

Neutral Citation Number: [2003] EWCA Civ 1957
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE TAUNTON COUNTY COURT
(His Honour Judge Roach)

Royal Courts of Justice
Strand
London, WC2

Thursday, 18th December 2003

B E F O R E:

LORD JUSTICE PETER GIBSON
LORD JUSTICE LATHAM
SIR MARTIN NOURSE

(1) JOHN BRIAN FIELD
(2) ELIZABETH ALICE FIELD

Claimants/Respondents

-v-

(1) RAYMOND WILLIAM BRYANT
(2) VERA BRYANT

Defendants/Appellants

(Computer-Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

MR SEAN BLACKMORE (instructed by Stephens & Scown, Exeter, Devon EX1 1RS) appeared on behalf of the
Appellants

MR RICHARD MAWHINNEY (instructed by Clarke Willmot Clarke, Taunton TA1 2PG) appeared on behalf of the
Respondents

J U D G M E N T

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1. LORD JUSTICE PETER GIBSON: I will ask Sir Martin Nourse to give the first judgment.
2. SIR MARTIN NOURSE: Shortly stated, the question on this appeal is whether provisions in a farm business tenancy agreement requiring the tenants to use the holding "for agricultural purposes only" and "for permanent pasture for livestock only" permitted them to carry on a milking and dairying business on the holding.
3. Before the events with which this action is concerned, the defendants, Raymond William Bryant and his wife, Vera Bryant, had, since about 1977, owned and farmed Meadlands Farm, Greenham, near Wellington in Somerset, which consisted of a farmhouse and various buildings, including a dairy and a sheep house, and approximately 71 acres of land. The business of the farm consisted of the running of a dairy herd and a flock of sheep, the defendants being contracted to Milk Marque and the land having the benefit of a milk quota. The herd consisted of 25 to 30 cows and the flock of about 120 sheep. The sheep house was the largest of the outbuildings, having an area of about 4,000 square feet. In the particulars of sale hereafter referred to it was described as a "five-bay timber and profile steel roofed sheep house with central feed passage". Its floor consisted of hardcore and stone dust on top.
4. By an agreement in writing dated 8th January 1997 and made between the defendants and the claimants, John Brian Field, and his wife, Elizabeth Alice Field, the defendants agreed to sell Meadlands Farm to the claimants for the sum of £310,000. The sale was subject to the condition precedent that planning permission should be obtained pursuant to the claimants' application, free from onerous conditions, by 30th June 1997. If permission was not so obtained either party would have the right to rescind the agreement. The agreement further provided that on completion the claimants would grant the defendants a farm business tenancy ("FBT") in accordance with the provisions of the draft annexed thereto.
5. A number of facts were agreed between the parties before the trial. They included, first, that the claimants were purchasing the property with a view to redeveloping the farmhouse and farm buildings for residential purposes, and that accordingly they had no immediate use for the land; secondly, that the claimants were not prepared to enter into an unconditional sale and purchase agreement for the purchase of the property until they had obtained the necessary planning consent for the redevelopment.
6. Planning permission having been duly obtained, the sale was completed and the FBT entered into on 16th June 1997. I refer to the material terms of the FBT, in which the claimants were called "the Landlord" and the defendants "the Tenant". The expression "the Holding" was defined to mean, first, the farm land and, second, the farmhouse and the farm buildings. By clause 2.1 the claimants let the holding to the defendants as to the farm land from 16th June 1997 to 15th June 1999 and as to the farmhouse and farm buildings from 16th June to 31st July 1997. The rent was £1 per year. Clause 4 was headed "Use and management of the holding". The provisions on which the outcome of the appeal principally depends are these:

"4.1(a) The Tenant will use the Holding for agricultural purposes only unless the Landlord gives written consent in advance to an alternative use.

(b) The Tenant will use the Holding for permanent pasture for livestock only throughout the Term but, for the avoidance of doubt, this shall not prevent the making of hay and silage."

By clause 4.2 it was agreed (a) that the tenant would not break up or convert into tillage any part of the holding or burn any heather or moorland on the holding, and (b) that the tenant would not remove any turf, topsoil, stone or gravel from the holding.

7. Reference must be made to two further provisions of the FBT. Clause 5.6 provided:

"The Landlord agrees at the request of the Tenant to relocate by the 31st July 1997 the sheep building shown marked 'A' on the attached plan 2 to, or to provide another building which affords similar facilities to such building on, such part of the Holding as the parties may agree between them or, failing agreement by the 30th June 1997 as fixed by an independent expert under the provisions of clause 12 (but in a location which is reasonably accessible from the rest of the Holding), such building to be connected to a water supply and to have a hard standing access."

Clause 13 provided that the agreement contained the whole agreement between the landlord and the tenant concerning the holding and that no custom of the country was to give or affect any right of either party.

8. The date by which the defendants were to vacate the farmhouse and the farm buildings (31st July 1997) was varied by agreement on three occasions, the last such agreement having extended the date in respect of the farmhouse to 10th November 1997 and in respect of the farm buildings to 29th November 1997. Meanwhile, in or about October 1997 a claim by the claimants in the Taunton County Court for forfeiture of the FBT on the ground that one of the agreed dates for vacation had not been met was dismissed. The defendants having failed to vacate the farm buildings in accordance with the third extension agreement, the claimants commenced the present action in the Taunton County Court on 31st December 1997. The sheep house was not relocated until October 1997 and the defendants maintain that it never complied with clause 5.6 of the FBT.
9. Amended particulars of claim, claiming possession of the farmhouse and farm buildings, arrears of rent, damages (principally for loss caused by the delay in commencing the claimants' redevelopment), mesne profits and interest, were served on 10th February 1998. By a consent order made on 2nd March 1998 the defendants were ordered to give the claimants possession of the farm buildings, which they did within 14 days. They also vacated the farm land by 16th June 1999. On 14th May 2002, after a change in the solicitors representing the defendants and an unsuccessful attempt to settle the dispute, the defendants served an amended defence and counterclaim, the essence of which was a claim that the claimants had breached clause 5.6 of the FBT. The defendants claimed damages of £53,562.81, principally in regard to cattle keep (£16,884) and loss of milk production for the period March 1998 to January 2001 (£27,128.46).
10. By an order of the district judge made on 20th February 2003 a trial was directed of the following preliminary issues:
 - "(a) whether the term livestock in clause 4(1)(b) of the Farm Business tenancy included a dairy herd;
 - (b) as in paragraph 14.2 of the Defendant's solicitors' witness statement dated 7th February a copy of which is annexed."

Paragraph 14.2 of that statement was in the following terms:

"Mr and Mrs Bryant would be able to put in place such temporary facilities at the relocated farm outbuilding as to enable them to continue their farm business, including the milking of their dairy herd and the carrying out of the terms of their contract with Milk Marque."

11. The trial of the preliminary issues took place before His Honour Judge Roach on 30th April and 1st May 2003. Oral evidence was given only by the surveyors on each side. On 1st May the judge gave judgment in favour of the claimants. By his order made on the same date, based on an agreed minute of counsel, the judge did not answer the specific questions posed but made the following declarations:
 - "(a) The Farm Business Tenancy does not provide for the running of a milking and dairying enterprise on the holding.
 - (b) The term at paragraph 14.2 of the Defendants' solicitors witness statement dated 7 February 2003 is not to be implied into the Farm Business Tenancy."

It was agreed between counsel that on the basis of those declarations the counterclaim should be dismissed, and it was dismissed accordingly. The defendants were ordered to pay the claimants' costs of the counterclaim, to include the cost of the preliminary issue. The defendants' application for permission to appeal was refused.

12. On 2nd July 2003 permission to appeal was granted by Aldous LJ on consideration of the documents. His reasons were these:
 - "There is a real prospect of persuading this court that clause 4.1(a) is concerned with the type of business and 4.1(b) with how the land is to be farmed. If so, the judge's conclusion may well be wrong. I am also worried at the lack of findings of fact as to the matrix."
13. Both in this court and below the claimants have been represented by Mr Mawhinney and the defendants by Mr Blackmore.

14. The outcome of the appeal depends on the true construction of the FBT, in particular clause 4.1(a) and (b), when read against the material background facts of which both parties had knowledge at the time the terms of the FBT were agreed, that is to say on 8th January 1997. Mr Mawhinney, while accepting that clause 4.1(b) did not prevent the defendants from grazing dairy cattle on the farm land, submits that they could not be milked on that land; they had to be milked elsewhere. That was the conclusion of the judge, who expressed his view of the effect of clause 4.1(a) and (b) as follows:

"In my judgment, the words that follow under the title 'use and management of the holding' ... do these things: paragraph 4.1(a) sets out as a general provision that the tenants (Mr and Mrs Bryant) must use the holding for agricultural purposes and no other purpose unless Mr Field gives permission. The words there are obvious and I accept the submission made by Mr Mawhinney that what flows thereafter is a further delineation of the use to which the tenants can put the holding, and that further delineation is clear in 4.1(b). The words of the clause are, 'The tenant will use the holding for permanent pasture for livestock only throughout the term.' The words 'permanent pasture', in my judgment, can only mean that the tenant is entitled to graze livestock on the land, but no more."

15. I cannot agree with the judge's view of these provisions. The general rule is that a tenant, unless his use of the demised premises is restricted by the terms of the tenancy, may use them for any purpose for which, in their physical state at the date of the grant, they are capable of being used. Paragraphs (a) and (b) of clause 4.1 of the FBT, though each is expressed as a positive obligation, are provisions restrictive of user. Thus, under (a) the tenant is not to use the holding other than for agricultural purposes; under (b) he is not to use it for other than permanent pasture for livestock only, but not so as to prevent the making of hay and silage.
16. It is agreed that under (a) until 31st July 1997 the tenant was entitled to carry on a milking and dairying business, that being an agricultural purpose, on the holding, which at that stage included the farmhouse and the buildings as well as the farm land. But it is said that the force of (b) is such as to bring that entitlement to an end on 31st July 1997, not only in regard to the farmhouse and the buildings, but also in regard to the farm land. I am unable to see how that can have been the intention of the parties. Clause 4.1(b), when read with clause 4.2(a) and (b), is seen to be concerned only with the preservation of the land as permanent pasture. It is not concerned with the agricultural purpose for which it is to be used.
17. Of the other provisions of the FBT the most significant is clause 5.6, which provides for the relocation of the sheep house by 31st July 1997, the date on which the farmhouse and buildings were to be vacated. The judge thought that the omission in that sub-clause to provide for the use of that building for milking and dairying purposes was, as he put it, "deafening". Again, I cannot agree. The important point is the converse, namely, that there is no restriction on the use to which the relocated sheep house may be put.
18. It has been suggested that once the sheep house has been relocated it becomes part of the holding to which clause 4.1(b) applies and that it, like the land, can only be used for permanent pasture, i.e. for housing cattle or sheep or for storage of hay or silage. While I would agree that the sheep house becomes part of the holding, it would in my view be an unrealistic construction to say that "the holding" in paragraph (b) includes the sheep house itself. It is already necessary in that paragraph to read "the holding" as excluding the farm house and buildings and it is but a small and inoffensive step to read it as excluding the relocated sheep house as well.
19. As to the material background facts of which both parties had knowledge on 8th January 1997, Mr Mawhinney has submitted that the only facts which fall into this category are the following:
- (1) It was the intention of the defendants that on the sale of the farm they would acquire another suitable property within the locality to continue the farm business.
 - (2) The defendants already owned two other farms, Higher Brown Farm and Syndercombe Farm.
 - (3) The defendants' farming business included a dairy herd and a flock of sheep.
 - (4) The farm buildings included a dairy and a milking parlour.
 - (5) The sheep house was not normally used for keeping or milking cows.
20. I take each of those facts in turn.

21. It is correct that it was the intention of the defendants that on the sale of the farm they would acquire another suitable property within the locality to continue the farm business, but the provision for the extended period of two years for their occupation of the farm land demonstrates that it was not necessarily their intention to acquire another suitable property immediately.
22. Second, reliance is placed by Mr Mawhinney on the fact that the defendants owned Higher Brown Farm and Syndercombe Farm. At one stage in his argument I understood him to be contending that those farms, or one of them, would have been near enough for the dairy cattle to be transported there and milked whenever necessary. But it transpires that each of them is about 10 miles away from Meadlands Farm. So that particular point falls to the ground. Moreover, the fact that the defendants owned two other farms cannot necessarily be taken to mean that they intended that the herd should be moved to one or other of them.
23. I take the third, fourth and fifth points together. It is perfectly true that the farm buildings included a dairy and milking parlour and also that the sheep house was not normally used for keeping or milking cows. But those facts do not mean that the sheep house could not have been used for milking and dairying purposes. Indeed, there was evidence from the defendants' surveyor, Mr Overhill, to the effect that it could have been so used by installing a milk bale, which could even, during the summer, have been used in the fields and not necessarily in the sheep house itself. So I do not regard any of those points as being sufficiently significant to affect the construction I suggest should be put upon the material provisions of the FBT.
24. In my judgment the most important background fact is that immediately before 8th January 1997 the defendants were carrying on a milking and dairying business with 25 to 30 cows on the land, which was described in the particulars of sale, on the basis of which the claimants bought, in this way:

"The land lies within an attractive ring fence, consisting of a number of conveniently sized and shaped enclosures of level or undulating pasture land ... and whilst the whole of the farm is currently into pasture, it would nevertheless be highly suited to a variety of alternative cropping."
25. As far as I have been able to discern, there is no positive indication, either in the material provisions of the FBT or in the material facts known to both parties on 8th January 1997, that they contemplated that the defendants would cease to carry on their milking and dairying business during the two-year period in which they were to remain in possession of the farm land. The natural assumption would have been that the business was to be continued as it was.
26. For these reasons, I would allow the appeal, discharge the declarations made by the judge, reinstate the counterclaim and make a declaration in favour of the defendants in a form to be discussed with counsel.
27. LORD JUSTICE LATHAM: I agree. The important point, in my view, is that when the agreement was made it was clear that the appellants would continue to run the farm as a dairy farm at least for the period until possession of the buildings was given to the respondents. It seems to me that clause 4.1(b) must be construed in that context.
28. Two consequences follow. First, the part of the holding consisting of the buildings cannot on a strict construction be used for permanent pasture for livestock. The parties must therefore have envisaged ancillary uses to be permissible. Second, use of the holding for the dairy herd must have been considered to be a use falling within clause 4.1(b) and the buildings, including the dairy buildings, were permissible as ancillary to that use. The agreement makes no provision for a change in the permissible use under clause 4.1(b) after the building had been handed over. Accordingly, I consider that no change was intended in the permissible use of the holding and that the appellants were thereafter entitled to continue to use the land in the same way as before. In practical terms, they can only do that with the sheep building and a bale milker, which would be ancillary to the permissible use, just as the old dairy buildings had been at the time that the agreement was entered into.
29. I would therefore make the same orders as proposed by Sir Martin Nourse.
30. LORD JUSTICE PETER GIBSON: I have had greater difficulty with this case than my Lords. The issue raised is a short point of construction of an agreement for a farm business tenancy within the meaning of section 1(1) of the Agricultural Tenancies Act 1995. This requires the ascertainment of what objectively the parties must be taken to have intended, and that requires the court to construe the document at the time of the sale agreement of 8th January 1997 to which the draft farm business tenancy agreement was annexed. The court construes the document against the background of the facts known to the parties. The salient facts have been set out by Sir Martin Nourse and I need not repeat them.

31. The defendants' intention for their dairy business was not known to the claimants other than that it was the defendants' intention that on the sale of the farm they would acquire another suitable property within the locality to continue the farm business. However, it was apparent from the sale agreement that the defendants intended on completion of the agreement for the farm business tenancy to carry on a farming business; hence the provisions in paragraph 16 of that agreement for a notice to be given pursuant to section 14 of the 1995 Act. For my part I do not see that it is safe to make any assumption or to invoke any presumption as to the continuation of the dairy business. In early January 1997 the defendants had nearly seven months before they were required under the agreement for the farm business tenancy to give up the farmhouse and farm buildings, and it was possible that the acquisition of another suitable property would have been completed before August 1997. With respect, I do not see that the agreement for the farm business tenancy shows an intention not to acquire another property immediately. No doubt if one became available it would have been acquired. The problem in this case arose because another property was not acquired before August 1997. It may be that the defendants had considered that their dairy cattle would be pastured on the tenanted land but would be dairied elsewhere. The judge said that that was not an uncommon arrangement.
32. The problems of construction, it seems to me, arise because both paragraphs (a) and (b) of clause 4.1 are expressed in mandatory terms and only permitted the user of the holding in the ways indicated in those paragraphs. Of the two paragraphs paragraph (a) is in the wider terms, being expressed not only to be for agricultural purposes but also to contemplate that the consent of the landlord might be obtained to an alternative use. Paragraph (b) is more limited. The purpose there contemplated is "permanent pasture for livestock only", adding, for the avoidance of doubt, hay and silage making. There is no doubt that all that is contained within paragraph (b) falls within the wider terms of paragraph (a), that is to say for agricultural purposes only. However, at first blush at any rate, if paragraph (a) applies, the narrower more restricted user required by paragraph (b) would have little scope for application. It is puzzling that both paragraphs appear one after the other. However, an explanation may be that "the holding" is defined in the two parts indicated by my Lord, one for the land and the other for the buildings, and that different terms are provided for each. For the buildings the tenancy was to end on 31st July 1997; for the land it was to continue until a date in 1999. It is to be noted that from the definition of the buildings there is no overlap with the land because the buildings are said to adjoin the property first described, that is to say the land.
33. Paragraph (b) cannot sensibly apply to the buildings because it clearly requires land to be pastured. However, in my view the required user does not exclude a use ancillary to pasture, for example as a shelter for livestock or as a building for the storage of hay and silage. What I cannot accept is that such ancillary use includes a dairy. That seems to me, with respect to those who think otherwise, an activity separate from pasturing, although I of course accept that dairy cattle are included in livestock and would need to graze: consider, for example, in the definition of "agriculture" in section 38(1) of the 1995 Act the separate references to "dairy farming" and "the use of land as grazing land".
34. On the view which I am inclined to favour paragraph (a) was intended to have application both to the land and buildings until 31st July 1997, and so the dairy business could properly be conducted during that time under the aegis of the agricultural purposes allowed by that paragraph. Paragraph (b) was intended to have application during that period to the land and was not inconsistent with the agricultural purposes in paragraph (a). But for the period after 31st July 1997 the user in paragraph (b), again within the agricultural purposes in paragraph (a), was alone intended to govern the use of the land, and it was the land and not the buildings which was the subject of the lease thereafter.
35. What then of the sheep building to be relocated or substituted and placed on part of the land? Was it intended that that could be used for a dairy business, that business having been permitted pursuant to paragraph (a) prior to 31st July 1997 in the buildings? The difficulty I have with that is that that sheep building is to be placed on the land which, as I see it, was intended to be used for permanent pasture for livestock only. The fact that the site occupied by the sheep building in its new position will not itself be pasture land is not determinative because it would not be inconsistent with the paragraph (b) purpose if the use of the sheep building is ancillary to the permitted purpose of permanent pasture for livestock; and I have already given examples of such ancillary use which may be conducted in that building.
36. It is said that it is surprising that the change in use at 31st July 1997 is not signalled more clearly in the agreement for the farm business tenancy; but that agreement makes clear that there is to be a significant change in what constitutes the holding at that date. It can be said with force that it is surprising that there is no mention anywhere in the sales agreement or the agreement for the farm business tenancy of an intention to continue the dairy business on the holding. The only building intended to be placed on the land is the sheep building, not a building associated with the dairy business which had been carried on previously. That supports the notion that only permanent pasture was contemplated as the use of the land after 31st July 1997.

37. I disagree with the greatest hesitation and regret from my Lords, but for the reasons which I have endeavoured to give I, for my part, would have dismissed the appeal. However, because my Lords take a different view, this appeal will be allowed and the orders suggested by Sir Martin Nourse will be made.

Order: Appeal allowed with costs here and below. There will be a declaration that the Farm Business Tenancy permits the running of a milking and dairying enterprise on the farm land.
The Counterclaim will be dismissed. Application for permission to appeal refused.