

DETERMINATION

Case Reference: LAN000044

Applicant: Fortismere School, Tetherdown, London N10 1NE

Application: Regarding transfer of land at Fortismere School, Tetherdown, London N10 1NE

Date: 12 April 2012

Determination

Under the powers conferred on me by paragraph 17 of Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, I hereby determine that the irrevocable licence drafted by Fortismere School (see appendix 1) be amended by deleting clauses 2.2 and 4.3, amending clauses 3.1, 4.1 and 6, and by adding a dispute resolution clause which mirrors the equivalent clause in the Services and Shared Facilities Agreement between the same parties.

The Referral

1. Solicitors acting for Fortismere School (the School), emailed the Office of the Schools Adjudicator on 5 March 2012 referring a dispute between itself and the London Borough of Haringey (the Council) over the wording of an irrevocable license associated with the transfer of land from the Council to the School. The School asked that the Adjudicator resolve this dispute by determining the content of the license.

2. This referral follows an earlier determination of a dispute between the same parties (LAN 34, 14 December 2011) by the Adjudicator in which I as the Adjudicator determined that:

“the transfer of land at Fortismere School from the London Borough of Haringey to the Governing Body of the School, consequent upon the School becoming a foundation school, shall address matters relating to car parking and fire exit provision through an irrevocable licence drafted by Fortismere School in a way which is acceptable to both parties.”

3 The School duly drafted a license (attached at appendix 1) but the parties have been unable to reach agreement on six provisions. In an email dated 5 March 2012 the School asked the Adjudicator to resolve this matter. The Council set out its position in an email dated 7 March 2012.

Jurisdiction

4 Under the terms of regulation 7 of, and Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England)

Regulations 2007 (the Regulations), the land held and used by the Council solely for the purposes of the School transferred to the Governing Body of the School on 1 September 2007, pursuant to the school becoming a foundation school on that date. Failing local agreement to the terms of the transfer relating to the number and location of certain staff parking facilities and access to a fire escape route, the documents relating to this transfer were not concluded and both parties referred the dispute to the Adjudicator who gave a direction determining the matter under paragraph 17 of Schedule 6 to the Regulations. The relevant element of the determination is set out at paragraph 2 above.

5 Since then, the parties have been unable to reach an agreement on the wording of the irrevocable license. The School therefore decided to refer the matter back to the Adjudicator requesting that he use his powers under paragraph 17 of Schedule 6 to the Regulations to assist the parties to resolve this dispute. I have agreed to this request and I am satisfied that I have the powers to do so

Procedures

6 In considering this matter I have had regard to all relevant legislation and guidance. I have considered all the papers put before me, including:

- the initial referral from the School dated 5 March 2012;
- the School's preferred wording;
- the response of the Council dated 7 March 2012;
- subsequent emails from the School dated 22 March 2012 and the Council dated 3 April 2012; and,
- the Adjudicator's previous determination on this matter (LAN34) dated 14 December 2011.

7 Both parties stated that they were content for this matter to be resolved without holding a meeting, a view I share.

Background

8 The School, which caters for pupils aged 11-19, is located on an educational campus which is shared by pupils in Key Stages 3, 4 and 5 of Blanche Nevile School (BNS), a community special school for deaf children. BNS's provision for pupils in Key Stages 1 and 2 of BNS is located elsewhere. The School and BNS share certain facilities and services. The two schools have developed a strong working partnership which reflects the needs of the current pupils who use the site. Evidence, such as Ofsted inspection reports, suggests this works well. The Council states that, whilst it accepts that this is the case and they have no plans to change the nature of the provision at BNS, they wish to protect the long term interests of BNS and themselves should relationships between the schools deteriorate.

9 The specific matters which are the foci of this dispute relate to car parking rights and fire exit provision and are set out in detail in paragraphs 11

– 32 below. The December 2011 determination concluded that BNS should be entitled to use 14 parking spaces in the northern car park though not to any specific dedicated or marked spaces. This was designed to protect the needs of BNS whilst enabling the School to have the flexibility to develop its site to meet its evolving needs. The determination also set out how the fire exit routes should be delineated.

10 The determination noted that the shared use arrangements may not work as effectively if the BNS site were to be occupied by a different type of provision. For example, if it became a primary school or a school for pupils with severe learning difficulties and/or disabilities. In such cases, access, suitability and safeguarding issues might make joint provision more difficult or impossible. To protect the interest of the School, the Adjudicator determined that the irrevocable license would not continue if the site ceased to be used by BNS to provide the current specialist provision.

The Current Dispute

11 This dispute focuses on six clauses (2.2, 3.1, 3.3, 3.4, 4.1, and 4.3) in the irrevocable license drafted by the School and which is attached at appendix 1. The Council believes that all six clauses should be removed because *“the licence should reflect the position between the two parties as at the implementation date”*, whilst the School initially believed that the license should *“reflect the current position”*. It is reasonable for the Council to wish to preserve the 2007 position as, under Schedule 6, it is the land held by the School, plus all rights and responsibilities associated with the land, which transfers to the School on the implementation date which, in this case, is 1 September 2007.

12 In an email dated 22 March 2012, the School also accepted that *“it is reasonable to accept the Council’s request to preserve the 2007 position”* but that it also wished to ensure that the provisions of the irrevocable license *“seek to ensure the harmonious use of the car park by all parties.”*

13 Before 1 September 2007, the Council was fully responsible for the car park with maintenance forming part of a facilities management contract under a Private Finance Initiative arrangement which is, at present, suspended. The Council states that responsibility for day to day matters (such as filling pot-holes) fell to the School, whilst responsibility for major refurbishments (such as re-surfacing) fell to the Council. The Council also states that *“there is no provision for BNS to contribute to any of these expenditures”*. There is no evidence available to me which specifies which party should be responsible for the cost of repairing any damage to the car park although common sense would suggest it should be the party that caused the damage.

14 The School also notes that *“the car park is now significantly busier than it was then (in 2007) and that the use of permits is a sensible way to manage the situation.”*

15 In the December 2011 determination, the Adjudicator concluded that the use of an irrevocable license was the best way to balance the interests

and need for security of both parties. Whilst I accept the Council's view that it is reasonable to preserve the 2007 position, it is also reasonable that the School wishes to be clear about the future management arrangements. As the irrevocable license focuses on the future relationship between the parties, it makes sense for it to address issues to do with liability and usage that have previously not been formally considered. I therefore conclude that the removal of the six disputed clauses, as initially requested by the Council, does not properly balance the interests of both parties.

16 I shall now consider each of the disputed clauses in turn.

Clause 2.2

17 I have considered the difference between clauses 2.2 and 4.2 and the extent to which clause 4.2 alone provides the School with the security it seeks. I asked the parties to comment on the inclusion of clause 2.2. The Council's response was that "*if there is an indemnity in clause 4.2 there is no requirement for clause 2.2*". The School did not respond on this matter. I am satisfied that clause 2.2 does not provide any additional security to the School and should be deleted.

Clause 3.1

18 The School included this clause "*to ensure that the benefit of the licence cannot be assigned to a third party, which is what the Adjudicator's decision stated*"

19 The Council is concerned that this clause will prevent the Council or BNS from passing the parking rights to a free school or Academy if BNS decides to become such a school in the future.

20 In the earlier determination, the Adjudicator stated (at paragraph 34) that the School should grant the Council an irrevocable license "*until such time as the site ceases to be used by BNS as specialist provision for deaf pupils*". This position is reflected in clause 5.2 which makes a general reference to "*a school for deaf children*" rather than to the particular legal status of such a school. However, if BNS was to become an academy it would become a different legal entity and clause 3.1 could be invoked. I believe that, whilst clause 5.2 provides both parties with some of the security they seek, clause 3.1 as it stands does not provide reasonable security to the Council and should be amended to cover the possibility that BNS, whilst continuing to cater for pupils with the same educational needs as at present, may become a different legal entity. I therefore conclude that clause 3.1 should read as follows:

"the benefit of this License is personal to the Licensees and their successors unless and until the school ceases to be used as a specialist provision for deaf pupils;"

Clause 3.3

21 The School has included this clause to “*ensure that Haringey and Blanche Neville only use their allocated number of spaces and to aid Fortismere’s management of the car park should there be any problems.*”

22 The Council’s view is that “*the Adjudicator has stated that the parking spaces should be in the parking area used at present so why does Fortismere want to change the location?*”

23 I do not accept that the School wishes to change the location of the car parking spaces. I note that both parties accept that there is pressure on the management of the available parking spaces. The earlier determination was clear that 14 parking spaces should be available to BNS in the northern car park and that these should not be defined. Given the pressure on parking places, I believe it is reasonable that all vehicles which use the car park display parking permits and, therefore, that clause 3.3 be retained.

Clause 3.4

24 The School states that “*this mirrors current arrangements and ensures that Fortismere would not be required to provide 24 hour access to the car park, which it does not do at the moment.*” For their part, the Council is concerned that no such restrictions exist at present and that “*restrictions on hours will prevent teachers and governors from using the car park if they have to stay late for meetings or come in during the weekends or during the school holidays.*”

25 The School has a right to manage access to the car park and the security of the School site. This clause requires the School not to unreasonably withhold or delay access to BNS or Council staff at other times and I note that BNS also has access to a second car park of its own. I believe this clause brings benefits to the School and does not place unreasonable burdens on BNS or Council staff. I therefore believe that clause 3.4 should be retained.

Clause 4.1

26 The School believes “*this is something that any prudent landowner would make provision for in a licence to make sure that Haringey and Blanche Neville comply with all relevant laws in exercising their rights.*”

27 The Council is concerned that the inclusion of reference to future legal requirements “*allows Fortismere to impose future restrictions on the use of the car park*”. The Council “*wants to know the conditions for using the car park from the outset.*”

28 I asked the School to further clarify its intentions in relation to its wish to include this clause and the Council to clarify its objection. In response the School indicated it wished to ensure that the licensees were required to comply with any future legislation. The Council was concerned that the initial

clause did not refer to legislation but to legal requirements more generally and that such a requirement could be imposed by the School.

29 It is reasonable that the irrevocable license should require the parties to comply with all legislation and the clarification response from the School shows that this is what the School intended. I therefore conclude that clause 4.1 must be amended to read as follows:

“to observe all present or future legislation regulating the exercise of the Rights.”

Clause 4.3

30 The School believes this is *“a standard clause in a document such as this”* and that *“any prudent landowner would include such a provision in a license granted to a third party to use its land.”*

31 The Council believes that *“Fortismere must be liable if it does not comply with its obligations under the licence.”* It gives the following example, *“if Fortismere prevents the teachers from using the car park and this causes a disruption to the Blanche Nevile School then they must be liable for breaching their obligations under the licence.”*

32 When asked to further clarify its position, the School stated that the intention of this clause was *“a belt and braces measure where a third party made a claim against both the Council as Licensee and the School as the landowner where the incident that caused the claim to arise was clearly the fault of the Council.”* For its part, the Council takes the view that *“the clause as drafted is meant to absolve (the School) of any liability for its failure to provide the rights contained in this license.”* I believe that an eventuality such as that described by the School is covered by clause 4.2 which offers the School the security it seeks whilst the scope of clause 4.3 is potentially unreasonable to the Council. I therefore conclude that clause 4.3 does not properly balance the interests of the parties and should be deleted.

Other Matters (i) Clause 6

33 Although clause 6 has not been raised as a matter of concern by either party I believe this clause could be confusing as there is no provision or requirement anywhere in the License for the serving of notice. On reflection, the School accepts that this is the case and it has suggested that clause 6 be replaced by a provision which states that:

“Any notice should be given by the headteacher of the School, the headteacher of BNS, or the relevant officer of the Council.”

This is a sensible and reasonable suggestion which I accept.

Other Matters (ii) Dispute Resolution

34 The December 2011 determination concluded that “*the termination and dispute resolution procedures contained in the Services and Shared Facilities Agreement be as drafted by the Council.*” Whilst it was not envisaged at the time that these procedures be used in matters relating to disagreements concerning the implementation of the irrevocable license I believe it would be helpful if they were. This would enable such disagreements to be resolved locally and, rightly, at the expense of the parties rather than the Adjudicator. These procedures require the President of the Law Society to appoint a Counsel with at least 10 years experience of education law. The appointee would seek to resolve disputes and their decision would be final. I therefore conclude that a dispute resolution clause be added to the License and that this clause should mirror the approach adopted in the Services and Shared Facilities Agreement.

Conclusion

35 For the reasons stated above, I determine that the School must redraft the irrevocable license to include the following changes:

- (i) clauses 2.2 and 4.3 should be deleted;
- (ii) clauses 3.3 and 3.4 should be retained;
- (iii) clause 3.1 should be amended as stated in paragraph 20 above;
- (iv) clause 4.1 should be amended as stated in paragraph 29 above;
- (v) clause 6 should be amended as stated in paragraph 33 above; and
- (vi) a dispute resolution clause be added as stated in paragraph 34 above.

Determination

36 Under the powers conferred on me by paragraph 17 of Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, I hereby determine that the irrevocable licence drafted by Fortismere School (see appendix 1) be amended by deleting clauses 2.2 and 4.3, amending clauses 3.1, 4.1 and 6, and by adding a dispute resolution clause which mirrors the equivalent clause in the Services and Shared Facilities Agreement between the same parties.

Dated: 12 April 2012

Signed:

Schools
Adjudicator: John Simpson

Appendix 1

DATED

2012

THE GOVERNING BODY OF FORTISMERE SCHOOL

and

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HARINGEY

and

THE GOVERNING BODY OF BLANCHE NEVILE SCHOOL

LICENCE TO USE CAR PARK AND FIRE ESCAPE ROUTE

at

FORTISMERE SCHOOL

**Winckworth Sherwood LLP
Minerva House
5 Montague Close
London
SE1 9BB**

Ref: AMS/30074/2/LHS

DATE: 2012

LICENSOR : The Governing Body of Fortismere School of Fortismere School, South Wing, Tetherdown, London N10 1NE

LICENSEES : The Mayor and Burgesses of the London Borough of Haringey of Civic Centre, High Road, London N22 4LE and The Governing Body of Blanche Nevile School of Blanche Nevile School, Burlington Road, London N10 1NJ

NOW IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

In this agreement the following expressions have the meanings given in this clause

BASKETBALL COURT: the basket ball court located on the Fortismere School Site and shown hatched pink on the Plan;

CAR PARK: the car park area located on the Fortismere School Site and shown hatched blue on the Plan;

RIGHTS : (1) the right of access to and from Creighton Avenue to the Car Park along the route shown cross hatched orange and a right of way on foot only over all accessways between the Premises and the Car Park to gain access to and from the Car Park and a right to park 14 motor cars vehicles in connection with the use and operation of the Licensees' Premises; and

(2) the right to use the Basketball Court as a fire escape route and as a fire assembly point;

LICENCE PERIOD : from and including the Licence Start Date until the Termination Date

LICENCE START DATE :

LICENCE FEE : one peppercorn per annum if demanded

PLAN : the plan attached to this Licence

PREMISES : The premises known as Blanche Nevile School, Burlington Road, London 10 1NJ

TERMINATION DATE: Such date that the Licence is terminated under the provisions of Clause 5

Licence

1. The Licensor permits the Licensees to enjoy the Rights for the Licence Period.

Payments

2. The Licensees are to pay to the Licensor without deduction:
 - 2.1 the Licence Fee in advance on the First of January each year if demanded;
 - 2.2 the cost of any works which the Licensor does as a result of default by the licensee.

Nature of Privileges

3. The Rights are granted on the basis that:
 - 3.1 the benefit of this Licence is personal to the Licensees and is not transferable;
 - 3.2 The Licensor does not undertake to provide secure or attended parking facilities and accept no liability for the security of vehicles parked or their contents;
 - 3.3 any vehicle parked in accordance with this Licence displays the parking permit provided by the Licensor at all times;
 - 3.4 they are only to be enjoyed between 07:00 and 19:00 Monday to Friday in term times and at no other time except on with the prior consent of the Licensor (such consent not to be unreasonably withheld or delayed).

Licensee's responsibilities

4. The Licensees are:
 - 4.1 to observe all present or future legal requirements regulating the exercise of the Rights;
 - 4.2 to indemnify the Licensor and its employees from all losses, reasonable costs and third party claims or other liability (including for death or personal injury) arising in any way from the grant or existence of this Licence and anything done as a result of its grant or existence, except where due to the neglect or default of the Licensor, its employees or agents;
 - 4.3 to release the Licensor from any such claim or other liability on the part of the Licensee (except where in the case of liability for death or personal injury this would be unlawful, or where due to the neglect or default of the Licensor, its employees or agents);

- 4.4 fire drills involving the Basketball Court are to take place on the days agreed between the parties and to inform the Licensor when any proposed fire drill is to be carried out outside the agreed day at least 7 days before the drill takes place and where such drill will include assembly on the Basketball Court;

End of Licence

- 5.1 This Licence may be ended by the Licensor and the Licensee's mutually agreeing to terminate it
- 5.2 This Licence will terminate with immediate effect should the Premises no longer be used as a school for deaf children

Notices

6. Any written notice which is under the terms of this Licence to be given to the Licensor is to be treated as effectively served if and only if sent through the post by recorded delivery service. Any written notice which is to be given to the Licensees is to be treated as effectively served if sent through the post by recorded delivery service addressed to the Licensees at their last known place of business or abode in the United Kingdom

AS WITNESS whereof this Deed has been executed by the parties hereto and is intended to be and hereby delivered on the date first above written.

)
duly authorised on behalf of)
The Governing Body of)
Fortismere School)

THE COMMON SEAL of)
The Mayor and Burgesses of)
The London Borough of Haringey)
was hereunto affixed by ORDER)

EXECUTED AS A DEED by)
The Governing Body of)
Blanche Nevile School)