

**REPORT ON LEASE**

**BETWEEN:**

**LIBERMANN TRUST AND FR SEAMUS GALVIN C.S.SP ( the "Landlord")**

**AND**

**SPIRITAN EDUCATION TRUST C.L.G (COMPANY LIMITED BY GUARANTEE) (the "Tenant"  
and "SET")**

**Prepared by EVERSHEDES SUTHERLAND  
for and on behalf of the board of directors of SET**

This report has been prepared by this firm for the benefit of the board of directors of SET only. It cannot be relied on by any other party.

## REPORT ON TITLE

The defined terms in this Lease Report have the same meaning as set out in the Lease.

### 1. LEASE

**Parties:** Landlord: **LIBERMANN TRUST AND FR SEAMUS GALVIN C.S.SP<sup>1</sup>**

Tenant: **SPIRITAN EDUCATION TRUST C.L.G (COMPANY LIMITED BY GUARANTEE)**

**Demised Premises:** Schedule 1 as attached to the Lease.

Lease of whole  part

As we do not hold title documents, we will not be in a position to advise on the extent of the premises being demised.

**Date of Heads of Terms:** No heads of terms provided

**Term:** 3 years from 1 September 2017. The term time remaining is now at less than 2 years.

**Option to renew** Yes  No

**Lease Break:** Available in limited circumstances, see Break Option below.

**Rent:  
(Pg 3 & Clause 4.1)** The Lease provides the Initial Rent as being €1.8 million being €900,000 payable on the 15<sup>th</sup> February and €900,000 payable on the 15<sup>th</sup> September. This clause has been amended from the first draft which may be an attempt by the Landlord to reflect the reality of how rental payments are currently demanded from the schools. However, SET must assess if these dates give SET sufficient time to collect fees from the schools in time for payments to be made to the Landlord on the 15<sup>th</sup> February and the 15<sup>th</sup> September. If not, this provision of the Lease should be amended or a side letter be provided to disapply certain aspects *e.g.* the Rent not becoming payable unless and until the licence fee is received with a corresponding obligation on the Tenant to remit funds within an agreed number of days. This is an important consideration from a directors' duty perspective. Please note further that clause 4.1 states that there is to be no deductions to the Rent during the Term.

**Rent Free Period:** None such.

**Rent Reviews:** None such. Given that this is a short term lease, this is expected.

**VAT payable on Rent:** Yes  No

Please refer this to your accountant for clarification on this point.

**Outgoings:  
(Clause 4.3)** The tenant is to pay and indemnify the Landlord against all Outgoings (as defined in the lease). We would propose limiting this to all

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<sup>1</sup> Our firm has not being provided with any title documents. In the absence of title documents, it is not possible to verify the Landlord's title to enter the Lease and in what capacity Libermann Trust and Fr Seamus Galvin C.S.SP enter the Lease (e.g. trustees or otherwise).

**vouched** Outgoings.

Given that SET will remit the bulk of the licence fees collected from the schools to the Landlord in discharge of its rent obligation, SET must consider its ability to pay such Outgoings. This is a liability that needs to be considered and assessed by SET as the Outgoings are quite extensive.

**Rights Granted  
(Clause 5.1 & 5.2)**

Quiet enjoyment and to make good any damage caused by the Landlord.

**Repair:  
(Clause 4.4)**

The Tenant is under an obligation to *"maintain, repair and keep in good working order and condition and as often as may be necessary to review and replace all plant and conduits in, over and under the Demised Premises and to repair any damage to the Demised Premises caused by breakdown, mis-use or failure to repair the plant and conduit and to indemnify the Landlord against any loss or liability resulting from this."* The repairing obligation only extends to uninsured risks. However, uninsured risks are not defined in the Lease and should be defined.

We would recommend that the Lease be amended to state that the Tenant shall not be obligated to put the Demised Premises in any better state of repair and condition than that which existed on the grant of the Lease. In addition, the Tenant should not be made liable for any damage caused due to fair wear and tear nor that caused by inherent or latent defects. A schedule of conditions annexed to the Lease would assist in this regard. Please see our comments made below under 'Yielding Up' on this point.

Furthermore, the repairing obligations should be limited and be made 'subject to the Break Option at clause 6.9'.

Please see the comments below regarding the lease not appearing to reflect the relationship between the Landlord, SET and the schools as well as the comments regarding licence agreements.

**Decorations:  
(Clause 4.5)**

Please note that the Tenant is to *"decorate in a good and workman like manner...during the last 6 months of the Term all exterior parts of the Demised Premises requiring decoration"* and *"during the last 3 months of the Term all interior parts of the Demised Premises requiring decoration"*. We would suggest this be limited to matters 'requiring decoration in order to put the Demised Premises in the original prevailing condition'.<sup>2</sup> Given the number of schools involved, this obligation is potentially substantial and while this clause is market standard in a commercial lease, it does not appear to reflect the reality of the relationship between the Landlord, SET and the schools.

If licence agreements were being executed contemporaneously and in sequence with the Lease, this obligation could be addressed in the licence. However, it should be borne in mind that these are 1 year licences and while ordinarily it might be expected that these will be renewed, the obligation to decorate will rest with SET should a renewal not be forthcoming.

**Yielding Up:  
(Clause 4.7)**

The Tenant is to yield up the Demised Premises together with any fixtures and fittings, furniture etc to the original prevailing condition. The yield up provisions may not be of huge concern given the circumstances in which this Lease is being put in place.

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<sup>2</sup> See further comments made below under 'Yielding Up'.

However, we would advise that SET carry out a survey of the Demised Premises and a schedule of conditions be attached to the Lease so that when the Lease Term expires there is a reference point for the Tenant and the Landlord as to the original condition of the Demised Premises.

**Common Facilities:  
(Clause 4.9)**

The Tenant is obligated to pay "on demand to the Landlord such proportion (to be fairly and properly determined by the Landlord) of any expenses (except to the extent these are recovered by the Landlord under Insurance) properly incurred by the Landlord" regarding maintenance of the "Adjoining Property" (currently undefined). Adjoining Property needs to be defined in Schedule 2 of the Lease as soon as practicable. The extent of this obligation is currently unascertainable. Ordinarily a service charge statement regarding annual expenses in maintaining the common facilities would be furnished and the Tenant's contribution would be quantified. SET would need this in order to assess its liability. Payment is to be made 'on demand' and to be assessed by the Landlord. Again, this clause does not reflect the reality of the relationship between the Landlord, SET and the schools and requires further attention.

**Compliance with Notices  
(Clause 4.11)**

On written notice given by the Landlord to the Tenant of any breach of a covenant, the Tenant has 60 days in which to remedy the breach. Should the Tenant be unable to remedy the breach or attempt to remedy the breach within 21 days of being served with a notice then the Landlord can step in and remedy the breach. The Tenant is affixed with all the costs and expenses incurred by the Landlord in remedying the breach.

While this clause is market standard in a commercial lease, this clause does not take into consideration the reality of the situation nor the relationship between the Landlord and SET. For example, given that SET's main concern is its ability to fulfil its obligation to make repairs, this clause should exclude/limit breaches occurring under clause 4.4 (the Repair Clause).

**Permitted User:  
(Lease Particulars Pg 3 & Schedule 4)**

Provision of primary and secondary education in accordance with the Ethos as defined in the Lease (Ethos is to be defined under Schedule 4 but no definition is given).

**Alienation:  
(Clause 4.15)**

The Tenant is not to assign, part with possession or sub-let or share possession of the Demised Premises. It is only permitted to issue a licence for a period of not more than a year and then only on terms as directed by the Landlord from time to time. The Tenant must also provide the Landlord with a list of all the users of the Demised Premises. User is not defined.

Again, SET is committing to significant obligations and yet it may only enter into licences on a yearly basis.

**Indemnity:  
(Clause 4.21)**

The Tenant is to keep the Landlord fully indemnified against all actions, proceedings, claims, demands, losses, costs, expenses, damages and liability arising directly or indirectly from breach by the Tenant of any provisions of the Lease, the works carried out on the Demised Premises during the Term and any neglect or act by the tenant on the Demised Premises, with its actual or implied authority.

We would propose limiting this clause to all reasonable and properly vouched losses stemming 'directly' rather than 'indirectly' from a breach. Again, given SET's concerns regarding the repairing obligation under clause 4.4, the indemnity provision should exclude breaches relating to repairing obligations.

**VAT:  
(Clause 4.23)**

Please clarify with your accountant if VAT is payable on this Lease.

**Insurance:  
(Clause 4.24)**

Please familiarise yourselves with the insurance provisions of the Lease and consult your insurance broker. In short, the Tenant is obligated to insure the premises with an insurer of repute located in Ireland in the name of the Landlord. It would be important to consult with an insurance provider to ensure adequate cover is in place.

Insurance should cover the Demised Premises against loss and damage by the Insured Risks (as defined in the Lease) and to include professional fees, the cost of demolition, site clearing and several expenses and all stamp duty and taxes etc relative to the reconstruction or reinstatement of the Demised Premises.

The insurance should also cover loss of rent from time to time payable following loss or damage to the Demised Premises by an insured risk for 3 years or such longer period as the Landlord may reasonably deem necessary. Please note that if as a result of destruction or damage the Demised Premises it unfit for use and the Landlord is unable to repair the Demised Premises within 3 years of the destruction, then both parties are entitled to "walk away" from the Lease but that the Tenant must wait a minimum of 3 years before it is entitled to do so.

Regarding the suspension of the rent it will be suspended as a whole or proportioned in accordance with the damage caused. The suspension will last until the Demised Premises is rendered fit for use and where the destruction takes place during a period in which the Rent has been paid in advance, the Landlord will refund the Tenant the portion of that Rent which is attributable to the period following the date of destruction or damage. Please note given that the term of this lease is 3 years, a year of which has passed, the 3 year time period for suspension of rent is not appropriate and should be limited to what remains in respect of the Term time.

While the Articles of Management of Voluntary Secondary Schools (the "**Articles of Management**") covers to an extent the insurance obligations, the licence agreements should cover the insurance obligations to ensure SET's position is protected.

**Uninsured Risks:  
(No definition)**

This should be defined in the Lease but is not. This is addressed to a limited extent under the Break Option.

**Break Option  
(Clause 6.9)**

Should the Demised Premises be damaged by an uninsured risk and the Tenant is unable to raise sufficient funds to cover the cost of the repairs then the Tenant may terminate the Lease upon service of three months' written notice ("**Notice Period**") to the Landlord subject to the following:

- the cost of the repairs to be carried out is not below 1 million euros. This means SET will not have recourse to the Break Option where the cost of repair is close to but below €1 million. It could also be read to mean that SET is to pay €1 million and the Landlord is to pay the excess.
- the Tenant will need to show the effort made to raise funds.
- all funds collected **or otherwise** will be used towards the cost of repairs to the Demised Premises. The phrase 'or otherwise' could extend to funds held in SET's bank account not for the purpose of the repairs or could extend to other assets held by SET to cover the cost of the repairs up to €1 million.
- Rent is still payable until the expiry of the Notice Period. If a school refuses to pay its licence fee to SET due to the damage caused by an uninsured risk then SET's ability to pay the Rent will be

compromised.

On receipt of the Tenant's notice to exercise the Break Option, the Landlord may elect to carry out the repair work and if it chooses to do so it will notify the Tenant of its decision within a month of receipt of the Tenant's notice. Where the Landlord chooses to repair, the Tenant is not permitted to exercise the Break Option and the Lease remains in full force and effect.

Clause 6.9.1 needs to provide a 'drop dead' timeframe before written notice is submitted.

It is not clear what the position is regarding the rent obligations should the Landlord elect to carry out the repair obligations.<sup>3</sup>

**Representations  
(Clause 6.4)  
Waiver (Clause 6.6)**

Please note that clause 6.4 (Representations) of the Lease provides that "[t]he Tenant acknowledges that this Lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the Landlord, except any such statement or representation that is expressly set out in this Lease."

This should be deleted in its entirety or at the very least limited to verbal assurances as SET would like to place reliance on comfort/side letters that are later entered into.

This is particularly so, given the insertion of clause 6.6 (Effect of Waiver) of the Lease which provides that "[e]ach of the Tenant's covenants shall remain in **full force** both at law and in equity notwithstanding that the Landlord may have appeared to have waived or released temporarily any such covenant, or **waived or released temporarily or permanently, revocably or irrevocably** a similar covenant affecting other property belonging to the Landlord."

This is a "no waiver" clause which has the effect of re-instating covenants that the Landlord may have appeared to have waived or released. In short, the Landlord reserves its legal position even if a concession is granted to the Tenant (e.g. in a letter of comfort or side letter). This clause should also be deleted in its entirety or amended.

**Licence for Alterations  
(Clause 4.14)**

Not to engage in any works without the prior written consent of the Landlord. '*Which consent the Landlord may withhold for any reason*'. This should be amended to 'consent is not to be unreasonably withheld'.

**Other points**

We have reviewed the Articles of Management and it is unclear when referring to 'Trustee obligations' who the 'Trustee' is meant to be. At times it appears to be the Patron (as in SET) and at other times it appears to be the Trustee (as in the Congregation/Landlord).

For example, Article 27 states that the Board of Management of a school is not to carry out any improvements without the prior written consent of the Trustee. The Board may borrow money but it is subject to Trustee approval – is this SET, the Congregation or the Landlord? Unfortunately the answer to this is unclear.

Article 28 states the Trustees are to indemnify the Board for any expenses properly incurred.

The Lease as drafted does not envisage a direct relationship between the Congregation/Landlord and the Boards of schools. However the Articles of Management make this unclear.

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<sup>3</sup> The clause numbering in the Lease requires amending. Clause 6.9.2 refers to a clause 6.2.1 and this should instead refer to 6.9.1

In some cases the Lease will require the prior written consent of the Landlord (e.g. alterations) but where the Trustee is to indemnify the Board for expenses properly incurred, the Lease is silent on this. SET should clarify these point with the Landlord before entering the Lease.