 Act applies, the trustees now hold land on trust for sale for the benefit of the revertee. Unless the revertee is known to be a charity, the property is then no longer held on charitable trusts and there is, for capital gains tax purposes, a deemed disposal and re-acquisition[22] which may give rise to a chargeable gain. In addition, if the revertee has not been immediately identified, chargeable gains may also arise to the trustees if the land or other property in the new trust is sold, or when the revertee is subsequently identified, and any income arising will be liable to income tax.

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21 See *Cawston's Conveyance* [1939] 4 All ER 140, supra.

22 Taxation of Chargeable Gains Act 1992 s.256(2).

In certain circumstances, the land, or any sale proceeds, will subsequently come to be held on charitable trusts, or for the benefit of a charity. Consequently there will have been a period during which charitable status will have been temporarily lost where:

(1) the Charity Commissioners make an order under section 2 of the 1987 Act; or

(2) the Secretary of State makes an order under section 2 of the Education Act 1973; or

(3) the revertee, or one of the revertees, is identified in due course and is a charity; or

(4) the revertee, or one of the revertees, is identified in due course and is not a charity but disclaims all entitlement to the property.

The Inland Revenue announced a concession in March 1994[23] whereby, if any of these four circumstances apply, provided charitable status is established within six years of the date on which the land ceases to be held on the original charitable trust, any capital gains tax which has been charged on the cessation of the original charitable purpose and on any disposals by the trustees during the relevant period will, by concession, be discharged or, to the extent already paid, be repaid with repayment supplement.[24]

Similarly, any income tax which has been charged on income which the trustees receive during the relevant period from the property, or from the proceeds of sale of the property, will be discharged or, to the extent already paid, be repaid with repayment supplement, provided that the income is used for charitable purposes. Any income tax suffered at source will also be repaid with repayment supplement.

If the property is held only partly for one or more charities or revertees who disclaim entitlement in circumstances (3) or (4) above, then only the share relating to the charity or charities or the revertes who make the disclaimer will be exempted from capital gains tax and income tax.

As a consequence of this concession, the Inland Revenue will, at the request of the trustees of a trust where the revertee has not been identified, agree to postpone the collection of any tax charged which may be subsequently discharged by the concession. If the revertee is identified at a later stage and does not have charitable status and does not disclaim entitlement, the postponed tax charges will become payable with interest.

Gunning v Buckfast Abbey Trustees Registered

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23 *Temporary loss of charitable status due to reverter of school and other sites - new concession* [1994] STI 338.

24 The concession applies where the land ceased to be held on charitable trusts on or after 17th August 1987 (the commencement date for the Reverter of Sites Act 1987).

In this case the plaintiffs were parents of children who attended a preparatory school run by the Benedictine Monks of St Mary's Abbey, Buckfast, Devon. The first defendant was the trustee of property used in the charitable activities of the monks. In early 1994, the trustee announced that the school was to close at the end of the summer term 1994. The plaintiffs wanted the High Court to determine whether the decision to close the school was valid and effective.

The plaintiffs claimed that the decision to close the school was not valid because it was taken without the consent of the Chapter. Alternatively they said that, if they were wrong on this and the consent of the Abbot's Council was sufficient, that consent was not validly obtained.

It should be noted that all the parties accepted that these matters could have been resolved without the intervention of the court, namely by the Abbot convening a meeting of the Chapter and the Abbot's Council to ratify the decision to close the school. However, the trustee was unwilling to agree to such meetings being called, not because it considered that the necessary ratification would not be forthcoming, but because it considered that the points in issue had wider implications.

The court was not concerned with the reasons for the decision to close the school or any question other than two preliminary questions which were as follows:

(1) did the plaintiffs have standing to bring the proceedings?

(2) upon the true construction of the Trust Deed dated 28th October 1950 was the advice or consent of the Chapter or the Abbot's Council required for the decision to close the School?

Who May Bring Charity Proceedings

The first and most important question arises out of section 33 of the Charities Act 1993. This applies to charity proceedings, defined as meaning "proceedings in any court in England or Wales brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of trusts for charitable purposes".

There are restrictions on when charity proceedings may be brought. Section 33(2) provides that no charity proceedings should be brought unless authorised by order of the Charity Commissioners. In this case, the relevant authorisation had been given. The objection taken to the plaintiffs' standing was based on section 33(1) which restricts the persons who may bring charity proceedings as follows:

> "charity proceedings may be taken with reference to a charity either by the charity, or by any of the charity trustees, or by any person interested in the charity, or by any two or more inhabitants of the area of the charity if it is a local charity, but not by any other person."

A Person interested in the Charity

The leading authority on the meaning of `person interested in the charity' is the decision of the Court of Appeal in *Re Hampton Fuel Allotment Charity*.[25]

In *Re Hampton Fuel Allotment Charity* the local authority and two trustees of the charity brought proceedings concerning the administration of the charity under section 28 of the Charities Act 1960, which is the predecessor of section 33. As regards the interpretation of the phrase `any person interested in the charity' Nicholls LJ said:

> "Thus the interest which ordinary members of the public, whether or not subscribing to a charity, and whether or not potential beneficiaries of a charity, have in seeing that a charity is properly administered is a matter in respect of which the Attorney General remains charged with responsibilities. He can institute proceedings ex officio or ex rationale. This suggests, therefore, that to qualify as a plaintiff in his own right a person generally needs to have an interest materially greater than or different from that possessed by ordinary members of the public such as we have described.
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> In our view that may be as near as one can get to identifying what is the nature of the interest which a person needs to possess to qualify under this heading as a competent plaintiff. It is not a definition. But charitable trusts vary so widely that to seek a definition here is, we believe, to search for a will-o'-the-wisp. If a person has an interest in securing the due administration of a trust materially greater than, or different from, that possessed by ordinary members of the public as described above, that interest may, depending on the circumstances, qualify him as a person interested."[26]

Accordingly a person may, depending on the circumstances, be a `person interested' if he or she has an interest in securing the due administration of a charity which is materially greater than, or different from, that possessed by ordinary members of the public. In the *Hampton Fuel* case itself, it was held that as the local authority was itself concerned in the relief of poverty in the same area as that in which the charity's funds had to be applied for this purpose, the local authority was a `person interested in the charity' in question. It was relevant that the local authority could appoint some of the trustees and that the charity had very substantial assets.

It was submitted on behalf of the defendant in *Buckfast* that in the *Hampton Fuel* case the Court of Appeal had declined to lay down the categories of `persons interested in the charity' but had left the definition flexible. It was therefore necessary to look to see if the proposed plaintiff was bringing his or her claim for good reason. In this connection it was necessary to look at the relief claimed and in that connection it was submitted that here the ground of the complaint was an alleged procedural irregularity which was a domestic matter in which the plaintiffs had no entitlement to interfere.

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25 [1988] 2 All ER 761.

26 [1988] 2 All ER 761, 767.

To be contrasted with the *Hampton* case is *Haslemere Estates v Baker.*[27] In that case, developers sought to bring several claims against a charity arising out of an agreement which it wanted to enforce. Among those claims was a claim for an enquiry as to whether it would be for the benefit of the charity to perform the agreement. Sir Robert Megarry VC held that the plaintiffs were not 'persons interested in the charity'. He said:

> "An interest which is adverse to the charity is one thing, an interest in the charity is another. Those who have some good reason for seeking to enforce the trusts of a charity or secure its due administration may readily be accepted as having an interest in the charity, whereas those who merely have some claim adverse to the charity, and seek to improve their position at the expense of the charity, will not."

The thrust of the trustee's case in *Buckfast* was that, relying on *Haslemere Estates*, the parents had a contractual relationship with the trustee and that their interest in these proceedings arose by virtue only of that interest which was insufficient for the purposes of section 33(1) of the Charities Act 1993.

Various points were put forward on behalf of the plaintiffs to suggest that they were 'persons interested in the charity'. These were:

(1) As parents of pupils at the school, they were `persons interested in the charity' through the benefit to themselves in having their children educated as they wished;

(2) The plaintiffs had a natural and moral concern for the children's education, as well as a legal obligation, and that this gave them an interest which was materially different from that enjoyed by a member of the public;

(3) The plaintiffs were persons `interested in the charity' since they were concerned that the charity should be properly administered so as to benefit both their children and themselves;

(4) The parents were either beneficiaries or subscribers to the charity;

(5) The proceedings should be regarded as if the parents were suing as next friends and that the children had an obvious interest in how they were educated which went beyond their parents' contractual rights.

Arden J concluded that the plaintiffs did have a materially greater interest than ordinary members of the public in securing the due administration of that part of the charitable activities of the Abbey represented by the school because they were parents of pupils at the school. This was so even though they were neither subscribers to nor beneficiaries of the charity. Their children who were pupils were the beneficiaries. They could only become pupils as a result of their parents making a contract for their education with the trustee. The mere fact that the plaintiffs had such contracts did not mean that they were barred from bringing charity proceedings. In the judge's view they would be so barred if they were seeking to use the charity proceedings to assist

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[27] [1982] 3 All ER 525.

them to pursue an adverse claim against the trustee. So far as she could see, this was not the object of the proceedings. Accordingly, in her view, the case was not analogous to that of *Haslemere Estates.*

Having ascertained that the parents could bring the case, Arden J then turned her attention to the second issue, and having looked closely at all the relevant documents, ultimately decided that the decision to close the school required the advice but not the consent of the Abbot's Council. It did not, however, require the advice or consent of the Chapter.

Comment

It is not that often that charity cases reach the courts. It is contended that the judges in both these recent cases did not take the rare opportunity to clarify charity law in a manner which would have been most beneficial to charity lawyers.

In the first case, there is dicta in the judge's decision in *Marchant v Onslow* which may seem inconsistent with dicta of Sir Wilfred Green MR in the Court of Appeal in *Re Cawston's Conveyance.* Mr David Neuberger QC acknowledges this, but does not go sufficiently far to justify his divergence of view. The judge also seemed to ignore the helpful analysis of the nature of the reverter right exemplified by Nourse J in *Rowhook.* That analysis - which suggests that the right is almost a personal right of the grantor - seems inconsistent with the conclusion of Mr David Neuberger QC, that the right reverts to the grantor's land. Other cases, referred to in this note, which may have been helpful were neither cited nor considered by the judge. This may lead to further litigation on similar points. The judge referred to the Law Commission Report of 1981 to assist in his interpretation of section 2 of the 1841 Act, but he failed to refer to the debates which took place whilst the School Sites Conveyance Bill of 1841 was being passed.[28] These would suggest that the reverter right was intended to be for the original grantor (or his or her successors) not for the original land.[29] The practical application of Mr David Neuberger QC's rule that generally reverter rights should go back to the original grantor's land may also lead to difficulties. Many of these transactions took place a long time ago and it will be rare to find detailed records which define the extent of a piece of land out of which a reverter grant was made. This information will, however, be required in order to determine who are the successors in title who are eventually to benefit from the reverter.

There are also other issues relating to reverter which are still in a confused state. These include the construction of sections 1(4) and 1(5) of the 1987 Act, which make special provision for cases where reverter has occurred, but the claim of the person who would otherwise be entitled as a beneficiary of the statutory trust for sale was statute barred, before the Act came into force. The Charity Commissioners suggest[30] that the uncertainty may be resolvable only by a decision of the courts or by amending legislation.

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[28] Reference to such parliamentary material is permitted to assist in statutory interpretation according to the House of Lords decision in *Pepper v Hart* [1993] 1 All ER 42.

[29] See *Mirror of Parliament*, 7th May 1841, at p 1515.

[30] *Charity Commissioners Report* 1988 para 82.

In the second case, it is argued that the judgment of Arden J in *Buckfast* does not go much further to throw light on the dicta of Nicholls LJ in *Re Hampton Fuel Allotment Charity* concerning who is a `person interested in a charity'. That case left the goalposts deliberately vague, and it seems as though that is where they are going to stay. Clearly, it is not the case that *any* members of the public can bring charity proceedings, whatever their intentions may be. However, the cases seem to provide more certainty over who is *not* a `person interested in a charity'. For example, cases have determined that a person who provides a modest financial contribution is not a person interested. Nor does a contractual relationship of itself make that person a person interested. In *Bradford v University College of Wales*[31] it was even held that a founder of a charity was not a person interested. In *Re Hampton Fuel Allotment Charity,* Nicholls LJ, having set out his guidelines on who is a `person interested' said:

> "We appreciate that this is imprecise, even vague, but we can see no occasion or justification for the court attempting to delimit with precision a boundary which Parliament has left undefined."[32]

It seems as though the courts are determined to allow the law to develop on a case by case basis, leading to more expense for those interested in charity who may be forced to go to court in order to discover whether they really are `persons interested in a charity' or not.

Perhaps the most welcome development is the Inland Revenue's concession, which will be much appreciated by those whom it affects.

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31 [1987] 3 All ER 200.

32 [1988] 2 All ER 761, 767.