

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Hamilton

[2005CSIH66]

Lord Macfadyen

XA68/04

Lord Reed

OPINION OF THE COURT

delivered by LORD MACFADYEN

in

APPEAL

in the cause

I & H BROWN (KIRKTON) LIMITED

Pursuers and Respondents;

against

MRS SYLVIA HUTTON

Defender and Appellant:

Act: Webster; Russel & Aitken (Pursuers & Respondents)

Alt: Party (Defender & Appellant)

24 August 2005.

Introduction

[1] The pursuers in this action are the heritable proprietors of subjects known as Lassodie Mill Farm, Lassodie, Fife ("the farm"). Their predecessors in title were the Coal Authority (previously the British Coal Corporation and before that the National Coal Board). The defender is in occupation of the farm. She

claims to be entitled to be so as tenant. The farm was originally let to her father-in-law, Charles Hutton ("Charles"), and she claims that the tenant's interest in the subjects passed from him to his son, her husband, James Hutton ("James"), and from James to her. The pursuers maintain that the defender has not succeeded to the tenant's interest and has no right to occupy the farm. They accordingly raised an action of removing against her in Dunfermline Sheriff Court. After debate, by interlocutor dated 19 March 2004, the sheriff granted decree of removing. The defender has appealed to this court.

The history of the tenancy

[2] The farm was let to Charles in about 1966. The original lease has been lost. The pursuers aver that it was subject to their predecessors' General Conditions of Let of Farms, which provided that the lease was limited to the tenant alone, excluding all successors, whether heirs, executors or legatees, and all representatives, assignees, whether legal or conventional, and subtenants. The set of General Conditions which we were shown was of limited value as a voucher for that proposition, since it bore to be the British Coal Corporation's conditions, whereas the proprietor at the time of the lease was the National Coal Board. It was, however, common ground that by 1990 the lease in favour of Charles, whatever its terms may have been, was continuing from year to year by tacit relocation.

[3] In 1990 an agreement was entered into between Charles and the British Coal Corporation to the effect that James would be "taken into the lease". That is recorded in a letter from an official in the British Coal Corporation Estates Department to Charles dated 8 November 1990 (Appendix, item 2), which was in the following terms:

"Holding of Lassodie Mill

Following their recent meeting with you Messrs. Davidson & Robertson have advised me that you have agreed that, with effect from Martinmas 1990, the rental of the above holding would be £1700 [per] annum on condition that your son James Stewart Hutton is taken into the lease.

I confirm that the foregoing is acceptable to the Corporation, as Landlords, and should be pleased if you would sign one of the enclosed formal acceptances and return the same to me."

No copy of the acceptance has been produced, but it is averred by the defender and admitted by the pursuers that Charles accepted the proposal.

[4] The pursuers aver that the effect of that agreement was that James became a joint tenant (more accurately a tenant in common) of the farm along with Charles. The defender avers that the effect of the agreement was that James was taken into the lease as sole tenant (in succession to Charles), with a view to the tenancy continuing with him (alone) as tenant. She avers that in 1990 Charles was "fairly elderly (76)" and was looking forward to retiral; and that James had been working on the farm since 1968, full-time from about 1980. She also avers, "It is ... believed that, at 1990, it was not the policy of the British Coal Corporation to enter into joint tenancy agreements".

[5] Charles died on 20 May 1998. The pursuers' position in their pleadings is that he left a will bequeathing his whole estate to his widow, who is still in life. While denying that he made a valid bequest of his interest in the lease to her, they maintain that, if he did so, her acceptance of it was not intimated to the landlords within twenty-one days, and the provisions of section 11 of the Agricultural Holdings (Scotland) Act 1991 were therefore not complied with. Charles's interest in the tenancy therefore became available for transfer by his executor, but no steps to do so were taken within a year of his death. There was no compliance with section 16 of the Succession (Scotland) Act 1964. The tenancy in common therefore came to an end, for want of a successor to one of the two tenants in common. The defender's position in her

pleadings is that by the date of Charles's death, he no longer had any interest in the tenancy of the farm, and there was therefore no interest of his which required to be transferred to a successor on his death. At the date of Charles's death, James was, as he had been since 1990, the sole tenant.

[6] James died quite shortly after his father, on 16 August 1998. The pursuers maintain that, as he was not at the date of his death the tenant of the farm, the purported holograph bequest of *inter alia* the tenancy which he made in favour of the defender (Appendix, item 4) was of no effect. The defender maintains that James was, at the date of his death, the sole tenant of the farm, by virtue of having been "taken into the lease" in 1990. She therefore maintains that the bequest in her favour was effective to convey to her the tenant's interest in the lease.

[7] The defender applied to the Scottish Land Court for an order declaring her to be the tenant of the farm. In the course of those proceedings she was ordained to find caution in the sum of £1500. She did not do so within the appointed time. Her application for an extension of the time within which to find caution was refused, and the defenders in that process, the present pursuers' predecessors in title, were assoilzied from the crave of the application. The present defender appealed to this court, and on 17 July 2003 it was held that the Land Court should not have granted absolvitor, but should have dismissed the application. The result is that the disposal of the Land Court application in the landlord's favour does not preclude the defence to the present action.

The sheriff's decision

[8] After debate, the sheriff granted decree of removing. Her reasoning was as follows:

"I take the view that the language of the letter of 8 November 1990, given its ordinary and plain meaning, indicates, at most, that it was proposed to take James Stewart Hutton into the agricultural tenancy alongside his father, Charles Hutton. Charles Hutton would have had no locus in agreeing to the future level of rent in the lease if his interest in it was being effectively terminated in that letter by substituting his son as tenant. It was clear from the correspondence produced that Charles Hutton remained as a joint tenant with his son up until his death. Accordingly as no steps were taken to confirm or transfer his interest in the lease as required by Section 11 of the 1991 Act or Section 16 of the 1964 Act, the whole lease terminated including the interest of James Hutton. The defender has no title to occupy the subjects. No amount of amendment of the defender's pleadings could, in my view, cure that."

The defender's submissions in the appeal

[9] The defender conducted the appeal in person. She lodged grounds of appeal to which we refer for their terms. In her oral submissions before us, her primary position was that the agreement referred to in the letter of 8 November 1990 was to be understood as providing that James was to take over from Charles as the tenant of the farm. James was to be substituted as sole tenant in place of Charles, not to join him as a tenant in common. In support of that submission she told us, as is averred by her, that for some years before 1990 James had been doing most of the work on the farm. She added (going beyond the terms of her averments) that Charles had asked that James be "taken in". There was no question of a joint tenancy. Charles did not want that. He wanted James to take over. If a joint tenancy had been the intention, a new lease would have been drawn up. At no time had Charles and James had a joint business account together. From 1990 to 1994 the account remained in Charles's name, and he ran the finances of the farm and took the profit. It had been agreed between Charles and James that Charles would act on James's behalf in that way. James took over personally as soon as he was able, which was in 1994. Charles and his wife applied for sheltered housing, which they would not have done if Charles had remained a joint tenant, because the tenant of an agricultural holding required to reside on the holding. The defender told us further that she was resisting the action of removing for the benefit of her son, who was twenty-three years of age, had attended

agricultural college, and was working in the agricultural industry. She reiterated that she knew what had been intended in 1990. Charles had accepted the letter. James would also have accepted it. The defender accepted that she was not in a position to prove her averment that in 1990 it was not the policy of the British Coal Corporation to enter into joint tenancy agreements.

[10] The defender also maintained the alternative argument outlined in her grounds of appeal. That was to the effect that, if the letter of 8 November 1990, properly construed, brought about a joint tenancy, it was a joint tenancy in the strict sense (as distinct from a tenancy in common), so that on Charles' death his interest accrued to James, leaving James as the sole tenant without the need for any transfer of Charles's interest to him. In support of that submission she adopted the arguments set out in the Note by Counsel dated 5 June 2003 (Appendix, item 6).

The pursuers' submissions in the appeal

[11] Mr Webster, for the pursuers, submitted that the sheriff was entitled to grant decree of removing without proof. The letter of 8 November 1990 by itself provided a sufficient basis for that course. On a proper construction of that letter, the position at the date of Charles's death was that he and James were tenants in common. The words of the letter should be given their plain ordinary meaning (*Stair Memorial Encyclopaedia, The Laws of Scotland*, Vol 12, paragraphs 1215 and 1216). The letter provided for James being "taken in", but said nothing to indicate that at the same time Charles ceased to be a tenant. Strictly, the sheriff had not been entitled to rely as she did on the post-1990 correspondence, but if she had been entitled to do so, it simply supported the conclusion properly to be derived from the terms of the letter of 8 November 1990, namely that Charles remained a tenant thereafter along with James. The correspondence supported his still being a tenant in 1998. The only relevant averments to be taken into account in construing the letter were those about James's having worked on the farm, and they, if proved, would not lead to any different construction.

[12] Mr Webster further submitted that the defender's alternative submission was ill-founded. If, after the letter of 8 November 1990, Charles and James were both tenants of the farm, they were tenants in common, not joint tenants. There was therefore no question of Charles's interest accruing on his death to James, as would occur if it were a case of true joint tenancy. There were only two cases of true joint property known to the law of Scotland, namely the ownership of property by a body of trustees, and the ownership of property by an unincorporated association (Reid, *The Law of Property in Scotland*, paragraph 20; *Magistrates of Banff v Ruthin Castle Limited* 1944 SC 36; *Rankine on Leases* (3rd Edn.), pages 82 - 87). The circumstances of the present case did not fall into either of these categories.

Discussion

[13] To avoid decree of removing passing against her the defender must succeed in maintaining one or other of two submissions, namely that the effect of the letter of 8 November 1990, properly construed, was either (1) to make James the sole tenant of the farm, or (2) to make him and Charles joint tenants of the farm in the strict sense rather than tenants in common.

[14] In our opinion the defender's primary contention, namely that the effect of the letter was to substitute James for Charles as tenant of the farm, must fail. We do not doubt the sincerity of the defender's belief that what was intended was that James should succeed Charles as the sole tenant of the farm, but the effect of the letter must be determined objectively. The primary consideration must be the ordinary meaning of the words used in the letter, construed in the light of any relevant surrounding circumstances.

[15] The language of the letter, given its ordinary and natural meaning, points, in our opinion, unequivocally to the assumption of James as an additional tenant in common with his father Charles, and not to the substitution of James for Charles as the sole tenant. In the first place, the words used were "on condition that your son James Stewart Hutton is taken into the lease". The natural meaning of that phrase is that James was to be taken in as a tenant, but there is nothing in the language used to suggest that Charles was to cease to be a tenant. Moreover, the context of the condition that James was to be "taken into the

lease" was an agreement on the part of Charles that with effect from Martinmas 1990 the rent was to be £1700 per annum. As the sheriff pointed out, if James was to take over from Charles as the sole tenant, it would have been primarily James's, not Charles's, consent to the new rent that would have been required.

[16] We do not consider that there is anything in the averred surrounding circumstances to support the defender's construction of the letter. The averments about James having worked the farm are not in our opinion sufficient to make it clear, in face of the terms of the letter, that James was to succeed Charles as the sole tenant. The only other averment which might have been relevant to the construction of the letter was the averment that at the time it was not the practice of the British Coal Corporation to enter into joint tenancies. As we have recorded in paragraph [9] above, the defender accepted in the course of her submissions that she was not in a position to prove that averment.

[17] In reaching her decision on the construction of the letter the sheriff placed some reliance on the subsequent correspondence to which she was referred, and which suggested that Charles continued to be treated as a tenant in common until 1998. It is not necessary for us to determine whether the sheriff was entitled to rely on that material, because we are satisfied that, without it, it is nevertheless clear that the correct construction of the letter is that with effect from Martinmas 1990 Charles and James became tenants in common.

[18] The defender's alternative submission is also, in our opinion, unsound. If James was assumed as a tenant along with Charles, they became tenants in common, not joint tenants in the strict sense. As the authorities to which we have referred (in paragraph [12] above) show, joint tenancy, which has the effect that on the death of one of the joint tenants his interest accrues automatically to the surviving tenant or tenants, arises only in the context of the interest being held by trustees or by an unincorporated association. There are no averments in the present case which bring the nature of the interest held by Charles and James into either of these categories.

[19] We are therefore of opinion that the sheriff was right to hold that, on a sound construction of it, the effect of the letter of 8 November 1990 was that Charles and James became tenants in common. It follows that neither of the bases on which the defender argued that the tenancy passed to her is relevantly averred. The question whether the prohibition of bequest of the tenancy contained in the British Coal Corporation's General Conditions formed part of the lease does not arise. The sheriff was therefore right to grant decree of removing.

Result

[20] We shall therefore refuse the appeal, adhere to the sheriff's interlocutor of 19 March 2004, and remit to the sheriff to proceed as accords.