*14 MacFarlane v Falfield Investments Limited

Positive/Neutral Judicial Consideration

Court
Court of Session (Inner House, First Division)

Judgment Date
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First Division

Lord Marnoch

29 July 1997

Representation

ANDREW RUSSELL MACFARLANE, Pursuer (Reclaimer)— Agnew of Lochnaw, QC, Miller
FALFIELD INVESTMENTS LIMITED AND TARGA LIMITED, Defenders (Respondents)— Reid, QC, Gibson

Landlord and tenant—Agricultural holdings—Lease—Partnership—Lease to limited partnership in which landlords were partners—Pursuer general partner but partnership not operated—Whether pursuer entitled to security of tenure—Whether limited partnership void as sham to avoid security of tenure— Agricultural Holdings (Scotland) Act 1991 (cap 55), sec 22

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The pursuer entered into limited partnerships with the landlords of two agricultural holdings the landlords being limited partners and the pursuer general partner. The partnership was not operated but at the ish of each lease the pursuer failed to vacate the holdings. He brought an action against the *15 landlords contending that the contracts of copartnery were a pretence, the sole purpose of which was to allow the pursuer to be granted tenancies of the holdings without enjoying the benefit of security of tenure provided under sec 22 of the Agricultural Holdings (Scotland) Act 1991 . The landlords accepted that the purpose of the limited partnership tenancy was to prevent security of tenure being granted to the pursuer. The pursuer sought declarator that the contracts were a nullity and that he was the tenant of the holdings under the leases. Alternatively, the pursuer sought declarator that the provision that the partnerships should terminate at the ish was null and that the partnerships, and he himself as general partner, could be removed from the holdings only by operation of a notice to quit under Part III of the 1991 Act. The landlords counterclaimed for violent profits. At procedure roll, the Lord Ordinary (Marnoch) dismissed the pursuer's action and the landlords' counterclaim. The pursuer thereafter reclaimed and the landlords counterclaimed.

Held (1) that there was no objection in principle to a lease of an agricultural holding being granted to a limited partnership in which the landlords were limited partners, even when the admitted purpose of the arrangement was to prevent the general partner becoming sole tenant and therefore able to rely, as tenant, on the statutory provisions relating to security of tenure; (2) that the intention of Parliament was that it was in the public interest that tenants of agricultural holdings should have the degree of security of tenure which the statutory provisions secured for them but the arrangement in this case did not constitute an attempt to contract out of the statutory security of tenure provisions for in each instance the tenant was a limited partnership and, so long as the lease endured, the limited partnership was entitled to the statutory protection afforded by the Act; (3) that an agreement or contractual term by which a tenant under an agricultural lease renounced his statutory right to serve a counter-notice in terms of the legislation was unenforceable, but this was not a case where the tenant had so contracted as there was no term which sought to take away the right of the limited partnerships *qua* tenants to serve a counter-notice and, although the scheme was deliberately designed to make sure that the occasion where such a notice might be served would not arise, if such an occasion had arisen, there would have been nothing to prevent the limited partnerships from exercising their right under the Act to serve a counter-notice on the landlords; (4) that where two parties having all the necessary powers exchange consents in formal documents, the usual result in law would be that a contract was concluded, but that the law would look behind any such agreement if it was simply a sham designed to conceal the true nature of the parties agreement, which was not the case here as there was no basis upon which it could be held that the parties' exchange of consents was of no legal affect and that they did not become contractually bound by the terms of the partnership contract; (5) that there was nothing to prevent parties to a contract or partnership agreeing, as the parties had done in this case, to contract that the partnership should come to an end on a certain date; (6) that the leases which *ex facie* were leases to a partnership were *prima facie* inconsistent with the leases to the pursuer *qua* tenant so that the pursuer could not invoke the missives of let as being a foundation for leases to himself as an individual; and (7) that, as the sum sought in both of the conclusions in the counterclaim had been paid, if it were to proceed, the defenders would require to amend the pleadings and conclusions and any sums claimed could be the subject of separate proceedings, the counterclaim having been agreed to be dismissed were the principal action to be dismissed by the Lord Ordinary; and reclaiming motion and counter-appeal *refused* .

Opinion that if the pursuer had a verred a relevant case for a declarator that the limited partnership agreements were invalid and a nullity a proof before answer would have been allowed.

Andrew Russell MacFarlane brought an action of declarator against Falfield Investments Limited and Targa Limited. The defenders counterclaimed. The ***16*** averments of parties appear sufficiently from the opinion of the Lord President (Rodger).

The cause called in procedure roll before the Lord Ordinary (Marnoch) on parties' preliminary pleas in law. At advising, on 21 June 1996, the Lord Ordinary dismissed the principal action and counterclaim.

The pursuer reclaimed and the defenders cross-appealed.

Cases referred to:

Antoniades v Villiers [1990] 1 AC 417
Belvedere Court v Frogmore [1996] 1 All ER 312
Craven v White [1989] AC 389
Dando (SL) Ltd v Hitchcock [1954] 2 QB 317
Dickson v MacGregor 1992 SLCR 1
Featherstone v Staples [1986] 1 WLR 861
Firstcross Ltd v East West (Export/Import) Ltd (1980) 41 P & CR 145
Furniss v Dawson [1984] AC 474
Galloway (Earl of) v McClelland 1915 SC 1062
Gisborne v Burton [1989] QB 390
Hilton v Plustitle Ltd [1989] 1 WLR 149
Inland Revenue Commissioners v Burmah Oil Co Ltd 1982 SC (HL) 114
Inland Revenue v Graham's Trs 1971 SC (HL) 1
Inland Revenue v McGuckian [1997] 1 WLR 991
Jamieson v Jamieson 1952 SC (HL) 44
Johnson v Moreton [1980] AC 37

Jones v Wrotham Park Settled Estates [1980] AC 74
Kaye v Massbetter Ltd (1991) 62 P&CR 558
Morrison-Low v Paterson 1985 SC (HL) 49
Ramsay (WT) Ltd v Inland Revenue [1982] AC 300
Shell Mex and BP Ltd v Manchester Garages Ltd [1971] 1 WLR 612
Snook v London and West Riding Investments Ltd [1967] 2 QB 786
Somma v Hazelhurst [1978] 1 WLR 1014
Stoneleigh Finance Ltd v Phillips [1965] 2 QB 537
Street v Mountford [1985] AC 809
Turnbull v Millar 1942 SC 521
Yorkshire Railway Wagon Co v Maclure (1882) 21 Ch D 309

Textbooks referred to:

Connell, *The Agricultural Holdings (Scotland) Acts* (6th edn), p 50 ; (7th edn), p 64
Gill, *Law of Agricultural Holdings in Scotland* (2nd edn), pp 4 – 7

Lord Marnoch's—

Opinion —I heard a procedure roll debate in this action which lasted four days but, at the end of that debate, I was invited, *inter alia* , to give effect to a substantial minute of amendment lodged by the pursuer of which the effect was greatly to simplify the nature of the action and render otiose a number of arguments which had been canvassed by counsel. In these circumstances it would not, I think, be helpful to set out a full narrative of counsel's submissions but I trust that in what follows I shall nonetheless do justice to such of these submissions as remain relevant to the amended pleadings.

The action concerns the agricultural leases of two farms in Aberdeenshire and, in its amended form, the summons contains four declaratory conclusions. Two of these are to the effect that contracts of limited partnership entered into between the pursuer and the landlords of the farms were a pretence intended to evade the security of tenure provisions of the Agricultural Holdings (Scotland) Acts and that the pursuer (rather than the partnerships) should accordingly be regarded as the true tenant of the farms in question. On the assumption that these conclusions fail the remaining two conclusions seek declarator that certain provisions of the partnership agreements are nonetheless null and void and that the partnerships ****17*** can only be displaced as tenants through the operation of notices to quit served under Part III of the Agricultural Holdings (Scotland) Act 1991 .

The first thing I should say about all this is that there was, I think, no dispute between the parties but that an agricultural lease to a partnership comprising the landlord as one of the partners was, as such, perfectly legal. Indeed, the validity of such a lease was expressly recognised, in England, in the case of *Featherstone v Staples per* Slade LJ at p 879 and, in Scotland, in the recent case of *Dickson v MacGregor* . What, however, the pursuer offers to prove in the present case is that, while the partnership agreements and missives of lease were all duly executed according to the requirements of the law, neither partnership operated, or was intended to operate, as a substantive business enterprise. Had I been asked to do so I would, I think, have drawn this inference from the terms of the partnership agreements themselves (nos 15/7 and 15/9 of process) because, in each case, the only substantive contribution by the landlord appears to be a nominal capital sum of £10 and his only entitlement is interest on that sum. But, in addition, the pursuer sets out in art 11 of the condescendence extensive averments to the effect that, although apparently registered under the Limited Partnership Act 1907 , neither partnership had a separate bank account or separate books of account and that in neither case was even the nominal sum of £10 in fact contributed by the landlord. It is also averred, in terms, that neither partnership ever traded and that at no time did the supposed partners ever meet or confer about the respective partnership businesses.

As against all this counsel for the defenders pointed out that the pursuer nowhere avers that, at the time the partnerships and leases were formally constituted, either or both of the pursuer and landlords intended that the legal relationships between them should be governed or regulated on any basis other than that of partnership and that the partnerships could accordingly have a real existence for that, if no other, purpose. In short, they gave, and were intended to give, to the landlords 'control over the lifespan of the partnerships and, thus, the leases to these partnerships'.

As it seems to me, therefore, the real issue is whether the intended legal relationships should themselves be regarded as the substance of the transactions between the parties and should, as such, be respected or whether, as counsel for the pursuer submitted, the proper approach is to look beyond the legal formalities and regard the substance of the transactions as being that shown up, as it were, on the ground. I confess that I find the issue, as thus focused, to be a particularly difficult one and I suspect that in the agricultural community much may depend on how it is resolved. I accordingly now turn, with more than customary enthusiasm, to see what assistance can be derived from the various authorities which were cited in the course of the debate. For want of any better route I shall take them in chronological order.

The *dictum* earliest in date to which I was referred is to be found in *Snook v London and West Riding Investments Ltd* at p 802 where Diplock LJ (as he then was) states this: 'As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ***18** (see *Yorkshire Railway Wagon Co v Maclure* and *Stoneleigh Finance Ltd v Phillips*), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.'

As always, Lord Diplock expresses himself with great lucidity and if his *dictum* falls to be applied to the circumstances of the present case it seems to me that the pursuer must fail. As I have just indicated there is, in the present case, no averment that the relevant actings or documents were not intended to create the legal rights and obligations which they gave the appearance of creating and I doubt that any such averment could properly have been made.

The next case referred to, in order of date, was *Street v Mountford. That was a case in which the House of Lords* was satisfied that the legal effect of an agreement, as entered into between the parties, was that of tenancy and that it could make no difference that the parties professed themselves as intending only to create a licence. As Lord Templeman put the matter at p 819 , 'Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.' In a later passage, at p 821 , Lord Templeman added, 'Words alone do not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. The circumstances and the conduct of the parties show that what was intended was that the occupier should be granted exclusive possession at a rent for a term with a corresponding interest in the land which created a tenancy.'

It is against that background that one must read an even later passage, at p 825 , which appears in Lord Templeman's discussion of an earlier case, *Somma v Hazelhurst* , and which was strongly founded on by counsel for the pursuer: 'Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the Court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts.'

As it seems to me, the case of *Street v Mountford* is in the end of limited assistance for the simple reason that everything agreed between the parties in the present case was entirely consonant with the legal concept of a tenancy and, moreover, a tenancy in favour of a partnership.

The next case is that of *Gisborne v Burton* in which it was held by Dillon and Russell LJJ (Ralph Gibson LJ dissenting) that, although the plaintiffs were nominally sub-tenants of the landlord's wife, they fell to be treated, for purposes of the Agricultural Holdings Act 1948 , as being directly tenants of the landlord.

After setting out the statutory background Dillon LJ deals with the facts of the case and comments, *inter alia* , that, 'The Judge found, and this is not disputed, that at the time of the grant of his tenancy of Berrywood Farm the defendant was well aware of the details of the scheme and that its object was that he should not enjoy the usual security of tenure of an agricultural tenant. It is ***19** likely that he had, as the Judge found, taken advice from local solicitors and the correspondence shows that he negotiated certain improvements in the terms to compensate him for not having security of tenure.' Then, after referring to the *dictum* of Lord Diplock in *Snook* , Dillon LJ goes on to say: 'There is, however, a slightly different aspect of sham which is exemplified by *Somma v Hazelhurst* as interpreted by Lord Templeman in *Street v Mountford* at p 825 , where the actual decision of this court in *Somma v Hazelhurst* was disapproved. In *Somma v Hazelhurst* a landlord, being desirous of avoiding certain statutory provisions in the Rent Acts in relation to furnished lettings, required a young couple who wanted to occupy a particular room to execute two separate forms of licence agreement. The young couple, who urgently wanted accommodation, signed the agreements without query but, on the findings of the judge, "understood what they were letting themselves in for". It seems clear that the landlord at any rate had the intention that the documents would, if that was at all possible, create the legal rights and obligations which they gave the appearance of creating, and the young couple went along with that intention. Nonetheless the documents were a sham because they did not reflect what was actually happening; in essence the documents, and the parties by entering into the documents, were trying to do what in law cannot be done, *viz* to give the young people exclusive possession of furnished residential accommodation without the statutory protection for tenants of such accommodation which are (sic) mandatory under the Rent Acts.'

The Lord Justice then goes on to opine, at p 399 , that in like manner the documents in *Gisborne* were a sham insofar as 'it was perfectly clear that Mrs Christopherson [the landlord's wife] was not going to farm the land at all because the farming had got too difficult for the Christophersons….'

Ralph Gibson LJ delivered a strong dissenting opinion in the course of which, at pp 406 – 407 , there appear the following passages: 'The problem in this case has arisen from the use by the parties of a form of transaction which, if upheld, reduces the nature and effectiveness of the statutory protection enjoyed by the defendant as occupier of the agricultural holding from that he would have had if the parties had used a different form of transaction. A similar problem has, of course, arisen under other statutory schemes, namely, the Rent Acts for residential accommodation and the Landlord and Tenant Act 1954 for business premises. Landlords seek to permit occupation of living accommodation and of business premises on terms which cause the occupier to be a licensee only and not a tenant. Once the real transaction has been proved the court may not allow the purpose of the landlord to avoid the consequences of statutory protection to alter or influence the construction of the agreement: see Lord Templeman in *Street v Mountford* at p 825 and Buckley LJ in *Shell Mex and BP Ltd v Manchester Garages Ltd* at p 619 . Still less, as it seems to me, can the court disregard the real transaction which has been proved and treat the parties as having made some other transaction, for the sole reason that the purpose of the parties in making the transaction which they did, and not some other transaction, was to avoid the consequences of statutory provisions which would have attached to that other transaction.…As I said at the beginning of this judgment, the essential question is by reference to what principles the court must determine the “reality” of a transaction which has the effect of depriving an occupier of statutory protection which he would have got if a different transaction had been made. As I understand the cases, such as *Firstcross Ltd v East West (Export/Import) Ltd S L Dando Ltd v Hitchcock* which was considered by Stephenson LJ in the *Firstcross* ****20*** case, the reference to “the real party” to whom and by whom property is let is a reference to that party to and by whom, upon the facts, it was the intention of the parties to the transaction that the tenancy be granted. There has been no detailed attempt, so far as I know, to lay down tests dealing with such an issue. If, however, it is proved, as it was in this case, that the nature of the transaction was made clear to both sides, together with the consequences which would follow by way of reduced statutory protection for the defendant as a subtenant, and that there was thus informed assent and understanding by all parties, then, as it seems to me, it has been proved that the defendant was the real party to whom a subtenancy had been granted and that it was granted by Mrs Christopherson.’

Lastly, Russell LJ, at pp 408 – 409 , summarises the issue thus, ‘The question for this court is whether we are entitled to have regard to the object of the exercise, or whether we should accept both the lease and sub-lease at their face value as documents creating a valid tenancy (with protection to Mrs Christopherson) and a valid subtenancy (with no protection to the defendant). Upon their face, there is nothing to indicate anything other than perfectly straightforward transactions. No one was deceived. Hence, submits Mr Albery for the plaintiffs, there was no sham as defined by Diplock LJ in *Snook v London and West Riding Investments Ltd* at p 802 . The documents could have evidenced a perfectly straightforward arrangement whereby Mrs Christopherson undertook the agricultural obligations to be found in her lease by way of tenant's covenants, whilst requiring the physical performance of those covenants to be the responsibility of the defendant pursuant to the sub-lease. The converse argument advanced on behalf of the defendant is that it is to fly in the face of reality not to look behind the agreements so as to ascertain what was the true contractual relationship between the three parties.’ Lord Justice Russell then refers to Lord Diplock's *dictum* and continues, ‘It is submitted by Mr Elvin for the defendant that deception of one of the parties is not crucial. If the court can be given, by documents executed by the parties, a false impression of legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create, then a “sham” as defined by Diplock LJ is made out. Whatever pejorative epithet is applied to this arrangement, the documents were never intended to be that which they purported to be.’ The Lord Justice then goes on, at p 410 , to summarise his conclusions as follows: ‘I am firmly of the view that the lease to Mrs Christopherson was an artificial device the only object of which was to disguise the grant of a tenancy to the defendant and to evade the Agricultural Holdings Act 1948 . In striking down the lease to Mrs Christopherson as an artificial device, I do not think the court is guilty of a procedure which it is not entitled to take; on the contrary, in one sense it is giving effect to the true intention of the parties, although in the process not permitting the legal consequences to flow to which the parties were prepared to accede.’ It is perhaps of some significance that, in one of the passages quoted above, Lord Justice Russell appears to consider the decision in the case to be consistent with Lord Diplock's *dictum* in *Snook* .

The next case to which I was referred was *Hilton v Plustitle Ltd.* That concerned the letting of residential property to a limited company being, as it happens, precisely the analogous type of case figured by Ralph Gibson LJ in *Gisborne* at p 407 . An actress by the name of Miss Rose bought a company ‘off the shelf’—Plustitle Limited—solely in order to obtain the lease of residential ****21*** accommodation in London. She paid the rent by personal cheques, the company not even having a bank account. In delivering the judgment of the Court of Appeal, comprising himself and Stuart-Smith LJ, Croom-Johnson LJ summarised the position, at p 155 , as follows: ‘In the present case, the company was not the plaintiff's agent. It was the only tenant to whom he was prepared to let the property, and the covenants in the lease were perfectly capable of being complied with by the company through its nominee, Miss Rose, and enforced against the company by the plaintiff. Unlike *Street v Mountford* the transaction did represent the true position. The company obtained a protected tenancy with the benefits attached to that but neither it nor Miss Rose obtained a statutory tenancy when the protected tenancy came to an end. We conclude that if the facts are consistent with the purported transaction, we see no reason why, by analogy with *Gisborne's* case, public policy should over-ride the transaction which was deliberately intended to avoid, but not evade, the Rent Acts.' *Gisborne* was distinguished on the ground that in that case 'the documents were never intended to be acted on'. As to that matter I agree with a submission advanced by senior counsel for the pursuer to the effect that, on the facts found in *Gisborne* , it would be incorrect to say that the documents were not at the time intended to govern the legal relationship between the parties. It is probable, therefore, that another meaning falls to be attached to the phrase which I have just quoted.

I pass now to *Antoniades v Villiers which was another case in which it was held by the House of Lords* that, as matter of fact, exclusive possession had been given to residential property in London, with the result that a protected tenancy under the Rent Acts had necessarily been created, and that a clause in the relative documents suggesting the contrary could, and should, be ignored as a pretence. Again, I do not find this case, any more than that of *Street v Mountford* , to be of any great assistance but it was, I think, relied on by counsel for the pursuer in relation, in particular, to the following *dictum* of Lord Templeman, at p 462 : 'In *Street v Mountford* at p 825 , I said "Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the Court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts." It would have been more accurate and less liable to give rise to misunderstandings if I had substituted the word "pretence" for the references to "sham devices" and "artificial transactions". *Street v Mountford* was not a case which involved a pretence concerning exclusive possession. The agreement did not mention exclusive possession and the owner conceded that the occupier enjoyed exclusive possession.'

It was submitted by counsel for the pursuer that in this passage Lord Templeman was deliberately moving away from the concept of 'sham', as defined by Lord Diplock in *Snook* , to a somewhat broader concept of 'pretence'. However, I do not so read the passage in question. Rather do I think that Lord Templeman's purpose was, quite simply, to facilitate the application of the 'sham' or 'pretence' principle to a part of a document. Whether or not I be right about that, there is, in my view, no indication that Lord Templeman's use of the word 'pretence' is meant to have some wider connotation than that of 'sham'.

I turn then, almost lastly, to the case of *Kaye v Massbetter Ltd.* This, again, was a 'company lease' case in which there is no doubt that the company was purchased simply in order to obtain in its name a tenancy of residential property ****22*** which the purchaser was anxious to occupy. At first instance His Honour Judge Hayman, in a passage cited by the Master of the Rolls in the Court of Appeal with apparent approval, said this: 'The flat was offered on the basis that a company was to be the tenant and a company was purchased for that purpose. That was the common intention: however much of a "shotgun" tenancy (to coin an expression to describe what might have been Mr Kanter's attitude), it was the common intention that the tenancy should be in the name of the company.' In regard to a submission that the subsequent conduct of the parties showed that the lease in favour of the company was a 'sham' the judge continued, '…if the agreement was not a sham on Day 1 it did not become a sham thereafter, and on Day 1, in my judgment, it was the common intention of these parties and the agreement, as set out in the document, should be of a tenancy to the company.'

In the Court of Appeal the argument that a company let could only be effective if the purpose was other than to avoid the application of the Rent Acts was expressly rejected, the Master of the Rolls saying, at pp 562 – 563 , 'In the context of this argument about company lettings, it is, I think, important not to confuse the objective of the parties with the route which they say, or one of them says, was adopted to achieve this objective.…So, for my part, I cannot see why it should not be possible to adopt the company route, provided always that you really do adopt it and you do not merely go through the motions of adopting it, not intending to do so at all. In this case, undoubtedly, Mr Kaye wanted to achieve a letting of the flat to provide him with income at a time when he was not using it. Mr Kanter undoubtedly wanted to obtain the right to occupy the flat. That right he could obtain either directly by a tenancy, or indirectly by achieving a tenancy for his creature in the shape of a company which he controlled. Mr Kaye, for his part, was not interested in letting to Mr Kanter or to any other individual. He was only prepared to let to somebody to whom or to which the benefits of the Rent Acts are not available, that is to say, to a company. It does not seem to me, again, that the achievement of those objectives by using a company is necessarily a sham. It is merely adopting one route rather than another. It is in the end entirely a question of fact.'

Nicholls LJ, at pp 563 – 564 , says this: 'The issue in every case involves seeing what, in law, was the agreement between the parties. In this regard the terms of a document signed by the parties or the form of words used by them in an oral agreement are, of course, not conclusive. Parties cannot contract out of the Rent Acts and the Court will be astute in detecting and frustrating shams or pretences, namely, agreements expressed in a form which do not truly reflect the parties' intention. Thus, the purpose for which and circumstances in which the company is introduced onto the scene are very important background facts. But it by no means follows that, a company having been introduced, the parties did not intend that in law the company should be the tenant and liable as such to the landlord.'

Lastly, Mann LJ, in delivering a short concurring opinion, expresses himself thus, at p 564 : 'The only perceptible transaction is the tenancy agreement of April 21, 1988. That, on its face, is an agreement between Mr Kaye as landlord and Massbetter Limited as tenants. The purposes for the achievement of that relationship are not material. What would have to be established here is that the agreement was not the operative agreement between the parties, but there was another relationship intended between Mr Kaye and Mr Kanter. That is a ***23*** matter of fact which was examined by the learned judge and I do not fault his conclusion.'

By way of authority it remains only to notice the case of *Dickson v MacGregor* . That was a case in which, in the context of an arbitration about rent, the landlord, on averments very similar to those in the present case, offered to prove that a lease to a limited partnership was a sham. It is, I think, clear that the *ratio* of the decision is to be found in a passage at p 88G–H which reads, 'The Court therefore agrees with counsel for the tenant's main submission that this is not a ground which can be invoked by the author of the pretence itself or her successor in order to nullify it [the lease to the limited partnership] *ab initio* .'

There is, however, the following *obiter dictum* at p 88F : 'If the original arrangement in the present case had been designed entirely to avoid security of tenure under the 1949 Act, with no genuine partnership enterprise, it might have been open to challenge by the tenant, as being a 'pretence' following *Featherstone* and *Gisborne* —but with an added complication of a Scottish partnership firm as tenant.'

As so worded, I regard that *dictum* as being reasonably neutral. Rather less neutral, perhaps, is the statement in the current (2nd) edition of Gill on *The Law of Agricultural Holdings in Scotland* at p 7 that, 'in a particular case, the facts may show that the transaction was a wholly artificial contrivance to evade security of tenure'. In making that statement, however, the author does not notice the 'company lease' cases in England and he was, of course, writing without the benefit of the decision of the *Court of Appeal in Kaye v Massbetter Ltd.*

In the result, having analysed the authorities as best I can, it seems to me that, on averment, the present case is virtually indistinguishable from the 'company lease' cases to which I have just referred. In relation to the date or time the parties contracted all the pursuer avers (p 31C–D of the closed record) is that the purpose of setting up the limited partnerships, 'was to avoid granting in favour of the pursuer as tenant of each holding the right to security of tenure granted to tenants of an agricultural holding by the Agricultural Holdings (Scotland) Act

, and furthermore to deprive the pursuer as such tenant of the right to resist a notice to quit each holding at the instance of the landlord thereof.' Proof of a similar purpose was, however, held, in terms, to be insufficient to invalidate the company lease in *Kaye* . What is lacking in the present case, in my opinion, is an averment that the intention of the parties was to create anything other than the legal relationships as recorded in the written documents. This is particularly important bearing in mind that, when the written agreements were entered into, there was no physical reason why limited partnerships, for what they were worth, could not have been operated.

In this connection, there are, of course, numerous averments to the effect that the limited partnerships did not, as matter of fact, operate but these, in my opinion, take the matter no further than did the evidence in *Kaye* that, following the formal constitution of the lease to the company, the company was largely, if not entirely, disregarded. As Judge Hayman put the matter, 'if the agreement was not a sham on Day 1 it did not become a sham thereafter'.

As I understand it, the Court of Appeal applied similar reasoning, namely that, in order to uphold the validity of the formal legal transaction, it was sufficient that the parties 'on Day 1' genuinely intended the contract to be one between the landlord and the company, it being nothing to the point that, even at that date, neither party envisaged the company as having any meaningful ***24*** existence apart from facilitating the constitution of the lease. Applying the same reasoning to the present case it seems to me—and I so decide—that the pursuer's averments as to this branch of the case fail to set out any relevant case for enquiry.

In reaching this view it goes without saying that I have given long and anxious consideration to the case of *Gisborne v Burton* , in which the decision, at first sight, might be thought to be in conflict with those reached in *Hilton* and *Kaye* . On close analysis, however, it seems to me that the majority decision in *Gisborne* rested essentially on the finding that the landlord's wife, Mrs Christopherson—to whom the head lease was purportedly granted—'was not going to farm the land at all, because the farming had got too difficult for the Christophersons…'. In my view it was this finding which enabled the *Court of Appeal in Hilton* to distinguish *Gisborne 'on the very ground on which the Court of Appeal* decided it, that the documents were never intended to be acted on'. Read in the sense that the documents were never intended to be acted on because Mrs Christopherson, physically, could never have been the tenant I similarly distinguish *Gisborne* from the present case. Senior counsel for the defenders went so far as to submit that *Gisborne* had been wrongly decided but, if I have correctly construed its *ratio* , it is unnecessary to go that length. Suffice to say, however, that if there were a clear conflict between the decision in *Gisborne* and the decisions in the 'company lease' cases I would feel obliged to follow the reasoning unanimously expressed in the latter—all the more so because of its consonancy with the original definition of 'sham' as pronounced by Lord Diplock.

For the above reasons I am of opinion that the leading conclusions in the amended summons, namely conclusions 1 and 3, are unsupported by the pursuer's averments. There remain for consideration, however, the subsidiary conclusions, *viz* conclusions 2 and 4, which, on the assumption that the partnerships are valid, seek declarator in each case that, '(i) the provision at clause 2 of the partnership agreement that the partnership shall endure to 27 November 1992 is null, void and of no effect and accordingly (ii) that the pursuer, as such general partner, and the limited partnership may be removed from the said agricultural holding only by operation of a notice to quit the said agricultural holding served upon the limited partnership as tenant by the…defenders as landlord under and in terms of part III of the Agricultural Holdings (Scotland) Act 1991 .'

The proposition contained in these subsidiary conclusions was said to be that a landlord cannot take the benefit of any clause in a partnership agreement or in a lease to the partnership, of which he is a partner, which has the effect of automatically terminating an agricultural tenancy, and senior counsel for the pursuer, did not shrink from the submission that this proposition applied to all such partnerships and leases, however substantial and meaningful the partnership in question.

Bearing in mind the recent and unreserved expressions of opinion on both sides of the Border that the granting of an agricultural lease to a partnership, in which the landlord himself has an interest, is not *per se* illegal, I am bound to say that I found this proposition a somewhat surprising one. In particular, it involves the court in effectively re-writing contractual provisions and in denying the application to the partnerships in question of the provisions of sec 32 of the Partnership Act 1890 to the effect that a partnership can, in general, be dissolved by either expiration or notice.

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The only authority cited by senior counsel for the pursuer in support of his proposition was the case of *Featherstone v Staples* , in which a provision that only the landlord partner could authorise service of a counter-notice, following on a notice to quit, was held to be contrary to public policy and void. As was pointed out by counsel for the defenders this case has to be understood against the background of English law, which denies to partnership a separate legal *persona* , but, that apart, it is, in my opinion, a long way from justifying the proposition in question.

At p 879H of the report Slade LJ, in delivering the judgment of the Court of Appeal, states, in terms, that there is nothing contrary to public policy in arrangements whereby landowners enter into a partnership with one or more persons on the basis that the partnership will be granted a tenancy of an agricultural holding and that the landowner, himself, will be ‘what is colloquially know as a sleeping partner’. ‘Quite apart’, he says, ‘from any considerations relating to security of tenure, there may well be good and sufficient reasons (whether of a commercial, family, fiscal or practical nature) why all interested parties should regard such an arrangement as sensible and beneficial.’ He then goes on to express what I understand to be the *ratio* of the decision in, *inter alia* , the following terms: ‘The *House of Lords decision in Johnson v Moreton* establishes beyond argument that if A grants a tenancy of an agricultural holding to B and the tenancy agreement contains a condition by which B agrees never to serve a counter-notice under the relevant legislation, that condition is void and unenforceable. It must, I think, inevitably follow from this decision that if A were to grant a tenancy of a holding to A, B and C and the tenancy agreement were to contain a condition by which A, B and C as tenants agreed with A as landlord never to serve a counter-notice without A's consent, that condition would be no less void and enforceable (sic). The present case is not quite the same as that. In essence it is a case where A has granted a tenancy of the holding to A, B and C and, by a separate partnership agreement, B and C have agreed with A that they will not serve a counter-notice without A's consent…I am driven to the conclusion that, if a land owner chooses to grant other persons a tenancy of agricultural land (whether or not including himself as a tenant), public policy (affirmatively) requires that those other tenants should have authority, or be treated as having authority, to serve an effective counter-notice under section 2(1) of the Act of 1977 on behalf of all the tenants without his concurrence, and thus (negatively) requires the avoidance of any contractual condition, whether express or implied and whether contained in the tenancy agreement itself or in a partnership agreement or elsewhere, which purports to deny those other tenants such authority.’

In the result, it seems to me that the decision in *Featherstone* is essentially bound up with the counter-notice provisions of the Agricultural Holdings (Notices to Quit) Act 1977 and I do not consider that it has the broad application for which senior counsel for the pursuer contended. In particular, I do not consider that the decision has any application to the situation which obtains in Scotland when, quite independently of and extraneous to the agricultural holdings legislation, the separate entity of a partnership comes to an end with all that that entails. It follows that, in my opinion, the pursuer's subsidiary conclusions are also unsupported by any relevant averments.

For all the above reasons I shall allow the minute of amendment tendered on behalf of the pursuer to be received as no 17 of process and allow the closed ***26*** record to be amended in terms thereof. That having been done, I shall sustain the defenders' first plea in law and dismiss the principal action. It was agreed that the counterclaim fell with the principal action and I shall accordingly also sustain the pursuer's first plea in law in the counterclaim. It only remains for me to express my appreciation to counsel on both sides of the Bar for the assistance which they gave me in dealing with this difficult case.

The cause called before the First Division, comprising the Lord President (Rodger), Lord Kirkwood and Lord Murray for a hearing on the summar roll.

At advising, on 29 July 1997—

Lord President (Rodger)——

In 1948 Parliament enacted the Agriculture (Scotland) Act 1948 . Section 7 gave an agricultural tenant who was served with a notice to quit the right to serve a counter-notice. Where such a counter-notice was served, except in certain specified circumstances, the notice to quit was not to have effect unless the Secretary of State gave his consent. The result was to give agricultural tenants a significant measure of security of tenure. With certain modifications the provisions have endured. They were re-enacted in sec 25 of the consolidating Agricultural Holdings (Scotland) Act 1949 and are currently to be found in sec 22 of the Agricultural Holdings (Scotland) Act 1991 . Whatever may have been the benefits of the legislation for tenants, not all landlords found the arrangements congenial. Not surprisingly therefore they looked for ways in which they might let their agricultural land without creating tenancies which attracted the operation of the security of tenure provisions. Their lawyers were set to work and came up with a variety of schemes which are listed in the books on agricultural law (Gill, *Law of Agricultural Holdings in Scotland* (2nd edn, 1990), pp 4 – 7 and Connell, *The Agricultural Holdings (Scotland) Acts* (7th edn, 1996), p 64). One device involved letting the subjects to a company in which the landlord held a share or shares carrying voting rights which enabled him to terminate the company's tenancy. Due to certain changes in tax law this device fell into desuetude. Another device was to let the subjects to a partnership of which the landlord was partner. A refinement was to let the subjects to a limited partnership. In both cases the basic idea was that the tenancy would come to an end when the partnership ceased to exist, with the partnership agreement being so framed as to limit the life of the partnership and hence the life of the lease. The limited partnership device has been in use in Scotland since before 1970 and it is now usual for new leases to be on this basis. See *Connell* (6th edn, 1970), p 50 and (7th edn), p 64 . In this action the pursuer has mounted a fundamental challenge to the validity of two such schemes involving a lease to a limited partnership. Given the widespread use of the limited partnership device, the question raised in this reclaiming motion is of considerable general importance.

The Facts and Issues

The pursuer is Andrew Russell MacFarlane who is a farmer and agricultural consultant. The transactions to which the action relates took place in 1987. They concerned two agricultural holdings, one at Laingseat, Potterton, Aberdeenshire ('Laingseat') and the other at Milton of Potterton, Belhelvie, Aberdeenshire ('Milton'). The gist of the dispute can be set out fairly briefly.

According to the pursuer the transactions in question arose out of an advertisement which appeared in April 1987 offering Laingseat and Milton to ***27*** let. In May the pursuer entered into one contract of limited partnership with Mr Harry Gilbert, the owner of Laingseat, and another with the defenders, the owners of Milton. In each case the partnership was to come to an end on 27 November 1992. Mr Gilbert and the defenders were to be the limited partners in the respective partnerships. Thereafter in June 1987 Mr Gilbert leased Laingseat to the limited partnership of which he was a partner, while the defenders let Milton to the limited partnership of which they were partners. In each case the lease was to terminate on 27 November 1992. In 1990 Mr Gilbert disponed Laingseat to the first defenders who also replaced him as the limited partner in the limited partnership. The pursuer did not vacate the holdings in November 1992 and remains in occupation. He contends that the contracts of co-partnery were a pretence, the sole purpose of which was to allow the pursuer to be granted the tenancies of Laingseat and Milton without enjoying the benefit of security of tenure under the Agricultural Holdings (Scotland) Act 1949 . He therefore seeks declarator that the contracts of limited partnership were a nullity and that he himself was the tenant of the holdings under the leases. Alternatively, if the contracts of limited partnership were not a nullity, he seeks a declarator that the provision that the partnerships should terminate on 27 November 1992 was null and that the partnerships, and he himself as the general partner in each, can be removed from the holdings only by operation of a notice to quit under Part III of the Agricultural Holdings (Scotland) Act 1991 . There is also a counter-claim by the defenders for violent profits.

After a debate on procedure roll, the Lord Ordinary dismissed the pursuer's action and the defenders' counter-claim. The pursuer reclaimed against the dismissal of the action and the defenders cross-appealed against the dismissal of the counter-claim. During the course of the hearing of the reclaiming motion the pursuer amended his pleadings to include two alternative conclusions for declarator that the contracts of lease were null and that the pursuer is tenant under an agreement evidenced by various actings on his own part and on the part of Mr Gilbert and of the defenders.

During the proceedings before this court I raised with counsel the fact that the conclusions for the pursuer did not seek reduction of the partnership deeds. Counsel for the defenders specifically asked that the court should not concern itself with the absence of any such conclusion but should rather address the substance of the issues between the parties. I have accordingly approached the matter on that basis and have not considered any possible complications which might have presented themselves if the pursuer had sought reduction of the contracts of co-partnery in an action signetted some months after the date on which—according to their terms—the partnerships were to come to an end.

Public Interest in Security of Tenure of Agricultural Tenants

One particular point ran as a *leitmotiv* through the submissions for the pursuer: the emphatic assertion of the importance of the public interest which was said to attach to long-term security of tenure for tenants of agricultural holdings.

Security of tenure in the case of such holdings is achieved by the statutory provisions affecting the landlord's power to serve a notice to quit. As I have noted already, those provisions made their *début* in the Agriculture (Scotland) Act 1948 . But long before that the policy behind earlier enactments on tenants' improvements had been set out by Lord Salvesen in *Earl of Galloway v McClelland* at pp 1099 – 1100 . Referring to the Agricultural Holdings (Scotland) Act 1908 he ***28*** said: ‘I do not think that I am wrong in saying that its main object was to encourage the best methods of cultivation so that the land might be made most productive to the tenant in his interest and the interest of the community at large.…While the Act therefore constituted an interference with freedom of contract in certain respects it did not, as I think, infringe any principle of equity, but was really in the interests of both landlord and tenant, as well as of the community at large to whose advantage it is that the arable land of Scotland shall be cultivated to the best advantage.’ Lord Salvesen's approach was endorsed by the Second Division in *Turnbull v Millar* . In the same way counsel for the pursuer stressed that the provisions of the 1991 Act were regarded as being conceived not simply in the interests of the individual landlords and tenants but in the interests of the community at large. In this context counsel referred to the speeches in *Johnson* *v Moreton* which deal with the policy behind the similar security of tenure provisions introduced in England in 1947. Most eloquent perhaps are the words of Lord Hailsham of St Marylebone. Referring to the statutory provisions he says: 'These are not simply matters of private contracts from which the landlord can stipulate that the tenant can deprive himself as if it were a *jus pro se introductum* . It is a public interest introduced for the sake of the soil and husbandry of England of which both landlord and tenant are in a moral, though not of course a legal, sense the trustees for posterity' (at p 59G–H). Lord Simon of Glaisdale felt unable to emulate what Lord Hailsham of St Marylebone had said on this matter, but he himself painted a broad historical canvas and concluded by saying, at p 67H : 'As for the public interest in good husbandry, *contemporanea expositio* makes it legitimate to recall that the Acts of 1947 and 1948 were passed on the morrow of the second occasion within a half-century when this country faced mortal peril through its dependence on imports of food in consequence of the long agricultural decline when an unprotected farming interest had to face the competition of cheap food from abroad. We relearnt that one must dig to survive. Society came once again to treasure the productivity of its agricultural land, and the heart follows the treasure.' No-one can fail to be impressed by such passages. None the less if we are concerned with matters of public interest, then our concern must be with the public interest which applies today. For my part I am not sure that in the era of the Common Agricultural Policy and set-aside the public interest would necessarily be formulated in quite the same way as in their Lordships' speeches. I am conscious also that the Agricultural Tenancies Act 1995 has introduced great changes into the system applying to agricultural tenancies in England and Wales. In these circumstances the only safe guide to what is thought to be in the public interest in this field in Scotland is the current legislation. This appears to me to be in line with what Lord Simon of Glaisdale said in *Johnson* at p 67D . The relevant Scottish provisions were re-enacted as recently as 1991, albeit in a consolidating measure. They must therefore be taken to embody the view of Parliament that it is in the public interest that tenants of agricultural holdings in Scotland should have the degree of security of tenure which the provisions secure for them. I do not myself consider that the relevant public interest can be properly stated in any wider terms.

The Operation of the Limited Partnerships

In one respect at least the issue between the parties was simplified by a concession by the defenders. Counsel for the defenders were quite candid about ***29*** the purpose which lay behind establishing the partnerships. As senior counsel for the defenders put it, in each case the partnership was a scheme to limit the duration of the tenancy. Since under cl 2 of each of the contracts of limited partnership the partnership was to come to an end on 27 November 1992, if the partnership was the tenant under the lease, then the tenant would itself cease to exist on that date. This in turn would mean that the lease would come to an end on that date since the farm had been let to the co-partnership and to no-one else. See *Inland Revenue v Graham's Trs* at p 20 *per* Lord Reid. Therefore by fixing the date of termination of the partnership and the ish of the lease for the same date, the scheme ensured that the lease came to an end on the chosen date without there being any need for the landlord to give a notice to quit and so bring the counter-notice provisions of the 1991 Act into effect.

It is important to notice that under this arrangement, so long as the partnerships remained in existence, they enjoyed all the rights of tenants under the 1991 Act. So, for instance, if the partners had agreed that one of the limited partnerships should continue beyond the term fixed for its expiry, the partnership would not have come to an end on 27 November 1992. That being so, the lease would not have come to an end automatically on that date either. Rather, the lease would have been renewed by tacit relocation in terms of sec 3 of the 1991 Act. To bring the tenancy to an end, the landlord would have required to give the limited partnership the appropriate notice to quit under sec 21 —and this would have entitled the general partner in the limited partnership to serve a counter-notice under sec 22 . In short, this was a case of the kind described in Connell at p 64 where 'the tenant will have security of tenure so long as it continues in existence'. So much was admitted by counsel for the pursuer. There was nothing therefore in the terms of the leases in this case which interfered with the operation of the statute. So long as either of the leases lasted, all the provisions which Parliament had enacted on notices to quit and counter-notices applied to the lease and to the tenant under the lease. The scheme operated to bring the tenancy to an end simply because the tenant was an entity with a limited and defined life and the lease terminated automatically when the tenant ceased to exist.

Contracting out

I have gone out of my way to emphasise how this kind of scheme operates because counsel for the pursuer repeatedly argued that the tenant (by which was meant the pursuer) had contracted out of his statutory rights to security of tenure under the 1991 Act. Counsel put the matter in this way, of course, because there is clear authority that an agricultural tenant cannot contract out of his right to serve a counter-notice since the legislation giving him that right is conceived, not simply in the interest of any particular tenant, but in the interests of the whole community which should profit from the long-term improvement of British agriculture. The *House of Lords so held in Johnson v Moreton* . By a term of the lease itself the tenant in that case was taken bound not in any event to serve a counter-notice. The House ruled that this term was invalid. The same approach was taken in *Featherstone v Staples* where the landlords granted an agricultural lease to a partnership having as one of its partners a company which was wholly owned by the landlords. The partnership agreement contained a term by which the other partners agreed not to serve a counter-notice without the consent of the company, *ie* in effect without the consent of the landlords. The Court of Appeal held that, even though the term ***30** was contained in the partnership agreement rather than in the lease itself, it was void and unenforceable since it sought to deny the tenants' statutory right to serve a counter-notice.

These cases are the clearest possible authority that an agreement or contractual term by which a tenant under an agricultural lease renounces his statutory right to serve a counter-notice will be regarded as unenforceable. Such attempts to contract out of the counter-notice provisions are doomed to fail. But, for the reasons which I have given, this is not a case where the tenant has contracted out of his rights under the Act. According to the terms of the leases, the parties to the leases were the landlords and the partnerships. There was no term which sought to take away the right of the limited partnerships *qua* tenants to serve a counter-notice under the 1991 Act. The scheme was deliberately designed, of course, to make sure that the occasion where such a notice might be served would not arise. But none the less, if such an occasion had arisen, there would have been nothing to prevent the limited partnerships from exercising their right under the Act to serve a counter-notice on the defenders. Since the scheme operated in this way I do not find the actual decisions in *Johnson* or in *Featherstone* of assistance in considering the present case.

The Scheme as a Device to Avoid Security of Tenure Provisions

In reality, although counsel referred to contracting-out, the pursuer's attack was directed at the very nature of the scheme as a whole: it was said to be a pretence or device to avoid the operation of the security of tenure provisions. I consider later the underlying assumption that the pursuer was the tenant whose rights were being thwarted. It should, however, be noted that counsel for the pursuer accepted that if there were some sound commercial reason why a limited partnership had been formed to farm a holding then a lease to a limited partnership would be valid. That concession was unavoidable since a limited partnership is an entity which is recognised by our law and there is nothing in the 1991 Act to prevent such a partnership from being a tenant of an agricultural holding. If authority for this view is required it can be found in the decision of the *Land Court in Dickson v MacGregor* at p 20 . But counsel argued that if the parties' only purpose in setting up the limited partnership was to avoid the statutory provisions on security of tenure then the position was different—then there would be no genuine partnership relationship and it should be struck at.

This submission runs together two distinct propositions. The first is that the purpose of introducing a limited partnership was to avoid the protection afforded by the 1991 Act. The second is that in some sense the limited partnership was not genuine—the suggestion apparently being that, *because* the partnership was introduced to avoid creating a situation where a tenant would be entitled to security of tenure, the partnership should *for that reason* be regarded as not genuine and indeed, in the terms of the first and third declarators, it should be regarded as ‘a nullity’.

Such an argument is a *non sequitur* . The history of many aspects of our law, not least in Revenue matters, is littered with schemes involving various steps which have been devised to avoid some result which Parliament had decreed should apply in particular circumstances. The very success of such schemes will often depend on the steps being regarded as genuine. Precisely this point was brought out by Lord Steyn in *Inland Revenue v McGuckian* , the decision in ****31*** which was handed down after the argument in this case was completed. It was an appeal involving the approach to tax avoidance schemes first laid down in *Ramsay v Inland Revenue* . Lord Steyn said at p 1001G of the scheme in *McGuckian* : ‘Neither the individual steps nor the composite transactions were simulated transactions in the sense in which those terms are understood in contract law or trust law: see *Snook v London and West Riding Investments Ltd.* …On the contrary, tax avoidance was the spur to executing genuine documents and entering into genuine arrangements. But this appeal is concerned with a different question, namely the fiscal effectiveness of the composite tax avoidance scheme.’

Nor is it the law that, just because a scheme is designed to avoid some statutory provision, the individual steps or transactions making up the scheme, which would otherwise be valid, should for that reason alone be regarded as unlawful or invalid. In this connexion counsel for the respondents pointed indeed to the radical line of cases involving tax avoidance schemes which began with *Ramsay. In those cases the approach of the House of Lords* required the courts to look at the series of transactions as a whole and to judge their overall effect; it did not on the other hand mean that the courts were to regard any of the transactions in the series as a nullity. This was the point which Lord Oliver of Aylmerton stressed in *Craven v White* at p 503H : ‘It is equally important to bear in mind what the case [*Ramsay*] did not decide. It did not decide that a transaction entered into with the motive of minimising the subject's burden of tax is, for that reason, to be ignored or struck down. Lord Wilberforce was at pains to stress that the fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides (see [1982] AC at p 323). Nor did it decide that the court is entitled, because of the subject's motive in entering into a genuine transaction, to attribute to it a legal effect which it did not have.’ Later in his speech, referring to some observations of Lord Diplock in *Inland Revenue Commissioners v Burmah Oil Co Ltd* at p 124 , Lord Oliver of Aylmerton had this to say: ‘It is this reference to the motive of the taxpayer in engaging in a particular transaction which represents the significant alteration in approach and which raises immediately the question why the taxpayer's motive for an action, otherwise lawful and effective, should lead to its being disregarded. It does not, I think, arise from a moral judgment which the court is called on to make, for Lord Fraser in his speech stressed that the fact that the purpose of a scheme is tax avoidance does not carry any implication that it is in any way reprehensible or other than perfectly honest and respectable…The reason must, therefore, be something else and it is, I think, simply this: that the absence of any commercial motive underlines the artificiality of the interrelated transactions and entitles the court to disregard them because they are not intended to produce anything other than an artificial fiscal result.’ The remarks of Lord Fraser of Tullybelton to which Lord Oliver of Aylmerton alludes are to be found in *Burmah Oil* at p 130 .

I have already pointed out that counsel for the defenders conceded that the purpose of the parties to the contracts of limited partnership in this case was to create a tenant of these agricultural holdings which would exist only for a limited period and so not attract the operation of the security of tenure provisions in the 1991 Act. In the light of the comments of Lord Fraser of Tullybelton and Lord Oliver of Aylmerton it is worth emphasising that there was nothing reprehensible or other than perfectly honest and respectable in what the parties did. Nor does the parties' purpose in concluding the contracts provide any ****32*** reason for striking them down or holding that they were a nullity. So in my view the defenders' counsel's frank and proper concession about the purpose behind the contracts of limited partnership would not of itself justify the court in pronouncing declarators that the contracts of limited partnership were a nullity.

The Pursuer's Argument from the Revenue Cases

In the Revenue cases, of course, for the reasons explained by Lord Oliver of Aylmerton the House of Lords has been prepared to look at a whole series of interrelated transactions and, while not impugning their individual validity, to disregard them on the ground that they were not intended to produce anything other than an artificial result. Senior counsel for the pursuer submitted that in the present case the court should adopt the approach which the House of Lords had taken to artificial transactions in *Ramsay* . Counsel drew attention to the (admittedly *obiter*) remarks of Slade LJ in *Featherstone* at p 897G where he seemed to leave open the possibility of treating artificial transactions differently. Counsel urged us to follow the reasoning of the *Court of Appeal as expressed in the opinion of Dillon LJ in Gisborne v Burton* at pp 398 – 399 where reference is made to *Ramsay* . I shall require to consider *Gisborne* in a little more detail below, but for present purposes it is sufficient to say that I certainly accept that, where a series of steps has been taken as part of one scheme, the court should look at the scheme as a whole (at p 399B–C). But if Dillon LJ is going a stage further and suggesting that, having looked at the various steps as a whole, the court should somehow disregard them, I do not with respect consider that such an approach is justified in this context.

In *McGuckian* the House of Lords identified the essence of the *Ramsay* approach as involving the abandonment of the previous literal approach to the interpretation of taxing statutes combined with a willingness to look at the true nature of a composite transaction rather than at its individual components in isolation. For fiscal purposes the artificial steps are disregarded and the fiscal focus is directed on the end result. In *McGuckian this led the House of Lords* to the conclusion that moneys paid by way of a dividend were really received by a trustee for the taxpayer as income rather than as capital and were therefore taxable as such.

That approach looks to the practical result and the taxpayer is taxed on that practical result. It does not involve substituting a different legal relationship for the legal relationships which the parties have created. These indeed remain. In the present case by contrast the pursuer is asking the court not only to disregard the actual legal relationships which the parties entered into, but also to hold that they in fact entered into a different legal relationship, *viz* a lease by Mr Gilbert or the defenders to the pursuer. In my view the *Ramsay* line of cases does not provide authority for that approach.

I am fortified in this view by the decision of the *Court of Appeal in Belvedere Court v Frogmore* . In order to avoid the operation of certain provisions of the Landlord and Tenant Act 1987 giving tenants a right to acquire their landlords' reversion, the landlords of a block of flats granted long leases of the individual flats to an associate company. The tenants' management company sought a declaration that it was entitled to acquire the estate or interest unencumbered by those leases. Sir Thomas Bingham MR said, at p 326 : 'I share the judge's view that these arrangements were not a sham. There was no element of pretence, ***33** as there was in *Gisborne v Burton* . The parties were not doing one thing and saying another. I would also accept the judge's view that the Atherton leases were an artificial device intended to circumvent a result the Act would otherwise have brought about. But the finding of such a device did not defeat the reversioners in *Jones v Wrotham Park Settled Estates* nor the lessor in *Hilton v Plustitle Ltd* and I am not for my part satisfied that in the field of real property the principles in *W T Ramsay Ltd v IRC* and *Furniss v Dawson* entitle the court simply to ignore or override apparently effective transactions which on their face confer an interest in land on the transferee. Many transactions between group companies may be artificial. That does not entitle the court in ordinary circumstances to treat such transactions as null.' In my view therefore even if the creation of the partnerships and the leases to them can be regarded as being in some sense artificial, that is no reason in itself to ignore or override these transactions or to treat them as null even though they are specifically designed to bring about a situation in which the statutory rules on security of tenure are unlikely to come into operation. Like the Lord Ordinary I find support for that approach in the decisions in the company lease cases under the Rent Acts, *Hilton v Plustitle Ltd* and *Kaye v Massbetter Ltd.*

Arguments relating to the Public Interest

Counsel for the pursuer sought to distinguish *Belvedere Court* and the company lease cases on the ground that the public interest in security of tenure of agricultural tenants was of a particularly high level—higher than both the public interest in tenants being entitled to acquire their landlords' reversion under the Landlord and Tenant Act 1987 and the public interest in residential tenants being entitled to the relevant measure of security of tenure under the Rent Acts. Since the public interest in security of tenure for agricultural tenants was greater, this court should approach artificial transactions in the sphere of the 1991 Act differently from the way in which the Court of Appeal had approached artificial transactions in the sphere of the Landlord and Tenant Act 1987 and the Rent Acts.

I have already explained that in my view the only touchstone by which a court can gauge the public interest in matters which are regulated by statute is the terms of the legislation enacted by Parliament. Where Parliament has passed a number of statutes protecting different interests it is impossible for the court to assess the relative importance of the interests protected by Parliament except by reference to the degree of protection afforded to them by the legislation which has been enacted. That in turn must be judged by the terms of the various statutes. In putting forward their submissions about the relative importance of the interests protected by the statutes to which I have referred, counsel were unable to grade their terms in any way which would show that Parliament had attached greater importance to the public interest in agricultural tenants' security of tenure under the 1991 Act than to the public interest in tenants' purchasing rights under the Landlord and Tenant Act 1987 or to the public interest in the protection of residential tenants under the Rent Acts. For that reason I cannot accept counsel's argument that there is some greater public interest in security of tenure for Scottish agricultural tenants which would justify this court in distinguishing the *Court of Appeal's approach in Belvedere Court* and in adopting a different approach to schemes which involve the introduction of a limited partnership as a tenant in an agricultural lease.

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I would add this. When the court is asked to proceed on the basis that limited partnership schemes are against the public interest it is relevant to remember that they have existed in Scotland for over a quarter of a century. During that time such schemes have become widespread and their operation must have been well known to all who have an interest in agriculture, including Government ministers in various administrations. Yet no steps have been taken to alter the agricultural holdings legislation to prevent the granting of agricultural tenancies to limited partnerships. In these circumstances it is not for this court to second guess those who are charged with policy in this matter and to strike these schemes down simply on the basis of our uninstructed view of what might be contrary to the public interest in good husbandry.

Whether the Partnerships were Non-Existent

The argument on behalf of the pursuer was taken further, however. Counsel submitted that the pursuer was not simply offering to prove that the parties had entered into these contracts of limited partnership to defeat the legislation: they were also offering to prove that the limited partnerships had no real existence at all and that they were a pretence. This argument was put in a variety of ways, not all of which were consistent with one another. The essential contention was, however, that if the limited partnership had not been genuine, then the scheme was open to challenge. Counsel referred to the *obiter* observations of the *Land Court in Dickson v MacGregor* where they said, at p 21 : ‘If the original arrangement in the present case had been designed entirely to avoid security of tenure under the 1949 Act, with no genuine partnership enterprise, it might have been open to challenge by the tenant, as being a “pretence” following *Featherstone* and *Gisborne* —but with an added complication of a Scottish partnership firm as tenant.’

The authorities show that the courts have recognised that in certain circumstances it is proper to look beneath the surface of a transaction to see what is the real nature of the relationship between parties to the transaction. The first type of situation is where the transaction is a sham. The idea of a ‘sham’ is described by Diplock LJ in *Snook v London and West Riding Investments Ltd* at p 802 where he says that if ‘sham’ has any meaning in law, ‘it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court of the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* and *Stoneleigh Finance Ltd v Phillips*), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived'. As the Lord Ordinary points out there is in the present case 'no averment that the relevant actings or documents were not intended to create the legal rights and obligations which they gave the appearance of creating'. In particular there is no averment that the parties intended to create leases between the landlords and the pursuer as an individual, but chose to execute documents which would give the appearance of leases to limited partnerships. Like the Lord Ordinary I doubt whether any such averment ***35** could have been made since it is plain that the intention of the landlords at the very least must have been to create leases to the limited partnerships which would have a limited life. It is not to be forgotten either that the original offer which the pursuer accepted envisaged that any lease would be to a limited partnership. Not surprisingly therefore counsel for the pursuer disclaimed any intention of seeking to persuade us that the parties had been engaged in a *Snook* sham.

Counsel argued instead that the relevant pretence was to be found in the fact that the documents did not reflect the reality of the situation. Under reference to *Street v Mountford* and *Antoniades v Villiers* counsel argued that the pretence was that there was a limited partnership, whereas the reality was that the pursuer was the tenant of the holding. Like the Lord Ordinary I do not obtain much assistance from the decision in *Street. In that case the House of Lords* held that where the legal effect of an agreement was to create a tenancy it made no difference that the parties professed only to be creating a licence. There is no suggestion in the averments in this case, however, that the court should construe the limited partnership agreements as agreements creating a legal relationship of a different kind between the parties to those agreements. Similarly, it is not suggested that, in entering into what professed to be contracts of lease between the landlords and the limited partnerships, the parties actually created a mutual legal relationship of a different kind.

In *Antonaides* the *House of Lords took the approach in Street* a little further. Their Lordships held that, where the owner of a flat had in fact agreed to give exclusive possession of the flat to a couple and had thereby created a joint tenancy, the position was not altered merely because the relevant agreement contained a clause which suggested that the landlord could go into possession along with the tenants. If intended to be acted upon, such a clause would be inconsistent with the existence of a lease and would mean that the relationship between the parties was one of licence. The House of Lords decided, however, that the landlord never intended to exercise the right contained in the clause and that the clause was simply a pretence which was inserted to give the impression that the arrangement was a licence. In these circumstances the clause could be ignored. The documents therefore created a joint tenancy. Again I do not find their Lordships' decision of direct assistance since it was not suggested that in the present case any clause had been inserted into either the partnership agreements or the contracts of lease in order to make it appear that the parties to them had entered into an agreement of a different kind.

Counsel suggested, however, that we should follow the kind of pragmatic approach which the *House of Lords had adopted in Antoniades* . In particular their Lordships held that when deciding whether the crucial clause was a pretence it was legitimate to look not only at the documents themselves but also at the actings of the parties, including their actings after the agreements had been concluded. Counsel submitted that similarly in the present case the court should not simply look at the documents but should also look at the surrounding circumstances in order to decide whether arrangements were merely a pretence. In the words of Lord Templeman, at p 462G–H , we should be astute to detect and frustrate such a pretence.

Counsel for the pursuer listed a number of factors which they said pointed to the limited partnerships being a pretence. The pursuer had been given entry and the ingoing valuations had been agreed simply on the basis of the letter of ***36*** offer in April. The limited partnership agreements had not been signed until May. The missives of lease were not signed until June although they had a date of entry from 28 May. These facts showed that the landlord had been happy to let the pursuer on to begin farming as an individual before the pretended documents had been completed. He was farming with exclusive possession of the subjects. The pursuer put £25,000 of capital into the business whereas under the limited partnership the limited partners merely agreed to contribute £10 of capital and in fact did not actually contribute anything. Hence no interest was paid to the limited partner. The partnership had no separate partners' bank account. Instead of being addressed to the partnership the rent demands were addressed to the pursuer as an individual and the rent was paid by the pursuer using a cheque drawn on his own account. The partners never met to confer about the business of the partnership as envisaged in the agreement. There was a dispute about a water supply to the farm steading at Laingseat in which Mr Gilbert had not acted in a manner which was consistent with farming in partnership with the pursuer. The pursuer was offering to prove all these actings or lack of actings. If the pursuer succeeded, then it would be open to the court to take all these circumstances into account and conclude that the limited partnerships had never been anything other than a pretence. Although, as counsel for the defenders contended and as I note when considering the pursuer's contention that he was a tenant under the missives of lease, these averments of the pursuer really require to be seen in the context of his averments as a whole, I am content for present purposes to take them in isolation.

I accept, of course, that the subsequent conduct of the parties is admissible as evidence on the question of whether the partnership agreements were or were not genuine documents giving effect to the parties' true intentions. That was the test which Lord Oliver of Aylmerton applied to the clause in the lease in *Antoniades* at p 469C . But it is noteworthy that in applying it Lord Oliver of Aylmerton upheld the judge's decision that the licences were artificial transactions designed to evade the Rent Acts on a finding ‘that they were sham documents designed to conceal the true nature of the transaction’. In other words he held that the parties truly intended to enter into a tenancy agreement but used sham documents designed to conceal the true nature of the transaction. By contrast, as I have explained already, the pursuer in the present case does not aver that the pursuer and Mr Gilbert or the defenders intended to enter into a different kind of contract. We are therefore left with the situation that the pursuer offers to prove that he ‘entered into the contract of limited partnership with Mr Gilbert in respect of Laingseat’ and ‘with the defenders in respect of Milton’ (art 9). He proceeds on the basis that the contracts were formally constituted, but says that beyond that neither had any existence or substance and that each of them was a pretence (art 11). It is in support of this last averment that the pursuer points to his averments as to what happened in April 1987 and as to what did or more precisely did not happen in relation to the partnerships. On this basis the pursuer asks the court to pronounce declarators that the limited partnerships were invalid and nullities.

In my view the pursuer's averments are irrelevant. Where two parties having all the necessary powers exchange consents in formal documents, then the usual result in law will be that a contract is concluded. In certain situations, even though there is an agreement, the parties do not intend that it should be binding in law and no contract results. Nothing like that is suggested in the ***37*** present case. On the pursuer's own averments in each case the parties exchanged formal missives to conclude a contract of co-partnery. The partnership was registered as a limited partnership. The law will look behind any such apparent agreement if it is simply a sham which is designed to conceal the true nature of the parties' agreement. But the pursuer makes no such case on record. In that situation I can see no basis upon which, even if the pursuer proved all his averments about prior and subsequent actings, it would be open to a judge to hold that the parties' exchange of consents was of no legal effect and that they did not become contractually bound by the terms of the partnership contract. That being so, I can also see no basis upon which the court could hold that the partnerships did not come into existence on 28 May 1987 in terms of cl 2 of the respective agreements.

In pressing us to allow a proof before answer on this matter counsel for the pursuer prayed in aid the majority decision of the *Court of Appeal in Gisborne* . That case was similar to the present case in that it concerned a scheme to avoid the security of tenure provisions of the Agricultural Holdings Act 1948 . The landlord, Mr Christopherson, granted a tenancy of certain farm land to his wife, who on the same day granted a subtenancy of the land to the defendant at the same rent. The landlord died and his personal representatives served a notice to quit on his widow. When she failed to serve a counter-notice, they claimed an order for possession of the land on the basis that, the head lease having come to an end, the sub-lease to the defendant had come to an end also. Among the clauses in the head lease was one by which the landlord's wife agreed to farm and cultivate the land in accordance with the rules of good husbandry. Since it was perfectly clear that Mrs Christopherson was not going to farm the land at all, because farming had become too difficult for herself and her husband and because the defendant was going to take it over, Dillon LJ concluded, at p 399F–G , that the landlord's wife was at highest a mere nominee or agent of the landlord to grant a tenancy to the defendant, and that what had actually happened was that the landlord had granted such a tenancy to the defendant.

The critical conclusion in *Gisborne* was that the landlord had in fact granted a tenancy to the defendant. Once the majority of the Court of Appeal had reached that conclusion, they were then able to reach the further conclusion that the scheme which had been contrived with the use of a head lease and a sub-lease must fail because the landlord and his wife ‘were trying to do by the documents what, for the reasons given in *Johnson v Moreton* , the law does not permit, *viz* to grant the defendant an agricultural tenancy without the statutory protection’ (at p 400H).

The crucial point, however, was that the majority felt able to conclude that the landlord had in fact intended to grant a lease to the defendant. Once they reached the view that the parties had executed a head lease and a sub-lease but the landlord had intended to grant a lease direct to the defendant, the case really became similar to the type of sham described by Diplock LJ in *Snook* where the parties execute documents which are intended to give the appearance of creating between the parties legal rights and obligations different from those which they actually intend to create. By contrast counsel for the pursuer explicitly accepted that the present case does not involve a *Snook* sham. That reflects the way in which his case is pled. The pursuer does not aver that Mr Gilbert or the defenders intended to grant a lease to the pursuer but that the parties disguised ***38** that intention by the use of the limited partnership and the lease to the limited partnership. That being so, the decision in *Gisborne* is distinguishable. See *Hilton v Plustitle Ltd* at p 155 *per* Croom-Johnson LJ and *Belvedere Court* at p 326d–f *per* Sir Thomas Bingham MR. This aspect of the pursuer's argument appears in any event to be vitiated by the assumption, which I have rejected above, that if the partnership was part of an artificial scheme the partnership was *ipso facto* invalid.

The Pursuer's Original Alternative Argument

As I mentioned at the outset, both before the Lord Ordinary and before this court the pursuer had a fall-back position to the effect that, even in the limited partnerships were valid, the provision that the partnerships should terminate on 27 November 1992 was null. I reject that argument essentially for the same reasons as the Lord Ordinary gives for rejecting it. There is nothing in our law to prevent parties to a contract of partnership agreeing, as the parties did by cl 2 of each of the partnership contracts, that the firm should come to an end on a certain date. Such a term is valid. I have already explained that I reject the pursuer's contention that this kind of termination clause is in effect to be equated with a clause by which a tenant contracts out of his right to serve a counter-notice under sec 22 of the 1991 Act. I am accordingly satisfied that the termination clause in each contract was effective; that the partnerships came to an end on 27 November 1992 and that the pursuer is therefore not entitled to decree of declarator in terms of conclusions 2 and 4.

For these reasons, which are essentially the same as those which the Lord Ordinary expressed with such commendable brevity, I agree with his overall conclusion that the pursuer's averments are irrelevant. Although that is sufficient to dispose of the reclaiming motion, I think it right to refer to certain matters which were the subject of considerable debate before us but which for various reasons are not covered in the Lord Ordinary's opinion.

The Pursuer as Tenant under the Lease

In presenting the reclaiming motion counsel for the pursuer placed the main emphasis of their argument on the importance attached by the law and public policy to security of tenure and on why therefore the Lord Ordinary had been wrong to reject the argument that the limited partnerships were invalid because they were part of a scheme which was designed to evade secs 21 and 22 of the 1991 Act. That is the matter with which I have dealt in the opinion so far. But in fact this is a live issue between the pursuer and the defenders only if the pursuer can establish that he was a tenant who was entitled to the benefit of those sections. If he was not a tenant who could invoke their protection, he cannot complain that the defenders sought to deprive him of that protection. Putting the same point in a slightly different way, the pursuer has no interest to ask for a declarator that the partnerships were nullities and were not therefore the tenants under any pretended leases from the defenders unless he can show that he himself was truly the tenant of the holdings. It is therefore necessary to see on what basis the pursuer claims to be the tenant. During the debate counsel for the pursuer advanced two possible arguments.

The first is reflected in conclusion 1(iii) so far as Laingseat is concerned and in conclusion 3(iii) so far as Milton is concerned. The argument is that in each case the pursuer's tenancy can be inferred from a number of factors which are averred in the pursuer's pleadings. Essentially the argument is the same for ***39** each of the holdings and I can therefore refer simply to what is said about Laingseat. First, counsel pointed out that the pursuer was allowed into possession of the holding on 14 April 1987 and was allowed to engage in agricultural operations. He then referred to the missives of let dated 3 and 19 June 1987. Counsel also relied on the facts that the pursuer had tendered rent using cheques drawn on his personal account and that the defenders had accepted that rent.

The central element in the pursuer's argument—and by far the most puzzling—is his reliance on the missives of let. What the landlord's offer said was that the landlord was letting Laingseat ‘to Laingseat Farm, a limited partnership constituted under the Limited Partnerships Act 1907 , and of which the partners are the Landlord and yourself (which limited partnership is hereinafter called "the Tenant") ALL and WHOLE the Farm of Laingseat…’ That was, of course, the offer which was then accepted by C & P H Chalmers on 19 June in the following terms: ‘On behalf of and as instructed by our clients Laingseat Farm, a limited partnership under the Limited Partnerships Act 1907 , we hereby accept your offer dated 3 June 1987 to lease to our clients ALL and WHOLE the farm of Laingseat, Potterton, Aberdeenshire on the terms and conditions set out in your offer and hold the bargain between our respective clients as concluded.’ The terms of those missives are clear and they suggest that what was concluded was a lease between Mr Gilbert and the limited partnership of Laingseat Farm. It is trite that in Scots Law a partnership is distinct from the partners themselves. A lease to a firm is therefore not a lease to the individuals who make up the firm or to anyone else. If authority for such a proposition is required it can be found in the speech of Lord Reid in *Inland Revenue v Graham's Trs* at p 20 where his Lordship says that where a partnership which had been a tenant was dissolved ‘there was no tenant, because the farm had been let to the co-partnership and to no one else.’ A lease of Laingseat which is on its face a lease to a co-partnership is *prima facie* inconsistent with a lease to the pursuer. It is therefore hard to see how the pursuer can invoke these missives as somehow being the foundation for a lease of Laingseat to himself as an individual.

Counsel sought to argue that, because the contract of limited partnership was bad, the provision in the lease which made the grant to the limited partnership was invalid. In other words, though the missives of lease as a whole were valid, the actual provision naming the limited partnership as the person to whom the offer of the tenancy was made was itself invalid. This argument is not consistent with the terms of the first conclusion which does not seek a declarator that any part of the missives of lease is invalid. To judge by the terms of the conclusion, the pursuer is proceeding on the footing that the missives of let are perfectly valid.

In fact, however, the argument faces greater difficulties than that. The starting-point as set out in conclusion 1(i) is that the contract of limited partnership 'was a pretence'. Conclusion 1(ii) goes on to ask the court to declare that 'the said contract of limited partnership was a nullity'. In argument counsel for the pursuer expressly accepted that, if the contract was a nullity, it had been a nullity at the very moment when it was signed. In other words on the pursuer's own approach the limited partnership never came into existence. The logic of that position must be that by Paull & Williamson's letter of 18 June Mr Gilbert offered to let Laingseat to an entity (the supposed limited partnership) which did not exist and that on 19 June C & P H Chalmers accepted that offer on behalf of that non-existent entity. It is extremely difficult to see what legal force ***40** these letters would have if the partnership had all along been a nullity. But the point does not require to be explored since the fundamental difficulty remains that of seeing how those letters, whatever their status, could confer any rights on the pursuer as an individual. In my view, given the terms of the letters, they simply cannot provide any basis for a claim by the pursuer to be or to have been a tenant of Laingseat.

Since I reject the central element in the pursuer's argument, it follows that in my view this argument must fail. The other elements are really only makeweights. Although much was made of the point that the pursuer was given possession of the land and allowed to farm before the missives of let were concluded, in my view this is a matter of little importance. He was allowed on to the land only after he had replied to the advertisement in terms which refer to 'the lease and associated contract of co-partnery'. Moreover in art 7 the pursuer admits that 'no rent was demanded, tendered, received or accepted in respect of any period prior to' 28 May—which is the date on which the lease to the partnership commenced in terms of the missives of let to the partnership. It is extremely difficult to see how the fact that the pursuer was allowed on to the farm but was not charged rent can of itself point to the existence of a tenancy under which the pursuer was obliged to pay rent—the rent in question and the other terms of the lease being apparently those specified in the missives of let to the limited partnership. Even if the pursuer were to prove his averments that he paid the rent specified in the missives of let with his personal cheque, that would not in my view entitle a court to draw the inference that he was a tenant under the missives. For these reasons I reject the first approach by which the pursuer claimed that his averments showed that as an individual he was a tenant of Laingseat. For the same reasons I also reject that approach so far as Milton is concerned.

Pursuer as Common Law Tenant

The pursuer has a second approach, however. When the difficulties with his first approach emerged in the course of the debate before us senior counsel for the pursuer asked for an adjournment to prepare a minute of amendment. The adjournment was granted and the minute of amendment was lodged. Senior counsel for the defenders opposed the motion that we should allow the minute to be received, but in the event we granted the motion. Since the defenders did not wish to lodge answers, we allowed the closed record to be amended in terms of the minute of amendment. The effect of the minute was to introduce two new conclusions, 1A and 3A, with corresponding pleas-in-law and a short passage of averment. The purpose of the amendment was to lay the basis for an alternative argument for saying that the pursuer was a tenant of the defenders. The important thing to notice is that these conclusions seek a declarator that the leases of the holdings were a nullity. In other words the pursuer asks the court to pronounce these declarators if it holds that the partnerships were invalid and that the leases were also a nullity because the landlords had purported to grant them to non-existent limited partnerships. This is the key element in the pursuer's alternative argument.

This alternative argument was to the effect that the pursuer had a so-called common law tenancy. Counsel referred to the general doctrine mentioned in the speech of Lord Keith of Kinkel in *Morrison-Low v Paterson* at p 78 : ‘In the ordinary case, there can be no doubt that where a proprietor admits someone *41 into possession of an agricultural holding, or maintains him in such possession without any pre-existing right thereto, and regularly accepts rent from him, there is an inescapable inference that a tenancy has been brought into existence, and it is of no moment that no particular occasion can be pointed to upon which the parties agreed to the one granting and the other taking a tenancy.’ In that case an agricultural holding had been let under a lease entered into in 1929. The tenant died in 1973 and the appropriate steps were not taken to ensure that the lease continued. The lease came to an end in December 1974, but neither the landlord nor the tenant's executors realised this and the executors remained in possession and the landlord continued to receive the rents. Lord Keith of Kinkel described the result in this way at pp 78 – 79 : ‘The true position in law was that the 1929 lease gave the defenders, at all events after 4 December 1974, no right or title to possession of the farm. The landlord did not know this. But the fact remains that he did maintain the defenders in possession of the farm, he did demand and accept rent from them, and he did allow them to carry out improvements. It does not avail him to say that he would not have done so had he known the true legal position. The defenders' possession was not capable of being ascribed in law to the 1929 lease. It must, therefore, be ascribed to something else, and that something else can only be an agreement. The parties did in fact agree, as demonstrated by the possession of the defenders and the acceptance of rent by the landlord. The circumstance that both had been misled about the legal position is irrelevant. The former legal basis for the defenders' possession came to an end on 4 December 1974, and, as later events demonstrate, the new one came into existence at the same time.’ Counsel for the pursuer submitted that the same kind of reasoning could be applied in the present case. Here, said counsel, the pursuer avers that he was admitted into possession of the holdings without any pre-existing right and he also avers that Mr Gilbert and the defenders accepted rent from him. In the normal case this would be sufficient to infer that there was a tenancy between the parties. The only basis upon which the defenders can argue that this inference should not be drawn is that the pursuer occupied and farmed the holdings by virtue of the leases to the respective partnerships. The pursuer offers to prove that those partnerships and leases were nullities. If the court so declares, then the position will be that the pursuer's occupation of the holdings cannot be ascribed in law to those pretended leases to the partnerships; they must, however, be ascribed to something else and that something else must be an agreement between Mr Gilbert and the pursuer in the case of Laingseat and an agreement between the defenders and the pursuer in the case of Milton.

This approach avoids the more clamant contradictions which are inherent in the pursuer's first approach. On the other hand junior counsel for the defenders submitted that substantial difficulties stood in its way. I do not require to examine the competing submissions. It may be true to say, as junior counsel for the defenders submitted, that no unequivocal inference as to the existence of a tenancy can be drawn from the actings set out in the averments upon which the pursuer founds this aspect of his case. But that would not in itself be a sufficient reason to refuse to allow a proof before answer of these averments since, having heard the proof, the judge might consider that this inference should be drawn even though it is not one which appears to be unequivocal when judged by reference to the averments. If therefore I had reached the view that the pursuer had averred a relevant case for a declarator that the limited partnership *42 agreements were invalid and a nullity, I should have favoured allowing a proof before answer on the whole matter. Since in my view, however, the court would not be justified in pronouncing the declarator which would open the way to the *Morrison-Low* argument, I conclude that the pursuer's entire case is irrelevant.

Counterclaim

The defenders have a counterclaim. In the court below it was apparently agreed that, if the claim in the principal action were dismissed, the defenders' counterclaim should be dismissed also. The defenders may have adopted this attitude because they thought that the pursuer would give up his occupation of the holdings. He has not done so. In fact, however, the sums sought in both of the conclusions in the counterclaim have been paid. If the counterclaim were to proceed, the defenders would require to amend the pleadings and the conclusions. Any sums which the defenders now claim could be the subject of separate proceedings. Counsel for the defenders did not really suggest that the counterclaim should be revived if we were to dismiss the pursuer's claim in the principal action. In that situation I should favour refusing the defenders' cross-appeal in respect of the counterclaim.

Conclusion

For these reasons I would repel pleas in law 3A and 4A for the pursuer, dismiss the action so far as laid against the defenders in conclusions 1A and 3A, refuse the reclaiming motion and the cross-appeal and adhere to the interlocutor of the Lord Ordinary.

Lord Kirkwood——

I am in full agreement with the opinion of your Lordship in the chair.

Counsel for the defenders frankly conceded that the two arrangements, which involved leases to limited partnerships in which the landlords were what are colloquially known as "sleeping partners", were entered into in order to enable the landlords to control the existence of the tenant and the duration of each lease. When each of the limited partnerships came to an end, the lease to that limited partnership would also come to an end and the agricultural holding would revert to the landlord. Each arrangement was designed to make it clear that the pursuer was the general partner and was not the tenant so that he would be unable, as tenant, to invoke the statutory provisions relating to security of tenure.

Junior counsel for the pursuer submitted that, even if all the obligations contained in the contracts of limited partnership had been implemented, the scheme was not a legitimate means of avoiding the operation of the security of tenure provisions. It was permissible for parties to contract out of those provisions and that was the intended effect of the arrangements which had been made. However, senior counsel for the pursuer conceded that if all the obligations contained in the contracts of limited partnership had, in fact, been implemented then, as he put it, all would be well and the arrangements would not have been open to challenge.

In my opinion, there is no objection in principle to a lease of an agricultural holding being granted to a limited partnership in which the landlord is the limited partner, even when the admitted purpose of the arrangement is to ***43*** prevent the general partner becoming the sole tenant and therefore being able to rely, as tenant, on the statutory provisions relating to security of tenure. I do not consider that such an arrangement is *per se* contrary to public policy. For at least 25 years it has been common practice in Scotland for agricultural holdings to be leased to limited partnerships in which the landlord is the 'sleeping partner' and no attempt has been made by Parliament to bring such a practice to an end. In the circumstances I am clearly of the opinion that the admitted objective of such an arrangement would not be a ground for declaring that it is unlawful (*Featherstone v Staples* and *Dickson v MacGregor*). This is not to say that such an arrangement will be immune from challenge on some other ground but in the event of a challenge being made, each case must be considered in light of its own particular circumstances and the averments made by the parties. Further, I do not consider that such an arrangement constitutes an attempt to contract out of the statutory security of tenure provisions. In the case of a lease to a limited partnership, the tenant is the limited partnership and, so long as the lease endures, the limited partnership will be entitled to the statutory protection afforded by the Agricultural Holdings (Scotland) Act . Unless, and until, the general partner can establish that he was, as an individual, the tenant of the agricultural holding, he cannot say that he has been deprived of the statutory protection afforded by the Act.

However, in the present case the pursuer goes on to aver that, beyond the formal constitution of the two limited partnerships, neither had to his knowledge any existence of substance. In art 11 of the condescendence he makes the specific averments which have been set out by your Lordship in the chair and he avers that in these circumstances each limited partnership was a pretence and that ‘the purpose of each was to avoid granting in favour of the pursuer as tenant of each holding the right of security of tenure granted to tenants of an agricultural holding by the Agricultural Holdings (Scotland) Act , and furthermore to deprive the pursuer as such tenant of the right to resist a notice to quit each holding at the instance of the landlord thereof’. In the circumstances he alleges that each contract of limited partnership was a nullity and he seeks decree of declarator to that effect.

The pursuer does not seek reduction of the contracts of limited partnership and it seems to me that, if reduction was sought, there could be difficulties inherent in the concept of seeking to reduce partnership contracts which had, according to their terms, come to an end before the present action was raised. However, we were asked not to concern ourselves with the absence of a conclusion for reduction and to address the principal issue between the parties, namely, whether or not the pursuer's averments in support of his conclusions for declarator that each limited partnership was a nullity, are relevant. In this connection we had to bear in mind that the action cannot be dismissed as irrelevant unless we are satisfied that it must necessarily fail even if all the pursuer's averments are proved (*Jamieson v Jamieson*).

The pursuer's case on record is that each of the contracts of limited partnership was a ‘sham’ or a pretence in respect that neither of them had any existence or substance, the sole purpose of the arrangements entered into being to avoid granting in favour of the pursuer, as tenant, a statutory right of security of tenure. Counsel for the pursuer conceded that if there had been good commercial reasons for the constitution of a limited partnership and a lease to that limited partnership, the arrangement might be acceptable. However, it was submitted ***44** that the pursuer had averred facts and circumstances which, if they could be proved, were capable of demonstrating that each limited partnership was a ‘sham’ or a pretence and that the pursuer was entitled to a proof before answer in order to give him an opportunity of proving the averments which he had made. In these circumstances it is necessary to examine in some detail the averments which the pursuer has made in support of his contention that each contract of limited partnership was a pretence.

The pursuer admits that in May 1987 he entered into both contracts of limited partnership and he does not suggest that the obligations contained in each of the contracts were not capable of being implemented. He was at the time represented by solicitors in concluding the legal formalities associated with each of the partnership agreements and the draft agreements were revised by them on his behalf. He avers that in each case he was the general partner, and he admits that by letter to the defenders' solicitors dated 14 February 1989 he acknowledged his status as general partner under explanation that the subject-matter of the letter related to Milton of Potterton. In May 1990 he signed a form LP6 which gave intimation to the Registrar of Companies of a change in the partners. He signed the form ‘for and on behalf of the firm of Laingseat Farm’ and sent it to the defenders' solicitors for onward transmission to the Registrar of Companies. The pursuer sought, however, to found on the averments which are contained in art 11 with a view to establishing that neither of the limited partnerships had any existence or substance and that each was accordingly a pretence. In this connection it is far from clear to what extent the pursuer, as the general partner, was responsible for the various alleged failures to implement the obligations contained in each contract of limited partnership. However, the question which arises is what was the nature of the alleged ‘sham’ or pretence.

Counsel for the pursuer conceded that it could not be contended that each contract of limited partnership constituted a ‘sham’ as that term was described by Diplock LJ in *Snook v London and West Riding Investments Ltd* at p 802 , as the acts done and the documents executed by the parties were not ‘intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create’. Diplock LJ went on to observe that it was clear in legal principle, morality and the authorities 'that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating'. In my opinion, in the circumstances of this case the concession that the partnership contracts were not *Snook* 'shams' could not have been withheld. It is of significance that the pursuer does not aver that the relevant actings or documents were intended by the parties to create legal rights and obligations other than those which they gave the appearance of creating. In particular, the pursuer does not aver that the parties had the common intention of granting leases to the pursuer as an individual while executing documents which gave the appearance of being leases to the limited partnerships. Indeed, it was conceded by counsel for the pursuer that the landlords all along intended to grant leases to the limited partnerships and that they did not intend that the pursuer, as an individual, should be the tenant.

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In the circumstances counsel for the pursuer sought to argue that each contract of limited partnership was a pretence in respect that it did not truly reflect the reality of the situation, the reality being that the pursuer was the tenant and the contract of limited partnership was simply a paper transaction intended to disguise that fact and thereby evade the security of tenure provisions to which the pursuer would otherwise have been entitled. In this connection reference was made to *Street v Mountford* and *Antoniades v Villiers* . Like your Lordship in the chair I do not derive much assistance from these two cases as it was not suggested in this case that the contracts of limited partnership themselves had the effect of creating agreements of a different nature from that expressed in the documentation. What we were asked to do was to consider the actings of the parties after the contracts of limited partnership had been entered into and on that basis conclude that the averments made by the pursuer would, if proved, be sufficient to enable the inference to be drawn that each contract of limited partnership had been a pretence and was therefore a nullity. However, the fact of the matter is that the contracts of limited partnership were entered into by the parties and counsel for the pursuer conceded that the action could not succeed unless the pursuer could establish that each contract of limited partnership was a pretence at the time it was entered into. If they were valid at the time they were entered into they could not subsequently become 'shams' or pretences by reason of the actings of the parties following conclusion of the agreements. It may be, of course, that the evidence of the parties' later actings would be admissible as being relevant to the issue as to the true intentions of the parties at the time the contracts were concluded. But in this connection a major difficulty for the pursuer is that he does not aver that the parties, at the time they entered into each contract of limited partnership, had the common intention that the obligations contained in the partnership contracts would not be implemented or that they truly intended to enter into an agreement of a different kind. He does not aver that it was the intention of the parties to enter into a contract which had the effect of making the pursuer, as an individual, the tenant of each agricultural holding.

However, counsel for the pursuer founded very heavily on *Gisborne v Burton* which turned out to be the high point of the pursuer's case. In *Gisborne* , the landlord had granted the tenancy of farm land to his wife and on the same day she granted a sub-tenancy to the defendant at the same rent. In terms of the head-lease the landlord's wife agreed to farm and cultivate the land in accordance with the rules of good husbandry. However, it was clear that she was not going to farm the land at all as farming had become too difficult for her and her husband and the court, by a majority, held that the landlord's wife was at highest a mere nominee or agent of the landlord to grant a tenancy to the defendant, and that what actually happened was that the landlord had granted a tenancy to the defendant. The basis of the majority decision was that the landlord and wife were trying to do what the law did not permit, namely, to grant the defendant an agricultural tenancy without the statutory protection. However, as in the present case the pursuer does not aver that the landlords intended to grant a lease to the pursuer as an individual, I consider that the case of *Gisborne can be distinguished* .

In this case the parties entered into formal contracts of limited partnership and the landlords subsequently leased the agricultural holdings to the limited partnerships. As your Lordship in the chair has observed, it was not suggested ***46*** in this case that the parties did not intend that each arrangement should be binding in law at the time it was concluded, or that it was a 'sham' designed to conceal the true intention of the parties. On the contrary, it was conceded by the pursuer that the landlords all along intended that the agricultural holdings should be leased to the limited partnership and that it was also their intention that the pursuer, as an individual, should not be the tenant. The pursuer subsequently acted in certain respects in reliance on the contracts of limited partnership. What he seems now to be suggesting is that, by virtue of the fact that a number of the obligations contained in the contracts of limited partnership were not implemented, at a time when he was the general partner, it can be inferred that it was never the intention of the parties that the contracts should be implemented. However, as I have said, the pursuer does not have an averment to that effect. The fact that obligations contained in an *ex facie* valid contract were subsequently not implemented would not, by itself, enable an inference to be drawn that the contract had been a nullity *ab initio* . In my opinion, the averments which the pursuer has made in art 11 of the condescendence, even if proved, would not establish that, at the time the contracts of limited partnership were concluded, they were simply pretences. On the whole matter I have reached the conclusion that the pursuer's averments in support of his conclusions that the two contracts of limited partnership were nullities are irrelevant.

There is, however, another difficulty facing the pursuer. Even if each contract of limited partnership was declared to have been a nullity I am unable to see how, on the basis of the averments made by the pursuer, that could lead to the conclusion that a tenancy had been constituted in favour of the pursuer as an individual. This is an issue which would require to be decided in light of the true intentions of the parties. It is common ground in this case that the purpose of each lease in favour of the limited partnership was to avoid creating a protected tenancy in favour of the pursuer as an individual, and counsel for the pursuer conceded that the landlords never intended that the pursuer should become the tenant. In relation to the question as to whether, if each partnership contract was a nullity, the pursuer had become the tenant, the pursuer's averments can only be described as sparse. He avers that each contract of limited partnership was a pretence, that each was a nullity and he then avers that 'Accordingly, the pursuer is the tenant of Laingseat and Milton by virtue of the missives…and the pursuer's admission to each holding and regular acceptance of rent from him as an individual.' Counsel for the pursuer admitted that the landlords intended to lease each holding to the limited partnership but submitted that the contracts of lease could take effect in a way which was not intended by the parties, namely, by the substitution of the pursuer for each limited partnership. However, the fact that each contract of limited partnership was a nullity would not, in my view, go any way towards creating an inference that the pursuer had become the tenant of each holding. If the contracts of limited partnership were nullities, they must have been nullities *ab initio* . In these circumstances each lease was executed in favour of a tenant which did not exist. However, that would not, in my view, enable the inference to be drawn that a tenancy had been created in favour of the pursuer as an individual and, as I have said, the pursuer does not aver that it was ever the intention that he should become the tenant. Indeed, the whole argument for the pursuer proceeded on the basis that the express intention of the landlords was that he should not become the tenant. In so far as the pursuer seeks to found on the ***47** missives, they refer to the limited partnership as the tenant in each case and I fail to see how the pursuer can found on these missives in order to support an inference that, if the limited partnerships were declared to be nullities, he was to be substituted as the tenant. The pursuer also seeks to found on his 'admission to each holding and regular acceptance of rent from him as an individual'. His admission to the holding ceases, in my view, to have any weight standing his concession that in respect of the period prior to 28 May 1987, the date of entry stipulated in the leases, no rent was demanded, tendered, received or accepted. With regard to the averment that the defenders regularly accepted rent from the pursuer as an individual, it has to be borne in mind that when the rent was paid it was in the context of the pursuer being the general partner of the limited partnership and of the lease having been granted in favour of that limited partnership. In the circumstances I have reached the conclusion that, even if the two contracts of limited partnership were declared to be nullities, the pursuer has not relevantly averred facts and circumstances which would enable the inference to be drawn that he had become the tenant under each of the leases.

The pursuer has an alternative case that, *esto* the contracts of limited partnership were not pretences and were not nullities, and the pursuer occupied each holding as the general partner, the provision in cl 2 of each partnership contract, to the effect that the partnership was to terminate on 27 November 1992, was null, void and unenforceable. However, there is no reason, in principle, why a contract of limited partnership should not contain a clause stipulating a date on which, in the absence of agreement to the contrary, the partnership will come to an end and in my opinion the pursuer's averment that the provision in cl 2 of each of the limited partnership contracts was null, void and unenforceable is quite unsupported by any relevant averments.

In the course of the debate, senior counsel for the pursuer lodged a minute of amendment and we allowed the closed record to be amended in terms thereof. The minute of amendment introduced two new conclusions, namely, 1A and 3A, seeking declarator that the leases of the agricultural holdings were also nullities. The pursuer's argument was that if the contracts of limited partnership and the leases which followed thereon were nullities, the pursuer was the tenant at common law. In that connection counsel for the pursuer sought to found on the observations of Lord Keith of Kinkel in *Morrison-Low v Paterson* at p 78 . Each declaratory conclusion contains a statement that the lease was ‘part of a pretence whose purpose was to avoid granting in favour of the pursuer as tenant of the said holding the right to security of tenure under the Agricultural Holdings (Scotland) Acts and purported to create a mechanism for terminating the pursuer's tenancy otherwise than by notice to quite the said holding under the Acts’. These conclusions are not supported by any averments in the pursuer's pleadings setting out the grounds on which he alleges that each lease, as opposed to each contract of limited partnership, is said to have been a nullity. There is not even a formal averment that they were nullities. However, counsel for the pursuer informed us that the pursuer's case was that the leases were nullities because the landlords had purported to grant them to non-existent limited partnerships and I am content to proceed on that basis. On the assumption that both leases, as well as the contracts of limited partnership, are nullities the pursuer avers that he is tenant ‘by reason of his admission as an individual into possession of the said holdings on or about 14 April 1987, by the maintenance of him in said possession and by the regular acceptance of rent from him as an ***48*** individual for said possession, all as hereinbefore condescended upon’. If the pursuer had relevantly averred that the two contracts of limited partnership were nullities I would, like your Lordship in the chair, have been inclined to allow a proof before answer. However, the pursuer's argument in support of his contention that he was a tenant at common law depends on the contracts of limited partnership being nullities and, as I have taken the view that his averments to that effect are irrelevant, it follows that I have concluded that his whole case is irrelevant.

So far as the defenders' counterclaim is concerned, I agree that the defenders' cross-appeal should be refused.

For the foregoing reasons, and the reasons more fully set out by your Lordship in the chair, I agree that the action should be disposed of as proposed by your Lordship.

Lord Murray——

My initial view in considering the issues in this reclaiming motion was that the case should go to proof before answer on the basis of the majority decision of the court in *Gisborne* . Having read the opinion of your Lordship in the chair I am persuaded that on no view can the pursuer's averments be read as stating a relevant case founding on *Gisborne* . The Lord Ordinary deals with this matter in his opinion and I can find no fault with his reasoning. In particular it appears to me that *Gisborne* is distinguishable from the present case on exactly the ground which he identifies. In that case the majority judges were able to discern a real intention of the parties that the defendant farmer should be a tenant without security of tenure although formally he became a subtenant. When that feature is accepted the absence of averments which could justify a proof before answer in this case becomes patent. As the Lord Ordinary points out what is lacking here ‘is an averment that the intention of the parties was to create anything other than the legal relationships recorded in the written documents’. Nor does the *esto* case added by amendment during the hearing assist the pursuer to obtain a proof before answer because of the absence of averments from which it could reasonably be inferred that the contracts of limited partnership and the associated leases were null and void *ab initio* .

Accordingly I am in full agreement with the opinion of your Lordship in the chair.

Representation

Ledingham Chalmers—Paull & Williamsons

The Court refused the reclaiming motion and refused the cross-appeal

Footnotes

1 Section 22 of the Agricultural Holdings (Scotland) Act 1981 enacts that: ‘(1) Where not later than one month from the giving of a notice to quit an agricultural holding (or, in a case where sec 23(3) of this Act applies, within the extended period therein mentioned) the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, subject to subsec (2) below and to sec 25 of this Act, the notice to quit shall not have effect unless the Land Court consent to the operation thereof. (2) Subsection (1) above shall not apply where—(a) the notice to quit relates to land being permanent pasture which the landlord has been in the habit of letting annually for seasonal grazing or of keeping in his own occupation and which has been let to the tenant for a definite and limited period for cultivation as arable land on the condition that he shall, along with the last or way going crop, sow permanent grass seeds; (b) the notice to quit is given on the ground that the land is required for use, other than agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning, or for which (otherwise than by virtue of any provision of those enactments) such permission is not required; (c) the Land Court, on an application in that behalf made not more than 9 months before the giving of the notice to quit, were satisfied that the tenant was not fulfilling his responsibilities to farm the holding in accordance with the rules of good husbandry, and certified that they were so satisfied; (d) at the date of the giving of the notice to quit the tenant had failed to comply with a demand in writing served on him by the landlord requiring him within 2 months from the service thereof to pay any rent due in respect or the holding, or within a reasonable time to remedy any breach by the tenant, which was capable of being remedied, of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry; (e) at the date of the giving of the notice to quit the interest of the landlord in the holding had been materially prejudiced by a breach by the tenant, which was not capable of being remedied in reasonable time and at economic cost, of any term or condition of the tenancy which was not inconsistent with the fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry; (f) as at the date of the giving of the notice to quit the tenant's apparent insolvency had been constituted in accordance with sec 7 of the Bankruptcy (Scotland) Act 1985 ; (g) section 25(1) of this Act applies, and the relevant notice complies with sec 25(2)(a), (b) and (d) of this Act; and, where any of paras (a) to (f) above applies, the ground under the appropriate paragraph on which the notice to quit proceeds is stated in the notice.’