THE HEATHEN ARE COME INTO THINE INHERITANCE: REVERTER OF SCHOOL SITES AND THE HOUSE OF LORDS' DECISION IN *FRASER v CANTERBURY DBF*

NICK RICHENS

Solicitor

On 27 October 2005 the House of Lords' decision in *Fraser v Canterbury Diocesan Board of Finance (No 2)*[1]—referred to in this Comment as *Fraser (No 2)*[2]— ended an audacious attempt by the Canterbury Diocese to eliminate the issue of reverter in the majority of school sites affected by it. The media, largely unable to comprehend the legal issues, announced that the decision would lose the Church a lot of money: 'The widespread practice of selling school sites could prove to be a costly mistake';[3] 'Defeat over sale of school land to cost Church millions'.[4] But in reality, and whilst losing the case will prove expensive to the Diocese of Canterbury, this is in the main money that the Church never had but might have come into had the decision gone the other way, rather than money that it now has to pay back.

REVERTER

There were three groups of Acts passed in the nineteenth century to encourage and facilitate the grant of land for worthy educational and religious purposes: the School Sites Acts 1841 to 1852, the Literary and Scientific Institutions Act 1854 and the Places of Worship Sites Act 1873. Each contained provisions for the land to revert to the grantor in certain circumstances. As well as being an incentive to give land, reverter was particularly important to the owners of landed estates, who might be prepared to see their land used for, say, the village school, but would not wish it to be sold if the school closed.[5]

By far the greatest number of grants were made under the School Sites Acts for schools (particularly Church of England schools) and teachers' houses. The National Society (the principal Church of England educational charity) produced model conveyances for Church school sites, which also

[1] *Fraser v Canterbury Diocesan Board of Finance (No 2)* [2005] UKHL 65, [2006] 1 All ER 315, [2005] 3 WLR 964, HL.
[2] The same parties had previously litigated in respect of a different school site: *Fraser and Fraser v Canterbury Diocesan Board of Finance (No 1)* [2001] Ch 669, [2001] 2 WLR 1103, (2001) 6 Ecc LJ 163, CA.
[3] *The Times*, 29 October 2005.
[4] *Daily Telegraph*, 29 October 2005.
[5] See the remarks of Sir Wilfrid Green MR in *Re Cawston's Conveyance and the School Sites Act 1841* [1940] Ch 27 at 33-34, [1939] 4 All ER 140 at 142, 143.

served as a school's trust deed. The usual trust clause in the nineteenth century models stipulated that the school was to be for the poorer classes of a particular parish and that it was to be in union with the Society. This last provision imported into the trusts the Society's Terms of Union which, in particular, required the school to provide Church of England religious education.[6] A great many Church schools today are still held under these trust deeds, even where the school now operates on a new site.

Not all nineteenth century school sites were subject to reverter. Some were not given under the School Sites Acts at all. Moreover, reverter only applied in the case of land granted under section 2 of the School Sites Act 1841 by beneficial owners or under section 3 by the Duchy of Lancaster. Grants by incumbents out of their glebe, or by charities, Poor Law Guardians, colleges and universities or the Ecclesiastical Commissioners all took effect under section 6, which carried no reverter.

The relevant parts of section 2 of the School Sites Act 1841 are in the following terms:

> Any person, being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, ... may grant, convey, or enfranchise by way of gift, sale, or exchange, in fee simple or for a term of years, any quantity not exceeding one acre of such 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 purposes of the education of such poor persons in religious and useful knowledge; ... Provided also, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, any thing herein contained to the contrary notwithstanding.

The section is hardly a model of clarity, and the question of to whom the land reverted (the revertee) has been the subject of judicial attention in recent years,[7] but is beyond the scope of this Comment. The issue before the House of Lords was what triggered the occurrence of reverter.

Until the coming into force of the Reverter of Sites Act 1987 on 17 August 1987, the effect of reverter was that the school trustees were divested of the legal estate, which automatically passed to the revertee. If the school

[6] 'The Children are to be instructed in the Holy Scriptures, and in the Liturgy and Catechism of the Established Church' (item 1 of the Terms of Union in use from 1839).

[7] See *Marchant v Onslow* [1995] 1 Ch 1, [1994] 2 All ER 707, overruled in *Fraser and Fraser v Canterbury Diocesan Board of Finance (No 1)* [2001] Ch 669; and see *Bath and Wells Diocesan Board of Finance v Jenkinson* [2002] EWHC 218, [2003] Ch 89, [2002] 4 All ER 245.

trustees nevertheless remained in possession of the land for twelve years, they could in many cases acquire title by adverse possession against the revertee and they would hold that title on the charitable trusts on which it was originally given, but free from reverter.[8] The Reverter of Sites Act 1987 provided, with retrospective effect, that the trustees hold the land on trust for the person to whom, but for Act, it would have reverted.[9] However, the Act contained a saving where the rights of that person had been extinguished by the time the Act came into force.[10] So, reverter can only now be statute barred if it occurred more than twelve years before the Reverter of Sites Act 1987 came into force, ie before 17 August 1975.

In *Attorney General v Shadwell*[11] Warrington J held that reverter occurred when the school site ceased to be used for such of the purposes mentioned in section 2 of the School Sites Act 1841 as are specified in the trust deed. The site in question had been given on trust to use it as a school. The school closed, but the trustees continued to use it as a Sunday school. Warrington J held that the trust deed required use as a day school so that reverter occurred when use for that purpose ceased. Use as a Sunday school was within the section as use 'otherwise for the purposes of the education of such poor persons in religious and useful knowledge', but that was not the use specified in the trust deed. In his judgment, Warrington J said:[12]

> I think you must read 'the purposes in this Act mentioned' as meaning such of those purposes as are applicable to the case in question, namely, the purposes to which the land was devoted by the grantor. Now to what purpose was the land devoted in the present case? There can, I think, be only one answer to that question—to the purpose of a day school for the education of the poor, to be conducted according to the principles and in furtherance of the ends of the National Society. The mere holding of a Sunday school does not fulfil that purpose.

These words were applied in *Habermehl v Attorney General*.[13] Land had been given as the site for a school for the education of poor persons, and the trust deed specified that the school was to be conducted in accordance with the principles of the National Society. In 1876 the managers of the school transferred it to the local School Board under the provisions of the Elementary Education Act 1870. The school then became a school provided by the Board and as such was prohibited by law from providing religious education distinctive of any particular denomination. Rimer J held that reverter had occurred in 1876 and so was statute barred. It was

[8] *Re Ingleton Charity* [1956] Ch 585, [1956] 2 All ER 881; *Re Rowhook Mission Hall, Horsham* [1985] Ch 62, [1984] 3 All ER 179 (not following *Re Clayton's Deed Poll* [1980] Ch 99, [1979] 2 All ER 1133). See also the Limitation Act 1980, s 15.
[9] Reverter of Sites Act 1987, s 1(1).
[10] Ibid, s 1(4)(a).
[11] *Attorney General v Shadwell* [1910] 1 Ch 92.
[12] Ibid at p 99.
[13] *Habermehl v Attorney General* [1996] EGCS 148. The decision was approved by the Court of Appeal in *Fraser and Fraser v Canterbury Diocesan Board of Finance (No 1)* [2001] Ch 669.

the decision in *Habermehl v Attorney General* that the Canterbury Diocese sought to develop in *Fraser (No 2)*.

FRASER (No 2)

The site of St Philip's School, Maidstone, was acquired by trustees in 1865 under a single deed, partly by purchase and partly by gift. The deed was made under the School Sites Acts and declared that the land was held on trust '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 St Philip Maidstone ... and for no other purpose'. The deed also contained a direction that the school was to be conducted in accordance with the principles of the National Society. The school remained a Church of England school throughout its life, becoming voluntary controlled under the Education Act 1944. The Canterbury Diocesan Board of Finance was appointed trustee of the school in 1952. The school closed in 1995. The site was sold and the proceeds of sale were spent on building work at another school in the Diocese.

Fraser and Fraser are genealogists. As part of their business they trace revertees and pursue claims on their behalf. In this case they acquired the interests of the revertees of St Philip's School, thus enabling them to litigate in their own right. The matter that came before the House of Lords was a preliminary issue: whether reverter of the school site occurred before 17 August 1975 (in which case the claims of the revertees would be statute barred).

It will be noted that, unlike the school in *Habermehl v Attorney General*, this school had continued to be conducted as a Church of England school until its closure and it had not closed until 1995. The argument of the Canterbury Diocesan Board of Finance was that reverter had occurred long before 1975 because the school, in breach of its trust deed, had admitted pupils who were not from the poorer classes and pupils who lived outside the parish of St Philip, Maidstone. At first instance[14] Lewison J accepted evidence that between 1931 and 1947 approximately 16 per cent of pupils came from outside the parish and that the pupils came from a variety of social backgrounds. The judge held that the school had been conducted in breach of trust, but that it had continued to educate children who were 'qualifying persons' under the trust deed even if it had also educated others who were not. It had not therefore ceased to be used for the purpose for which it was established.

In the Court of Appeal[15] the first instance decision was reversed on the basis that the decision was inconsistent with the judge's finding of fact. The school had come to be used for a new and wider purpose than that

[14] [2003] EWHC 1075, 14 May 2003 (Lewison J).
[15] [2004] EWCA Civ 15, 28 January 2004 (Potter and Arden LJJ and Wilson J).

prescribed by the trust deed and that had triggered reverter long before 1975. Fraser and Fraser appealed to the House of Lords.[16] Their lordships were unanimous. The judgment of the Court of Appeal was reversed and it was held that reverter did not occur until the school closed in 1995. Reverter was not therefore statute barred. Moreover, *Habermehl v Attorney General* and, on this point, *Fraser and Fraser v Canterbury Diocesan Board of Finance (No 1)* were wrongly decided.

There were three statutory purposes in section 2 of the School Sites Act 1841: a school for the education of the poor; a residence for the schoolmaster or schoolmistress; and otherwise for the education of such poor persons in religious and useful knowledge. The grantor could specify one or more of those statutory purposes in the trust deed. Reverter would occur when the land ceased to be used for the purpose or purposes specified. But if the grantor gave directions about how the purposes were to be carried out (eg in union with the National Society or for the benefit of children in a particular parish), departure from that direction was a matter for trust and charity law but did not trigger reverter. As Lord Walker of Gestingthorpe said:

> Mr Nugee [counsel for the appellants] ... posed the question which might have been put to the school managers (around the middle of the twentieth century or at any time up to 1975), 'Are you still providing education for the poor of the parish?' To my mind that question could only have received an affirmative answer, and that is determinative of this appeal.[17]

Their lordships criticised the judges below for being too ready to find that there had been a breach of trust. Lord Hoffman suggested that:

> The admission of some children from better-off families is explicable on other grounds, for example, keeping up the numbers or income to make the school viable for the purpose of educating poor persons, or improving the education of poor persons by adding some children with a more literate home background or more demanding and articulate parents.[18]

However, the point does not appear to have been made at any stage of the case that, under the Education Acts, maintained schools are not now free to set whatever admission policy they like. St Philip's had been a voluntary controlled school and so its admission arrangements were made by the local education authority and not by the trustees or governing body. Even if it had been a voluntary aided school, it would be unable to refuse

[16] *Fraser v Canterbury Diocesan Board of Finance (No 2)* [2005] UKHL 65, [2006] 1 All ER 315, [2005] 3 WLR 964, HL (Lords Nicholls, Hoffman, Hope, Walker and Brown).
[17] *Fraser (No 2)* [2006] 1 All ER 315 at 329, [2005] 3 All ER 964 at 977, 978.
[18] Ibid at 321 and at 969.

admission to all who applied unless the school were oversubscribed,[19] and in setting its admission arrangements the governing body would have to have regard to the code of practice issued by the Secretary of State.[20] No maintained school could now prohibit the admission of pupils living outside a particular parish. Nor could it restrict admission to those of the poorer classes. Had the House of Lords not reversed the Court of Appeal's decision, a significant proportion of the Church of England maintained schools in the country would be operating in breach of trust.

Despite the coverage in the media suggesting that reverter was a long-forgotten law rediscovered by Messrs Fraser, practitioners in this field deal with reverted sites on a regular basis. The majority of them would have been surprised if the House of Lords' decision had been otherwise. Had the Court of Appeal's judgment stood, reverter would now be statute barred for most of the school sites that were subject to it. The Church of England would have gained considerable educational trust assets when those sites were sold in the future. But just because that would be welcomed by diocesan boards of education does not mean that the House of Lords' decision was wrong or that the law is a bad one and should be changed. The Church fought to retain the benefit of the obscure and arbitrary chancel repair liability. It should not complain when those entitled on reverter successfully fight to retain their rights.

[19] See the School Standards and Framework Act 1998, s 86.
[20] Ibid, s 84.