HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 65

on appeal from: [2004] EWCA Civ 15

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Fraser and another (Appellants)
v.
Canterbury Diocesan Board of Finance and others (Respondents)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Christopher Nugee QC
Caroline Furze
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Respondents:
Christopher McCall QC
Vivian Chapman
(instructed by Furley Page)

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. For the reasons they give, with which I agree, I would allow this appeal.

LORD HOFFMANN

My Lords,

2. By a deed dated 5 April 1866 Jane Mercer and Lewis Wigan conveyed land in Maidstone to trustees under the terms of the School Sites Act 1841 (4 & 5 Vict, c 38) on trust?

> "to permit the said premises and all buildings thereon erected or to be erected 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."

3. The deed went on to provide that the school should always be "in union with and conducted according to the principles and in furtherance of the ends and designs of the National Society for promoting the education of the poor in the principles of the Established Church

throughout England and Wales". There followed detailed provisions for ensuring that the management of the school should always be in the hands of members of the Church of England. The Canterbury Diocesan Board of Finance ("the DBF") are successors in title to the original trustees.

4. Section 2 of the School Sites Act 1841 empowers both fee simple and more limited owners to grant in fee simple up to one 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"

5. The section then goes on to provide that?

> "upon the said land being 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 …"

6. The effect of this section was that if a reverter occurred but the trustees of the school remained in possession for 12 years, the title by reverter would usually become statute-barred: see *In re Ingleton Charity* [1956] Ch 585. Section 1 of the Reverter of Sites Act 1987 abolished the reverter of the freehold under the 1841 Act and substituted a trust for sale coming into existence when there would previously have been a reverter. The trustees of the school become trustees to hold the proceeds of sale for the persons who would previously have been entitled under the reverter. That prevented the trustees from acquiring a title by limitation because time does not run in favour of a trustee against his beneficiaries. But section 1(4) provided that the section conferred no rights upon any person as a beneficiary in relation to property in respect of which that person's claim was statute-barred before the Act came into force on 17 August 1987.

7. The school continued in operation until July 1995 when it was closed and the site sold. The appellants claim to be beneficiaries of the proceeds of sale under the statutory trusts created by section 1 of the

1987 Act. They are assignees of the persons whom, as a result of genealogical investigation, they allege would have been entitled to the reverter under the 1841 Act.

8. The DBF claim that the title of the appellants is statute barred because the reverter occurred long before the school closed and in any event before 17 August 1975. The title was therefore already barred when the 1987 Act came into force. The DBF also dispute the appellants' paper title but a preliminary issue was directed to be tried upon whether the title was in any event statute-barred.

9. The ground upon which a reverter is alleged to have taken place is that the school had long ceased to be used for the "education of children and adults of the labouring manufacturing and other poorer classes in the Ecclesiastical District of Saint Philip Maidstone" in accordance with the trusts of the deed. The evidence adduced to support this claim consisted of extracts from the school log book which had been published in a commemorative booklet published in 1963, the school register from 1931 to 1944, rate books which showed the rateable values of houses given in the register as the addresses of children at the school and statement by Mr R C Harris, who attended the school between 1947 and 1950. All this evidence was admitted by consent and without cross-examination.

10. An inference which the judge drew from this evidence was that some of the children had come from middle class streets of owner occupied houses. Mr Harris's father, who worked for the local electricity board, lived in such a street and owned his own house. A friend of his, whose father was a police inspector, came from a similar house. On the other hand, the rateable value of the house was not a sure guide to the affluence of the occupants because many appear to have been in multiple occupation or to have included shops. What could be said was that a mixed variety of children were admitted, some from very obviously poor backgrounds but some from more wealthy areas. From 1891 the school had been free for children over 3 (toddlers were then charged 1d a week) and there was no evidence that any child from the "labouring manufacturing and other poorer classes" had ever been refused entry.

11. The addresses in the register also showed during the period 1931-1947 about 16% of the children lived outside the ecclesiastical district of St Philip.

12. On the basis of this evidence, the DBF says that by 1947 the purposes for which the land was being used had changed. Instead of being used for the purposes of a school for the children of the labouring manufacturing and other poorer classes in the ecclesiastical district of St Philip, it was being used as a school for any children, whatever their means or place of residence. That brought about a reverter.

13. The first question raised by this appeal is the meaning of the words "upon the said land…ceasing to be used for the purposes in this Act mentioned". Does it mean for one of the three purposes mentioned in the Act, that is to say, (1) the education of poor persons (2) the residence of the schoolmaster or schoolmistress, and (3) otherwise for the education of such poor persons in religious and useful knowledge; or does it mean for the purposes specified in the grant? These had of course to be within one or more of the three statutory purposes but could be a good deal narrower. For example, the purpose specified in this deed fell within the statutory category of "the education of poor persons" but was narrower in being confined to (1) persons in the ecclesiastical district of St Philip and (2) education in accordance with the principles of the National Society.

14. As a matter of language, I should have thought that there was no doubt about the matter. The Act says "the purposes in this Act mentioned". It does not say "the purposes in the deed of grant mentioned". The National Society, which promoted the 1841 Act, would have been well aware of the difference. Their standard form of grant specified that the purpose of the school was to be education in accordance with the principles of the Church of England. That was the form used in this case. But the purpose mentioned in the Act was education in general.

15. That does not mean that the restrictions in the deed could have no effect. They could be enforced in the same way as those in any other charitable trust. But a breach of those restrictions would not have the drastic consequence of causing a reverter.

16. The matter is not however free from authority. In *Attorney General v Shadwell* [1910] 1 Ch 92 the terms of the grant were for practical purposes identical with those in this case, save that the parish was Northolt. In 1907 the school was closed, another school having been opened by the local authority nearby. Thereafter the building was used only once a week for a Sunday school. The Board of Education

contended that there had been no reverter because although the land was no longer being used for the general education of poor persons, use as a Sunday school provided them with "religious and useful knowledge". The argument, at p 96, of Mr Cave KC for the successor to the grantor was that a reverter occurred if the land ceased to be used for the statutory purpose chosen by the grantor. It did not matter that it was still being used for some other purpose which he could have chosen but did not:

> "The provision for reverter means that the land is to revert if it ceases to be used for such of the purposes of the Act as are specified in the grant, namely, in this case, the first purpose only."

17. Warrington J accepted this argument. He said that the Act specified three purposes and that "the grantor may select his own purpose from amongst those three". In the judge's opinion, at p 99?

> "you must read 'the purposes in this Act mentioned' as meaning such of those purposes as are applicable to the case in question"

and he went on to say:

> "looking at the substance of the matter, as I consider I am bound to do, I must hold that the premises have ceased to be used for the purposes in the Act mentioned."

18. This case may be regarded as having glossed the statutory language. But it has stood without criticism for nearly a century and I would not cast any doubt upon it. It does not however assist the DBF. It does not say that the "purposes in the Act mentioned" means the purposes in the deed mentioned. It says that if the grantor has chosen one of the three statutory purposes and the land ceases to be used for that statutory purpose, a reverter is not avoided because it can still be used for one of the other two statutory purposes. But the argument for the appellants in this case is that until 1995 the land was continuously used for the statutory purpose chosen by the grantor, namely the education of poor persons. Accordingly it is said that even if there was a

breach of the trusts of the deed, there was no departure from the chosen statutory purpose.

19. The effect of *Shadwell's* case was considered by Rimer J in *Habermehl v Attorney General* [1996] EGCS 148. This involved another deed in terms virtually the same as those in *Shadwell* and this case, granting the land for use as a school for the education of poor persons in accordance with the principles of the National Society. In 1876 the school had become a "provided school" run by a School Board under the Education Act 1870. That meant that, by virtue of section 14(2) of the Act, no "religious catechism or religious formulary distinctive of any particular denomination" could be taught in the school. Teaching could therefore no longer be in accordance with the Anglican principles of the National Society. It was agreed by counsel on both sides that Warrington J had decided that the purposes mentioned in the Act meant the purposes mentioned in the deed. Given this concession, the decision of Rimer J that a reverter had taken place in 1876 was inevitable. But, for the reasons I have explained, I think that the concession was wrong.

20. No such concession was made in *Fraser v Canterbury Diocesan Board of Finance* [2001] Ch 669 where the Court of Appeal approved *Habermehl*. The judgment of Mummery LJ (at paras 27-35) says that Rimer J followed the "approach" of Warrington J in *Shadwell* and that his decision was correct. There is no further discussion. In my opinion the decision of the Court of Appeal on this point was wrong.

21. The question is then whether the evidence showed that during the period covered by the evidence the school had ceased to be used for the statutory purpose of educating poor persons. There was, as I have said, some evidence that the school had admitted some children who could not be described as poor persons. On the other hand, an indeterminate number of children undoubtedly were poor persons and there was nothing to show that any poor person seeking entry had been refused. In my opinion, this is insufficient material from which to draw the inference that the purpose of the school was no longer the education of poor persons. 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.

22. The judge found (in para 67) that?

> "the way in which the school was run indicates that its purpose was to educate not merely qualifying persons, but others as well. In my judgment it was a breach of trust for the school to have adopted a policy of educating children who were not resident in the ecclesiastical district of St Philip and who were not from the relevant social classes."

23. The judge nevertheless held that the school continued to be used for the purposes specified in the deed. That was not inconsistent with it being used for other purposes as well. He therefore decided that the claimants' title was not statute-barred. The Court of Appeal reversed this decision. Arden LJ accepted a submission that the judge's finding in paragraph 67, which I have quoted above, was inconsistent with the school still being for the purpose of educating poor persons. A "policy" of also educating other children meant that the purpose was now different, even though some of the children who fell within the new class of objects might be poor.

24. I do not think that the evidence supported a finding that the trustees of the school had acted in breach of trust, let alone a finding that the purpose of the school had become different. If there was any material to explain why they had admitted middle-class children or children from outside the parish, it would have been peculiarly within the knowledge of the DBF, who were successors to the trustees. But there was no evidence of any kind. Mr McCall QC, who appeared for the DBF, submitted that an inference of a decision to change the objects of the school should be drawn simply from the numbers of children from the middle-classes or outside the parish. The latter was estimated at 16% and the former were not quantified. I do not think that the DBF are entitled to ask the court to assume that their predecessors must have acted in breach of trust when other inferences such as I have suggested, consistent with a proper performance of their duties as trustees, can reasonably be drawn. As Mr Christopher Nugee QC said in reply, the school until it closed was a school which educated the poor of the parish of St Philip. There is no evidence inconsistent with the school having been used for that purpose.

For these reasons and those to be given by my noble and learned friend Lord Walker of Gestingthorpe, which I have had the privilege of reading in draft, I would allow the appeal and restore the answer which the judge gave to the preliminary issue.

LORD HOPE OF CRAIGHEAD

My Lords,

25. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. I agreed with them, and for the reasons that they have given I would allow the appeal and make the order proposed by Lord Walker.

LORD WALKER OF GESTINGTHORPE

My Lords,

The School Sites Acts

26. This appeal is concerned with a grant made under the School Sites Act 1841 ("the 1841 Act"). That statute is still in force (though its operation has been affected by the Reverter of Sites Act 1987) and it has produced a good deal of litigation. This is the first appeal on the 1841 Act which comes to be decided by your Lordships' House (*Attorney-General v Price* was compromised during the hearing: [1914] AC 20).

27. The 1841 Act enables a grant of land (not exceeding one acre) to be made in favour of trustees for educational purposes identified in section 2:

> " … 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 most striking feature of the 1841 Act, and the one which has given rise to most litigation, is the statutory reverter in the third proviso to section 2:

> "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, anything herein contained to the contrary notwithstanding."

28. This provision for reverter (not found in the School Sites Act 1836, which was repealed by the 1841 Act) was intended to encourage landowners, and especially limited owners interested in settled land, to make use of the powers conferred by the 1841 Act. This was explained by Sir Wilfrid Greene MR in *In re Cawston's Conveyance and the School Sites Act 1841* [1940] Ch 27, 33-34:

> "One can see that the provision with regard to reverter would have been and no doubt was considered by the Legislature to be a very useful encouragement to charitably minded persons, particularly if they were the owners of an estate or life tenants of a settled estate, to make grants for purposes such as these, because such persons might very well be satisfied to have the village school built upon the family estate, but would strongly object to the site on which such a school had been built being diverted later on to other purposes; therefore, as I have said, that proviso as to reverter must have been a very valuable encouragement, because landowners by reason of it were thus enabled to ensure that the site should be used in perpetuity for school purposes, or, if it ceased to be used for school purposes, that they would get it back. The common sense of that is obvious."

This general statutory intention is not in dispute, though it should be noted that the effectiveness of the encouragement may have been reduced, if the grantor directed his mind to it, by a statutory power of sale conferred by section 14 of the 1841 Act.

29. The historical background to the 1841 Act and the facts directly relevant to this appeal reflect the slow and sometimes contentious development of universal elementary education in this country over two centuries. At the beginning of the 19th century the general state of education was very bad. Many grammar schools, founded for poor students, had become fee-paying schools for children of the gentry or the professional classes. The children of the poor often received little or no education, even at an elementary level. A number of voluntary societies, almost all with a strong religious affiliation, were founded in order to improve the education of the children of the poor. The largest and best known of these, strongly affiliated to the Church of England, was (by its full name) the National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales ("the National Society"), which was incorporated by Royal Charter in 1817, with the Archbishop of Canterbury for the time being as its president. Societies of this sort attracted a certain amount of jocularity even from contemporaries, including Dickens (especially in the grotesque characters of Mrs Jellyby and Mrs Pardiggle in *Bleak House*) and they were no doubt suffused, to a present-day observer, by a great deal of class-consciousness and condescension; but they achieved something at a time when Parliament had taken no effective measures towards universal elementary education.

30. The National Society raised large sums by subscription and made grants in favour of schools in which children were to be instructed (in addition to reading, writing and arithmetic) in holy scripture and in the liturgy and catechism of the established church (see *National Society v School Board of London* (1874) 18 Eq 608, 609). Its aim was to have such a school in every parish in the country (many of the authorities refer to village schools, but often the educational need was even greater in rapidly-growing urban centres). There was no reference to the Church of England in section 2 of the 1841 Act (only a general reference to "the education of such poor persons in religious and useful knowledge"). This was in contrast to section 3 of the School Sites Act 1836 (6 & 7 Guil IV c 70) (repealed by the 1841 Act); section 3 had referred to education in the Christian principles of the established church, and had actually identified the National Society as a potential grantee.

31. The relatively secular character of section 2 of the 1841 Act did not reflect the fact that at first the National Society and similar Church of England or free-church societies were economically the driving force of the new voluntary schools. Section 10 of the 1841 Act provided an optional form of grant, the habendum of which (with its original parentheses) was as follows:

> "To hold unto and to the Use of the said and his *or* their [Heirs, *or* Executors, *or* Administrators, *or* Successors,] for the Purposes of the said Act, and to be applied as a Site for a School for Poor Persons of and in the Parish of and for the Residence of the Schoolmaster [*or* Schoolmistress] of the said School [*or for other Purposes of the said School*], and for no other Purpose whatever; such School to be under the Management and Control of [*set forth the Mode in which and the Persons by whom the School is to be managed, directed, and inspected*]."

In practice the National Society required schools which it was proposing to support to be established by a fuller standard form of grant which provided for inspections (a requirement if the school was to be eligible for grants of public funds which were available after 1839 from the Privy Council's Committee on Education) and requiring the children to be educated in accordance with the principles of the National Society—that is, the principles of the Church of England.

St Philip's School, Maidstone

32. All these points are illustrated by the history of the school to which this appeal relates. It came to be known as St Philip's Church of England Primary School, Melville Road, Maidstone. It opened in 1863 in premises which it did not own, but in 1866 it acquired those premises (by purchase for £265 from the trustees of the will of Mr John Mercer) and some adjoining land (by gift from Mr John Monkton), and these together formed the site for a new school building, which opened in February 1867. It was in continuous use from then until July 1995, when it closed permanently.

33. The two pieces of land were conveyed to the school trustees (the Minister and Chapel Wardens of St Philip, Maidstone) by a single deed dated 5 April 1866. It was expressed to be made under the authority of

the 1841 Act and the School Sites Act 1844 (7 & 8 Vict, C 37) (which made minor amendments, not now material, to the 1841 Act). The habendum of the grant was as follows:

> "To hold the same unto and to the use of the said Minister and Chapel Wardens their successors and assigns [subject as to part of the land to certain covenants] upon trust to permit the said premises and all buildings thereon erected or to be erected 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 aforesaid and for no other purpose."

This was followed by a direction as to the school being open to official inspection (a requirement for a Privy Council grant) and a further direction that the school should,

> "always be in union with and conducted according to the principles and in furtherance of the National Society."

There were detailed provisions for the school to be controlled by a committee, with the principal officiating minister of the parish acting as chairman. Members of the committee were required to subscribe at least £1 a year to the charity; to be members of the Church of England; and to live in or near the parish.

34. The trusts of the deed were therefore narrower than the statutory pattern in two respects. They were framed exclusively in terms of the first of the three statutory purposes ("a school for the education of poor persons"), and they required the children's education to be in accordance with the principles of the Church of England.

35. A few years after the school was established, Parliament passed the Elementary Education Act 1870 (39 & 40 Vict, c 79) ("the 1870 Act"). This statute was the first step towards the provision of elementary education for all children at public expense. It set up school boards with the duty of providing public elementary schools. Section 14 prohibited religious teaching distinctive of any particular denomination being given in a public elementary school which was provided (as

opposed to being merely maintained) by a school board. Section 23 empowered managers of existing elementary schools to transfer their schools to their local school board, which could agree to assume responsibility for the school. Many schools supported by the National Society or other voluntary societies were in difficult financial circumstances, and their managers sometimes decided to transfer their school to the school board, despite the prohibition on religious teaching of a denominational character. This naturally upset the National Society, but (as was established by *National Society v School Board of London* (1874) 18 Eq 608) it had no remedy apart from making representations to the Education Department. *National School v School Board of London* is a useful source of background information but is not directly relevant to the issues in this appeal, since the committee managing St Philip's school did not exercise the power conferred by section 23 of the 1870 Act. The school remained a Church of England school in the voluntary sector. It became a public elementary school under the Education Act 1902, which replaced school boards by local education authorities and brought within its scope elementary schools maintained (although not provided) by local education authorities. Under the Education Act 1944 the school became a voluntary controlled school.

36. Over the years, however, there were changes in the characteristics (in point of residence and social class) of children who attended the school. These changes were the subject of some documentary evidence and written witness statements (on which there was no cross-examination) before the judge. I will address this evidence in a little more detail later on, but it is common ground that although throughout the life of the school the majority of the pupils were resident in the parish and came from families which could properly be described as poor, some were resident outside the parish (the average figure between 1931 and 1947 was about 16%) and some came from parts of Maidstone where the residents were relatively prosperous.

37. Under a scheme made in 1952 the title to the school premises was vested in the respondent the Canterbury Diocesan Board of Finance ("the Board of Finance"). There was a reorganisation of parishes in 1972 but it is common ground that it does not affect this appeal.

38. Following on a Law Commission report (Cmnd 8410, published in 1981) on Rights of Reverter, Parliament enacted the Reverter of Sites Act 1987 ("the 1987 Act"). This makes various amendments to the law, some of which have since been modified in technical respects by the

Trusts of Land and Appointment of Trustees Act 1996. The most far-reaching change (made by section 1 of the 1987 Act) was that rights of reverter under the School Sites Acts (and some other comparable statutes) were abolished and replaced by a trust for sale in favour of the persons who (but for the 1987 Act) would be entitled under the reverter (but without entitling them to occupation of the land). This had several important consequences which are not spelled out explicitly in the 1987 Act. The trustees can make a good title to the land (as they did when the school was sold in 1995 for about £125,000). Since trustees cannot acquire title by adverse possession against their beneficiaries, the beneficiaries' rights (if subsisting on 17 August 1987, when the statute came into force) cannot after that date be extinguished by adverse possession. But they may be extinguished by a Charity Commissioners' Scheme or a Ministerial Order under provisions in sections 2 to 5 of the 1987 Act. The details are not relevant, because by section 1(4) of the 1987 Act it confers no rights on any beneficiary whose claim has been statute-barred before 17 August 1987. The only issue in this appeal is whether there was a reverter followed by a period of 12 years' adverse possession completed before 17 August 1987. The evidence suggests that if there was a reverter, it would most probably have occurred during the first half of the 20th century; but the critical cut-off date is 17 August 1975. That is the date which (after the claimants had commenced Part 8 proceedings on 25 October 2001) was specified in the Master's Order dated 28 January 2002 directing a preliminary issue:

> "Whether the ownership of the site of St Philip's Church of England Primary School, Melville Road, Maidstone, Kent, reverted pursuant to the third proviso to section 2 of the School Sites Act 1841 before 17 August 1975, ie more than 12 years before the commencement of the Reverter of Sites Act 1987."

39. The appellants are genealogists who are assignees, no doubt for value, of the equitable interests of the persons now interested, by testate or intestate succession, in the estates of John Mercer and John Monkton. But Mr McCall QC (for the Board of Finance) did not suggest that this had any bearing on the legal strength of their claims. Indeed he chivalrously refrained from drawing any attention to this aspect of the matter; but it is apparent from the papers before the House.

The determinative issue: the proceedings below

40. The order directing a preliminary issue also directed standard disclosure "if required," but it was not required. The documentary evidence voluntarily provided by the Board of Finance included extracts from a "logbook" chronicling events in the life of the school; the (meticulously kept) school register for the period between 1931 and 1947; and extracts from rate-books (which provided some tenuous evidence of the prosperity of different parts of Maidstone). There was a witness statement from Mr R C Harris, who was a pupil at the school between 1947 and 1950.

41. The judge (Lewison J) summarised the effect of the evidence in paras 44 and 45 of his judgment as follows:

> "An analysis of the school registers for 1931 to 1947 shows that the children came from a variety of housing stock. Some came from what were, historically, middle-class streets of owner-occupied houses. Mr Harris lived in one such street, and his father, who worked for the local electricity board, owned his own house. An examination of the Maidstone rate-books for this period shows that some of the children lived in houses with high rateable values. I was shown photographs of some of these houses which were plainly comfortable and relatively spacious houses. However, further analysis by Mr Neil Fraser demonstrated that many of the higher rated houses appeared to have been in multiple occupation and others of them may well have been highly rated because the hereditament also included a shop. In the case of those children who lived in hereditaments including a shop, they may have been the children of 'tradesmen', who were specifically mentioned in the 1851 Act, but not in the conveyance.
>
> Mr Harris said in his evidence that the former parish of St Philip contains a variety of housing including premises which belonged to the local authority and premises in and around Stone Street, Maidstone which would certainly have been occupied by the poorer classes. He, however, lived in a 'better class area', as did a friend of his, who also attended St Philip's and was the son of a police inspector. He concluded that, having looked at the register, there were clearly a mixed variety of pupils being

> admitted to the school, some from very obviously poor backgrounds but some clearly from a more wealthy area."

The judge's reference to the 1851 Act should, I think, have been to the School Sites Act 1852 (15 & 16 Vict, c 49) ("the 1852 Act"). There was a School Sites Act enacted in each of those years, but it was the 1852 Act which extended the permitted purposes to the "religious or educational training of the sons [but not, regrettably, the daughters] of yeomen or tradesmen." But the 1852 Act does not seem to have been mentioned in the Court of Appeal, and Mr Nugee QC (for the appellants) placed no reliance on it before your Lordships.

42. Neither side challenged the judge's findings of fact set out above. The dispute centres on four paragraphs later in his judgment, with which the Court of Appeal found fault. The judge was using "qualifying persons" to mean pupils who were (i) "of the labouring manufacturing or other poorer classes" and (ii) resident in the ecclesiastical district of St Philip. In the crucial passages he began by summarising the argument for the Board of Finance:

> "66. Mr Chapman submits that that is not this case. In the present case there is no evidence that the trustees had an admissions policy that restricted admission to qualifying persons. So far as the evidence goes, the trustees never rejected any pupil either on the ground that he or she lived outside the ecclesiastical district or on the ground that he or she was not a member of the relevant social classes. The school was simply open to any child who wished to attend it. Once the school simply became part of the state education system it ceased to be used for the purpose specified in the conveyance.
>
> 67. In my judgment Mr Chapman is correct to submit that the way in which the school was run indicates that its purpose was to educate not merely qualifying persons, but others as well. In my judgment it was a breach of trust for the school to have adopted a policy of educating children who were not resident in the ecclesiastical district of St Philip and who were not from the relevant social classes. Thus I do not accept Mr Nugee's submission that the school was not being used for a purpose other than that set out in the conveyance.
>
> 68. It is Mr Chapman's next step that I cannot take. Mr Chapman submits that the purpose for which the school

> was used was the education of all-comers and not for qualifying persons. That is a different purpose from the education of qualifying persons and hence use of the land for the purpose specified in the conveyance ceased (or perhaps never even began).
>
> 69. I do not characterise what happened in that way. If land is conveyed to be held on trust for purpose A and for no other purpose, and the trustees use the land for purpose A and also for purpose B, it seems to me that they are using it for two purposes, one of which is permitted by the trust and the other of which is not. What they have not done is to cease to use the land for purpose A merely because they are also using it for purpose B."

So the judge decided the preliminary issue in favour of the claimants.

43. The Court of Appeal reversed this decision. The main reasons are in the judgment of Arden LJ at paras 22-29 of her judgment; Potter LJ agreed with her; so did Wilson J, adding some further reasons of his own. Arden LJ took the judge to have found as a fact that the school had ceased to be used solely for the purposes set out in the trust deed. It had come to be used for a new and wider purpose, the provision of a school for all-comers (with no finding that priority was given to qualifying persons). The judge then, inconsistently with his own findings, treated the wider purpose as two separate purposes (his "purpose A" and "purpose B").

Arden LJ observed in para 24,

> " … the fact that a breach or breaches of trust have occurred does not necessarily mean that the authorised purpose has ceased to be the purpose for which the school is used."

But she also observed in para 25,

> "Nor do I accept the submission that the construction which I place on section 2 makes the trustees' title precarious. It simply means that the trustees must adhere to purposes permitted by the terms of the trust."

Wilson J also attached importance (para 32) to the words “and for no other purpose”. So the Court of Appeal allowed the appeal and declared that reverter occurred before 17 August 1975.

The determinative issue: discussion

44. My Lords, I cannot wholly accept the reasoning by which the judge proceeded from his undisputed findings of primary fact. But neither do I agree with the Court of Appeal's criticism of his reasoning. I do not think that the judge was entitled to infer, from the rather meagre evidence before him and the limited findings which he made on it, that the trustees of the school had an "all-comers" admissions policy and that the adoption of that policy amounted to a breach of trust. The school's committee of management might be expected to have kept minutes of their meetings recording any important policy decisions; none were produced and put in evidence by the Board of Finance, and it hardly lies in their mouths to ask the court to infer a breach of trust from a gap in their own evidence. There is no evidence that any fully qualified child was ever refused admission to the school as a result of an all-inclusive admissions policy. An equally probable explanation (and one which should be preferred in the absence of any evidence of breach of trust) is that the management committee recognised the need to keep up enrolment at the school, in order to maintain its financial viability, and accepted pupils from outside the geographical area of the ecclesiastical district, or from middle-class homes, so far as necessary to fill up numbers.

45. Such a course of action would not to my mind amount to the adoption of a new, unauthorised trust purpose. 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 (deceased)* [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 HLC 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.)

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.

The further issue: statutory purposes or trust purposes?

47. That is sufficient to dispose of this appeal. But the House also had the benefit of written and oral submissions on a further issue, which was (as it happens) raised between the same parties in separate proceedings about another school, at Chartham in Kent. Those proceedings reached the Court of Appeal: see *Fraser v Canterbury Diocesan Board of Finance* [2001] Ch 669 ("*Fraser (No 1)*"). They were deciding in favour of the Board of Finance and there was no further appeal. The judgment of your Lordships' House in the present appeal cannot alter the outcome of *Fraser No 1*. But it may be that this House will never again have to consider the 1841 Act, and it may be many years before it comes before the new Supreme Court. For that reason I think that the House should take this opportunity of achieving some further clarification of this obscure area of the law.

48. *Fraser No. 1* was a case where a grant was made under the 1841 Act in 1872 (that is, after the coming into force of the 1870 Act) and the school had in 1874 been transferred to a school board under section 23 of the 1870 Act. The school closed permanently in 1992. The issue was whether reverter had occurred in 1874, with the result that the claim of those interested under the reverter had long since become statute barred. The original grant under the 1841 Act followed the National Society standard form, and so was very similar to the grant relating to St Philip's School at Maidstone.

49. Whether a reverter had occurred in 1874 depended on whether (in the words of the third proviso to section 2 of the 1841 Act) the land had "ceas[ed] to be used for the purposes in this Act mentioned." The land had continued to be used as a school until 1992, but as long ago as 1874 it had ceased to be a school run in accordance with the principles of the National Society and the established church—as Mummery LJ put it, in delivering the judgment of the Court of Appeal ([2001] Ch 669, 675, para 6), it had "lost its essentially Church of England character."

50. The Court of Appeal, upholding the deputy judge, held that reverter had occurred in 1874. Mummery LJ reasoned as follows (p 681, paras 30 and 31):

> "As already explained the purpose of the 1841 Act was to reform certain aspects of the law of real property so as to facilitate and encourage grants of land as school sites. In order to come within the Act the grant has to be for one or more of the three purposes mentioned in section 2, ie for the education of poor persons, or for the residence of a schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge. But the Act does not expressly or impliedly require the grant either to be for all of those purposes or to be for purposes expressed in those very words. The grantor, like any other benefactor of charity, is allowed freedom of choice as to the precise object of his bounty, so long as his stated purpose is within the scope of one or more of the purposes mentioned in section 2.
>
> The purposes chosen by [the grantor] were within the limits of the third purpose allowed by section 2. The purposes specified in the 1872 conveyance followed a model deed of the National Society, one of the principal pressure groups in the 1830s for the school sites legislation. The correct approach is to ask whether the school ceased to be used for those purposes and, if so, when."

In reaching this conclusion the Court of Appeal approved and followed two first-instance decisions, one by Warrington J in *Attorney General v Shadwell* [1910] 1 Ch 92 and the other by Rimer J in *Habermehl v Attorney General* [1996] EGCS 148. It is therefore necessary to examine those cases.

51. In *Attorney General v Shadwell* a grant under the 1841 Act in the National Society's standard form had been made in 1868 for a school at Northolt with (as Warrington J said at [1910] 1 Ch 92, 94) "elaborate provisions intended to secure what I may call the Church of England character of the school." The school was run on that basis (though latterly, it seems, as a maintained public elementary school) until 1907, when the local education authority opened a provided school on a different site. The church school then ceased to be used except for weekly use as a Sunday school, and the first defendant (a party to the original grant) claimed that reverter had taken place when the school ceased to be used during the week. He argued that the use of the premises as a Sunday school was not one of the trusts or objects of the grant, but was only a power which continued as long as the main purpose continued.

52. Warrington J accepted this argument. He said at p99:

> "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."

He held, therefore, that reverter had occurred.

53. Mr Nugee accepted the correctness of that decision, but submitted that it had been misunderstood or misapplied in later cases. What Warrington J was saying, Mr Nugee submitted, was that if land was granted for the first statutory purpose (the education of the poor) an ancillary power to run a Sunday school could not be elevated (as the Attorney General had argued) into a trust for the third statutory purpose.

54. The first case in which *Attorney General v Shadwell* [1910] 1 Ch 92 was followed was *Habermehl v Attorney General* [1996] EGCS 148, a decision of Rimer J concerning a school at Kempston, Bedfordshire. In that case a grant under the 1841 Act was made in 1854 in what has

now become familiar as the National Society standard form. There were two later grants of adjoining land on the same trusts. In 1876 the school managers agreed to let the school to the local school board. The effect of this was that the school became a "provided" school to which section 14 of the 1870 Act (prohibiting religious instruction or observance of a denominational character) applied. The school was burned down in 1975 and never reopened. The dispute was as to the beneficial ownership of the insurance money and the vacant site.

55. The Attorney General's counsel argued that reverter had occurred in 1876, and that the charity trustees had long since acquired a title by adverse possession. The Official Solicitor (representing unascertained claimants under a reverter) argued that reverter occurred no earlier than the fire in 1975. Rimer J quoted at some length from the judgment in *Attorney General v Shadwell*, including the passage which I have set out. He concluded that the principle of the decision was that the statutory purposes referred to in the third proviso to section 2 of the 1841 Act meant "the purposes to which the land was devoted by the grantor." He concluded that the question which he had to answer was

> " … whether the loss of the school's Church of England character upon its becoming a provided school in 1876 was a change which meant that the land was no longer being used for the substantive purposes for which it had been devoted by its grantors."

He answered that question by accepting the submission made on behalf of the Attorney General, that after 1876 the purposes of the grant were no longer being fulfilled, and so reverter occurred.

56. I accept Mr Nugee's submission that *Attorney General v Shadwell* was rightly decided, but that Rimer J mistook its real significance. Rimer J's error was (if I may respectfully say so) one to which Warrington J had to some extent contributed, because he did include "the principles and … the ends of the National Society" in his statement of the primary trust. But there had been no interruption of the Church of England connection in *Attorney General v Shadwell*; on the contrary, the religious instruction and observance at the Sunday school had taken over as the only surviving activity; and as was pointed out by counsel arguing for reverter ([1910] 1 Ch 92, 96) the 1841 Act was intended to promote education, not religion. So the breaking of a Church of England connection was simply not an issue in the case.

57. The real principle in *Attorney General v Shadwell* is that there must be a cesser of a relevant statutory purpose, which is to be identified by looking at the terms of the grant. The case does not establish that the terms of the grant (if relatively narrow and detailed) cut down the breadth and simplicity of the statutory purpose (with the result that a reverter is more likely to occur). Such a conclusion would be contrary to the views of the majority of the Court of Appeal in *Attorney General v Price* [1912] 1 Ch 667 (and it is to be noted that Buckley LJ differed only as to the terms of the proposed scheme). This decision's authority is reduced both by the non-joinder of persons interested under a possible reverter and by this House having discharged the Court of Appeal's order as part of a compromise (see [1914] AC 20). But at the least it shows that there is nothing in the 1841 Act that automatically excludes the possibility of a cy-pres scheme.

58. In *Fraser No. 1* the Court of Appeal mistook the significance of *Attorney General v Shadwell* in the same way as the judge had in *Habermehl v Attorney General*. I have already set out paras 30 and 31 of the judgment of the court. It is entirely correct that the 1841 Act

> " … does not expressly or impliedly require the grant either to be for all of those purposes or to be for purposes expressed in those very words. The grantor, like any other benefactor of charity, is allowed freedom of choice as to the precise object of his bounty, so long as his stated purpose is within the scope of one or more of the purposes mentioned in section 2."

But if the grantor's stated purposes are narrower and more detailed and elaborate than the statutory purposes, non-compliance with them (in particular, by severance of a Church of England connection) will not necessarily result in the cessation of the statutory purposes, and consequential reverter. Reverter (after 1987, in equity) will occur only if the relevant statutory purpose is no longer being carried out. The first statutory purpose in section 2 is consistent with wholly secular (that is, non-religious) education, even if a grantor has made an express declaration that the school is to be run as a Church of England school. The third statutory purpose in section 2 cannot be used to alter the character of a grant which falls squarely within the first purpose.

59. For these reasons I consider that *Habermehl v Attorney General* and *Fraser No. 1* were wrongly decided. But that conclusion does not

affect the practical consequences of the decision of the Court of Appeal in *Fraser No. 1*, from which there has been no appeal, and it is not directly relevant to the outcome of this appeal, which turns on different issues. For the reasons stated in the preceding section of this opinion, I would allow this appeal and restore the decision of Lewison J on the preliminary issue.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

60. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe and for the reasons they give, I too would allow the appeal and make the order they propose.