AGRICULTURAL LAW UPDATE 2017

William Batstone, Guildhall Chambers – March 2017

1. Reforms of the agricultural holdings legislation

Third party determination: from 26.5.15, s13 and Sch4 of the Deregulation Act 2015 amended the 1986 Act to introduce a consensual TPD process as an alternative to arbitration under the 1986 Act, e.g. upon written terms under s6 or of rent under s12. S84A of the 1986 Act provides that TPD means that the parties "must jointly appoint a third party to determine the matter"; that no TPD is possible after an arbitrator has been appointed under s84; and that no arbitration is possible after a reference to TPD if the TP survives.

Model clauses reform: from 1.10.15 the Agriculture (Model Clauses for Fixed Equipment) (England) Regulations 2015 revoked the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973, SI 1973/1473 as amended by SI 1988/281, and provides a more up to date and more comprehensible set of model clauses. The 2015 Model Clauses apply to every 1986 Act tenancy, whether made before or after the commencement of the 1986 Act, "except insofar as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other". The 1973 Model Clauses will still apply where the tenancy agreement applies them and makes no provision for any replacement. In that case the 2015 Model Clauses will add terms but will not replace any. NB with residential sub-lettings the impact of s11 Landlord and Tenant Act 1985 which would impose on the tenant/lessor for a term of less than 7 years, including a yearly tenancy, liability for keeping in repair the structure and exterior whereas the 2015 Model Clauses render the head landlord liable. Provision should be made in the sub-tenancy and head tenancy agreements.

Compensation reform (1): from 1.10.15 the Agriculture (Calculation of Value for Compensation) (Revocations) (England) Regulations 2015 revoked the 1978 Regulations with its very out of date values and put nothing in their place. S66(2) of the 1986 Act provides that: "The amount of any compensation under this Act for a relevant improvement specified in Part I of Schedule 8 to this Act [e.g. liming and application of fertilisers], or for any matter falling within Part II of that Schedule [i.e. tenant-right matters] shall be the value of the improvement or matter to an incoming tenant calculated in accordance with such method, if any, as may be prescribed". Parties are now free to agree or have determined that value without further prescription.

Compensation reform (2): from 6.4.16 the Agricultural Holdings Act 1986 (Variation of Schedule 8) (England) Order 2015 limits the scope of para 5 of Sch 8, "purchased manure and fertiliser" to Wales and introduces paras 4A "manure, fertiliser, soil improvers and digestate" & 5A: home grown manure of livestock and horses to widen the scope of a claim by a tenant in England for compensation for manure and fertiliser left on the holding on termination of the tenancy.

2. Service of notices

Pye v Stodday Land Ltd & Ripway Properties Ltd [2016] 4WLR168 Norris J. P had a 1986 Act tenancy of c18a of registered land of which S was his landlord. On 19.6.13 S sold a plot of 0.114a to R and R was registered on 16.7.13 until which date the transfer did "not operate at law" by s27(1) of the Land Registration Act 2002. On 1.7.13 two notices were served on P: a Case B notice to quit the plot by R; and a Case D notice to quit the c17a by S for failure to pay rent. At first instance and on appeal by S&R both notices were held to be invalid: R's because it was not in 'the registration gap' legally entitled to the reversion; and S's because its notice was therefore notice to quit part of the holding and so was invalid at common law. "The giving of a notice to quit is one of the instances in which, under the general law, the ownership of the equitable title does not suffice for the service of an effective notice, and where subsequent acquisition of the legal estate cannot validate the notice retrospectively" said Norris J at [37]. The wide definition of 'landlord' in s96(1) of the 1986 Act: "'landlord' means any person for the time being entitled to receive the rents and profits of any land" did not save R's notice. The notice also had to be valid at common law and that meant that it had to be given by the person in whom the reversionary estate is vested. The landlords' problems in that case can be easily avoided in others:

"The time will come when every completion pack for the sale of a reversion includes a document in appropriate form constituting the transferee the agent of the transferor in respect of all matters concerning the estate transferred pending registration, a copy of which will be provided by the landlord to the tenant along with notice of the assignment"

said Norris J at [41].

3. Terms of succession tenancies

Jordan v Jordan & Hughes ALT/M/S/2013/016. On 13.6.16 the Tribunal gave a direction entitling the applicant son to a new tenancy the terms of which, s47(1) of the 1986 Act provides, are "Subject to … section 48 below … the same as the terms on which the holding was let … under the contract of tenancy under which it was let at the date of death." S48(4)(a) allows arbitration on the question: "what variations in the terms of the tenancy … are justifiable having regard to the circumstances of the holding and the length of time since the holding was first let on those terms". The question arises: does s48(4)(a) allow a landlord to seek to recover surplus

dwellings and farm buildings as a variation of the terms? Is a change in the extent of the demise a variation of a term of the tenancy? An affirmative answer is supported by:

(i) Neuberger J in *Secretary of State for Defence v Spencer* [2003] 1 WLR 75 that an agreement between L and T, while notice under s12 of the 1986 Act was running, to 'add' 1.3a to the holding and increase the rent by £83pa was an increase of rent that was to be disregarded for the purposes of para 4(1)(b) of Sch2 by para 6 because it was an agreement making provision "for adjustment of the boundaries of the holding or for any other variation of the terms of the tenancy" and Neuberger J rejected the argument that the 'addition' of the 1.3a was an adjustment of the boundaries.

(ii) S6(1) of the 1986 Act which allows arbitration where "the terms of the tenancy do not make provision for one or more of the matters specified in Schedule 1 to this Act" and Sch1 para 2: "Particulars of the holding with sufficient description, by reference to a map or plan, of the fields and other parcels of land comprised in the holding to identify its extent."

4. Notice to pay rent

Secretary of State for Defence v Spencer ('No 3') On 28.1.05 L served on T notice to quit on grounds of failure to comply with notice to pay rent of £56,835 of 24.11.04. On 21.7.05 the Arbitrator was appointed and on 4.1.16 he stated a special case for the opinion of the county court under para 26 of Sch11 to the 1986 Act.

Case D para (a): "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" (emphasis added).

For the special case stated it was an assumed fact that at the date of the notice to pay T had a valid claim that L was in breach of its repairing obligations such that if L had issued a claim for £56,835 T would have been able to set off his claim in diminution of the judgment sum by exercising the right of equitable set-off.

The judge held that T's right of equitable set-off had not been excluded by the tenancy agreement which provided that rent had to be paid "free from all deduction whatsoever except for the Tithe Redemption Annuity and the Owner's Drainage Rates". Clear words were required to exclude the right and those words were insufficient on the authority of *Connaught Restaurants Ltd. v Indoor Leisure Ltd* [1994] 1WLR501.

The judge followed the decision of the Court of Session: Inner House in *Alexander v Royal Hotel (Caithness) Ltd* [2001] 1 EGLR 6 under the similar provisions in the Agricultural Holdings (Scotland) Act 1991 in which Lord Gill said at 12A: "In my opinion, rent is not due if the tenant is entitled to retain it. A sum of money can be said to be due only if the debtor is under an enforceable obligation to pay it. The logic behind the service of a statutory demand to pay a sum of rent is that, at the date of the demand, the landlord is entitled to recover that sum by legal proceedings if it is not paid".

The judge concluded that T could rely on equitable set-off in order to invalidate the notice to pay rent because it overstates the rent due if three conditions are satisfied:

1) If the set-off has been asserted before the notice to pay rent in reduction or extinction of the rent claimed to be due;

2) If the claim has been quantified; and

3) If both the assertion and the quantification of the claim were bona fide and on reasonable grounds.

With the judge's permission both parties appealed: L against the principle of equitable set-off applying to Case D and T against the imposition of the three conditions. Newey J is expected to hear the appeals in June 2017.

5. Boundaries

Jones v Murrell [2016] EWHC 3036(QB) Lang J, concerned a boundary dispute in which the parties instructed a surveyor to determine "the correct line of the boundary" as "a third party independent Surveyor acting as an expert" by whose decision the parties "agreed to be bound and will not dispute the same thereafter." The surveyor's decision against the appellant could not be challenged on grounds that he had to interpret legal documents and receive legal submissions or even if he had made a mistake. His decision could only be challenged if had departed from the instructions given to him in a material respect or he had acted fraudulently or in bad faith (*Jones v Sherwood Computer Services plc* [1992] 1WLR277).

On 9.12.16 The Property Boundaries (Resolution of Disputes) Bill had its second reading in the House of Lords. Existing proceedings relating to trespass to land or obstruction of a right of way in which "the precise location of the boundary or [private] right of way" is in issue would be stayed automatically to be determined in accordance with the statutory scheme. Absent proceedings, an owner wishing to establish the position of a boundary or right of way would have to serve a plan on the adjoining owner and if he objected or failed to respond then the scheme would apply. Issuing proceedings without serving such a plan would mean no recovery of costs

“incurred in the issue and service of such proceedings”. One or more surveyors would settle the location of the boundary or location and extent of the right of way by an award which would be conclusive save for an appeal to the High Court in 28 days.

6. Acquisition of rights by long user

In *Winterburn v Bennett* [2016] P&CR 11 CA, W claimed a right to park cars and other vehicles of theirs and visitors to their fish and chip shop on a car park across the road from the shop, by prescription by “lost modern grant” which required W to show 20 years uninterrupted user “as of right” i.e. without force, secrecy or permission. It was common ground that for the relevant period visitors to the fish and chip shop had parked in the car park openly and without permission. The dispute was whether clearly visible signs in the car park that it was private and for use of the patrons of the adjoining club only were sufficient to render the use contentious and thus with force. The Court of Appeal held that it was and the owners were not obliged to write “stiff letters” still less were they obliged to start proceedings.

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9 March 2017