

The Honourable Andrew Shirley, Tamara Shirley, Jason Bowerman, The Right Honourable Countess Ferrers (as Trustees of the Shirley Children's Settlement) v Ruth Elizabeth Mary Crabtree



Positive/Neutral Judicial Consideration

Court

Queen's Bench Division (Administrative Court)

Judgment Date

27 June 2007

Case No: 9843/06

High Court of Justice Queen's Bench Division Administrative Court

[2007] EWHC 1532 (Admin), 2007 WL 1942795

Before : The Honourable Mr Justice Beatson

Date: 27/06/2007, Hearing dates: 14 June 2007

Representation

Mr Martin Rodger QC (instructed by Mills and Reeve ,solicitors) for the Appellants.
Miss Caroline Hutton (instructed by Nigel Davis , solicitors) for the Respondent.

Judgement

Beatson J :

1. The Appellants are the Trustees of the Shirley Children's Settlement and the landlords of Shirley Hall Farm, Shirley, Ashbourne, Derbyshire, a holding of 80.9 hectares. By a tenancy agreement dated 5 March 1963 Shirley Farm was let by Earl Ferrers to the current tenant, Mr John Foster. Mr Foster and his daughter Mrs Crabtree have been in a farming partnership since 1997. The partnership agreement, dated 5 April 1997, provided that Mrs Crabtree was to have 49% of the profits and Mr Foster 51%. On 1 April 2004 the profit-sharing ratios were altered to give her 90% and him 10% of the profits.

2. On 21 March 2004 Mr Foster gave a retirement notice pursuant to [section 49\(1\) of the Agricultural Holdings Act 1986](#) ("the 1986 Act"). He stated he intended to retire on 25 March 2005 and nominated Mrs Crabtree to succeed him as the tenant of the holding. On 19 April 2004, pursuant to [section 53\(7\)](#) of the 1986 Act, Mrs Crabtree applied for a direction entitling her to the tenancy. The landlords' reply, dated 18 May 2004, opposed her application.

3. It was not until 24 July 2006 that the Agricultural Land Tribunal heard the case. It was common ground that, for the purposes of [section 53\(5\)](#) of the 1986 Act, Mrs Crabtree was a suitable person to become the tenant and that she was not the occupier of a commercial unit of agricultural land and therefore satisfied the eligibility requirement in [section 50\(2\)\(b\)](#) of the Act. The issue was whether she satisfied the eligibility criterion in [section 50\(2\)\(a\)](#) . This required her principal source of livelihood in the relevant period or periods to be derived from

her agricultural work on the holding. In its decision, given on 15 September 2006, the Tribunal made a direction entitling Mrs Crabtree to a tenancy of the holding on Mr Foster's retirement. At the request of the landlords, and pursuant to [section 6\(1\) of the Agriculture \(Miscellaneous Provisions\) Act 1954](#), the Tribunal stated a case for the opinion of this court.

The legislation

4. A right to the succession of the tenancy of an agricultural holding on death was first introduced by the [Agriculture \(Miscellaneous Provisions\) Act 1976](#). The 1976 Act empowered certain close relatives of a deceased tenant of an agricultural holding to apply to the Agricultural Land Tribunal for a direction entitling them to a tenancy of the holding. In 1984, in the [Agricultural Holdings Act 1984](#), this right was abolished in respect of tenancies granted after 12 July 1984. In respect of tenancies granted before 12 July 1984 and tenancies derived from such tenancies the 1984 Act, however, introduced a right to succeed on the retirement of a tenant. The provisions governing succession to agricultural tenancies are now to be found in [Part IV](#) of the 1986 Act.

5. By [section 49\(1\)\(b\)](#) of the 1986 Act the tenant (or, in the case of a joint tenancy, all the tenants) may give notice to the landlord indicating “that he or they wish a single eligible person named in the notice to succeed him or them as tenant of the holding as from a date specified in the notice ... which falls not less than one year, but not more than two years, after the date of the notice”. The nominated successor may apply to a Tribunal for a direction entitling him or her to a tenancy of the holding within one month after the date of the giving of the retirement notice: [section 53\(1\) and \(2\)](#).

6. [Section 50](#) of the 1986 Act is headed “Right to apply for new tenancy on retirement of tenant”. Its material parts provide:

“(1) The eligible person named in the retirement notice may ... apply under section 53 below to the Tribunal for a direction entitling him to a tenancy of the holding unless excluded by section 51 below.

(2) For the purposes of section 49–58 of this Act, “eligible person” means (subject to the provisions of Part 1 of Schedule 6 to this Act as applied by subsection (4) below) a close relative of the retiring tenant in whose case the following conditions are satisfied —

(a) in the last seven years his only or principal source of livelihood throughout a continuous period of not less than five years, or two or more discontinuous periods together amounting to not less than five years, derived from his agricultural work on the holding or on an agricultural unit of which the holding forms part, and

(b) he is not the occupier of a commercial unit of agricultural land ...”

7. By [section 49\(3\)](#) “close relative” means the wife or husband, a brother or sister, or a child of the retiring tenant. It also includes a person who, in the case of any marriage to which the retiring tenant has been at any time a party, has been treated by the retiring tenant as a child of the family in relation to that marriage. [Section 49\(3\)](#) provides that “eligible person” has the meaning given by [section 50](#).

8. The conditions in [section 50\(2\)\(a\) and \(b\)](#) are respectively referred to as the “livelihood” and “occupancy” conditions. The “livelihood” condition requires that the applicant's agricultural work on the holding be his or her principal source of livelihood during the relevant period or periods. This requires the applicant to establish economic dependence on the holding by showing that the work on the holding was his or her main means of livelihood. The “occupancy” condition requires that the applicant is not the occupier of a commercial unit of agricultural land other than the holding that is the subject of the application.

9. Whether a holding occupied by an applicant is a commercial unit of agricultural land depends on whether it is capable of producing a specified net annual income: see [paragraph 3\(1\) of Schedule 6](#) to the 1986 Act. The income producing capacity of land is assessed by reference to statutory orders made by the Minister under [paragraph 4 of Schedule 6](#). Those orders are made for a twelve-month period and the annual income figures change each year, as do the figures for average annual earnings. The changes can be seen by comparing the figures in the two most recent orders, the [Agricultural Holdings \(Units of Production\) \(England\) Orders 2005 and 2006](#); S.I. 2005 No. 2867 and S.I. 2006 No. 2628. Since the decision of the *House of Lords in Jackson v Hall [1980] AC 854*, it has been clear that the occupancy condition must be satisfied at the date of the death or the retirement notice and that the use of the present tense in the provisions now contained in [sections 36\(3\)\(b\) and 50\(2\)\(b\)](#) means that it must also be satisfied at the date of the tribunal hearing. Accordingly, if a new Order has been made by the minister between the date of the death or the retirement notice and the tribunal hearing, the applicant's eligibility may be affected.

10. By [section 51\(2\)](#) [section 50\(1\)](#) does not apply if the retiring tenant has “at any time given any other notice under [section 49\(1\)](#) ... in respect of the holding ...” and an application to become the tenant of the holding has been duly made by any person in respect of that notice. The effect of this provision together with [section 57\(4\)](#) is that, save in limited circumstances (on which see [section 53\(10\)](#)), there is no opportunity in a retirement case for more than one application.

11. [Section 51\(3\)](#) provides that [section 50\(1\)](#) does not apply where the retiring tenant will be under 65 at the retirement date unless he or she is or will at the date of retirement be incapable “by reason of bodily or mental infirmity” of farming the holding to the requisite standard, and such incapacity is likely to be permanent.

12. I have referred to the requirement in [section 53](#) that the nominated successor must apply for a direction within one month of the giving of the retirement notice. An application must be signed by both the nominated successor and the retiring tenant or tenants. It must also be accompanied by a copy of the retirement notice: [section 53\(3\)](#). In the case of a tenant under 65 the Tribunal must first be satisfied that he or she is or will at the retirement date be incapable by reason of bodily or mental infirmity of farming the holding: [section 53\(4\)](#).

13. By [section 53\(5\)](#):

“If the Tribunal are satisfied —

(a) that the nominated successor was an eligible person at the date of the giving of the retirement notice, and

(b) that he has not subsequently ceased to be such a person, the Tribunal shall determine whether he is in their opinion a suitable person to become the tenant of the holding.”

14. The provisions governing succession on retirement share many of the features of those governing succession on death contained in [sections 34–48](#) of the 1986 Act. There are, however, a number of important differences. First, in the case of succession on death there may be more than one application: [section 36\(1\)](#). The Tribunal may, with the consent of the landlord, give a direction specifying up to four of the applicants as entitled to a joint tenancy of the holding: [section 39\(9\)](#). In the case of retirement, the provisions of [section 49\(1\)\(b\)](#) provide that only a single person may be nominated to succeed to the tenancy.

15. The second difference is that, as I have noted, in cases of succession on retirement, the application must be made within one month of the notice. In cases of retirement on death, however, the application must be made within three months of the death of the tenant.

16. Thirdly, in the case of succession on death there is provision for succession to part only of the holding ([section 39\(10\)](#)) but there is no similar right in a retirement case. Fourthly, in succession on death, where the tenant has more than one holding, an eligible person may make multiple applications. [Section 42](#) makes provision for the Applicant or Applicants to choose the order in which the Tribunal is to hear the applications. There is no similar provision in a retirement case.

17. The fifth difference between the two succession regimes is that in succession on death but not succession on retirement there is provision ([section 41](#) of the 1986 Act) for the Tribunal to treat an Applicant who does not fully satisfy the livelihood condition as if he does. The Tribunal can do this if it considers that in all the circumstances it would be fair and reasonable for the Applicant to be able to apply for a direction entitling him to a tenancy of the holding.

18. There is also a difference in the language in which the livelihood condition is formulated in [section 36\(3\)\(a\)](#) for succession on death and the way it is formulated in [section 50\(2\)\(a\)](#) for succession on retirement. [Section 36\(3\)\(a\)](#) states that the livelihood requirement is to be satisfied “in the seven years ending with the date of death”. [Section 50\(2\)\(a\)](#) states that it is to be satisfied “in the last seven years”. The issue before me is whether the difference in language denotes a further difference between the two regimes.

The decision of the Tribunal and the case stated

19. The question posed by the Tribunal for the opinion of this court is contained in paragraph 9 of the case stated. It is:

“Whether, on an application by a nominated successor for a direction under [section 53 of the Agricultural Holdings Act 1986](#) entitling her to a tenancy on the retirement of the tenant, the nominated successor must satisfy the livelihood condition in [section 50\(2\)\(a\)](#) not only by reference to the last seven years ending with the date of the giving

of the retirement notice, but also by reference to the seven years ending with the date of the Tribunal hearing.”

20. Paragraphs 4 and 5 of the case set out the submissions of the parties. Paragraph 6 summarises the reasons for its conclusion that the livelihood test must be satisfied in respect of the period ending with the retirement notice, and that once established, that qualification cannot be lost.

21. The essential findings by the Tribunal are succinctly stated in paragraphs 3, 7 and 8 of the case.

“3. The period of seven years ending with the giving of the retirement notice commenced on 22 March 1997. Mrs Crabtree adduced expert evidence from an accountant concerning the sources of her livelihood for the six years ending 5 April 1999 to 5 April 2004. We found that in five of those six years (not including the year ending 5 April 2003) she derived her only or principal source of livelihood from her agricultural work on the holding.”

22. Paragraph 7 of the case states that in the light of the Tribunal's reasons it found “that Mrs Crabtree was eligible and suitable to become tenant of the holding and gave a direction pursuant to [paragraph 53\(7\)](#) of the Act entitling her to a tenancy of the holding on the retirement of the current tenant, Mr Foster”.

23. Paragraph 8 states:

“Had we accepted the contentions of the landlords we would have found that Mrs Crabtree had not demonstrated that she was eligible to apply for a tenancy and we would have dismissed her application”.

The landlords' case

24. Mr Martin Rodger QC submitted that it is clear from; (a) the language of [section 50\(2\)](#), (b) the difference between [section 50\(2\)\(a\)](#) and the formulation of the livelihood condition in [section 36\(3\)](#) for succession on death, and (c) the terms of [section 53\(5\)](#), that the livelihood condition must be satisfied both at the date notice of retirement is given and at the date of the commencement of the hearing before the tribunal. He also relied on the fact that the other eligibility requirement, the occupancy condition in [sections 36\(3\)\(b\) and 50\(2\)\(b\)](#), can be lost between the date of the death or the retirement notice and the date of the hearing. This, he submitted, showed that the fact additional evidence would have to be adduced for the period between the date of the retirement notice and the date of the hearing was not something that was outside the legislative scheme and contrary to Parliament's intention.

25. [Section 50\(2\)](#) provides that “eligible person” means a close relative in whose case the conditions in (a) and (b) “are” satisfied. The condition in [section 50\(2\)\(a\)](#) is whether the applicant's principal source of livelihood “in the last seven years” derived from his or her agricultural work on the holding. It was submitted that the use of the present tense in the word “are” in [section 50\(2\)](#) makes it clear that the conditions must be satisfied at the point it is necessary to determine the issue. Mr Rodger relied on the statement of Lord Fraser of Tullybelton in *Jackson v Hall* [1980] AC 854, 891, in relation to the requirement in the 1976 Act that the tribunal be satisfied that the applicant “is an eligible person”. His Lordship stated that the use of the present tense “must mean” that the applicant must be eligible at the date of the decision. Mr Rodger submitted that the phrase “the last seven years” does not define a fixed period but expresses the period in relative terms. Accordingly, its temporal limits depend on the point in time at which the inquiry has to be made, so that the period can vary. The way in which the period can vary is shown by [section 53\(5\)](#). That provision directs the tribunal to satisfy itself that the nominated successor (a) was an eligible person at the date the retirement notice was given, and (b) has not subsequently ceased to be such a person.

26. Mr Rodger also relied on the undoubted differences between the death and retirement regimes. He submitted that, given those differences, the separate definitions of “eligible person” in [sections 50\(2\)\(a\) and 36\(3\)\(a\)](#), and the difference in the language used bolsters the meaning derived from the clear language of [section 50\(2\)](#). In the case of succession on death it is clear that the period for satisfying the livelihood condition is a fixed period. If Parliament wished the period for satisfying the livelihood condition in retirement cases to be a fixed period, why did it not provide that it was to be satisfied in five of the seven years before the retirement notice?

27. Mr Rodger submitted that, in principle, the test for economic dependency should be as current as possible but suggested that a difference between death and retirement cases reflects differences between death and retirement. Death may be unexpected and can lead to substantial changes outside the control of applicants. He suggested this was the reason the regime for succession on death is more flexible and favourable to tenants than the regime for succession on retirement. In the context of the livelihood condition he suggested that there may be unfairness to an applicant who satisfied the livelihood test at the date of death but who thereafter no longer satisfies the livelihood test, for instance because of the actions of executors. In the case of retirement, however, all is in the hands of the tenant and the applicant and he submitted there is no unfairness in assessing eligibility as close to the date of the determination as possible.

28. Mr Rodger also relied on *Jackson v Hall* [1980] AC 854, although that case concerned an applicant who was not eligible at the date of death but subsequently sought to establish eligibility by assigning a commercial agricultural unit to another. Mr Rodger submitted that since *Jackson v Hall* it has been clear that the occupancy condition must be satisfied both at the date of the giving of the death or the retirement notice and at the date of the tribunal hearing. It followed that eligibility can be lost, and that where a change in the formula for determining income-producing capacity means that a unit that was not a commercial unit at the time of the death or retirement notice is one at the date of the hearing, it can be lost as a result of circumstances outside the applicant's control.

Mrs Crabtree's case

29. Miss Hutton submitted that neither the wording of [section 50](#) nor the policy underlying the 1986 Act requires [section 50\(2\)\(a\)](#) to be interpreted as requiring the livelihood criterion of eligibility to be proved by showing eligibility over a rolling period of seven years changing daily until the date of the hearing. She accepted that the opening words of [section 50\(2\)\(a\)](#) are ambiguous. For this reason, she said it was necessary to consider whether there is a policy rationale behind the differences in the formulation used in [section 50\(2\)\(a\)](#) and that used in [section 36\(3\)\(a\)](#). She also submitted that the consequences of interpreting [section 50\(2\)\(a\)](#) to require eligibility

to be proved over a rolling period are so unjust and impracticable as to be beyond anything Parliament could have intended.

30. As to justice and practicability, Miss Hutton observed that the date of a Tribunal hearing will be affected by the availability of Tribunal members, witnesses and legal representatives. It will also be affected by time allowed for negotiations and procedural applications. The Appellant's submissions would, if accepted, subject an Applicant who satisfied the livelihood requirement at the time of the tenant's notice of retirement and the application to the risk of losing such entitlement because of delays in the date of the hearing outside his or her control. Miss Hutton submitted that such an interpretation might encourage landlords to seek to delay the commencement of the hearing in the hope that an applicant would not be able to prove livelihood eligibility for the later period. She gave the example of a nominated successor driven to take up alternative part-time employment because of the failing commercial viability of the holding due to the ill-health of the retiring tenant and the Applicant's inability to increase the overdraft until his succession application succeeded. She also pointed to the practical difficulties in proving livelihood to the date of the hearing.

31. Miss Hutton submitted that the definition of "eligibility" is contained in [section 50](#) and not in [section 53](#) which is only a procedural provision. She submitted that "the last seven years" in [section 50\(2\)](#) is a reference to the words "the retirement notice" in [section 50\(1\)](#). This is not affected by the fact that the definition of eligibility applies for the purposes of [sections 49–58](#), that is for the purposes of the retirement regime. She submitted that [section 53\(5\)](#) does not give a temporal context to the definition of livelihood eligibility in [section 50\(2\)](#). [Section 53\(5\)](#) does not purport to affect the meaning of "eligible" or whether a particular eligibility criterion is fixed or variable.

32. Miss Hutton submitted that the differences between [section 36](#) and [section 50](#) are explicable because death is an event whereas the trigger for an application under the retirement provisions is the tenant's nomination of the eligible person in the retirement notice. She submitted that, since the retiring tenant must name an eligible person who complies with [section 50](#), it must be necessary to determine eligibility with certainty at that point. While agreeing that the more generous provisions in succession on death (such as the ability to "materially" satisfy the livelihood criterion, the longer time in which to make the application, and the ability to make multiple applications) reflect the fact that death is sudden but retirement can be planned, she did not consider this difference justified any difference in relation to the time the livelihood requirement had to be satisfied. She argued that since in the absence of a succession tenancy on death, there is vacant possession whereas, where the Tribunal does not make a direction following a retirement notice the existing tenancy continues, there is no reason to impose a heavier burden on the Applicant in the latter case.

33. Miss Hutton also submitted that the occupancy condition of eligibility, that the tenant not be the occupier of a commercial unit of agriculture, differs from that of the livelihood condition. Any change after the date of the death or the retirement notice outside the control of the applicant would be the result of a new ministerial order. Those orders are made annually and it is easy to apply the formula in the new order to the Applicant's position at the date of the hearing. If, however, the livelihood criterion has to be satisfied in a period ending on the date of the Tribunal hearing it would be necessary to re-calculate the farm accounts for the whole period between the retirement notice and that date. With respect to the submissions based on *Jackson and Hall*, Miss Hutton submitted that case was only concerned with the occupancy condition. The amendments to the statutory scheme now contained in [sections 39\(2\) and 53\(5\)](#) were made in order to codify the ruling in that case (see HC Debs. 6 June 1984 cols. 397–8) and not to affect the meaning of the livelihood condition.

Analysis

34. This issue has not been considered by the court and there is a division of opinion in the text books. *Woodfall's Law of Landlord and Tenant*, paragraph 21.19, states that in a retirement case the principal livelihood test

“is almost identical to the principal livelihood test which applies in the case of succession on death; however the test in the case of succession on death refers to the last seven years ending with the date of death but there is no specified end-date in the case of succession on retirement. It would seem to follow that, in the case of succession on retirement, because the principal livelihood test has to be satisfied at all times during a period of time beginning with the service of the retirement notice and ending with the consideration of the matter by the Tribunal, the relevant periods of seven years are the periods of seven years immediately before all the dates on which eligibility falls to be considered.”

The release containing this paragraph was last amended in September 2006 and, in a footnote, states that in the present case the Agricultural Land Tribunal did not accept its reasoning.

35. The other texts take a different view. *Hill and Redman's Law of Landlord and Tenant*, paragraph 244 (September 2005), states, of the livelihood condition in retirement cases, that “apart from the period being calculated from the retirement notice rather than the tenant's death, is the same as the livelihood condition on a succession application at the tenant's death”. Muir Watt and Moss, *Agricultural Holdings* (14th ed.,1998) paragraph 14.103, states that in a retirement case:

“The nominated successor must be a close relative of the retiring tenant, must be otherwise eligible within the meaning of the principal livelihood and the occupancy conditions, and must be found suitable by the Tribunal. These conditions are closely modelled on the conditions for succession on death and the commentary above will with minor modifications apply.”

Paragraph 14.110 states that the earlier detailed discussion of eligibility and suitability in relation to succession on death applies *mutatis mutandis* to succession on retirement. Neither work, however, refers to or discusses the difference in the wording of [sections 36\(3\)\(a\) and 50\(2\)\(a\)](#).

36. Finally, Scammel and Densham's *Law of Agricultural Holdings* (8th ed.,1997) eds. Densham and Evans, 285–286 states:

“Section 50(2)(a) speaks of ‘the last seven years’ and does not specify whether the seven year period expires on the date of the retirement notice, on the date of the application or on the date on which the retirement notice is to take effect (i.e. more than a year after the date of the retirement notice). It is submitted that since the retirement notice must nominate a ‘single eligible person’ the Applicant must be possessed of the qualifications of eligibility at the date on which the retirement notice is given and,

therefore, the seven year period expires on the date of the retirement notice and not on any later date. Furthermore, section 53(5) requires the Tribunal to be satisfied in due course that the Applicant was 'an eligible person at the date of the giving of the retirement notice'."

37. The concern of the authors is with the earliest time for satisfying the test. They do not expressly consider whether the Applicant must demonstrate livelihood eligibility in five of the seven years expiring at the date of the hearing. The position is that while the majority of the texts appear to favour the approach which Miss Hutton submitted was the correct one, Woodfall is the only text which considers the precise point before me.

38. In my judgment the Tribunal did not fall into error in concluding that the livelihood condition must be satisfied in respect of the period ending with the retirement notice, and that once established, that qualification cannot be lost. I consider that the sub-section should be construed in a purposive manner and that the words "in the last seven years" should be given their ordinary and natural meaning : see *Jackson v Hall* [1980] AC 854 , 887 in relation to "the occupier" and *Wellby v Casswell* [1995] 2 EGLR 1 , 3, in relation to "livelihood". The sub-section could have been clearer, but in the context of the eligibility conditions in the 1986 Act and its predecessors, I consider that the ordinary and natural meaning of "in the last seven years" is the period of seven years expiring at the date of the retirement notice. It was submitted on behalf of the Appellants that the definition in section 50(2)(a) is furnished for the purposes of sections 49–58 so that it is wrong to look to the reference in section 50(1) to the retirement notice as providing the temporal context for the phrase in section 50(2)(a) . It is, however, important to note that section 49(3) provides that "eligible person" has the meaning given by section 50 . While the definition of "eligible person" is to be applied to all the provisions concerning retirement neither section 49, nor sections 51 to 58 affect the definition.

39. I accept Miss Hutton's submission that section 53(5) does not affect the meaning and content of the eligibility test in the sense that it assists in determining whether an eligibility condition can be lost although it has been satisfied at an earlier stage. The occupancy condition can be lost, but that follows from the use of the present tense in section 50(2)(b) . It is a condition precedent to eligibility that the person is "a close relative" of the retiring tenant. Status as a wife or husband may in fact be lost but status as a sibling or child cannot. Whether eligibility or the status of being a "close relative" can be lost, however, depends on section 50(2) . Section 53(5) does not give guidance as to which of the eligibility conditions or status conditions can and which cannot be lost.

40. Are there, therefore, any indications in section 50(2)(a) that eligibility by reason of livelihood at the date of the retirement notice can be lost thereafter? I do not consider there are. Mr Rodger relied on the use of "are", the present tense, in the introductory part of section 50(2) and the significance attached to the use of the present tense by the House of Lords in *Jackson v Hall* in relation to the occupancy test. *Jackson v Hall* , however, was concerned with the use of the present tense in the equivalent of what is now section 36(3)(b) , which is in identical terms to section 50(2)(b) . The equivalent words in section 50(2)(a) do not use the present tense: the reference is to "the last seven years". Only limited assistance can be derived from *Jackson v Hall* in relation to the livelihood condition because (see for example Lord Fraser of Tullybelton at 891E) it was clear that nothing occurring after the date of death could affect qualification under the livelihood condition. Moreover, as I have noted earlier in this judgment, that case was concerned with a person who was not eligible at the time of death but subsequently assigned his interest in a farm with a view to satisfying the occupancy condition. It was thus concerned with the acquisition of eligibility, rather than its loss.

41. The statutory provision is that the livelihood condition is to be satisfied in a period of five out of seven years, the years to be chosen by the applicant: see *Bailey v Sitwell* [1986] 2 EGLR 7, 8. There is nothing in section 50(2)(a) itself to indicate that it is to be satisfied in two separate periods of five out of seven years. In the present case (see paragraph 46 below) the effect of accepting the Appellants' submissions would require livelihood eligibility to be satisfied over a period of nine years.

42. I turn to the submissions on behalf of the Appellants based on possible policy differences between succession on death and succession on retirement. The retirement regime is stricter than the succession regime in a number of respects. Mr Rodger suggested that the difference in the time at which the livelihood requirement must be satisfied is one of those differences. It was submitted that the justification for this difference and for a stricter approach in retirement cases is that retirement, unlike death, can be planned. While in general this may be so, it is not the case where retirement is due to incapacity to farm a holding by reason of bodily or mental infirmity. Moreover, in a retirement case there is a greater need for certainty as to the position at the time of the nomination and application than in a death case. This is because of the fact that, as stated in paragraph 10 above, save in limited circumstances, there is no opportunity for more than one retirement notice and application and moreover, an unsuccessful applicant under the retirement provisions cannot later apply to succeed to the tenancy on the death of the tenant: see section 57(4).

43. I turn to the submission that it is no objection to the interpretation contended for by the Appellants that the applicant and the tenant will have no certainty at the time of the application that the applicant will be eligible. It is true that the operation of the occupancy condition means that there will be some uncertainty in a retirement case after service of a retirement notice. The effect of the submissions made on behalf of the Appellants would, however, significantly increase that uncertainty and make it more difficult to plan retirement.

44. The uncertainty that results from the need to satisfy the occupancy condition at the date of the commencement of the hearing is more limited than the uncertainty that would arise if the livelihood condition also had to be satisfied at that time. The occupancy condition may be lost by the application to a holding occupied by the Applicant of a new annual formula. Even where the hearing occurs shortly after a new order is laid the application of the new formula to the Applicant's holding is unlikely to cause practical difficulties. A requirement that an Applicant demonstrate livelihood on a rolling basis ending at the date of the hearing produces uncertainty of a different order.

45. Mr Rodger pointed to the fact that in the present case additional evidence, in a report dated 23 July 2006, the day before the Tribunal hearing, was produced on behalf of the tenant. He suggested that this showed that the preparation of evidence at a late stage is not so onerous that Parliament must have intended a fixed period in respect of the livelihood requirement. The additional evidence tendered in this case was in reply to Mr Rodger's introductory note, which took issue with the conclusion in the earlier report. But the additional data produced was for income and livelihood in 1999 to supplement the data for the years 2000–2004 previously provided. The ability to adduce additional evidence relating to a period in the past does not address the difficulty of requiring evidence as to livelihood until the date of the hearing.

46. The date of the hearing may, as the facts of the present case show, be a considerable time after the date of the retirement notice. Indeed in the present case the hearing took place over a year after the date on which the tenant originally proposed to retire. Whether or not a delay in the substantive hearing results from unavailability of a Tribunal or witnesses, time for negotiation, or the need for procedural hearings it is not satisfactory that such delay should require the Applicant to revise and renew the case for eligibility under the livelihood condition or lose such eligibility. I have noted that the effect of the Appellant's interpretation in this case would require

eligibility to be shown during a period of nine years; the seven years prior to the retirement notice, and the seven years prior to the commencement on the hearing.

47. For these reasons I have concluded that on an application by a nominated successor for a direction under [section 53](#) of the 1986 Act, the nominated successor does not have to satisfy the livelihood condition in [section 50\(2\)\(a\)](#) by reference to the seven years ending with the date of the Tribunal hearing as well as by reference to the seven years ending with the date of the giving of the retirement notice.

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