

APPENDIX C**OPINION OF THE REPRESENTATIVE CHURCH BODY
LEGAL ADVISORY COMMITTEE**

Querist: Representative Church Body of the Church of Ireland

Re: Proposed Transfer of Glebeland in Kilternan to Cowper Care Centre Limited

THE PROPOSAL

A proposal has been made for the transfer of 2.9 acres of glebeland in the Parish of Kilternan to Cowper Care Centre Limited ¹ for the development of a nursing home and sheltered housing. The transfer would take the form of a 99 year lease at a nominal annual rent of €1. Property consultants have estimated the open market value of the site at £1m. The question which arises is whether or not it is within the powers of the Representative Church Body ² to transfer the glebeland for a sum less than its market value.

On the 27th September 1983 the Legal Advisory Committee advised on the proposed sale of parochial land in the Parish of Mallusk. The opinion then was that this sale in all the circumstances, would be a breach of trust. That opinion concerned land situate in Northern Ireland which does not enjoy the same statutory regime referred to in this Opinion. For that reason the opinion of the Legal Advisory Committee herein differs from the earlier opinion then given.

THE ISSUES TO BE ADDRESSED**A. Power of Trustees to dispose of property.**

The glebelands in question were vested in The RCB in 1878 and are held in trust, pursuant to Chapter X Part II of the Constitution of the Church of Ireland. Should the proposed transfer take place, the remainder of the glebelands in Kilternan not transferred will remain the property of The RCB, and will hold also the reversionary interest in the land transferred.

There are three circumstances in which Trustees may be empowered to sell or otherwise dispose of trust property. First, the trust instrument may contain an express or implied power of disposal. Alternatively, the Court may authorise a Trustee to dispose of trust property, or such a power may be conferred by statutes.

Section 5 of the Glebelands Representative Church Body Ireland Act 1875 confers a power of disposal on the RCB. It provides as follows:

“The said Representative Church Body may from time to time sell, lease, exchange or otherwise dispose of, on such terms and in such manner as they think

¹ Hereafter “Cowper”

² Hereafter “The RCB”

fit, or mortgage, any lands vested in them, and not being otherwise required for purposes of the said church or any of the colleges or congregations connected therewith, and may enter into, execute, and do all contracts, assurances and things necessary or proper in that behalf; and every such sale or lease as aforesaid may be made either absolutely for a sum in money, or for any annual rent or rents, to be made payable as the said Representative Church Body direct, or partly for a sum of money and partly for such rent or rents as aforesaid, as the said Representative Church Body think fit, and the said Representative Church Body may afterwards sell any rent so to be made payable.”

The Constitution of the Church of Ireland also provides for the disposal of property by the RCB:

“The Representative Body shall be at liberty to let on lease, or to sell either by public auction or by private contract, any see lands, glebes or sites of churches or see or glebe houses, with the buildings thereon, or any schoolhouse vested in it, and the land occupied therewith, which shall be found unsuited or unnecessary for the Church of Ireland; provided that no such sale or letting shall be made without the consent of the Diocesan Council of the Diocese in which such property is situated; but it shall not be necessary for any purchaser to enquire whether such consent has been obtained”.³

This general power of disposal (which largely mirrors Section 5 of the 1875 Act) is clearly conditional upon a number of factors. First, the property to be disposed of must be found unsuited or unnecessary for the Church of Ireland. The section does not specify who must make this finding, but in our opinion, it is the RCB who must be satisfied that this criterion is met, and any resolution of the RCB should specify, in a recital or elsewhere, that the glebelands are not necessary for the Church of Ireland.

The second condition is that the Diocesan Council of the Diocese of which the property in question is situated must consent to the disposal. This formal requirement must also be satisfied and should be referred to in the relevant resolution of the RCB. If there are any relevant standing orders as to how the Diocesan Council may give its consent, this should be attended to before the RCB resolves that the property may be transferred.

B. Power To Sell At An Undervalue

The common law rule is that Trustees selling or otherwise disposing of trust property must obtain the best possible price for the beneficiaries⁴. Special provision, however, is made for charitable trusts, under Section 34 of the Charities Act, 1961⁵. In particular, Section 34(2) provides the following:

“Where an application is made to the Board by the Trustees of any charity comprising land representing that a specified disposition of the land for the benefit of a specified charitable purpose other than a purpose of the charity of

³ Chapter X part II section 12

⁴ *Buttle v Saunders* (1950) 2 All ER 193

⁵ As amended by Section 11 of the Charities Act, 1973

which they are trustees, being a disposition the consideration for which is not the market value, would, if effected, operate to the benefit of the public, the Board may, if they think fit, inquire into the circumstances, and if, after inquiry, they are satisfied that the proposed disposition would both be for the benefit of the specified charitable purpose and operate for the benefit of the public, they may authorise that disposition and give such directions in relation thereto (including directions for securing the due investment or application of any money arising therefrom for the benefit of the charity), as they think fit”.

An application may therefore be made to the Commissioners of Charitable Donations and Bequests for Ireland⁶ to authorise the disposition at an undervalue. However, under the section a number of criteria must be satisfied.

First, the section presupposes that the transferors are the Trustees of a charity and requires that the land be transferred “*for the benefit of a specified charitable purpose other than a purpose of the charity of which they are Trustees*”. Effectively, this means the transfer must be from one charity to another. Undoubtedly, the Church of Ireland is a charity, but the question arises whether Cowper satisfies the statutory requirement.

There are a number of legal prerequisites for the establishment of a charity. First, a gift of funds or other form of property is necessary. Second, there should be a formal governing instrument such as a Declaration of Trust or a Company Memorandum or Articles of Association. Thirdly, the governing instrument must state the charitable aims or purposes of the body, and these should conform to one of the principles set out by Lord McNaghten in the seminal case of Commissioners for Special Purposes of Income Tax v Pemsell, where he stated the following:

*““Charity” in its legal sense comprises of four divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts beneficial to the community not falling under any of the preceding heads.”*⁷

Cowper is a company limited by guarantee. Whilst it is not uncommon to use a company to effect charitable purposes a difficulty has arisen in the past. Namely that the objects of a charity can be changed by vote. Accordingly the Charity Commissioners may well require something to be done to ensure that the charitable objects of the company are made immune from casual change without, at least, appropriate notice being given to the Charity Commissioners or Representative Church Body. We suggest therefore that a provision should be inserted into the Memorandum and Articles of the company to the effect that no change is to be made to the Objects or to the Articles except with the prior consent in writing of the RCB and the Charity Commissioners. The principal objects of Cowper are set out in this Memorandum of Association. These are the establishment of care centres for the relief of persons in need of accommodation due to age, infirmity, disability or other social or economic circumstances, and the provision of relief to “*adults who are in conditions of need, hardship and distress as a result of their social and economic circumstances*”. In our opinion, these objects are

⁶ Hereafter referred as “The Charity Commissioners” and referred to in Section 34(2) as “The Board”

⁷ (1891) AC 531

such as to satisfy the Pemsel test falling into the first or fourth category thereof. Thus, the proposed transfer would be between two charities.

The next stage of Section 34(2) test is to show that the proposed transfer would be for the benefit of the “*specified charitable purpose*” – i.e. for the benefit of the charitable purpose carried out by Cowper. There is no difficulty with this, as the purpose of the proposed transfer is stated to be for the development of a nursing home and sheltered accommodation – the very purpose for which Cowper was established.

The third criterion under Section 34(2) is public benefit – i.e. if effected, the disposition must operate for the benefit of the public. It is useful to know the dictum of Lord Wrenbury, who said that the gift must be made:

“... for the benefit of the community or an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.”⁸

First, it should be noted that the objects of Cowper are expressly stated to be for the relief of members of the Church of Ireland and their families. On the basis of Lord Wrenbury’s statement above, however, this does not appear to affect the charitable status that can be accorded to Cowper. Equally, if the proposed nursing home and sheltered house is to be used primarily to house needy members of the Church of Ireland, we consider that this will not preclude the application of Section 34(2). Indeed in the case of *IRC v Braddley* the Court held that: “*Methodists*” constituted a class that was public in nature and, therefore, could be beneficiaries of a charitable trust.

As to the disposition itself, in our opinion, it would clearly operate for the benefit of the public, given that it has essentially the same purpose as the existence of Cowper itself – i.e. the provision of sheltered accommodation for persons in need.

It is to be noted that Section 34(2) of the Charities Act, 1961 (as substituted) provides a mechanism for a “*specified disposition*”. Given that “*disposition*” is defined in Section 34(6) as meaning a disposition of the land by selling it, exchanging it for other land, surrendering a lease or other contract of tenancy of it, or accepting a surrender of a lease or other contract of tenancy of it. Care needs to be taken to structure the “*specified disposition*” to fall within what the section defines as “*disposition*”. We note the proposal is to grant a 99 year lease. We are of the opinion that if the proposal is to pass muster before the Charity Commissioners it must be presented as a disposal by way of sale. We see no reason why a sale could not be by way of lease but are concerned that too short a lease might not be considered to be a disposition by way of sale. The opinion of an Auctioneer as to what would constitute a saleable leasehold interest should be obtained to establish that the proposal is a disposition. We understand that in or about 1993 or 1994 the Commissioners approved a sale by way of lease between the Jesuits and the National College of Industrial Relations (Joyce O’Connor) on the application of J.G. O’Connor

⁸ *Verge v Somerville* (1924) AC 496 at page 499

(T. Bacon) being a lease for 500 years at an undervalue between two charities. Agent might enquire about this precedent.

Once the conditions laid down in Section 34(2) are satisfied, it is open to the RCB to make an application to the Charity Commissioners seeking authorisation to dispose of the land at an undervalue. It should be noted, however, that the Charity Commissioners have a discretion under the Section and, notwithstanding compliance with all the criteria, they could, theoretically, at least, decide to refuse authorisation. However, hopefully in the circumstances they would be sympathetic to such an application.

It is worth noting Section 40 of the 1961 Act. That section provides that a transaction authorised by the Charity Commissioners under the Act, shall have the like effect and validity as if authorised by the express terms of the trust affecting the charity. In the present case, this appears to provide a safety net. The Constitution of the Church of Ireland clearly entitles the RCB to dispose of the property. If, however, there should be any reason why this is not so in relation to the land in question, the authorisation of the transfer by the Charity Commissioners will deem the transaction acceptable under the trust.

We note that in the proposal sub-paragraph (e) envisages a claw-back in the event of sale and a profit being generated. We are of the opinion that this proposal should be re-cast in a manner which makes it clear that if the Purchaser makes a sale at a profit it is obliged, in circumstances detailed, to pay over a sum which is capable of ascertainment by an appropriate formula and that the obligation to pay be secured upon the land the subject matter of the disposition by way of sale. As a matter of practicality the extent of this provision may affect the ability of the enterprise intending to develop the land to secure funding. A view will have to be taken as to what is reasonable and sustainable in all circumstances. The purpose of the charge is to avoid a total loss in the case of an insolvency.

Finally, we have noted, in the course of considering this matter, that there is a covenant contained in the Indenture of the 15th February 1776 made between Richard Anderson and the original trustees which might be construed as restricting the use of the land “as the Glebe of the said Parish of Killgobbin and not otherwise”. The interest transferred under the 1776 Deed was a fee farm grant. By Indenture dated the 12th September 1941 the RCB bought out the fee farm rent “and all the estate and interest of the Grantor under said lease” [sic]. It may well be that the restrictive covenant is no longer operative. However, for the sake of certainty, we would recommend that the advice of conveyancing Counsel be obtained as to the precise nature of the covenant and as to whether, more particularly, that covenant could properly be construed as still operating as a burden on the lands.

SUMMARY

The following criteria must be satisfied in order for the proposed transfer of the glebelands to Cowper to be effective:

- (a) The lands must be unnecessary for the needs of the Church of Ireland, in order to satisfy the Constitution of the Church.

- (b) The transfer must be for the benefit of the charitable purpose carried out by Cowper – i.e. the establishment of care centres for persons in need of accommodation by reason of age, infirmity, etc.
- (c) The transfer must operate for the benefit of the public.
- (d) The transfer must be by way of “specified disposition”.

The consent of the following bodies is required:

- (a) the relevant Diocesan Council,
- (b) the Charity Commissioners,
- (c) the decision to transfer the land must be made by the RCB.

In our opinion the following steps should be taken:

- (a) The formal consent of the relevant Diocesan Council should be obtained
- (b) The RCB should pass a resolution authorising the transfer of lands. Such resolution should state expressly that the consent of the Diocesan Council was obtained, and should set out clearly each of the matters listed in paragraph 21 above, stating why each is satisfied
- (c) An application should then be made to the Charity Commissioners, in appropriate form.⁹

The following documents should be forwarded to the Charity Commissioners with the application:

- (i) A copy of the Deed vesting the property in the RCB.
- (ii) A copy of the Memorandum of Association of Cowper, to indicate its charitable status¹⁰ and the amended terms.
- (iii) A copy of the proposal for the site in question, to indicate the criteria in Section 34(2) are satisfied.
- (iv) A copy of the Valuer’s Report on the property, including its full market value.
- (v) A copy of the RCB resolution.

Declan Budd

11 December 2001

Signed on Behalf of the RCB Legal Committee by the Honourable Mr Justice Declan Budd.

⁹ Please note an appropriate form is set out at page 439 of O’Halloran’s book

¹⁰ In the perfect world one would like some form of protection to limit the ability to change the Memorandum and Articles of Association of that company without the consent of the Charity Commissioners to avoid its objectives being suborned.