

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

24/11/2009

Before:

HIS HONOUR JUDGE RAYNOR, Q.C.
(Sitting as a High Court Judge)

Between:

Malcolm Anthony Kemp

Claimant

- and -

Fisher & Ors

Defendants

APPROVED JUDGMENT

Judge Raynor:

1. In these proceedings the Claimant seeks a declaration that his tenancy of an agricultural holding at Kilverstone in Norfolk is a tenancy to which the statutory succession provisions in Part IV of the Agricultural Holdings Act 1986 continue to apply.
2. The proceedings are not actively opposed by the Defendants, the Claimant's landlords, but neither do they admit the claim. They do, though, admit that Part IV of the Act applies to the Claimant's tenancy.
3. This action raises an issue of law which has been the subject of some debate in textbooks relating to agricultural holdings in the light of what is seen as uncertainty created by an *obiter* remarks of Jowitt J in the case of *The Trustees of Saunders v Ralph* (1993) 66 P & CR 335.
4. The short point which arises is whether the consensual grant of a new tenancy which takes place prior to 14th November 1976, which was the date of the coming into effect of the Agriculture (Miscellaneous Provisions) Act 1976, can adversely affect the succession rights created by that Act of the tenant of an agricultural holding.
5. The circumstances which give rise to this claim can be stated shortly. The Claimant, Malcolm Anthony Kemp, is the tenant of an agricultural holding in Norfolk, namely Lodge Farm, which is on the Kilverstone Estate. The family of Mr. Kemp have farmed that land for generations and the initial tenancy was created as long ago as 1947. A new tenancy agreement was made on 16th October 1973 under which the Claimant's father, Roy Kemp, became the tenant of Lodge Farm under a yearly tenancy from 11th October 1972. The current tenancy of Lodge Farm was granted by an agreement made on 25 February 1998 between the Trustees of the Kilverstone Settlement as Landlord, the Claimant as tenant and his father as outgoing tenant. The term was from 11 October 1996 until October 1997 and thereafter from year to year.

6. The issue which arises in this action is whether the tenancy granted by agreement on 16th October 1973 before the inception of the statutory succession scheme introduced by the Act of 1976, is deemed by the provisions of section 37(2) of the Agricultural Holdings Act 1986 to be one of the maximum of two statutory succession opportunities permitted by the 1986 Act. If it does count as one, then it follows that there can be no further succession rights under the Act and Mr. Kemp's son, who farms the land and whom he would want to take over, would not be an eligible person.
7. Section 18(1) of the 1976 Act provided that where, after the passing of the Act, the sole or sole surviving tenant of an agricultural holding died and was survived by any of a number of defined persons, then the succession rights under the Act would apply unless excluded by section 18(4). By section 18(4)(e) those rights were excluded if on each of the last two occasions when there died a sole or sole surviving tenant there occurred one or other of the following: (i) an eligible person becoming entitled to a tenancy of the holding by direction of the Agricultural Land Tribunal; or (ii) a tenancy being granted by the landlord to a person who, being an eligible person, was or had become the sole or sole remaining applicant for such a direction. This last provision was inserted to make it unnecessary for parties who agreed that a tenancy should be granted to pursue the application to a decision by the Tribunal.
8. The exclusion in section 18(4)(e) was stated to be without prejudice to subsection (5), which contained a deeming provision providing (in effect) that the consensual grant of a new tenancy to an eligible person prior to the death of the sole or sole surviving tenant should be deemed to be an occasion such as is mentioned in section 18(4)(e)(i) on which a direction was given by the Tribunal for the grant of a tenancy. This provision made it unnecessary to wait for the death of the tenant, but avoided disadvantaging a landlord who granted a new tenancy in such circumstances.
9. The Act was amended in 1984 under the Agricultural Holdings Act of that year. Paragraph 2 of Schedule 1 to the Act amended the provisions of section 18(4) and (5) of the 1976 Act so that (inter alia) the assignment of the tenancy to a close relative by agreement of the landlord was now an event deemed to be within section 18(4)(e).
10. The succession provisions of the 1976 Act were repealed by the Agricultural Holdings Act 1986, which was a consolidating Act; they were re-enacted in Part IV of the 1986 Act. The exclusion provisions in sections 37(1) and (2) provide:

Exclusion of statutory succession where two successions have already occurred

- “(1) Section 36(1) above (and section 41 below) shall not apply if on each of the last two occasions when there died a sole (or sole surviving) tenant of the holding or of a related holding there occurred one or other of the following things, namely—
- (a) a tenancy of the holding or of a related holding was obtained by virtue of a direction of the Tribunal under section 39 below, or such a tenancy was granted (following such a direction) in circumstances within section 45(6) below, or
 - (b) a tenancy of the holding or of a related holding was granted by the landlord to a person who, being a close relative of the tenant who died on that occasion, was or had become the sole or sole remaining applicant for such a direction.
- (2) If on any occasion prior to the date of death, as a result of an agreement between the landlord and the tenant for the time being of the holding or of a related holding, the holding or a related holding became let—
- (a) under a tenancy granted by the landlord, or

- (b) by virtue of an assignment of the current tenancy, to a person who, if the said tenant had died immediately before the grant or assignment would have been his close relative,

that occasion shall for the purposes of subsection (1) above be deemed to be an occasion such as is mentioned in that subsection on which a tenancy of the holding or a related holding was obtained by virtue of a direction of the Tribunal under section 39 below.”

11. In this case it is common ground that the agreement of 25th February 1998 under which the Claimant became tenant was one agreement falling within subsection (2). It follows, therefore, that, if the agreement of 16th October 1973 also counts, there can be no further succession rights under the Act.
12. In his very impressive skeleton argument Mr. Martin Rodger, Q.C., for the Claimant sets out at length his submissions why it cannot have been intended by Parliament when it passed the 1986 Act that the provisions of section 37(1) and (2) would apply if the agreement under which the tenancy was granted pre-dated the coming into being of the original statutory succession scheme and the Agricultural Land Tribunal in 1976.
13. As I have indicated, the issue is uncertain because of a passage in the judgment of Jowitt J in the case of *The Trustees of Saunders v Ralph*. His remarks were clearly obiter because he had held that there had been no prior statutory succession in the case before him, and so he did not need to consider the retrospectivity issue. However, he chose to do so: on page 349, under the heading “Retrospectivity” he stated, “For the seek of completeness I deal with the issue of retrospectivity raised by Mr. Denbin for the respondent. He submits that in any event a succession falling within subsection (2) of section 37 cannot be one which occurred before the passing of the 1976 Act. The submission in my judgment is misconceived. Before the passing of that Act there were no rights of succession. The Act created such rights and subsection (2), just as subsection (1) of what is now section 37, merely placed limits upon the availability of those rights.”
14. The passage that I have quoted has been the subject of considerable academic criticism and, in the current edition of Scammell & Densham’s *Law of Agricultural Holdings* (9th edition) on pages 575 to 577 the editors set out why, in their view, the judgment of Jowitt J is wrong. A similar conclusion is reached by the editors of Muir Watt and Moss on *Agricultural Holdings* (14th edition, p428 n44).
15. I have considered those views and the much fuller submissions of Mr Rodger and I have concluded that those submissions are sound. In my judgment, essentially for the reasons advanced by Mr Rodger and the editors of Scammell and Densham, and with all due respect of the judgment of Jowitt J, a tenancy granted by agreement prior to 14th November 1976 does not have the effect of taking the case out of the statutory scheme introduced in 1976. This is because
 - a. Subsections (1) and (2) of section 37 should be read together. Subsection (2) deems the consensual grant of a new tenancy (or letting by assignment) to be an occasion when the tenancy was obtained by virtue of a direction of the Agricultural Land Tribunal. It is an unnatural construction to envisage that something would be deemed to be obtained by direction of a Tribunal which did not exist at the relevant date – ie to deem something to have happened which could not possibly have occurred. I accept Mr Rodger’s submission that the more natural -- and in my view correct -- construction is that events that are to be deemed to be the equivalent of a Tribunal direction should have occurred at a time when it was possible to obtain a direction.
 - b. This construction advances the obvious legislative purpose of sections 37(1) and (2), which is to limit the number of statutory successions to two. Pre-1976 tenancies have nothing whatever to do with the statutory scheme, and there is no reason to think that Parliament intended that pre-1976 consensual acts should restrict the statutory rights of an eligible

person. I agree with the view expressed by the editors of Scammell and Densham that “it would be very surprising if Parliament intended that landlords could exhumate the past in this way”.

- c. It is legitimate to go back to the original legislation if it is contended that the words of a consolidating Act are ambiguous. In this case, it seems to me that the editors of Scammell and Densham are right in their view that on their true construction the succession provisions contained in Pt II of the 1976 Act are intended to be governed by the opening words of section 18(1) “Where after the passing of this Act...” This construction accords with the well known presumption against retrospective legislation as enunciated in the advice of the Privy Council in *Yew Tew v Kenderaan* [1983] 1 A.C. 553 at 558. As submitted by Mr Rodger, the effect of construing section 37(2) as applying to transactions taking place before the commencement of the 1976 Act would be retrospectively conferring on those transactions a significance which they did not have at the time, and I agree that one would have expected Parliament to make that intention much clearer if that had indeed been its intention.
- d. If the statute is construed so as to apply to pre-1976 consensual grants, its operation would be capricious. Many families will have been entirely excluded from the statutory scheme because two voluntary successions had taken place years before the statutory right of succession had been conceived. It is difficult to see why Parliament should have decided to disadvantage these families, compared to the family of a first generation tenant.
- e. If the Act was retrospective in the way suggested by Jowitt J, as the editors of Scammell and Densham say, the possible extent of retrospectivity would be limitless and it would be possible for an owner of a traditionally managed estate to point back to a succession of handovers from one family member to another stretching back over decades. It would need very clear language to induce me to construe the Act in a way that would have that effect and I do not find that the Act was intended to be so construed.

16. It follows that in my judgment the Claimant is entitled to the declaration he seeks.