AGRICULTURAL LAW UPDATE

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CASE D – NOTICES TO PAY RENT

The relevant part of Case D in Part I of Schedule 3 to the Agricultural Holdings Act 1986 provides as follows:

> *At the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord, being … a notice requiring him within two months from the service of the notice to pay any rent due in respect of the agricultural holding to which the notice to quit relates … and it is stated in the notice to quit that it is given by reason of the said matter.*

For the notice to quit to be valid, an arbitrator must be satisfied, amongst other things, that there had been failure to comply with a notice *to pay any rent due*. If the notice to pay rent overstates the rent due then it is invalid and a notice to quit served in reliance upon it will be invalid too.

That is what happened in *Dickinson v Boucher* [1984] 1 EGLR 12 where £625 was the rent due but the notice to pay demanded payment of £650. No rent was paid by the tenant – not £650, nor £625, nor any sum. The Judge held that the notice to pay was invalid and that accordingly the notice to quit served in reliance upon it was also invalid. At the conclusion of his judgment Oliver LJ said this:

> *With some little regret, I consider that Pickard v Bishop was, as His Honour Judge Clapham found, binding upon him and it is binding upon us and is not readily distinguishable from the circumstances of the present case. In that case, Sir John Pennycuick observed at the termination of his judgment:*
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> > *This is a highly technical point and I venture to think the mistake is a piece of outstanding good luck for Mr Pickard. The fact remains that the notice to pay is made by section 24 of the Act of 1948 the foundation of forfeiture of an agricultural tenancy, and it is of general, and I think generally recognised, importance in connection with forfeiture that the requirements of the relevant statute or the lease, as the case may be, should be strictly complied with.*
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> *I think that that equally applies in the present case and, albeit with some little regret and a similar expression of my feelings that the tenant has been extremely fortunate in this case, I think that His Honour Judge Clapham was right in the conclusion to which he came and that this appeal must be dismissed.*

In *Sloan Stanley Estate Trustees v Barribal* [1994] 2 EGLR 8 the tenant deducted landlord's drainage rate from rent payment in response to a notice to pay but his failure to have paid the landlord's rate to the drainage board until after the notice to quit meant that he had not paid the rent due and the Case D notice to quit was good. The words of Case D cannot be construed as entitling a tenant to diminish the rent due by some contingent liability.

Section 48(1) in Part VI of the Landlord and Tenant Act 1987 provides that:

> *A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.*

Section 46(1) provides that:

> *This Part applies to premises which consist of or include a dwelling and are not held under a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.*

The consequences of failure to serve such a notice are set out in section 48(2):

> *Where a landlord of any such premises fails to comply with subsection (1), any rent … otherwise due from the tenant to the landlord shall (subject to subsection (3)) be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.*

The Court of Appeal decided in *Dallhold v Lindsey* [1994] 1 EGLR 93 that section 48 of the 1987 Act applies to tenancies protected by the 1986 Act.

Day v Coltrane [2003] 1 WLR 1379 CA was a possession claim based on arrears of rent under the Housing Act 1988 in which 5 days before the hearing the tenant sent the landlord a cheque for the full amount of the arrears. The Court of Appeal allowed the tenant's appeal against the possession order: an uncleared cheque accepted by the landlord prior to the hearing was to be treated as payment at the date of delivery provided the cheque cleared at first presentation. The District Judge had therefore been right to adjourn to see whether the cheque would be paid and the Judge had been wrong to allow the landlord's appeal from that decision.

The law is set out in the judgment of Tuckey LJ at 1382, paragraphs 8-10, as follows:

> 8. *It is common ground that in principle a landlord is entitled to have his rent in cash on the due date, unless the parties have expressly or impliedly agreed upon some other method of payment, such as by cheque. If they have agreed to pay by cheque per Lord Woolf at para. 35 in Homes v Smith (2000) Lloyds Law Rep. (Banking) 139*
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> > *"The general position in law … is clear. Where a cheque is offered in payment it amounts to a conditional payment of the amount of the cheque which, if accepted, operates as a conditional payment from the time when the cheque was delivered."*
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> *For this summary of the principle, Lord Woolf relied on earlier cases and in particular what Farwell L.J. said in Marreco v Richardson (1908) 2 KB 584, 593:*
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> > *"The giving of a cheque for a debt is payment conditional on the cheque being met, that is, subject to a condition subsequent, and if the cheque is met it is an actual payment ab initio and not a conditional one."*
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> *Marreco was concerned with the effect of the Limitation Act, but Lord Woolf added that Farwell L.J.'s approach was of general application. This is demonstrated by three cases decided under the Agricultural Holdings Act 1948 to which we were referred.*
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> 9. *Under the 1948 Act, effect must be given to a notice to quit served after failure to comply with a notice requiring the tenant to pay any rent due within two months of the notice. In Beevor v Mason (1978) 37 P & CR 452 the evidence showed that the landlord had previously accepted payment of the rent by cheque posted on the date it was due. The court held that a cheque posted in this way on the last day of the two month notice period was payment of the rent on that day if the cheque was honoured. The cheque was not received by the landlord until after the notice had expired. Nevertheless, as a result of the previous course of dealing, the court held that the tenant was entitled to pay by cheque and treated the post office as the landlord's agent for the purpose of deciding when the cheque was delivered. This court accepted that approach in Official Solicitor v Thomas (1986) 2 EGLR 1 although it did not apply to the facts of that case. It would also have applied in Luttenberger v North Thoresby Farms Ltd. (1993) 1 EGLR 3 but for the fact that the tenant's cheque lacked a necessary signature.*
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> 10. *There really cannot be any doubt about the principles of law to which I have referred in the last two paragraphs.*

The facts of *Beevor v Mason* were that the landlord had previously been prepared to accept payment of rent not only by cheque but also several months later than the due date. On those facts the Court of Appeal held that a notice to pay served on 22 October had been complied with when the cheque

and covering letter was put in the post on 20 December and postmarked 22 December. Shaw LJ said at p460:

> *When the cheque was put in the post, then, subject only to its being honoured, the rent was paid. The postmark showed that that was not later than December 22, that is, within the two months after demand.*

Muscat v Smith [2003] 3 EGLR 11 CA was a possession claim based on arrears of rent. The tenant, S, had long held a statutory tenancy of a house. When W was his landlord repair work was carried out pursuant to local authority notices that took far longer than necessary and caused major disruption and inconvenience to S. In December 1995 S began withholding rent. In October 1999 the freehold was acquired by M who commenced proceedings. CA allowed S's appeal against the possession order. S had the right to set off against rent arrears damages for breach of the landlord's repairing covenant accrued under the previous landlord W.

(1) At paras 30-31 Sedley LJ explained the reasoning:

> *…rent today is correctly regarded as consideration, not merely for granting possession but for undertaking obligations that go with the reversion. The just answer is that, provided the nexus between the rent and the breach is appropriately close, what the common law recognises as an abatement of rent where the damage has been quantified in expenditure is treated by equity as the potential subject matter of a set-off where the damage requires quantification.*
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> *… Mr Smith is entitled to set off against Mr Muscat's claim for assigned rent arrears any damages due to him for the assignor's breach of his repairing obligations because the debt, a chose in action, vests in Mr Muscat as assignee subject to all equities that were available to Mr Smith against the assignor. These, it is accepted, will include Mr Walker's liability to pay unliquidated damages for disrepair*

In *Edlington Properties Limited v JH Fenner & Co Limited* [2006] 1 WLR 1583 the CA held that T could not set off against rent falling due after a transfer of the reversion, a claim for damages he has against his original landlord for breach of covenant.

In *Alexander v Royal Hotel (Caithness) Limited* [2001] 1 EGLR 6 the landlord was in material breach of his obligation to repair so the tenant was entitled to withhold rent and a notice to pay served by the landlord was invalid because the rent was not *due*, that word meaning not only that the date for payment had passed but also that the rent was payable.

In *Mason v Boscawen* ([2008] EWHC 3100 (Ch) Lewison J) L informed T in 2001 that he proposed to charge VAT on the rent due under the 1988 AHA tenancy agreement. Notice to pay served by L on T demanding rent inclusive of VAT not complied with and Case D notice to quit served. Case stated by the arbitrator as to whether the VAT element was rent so that the notice to pay did not overstate what was due as rent. Lewison J held that it was for the following reasons he set out in para 52 of his judgment:

i) The modern meaning of "rent" is the total periodic monetary consideration for the tenant's right to possess the land let to him;

ii) The prima facie rule under the VATA is that the sum agreed for the supply is inclusive of VAT;

iii) It is the supplier who has the duty to account for VAT to HMRC;

iv) Whether the VAT element is specified in a VAT invoice depends on whether the person to whom the supply is made is a taxable person, but "rent" in the 1986 Act must bear the same meaning, whether the tenant is a taxable person or not;

v) There is no free-standing or independent statutory right to recover VAT. If the VAT is not part of the rent, the landlord has no means of recovering it;

vi) If an all-inclusive rent is agreed, and the rate of VAT subsequently changes, the amount of the change is added to or deducted from the consideration for the supply;

vii) The same applies where the landlord and the tenant agree a rent at a time when no VAT is chargeable but VAT subsequently become chargeable. What happens is that the consideration for the grant is increased;

viii) If the consideration for the supply is characterised as rent, then an increase in or deduction from the consideration must have the same character;

ix) Those cases that have touched on the question hold that VAT on rent is part of the rent itself.

Lewison J reached this conclusion despite the consequence that changes in the rate of VAT would amount to an increase or decrease in rent which would re-set the 3 year rent review clock under para 4(1)(b) of Schedule 2 to the 1986 Act:

> *Subject to the following provisions of this Schedule, a demand for arbitration shall not be effective for the purposes of section 12 of this Act if the next termination date following the date of the demand falls earlier than the end of three years from any of the following dates, that is to say— … the date as from which there took effect a previous increase or reduction of rent (whether made under that section or otherwise)*

So the decrease in VAT from 17.5% to 15% on 1 December 2008 and the promised increase back to 17.5% in 2010 would re-set the clock.

Lewison J said in concluding his judgment in para 54:

> *I do not reach this conclusion with any satisfaction. The consequences of this conclusion, if correct, make it urgent for legislation to be rapidly passed if recent political events are not to have the effect of causing an inadvertent and possibly prolonged agricultural rent freeze.*

The solution to this problem was provided by section 79 of the Finance Act 2009 which received Royal Assent on 21 July 2009. Section 79 provides as follows:

> *(1) In paragraph 4(2) of Schedule 2 to the Agricultural Holdings Act 1986 (frequency of arbitrations of rent: changes in rent to be disregarded), insert at the end—*
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> *"(d) an increase or reduction of rent arising from—*
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> *(i) the exercise of an option to tax under Schedule 10 to the Value Added Tax Act 1994,*
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> *(ii) the revocation of such an option, or*
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> *(iii) a change in the rate of value added tax applicable to grants of interests in or rights over land in respect of which such an option has effect."*
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> *(2) Paragraph 4(2)(d) of Schedule 2 to that Act (as inserted by subsection (1)) includes an increase or reduction of rent arising from an option, revocation or change in rate that takes effect before the day on which this Act is passed.*
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> *(3) The references in that provision and in subsection (2) to an option to tax, or to the exercise or revocation of such an option, under Schedule 10 to VATA 1994 include a reference to an election to waive exemption, or to the making or revocation of such an election, under that Schedule (as it had effect before 1 June 2008).*

Section 12(1), (4) and (5) of the 1986 Act provide that:

> *(1) Subject to the provisions of Schedule 2 to this Act, the landlord or tenant of an agricultural holding may by notice in writing served on the other demand that the rent to be payable in respect of the holding as from the next termination date shall be referred to arbitration under this Act.*

(4) References in this section (and in Schedule 2 to this Act) in relation to a demand for arbitration with respect to the rent of any holding, to the next termination date following the date of the demand are references to the next day following the date of the demand on which the tenancy of the holding could have been determined by notice to quit given at the date of the demand.

(5) Schedule 2 to this Act shall have effect for supplementing this section.

Paragraph 4(1) of Schedule 2 provides that:

Subject to the following provisions of this Schedule, a demand for arbitration shall not be effective for the purposes of section 12 of this Act if the next termination date following the date of the demand falls earlier than the end of three years from any of the following dates, that is to say—

(a) the commencement of the tenancy, or

(b) the date as from which there took effect a previous increase or reduction of rent (whether made under that section or otherwise), or

(c) *the date as from which there took effect a previous direction of an arbitrator under that section that the rent should continue unchanged.*

As amended paragraph 4(2) provides that:

The following shall be disregarded for the purposes of sub-paragraph (1)(b) above—

(a) an increase or reduction of rent under section 6(3) or 8(4) of this Act;

(b) an increase of rent under subsection (1) of section 13 of this Act or such an increase as is referred to in subsection (3) of that section, or any reduction of rent agreed between the landlord and the tenant of the holding in consequence of any change in the fixed equipment provided on the holding by the landlord;

(c) a reduction of rent under section 33 of this Act;

(d) an increase or reduction of rent arising from—

(i) the exercise of an option to tax under Schedule 10 to the Value Added Tax Act 1994,

(ii) the revocation of such an option, or

(iii) a change in the rate of value added tax applicable to grants of interests in or rights over land in respect of which such an option has effect.

Section 79(2) of the 2009 Act makes it clear that an outstanding demand for arbitration that had been caught by the *Mason v Boscawen* decision and the reduction in rent on 1 December 2008 will now be effective for the purposes of section 12.

CASE D – NOTICES TO REMEDY

Will amending legislation be required to salvage paragraph (b) of Case D?

Agricultural Holdings (Arbitration on Notices) Order 1987 Article 6(1):

Where a tenant requires any question to be determined by arbitration under article 3 or 4, the time specified for doing the work which is the subject of the arbitration shall be extended until the termination of the arbitration.

Article 3 allows a tenant served with a notice to do work to require arbitration upon one or more of three questions: (a) liability to do the work; (b) deletion of any item because it is unnecessary or unjustified; or (c) substitution of a different method or material in place of those specified in the notice, by serving notice on the landlord within one month of service of the notice to do work.

Article 4:

(1) Where the tenant on whom a notice to do work has been served wishes to have determined by arbitration under the 1986 Act in addition to a question specified in article 3(1) any other question arising under that notice which is not a question so specified, he shall do so by serving on the landlord within one month after the service of the notice to do work a notice in writing requiring the question to be so determined.

(2) Where the tenant on whom a notice to do work has been served does not wish any question specified in article 3(1) to be determined by arbitration under the 1986 Act but wishes to have determined by such arbitration any other question arising under that notice, he shall do so—

(a) by serving on the landlord within one month after the service of the notice to do work a notice in writing requiring the question to be so determined, or

(b) by serving a notice in accordance with article 9.

(3) Nothing in this article shall preclude a tenant who has required arbitration under this article and who has been found liable to comply with a notice to do work or with any part of it from subsequently requiring arbitration under article 9 on the ground that, in consequence of anything happening before the expiration of the time for doing the work as extended by the arbitrator in pursuance of article 6(2), it would have been unreasonable to require the tenant to do the work within that time.

Article 9 provides that:

Where it is stated in a notice to quit an agricultural holding or part thereof that the notice is given for one or more of the reasons specified in Case A, B, D or E and the tenant wishes to contest any question arising under the provisions of section 26(2) of, and Schedule 3 to, the 1986 Act relating to any of the reasons so stated, he shall within one month after the service of the notice serve on the landlord notice in writing requiring the question to be determined by arbitration under the 1986 Act.

To summarise paragraphs (1) and (2) of article 4: if a tenant wants arbitration on one or more of the three article 3 questions and other questions then he must require arbitration on all questions by notice served within one month of the notice to do work but if he only wants non-article 3 questions determined by arbitration then he has the option of serving such a notice within one month or waiting until he receives a notice to quit and then serving notice under article 9.

The argument is that service of notice under article 9 is to require any question to be determined by arbitration under article 3 or 4 so that the time for doing the work the subject of the arbitration is extended until the termination of the arbitration.

Article 4(1) of the 1978 Order provided that:

(1) *Where the tenant on whom a notice to do work has been served wishes to have determined by arbitration under the 1948 Act any question arising under that notice other than or in addition to any of those specified in Article 3(1), he shall do so by serving on the landlord within one month after the service of the notice to do work a notice in writing requiring the question to be so determined.*

The provision differs from article 4(1) of the 1987 Order. The now revoked enactment provided for arbitration on questions in addition to or instead of any article 3 question whereas the enactment in force provides for arbitration on questions in addition to any article 3 questions only. Any other questions outside article 3 are now dealt with separately in article 4(2) of the 1987 Order. As a result of article 4(1) of the 1978 Order covering both sets of questions, article 4(2) made provision which is different to that found in clause 4(2) of the 1987 Order, as follows:

> *A tenant who has not required arbitration under Article 3(1) or paragraph (1) shall not be precluded from requiring arbitration under Article 9 in respect of any questions other than those specified in Article 3(1).*

Articles 3, 4(3) and 6 are, in effect, identical in both Orders.

The argument is flawed and so Case B paragraph (b) will survive because:

(1) a demand for arbitration under article 9 is not a demand for arbitration under article 4.

(2) the 1987 Order should be construed purposively and so as not to produce an absurd result.

(3) delegated legislation cannot override an Act especially its enabling Act.

(4) the object of consolidating enactments which both the 1986 Act and the 1987 Order are, subject to minor amendments, is to improve the form of the law without altering its substance.

CATTLE COMPENSATION – THE PARTRIDGE FARMS CASE

David Partridge farms about 900 head of cattle, including about 300 pedigree Holstein dairy cows of significantly higher quality than the average producing about 80 litres of milk a day, well over twice the national average. The farm near Tiverton in Devon is in a bovine TB hotspot. Between 2002 and 2006 110 animals had been removed from the herd for slaughter. Compensation for those animals will probably have been paid under the Brucellosis and Tuberculosis (England and Wales) Compensation Order 1978 (SI1978/1483, as amended) according to market value based on individual valuation by a government approved valuer.

The Cattle Compensation (England) Order 2006 (SI2006/168) was proclaimed *to deal with overcompensation, particularly for bovine TB, which placed an unfair burden on taxpayers and might provide a disincentive for some cattle owners to implement robust bio-security controls; to reduce bureaucracy and increase transparency by simplification of the compensation regime through a table valuation system; and to facilitate the speedier removal of diseased animals*.

Article 3 of the Order provides in respect of TB:

> *3. — (1) Subject to article 6, where the Secretary of State causes a bovine animal to be slaughtered under the powers conferred by section 32 of the Animal Health Act 1981 in its application to—*
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> *(b) tuberculosis,*
>
> *compensation is payable in relation to those animals which are identified by means of eartags and a cattle passport in accordance with the requirements of the Cattle Identification Regulations 1998 and shall be determined in accordance with the following provisions of this article.*
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> *(2) The compensation payable by the Secretary of State in respect of buffalo or bison shall be at the level of its market value as ascertained under the Individual Ascertainment of Value (England) Order 2005.*

(3) Subject to paragraph (7), the compensation payable in respect of a bovine animal of the genus Bos shall be at the level of the average market price for the bovine category into which that animal falls at the relevant date.

(4) The Secretary of State shall determine the bovine category into which a bovine animal of the genus Bos falls at the relevant date and, for the purposes of that determination, the date of birth of that animal shall be as shown on its cattle passport and the age of the animal shall be calculated accordingly.

(5) For the purposes of this article, the relevant date means—

(b) in respect of affected animals or suspected animals slaughtered for tuberculosis—

(i) the date on which a positive or inconclusive skin test for that animal is read;

(ii) where the skin test is negative, or no skin test has been carried out, the date on which a clinical sample is taken from that animal for the purposes of any other relevant test; or

(iii) where no other relevant test has been carried out, but the animal has been slaughtered because it has been exposed to infection as a result of contact with, or close proximity to, an affected or suspected animal, the same date as the relevant date for that affected or suspected animal.

(6) The Secretary of State may appoint an agent to act on her behalf for the purposes of the determination referred to in paragraph (4).

(7) *In any case where, in accordance with paragraph 1(3) or paragraph 2(3) of Schedule 1, the Secretary of State considers that sales price data for any particular bovine category in any given month are inadequate, or such data are unavailable, she may opt to pay compensation at the level of the market value of the animal in question, as ascertained under the Individual Ascertainment of Value (England) Order 2005.*

Part I of Schedule 1 to the Order provides for calculation of the "average market price" as follows:

1. — (1) The average market price for each non-pedigree bovine category shall be calculated in respect of each month from data collected in Great Britain relating to the sale prices of animals of that category in the preceding month.

(2) Subject to sub-paragraph (3), it shall be the amount obtained by dividing the sum of those sale prices by the total number of animals of that category for which sale price data have been collected.

(3) Where, in respect of any non-pedigree bovine category in any given month, the Secretary of State considers that the sale price data collected pursuant to sub-paragraph (1) are inadequate, or where no such data are available, the average market price for the month shall be the most recently ascertained average market price for the same category, where one has been previously calculated.

2. — (1) The average market price for each pedigree bovine category shall be calculated in respect of each month from data collected in Great Britain relating to the sale price of animals of that category in the preceding six months.

(2) Subject to sub-paragraph (3) it shall be the amount obtained by dividing the sum of those sale prices by the total number of animals in that category for which sale price data have been collected.

(3) Where, in respect of any particular pedigree bovine category in any given month, there is no available sale price data for any of the preceding six months or the Secretary of State considers that the available data for every one of these months is inadequate, the average market price for the month shall be the most recently ascertained average market price for the same category, where one has been previously calculated.

3. The sale price data referred to in paragraphs 1 and 2 shall be collected from store markets, prime markets, rearing calf sales, breeding sales and dispersal sales.

Part II identifies 47 valuation categories, largely by reference to sex and age.

The Order came into force on 1 February 2006 and in that month 8 of the Partridge Holsteins were tested and identified as reactors and were slaughtered the following month. Two valuers reached broadly similar valuations of an average of £3,000 for the market price for healthy animals but under the Order the compensation payable for each animal was just over £1,000. Supported by the NFU, Partridge Farms Limited issued a claim form on 6 June 2006 seeking a judicial review of the Order on the grounds that it did not make proper provision for pedigree cattle of exceptionally high value. Permission was given on 5 April 2007; Stanley Burnton LJ heard the claim on 9 and 10 June 2008 and gave judgment on 14 July 2008 ([2008] EWHC 1645 (Admin)).

Stanley Burnton LJ upheld the claim on the grounds that discrimination had been established - *the Order does not provide for the payment of anything like a reasonable approximation of their true healthy market value* – and that the Secretary of State had not established objective justification.

On 1 April 2009 the Court of Appeal allowed the Secretary of State's appeal ([2009] EWCA Civ 284). Lawrence Collins LJ gave the only reasoned judgment: Ward and Keene LJJ simply agreed. It was common ground that the Order had to comply with the principle of equality: one of the fundamental principles of Community law but decisions of the European Court established that (para 66):

> *The fact that one particular group is affected to a greater extent than another by a legislative measure does not necessarily mean that the measure is disproportionate or discriminatory inasmuch as it seeks a comprehensive solution to a problem of general public importance.*

Lawrence Collins LJ differed with Stanley Burnton LJ on the question of discrimination (paras 75-78):

> *75. In my judgment there was no discrimination. The farmers to whom compensation was payable were farmers whose cattle had been slaughtered because the cattle had been identified as being affected with TB. I accept the Secretary of State's submission that the true value of any animal once it has tested positive for TB is the salvage value of its carcass. That is of course a very low value. It appears to be in the region of £235 on average. The true value of the claimant's cattle was not materially different from any other cattle which had been diagnosed with TB.*
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> *76. What the Order was doing was to provide for compensation to farmers at figures in excess of salvage value, with the compensation based on table values. The relevant classes to whom the relevant parts of the Order applied were owners of pedigree cattle which had been slaughtered.*
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> *77. Defra's Final Regulatory Impact Assessment in November 2005 rejected compensation based on the true value of cattle affected by disease. That option would more accurately reflect market values, and reduce levels of compensation, but it was rejected because the social costs would be largely unsupportable.*
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> 78. *Instead the recommendation was of the table valuation proposal. The farmers were treated equally. All owners of pedigree cattle received sums in excess of the salvage value of the cattle. It is true that as a result of the table valuation scheme some farmers, such as the claimant, suffered greater losses from TB than others. But that was not the result of discrimination against them.*

The Respondents relied upon the provisions of Article 3(2) and 3(7) as indications that the underlying principle of the Order was that compensation should be based on "healthy market value". In para 80 Lawrence Collins LJ rejected this:

> *Nor do I consider that this conclusion is affected by the fact that in two cases the Order provides for payment of "market value," which is defined in Article 2 to mean the price which might reasonably have been obtained for it at the time of valuation from a purchaser in the open market if the animal was not an affected animal or suspected of being infected. The two cases are (1) buffalo or bison (which, as I have said, are not found in England) under Article 3(2), and (2) where the Secretary of State considers that the relevant sales price data for table valuation are inadequate or unavailable: Article 3(7). There is nothing in these provisions to justify the proposition that the underlying principle of the Order is healthy market value. Even if it were the underlying principle, that would not mean that by failing to make special provision for the owners of cattle which had previously been (but were no longer) of high value the Order was discriminatory. The whole purpose of the Order was to depart so far as possible from individual valuation.*

Although not necessary to the outcome of the appeal, Lawrence Collins LJ also differed from the judge on the second question of objective justification because he had given insufficient weight to DEFRA's final regulatory impact assessment of November 2005 which considered the 3 alternatives:

1. The first was to continue with the present system but this would perpetuate over-valuations and delays and act as a disincentive to the introduction of strict bio-security controls.

2. The second was the course ultimately taken which was seen to ensure that over-valuations would be reduced so that compensation more accurately reflected market values; the taxpayer would benefit to the extent of about £9m a year; for exceptionally high value animals the onus would fall on farmers to insure privately (but DEFRA acknowledged that this might not always be possible); and the measure was expected to encourage farmers to pay greater attention to available bio-security measures.

3. The third was to compensate on the basis of the diseased status of animals which would more accurately reflect market values and significantly reduce compensation at a saving of about £23m to the taxpayer but the salvage value of an animal with bovine TB was about £235 and the measure was rejected because it would be very unpopular, it would damage farm businesses and might prove a false economy in the long term.

Lawrence Collins LJ concluded in paras 88 and 89:

> *88. The conclusion was recommendation of the table valuation proposal which "should tackle, robustly, the problem of over-compensation (for TB)" and enhance disease control efforts. The costs and benefits of the option were significant, but "even with the inevitable upwards adjustment of market prices (post table valuation)" significant reductions in the amount spent on compensation for the four diseases (the three diseases covered by the Order, and also BSE), and in particular TB, should be expected.*
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> *89. It seems to me that these were compelling points which would have provided objective justification for any discrimination. It may be that some of the points might have been debatable, such as the availability of insurance, but it is not the function of the court to act as an appellate tribunal from ministerial decisions. The measures taken were neither inappropriate nor (if the formula in Unitymark is adopted) "manifestly inappropriate." It was held by the judge, and it is common ground on this appeal, that like Community institutions, Member States have a broad margin of appreciation in terms of objective justification. I am satisfied that the Order would have been well within that margin and that it would have been objectively justified in all the circumstances of this case.*

Partridge Farms Limited petitioned the House of Lords for leave to appeal but it is understood that in early July 2009 leave was refused and the petition was dismissed, the Appeal Committee not being satisfied that there was an arguable point of law of general public importance.

CERTIFICATES OF BAD HUSBANDRY

Case C provides that:

> *Not more than six months before the giving of the notice to quit, the Tribunal granted a certificate under paragraph 9 of Part II of this Schedule that the tenant of the holding was not fulfilling his responsibilities to farm in accordance with the rules of good husbandry, and that fact is stated in the notice.*

Paragraph 9(1) of Part II of Schedule 3 enables the landlord to apply for a certificate:

> *For the purposes of Case C the landlord of an agricultural holding may apply to the Tribunal for a certificate that the tenant is not fulfilling his responsibilities to farm in accordance with the rules of good husbandry; and the Tribunal, if satisfied that the tenant is not fulfilling his said responsibilities, shall grant such a certificate.*

Paragraph 9(1) and (2) of Part II of Schedule 3 provide for certain practices to be disregarded by the Tribunal in determining whether to grant a certificate:

> *(2) In determining whether to grant a certificate under this paragraph the Tribunal shall disregard any practice adopted by the tenant in pursuance of any provision of the contract of tenancy, or of any other agreement with the landlord, which indicates (in whatever terms) that its object is the furtherance of one or more of the following purposes, namely—*
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> *(a) the conservation of flora or fauna or of geological or physiographical features of special interest;*
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> *(b) the protection of buildings or other objects of archaeological, architectural or historic interest;*
>
> *(c) the conservation or enhancement of the natural beauty or amenity of the countryside or the promotion of its enjoyment by the public.*

Section 96(3) of the 1986 Act provides that:

> *Sections 10 and 11 of the Agriculture Act 1947 (which specify the circumstances in which an owner of agricultural land is deemed for the purposes of that Act to fulfil his responsibilities to manage the land in accordance with the rules of good estate management and an occupier of such land is deemed for those purposes to fulfil his responsibilities to farm it in accordance with the rules of good husbandry) shall apply for the purposes of this Act.*

Section 11 of the 1947 Act provides that:

> *(1) For the purposes of this Act, the occupier of an agricultural unit shall be deemed to fulfil his responsibilities to farm it in accordance with the rules of good husbandry in so far as the extent to which and the manner in which the unit is being farmed (as respects both the kind of operations carried out and the way in which they are carried out) is such that, having regard to the character and situation of the unit, the standard of management thereof by the owner and other relevant circumstances, the occupier is maintaining a reasonable standard of efficient production, as respects both the kind of produce and the quality and quantity thereof, while keeping the unit in a condition to enable such a standard to be maintained in the future.*
>
> *(2) In determining whether the manner in which a unit is being farmed is such as aforesaid, regard shall be had, but without prejudice to the generality of the provisions of the last foregoing subsection, to the extent to which—*
>
> *a) permanent pasture is being properly mown or grazed and maintained in a good state of cultivation and fertility and in good condition;*

b) *the manner in which arable land is being cropped is such as to maintain that land clean and in a good state of cultivation and fertility and in good condition;*

c) *the unit is properly stocked where the system of farming practised requires the keeping of livestock, and an efficient standard of management of livestock is maintained where livestock are kept and of breeding where the breeding of livestock is carried out;*

d) *the necessary steps are being taken to secure and maintain crops and livestock free from disease and from infestation by insects and other pests;*

e) *the necessary steps are being taken for the protection and preservation of crops harvested or lifted, or in course of being harvested or lifted;*

f) *the necessary work of maintenance and repair is being carried out.*

Cambusmore Estate Trustees v Little (1991 SLT (Land Ct) 33) is a decision of the Scottish Land Court on the very similar provisions in the Agricultural Holdings (Scotland) Act 1949 which has been followed by Tribunals in England and Wales, e.g. in *Executors of Ewbank v Hodgson* (Yorkshire and Humberside Area ALT/2/1508-09 June 1998). The following principles emerge:

1. There is no discretion in the Tribunal to refuse a certificate such as there is to refuse consent to the operation of a notice to quit if a fair and reasonable landlord would not insist on possession. If the Tribunal is satisfied that the tenant is not fulfilling his responsibilities then it *shall* grant a certificate.

2. Section 11(1) of the 1986 Act contains the primary rule requiring maintenance of a reasonable standard of efficient production and *may be capable of being breached on its own where the land is not being farmed at all* (page 39I) so that *in a case where there is simply no production whatsoever rule 1 would prima facie appear to be breached* and *Where a tenant even through no fault of his own, is seriously incapacitated, whether by reason of physical or mental disability, from maintaining any reasonable standard of production in terms of rule 1 – and is not employing others to do so – hence causing the holding seriously to deteriorate, then this court are bound to grant a certificate* (page 39L-40A).

3. Section 11(2) of the 1986 Act contains the subsidiary rules breach of which alone will not suffice for the grant of a certificate so that *insignificant and temporary breaches of rule 2, not otherwise amounting to the failure to maintain a reasonable standard of efficient production under rule 1, will not justify the granting of a certificate of bad husbandry. Nor, in particular, will mere temporary breaches of rule 2 do so where the tenant is suffering from some physical or mental disability from which he may shortly be expected to recover: for, in these circumstances, the overall standard of efficient production under rule 1 is then likely to be maintained* (page 40D).

Applications usually give rise to intense activity on the part of the tenant designed to address matters complained of by the landlord. This gives rise to the question when the state of husbandry on the holding is to be assessed by the Tribunal. In *Hale v Stone* (SW/ALT/27/71 on 20 March 1998) the Tribunal for the South West Area directed itself to the following effect, at paragraph 4.11 of the decision:

> *The Tribunal find that, notwithstanding the very recent ploughing and clearances, the holding gave the appearance of serious, previous neglect. Mr Mackay contended that the Tribunal should assess the state of husbandry as at the hearing, but in the opinion of the Tribunal the state of husbandry is a state of affairs existing at the time, not merely a matter of instant physical condition at the time of the hearing.*

This direction was followed by the Tribunal for the South Eastern Area in *Goldsmid v Hicks* (SE1547) 25 February 2002), at para 12:

> *In our judgment it is clear that what the Tribunal is required to consider is what "is" being done not what has been done in the past nor what could be done in the future save to the extent*

that it throws light on what "is" being done at the time that the Tribunal comes to consider the evidence. We are of the view that the state of husbandry is a "state of affairs" existing at the time of the hearing and view, not merely a matter of "instant" physical condition at that time, as was said in Hale v Stone south west/ALT27/71.

Philipps v Davies (ALT Wales (ALT6209) 7.2.07 Chairman Basil Richards) concerned 37.87 acres of bare land in Pembrokeshire. Landlord complained that two fields extending to c10 acres had been abandoned and parts of the two fields had been used for dumping and burying scrap metal, asbestos and other non-agricultural waste brought in from off the holding. One field of c2.5 acres was infested with docks but, save for general lack of attention to hedge trimming, no complaint was made about c24 acres of grassland.

The Tribunal found that the c10 acres had been abandoned and that the c2.5 acre field had a long term dock problem and the tenant had not maintained a reasonable standard of efficient production in that field. The Tribunal found that the abandoned fields had in part been used for the dumping and burial activities complained of and that constituted *extremely bad husbandry* and that hedges had not been maintained for some years.

The Tenant appealed to the High Court on the basis that the Tribunal failed to look at the holding as a whole but rather limited their assessment to the parts of the holding about which complaint was made and that, in not expressly resolving any of the arguments put forward by the Tenant, they failed to give adequate reasons for the decision.

On 17 May 2007 ([2007] EWHC 1395 (Admin)) Sullivan J dismissed the Tenant's application for the Tribunal to state a case. In para 24 Sullivan J stated that:

When one considers whether or not the reasoning of the Tribunal is adequate, it is important to bear in mind that the Tribunal is not addressing legal issues in a vacuum. It is responding to the arguments, which have been advanced before it. In the present case, if one looks at the manner in which the parties were putting their submissions, it is plain that there was no issue between the parties that the Tribunal had to look at the unit as a whole. This was not a case where the advocate on behalf of the tenant was submitting that the unit as a whole should be considered and the advocate on behalf of the landlord was submitting that it was sufficient if one looked at one part of the holding and found that on that part of the holding there was poor husbandry.

In para 27 in connection with the complaint about the adequacy of the Tribunal's reasons, Sullivan J said this:

Considering the adequacy of the Tribunal's reasons generally, Mr Rodger submitted that the applicant was entitled to know why a certificate had been granted. I entirely agree, but I am satisfied that the applicant knows perfectly well why a certificate was granted. In summary, and using my terminology, it was because the Tribunal concluded that he had allowed about a third of the holding to go to pot and although reasonable standards of efficient production were being maintained on the remainder of the holding, the standards there were no more than that. Overall, there was no proper maintenance. In other words, this was not a case where a tenant might be able to make up for very obvious deficiencies in the husbandry of one part of the holding by a good standard of efficient production on the remainder of the holding.

The Tenant's application was made against and opposed by both the Tribunal and the Landlord and yet Sullivan J ordered the Tenant to pay only the costs of the Tribunal and not those of the Landlord. Landlord's application for permission to appeal was granted by the CA and the Tenant agreed to pay some costs.

In *Tarmac UK Limited v Hughes* (ALT Wales (ALT6229) 3.3.09 Chairman James Buxton) the holding extended to less than 2 acres consisting of farmhouse, a small range of buildings and just over an acre of pasture. The Applicant complained of the land being badly poached with stone from crumbling walls incorporated and redundant sheep fencing puddled into the ground; long term serious neglect of fencing; gates not properly hung; hedging not attended to; weeds including ragwort and docks;

redundant machinery littering the farm and metal sheets in hedges an ditches. Photographs spanning a 2 year period supported the allegations. The state and condition had not improved, if anything it had got worse, in that time and the Respondent had taken no steps to make any improvements in the 9 months since he had been aware of the application.

The Tribunal concluded that the Applicant's management of the tenancy had been woefully inadequate because not steps had been taken to enforce the Respondent's husbandry obligations for over 15 years. But this did not have any adverse impact on the Respondent's ability to discharge his obligations of good husbandry.

The Tribunal followed the approach of Sullivan J in *Philipps v Davies*:

> *In determining the Application the Tribunal adopts the principle stated by Sullivan J. (as he then was) in Davies v Philipps & Philipps [2007] EWHC 1395 (Admin) that the Tribunal when considering whether the Respondent has been farming in accordance with the rules of good husbandry must have regard to the whole of the unit. A certificate will not necessarily be justified merely because there has been poor husbandry on part only of the holding. Equally, it is not necessary for the Applicant to demonstrate the rules of good husbandry having been breached over every part of the holding. The test is a pragmatic one. To satisfy Section 11 (1) the breaches must "significantly affect the holding so that it can broadly be said that a reasonable standard of efficient production has not been maintained nor the unit kept in such a condition to maintain such a standard in the future." The cases to which Sullivan J referred in support of this proposition were Ross v Donaldson [1983] SLT26 at p.27 (a Decision of the Scottish Land Court) and Maggs v Worsley (SW Agricultural Land Tribunal 11 May 1982). The Tribunal also applies the principle set out in Goldsmid v Hick (SE Agricultural Land Tribunal dated 15 February 2002), to the effect that the state of husbandry in a particular case is a "state of affairs" existing at the time of the Hearing and view, and not merely a matter of instant physical condition at that time; and the decision in Cambusmore Estate Trustees v Little 1991 STLT (Land Ct) 33 to the effect that the Tenant's personal circumstances, unrelated to any lapses by the Landlord from good estate management, are not to be taken into account.*

Contrast notices to remedy under Case D with the possibility of arbitration at both the notice to remedy stage and the notice to quit stage and if the notice to quit is upheld an application by the tenant to the Tribunal to avoid having to quit by satisfying the Tribunal that, having regard to the circumstances of the failure to comply with the notice to remedy, a fair and reasonable landlord would not insist on possession.

Costs:

(1) ALT: Agriculture (Miscellaneous Provisions) Act 1954 section 5(1): only where a person *has acted frivolously, vexatiously or oppressively*;

(2) Arbitration: Arbitration Act 1996 section 61(2): unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs. Contrast paragraph 23 of Schedule 11 to the 1986 Act: costs shall be in the discretion of the arbitrator.

CHANGE OF USE FROM AGRICULTURE

R (on the application of Dean Fewings) v Secretary of State for Communities and Local Government & Rochford District Council [2008] EWHC 2401 (Admin) Ouseley J 7July 2008

Enforcement notice issued by RDC on 20 December 2005 alleging a breach of planning control in making a material change of use of 4.3 hectares of agricultural land from agriculture to a mixed use of agriculture and storage, breaking and repairing of vehicles, plant and machinery and storage of scrap materials not associated with the authorised agricultural use. F appealed under section 174(2)(d) of the Town and Country Planning Act 1990 on the grounds that at the date of issue of the notice no enforcement action could be taken because the breach of planning control alleged in the notice

occurred more than 10 years before its issue, so before 20 December 1995. The Secretary of State appointed an Inspector who conducted an inquiry and concluded that the breach of planning control had occurred after 20 December 1995 and upheld the enforcement notice. F sought permission to appeal under section 289 of the 1990 Act on a point of law: the Inspector's conclusions were irrational because they were incapable of being sustained on the evidence she accepted and were even contradicted by that evidence.

The Inspector had decided that from 1993, when F had first taken up occupation, until 2001 the non-agricultural activities were to be regarded as de minimis or ancillary to the lawful agricultural and/or residential uses so that there was no material change of use before 20 December 1995. One piece of evidence relied upon was from F's own planning consultant in support of an application for planning permission for an agricultural dwelling to the effect that he wrote to RDC in May 1999 refuting the Council's suggestion that there was a separate vehicle plant hire and repair business operating from the premises. The Inspector was satisfied that it was not until 2001 that the vehicle business constituted a primary use of the land in its own right.

F contended that because the Inspector had expressly accepted his evidence as to the use of the land from 1993 she could not rationally have concluded that there had been no more than de minimis or ancillary uses until 2001. Ouseley J rejected the contention on the grounds that F sought to take parts of the evidence out of context:

> *The onus was on the appellant, on the balance of probabilities, to establish that the acts in question had been carried on before December 1995, and to demonstrate that they were not ancillary or de minimis, i.e. immaterial. Whether a use is an ancillary use or a de minimis independent use is a question of planning judgment for the Inspector, with which this court would not readily interfere. Care has to be taken when examining pieces of evidence such as advocates understandably draw to the attention of the court. That evidence has to be seen in the context of other evidence, and it may well have taken colour and qualification from cross-examination. It is an overall view of the evidence which is required in a careful decision letter, which fairly and accurately summarises the evidence, as this decision letter has done. There is little, if anything, to be gained by consideration of odd pieces of evidence or extracts from statements. It is necessary to read the decision letter as a whole, so that a passage which may offer some hope to one party, when qualified by other parts that may offer hope to the other, is read and adjudged as part of a whole.*

In the following para Ouseley J addressed the argument that the Inspector had regarded as de minimis or ancillary that which was merely relatively small:

> *All parties accept that uses ancillary to agriculture can include the buying, sale and repair of agricultural machinery to be used on that agricultural holding, or for residential-related uses, including for the purposes of cannibalising a vehicle for its spares for use in agricultural equipment to be used on the farm, and the subsequent sale of the scrap can also fall within the scope of an ancillary use. If buying and selling agricultural plant and machinery is an independent use and more than de minimis, that will involve a material change in the use of land. The test for whether something is an ancillary use is not simply and solely whether it is relatively small in relation to the other uses. A use can be relatively small, but nonetheless an independent use giving rise to a material change. But scale is relevant to the question of whether a use is de minimis or a material change of use judged by reference to the planning unit, and is relevant to what is the primary use or an ancillary use which is part of that primary use. I do not see in what the Inspector has actually said any passage which shows an error of law, principle or approach in that respect. Suggestions to the contrary I found quite unpersuasive.*

Ouseley J rejected the argument that the fact that F might successfully have concealed the scale and nature of the non-agricultural business could not have altered the facts as they were on the ground:

> *If it is the position that Mr Fewings and/or the planning consultant concealed their activities from the planning authority and its officers both by word and by deed, it can, as Mr Phillpot said, scarcely be said to be irrational for what they said in 1999 and 2000 to be accepted as the truth, persisted in as such representations were over a number of years, and in pursuit of their*

own desires for planning permission for a dwelling, and in response to concerns that might have led to an enforcement notice being issued earlier. If their concealment led the Inspector to come to the view that nothing much was going on at all, they can scarcely complain that that view was irrational, and if it turns out that their success in concealing matters has not led to the full success which they had hoped, they are in no position whatsoever to complain. I would add that I would be reluctant to indulge such deceit anyway.

R (on the application of Ian Williams) v Secretary of State for Communities and Local Government & Maidstone Borough Council [2009] EWHC 475 (Admin) Hickinbottom J 23 February 2009

Enforcement notices issued by MBC alleging in Notice A breach of planning control in making a material change of use of agricultural land from agriculture to a mixed use of agriculture and storage and distribution of pallets and vehicle repairs and spraying and in Notice B operational development in breach of planning control in laying a hardstanding and a hard surface access track. Both specified 3 months as the time for compliance. W appealed on various grounds under section 174 of the 1990 Act. The Inspector dismissed the appeal on all grounds except for one minor variation and extended the time for compliance to 6 months for Notice A and 9 months for Notice B.

Beatson J gave permission to appeal on two grounds:

(1) That the Inspector erred in law in holding that a conflict with the development plan could not be overcome by the imposition of a condition limiting the area of the outside pallet storage since MDC accepted that pallets would not be visible (in what was the North Downs Special Landscape Area) if stored within 10 metres of the north wall of a former Dutch barn and no more than 4 metres high.

(2) That the Inspector erred in law in not accepting the uncontradicted evidence given on behalf of W that 18 months was the absolute minimum period required to relocate the pallet business to an alternative site.

Hickinbottom J rejected the first ground of appeal for 2 reasons. First in addressing the question of the imposition of a planning condition the Inspector was entitled to have regard to the general risks of non-compliance, including the possibility that the condition may not be complied with despite the best efforts and intentions of those with the benefit of the permission. The Inspector had expressly concluded that it would be unrealistic to expect W to comply with a condition limiting the height and extent of the pallets and so declined to grant permission subject to such a condition. That was consistent with the approach of Sullivan J in *R (on the application of Akhtar) v The First Secretary of State and The City of Westminster* [2005] EWHC 2719 in connection with the imposition of planning conditions and was unchallengeable. Second, W's activities were in conflict with the development plan in relation to their impact on the transport network; section 38 of the Planning and Compulsory Purchase Act 2004 required any determination to be made in accordance with the development plan unless material considerations indicate otherwise; and no such considerations had been advanced by W.

Hickinbottom J rejected the second ground of appeal: although his reasons could have been better and more fully explained, the Inspector had considered the evidence that 18 months to relocate was required and expressly concluded that it was excessive and, by inference, he took into account all the matters he was required to take into account in deciding on 6 months. It was for W to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from flaw in the decision making process, as per Lord Brown in *South Buckinghamshire District Council v Porter No 2* [2004] UKHL 33 at 36, and W had failed to satisfy the Court of that.

R (on the application of Mid Beds Model Aircraft Club) v Secretary of State for Communities and Local Government & Bedford Borough Council [2009] EWHC 681 (Admin) Frances Patterson QC 7 April 2009

Appeal by the Club against an Inspector's dismissal of its appeal against BBC's refusal of an application for a temporary change of use from agriculture to recreation for the use of the land for the

sport of model aircraft flying. There were two grounds: a reason/rationality challenge; and a ground alleging omission of a material consideration.

The legal framework for a reason/rationality challenge was taken from *R (Newsmith Stainless Limited) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 per Sullivan J at para 8:

> *Moreover the Inspector's conclusions will invariably be based not merely on the evidence heard at an inquiry or an informal hearing, or contained in representations but, as this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an application alleging an Inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment faces a particularly daunting task.*

Frances Patterson QC set out the "classic exposition" of the legal framework for a reasons challenge of Lord Brown in *South Buckinghamshire District Council v Porter No 2* at para 36:

> *The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.*

On the first ground the Club relied principally on acknowledged compliance with the Code of Practice on Noise from Model Aircraft but the Inspector had nevertheless dismissed the appeal because the Code did not form part of the development plan; it was 26 years old; it states itself that it does not provide hard and fast rules to be applied to every site; and tonal quality of aircraft noise was not a factor that the Code took into account. In paragraph 9 of his decision letter the Inspector gave his decision (referring to the point of launch (POL)):

> *I have some sympathy for the appellants because it is clear that they have sought to minimise the impact on residents by complying with the Code of Practice and by exerting control over the way aircraft are operated. Nevertheless, the evidence before me indicates that, notwithstanding the moving of the POL to a point of 50 metres further away from the houses on Duck End Lane, the use is still close enough to have an unacceptable impact on the living conditions of their occupants. Consequently it conflicts with policy LR11 of the 2002 Bedford Borough Local Plan.*

Frances Patterson QC held that the Inspector's reasons were brief but clear and dealt with the main controversial issue. Paragraph 9 of the letter was the operative paragraph which contained his decision and reflected his planning judgment. She rejected the Club's argument that the lack of detailed reasoning or a comparison between the different aspects of the evidence betrayed a flaw in the decision-making process: such an argument went beyond the duty to give reasons enunciated in *Porter*.

The second ground was that the Inspector had omitted a material consideration, namely, consideration of conditions. The submission was that the Club's reliance on the Code carried with it an assumption that there would be conditions imposed to secure compliance with the Code. It was accepted that the Club made no positive averment to conditions in the event that the development was held unacceptable even though it complied with the Code. But BBC had produced a draft set of

planning conditions without prejudice to their case that permission should be refused and the Club contended that the Inspector should have grappled with either the question whether the conditions proposed by BBC met the tests of Circular 11/95 on the use of conditions or the question whether the conditions addressed the problem of residential amenity.

Frances Patterson QC accepted that in promoting the application for development in accordance with the Code, the Club was proposing such conditions as would make the development Code compliant. But otherwise there was no reference whatsoever in the Club's representations to conditions. The Judge rejected the submissions on several grounds, including these four:

(1) First, there was no indication that the BBC conditions were acceptable to the Club. The Club had knowledge that BBC was concerned about the ability of conditions to secure a satisfactory noise climate and yet had failed to address the question of how the problems of monitoring enforcement were to be overcome or what restrictive conditions it would accept. That approach meant that the Inspector having found that compliance with the Code was insufficient to protect residential amenity and hence that a set of conditions that secured compliance was insufficient, he was left with no room for manoeuvre.

(2) Second, the implications of the submission that on every occasion when a decision maker finds a use or development unacceptable he should go on to consider without prejudice conditions submitted in the event that the use or development was in principle acceptable, even in cases where the developer expressed no views on the conditions, were potentially enormous and meant that the submission was misconceived.

(3) Third, the differences between the parties on the history of use meant that there was no obvious solution to aircraft noise and no obvious set of conditions that the Inspector could be satisfied would deal with the problem. Absent such a position, there was no further duty on the Inspector.

(4) Fourth, while the Inspector did not deal expressly with conditions in the decision letter, it was implicit in his decision that compliance with the Code would be insufficient to avoid an unacceptable impact on the living conditions of local residents, that conditions that secured compliance with the Code were unacceptable too.

CASE B: planning permission for a non-agricultural use

> *The notice to quit is given on the ground that the land is required for a use, other than for agriculture— … for which permission has been granted on an application made under the enactments relating to town and country planning … and that fact is stated in the notice.*

Success in obtaining an award that a Case B notice to quit is valid and effective to terminate the tenancy involves satisfaction of the following:

(1) The land is required

(2) for a non-agricultural use

(3) for which planning permission has been granted, and

(4) that fact is stated in the notice.

(5) There is a bona fide intention to implement the change of use, and

(6) there are reasonable prospects of the change of use being implemented.

In a recent case, an arbitrator was not satisfied that a Case B notice to quit land and buildings in Oxfordshire required for residential development was valid when the notice required possession of land that was more extensive than the extent of the land for which permission had been granted. The planning permission was granted subject to a condition which provided:

That the residential curtilage of the proposed dwelling and the extended dwelling shall not be as shown on the submitted plan but shall be in accordance with a plan, showing a reduced area, first submitted to and agreed in writing with the Local Planning Authority prior to the commencement of development on the site.

The reason given for the imposition of that condition was:

To safeguard the character and appearance of the countryside and to ensure the satisfactory appearance of the completed development and to comply with Policy G2 of the Oxfordshire Structure Plan 2016 and Policies C13 and C28 of the adopted Cherwell Local Plan.

The question whether the land *is* required involves two questions: what is the land? and what does *is* required mean.

Relevant to the first question is *Telford Development Corporation v Heath*, an unreported decision of His Honour Judge Stuart-White in Wellington County Court on 12 October 1987. That was a special case stated for the opinion of the Court on two points of law posed in the case stated by an arbitrator concerned with a Case B notice to quit. The relevant point of law was whether the notice was invalidated by the fact that not all of the land the subject of the notice to quit, but only some 38%, was the subject of the planning permission and thus required for a non-agricultural use. The landlord submitted that this was immaterial, so long as *a serious, significant and important part of the land* was required. The tenant submitted that Case B was not satisfied unless *the whole or (possibly) substantially the whole of the land to which the Notice to Quit relates* was required. HHJ Stuart-White decided that there was:

…a precise meaning available for the expression "the land" namely "the land to which the Notice to Quit relates", whether or not the Notice to Quit relates to the whole of the Agricultural Holding.

The decision is referred to in support of this passage in *Scammell and Densham's Law of Agricultural Holdings* (9th Ed 2007) in paragraph 32.15:

The better view is that all of the land which is the subject of the notice to quit must be required for the purpose specified in Case B. It is not sufficient if merely a substantial part of the land has the benefit of planning.

In connection with the second question, the position is stated in paragraph 32.14 of *Scammell and Densham* to be:

The language of Case B suggests that the land must be required at the date of the giving of the notice to quit. It has been suggested that the requirement must be for use on the expiry of the notice to quit or a relatively short time thereafter. This point has not been determined by the courts.

The suggestion referred to is made in *Muir Watt and Moss, Agricultural Holdings* (14th Ed 1998) at paragraph 12.50.1.

SUCCESSION

Three recent cases:

Townson v Executors of G Waddington Deceased (ALT/W/S/352 22.10.08 Chairman Michael Haywood)

Application by a 61 year old son of the deceased tenant failed for want of proof of satisfaction of the livelihood condition.

4. *In order to meet the livelihood condition an applicant must satisfy the Tribunal that not less than 51% of the value in money and money's worth of his livelihood was derived from his agricultural work on the holding or on the larger agricultural unit of which the holding formed part in each of the requisite five years out of the seven years before the day after the last tenant's death. Mrs*

Townson died on 11th October 2006. This means that the relevant seven year period in this case ends on 12th October 2006 and begins on 13th October 1999. The Applicant may choose the five years, or any five years, within that period which best suit his case.

5. *'Livelihood' for this purpose means an applicant's "means of living" – what he actually spent and consumed for the purpose of living in the style which he had chosen and in which he in fact did lead his life during the relevant years. The annual monetary value of this livelihood is the aggregate of the cash spent and the value in money's worth of any benefits in kind enjoyed and used by him to support or achieve that lifestyle in each of those years.*

6. *The burden of proving compliance with the livelihood condition lies on the applicant. The information and evidence on which the Tribunal must base its findings and decision must necessarily come primarily, if not entirely, from the applicant. It is therefore incumbent on him to give full disclosure – by way of the particulars set out in his Form 1 (and in his replies to any requests for further information of these) and by disclosure of all documents necessary to prove his case – of all matters relevant to the question of what constitutes his lifestyle and how that is supported.*

In paragraphs 51 and 52 the Tribunal referred to the Applicant's livelihood as follows:

51. The Applicant's livelihood throughout each of the relevant seven years comprised –

(1) The benefit of his accommodation at Black Moss Farmhouse – meaning a bedroom, fully furnished and equipped, for his own use, and the shared use of the bathroom, w.c., kitchen and living room, also furnished and equipped, in common with his mother and Mr Lamb.

(2) The benefit of his proportionate share of the outgoings required to maintain and enjoy that accommodation such as Council Tax, the cost of fuels for water and room heating, electric power and light.

(3) The cost of food and drink consumed by him at the house,

(4) The benefit of his proportionate share of "services" provided and enjoyed in the house such as cooking, cleaning, laundry (which seem to have been provided mainly by his mother and Mr Lamb).

(5) The cost of all his personal clothing, toiletries and other items bought and enjoyed for his personal use, including any motoring or other transport expenses incurred in connexion with these.

(6) The cost (or his proportionate share of the cost) of all leisure activities, entertainments and holidays enjoyed by him personally, including any motoring or other transport expenses incurred in connexion with these.

52. Although it is easy enough to list the above elements as the "skeleton" of the Applicant's livelihood, the lack of particulars makes it difficult to cloak them with flesh so as to appreciate the full picture of this livelihood.

In particular the Applicant's land agent came in for criticism in failing to adduce evidence about the going rate for a let of a third share in a furnished house of the size and location of Black Moss Farmhouse, possibly in the shape of information from HMRC or an accountant about how such a benefit in kind has been valued by HMRC for income tax purposes.

There were a number of sources of the Applicant's livelihood during the 7 year period:

(1) Income earned from part-time work as a yardsman at Gisburn Auction Mart.

(2) Working tax credit.

(3) Interest earned on the investment and building society accounts in respect of which passbooks had been produced.

(4) Interest earned on other accounts that the Applicant had but had not produced in evidence.

(5) The Applicant's agricultural work on the agricultural unit of which Black Moss Farm formed part, of which there was very little in the way of reliable evidence, the Applicant himself conceding (para 39(2)) that he had no record and no recollection of what he actually received from his mother and that his income tax returns could not be relied upon to prove the amounts received.

The Tribunal concluded that the first 4 sources of the Applicant's livelihood were not derived from his agricultural work. Two points are to be noted.

First, the Applicant claimed that money paid into his various accounts was money given to him by his mother in respect of his agricultural work on the farm but the Tribunal concluded in para 55 that:

> *… the Applicant has failed to identify any payment into these accounts which represents payments from his mother in respect of his agricultural work on the holding. Even if he had been able to do that, interest earned on unspent wages which had been available to him to spend but which he has not in fact spent to meet his living expenses will not count as a source of his livelihood, any more than would dividends earned from stocks and shares.*

Second, the Tribunal held that his working tax credit – described as a payment from the government to support people on low income – was not derived from the Applicant's agricultural work on the holding by reference to the principles set out in *Caswell v Welby* (1995) 71 P&CR 137, 141 – the proper test for determining a source of livelihood is not where the sums spent by the applicant come from, but why he had access to them. In para 59 the Tribunal concluded:

> *Had the Applicant in this case been paid a cash wage out of his mother's farming business running at a loss but financed in part by his mother injecting her own WTC, that would have been a quite different case from what it is and would fall within the principles set out in Casswell v Welby. But that is not this case. The facts of this case are more akin to the case where an applicant has worked on his father's farm but has had also to do contract work on other farms (or to work in an auction mart) in order to make a living. It is well established that earnings derived from the off farm work are not derived from his agricultural work on the holding. We therefore hold that the Applicant's WTC cannot be derived from his agricultural work on the holding.*

Because of the deficiencies in the evidence the advocates were unable to agree a schedule of income and benefits in kind and the schedule the Tribunal produced in para 63 was riddled with boxes containing question marks. In para 64 the Tribunal concluded:

> *Each member of the Tribunal can speculate about what might be a reasonable figure in total or for each element, but the very fact that each of us tried to do so and arrived at different figures and by different routes illustrates precisely why we are not entitled to speculate. Our findings must be made on, and only on, the basis of the evidence we have heard and seen. We may in reaching our conclusions draw reasonable inferences from that evidence. We may not make good shortcomings in that evidence by assuming matters which we think could or should have been given in evidence, however reasonable those assumptions may appear to us to be. For these reasons we find ourselves quite unable to arrive, on the very limited evidence actually before us or by drawing reasonable inferences from that evidence, at a true valuation in money's worth of that keep which we have felt able to find was provided to the Applicant and which we are prepared to accept was provided to him by his mother in consideration of his agricultural work on the holding during the relevant seven years.*

Collins v Spofforth & Ors (ALT/SW/S/1057 & 1058 27.11.08 Chairman George Newsom)

Applications for a direction and for consent to the operation of the Case G notice to quit by the Landlords. Direction granted and the Landlords' application for consent dismissed, but only narrowly.

The landlords' application was made under section 44(1) of the 1986 Act – before giving a direction *the Tribunal shall afford the landlord an opportunity of applying for their consent under this section to the operation of the notice* – and section 27(3)(b): *that the carrying out of the purpose is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part or which that land constitutes*; and that, as required by section 27(2) in all the circumstances a fair and reasonable landlord would insist on possession.

If they recovered possession the Landlords' proposals were to renovate and re-let the farmhouse on an AST and to divide the land between three adjoining farms on the estate with a view to increasing the profitability of those farms and increasing the rent. In order to meet the fair and reasonable landlord condition the Landlords offered the Applicant a farm business tenancy of land and buildings on the estate for a term of up to 10 years on a variety of different sets of terms.

The Tribunal rejected the Applicant's argument based on *National Coal Board v Naylor* [1972] 1 WLR 908 that section 27(3)(b) could not apply where the landlord's purpose was simply to make more money: the purpose for which the land was required had to be connected with the management of the land. With reference to the strategic review that the Landlords had carried out before the death of the tenant and the question of succession arose, the Tribunal concluded in para 154:

> *In our opinion on the facts before us the financial motive cannot be looked at in isolation. There was no sound estate management purpose in the physical sense in NCB v Naylor because the objective was purely financial; but in the present case we do not consider that the landlords are acting purely for financial purposes. Furthermore achieving their financial aims in the manner proposed would have a dramatic effect on the physical management of the farm. The Strategic Review was not confined to financial and tax planning, and the Future Proposals Report moved further in the direction of physical planning, In our opinion they have been engaged in planning estate management in a physical sense within the section.*

The Tribunal considered the circumstances of the neighbouring farms and the offers that would be made to the tenants and concluded in para 166:

> *In our view the proposal to split the farmland between the neighbouring farms can (if actually carried out and followed through) reasonably be described as sound estate management. Farm amalgamations are capable of supporting the existing businesses in the three neighbouring farms and therefore would be likely on average to put them in a better position to cope with difficult times and the evolution of the Common Agricultural Policy. In our view a key question is as to the likelihood of that actually happening, given that the benefit to Shepherds Farm and Ventonarren Farm is marginal and the lack of enthusiasm of the tenant of Cargoll farm.*

The Tribunal stipulated conditions to be applied to the giving of consent, under section 27(4) – the Tribunal *may impose such conditions as appear to them requisite for securing that the land to which the notice relates will be used for the purpose for which the landlord proposes to terminate the tenancy* – and gave its conclusion on the sound estate management case in paras 168 and 169:

> *We do however note that the proposal as outlined to us is to create separate farm business tenancies, rather than adding the additional lands to existing tenancies. As the objective is to realign the respective farms in the interests of sound estate management, it is our view that any condition for division of the Trustees' farmland between the adjacent farms should require that the tenancies of the additional lands should be framed in terms that their duration is comparable with the existing tenancies of those farms.*
>
> *On balance we would be satisfied as to section 27(3)(b) if the landlords accept a condition such as is described above.*

In para 170 the Tribunal addressed the question whether a fair and reasonable landlord would insist on possession:

Would a fair and reasonable landlord insist on possession? The word "insist" assumes that at this stage of the reasoning the landlords are otherwise entitled to operate the notice to quit. The words "reasonable and fair" indicate a wide range of considerations including the situations, expectations, needs, conduct and interests of both landlords and tenant. Among those considerations is the relative weakness of the landlords' success in establishing the sound estate management requirement.

The Tribunal took into account the fact that the Applicant would not be homeless, because he owned a house that could be restored to provide a home for himself and his family, and that he would not be out of a job because he had been offered work as a relief milker and temporary herdsman but the probability was that he had a future as an agricultural contractor or mechanic. In para 172 the Tribunal considered that:

... a fair and reasonable landlord would not insist on possession without offering to provide Stephen Collins assistance in his transition to a new working life, whether monetary or in the form of suitable premises. For example it would be reasonable to offer to put him in a position where he could start to develop a business based on agricultural machinery, probably an agricultural contracting business, if he should so wish.

One of the offers made by the Landlords involved letting of a big barn in what was Option 3. The Tribunal's reasons for ultimately dismissing the application are found in the last 3 paragraphs of the decision, 174-176:

The big barn at Polstain Farm is probably suitable for Mr Collins to start a business based on agricultural machinery. We do however have concerns about the proposed Option 3 rent which we consider to be too high in all the circumstances: something like two thirds of market rent would in our view be more appropriate to enable Mr Collins to make the transition. A significant weakness in the landlord's case was that the terms offered would include the "terms set out in the standard Farm Business Tenancy" used on the Trewithen Estate; but we were not supplied with a copy of these.

In addition Option 3 envisaged a separate schedule of condition, a separate schedule of what would be the tenant's repair obligations applicable to a break clause in 2014, and another schedule as to tenant's repair obligations generally. These documents have apparently not yet come into existence and in our view are not matters that can be made subject to a satisfactory condition attached to a consent to the operation of the notices to quit. We consider that we must make a decision on the materials put in evidence to us and that these outstanding matters leave uncertainties such that in our view a fair and reasonable landlord would not insist on possession.

In the circumstances we will dismiss the landlord's applications, but the parties will be aware that our decision is a decision on the present applications as presented to us, not on any future notice quit application that might be made.

Roberts v Holmes (ALT Wales ALT/6230 6.5.09 Chairman James Buxton)

Application by the son of the deceased tenant, his mother, who in addition to his work on the holding was employed generally on a full-time basis as a welder by a manufacturer of steel framed buildings. Although he applied under both section 36 and section 41 he pursued only the latter application and sought to persuade the Tribunal that although he did not fully satisfy the livelihood condition he satisfied it to a material extent.

The main issue before the Tribunal was how the value of the Applicant's accommodation in the farmhouse on the holding should be assessed. In para 14 the Tribunal accepted that the starting point should be the rental value of the farmhouse if let on an AST but subject to a 5% reduction to reflect the fact that the farmhouse was not in fact let on such a tenancy but was subject to the more extensive repairing obligations imposed by SI 1973/1473 as amended (i.e. the model clauses). The Tribunal also concluded that the determination of the value of the livelihood derived by the Applicant from living in the farmhouse should reflect the fact that during the relevant period the Applicant lived in the house with his mother, the tenant, and his sister. Accordingly the Tribunal rejected the Applicant's

submission that no discount should be made from the AST letting figures beyond the 5% and concluded that the benefit should be assessed by reference to one-third of the AST rental value.

Given the Applicant's substantial earnings from his employment off the holding, this conclusion meant that in none of the relevant years did the Applicant's total livelihood derived from the agricultural unit exceed approximately 22% of his total income. Guiding itself by reference to the High Court decision in *Thomson v Church Commissioners for England* (Case No. CO/5766/2006), the Tribunal concluded that although percentages of fulfilment were a useful guide, no mathematical cut off point should be imposed as to what was material. But the Tribunal considered that the Applicant's failure to satisfy the livelihood test was so substantial, because such a large part of his source of livelihood was derived from his job as a welder, that it was bound to conclude that the Applicant had not established his case under section 41(1) of the 1986 Act.

William Batstone
9 September 2009
Guildhall Chambers