Neutral Citation Number: [2019] EWCA Civ 200

Case No: A3/2018/0757

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
Mr Richard Spearman QC
HC2017-000780

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 February 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HAMBLEN
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

(1) MICHAEL RITTSON-THOMAS **(2) HUGO RITTSON-THOMAS** **(3) KIM HUGHES**	**Claimants/ Appellants**
- and -	
OXFORDSHIRE COUNTY COUNCIL	**Defendant/ Respondent**

- -
- -

Mr Matthew Smith (instructed by **Lee Bolton Monier-Williams**) for the **Appellants**
Mr Nigel Thomas (instructed by **Oxfordshire County Council** for the **Respondent**

Hearing date : 7 February 2019

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Approved Judgment

Lord Justice Patten :

1. The School Sites Act 1841 ("the 1841 Act") was passed in order to encourage and facilitate the provision of up to one acre of land for use 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". In the majority of cases it was used to provide land for local Church of England elementary (or what we now call primary) schools. The purposes set out in the 1841 Act are charitable educational purposes all of which specify a particular use of the land conveyed. The grantor is entitled to select between the statutory purposes as the terms of the trust on which the land is conveyed and may even supplement or modify the statutory purposes with provisions of his own choosing. But, as I shall explain later in this judgment, it is the statutory purposes specified in s.2 of the 1841 Act which determine the duration of the grant. If the land ceases to be used for the statutory purposes selected in the conveyance then title to it reverts to the estate of the grantor.

2. The material provisions are contained in s.2 of the 1841 Act as follows:

> "Any person, being seised in fee simple, fee tail or for life, of and in any manor or lands of freehold … and having the beneficial interest therein, … may grant, convey or enfranchise by way of gift, sale or exchange, in fee simple … 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 … as fully as to all intents and purposes as if this Act had not been passed, any thing herein contained to the contrary notwithstanding."

3. But this statutory right of reverter is avoided in the circumstances provided for by s.14 of the 1841 Act. So far as material s.14 provides:

> "When any land or building shall have been or shall be given or acquired under the provisions of … this Act, or shall be held in trust for the purposes aforesaid, and it shall be deemed advisable to sell or exchange the same for any other more convenient or eligible site, it shall be lawful for the trustees in whom the legal estate in the said land or building shall be vested … to sell or exchange the said land or building, or part thereof, for other land or building suitable to the purposes of their trust, and to receive on any exchange any sum of money by way of effecting an equality of exchange, and to apply the money arising from such sale or given on such exchange in the purchase of another site, or in the improvement of other premises used or to be used for the purposes of such trust."

4. The effect of a conveyance under s.2 was to vest in the trustees of the school a fee which was determinable on the site ceasing to be used for the statutory purposes specified in the grant. In that event the title of the grantees terminated and the grantor or his estate resumed ownership of the land free from the trusts of the original conveyance. As explained by Nourse J in *Re Rowhook Mission Hall, Horsham* [1985] Ch 62, determinable fees ceased to exist as legal estates under the 1925 real property legislation but an exception was made by s.7(1) of the Law of Property Act 1925 for determinable fees created by a conveyance under s.2 of the 1841 Act.

5. The effect of a reverter under s.2 was therefore to re-vest the legal estate in fee simple automatically in the grantor or his successors in title and to make the original grantees trespassers in the event that they continued to occupy the land. But, in order to prevent the possibility of their acquiring a title by adverse possession against the grantor, s.2 of the 1841 Act was amended by the Reverter of Sites Act 1987 ("the 1987 Act") as follows:

> "1.(1) Where any relevant enactment provides for land to revert to the ownership of any person at any time, being a time when the land ceases, or has ceased for a specified period, to be used for particular purposes, that enactment shall have effect, and (subject to subsection (4) below) shall be deemed always to have had effect, as if it provided (instead of for the reverter) for the land to be vested after that time, on the trust arising under this section, in the persons in whom it was vested immediately before that time.
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> (2) Subject to the following provisions of this Act, the trust arising under this section in relation to any land is a trust for the persons who (but for this Act) would from time to time be entitled to the ownership of the land by virtue of its reverter with a power, without consulting them, to sell the land and to stand possessed of the net proceeds of sale (after payment of costs and expenses) and of the net rents and profits until sale (after payment of rates, taxes, costs of insurance, repairs and other outgoings) in trust for those persons; but they shall not be entitled by reason of their interest to occupy the land."
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> ….
>
> 6(2) It is hereby declared –
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> (a) that the power conferred by section 14 of the School Sites Act 1841 (power of sale etc) is exercisable at any time in relation to land in relation to which (but for the exercise of the power) a trust might subsequently arise under section 1 above; and
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> (b) that the exercise of that power in respect of any land prevents any trust from arising under section 1 above in relation to that land or any land representing the proceeds of sale of that land."

6. On an event occasioning a reverter under s.2 of the 1841 Act (after 17 August 1987) the land therefore continues to be vested in the original grantees but on a trust for sale in favour of those entitled on the reverter. From the coming into effect of the Trusts of Land and Appointment of Trustees Act 1996 this is now a trust of land with power to sell. Since the original grantees continue to hold the legal estate but on trust for the successors of the original grantor this therefore prevents any acquisition by the grantees of a title by adverse possession but leaves intact the operation of ss.2 and 14 of the 1841 Act in terms of when a reverter will occur.

7. In the present case we are concerned with two grants of land under s.2 of the 1841 Act which were made in order to provide the site of Nettlebed School. I can take the facts from the judgment below of Mr Richard Spearman QC (sitting as a Deputy Judge of the Chancery Division): [2018] EWHC 455 (Ch):

> **"**The facts
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> 2. The Claimants in this Part 8 claim are some of the heirs of the late Robert Fleming ("Mr Fleming"), who conveyed land to the Defendant in 1914 and 1928 under the 1841 Act for use as part of Nettlebed School ("the School").
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> 3. By a conveyance dated 29 September 1914 expressed to be made under the authority of the School Sites Acts, Mr Fleming freely and voluntarily conveyed without any valuable consideration to the Defendant certain land ("the First Site") already "forming a portion of the playground of the school at Nettlebed" to the Defendant "for the purposes of the said Acts and to be applied as a part of the playground of the said School and for no other purpose whatever." The First Site comprised about 0.13 acres of land.
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> 4. By a further conveyance dated 5 April 1928, also expressed to be made under the School Sites Acts, Mr Fleming freely and voluntarily conveyed without any valuable consideration to the Defendant further land ("the Second Site") "for the purposes of the said Acts and to be applied as a site for a public elementary school for children of and in the Parish of Nettelebed and adjacent Parishes and for the residence of the School Master (or School Mistress) of the said School or for other purposes of the said School and for no other purposes whatsoever." The Second Site comprised about 0.79 acres of land.
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> 5. The School was in existence prior to 1914. Indeed, other pieces of land which formed part of the school site had also been given to the Defendant for the purposes of the School under the School Sites Acts by other benefactors, including the fourth Lord Camoys. The 1928 conveyance permitted a new school building to be erected on the land conveyed by Mr Fleming while the pre-1928 school site continued in use as the School's kitchen and dining room.

6. The uncontested evidence of the Second Claimant contained in his witness statement dated 23 February 2017 is as follows. Mr Fleming died on 31 July 1933. The interest in any land which was subject to reverter, or in the trust of the proceeds of sale of any such land, now vests in the Claimants and other persons who have been given notice of these proceedings and who do not wish take part in them. The First, Second and Third Claimants each have 2/12 interests, the Fourth Claimant has a 1/12 interest, Mr David Hughes and Ms Victoria Young each have 1/12 interests, and the trustees of the Anne K. Brandt Trust have a 3/12 interest. The Claimants produced emails dated 26 February 2018 from the solicitors for the foregoing persons who are not Claimants confirming that their clients did not wish to be joined as parties to the claim.

7. The Defendant decided to relocate the School to its present site in the 1990s. A letter dated 18 April 2000 from the Defendant's then Joint Head of Legal Services to Currey & Co, solicitors for the trustees of the will of the late NPV Fleming, refers to the Defendant's "proposals for the school which include the sale of the area edged red on the attached plan in order to raise the capital required to build a new primary school on the area edged blue thereon".

8. The Scheme for "Nettlebed Replacement School" was also an agenda item for the meeting of the Defendant's Executive Committee on 22 July 2003. The Defendant's revised detailed project appraisal at that time envisaged that total expenditure of £2,035,000 would be incurred in 2004/5, which would be funded as to £1,702,000 by borrowing, as to £193,000 by contributions from third parties, and as to £140,000 by grants; and that this would be defrayed in part by capital receipts of £1,300,000 in 2005/6, representing the proceeds of sale of land on which the School had operated prior to its relocation to the new site.

9. The Defendant implemented these plans, by (a) building new (and improved) school facilities on land which it already owned, adjacent to the existing premises, (b) in or about February 2006, transferring the children who attended the School to the new premises, and (c) marketing and selling the old premises.

10. On 28 September 2007, the Defendant sold 0.844 acres of land to Bluespace Property Nineteen Limited for the sum of £1,355,000 ("the 2007 Land") pursuant to an agreement for sale dated 1 August 2007. The 2007 Land comprised a small part of the First Site and all, or almost all, of the Second Site. The Claimants' surveyor has calculated that 93.17% of the 2007 Land had been given to the Defendant by Mr Fleming under the 1914 and 1928 conveyances. Based on that calculation, the Claimants contend that 93.17% of £1,335,000 (i.e. £1,243,819.50) has been

> held on trust for them since September 2007. The Defendant accepts that calculation, but disputes that there was any reverter.
>
> 11. The Defendant explained the basis upon which it had proceeded in a letter from its solicitor dated 18 August 2010 to the Claimants' solicitors. This included the statements that "It was at all relevant times the Council's firm and settled intention to apply the proceeds of sale of the former school site towards the construction of buildings for the school on the alternative site" and "In practical terms, the pupils of the old site need somewhere to receive their education and therefore they need the new buildings to move into before the old site [is] sold".
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> 12. In a further letter dated 24 September 2010 passing between the same parties the Defendant stated (among other things) that "the closure, sale and use of proceeds is an event or series of events which does not cause a reverter to arise under the 1841 and 1987 Acts. The holding of a school site pending a planned s14 sale is, in the Council's position, entirely in accordance with the statutory purposes set out in s2 of the 1841 Act and set out in the relevant conveyances."

8. Under both the 1914 and the 1928 conveyances the grantor selected all three of the statutory purposes prescribed by s.2 of the 1841 Act but the site, as found by the judge, was used to house the school buildings (including a kitchen and dining room) rather than any form of accommodation for the teaching staff.

9. The principal issue for the judge was whether the removal of the school from its original site to the new site in 2006 triggered a reverter under s.2 of the 1841 Act. If it did then it is common ground that a substantial proportion of the proceeds of sale of the old site are held on trust for the claimants as the successors in title to the original grantor. The claimants contend that the closure of the old school building on the original site in 2006 meant that it ceased to be used either as a site for a school or otherwise for the purposes of education within the meaning of s.2. If there was such a cesser of use in 2006 so as to occasion a reverter then the County Council accepts that a subsequent exercise of the s.14 power of sale in 2007 was not effective to restore title retrospectively to the County Council as successors in title to the original grantees. This is consistent with s.6(2) of the 1987 Act which, I think, makes clear that the trust in favour of the grantor which now arises under s.1 on a cesser of use for the statutory purposes is only avoided if the s.14 power of sale is exercised prior to that event. The issue therefore for the Court in this case is whether that cesser of use did in fact occur prior to the sale of the old site in 2007. The claimants accept that the trustees of the original two conveyances can bring themselves within the provisions of s.14 of the 1841 Act notwithstanding that the new site already belonged to the County Council and that the old site was not sold in order to fund that purchase. In terms of the statutory language of s.14, the trustees had power "to sell … the said land or building … and to apply the money arising from such sale … in the purchase of another site or in the improvement of other premises used or to be used for the purposes of such trust". But no contract of sale was exchanged until August 2007 by which time the old school site and buildings had remained empty and unused for more than a year.

10. The judge held that s.14 of the 1841 Act was operable in this case so as to prevent a trust arising under s.1(1) of the 1987 Act. He accepted the argument of Mr Thomas for the County Council, which is renewed on this appeal, that the vacation and subsequent sale of the old site should be considered as part of a composite scheme or arrangement which began as early as the 1990s when the County Council first identified the possibility of using the new site for the village school. In 2003 the proposal was costed on the basis that the proceeds of sale from the old site would be used to re-imburse some of the cost of constructing the new school buildings. The implementation of this plan involved the construction of a new school on land already owned by the Council and the closure of the old school buildings which were considered to be substandard. But Mr Thomas contends, and contended successfully before the judge, that throughout the period from February 2006 when the old school buildings were vacated until August 2007 when the old site was sold the land continued to be used for the s.2 statutory purposes because it remained the Council's intention that the proceeds of sale should be used to meet part of the costs of constructing the new school. The old site therefore continued to be used for the purposes of the school. The judge accepted these submissions. He said:

> "60. If section 2 is considered alone, and bearing in mind that the 2007 Land comprised, in substance, the Second Site, in the present case the question that might have been posed to the Defendant after February 2006 is "Are you using the old site of the School for the purposes of a public elementary school for children of and in the Parish of Nettlebed and adjacent parishes?"
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> 61. If "using" is given a narrow meaning, the answer to that question would be "No", on the basis that premises which are empty are not "used" for anything.
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> 62. In my view, however, taking a broad and practical approach to the question, the Defendant could equally legitimately answer it as follows: "Yes, although the School has moved out of the old site and into new buildings on an adjacent site which now house a public elementary school for children of and in the Parish of Nettlebed and adjacent parishes, the old site is being sold to raise money to pay for part of the cost of the new buildings, and the old site is therefore being used 'for the purposes of' that public elementary school".
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> 63. In my opinion, that broader approach accords with, and is reinforced by, the power of sale and exchange conferred by section 14 of the 1841 Act.
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> 64. In the present case, it is not in dispute as matters of fact (in the words of section 14) that: (a) the Defendant "deemed [it] advisable" to sell the 2007 Land for the sole and express purpose of moving the School to "[an]other more convenient or eligible site" which comprised "other land or building suitable for the purposes of [the] trust" and (b) the Defendant did indeed "apply the money arising from such sale" to meet the cost to the

> Defendant of "other premises used or to be used for the purposes of [the] trust".
>
> 65. Accordingly, it seems to me that whether the Defendant's actions amounted to an exercise of the statutory power of sale must turn on other aspects of the wording of section 14. Does section 14 require that the 2007 Land had to be sold first and that the money realised from that sale had then be applied towards the cost of the new premises? Or (in the words of section 14) is it right to say that, in the events which happened, and although the new site and buildings were paid for first, the Defendant did sell the 2007 Land "for" the "other land or building suitable for the purposes of [the] trust" and did "apply the money arising from such sale … in the purchase of another site, or in the improvement of other premises used or to be used for the purposes of [the] trust"?
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> 66. In my view, although a sale or exchange of one piece of property "for" another may typically involve a transaction in which title in the first property is conveyed before or at the same time as title in the second property is acquired, this is not necessarily the case; and the same applies to the concept of applying the money "arising" from the sale of one piece of property "in the purchase" or "in the improvement" of another. I do not consider that the use of these words requires section 14 to be read as limiting the statutory power of sale or exchange so that it can only lawfully be exercised in circumstances where the original trust property is sold or exchanged before or at the same time as the replacement property is purchased or monies are expended on improving it."

11. Much of this passage is directed to the question whether the power of sale granted by s.14 must be exercised before the purchase of the alternative site or the expenditure on improvements but that is not an issue on this appeal. The claimants, as I have said, accept that the power of sale is exercisable under s14 even if no alternative site is to be purchased and even where the sale of the old site is intended to finance the acquisition of a new site for the school. Section 14 can in my view be read as accommodating a prior purchase of the new site using, for example, borrowed money and the re-imbursement of that expenditure from the sale of the old site. The trustees could still be said in such circumstances to be selling the old site "for other land or building suitable to the purposes of their trust" and to apply the proceeds of sale of the old site "in the purchase of another site".

12. But to give s.14 this broad construction does not avoid the problem created by s.2. Unless the sale takes place prior to the old site ceasing to be used for the specified statutory purposes, a reverter under s.2 will occur. Until 1987 this had the effect of depriving the trustees of their title to the land. Now, as a result of the 1987 Act, they continue to hold the legal estate but on trust for the grantor. Either way a sale of the land to a third party free of the rights of the grantor or his successors in title ceases to be possible.

13. I can turn now to whether a cesser of user occurred in 2006 or whether, as the judge found, the site continued to be used, as he put it, for the purposes of the school because the Council wished to sell the land and to use the proceeds of sale to reimburse the cost of constructing the new school buildings.

14. In support of his conclusion in [62] of his judgment, the judge made reference to the decisions of Clauson J in *Dennis v Malcolm* [1934] 1 Ch 244 and of the House of Lords in *Fraser v Canterbury Diocesan Board of Finance (No 2)* [2006] 1 AC 377, both of which considered the question whether a reverter under s.2 had occurred. The judge also referred to the 1981 report of the Law Commission Working Party "Rights of Reverter" (Cmnd 8410) which considered the operation of s.14 of the 1841 Act.

15. *Dennis v Malcolm* concerned a conveyance in 1876 of land under s.2 of the 1841 Act for use as a school. The school closed on 22 March 1932 and the trustees proceeded to sell the land purportedly in exercise of their powers under s.14. In April 1932, in the course of negotiations for the sale, the purchaser raised objections to the trustees' title on the basis that there had been a reverter on the closure of the school. Their objections were upheld by the Chief Land Registrar. Clauson J held that a reverter had occurred. At page 249 he said:

> "At some date in the year 1932, the property the subject of the grant ceased to be used as a school. If before it had ceased to be used as a school and while it was still being used as a school, the trustees had thought proper to make arrangements to sell the site in order to buy another site and to continue the school on another site or raise money to continue another school, it is possible the trustees might, notwithstanding the clause of reverter, have been able to sell their land under the School Sites Act. But they did not do that. The school was closed and ceased to be used as a school. Some time afterwards negotiations began, which are in progress, for the sale of this piece of land to a purchaser. It will be obvious to anybody who has perused s. 2 of the Schools Sites Act, 1841, that a serious question arose as soon as the property ceased to be used as a school, because the section, while it enables persons to convey land for the purposes of a school, contains this proviso at the end that "when land or any part thereof ceases to be used for the purposes in this Act mentioned" - those purposes being "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" - "the same" - that is the land - "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," that is the estate of which the grantor was the owner, "as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding." Accordingly, if the event occurs, namely, the site ceasing to be used as a school, this reverter clause comes into operation, as if the Act had not been passed."

16. In *Fraser* the House of Lords were concerned with whether a reverter had occurred because of a change in the composition of the school. Under the original grant in 1866 the land was to be used as a school for the education of "the labouring, manufacturing and other poorer classes" of a particular district. But, by at least 1975, the school's intake of pupils included all children regardless of their background, means or place of residence. The school eventually closed in 1993 but if the reverter had occurred much earlier in 1975 the title of those entitled on the reverter would have been barred by 12 years' adverse possession by the trustees prior to the coming into effect of the 1987 Act. The House of Lords held that for a reverter to occur the site had to cease to be used for the statutory purposes specified in the 1841 Act rather than for those specified in the 1866 conveyance and that, although some of the pupils could not be described as poor, a sufficient section of the intake continued to satisfy the statutory purpose of educating poor persons There had therefore been no reverter prior to 1975. In his speech Lord Walker of Gestingthorpe said at [45]-[46]:

> "45. ... Neither section 2 of the 1841 Act nor the trust deed admits of very close linguistic analysis (the inter-relationship between the statute and the trust deed is something that I shall return to). But some general principles are clear. It is clear that both the statute and the trust deed were intended to set up arrangements capable of lasting for a very long time-potentially for ever. Both were intended to operate through the medium of a charitable trust. Charity law has for centuries required that a general charitable purpose (or intention) should be recognised and given effect to, even though some particular directions given by the charity's founder are (or become) impracticable: see for instance the explanation given by Buckley J in *In re Lysaght, decd* [1966] Ch 191, 201–202. It is also a well-established principle of trust law that any provision determining or divesting an estate "must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine" (Lord Cranworth in *Clavering v Ellison* (1859) 7 HLCas 707, 725, cited in *Sifton v Sifton* [1938] AC 656, 670, and in *Clayton v Ramsden* [1943] AC 320, 326). As Mr Nugee put it in his written submissions, reverter is an event, not a process (and if it occurs, it is automatic and irrevocable.)
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> 46. All these considerations suggest that the court should take a broad and practical approach to the question whether a school has (in the words of the third proviso) ceased "to be used for the purposes in this Act mentioned" (and that it is not simply a coincidence that all the reported cases are concerned with schools which had closed permanently). The relevant statutory purpose was "the education of poor persons" (the school never gave up its Church of England connection, so I can for the present pass over the question of how significant that change would have been). Mr Nugee in the course of his reply (which was all the more effective for its brevity) posed the question which might have been put to the school managers (around the

> middle of the 20th 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. The Law Commission considered a number of questions relating to the operation of reverter provisions in various statutes including the 1841 Act. Some of their more radical recommendations (including the repeal of the 1841 Act) were not accepted, although specific problems such as the acquisition of title by adverse possession were eventually addressed by the changes made in the 1987 Act. The report is therefore a useful and informative survey of the operation of the reverter provisions in the 1841 Act and contains a number of observations relevant to the issues on this appeal.

18. The analysis of s.14 (at [106] of the report) begins with the recognition that the s.14 statutory power of sale (or exchange), if exercisable, has the effect of excluding the right of reverter that would otherwise take effect on the closure of the school. In [43] the working party says:

> "The power of sale under section 14 is exercisable only in order to enable the trustees to move the school: it does not allow the trustees to close the school, as an institution. In the middle of the nineteenth century the population was increasing and it was readily foreseeable that a school might outgrow its premises. Section 14 recognises not only that the site originally granted (which was by the statute limited in extent) might become too small, but also that there might not be available any adjacent land on which it could expand. The limited power of sale contained in section 14 was an almost essential feature of the 1841 Act if the general policy of the Act was not to be frustrated. By the same token, we believe that grantors would not have regarded the grant of the original site as an end in itself, but only as a means to an end, namely the establishment of a school; and, consistently with that approach, they would not have wished to recall their benefaction simply because their school was a success and had to move to larger premises. Of course, it would be quite different if the site ceased to be used for school purposes because their school ceased to exist. The grantor's right of reverter cannot be overriden by a sale under section 14 if education is thereafter provided not in the same school elsewhere but in a substitute school. Many grantors defined the school which they were helping to establish by reference to a locality and the fact that the new premises are a long way away from the old ones may well make the new school a different school for present purposes, if only because it is likely to have a fundamentally different catchment area."

19. In [114]-[116] the report considers the operation and scope of the s.14 power:

> "114. There is one further matter for consideration in this context. In order to have the desired effect, a sale under section 14 has always had to be carried out before the closure of the

> school. This is because, once reverter has occurred, the trustees have no title (or at least have no beneficial title enabling them to employ the proceeds in furtherance of the purpose of the sale as set out in the section). Precisely the same position is reached by section 29 of the Settled Land Act: once reverter has occurred the land is no longer "vested … in trustees on or for charitable … trusts or purposes" as required by the section, and the section is no longer applicable at all.
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> 115. Not surprisingly, trustees do not always find it easy to effect a sale in time. Quite often they fail and the intention behind section 14 is frustrated; but we understand that they sometimes succeed by resorting to devices which cannot be desirable on educational grounds, such as keeping a single class in the old premises after the main move has taken place.
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> 116. The requirement that the sale take place before reverter takes effect is obviously correct in principle; it is, however, equally obvious to us that the trustees need a period of time in which to sell. We recommend that wherever the trustees have obtained a Ministerial order to move (or an equivalent certificate, as mentioned in paragraph 112 above) reverter should not take effect earlier than two years from the date of the order (or certificate). There is, it may be remembered, a precedent for the postponement of the date on which reverter actually takes effect after the relevant use has stopped: under the Places of Worship Sites Act 1873 the non-use must have continued for a year."

20. It is clear that the view of the Law Commission was that in order to prevent a reverter occurring before the sale of the site under s.14 can take place, it was necessary for the school to remain in operation at the time of the sale. This is consistent with the decision in *Dennis v Malcolm*. The Law Commission recognised the difficulties which this could cause in terms of the operation of the school as it would necessitate the sale of the existing site prior to the closure of the school. In practice this will always necessitate the funding of the new site by the local education authority unless there is to be a hiatus between the closure of the old school and the construction and opening of its replacement. Assuming that the s.14 power is exercised no later than by the exchange of contracts in relation to the old site, it will still be necessary for the authority to keep the existing school open until that time and for it to complete its purchase of the new site and the construction of the new school buildings at its own expense in order for them to be ready to house the pupils on the completion of the sale of the old site and the closure of that school. As I indicated earlier, this difficulty about timing occasioned by the need to avoid a prior reverter of the existing site can be accommodated within s.14 by treating the reference to the application of the proceeds of sale "in the purchase of another site" as including the use of that money to reimburse the trustees or the local education authority for the expenditure of the new school which they have already incurred. But, as the Law Commission recognised in [114] of the report, there must still be a sale of the existing site prior to the closure of the school.

21. The judge relied on what Lord Walker had said in *Fraser* about the court needing to take a broad and practical approach to the question whether the land had ceased to be used for the statutory purpose of a school in order to justify his construction of s.2 even though what Lord Walker was addressing was the different issue of how the Court should approach the question whether the land had ceased to be used for the relevant statutory purpose. It is clear from what Lord Walker says in [45] of his speech that he accepted the principle of trust law that a provision for the divestment of an estate should be clearly and distinctly identifiable and, consistently with that, it is difficult to see how the possibility of a reverter under s.2 can depend upon the continuing intention of the education authority as to the ultimate use of the proceeds of sale even if that is sufficiently documented.

22. The 1841 Act was intended, as I have said, to encourage the conveyance of land for a specified and limited purpose or purposes and on terms that title to the land should revert to the grantor as previously described in the event that the use of the land no longer complied with one or more of those specified purposes. Since the sale of the old site post-dated the removal of the school to the new site by more than a year it is unrealistic to say, as a matter of ordinary language, even on a broad and practical approach to that issue, that the land continued to be used as a site for a school or otherwise for the purposes of education. It is, I think, important to bear in mind that the statutory purposes set out in s.2 of the 1841 Act are charitable educational purposes. They require, in terms, that the land should be used as a site for a school, a school house or otherwise for educational purposes. In each case they limit the use of the land to an identifiable function or purpose.

23. The judge's approach to this question of cesser of use as set out in [62] of his judgment was to say that the old site was being sold to raise money to pay for part of the cost of the new buildings and the old site was therefore being used "for the purposes of that public elementary school". But that is not the statutory question. The issue is whether the land continued to be used as the site for a school or for educational purposes: not whether it provided a means of re-imbursing the County Council for its expenditure on the new school. Expenditure on the improvement of other premises used for the purposes of the trust is a permissible use of the proceeds from the sale of the existing school site under s.14. But that power is only exercisable up to the moment when the land ceases to be used for those statutory purposes Despite Mr Thomas's submissions to the contrary, I am unable to accept that, by keeping the old site vacant pending a sale, the County Council continued either to use the land as a site for a school or to use it for educational purposes. Both require the active use of the land for the education of children. I would accept that this could include ancillary activities such as the use of the site as a playground or for meals. But, in this case, the old site remained vacant with no further possible use for educational purposes.

24. I would therefore allow the appeal.

Lord Justice Hamblen :

25. I agree.

Lady Justice Nicola Davies :

26. I also agree.