

**IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT**

Royal Courts of Justice Strand,
London, WC2A 2LL

13th July 2006

B e f o r e :

**Andrew Nicol QC,
sitting as a Deputy Judge of the High Court**

Between:

Pamela Ann Thomson

Claimant

- and -

**(1) The Church Commissioners for England
(2) Agricultural Lands Tribunal Northern Area Defendants**

**Emily Windsor (instructed by Ward Hadaway solicitors) for the the Claimant
Paul Harris (instructed by Department of Environment Food and Rural Affairs) for the Defendant**

Hearing date : 12th July 2006

Andrew Nicol QC :

1. This is an application by Pamela Thomson, the Claimant, for an order that the Agricultural Lands Tribunal state a case for the High Court to answer questions of law which are said to be raised by its decision on 18th May 2005.
2. In October 1957 the Church Commissioners, the 1st Defendants in this matter, granted a tenancy of Ricknell Grange Farm, Aycliffe, Darlington to the Claimant's grandfather. In 1995 the Claimant's brother, Christopher Walker, was granted a yearly tenancy in succession to his grandfather. Christopher Walker died on 21st March 2004 and the Claimant wished to apply for a second succession tenancy to Ricknell Grange Farm.
3. The statutory right to succeed to an agricultural tenancy is conferred by the Agricultural Holdings Act 1986. It is not disputed that the tenancies which had been granted to the Claimant's grandfather and brother came within the 1986 Act. In order for the Claimant to succeed to the tenancy, she had to show either that she was an 'eligible person' as defined by s.36 of the 1986 Act or that she should be treated as an eligible person pursuant to s.41 of the Act. Setting aside those aspects of the definition of an 'eligible person' which the Claimant undoubtedly satisfied, she had to show, in terms set out in s.36(3)(a) that:

'in the seven years ending with the death 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.'

4. On the findings of the Tribunal to which I shall come, the Claimant could not fulfil these requirements, but s.41 of the Act provided an alternative for her. Again, setting aside the requirements which she did fulfil, she had to show under s.41(1)(b) that she was a person in whose case

'the condition specified in [paragraph 36(3)(a)] though not fully satisfied, is satisfied to a material extent.'

5. If this condition is satisfied and the Tribunal goes on to find that it would be fair and reasonable for the applicant to be able to apply for a successor tenancy, it must direct that she is to be treated as if she was an eligible person. The Tribunal then has to decide whether the applicant is a 'suitable person' to whom a tenancy should be granted - see s.39 of the 1986 Act.
6. By a majority the Tribunal decided that the Claimant did not satisfy the condition in s.41(1)(b). Accordingly, it was not necessary for them to go on and consider whether it would be fair and reasonable for her to be able to apply for a successor tenancy. The Tribunal, thus, by a majority, held that she was not a person who ought to be treated as an 'eligible person' and her application for a succession tenancy failed. It did say that if she had been an eligible person, it had no doubt that she would have been a 'suitable person' to whom a tenancy should be granted.
7. By s.6(1) of the Agriculture (Miscellaneous Provisions) Act 1954 the Tribunal may at the request of any party refer to the High Court for decision any question of law arising in the course of the proceedings before the Tribunal. The Claimant made such a request on 28th May 2005, but on 6th June 2005, the Tribunal refused to state a case. Section 6(2) of the 1954 Act provides that if such a request is refused, any person aggrieved may apply to the High Court for an order directing the Tribunal to state a case. That is the application which the Claimant is now making.
8. The application was originally issued in the Newcastle-Upon-Tyne District Registry, but on 5th August 2005 it was transferred to the Administrative Court Office. On 30th August 2005, George Bartlett QC, sitting as a Deputy Judge of the High Court, allowed the application on consideration of the papers. The Defendants objected that this was premature since they were entitled to an oral hearing. By consent Mr Bartlett's order was set aside by Collins J. He suggested that if the Court were to decide that questions of law should be stated, it would be sensible to proceed immediately to answer them. However, the parties were agreed that this could not be done compatibly with the statutory scheme. Accordingly, the issue which I have to decide is whether there is any question of law which is fairly arguable that arises out of the Tribunal's decision and which would justify ordering the Tribunal to refer it to the Court for decision (see *Clegg v Fraser* [1982] EGLR 7 at 10; *William Smith (Wakefield) Ltd v Parisride Ltd* [2005] EWHC 462 (Admin) [2005] 2 EGLR 22 at para [14]).
9. The critical phrase in the legislation which the Tribunal had to consider and which I have to consider on this application is that in s.41(1)(b), namely whether the condition in s.36(3)(a) that for 5 of the previous 7 years the applicant's only or principal source of income had been derived from agricultural work on the holding was satisfied to 'a material extent'.
10. The 1986 Act repeated in substantially similar terms a comparable provision in the predecessor legislation, namely Agriculture (Miscellaneous Provisions) Act 1976 s.21. This had been considered in two High Court cases to which I have been referred. In *Littlewood v Rolfe* [1981]

2 All ER 51, His Honour Judge Fay, sitting as a Deputy Judge of the High Court commented that the definition of an eligible person (now in s.36(3)(a) of the 1986 Act then in s.18(2) of the 1976 Act) had two elements: one that the applicant's only or principal source of livelihood had derived from his work on the holding; the other that this derivation of livelihood had endured for five years. He went on to say at p. 58:

"Satisfied to a material extent". It is a strange phrase. "Extent" presents no difficulty; nor does "satisfied" in the context, although it is a misuse of the word to apply it to a condition which, ex hypothesi, is not satisfied. The crux of the question is the word "material". It is an adjective frequently used by lawyers: they speak of material facts, of material considerations. In this sense it means relevant to the matter in hand, but it can hardly mean relevant here. It has another sense: of something substantial, more than minimal; that seems to have been the path followed by the Northern and Yorkshire / Lancashire tribunals.

Counsel for the respondents argues that because this litigation takes away a landlord's right to possession it ought to be narrowly construed. On the other hand the policy of Part II of the 1976 Act [now Part IV of the 1986 Act] is clearly to create new rights in deserving persons with a view, I would think, to preserving that family continuity which has long been a feature of English farming life. It can equally well be argued that a wide construction is needed to give effect to the policy of the Act.

I do not find either of these approaches compelling. I do, however, find some assistance in s.21(3)(b) [the equivalent in the 1986 Act is s.41(3)(b)], the paragraph setting up the further hurdle to the successor tenant of whether the order is fair and reasonable. I think this points to a wide interpretation of the words "material extent". If the "not quite" view were right and the let-out consisted of what might be called the "hard luck cases" (where the applicant has 59 months instead of 60, or 49% in livelihood cases instead of the 51% which would make it the principal source) then it is difficult to see how any tribunal could find that it was not fair and reasonable to make the order bearing in mind that the applicant still has the final hurdle of suitability to surmount. On the other hand, if jurisdiction is given over a wide spectrum of facts by a beneficial interpretation of the word "material", the tribunal will have a real task in deciding where lies fairness and reasonableness.

I therefore find that the tribunal erred in law in following the narrow interpretation. But I must go beyond this and endeavour to afford some guidance for those who have to solve difficult problems. I agree wholeheartedly with the view that no mathematical formula can be laid down. Percentages of fulfilment, when worked out are a useful guide to put the facts of finance or of time in perspective and to help judge their weight,, but I would think it wrong to try to impose a mathematical cut-off point to what is material. After considerable casting about I do not feel that I can do better by way of definition than to adopt what the Northern Area tribunal said in *Dagg v Lovett*, namely that "material" means "substantial in terms of time and important in terms of value."

11. In *Wilson v Earl Spencer's Settlement Trustees* [1985] EGLR 3 Hodgson

J. broadly agreed with these comments of HHJ Fay. He added, though, at

p. 6

'I do not myself know why either the tribunal or the learned judge thought it necessary to have different words "substantial" and "important" in that definition, but I would not have been disposed to quarrel with it for that or indeed any other reason. I am happy to adopt it as the best one can do to give meaning to a word which, in its context, is a very peculiar one. But it is very important not take that judicial definition out of context....

What the tribunal have to consider is the extent to which the condition [in s.21(1)(b) of the 1976 Act] is not satisfied, or, to put it another way, the extent of failure. If, on the facts it is shown that there has been, in the words of one of the tribunal decisions, "a really large failure", then the applicant cannot bring himself within the section. Clearly the test requires a comparison between the value of what the applicant derives from the holding and her total livelihood. It is not the importance of the "holding value" to her which is relevant, but whether the "holding value" is an important satisfaction of the requirements of 51%. This, I think clearly follows from the wording of s.21(1)(b) itself, which begins with the postulate that the condition, namely 51%, was not fully satisfied.'

12. The Tribunal in the present case gave lengthy and careful consideration to the evidence which it had received. It acknowledged that the Applicant had worked hard on the farm. However, her livelihood had in part come from other sources as well. It summarised its findings in paragraph 21 of its decision. It is sufficient to note that it found the percentages of the Claimant's livelihood which were derived from the holding as follows in the first column (A). It is convenient to add at this stage a second column (B) which gives the figure expressed as a percentage of 50.1%. (The Tribunal has accepted that 50.1% would be sufficient to satisfy the statutory term 'principal source'). Column B has been worked out by Ms. Windsor. Mr Harris, on behalf of the Second Defendant, does not dispute its accuracy:

	A	B
1998	36.66	73.2
1999	39.48	78.8
2000	38.88	77.6
2001	38.08	76.0
2002	38.15	76.0
2003	36.64	73.1
2004	37.12	74.1

13. Having set out the percentages in column A, the Tribunal correctly found that they meant that the Claimant did not satisfy s.36(3)(a) and again correctly turned to the s.41 issue. As to this it said as follows:

'23) In applying s.41 the Tribunal was conscious that the percentages worked out above are useful, but do not constitute the whole picture. Littlewood v Rolfe refers to them as a useful guide to what is satisfaction to a material extent, but warns against using them to impose a mathematical cut-off point. The circumstances of each individual case are what count. HHJ Edgar Fay acknowledged this in the above case when he said that: "I can envisage that 50% could well in some circumstances be satisfaction to an extent that was material in the sense of substantial". He was talking in the context of failure to meet the period of years requirement of s.36 but the Tribunal considered the same remark could also be applied in calculating the value of the livelihood for each individual year, but unfortunately the example he gave for the term "in some circumstances" was not helpful as it seemed to be adopting a view Hodgson J. had warned against in Wilson v Earl Spencer's Settlement Trustees when he found that it was not the importance of the livelihood to the Applicant that counted in assessing "material", but whether it is an important satisfaction of the requirement of 51%. By using 50% HHJ Edgar Fay was referring to satisfaction of s.36(3)(a) to its full extent (i.e. only source of livelihood), but this would convert to 25% when considering the principal source of livelihood (i.e. source of livelihood as over 50% of total).

24) The Littlewood case goes on to warn against using such narrow concepts as "only just failing" and "coming within a hair's breadth" and for further guidance approves the less restrictive definition set out in Northern Area ALT decision of Dagg v Lovett where "material" was taken to mean "substantial in terms of time and important in terms of value" with "time" meaning the five out of seven year requirement and "value" meaning the 51% requirement for each of those years. In the present case the Applicant fails in both time and value so can only be saved by the material extent concept of s.41(1)(b). It was at this stage that the Tribunal members disagreed. One member considered that as Parliament had left it to the Tribunal's discretion to interpret "material" and this discretion was subject to the fair and reasonable provision of s.41(3)(b), he was prepared to exercise that discretion in favour of the Applicant and would be content that the failure to reach the 51% target by only 13.88% would be sufficient to qualify as "material extent". He reasoned that he was prepared to allow this latitude because, in his opinion the shortfall was not unacceptably large in the light of the circumstances. Having exercised that discretion he considered it would be fair and reasonable to allow the Applicant to seek a direction under s.39. The other two members took a contrary view. They considered that the shortfall was too large to allow a 37.12% achievement of a 50+% target to be counted as achievement to a material extent and because of this fairness and reasonableness did not enter the picture. It was only after the achievement rate had been adjudged to have reached a "material extent" that section 41(3)(b) comes into being. Whilst conscious of the fact that they should avoid a mathematical cut off, they thought the discrepancy was too large for any other consideration to influence their decision. In reaching the mathematical figure they had given careful attention to the evidence, considered all its implications before converting it into a percentage and given the Applicant the benefit of the doubt when the evidence warranted it. They knew they had a discretion in determining "material extent" but they had used that discretion in calculating the mathematical figure and when they had done that they found the mathematical gap to be too large to be acceptable. They had a further concern in that not only was the gap too large, but on average, it had stayed around the same level for all the relevant years, so it had always been there. They regretted their decision because had it become necessary to pronounce on suitability, their inspection of the farm, the evidence they had heard and the virtual admission by the Respondent's land agent would have led them to find the Applicant suitable, but they are also aware that the mandatory requirements of eligibility have to be satisfied always before suitability can be considered – section 39 (2).'

14. Ms Windsor has essentially three grounds of challenge:

- a. The Tribunal misdirected itself when it said that 'the Applicant had failed in both time and value'. On the contrary, the Claimant had manifestly derived part of her income in all 7 of the previous years.
- b. The Tribunal had misdirected itself in paragraph 24 of its decision when it appeared to regard itself as having a 'discretion'. In deciding whether the s.41 test was satisfied, the Tribunal had to make a judgment and assessment. It was not the case that it had to exercise a discretion.
- c. The Tribunal failed to take account of the fact that in Littlewood the applicant had succeeded although she could only satisfy 74% of the time element. HHJ Fay had decided that this was sufficient to amount to material satisfaction. Ms Windsor argues that as a matter of law, the Tribunal should have accepted that the present Claimant who fulfilled between 74.1% and 78.8 % in the five best years under consideration (an average of 75.9%) had fulfilled the 'value' element of s.41 to a material extent.

15. I do not think that Ms Windsor's first point amounts to a fairly arguable error of law. There could be no doubt that the Tribunal was aware that the Claimant had derived part of her income from the holding in each of the 7 preceding years. That is manifest, not least from the percentages which they set out in their findings and which I have reproduced above in my

Column A. What the Tribunal appears to have had in mind by this sentence was the point which it repeated later in paragraph 24, namely that there had been a shortfall from the 50.1% target in every one of the 7 years.

16. The Tribunal's use of the term 'discretion' was unfortunate. In reality they had to make a judgment. The difference is that a judgment means arriving at the 'right' answer (hard as that may be). A discretion means choosing between one or more alternatives any one of which would be 'right'. Although there is a clear conceptual difference, lawyers and indeed judges are not immune from using the terminology somewhat loosely. Ms. Windsor makes the point that one cannot sensibly substitute the word 'judgment' for the term 'discretion' in the sentences in which the later term is used by the Tribunal. She may be right, but I think that it is more important to look overall at the paragraphs from the Tribunal's determination which I have quoted. Overall, it appears to me that it is clear that the Tribunal has faithfully followed the assistance in the two decisions which I have also mentioned. In the end it does not matter how they labelled the task which they had done, if, looked at objectively, they carried out the right task. In my view, the Tribunal undoubtedly did. In short they simply thought that the discrepancy was too large to be described as satisfying the s.36 requirement to a 'material extent'.
17. In responding to Ms Windsor's third challenge, Mr Harris was minded to accept that whether the Claimant had satisfied the s.36 conditions to a material extent was a question of law. Thus he accepted that the application should succeed if it was fairly arguable that she had satisfied the conditions to a material extent. I found this surprising. It is, of course, a question of law as to whether a Tribunal has probably directed itself according to the statute and the authorities. There would also be an error of law if the Tribunal reached a conclusion which was not one that was reasonably open to it on the evidence, but Ms Windsor (and Mr Harris) go further and say that there would be an error of law if the Tribunal's decision as to materiality was rational but wrong. In my view there is considerable force in the alternative written submissions from the Church Commissioners (who were not represented at the hearing but whose submissions I have read) that 'Whether the livelihood condition is satisfied to a material extent is a question of assessment, judgment and appreciation for the ALT.' In my view these are questions of fact. They may depend on prior findings of primary facts (such as what were the Claimant's earnings in the previous years and the percentage which derived from the holding), but it is by no means unusual to have secondary questions of fact dependent on such prior primary findings. In a personal injury case, issues of negligence may involve exactly such questions of fact.
18. On this basis I would have held that the Tribunal did not misdirect itself, did not fail to take account of any material circumstances and reached a conclusion that could not be called irrational. In short it is not arguably impeachable as being wrong in law.
19. Nonetheless, in view of Mr Harris' submissions on behalf of the Tribunal, I have considered whether it is fairly arguable that the Claimant satisfied the s.36 condition to a material extent.
20. Ms Windsor argues that I must reach that conclusion because of the result in the Littlewood case. I do not think that this is even arguably so for a number of reasons:
 - a. The Tribunal had asked the High Court in that case whether an applicant can satisfy the 'material extent' requirement where the period of the tenancy was less than 75% of the period of five years. The Court answered 'yes'. I do not accept that as a matter of law, future tribunals must then determine that the 'material extent' requirement is satisfied where the proportion of income derived from the holding is above 74% of the 50.1% requirement. The one simply does not follow from the other.

b. Mr Harris argued that it was not necessary on the approach that the High Court took for the applicant in Littlewood to rely on the 'material extent' provision so far as 'value' element was concerned or, alternatively, that she had to do so only to a very marginal degree.

He refers in particular to the passage at p. 55 where HHJ Fay said:

'The livelihood aspects may be divided into three periods: first from 1st October 1975 to 13th June 1977 when the husband is working full-time on the farm and the wife is working part-time of the farm; second, from 13th June 1977 to what is called 'the latter part of 1978' when both were working full-time on the farm and, third, from the latter part of 1978 down to 13th June 1979, the date of the husband's death, when the wife was working full-time and the husband part-time on the farm. The joint livelihood was derived wholly from the farm during the second period. During the first period it would seem to have been derived almost equally from the farm and from the wife's nursing. We are not told what the husband earned when nursing during for the last six or seven months of his life but the proportion derived from the two pursuits are likely to have been similar to the period when it was the wife who was working.'

On this basis, Mr Harris says, during the second period the whole of the family income was derived from the farm and so the only source of livelihood was the holding during that period. During the first and third periods, the judge seemed to have worked on the basis that about half of the family income derived from the farm and it was thus the 'principal' source of livelihood or very near to it.

I agree that this is important context for what the Judge then said at p.58:

'The tribunal poses a similar question as regards the principal source of livelihood. I do not think one can approach the question of source of livelihood of husband and wife in two separate compartments. Husbands and wives usually pool their income. Here the husband and wife had two sources of income between them for part of the time and one source only, namely the farm for another part. The figures in this case show that an important part of the joint income at all times was the farm and I entertain no doubt that, applying the interpretation that I have to the word 'material', this applicant has brought herself within s.21 of the 1976 Act.'

Thus even if the applicant in that case did need to rely on the 'material extent' provision in relation to the proportion of her livelihood that had been derived from the holding during the relevant period, I agree that it was to only a very marginal degree. The present case is very different.

c. The approach advocated by Ms Windsor is at odds with HHJ Fay's own disavowal of imposing a 'mathematical cut off point to what is material'.

d. Certainly the judgment of Hodgson J. does not support such an approach. I have quoted from his judgment above. He said that the Tribunal had to consider 'the extent of failure' and 'If on the facts, it is shown that there has been "a really large failure", then the applicant cannot bring himself with the section.' That seems to me, to be exactly the approach which the Tribunal took in the present case.

e. HHJ Fay apparently concluded that the only conclusion to which the Tribunal could have come was to find that the condition had been satisfied to a material extent. That must have been his finding of law, but it was, of course, a decision on the facts of that case. The facts of the present case are different. In that case during the second period of which the Court spoke, 100% of the family income had derived from the holding. In the present case, as the Tribunal observed, there was not one year when the 50.1% target had been reached. As I have also shown, it must have been the Court's view that in the first and third periods the deficiency was

only have been marginal. In the present case, as Mr Harris submitted, the deficiency in each of the 5 best years was far from marginal. It fell short of the 50.1% by not less than 20% and on average about 24%.

f. One Tribunal member did find in the Claimant's favour, but with respect to that member, I do not think that that in itself demonstrates that it was fairly arguable that the majority erred in their conclusion.

21. Accordingly, I reject each of the grounds advanced by the Claimant.
22. Ms Windsor began her submissions by observing that the Claimant's family had farmed this land for centuries and that it was the nature of the farming business that land had to be husbanded for many years for it to reach its best. I understand these points. I have also commented as to how the Tribunal had been impressed with the hard work which the Claimant had put into her family's farm. The Tribunal's unanimous view was that she would have been a suitable person to be granted a succession tenancy. However, the Tribunal also rightly observed that Parliament had laid down mandatory conditions for such tenancies one of which was that an applicant had to be an eligible person or satisfy the criteria to be treated as an eligible person. It decided that the Claimant was neither. In my judgment there is no fairly arguable error of law in its decision which would justify this Court directing the Tribunal to state a case.
23. The application is dismissed.