



Office of
the Schools
Adjudicator

DETERMINATION

Case reference: LAN76

Applicant: The Nobel School, Stevenage, Hertfordshire

Application: Regarding the transfer of land and buildings referred to as the caretaker's house on the site of the Nobel School, Stevenage, Hertfordshire.

Date of direction: 22 February 2018

Direction

Under the powers conferred on me by regulation 6 of and paragraph 15 of Schedule 5 to The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013, I hereby direct that the transfer of land at The Nobel School, Stevenage, Hertfordshire from Hertfordshire County Council to the Governing Body of The Nobel School shall include the land and dwelling associated with the property referred to as the caretaker's house on the site of the Nobel School.

The Referral

1. The Governing Body of the Nobel School (the governing body) has applied to the Office of the Schools Adjudicator for a determination as to whether the caretaker's house (meaning the land and dwelling associated with the property referred to as the caretaker's house) on the site of The Nobel School (the school) should form part of the land transferred to and vested in the governing body under Paragraph 2 of Schedule 5 of the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013.

Jurisdiction

2. Schedule 5 to the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013 (the Regulations) applies in relation to the transfer of land where a school changes category or acquires a foundation.
3. Paragraph 2 (1) of Schedule 5 of the Regulations applies "*where any proposals that a community school should become a foundation school...have been approved*".
4. Paragraph 2 (2) provides "*In such a case, any land which, immediately before the implementation date, was held or used by a local authority for the purposes of the community school...must on that date transfer*

to, and by virtue of this paragraph vest in...the governing body, to be held by that body for the relevant purposes”.

5. Paragraph 14 (1) provides that *“The transferor and the transferee must arrive at such written agreements, and execute such other instruments, as are necessary or expedient to identify or define the property, rights and liabilities transferred to the transferee or retained by the transferor”.*
6. Paragraph 14 (3) provides *“If and to the extent that the adjudicator is requested to do so by the transferor or the transferee, the adjudicator may (a) assist the transferor, the transferee and any other interested person in identifying or defining the property, rights and liabilities transferred to the transferee or retained by the transferor...”.* No such request has been made but this extract is included in order to indicate the scope of paragraph 14.
7. Paragraph 15 (1) provides *“In the case of any matter on which agreement is required to be reached under paragraph...14, if such an agreement has not been reached within a period of six months of the implementation date, the adjudicator may give a direction determining that matter...”.*
8. The implementation date is 1 September 2016. The school’s application states that it is brought under paragraph 8 (3) of the Regulations. I have considered that provision and do not find that it applies to the current point of dispute. The provisions of paragraph 8 apply where land would otherwise be transferred by the provisions of paragraph 2 but, under the provisions of 8 (2) or 8 (3), that land is not to be transferred. Paragraph 8 (2) provides for the transferee or the transferor to agree in writing, before the implementation date, that land should be excluded and 8 (3) provides that where they cannot agree what land should be excluded they must refer the matter to the adjudicator.
9. A requirement to have regard to guidance is set out in paragraph 7 of the Regulations. My interpretation of the provisions of paragraph 8 is reinforced by the guidance *“The transfer and disposal of school land in England”* (the guidance). Paragraphs 40 to 47 of the guidance are headed *“Agreements to exclude surplus land”*. Although not explicitly stated, and although the word “surplus” does not appear in paragraph 8, these paragraphs of the guidance clearly refer to the provisions of paragraph 8. In my view, these paragraphs can only be read as referring to land which would be transferred under the provisions of paragraph 2 of Schedule 5 to the Regulations but for an agreement between the transferor and the transferee or that an adjudicator has by order directed its exclusion. That is not an issue I am asked to determine.

10. The question which I am asked to determine is whether the caretaker's house, immediately before the implementation date, was held or used by the Council for the purposes of The Nobel School. The school sets out in its application the provisions of paragraph 2 of Schedule 5 and argues that the caretaker's house falls within those provisions. The Council states; *"the Council agrees that the test is as set out in Paragraph 2 (2) of Schedule 5..."*. On my analysis, as set out above, that question falls to be determined by the Adjudicator under paragraph 15 of Schedule 5 to the Regulations.

Procedures

11. In considering this matter I have had regard to all relevant legislation and guidance. I have considered all papers put before me including:
- a. The school's application received on 20 December 2017 together with supporting documentation.
 - b. Further information received from the school on 17 January 2018.
 - c. The Council's response received on 12 January 2018.
 - d. Further submissions received from the school dated 29 January 2018.
12. Both parties have been consulted in accordance with paragraph 15(3) of the Regulations.

Background

13. The facts are straightforward and are not disputed by the parties.
14. The Nobel School is a mixed gender secondary school with an age range of 11 to 18 years. Up to 1 September 2016 the school was a community school maintained by the Council. On 31 March 2016 the governing body of the school published proposals for a change of status from community school to foundation school. Those proposals were approved and on 1 September 2016 ("the implementation date") the school became a foundation school. One consequence of the change of status is the transfer of land (and other property) from the Council to the governing body of the school.
15. The caretaker's house was built in the 1960s within the site of the school. It is situated towards the North West corner of the site and the caretaker's house has access directly onto the school entry road. It is likely that the intention when the house was built was to provide accommodation for an onsite caretaker and that this was the original and continuing use. It is not disputed by the parties that the house was occupied immediately prior to the implementation date by a caretaker employed to provide facilities management services (FM services) at the school. At all material times prior to the implementation date the Council held the freehold of the site referred to as the caretaker's house.

16. From 18 May 1996 the caretaker occupied the house under a service tenancy. This occupation was a condition of the caretaker's employment by the Council. Under Building Schools for the Future (BSF) arrangements entered into by the Council it was agreed between the Council and the governing body of the school that the caretaker would be provided with accommodation. As part of the BSF arrangements the facilities management functions were transferred to a third party, the facilities management provider (the FM provider), and the caretaker's employment transferred to the FM Provider under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations. At the instigation of the governing body, arrangements were made for a lease of the caretaker's house to the FM Provider, which in turn granted a tenancy to the caretaker. The school were to cover the cost of meeting the maintenance obligations in the tenancy agreement provided works were carried out by the Council to bring the caretaker's house up to a specified standard. The caretaker was not required to reside onsite. Clause 20A.8 of the facilities management agreement provides that if the caretaker ceases to be employed or engaged in the delivery of services at the school his right to occupy the caretaker's house is to be terminated.
17. The caretaker continued to reside in the caretaker's house and continued to be employed, albeit by the FM Provider rather than by the Council or the school, to provide facilities management services at the school. Rent was taken by the FM provider and paid to the Council and this was credited to the school.
18. Both parties have set out in some detail events subsequent to the implementation date, including the fact that the caretaker vacated the caretaker's house on 30 April 2017. Both parties have also commented on possible future uses of the caretaker's house, including potential safeguarding issues. I do not find that any events or proposed uses after the implementation date are relevant to my determination of the question before me. Consequently it is not necessary to set these matters out here.

Consideration

19. Up to the implementation date the school was a community school. Consequently, the land and buildings were held by the Council. In terms of day to day control and use of the land and buildings, this was a matter for the school's governing body but regardless of this use by the school may be treated as use by the Council for the purposes of this determination. It is not in dispute that the main school buildings and the land on which they stood were held and used by the Council for the purposes of the school. The question before me concerns only the caretaker's house. The question is whether immediately before the implementation date, the caretaker's house was held or used by the Council for the purposes of the school.

20. Paragraph 2 (2) of Schedule 5 to the Regulations includes the two verbs “held” and “used”. I am satisfied that the land was, at the relevant time, held by the Council, which is the freehold owner of the site, although a lease and a tenancy had been granted. The question of whether the land is “held” for some purpose is only likely to be distinct from whether it was “used” for that purpose in particular circumstances. Land could, in theory, be held for the purposes of the school but used immediately before the implementation date for a distinct purpose, for example where a school building is temporarily used for a purpose unconnected to the school. The facts of this matter are that the caretaker’s house was occupied by the caretaker and the caretaker was employed to work in the school at all material times including the time immediately prior to the implementation date. I conclude that at all material times the caretaker’s house was held and used for the same purposes (whether or not those are the purposes of the school) so that it is not necessary in determining this question to distinguish between “held” and “used” and I will, for simplicity, use the verb “used” in the analysis below.

21. The school’s position is straightforward. The caretaker’s house was built as a caretaker’s house on the site of a community school. As far as the governing body are aware it was intended for that purpose and has always been used for that purpose (until the current caretaker moved away after the implementation date). On those facts the school say that the statutory test set out above is met.

22. The Council’s argument is that the caretaker’s occupation immediately before the implementation date arises from a particular set of circumstances which affects the proper determination of the term “used” in this context. The council states

“The fact that the caretaker was resident does not mean that the Caretaker’s House was automatically used by the Council for the purposes of the school, but rather it can be seen that the caretaker was resident as a result of circumstances, and not as a result of a continued use of or by the school”.

23. In support of this argument the Council set out the following matters:-

- a. The caretaker was employed by the FM provider, not by the school or the Council.
- b. The caretaker was not required to reside in the caretaker’s house.
- c. If the caretaker was not resident, there would have been no loss of amenity to the school as a result.
- d. The caretaker was a tenant of the FM provider and the leasing structure described above was, at least in part, designed to avoid a secure tenancy arising.
- e. At the governing body’s request the Council acceded to provision for the caretaker to remain solely on *“the basis as an employee of the FM provider, but it was not the basis of any*

Agreement".

- f. The fact the caretaker lived on site was "merely a product of not evicting the caretaker, and not a requirement of use by the school".
24. If the situation had remained as it was before the BSF project arose then it seems to me that no issues would arise with the transfer of the caretaker's house. The question is whether the matters arising from the BSF project, as set out by the Council, change the position. For the reasons set out below, I am not persuaded that this materially changes the position.
 25. The provision of facilities management services is necessary for the school to perform its functions and consequently provision for delivery of those services is made for the purposes of the school. The Council accepts that the caretaker's house was used by the caretaker.
 26. In part, the Council's argument suggests that it is relevant that occupation of the caretaker's house by the caretaker is not necessary or required. That would imply into the term "used" in the statutory test, some concept of that use being necessary or required. There is nothing in the wording of the Regulation 2 to suggest that "necessary" or "required" are to be implied and if this were intended it would have been straightforward for the draftsman to make it explicit in the wording.
 27. I do not find that the position is materially affected by the change of employer or by the leasing structure post BSF. Whatever the employment and leasehold position it remains the case that the Council was using the house to accommodate the caretaker and the caretaker was providing FM services to the school.
 28. Further the Council's argument suggests that the primary reason for the continued right of the caretaker to occupy the caretaker's house is to avoid his being evicted, rather than to facilitate the provision of facilities management services to the school. I do not accept that this means that the caretaker's house is not used for the purposes of the school. The position is not materially affected by the school's motivation in wishing to retain the caretaker's house in the BSF process. In part this may have been to avoid the eviction of the caretaker but, as the Council state, the school sought inclusion of the provision that the caretaker's right to reside in the caretaker's house was to terminate if he ceased to be employed to provide FM services at the school. The provision of services at the school is not merely incidental to or distinct from the occupation of the caretaker's house. It is necessary for the school to have a caretaker and, given that the caretaker has historically been provided with accommodation, it seems it was desirable in the school's view to provide accommodation to the caretaker. It is pragmatic to use the onsite caretaker's house to provide that accommodation. Hence the purposes of the school are served by using the caretaker's house to provide accommodation for the

caretaker.

Conclusion

29. For the reasons set out above, I find that the caretaker's house, immediately before the implementation date, was both held and used by the Council for the purposes of the school. Consequently I make the direction set out below.

30. I have not been asked to determine the precise boundaries of the land referred to as the caretaker's house nor have I been asked to determine the effect of this determination and/or the vacation of the property by the caretaker, or the lease and sub-lease granted in relation to the caretaker's house. I anticipate that these are matters which can be decided by agreement between the parties after this direction is made by reference to the relevant statutory provisions.

Direction

Under the powers conferred on me by regulation 6 of and paragraph 15 of Schedule 5 to The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013, I hereby direct that the transfer of land at The Nobel School, Stevenage, Hertfordshire from Hertfordshire County Council to the Governing Body of the Nobel School shall include the land and dwelling associated with the property referred to as the caretaker's house on the site of the Nobel School.

Dated: 22 February 2018

Signed:

Schools Adjudicator: Tom Brooke