

By email

Mr Patrick Kitterick
Chairperson
Board of Directors
Spiritans Education Trust
Des Place House
Kimmage Manor
Kimmage
Dublin 12

Strictly Private & Confidential Legally Privileged Letter of Advice

Re: Draft Lease made between (1) Libermann Trust and Fr Seamus Galvin C.S.Sp (the "Landlord") and (2) Spiritans Education Trust CLG ("SET") as tenant (the "Lease")

Dear Pat

We refer to our meeting with you and Tom on Monday 1 October 2018, where a number of matters were discussed with you by myself, Jonathan and Noor in connection with the proposed Lease.

We understand that the Lease is the end result of lengthy negotiations between the Congregation, the Landlord acting in trust for the Congregation of the Holy Spirit C.S.SP (the "**Congregation**"), and the members of SET.

We understand that Solicitors for the Landlord and PWC have advised that a legal agreement in the form of a lease is required before licence fees can be demanded from the schools. As advised, the issue of the payment of the licence fees will need to be very carefully handled as failure to collect same in any one year, could have serious consequences.

The Lease has been presented to SET for signing and the Directors of SET would like advice regarding the liabilities taken on by SET in signing the Lease.

In advising on the Lease, we have reviewed the Articles of Management of Voluntary Secondary Schools (the "**Articles of Management**") to determine whether any provisions of the Articles of Management conflict with the Lease. As discussed at the meeting, the reference in the Articles of Management to "Trustees" is not clear and may not fully reflect the reality of the situation given that SET is not the owner of the properties occupied by the schools. It would appear that on some occasions the Articles of Management, in referring to the trustees, are referring to SET, for example, regarding the appointment of the Chairperson of the Board of Management, whereas on other occasions, the Articles of Management appear to be referring to the trustees of the property, for example, in clause 27 (a) which provides that no extension etc of the school building shall be undertaken by the Board unless approved in writing by the Trustees.

Lease report

As discussed at the meeting, we are enclosing a draft lease report that summarises the contents of the Lease for you together with reference to the Articles of Management, as appropriate. We have also highlighted the sections that might be of a concern to SET.

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David O'Beirne Joseph Stanley Jim Trueick Dermot McEvoy Peter Fahy Tony McGovern Norman Fitzgerald Joanne Hyde Sean Greene Alan Murphy Mark Varian Pamela O'Neill Margaret Gorman Peter Curran Steven Rodgers Seán Ryan Aisling Gannon Piaras Power Kevin Collins Gerard Ryan Alan Connell Gavin O'Flaherty Neil O'Mahony Ian Devlin Angelyn Rowan Lee Murphy Stephen Barry Cian MacGinley Darragh Blake Marie O'Riordan Marie McGinley Terry O'Malley
Consultants: Rory O'Donnell Patricia Heffernan Fiona Thornton Kevin O'Connor Niamh Caffrey

We understand that the Lease was given to SET on an essentially "take it or leave it basis", although I note that since our meeting there have been further discussions and a revised Lease has been provided. You explained at the meeting that the rationale for the 3 year term, to be granted by the Lease, is that the Congregation requires time to assess its position. We note that SET would like to have the term of the Lease extended, however, at this juncture, 3 years is all that is being offered, and one of these has already elapsed.

As indicated in the meeting, the standard procedure for a solicitor acting for a tenant is to raise pre-lease enquiries. The Landlord's solicitor is obliged to provide *prima facie* evidence of title, along with other important confirmations in respect of the property including, details of rights and easements, charges affecting the property, planning information, details of all rates and outgoings and confirmation of whether the Landlord is exercising its option to tax the Lease. At the same time, solicitors for both sides will negotiate the term of the draft lease in accordance with their respective clients' instructions. Given the nature of the relationship between SET, and the Landlord acting in trust for the Congregation, I understand that renegotiation is not an option. However, our recommendation would be to at least raise the necessary pre-lease enquiries to ensure the Landlord has the ability to validly grant the Lease and perhaps agree a side letter to address certain issues in the Lease. Negotiation of the terms can be considered once you've had a chance to review our lease report. Whilst many of the terms contained in the Lease may be considered market standard in a commercial context, the inclusion of such terms in the Lease present problems due to the manner in which fees are collected by SET, which will naturally impact SET's ability to meet payments required to be made under the Lease.

We would point out that the current draft of the Lease might not accurately reflect how fees are collected by SET (see comments made in the lease report). On that basis, SET could find itself automatically defaulting on rental payments demanded in accordance with the Lease. As discussed, given the many implications of this (including for the Directors of SET who are aware of the fee collection process), we would suggest that this is amended to reflect the reality of the underlying fee collections from schools.

Of further concern, as outlined in the Lease Report, once the Lease is executed, SET has taken various obligations onto itself, including in relation to repair etc. An issue which arises is where SET would source the funds to pay should such circumstances arise.

We further note that a letter has been given by the Congregation to SET to assist in obtaining a loan in the future, if required. This letter is quite vague and while SET could seek to rely on it, there is absolutely no guarantee that a court would enforce it in favour of SET. In addition, the draft Lease provided contains an "entire agreement clause" at clause 6.4 of the Lease which 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." Furthermore, clause 6.6 of the Lease contains a "no waiver" clause which provides that the Landlord reserves its legal position even if a concession is granted to the Tenant. As discussed in the Lease Report, we recommend that such clauses be either deleted in their entirety or modified so that they do not apply to letters of comfort or side letters.

You indicated that you would like us to draft licences and deeds of renunciations, for both the senior and junior schools, in line with the Lease. The granting of one year licences is provided for in the Lease. As discussed at the meeting, it will be necessary to ensure that the appropriate procedures are in place each year to ensure that the licences are renewed annually. Given the various obligations that SET would be taking on in the Lease, we would strongly advise that the licence agreements are put in place contemporaneously and in sequence with the Lease so that SET can ensure that its obligations under the Lease are reflected in the licence agreements.

As also discussed, the putting in place of licences can be used as an opportunity for SET to try to regularise the position in relation to the junior schools. I note that there are Articles of Management in place for these schools but that these need to be overhauled.

For example, I note that the Articles of Management refer to the dissolution of a Board of Management by trustees which refers to the consent of the Minister, which does not apply given that that the Schools in question are not recognised schools. In addition, it could also be used as an opportunity to review the Articles of Management for the second level schools in order to address the issue that SET does not own the properties on which the schools are situated as well as addressing the issue around the campus committees.

Given the composition of the Boards of Management of your schools, the request to sign such documentation is likely to be met with a lot of queries and potentially some resistance. Thus, we would advise that a letter/communication is prepared to explain the purpose of the documents in order to encourage co-operation from the Boards. We note that the letter/communication, the draft licence and deeds of renunciation are to be drafted once you have had an opportunity to consider the above.

You had asked us to provide a fee estimate for the preparation of the licence agreements and the preparation of deeds of renunciation. We estimate that our fees (excluding VAT and disbursements) as follows:

1. Preparation of a template licence agreement for Secondary Schools €8,000 ex Vat, as well as the normal licence
2. Preparation of a form of template licence agreement for issue to the Junior Schools €10,000 ex Vat.
3. Preparation of a form of deed of renunciation for Secondary Schools and Junior Schools €1,350 ex Vat.
4. Assistance regarding the preparation of a letter to boards of management explaining the new licence structure, to be charged on the applicable hourly basis. We would anticipate that you would prepare this letter and that we would review it for you.

Should you elect to pursue the standard procedure and raise pre-lease enquiries regarding the Lease, which we have advised, we are happy to provide a separate fee quote for this. Otherwise, ongoing work regarding the lease will be on the applicable hourly rate.

You might please note that fees quoted above do not include a review of the Articles of Management for either the junior or senior schools, we can of course provide this.

You might also please note that the fee estimate does not cover the work carried out to date. In this regard, you might note that to date Noor has spent just over 17 hours attending the meeting, time on telephone calls, reviewing the Lease/the amended Lease, reviewing the documentation provided at the meeting and preparing the Lease Report, Jonathan has spent 9.5 hours in preparing the company law advice, previously provided to you, attending the meeting and liaising with myself and Noor on this letter of advice and the Lease Report and I have spent 9 hours working on the matter, on the telephone calls, reviewing the documentation provided at the meeting and liaising with Noor and Jonathan on the letter of advice. The applicable hourly rate, for Noor and Jonathan is €295 per hour ex Vat. My hourly rate is €460 per hour ex Vat. However, in view of the fact that you are a very valued client and a charity, I am happy to significantly reduce my hourly rate to €350 per hour ex VAT. This gives an overall fee of €10,967 ex Vat for the work done to date.

Members of (1) The Libermann Trust and (2) SET

You might please confirm the identity of the current members and directors of:

- i. The Libermann Trust (Company Number 467160); and
- ii. SET.

Once you provide this information we will then review it to determine, for the purposes of the Companies Act 2014, whether a resolution of the members is required to approve the Lease. The draft Lease is prepared on the basis that no such resolution is required (clause 7) but this position needs to be verified.

I look forward to hearing from you once you have had an opportunity to consider the within and the Lease Report.

Yours sincerely

Sent by email and accordingly bears no signature

Margaret Gorman
Partner, Head of Education
Eversheds Sutherland