

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WEYMOUTH COUNTY COURT
(MR RECORDER JARVIS)**

Case No: CCRTF 1999/0201/B2

Royal Courts of Justice
Strand, London, WC2A 2LL
Thursday, 6th April 2000

B e f o r e :
LORD JUSTICE MORRITT
and
LORD JUSTICE SCHIEMANN

FLOYER-ACLAND and others

Appellants

- and -

OSMOND

Respondent

Miss Hazel Williamson QC and Mr M. Wonnacott (instructed by Bevan Ashford
for the Appellants)

Mr Derek Wood QC (instructed by Burges Salmon for the respondent)

Mr M Rodgers for Respondents

Judgement

LORD JUSTICE MORRITT:

1. On 17th July 1997 Mrs Floyer-Acland and her co-appellants, as the landlords under an agricultural tenancy, gave to the tenant, the respondent Mr Osmond, notice to quit in respect of part only of the holding pursuant to both a clause in the tenancy and Case B contained in Schedule 3 Agricultural Holdings Act 1986. The tenant, as he was entitled to do, required the appointment of an arbitrator to determine his objections to the notice to quit. The arbitrator stated a special case for the opinion of the County Court, in accordance with para. 26 Schedule 11 Agricultural Holdings Act 1986, raising a number of legal issues going to the validity of the notice to quit. The special case came before Mr Recorder Jarvis sitting in the Weymouth County Court. On 11th February 1999 the Recorder decided that the notice to quit was invalid on one only of those issues. This is the appeal of the Landlords and the cross-appeal of the Tenant from those parts of the judgement of the Recorder as were contrary to their respective submissions to him.
2. The Tenancy Agreement was made between the predecessors in title of the appellants and Mr Osmond on 13th November 1982. The Landlords thereby let to the tenant for the rent therein stated an agricultural holding comprising some 473 acres called Stafford Farm at West Stafford,

Dorset from 29th September 1982 and continuing from year to year. Clause 1(b) provided that the holding was let subject to the exceptions and reservations thereafter mentioned. Such exceptions and reservations are contained in Clause 3 which, so far as material, provides

“There are excepted and reserved to the Landlord from the tenancy hereby created:

- (1) [Springs]
 - (2) [Timber]
 - (3) All mines minerals quarries stones and sand brick earth clay gravel chalk marl peat turf petroleum natural gas and their relative hydrocarbons and all other substances (not being farm crops) normally removable by underground or surface working with liberty on giving the Tenant not less than three months’ prior notice in writing to search for work (including the right to sink boreholes) and remove the same including the right to let down the surface of the land and any buildings thereon in the course of such working provided that the Tenant shall be at liberty to use such stones as are on the surface of the land for the repair of roads field walls or paving on the holding but not for sale.
 - (4) [Game]
 - (5) [Landlord’s rights of way]
 - (6) [Wayleaves etc]
 - (7) [General right of entry]
3. Clause 4 provides that the Landlord shall pay reasonable compensation for all damage caused by the exercise of such exceptions and reservations and allow a reduction in rent in respect of any land of which the tenant is completely deprived of occupation. Clause 43 provides
- “It shall be lawful for the landlord at any time or times upon giving to the tenant not less than three calendar months’ notice in writing to resume possession and determine the tenancy of any part or parts of the holding not exceeding one tenth of the holding in any one calendar year for any purpose or purposes not being the use of the land for agriculture and notwithstanding that the use of the land for any such non-agricultural purpose is to be by a person or persons other than the Landlord.”
4. On 11th June 1997 the Landlords were granted planning permission in accordance with the details given in their application made in December 1996 for the “winning and working of sand and gravel” from a site comprising 110 acres, most, but not all of them, being part of West Stafford Farm. The permission was limited to the period ending on 31st December 2003 and was subject to the condition, amongst many others, that by the expiration of that period the extraction of minerals should have ceased and the site have been restored in accordance with a restoration and aftercare plan previously approved by the Mineral Planning Authority. The application included the requisite statement as to the “Subsequent Restoration to Agriculture and Amenity Woodland”. Paragraphs 9 and 11 contained detailed provisions as to the working of the sand and gravel by a rolling or phased programme of soil stripping, extraction and restoration divided into 12 phases. The restoration programme provided for the spreading of topsoil, surface regrading, cultivation and reseedling so that “the whole of the land will be restored to agriculture”.
5. The notice to quit given by the Landlords to the Tenant on 17th July 1997 required possession thereof to be given on 22nd October 1997 and related to 43.4 acres only. Those acres comprised phases I and II of the 12 phases provided for in the Statement and, amounting to less than 10%

of the total holding, came within the provisions of Clause 43. The notice stated “The Landlord requires these premises for the purpose of a non-agricultural use, namely mineral extraction and this notice is given pursuant to clause 43 of your contract of tenancy. This notice is given on and for the following ground and reason and pursuant to the appropriate paragraph set out in the Agricultural Holdings Act 1986 Schedule 3 Part 1: Case B The Land is required for a use other than agriculture for which permission has been granted under the enactments relating to town and country planning.”

6. It is convenient at this stage to explain the significance of some of the matters mentioned in the notice. First, by s.25 Agricultural Holdings Act 1986 a notice to quit must normally give not less than 12 months’ notice. One exception to that requirement is where the notice is given pursuant to a provision in the contract authorising the resumption of possession by the landlord for a specified purpose other than the use of the land for agriculture. Thus the notice to quit, which allowed only 3 months, would be invalid unless it came within clause 43. Second, a notice to quit part, as opposed to the whole, of a holding can only be given if and to the extent that it is authorised by s.31 Agricultural Holdings Act 1986. For present purposes such authority exists if the notice is given with a view to the use of the land to which it relates for “..opening or working...a sand or gravel pit..” Third, the Agricultural Holdings Act 1986 confers security of tenure on the tenant but subject to two broad exceptions provided for by s.26. First, where any of the Cases contained in Schedule 3 applies then the notice to quit, if otherwise valid, will operate. (s.26(2)) A dispute as to the applicability of the Case referred to in the notice to quit may be contested by the tenant if he serves a counter-notice. In that event the dispute is referred to arbitration. (Schedule 4 para. 1) But, second, where none of those cases applies the tenant may serve a counter-notice under s.26(1) requiring that subsection to apply to the notice to quit. In that event the notice to quit will not have effect unless the Agricultural Land Tribunal consents. By virtue of s.27 such consent may only be given if the Tribunal is satisfied as to one or more of the matters specified in sub-section (3) but even then it must withhold its consent if it appears to the Tribunal that a fair and reasonable landlord would not insist on possession. One of the matters specified in sub-section (3) is that the landlord proposes to terminate the tenancy “for the purpose of the land’s being used for a use, other than for agriculture not falling within Case B”.

7. It is apparent from the form of notice to quit that the Landlords considered that Case B applied. Case B applies where, so far as relevant,

“The notice to quit is given on the ground that the land is required for a use, other than for agriculture—

- (a) for which permission has been granted on an application made under the enactments relating to town and country planning,

[(b)-(e)]...

and that fact is stated in the notice.”

8. The tenant did not agree that Case B applied and gave a counter-notice. One consequence was that the operation of the notice to quit was suspended pending the arbitration, Agricultural Holdings (Arbitration on Notices Order) 1987 Art. 12. In order to avoid further delay on 9th September 1997 the Landlords gave notice that on and after 15th December 1997 the Landlords would exercise their rights under Clause 3(3) of the tenancy to enter onto the holding to search for, work and remove the minerals therein specified and if necessary to let down the surface of the land. And that is what they did. Since then the land to which the notice to quit relates has been worked by the Landlords or their agents in the extraction of sand and gravel.

9. Another consequence of the Tenant's counter-notice was the appointment of the Arbitrator and, in due course, the statement by him of a special case for the opinion of the County Court pursuant to para. 26 Schedule 11 Agricultural Holdings Act 1986. The questions of law submitted by the Arbitrator for such opinion were
- “(a) whether a landlord who has exercised the exception and reservation as to mines and minerals contained in Clause 3(3) of this Tenancy Agreement is entitled also to pursue a Notice to Quit of part of the holding, to wit, the same land and to terminate the tenancy of the holding in respect of that land;
 - (b) whether working the land for mines and minerals involves a use of land within the meaning of the enactments relating to Town and Country Planning and/or Clause 43 of the Tenancy Agreement;
 - (c) whether on the facts of this case the purpose for which the Landlord requires the premises and for which the Landlord seeks possession under Clause 43 in addition to the exercise of the reservation of mines and minerals under Clause 3(3) is a use of the land otherwise than for agriculture;
 - (d) generally on the facts of this case whether the reasons stated for the Notice of Quit are valid and effective insofar as that matter can be determined on the facts of reading this case.”
10. The Recorder's conclusions may be summarised as follows: (a) “required” for the purposes of Case B does not import more than that the landlord wants the land in question for the specified purpose; (b) the extraction of sand and gravel does not involve any “use” of the land in a planning sense for non-agricultural purposes but does involve a such a use within the meaning of clause 43 of the tenancy agreement; (c) accordingly though the notice to quit was properly given under clause 43 the circumstances do not fall within Case B.
11. In this court the proper construction and ambit of Clause 43 and Case B have been dealt with separately. Though similar points are raised in respect of each of them their respective terms are different. Accordingly I intend to consider the proper construction and ambit of clause 43 first and, in consequence, deal with points raised by the Tenant in his cross-appeal. There are three of them: (1) the phrase in clause 43 “any purpose or purposes” must be construed so as to exclude from the ambit of that clause purposes capable of achievement pursuant to any of the provisions of clause 3; (2) such purpose or purposes to be within clause 43 must be such as, if implemented, will take the land out of agriculture on a permanent basis; and (3) the phrase in clause 43 “any purpose or purposes, not being the use of land for agriculture” predicates that none of the purposes for which the landlord wishes to regain possession of the land include the use of the land for agriculture.
12. The Tenant relies on the well-recognised distinction between an exception and a reservation. The former excepts some specific item of property from the grant; the latter operates so as to take back some right otherwise included in the grant. In either case the enjoyment of the exception or reservation by the landlord is consistent with the continuation of the tenancy and uninterrupted possession by the tenant of the demised premises. In the case of sand and gravel the mineral remains in the ownership of the landlord and can be worked by him by opencast or underground mining. Comparable points may be made in the case of springs, timber and sporting rights. In these circumstances, it is submitted, it is necessary to give to the phrase “purpose or purposes” in clause 43 a construction which excludes the purpose or purposes achievable under clause 3.
13. I do not accept this submission. The wording of clause 43 is quite clear. It refers to “any” purpose or purposes. The only limitation is that such purpose or purposes should not involve

“the use of the land for agriculture”. The fact that all or some of the purposes of the landlord might be achievable by an exercise of the right conferred by clause 3 seems to me to be immaterial. The two rights are different and are attended by different limitations and consequences. Thus clause 3 applies to all the land, not to only one tenth per annum. It limits the landlord to the exercise of such rights as are expressed or inherent in the terms of the exception namely searching for, working and removing the mineral. The exercise of the rights conferred by clause 3 does not entitle the landlord to use the land free from the rights conferred on the tenant by the tenancy; the rights of each in that piece of land are limited by the co-existing rights of the other. I can see nothing in the nature of the two rights, the circumstances surrounding the grant of this tenancy or in its business efficacy which would require the court, by way of construction, to limit the ambit of the phrase “any purpose or purposes”.

14. The second submission overlaps to some extent with the first in that it too seeks to imply by way of construction a limitation on the words “any purpose or purposes”. In this case the suggested limitation is that the implementation of the purpose should take the land permanently out of agriculture. Though the tenancy is one from year to year, it is appropriate to construe it against the background of the substantial security of tenure afforded to the tenant by the Agricultural Holdings Act 1986 and its predecessors. But clause 43 looks to the purpose of the landlord in seeking to resume possession. It excludes a purpose “being the use of the land for agriculture”. Provided that the purpose does not fall within the exclusion I can see no reason why it should be implied in the non-agricultural purpose of the landlord that it should be so all-embracing as to exclude the possibility of any agricultural use permanently or for the foreseeable future. As in the case of the first submission I see no necessity for such an implication in either the terms or structure of the tenancy agreement, the circumstances surrounding its execution or its business efficacy.
15. The third point is to the effect that if the landlord has more than one purpose, one of which is to use the land for agriculture then he is not entitled to give notice under clause 43. This is disputed by the Landlords. They submit that a single non-agricultural use is enough to enable a notice to quit to be served in accordance with clause 43. They also submit that where there is more than one purpose it is necessary to have regard to the predominant purpose.
16. For my part I would accept the argument for the Tenant if it were shown that the Landlords had two or more concurrent purposes one of which involved the use of the land for agriculture. The liberty conferred on the landlord by clause 43 is “to resume possession...for any purpose or purposes not being the use of the land for agriculture”. But the use of the land for agriculture by the landlord would be a derogation from his grant to the tenant of the agricultural holding. If there were but one purpose and that involved the use of the land for agriculture then, plainly, the landlord would not be entitled to determine the tenancy. I can see no reason to impute to the parties an intention that if the landlord has more than one purpose then the second non-agricultural purpose should extinguish the adverse effect of a single agricultural use.
17. However it does not follow that in this case the Landlords are precluded from exercising the power given to them by clause 43. It is not disputed that the winning and working of the sand and gravel is a non-agricultural purpose. But the tenant submits that the subsequent works of restoration and aftercare and the later use of the land would both be agricultural uses or purposes. I accept that after the works of restoration and after-care have been completed the land is likely to revert to an agricultural use. But the Landlords do not seek to resume possession now for the purpose of that subsequent use. Further the works of restoration and aftercare do not, by definition, involve the use of the land for agriculture for they are necessarily preliminary to it. In any event the execution of those works is not the purpose for which the Landlords seek to resume possession. Their purpose is the winning and working of the sand and gravel; the subsequent execution of the works of restoration and aftercare is the necessary condition to its achievement.

18. The judge, in effect, answered each of questions (a) to (c) in the special case by reference to clause 43 in the affirmative. In my view he was right to do so.
19. I turn then to Case B. The relevant words appear in the introductory condition that “the notice to quit is given on the ground that the land is required for a use, other than for agriculture..”. For the tenant it is contended that Case B is not in point. Once again three points are taken: (1) the land is not so “required” where the purpose of the Landlords may be achieved through the exercise of the rights conferred by clause 3(3); (2) the meaning of the word “use” is that commonly found in the planning context and does not include mining operations such as the extraction of the sand and gravel must entail; and (3) the uses for which the land is required include its use for agriculture.
20. The word “required” is not uncommonly used in connection with the giving of a notice to quit in respect of premises for which there is some statutory protection. Thus in *Ireland v Taylor* [1949] 1 KB 300 the Court of Appeal was concerned with the defence of the landlord, in the face of his tenant’s claim to a new lease under Landlord and Tenant Act 1927, that “the premises are required for occupation by himself”. The argument that the use of the passive tense showed that the word “required” meant “needed” was rejected. It was sufficient that the landlord “desired” possession and genuinely intended to use the house. In *Kennealy v Dunne* [1977] 1 QB 837 the Court of Appeal was concerned with the proper construction of Case 10 of the Rent Acts which entitled a landlord to obtain possession of property let on a regulated tenancy if “the Court is satisfied that the dwelling-house is required as a residence for the owner-occupier..” The court held that the word “required” did not import an objective standard or reasonableness or impose any higher burden than demonstrating a genuine desire or intention to use. In *Boyle v Verrall* [1997] 1 EGLR 25 the Court of Appeal was concerned with Ground 1 in Schedule 2 Housing Act 1988 whereby the landlord was entitled to recover possession from an assured tenant if he “requires the dwelling house as his...principal home”. The court considered that the construction adopted in *Kennealy v Dunne* was equally applicable.
21. Counsel for the tenant contends that the principles illustrated by these cases do not apply. He suggests that they are irrelevant because in this case there is no balance to be struck between the rights of the tenant and those of the landlord for both can be accommodated if the landlord exercises his rights under clause 3(3). He submits that the phrase “is required” means is required in the context of the relationship of landlord and tenant, thereby introducing an objective test. He relies on *Heath v Drown* [1973] AC 498. In that case the House of Lords was concerned with the defence of a landlord to his tenant’s claim for a new tenancy under Landlord and Tenant Act 1954 Pt II on the ground that “the landlord intends to demolish...the premises...and could not reasonably do so without obtaining possession”. It was held by a majority that it was not reasonably necessary to determine the tenancy because the intended works could be carried out in exercise of the reservations contained in the old lease. But that case depended on the objective test evidently prescribed in the section.
22. Decisions on other statutory provisions can only indicate a drafting convention; they cannot be determinative. But, so far as they go, I would prefer the submissions for the Landlords that it would be unusual to impose an objective test to the requirement of a landlord. But, in the context of Case B, the question is whether the land, or rather, possession of it is required for a use not whether the landlord requires it. In this case the use for which permission has been granted, subject to the other points relied on by the Tenant, is for winning and working the sand and gravel from the surface. That use also involves the restoration and aftercare programme on which the permission is conditional. It seems to me that those provisions go well beyond what could be authorised by clause 3(3). It follows that possession of the land is required for the use for which permission has been granted and is required by the Landlords in the sense that they genuinely wish to regain possession for that purpose.

23. The second point is that which the Recorder determined contrary to the submissions of the Landlords and is the subject matter of the appeal. The Recorder considered that in Case B the context of planning permission indicated that the word “use” had the meaning attributed to it by s.336 Town and Country Planning Act 1990. That section provides that:

“..except where the context otherwise requires...”use”, in relation to land, does not include the use of the land for the carrying out of any building or other operations on it..”

In that respect the definition of use reflects the definition of development in [s.55](#) as being

“..except where the context otherwise requires,.. the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”

24. The Landlords contend that there is no reason to import the meaning of “use” from the planning field into legislation dealing with agricultural holdings. They submit that so to do is contrary to the evident intention of Parliament. In that connection they rely on [s. 31\(1\)\(b\)](#) and Schedule 3 Pt II para. 8(b). They also referred us to the Opencast Coal Act 1958 s.14. The Tenant supported the judge’s reasoning and conclusion.
25. I consider that the judge was wrong. First, if the meaning of use in the planning sense is imported into Schedule B it will substantially reduce the ambit of application of Case B. I am unable to see any good reason why Parliament should have intended that Case to apply where permission is given for a change of use but not where it is given for a building or other operation. Second, s.31(1)(b) permits a landlord of an agricultural holding to give notice to quit part only of the holding if, amongst other reasons, it is given with a view to the use of the land “for opening or working...a sand or gravel pit...”. If such a notice is given then it may be effective if either s.27(3)(f) or Case B applies on the ground that the purpose of the use of the land either is or is not within Case B. But if the construction favoured by the Recorder is right then neither Case B nor s.27(3)(f) could be applicable. In that case “the view” envisaged by s.31(1)(b) would be impossible of achievement. Parliament cannot have intended that either. Third, Schedule 3 para. 8 provides that, for the purposes of Case B and subject to certain further conditions, no account shall be taken of any permission relating to the working of coal by opencast operations. But if the Recorder’s construction of Case B is right then the working of coal by opencast operations could not fall within Case B anyway. Fourth, the exception provided for in that paragraph appears to have been necessitated by s.14 Opencast Coal Act 1958 which itself recognises that but for the provisions of that section the Agricultural Holdings Act could operate in such a way that if permission were granted for some coal-mining operation the agricultural tenancy could be determined on that account. This is some parliamentary recognition that mining operations do fall within Case B for if they do not why except from its operation the more limited class of opencast coal-mining operations. It may be, as counsel for the Tenant submitted, that Schedule 3 para.8 was inserted by way of precaution but, whether that is so or not, it points unequivocally in the same direction. For all these reasons I would allow the appeal.
26. The third and last point on Case B is very similar to the third point on Clause 43. Does the condition that “the land is required for a use, other than for agriculture” operate so as to preclude the application of Case B on the ground that the uses for which the land is required include its use for agriculture? It is submitted, and I agree, that the singular “use” includes the plural “uses”. No doubt it is possible to have two concurrent uses one of which is agricultural and the other not.
27. Case B does not involve any derogation from grant such as I referred to in connection with Clause 43. Nor in my view is it appropriate to consider any particular predominant use if, as I think, the provision envisages the possibility of more than one use. But, in my view, it is clear

that possession of the land is not required for any agricultural use. Neither the winning and working of the sand and gravel nor the subsequent activities of restoration and aftercare are agricultural uses though the subsequent activities may be preliminaries to the resumption of such use. Further those subsequent activities are a condition imposed on the use for winning and working the sand and gravel and are not the grounds on which the land is required or the notice to quit given. In my view the Recorder was right on this point both in relation to Case B as well as in connection with Clause 43.

28. For all these reasons I would answer each of questions (a) to (c) in the special case in the affirmative insofar as they relate to the Landlords' reliance on Case B.
29. The parties agreed that question (d) was not intended to cover any particular issue not already embraced by questions (a) to (c). It follows that the Recorder's response to it was appropriate. In all these circumstances I would allow the appeal and dismiss the cross-appeal.

LORD JUSTICE SCHIEMANN : I agree.

**Order: Appeal refused; cross-appeal dismissed with costs here and below.
Permission to appeal to House of Lords refused.
(Order does not form part of the approved judgement)**