**Occupation of Church Owned Land by Catholic Schools: Licence or Lease?**

1. **Introduction**
2. During the course of discussions about potential Trustee liability for breaches of health and safety legislation in schools, questions have been raised about whether it would be beneficial to change the current basis upon which Catholic schools occupy Church owned land and buildings for the purpose of conducting a Catholic school. It has been suggested that the grant of a lease to schools would be beneficial, including providing protection to the Trustees in relation to potential liability for health and safety breaches.
3. The CES settled position is that the existing arrangements under which Catholic schools occupy school sites should be retained and that Trustees should resist any move away from this and that they should not be persuaded that the grant of a lease is a preferable option. This purpose of this paper is to set out the reasoning for that position.
4. Throughout this document the term ‘school’ means all Catholic schools and colleges, including schools in the Trusteeship of a religious order. This includes maintained schools, academies in England, independent schools, sixth form colleges and non-maintained special schools.
5. **Current Basis of Occupation – Mere Licence**
6. The current arrangements are set out in detail in the attached paper *Statement of Facts: Occupation of Church Owned Land by Catholic Schools.* As can be seen, the Trustees own the freehold or equivalent interest in the school site. The governing body or academy trust company occupies and conducts the school on behalf of the Trustees as the occupier of the premises, the proprietor of the undertaking and the employer of the staff. Their occupation is subject to the Trustees’ objects, Trust Deed and any other parameters properly laid down by the Trustees.
7. The school occupies the site under a mere licence. Such licences are not normally in written form. A mere licence passes no interest in the site and is always revocable. It therefore passes *no rights* to the governing body of the school or the academy trust company. Unlike a lease, it does not create an estate in the land and unlike a licence *agreement,* it does not create any contractual rights. As a licensee, the school is simply given permission to use the site for the authorised purposes, without which it would be a trespasser.
8. A mere licence allows for maximum retention of control by the Trustees over the property. It does not give the school enforceable rights that would reflect any diminution of the rights of the Trustees. The terms of a mere licence can be varied by the Trustees at will and, potentially without notice.
9. **Disadvantages of Granting a Lease**
10. A lease is a commercial transaction in which temporary and conditional use and occupation of land and premises is granted usually for a fee (rent). Leases can be fixed term or periodic tenancies. Unlike a mere licence, the occupier, i.e. the tenant, is granted an interest in the land and enjoys rights as against the landlord, i.e. the person or body granting the lease.
11. A lease would create a proprietary interest in the land for the school in occupation. Proprietary interests are profits, rights, ownership shares or advantages held by the full or partial owner of a tangible or intangible asset or property. In this case, the school would enjoy rights of ownership for the term for which the lease has been granted to it.
12. It would not be possible to revoke or change the terms of the lease once this has been granted. The terms of the lease cannot be unilaterally changed without due process and usually only with the agreement of the tenant. This would provide rights in favour of the occupier and allow for a greater degree of control on the part of the school. It would limit the ability of the Trustees to direct the use of the premises and control the use by the school, provided that such use was not subject to a restriction in the lease. It would mean that the Trustees would not be able to retain possession of parts of the site of the school which the school may no longer need the use of, without the agreement of the school.
13. Additional restrictions would apply to the manner in which the Trustees would be able to deal with the land. For example, should the Trustees decide that it was no longer in their best interests for the school to continue to occupy the premises under the lease, they may be prevented from requiring the school to surrender it. That is because both schools and academy trust companies are charities, which are required to protect assets and the value in them. The governing body of the school or the academy trust company may conclude that it is not in their best interests to give up an asset. There is a further complication for academy trust companies in that the Secretary of State’s consent would be required to any surrender of a leasehold interest held by an academy trust company.
14. One of the key principles of a lease is that the tenant is granted exclusive possession of the premises and the right to quiet enjoyment. The right to quiet enjoyment may well impinge on the Trustees’ ability to deal freely with their site and any adjoining property owned by them. For example, if the site of the school adjoins a diocesan building and the Trustees’ wish to carry out work to the adjoining building the existence of the lease may require consent of the tenant for the Trustees’ to enter onto the site for the purpose of the works. The Trustees would need to consider how the carrying out of any building works would interfere with the tenant’s right to quiet enjoyment and may need to consult with the school and or offer compensation if appropriate.
15. Since both maintained schools and academy trust companies are public bodies, if legal rights are given to them through the grant of a lease, this effectively means that legal rights are signed over to a public authority. The lease, as an asset of the school, would be subject to valuation and would be accounted for in local authority or central Government accounts.
16. There are other practical issues that arise. Since every lease is a separate bipartite contract this means drawing up, negotiating and executing over 2,000 leases, which will obviously require legal and other professional fees to be paid. It would not be possible for the CES to provide a model lease because of the disparate range of needs. Each transaction would need to be considered individually having considered the title deeds under which the Trustees own each property. Additional obligations will arise, including a requirement to register the lease, depending on its duration. The registration process will also incur a fee.
17. Having separate and individual leases for each school will necessitate accurate and thorough record keeping. In all dealings relating to the school it will be necessary to consult the property records as no assumptions can be made about the basis of occupation.
18. It should be noted that a landlord retains tortious liability unless the lease contains a valid exculpatory clause. An exculpatory clause is a clause which limits the liability of the landlord under the lease. It would not be valid if it is unconscionable or unreasonable. Additionally, such clauses cannot excuse liability from harm which is caused unintentionally or recklessly. Having had sight of the opinion of leading counsel on the possibility of Trustees being fixed with liability under health and safety legislation, the CES is not satisfied that the provision of a clause in the lease limiting liability in this area would be effective.
19. **Conclusion**
20. A Catholic school is one which is recognised as such by the Diocesan Bishop. Essentially the definition of a Catholic school in canon law requires that it is controlled by the Catholic Church.[[1]](#footnote-1) That control is normally established where the diocese or a religious order owns the school and appoints those governing it.
21. Successive Governments have recognised the responsibilities of the Trustees and the rights of the Catholic community as a whole to ensure the long-term future of Catholic education is secure. The law enshrines a number of guarantees from the State to ensure the Catholic character and ethos of the schools is maintained. These guarantees include considerable legislative provision which protects the Trustees ownership and value in the land.
22. The legislative and contractual basis on which maintained schools and academies are enacted and drafted reflect the current arrangements under which Catholic schools occupy Trustee land, i.e. on the basis of a mere licence. The current arrangements apply to around a third of all schools. Any change would entail a substantial overhaul of the system which would have a large financial and administrative burden.
23. Ownership of the land and buildings by the Church, and through this the ability to exercise control over Catholic schools, is one of the fundamental reasons why the Church has been able to continue to retain the protections enshrined in legislation and in the governing documents applying to Catholic schools.
24. Whilst a lease has the benefit of being well understood by professionals such as solicitors, surveyors and accountants, unlike a mere licence, it is the view of the CES that a lease would impact substantially, and detrimentally, to limit the control currently exercised by Trustees and is unlikely to provide the Trustees with any greater degree of protection than they have under the existing arrangements.
1. Canon 803§1 [↑](#footnote-ref-1)