

William Smith (Wakefield) Ltd v Parisride Ltd

High Court of Justice Queen's Bench Division Administrative Court | March 23, 2005 | 2005 WL 699573

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William Smith (Wakefield) Limited v Parisride Limited (now known as White House (Staintondale) Ltd)



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Court

Queen's Bench Division (Administrative Court)

Judgment Date

23 March 2005

Case No: CO/1748/2005

[QB No: HQ04X01742

High Court of Justice Queen's Bench Division Administrative Court

Neutral Citation Number: [2005] EWHC 462 (Admin), 2005 WL 699573

Before : Mr Justice Leveson

Wednesday, 23 March 2005

Representation

Mr Derek Wood QC (instructed by Burges Salmon , Bristol) for the Claimant.

Mr John Collins (instructed by Longstaff & Midgley , Scarborough) for the Defendant.

Mr Paul Harris (instructed by Legal Services Directorate, Department for Environment, Food and Rural Affairs) for the Agricultural Land Tribunal.

JUDGMENT

Mr Justice Leveson :

1.. This action concerns an agricultural holding known as White House Farm, Staintondale, Scarborough (“the farm”) the freehold of which is owned by the Claimant, William Smith (Wakefield) Ltd (“the landlord”). More specifically, the landlord applies pursuant to [section 6\(2\) of the Agriculture \(Miscellaneous Provisions\) Act 1954](#) requiring the Agricultural Land Tribunal for the Yorkshire and Humberside Area (“the Tribunal”) to refer to the High Court questions of law said to have arisen in a hearing conducted between the landlord and Pariside Limited, which is now known as White House Farm (Staintondale) Ltd and is the tenant of the farm (“the tenant”). The purpose of the application is so that an appeal might be mounted pursuant to [section 6\(1\)](#) of the same Act.

Procedural Issues

2.. The application has been brought before the Court by proceedings under [CPR](#) as an appeal in the Queens Bench Division. My initial reaction was one of surprise that it was not brought in the Administrative Court which is the natural repository for appeals and other proceedings relating to the decisions of tribunals; its systems are specifically designed to deal with this type of case. Having considered the matter, however, I recognise that the [CPR](#) does not require that course and, during the hearing, it became apparent that similar proceedings had, in one case, been started both in what was then the Crown Office list and, in another case, in the Queens Bench Division, Carlisle District Registry before being transferred to London. This lack of clarity is a matter which the Rule Committee might care to consider but, to underline my view of the matter, I transfer this case to the Administrative Court.

3.. Of greater significance, the Tribunal was not named as a respondent or otherwise and, by application dated 7 March 2005, the Tribunal (acting through the Solicitor for the Department of the Environment, Food and Rural Affairs) sought to be joined as a Second Defendant. The tenant did not oppose the application but Mr Derek Wood QC for the landlord submitted in writing that the application was misconceived because this appeal was from a decision of a tribunal in a private civil dispute such that joinder would be contrary to practice. It was agreed that I should hear the Mr Paul Harris for the Tribunal *de bene esse*.

4.. In fact, this litigation is not an appeal from the substantive decision of the Tribunal; rather, it is an application directed to the Tribunal to state a case. [PD 52 paragraph 18.18](#) makes it clear that an application for an order directing a tribunal to state a case for determination by the Court must be made in accordance with [CPR Part 23](#). [CPR 23.3\(1\)](#) requires an applicant to file an application notice and 23.4(1) provides that the general rule is that a copy must be served on each respondent. The term “respondent” is defined by 23.1 as meaning “(a) the person against whom the order is sought and (b) such other person as the court may direct”. It is beyond argument that the person against whom the order (to state a case) is sought is the Tribunal. Thus, it is not merely a question of the Tribunal being permitted to be heard; it is an essential respondent (although whether in any particular case, it seeks to be heard is, of course, for the Tribunal). In the circumstances, I join the Tribunal as a Defendant to these proceedings. It was not suggested that any adjournment was required and, having heard argument from landlord, tenant and Tribunal, I am in a position to deal with the matter.

5.. As a final preliminary issue, I should deal with the request for an extension of time. It is accepted that these proceedings are three days out of time (the time limit pursuant to paragraphs 18.20 [CPR 52PD at 52.PD.78](#) being 14 days) the explanation being the time taken to obtain instructions and advice on what is said to raise a difficult and previously undecided question of law. The tenant frankly concedes that no prejudice has been caused by the delay although it is pointed out that an extension of time for the request to state a case was allowed by the Tribunal. In all the circumstances, I grant this extension of time.

The Background Facts

6.. In order to understand the underlying dispute and, thus, the circumstances in which a request is made for a case to be stated, it is necessary to spell out the history in a degree of detail. Thus, for some 20 years before 1997 the farm was operated as such by three members of the Stenton family under the terms of an oral agreement made with the previous owner of the holding, Mrs. Atkinson. By a Deed dated 29th September 1997 they assigned to the tenant, which was an off-the-shelf company, all their interest in the holding. Thereafter, on 7 August 1998, the freehold was acquired by Mr and Mrs W. D. Smith who, in turn, transferred it to another company, the landlord. An issue then arose as to whether the tenant had an agricultural tenancy of the holding fully protected by the [Agricultural Holdings Act 1986](#) (“the 1986 Act”), or merely a grazing licence.

7.. This issue was litigated before the Scarborough County Court and, on 23 July 1999, determined in the tenant's favour. The effect of the tenancy being held by a limited company rather than by any individual is that the procedure entitling a landlord to terminate a protected tenancy on the death of the tenant is unavailable. Thus, subject to other provisions contained in the 1986 Act the tenancy is virtually a perpetual tenancy transferable on the sale and purchase of shares in the tenant company rather than an assignment of the term.

8.. In this, as in any other, case, the existence of any tenancy gave rise to a number of other issues each one of which, pursuant to the terms of the 1986 Act and in the absence of agreement, was capable of being referred to arbitration. First, being an oral tenancy, the parties are entitled under [section 6](#) of the 1986 Act to have the terms of that agreement reduced to writing. In the event of arbitration, the arbitrator can not only identify what was agreed but also insert such other provisions into the tenancy as he believes right.

9.. Secondly, in relation to rent, [section 12](#) of the 1986 Act entitles the parties to such a tenancy to call for a rent review. In determining the rent properly payable for the holding the arbitrator must take into account the matters set out in [Schedule 2](#) of the Act and, in particular, all relevant factors, “including (in every case) the terms of the tenancy (including those relating to rent), the character and situation of the holding (including the locality in which it is situated) ...” and other matters: see [Schedule 2, para. 1\(1\)](#).

10.. Thirdly, if the landlord believes that the tenant has defaulted on repairing obligations, a notice to do work can be served. As I shall explain, it is possible that the landlord can rely on such a notice as the ground for serving a notice to quit under Case D (if the work is not done) and, if the tenant wishes to challenge his liability to do that work, the notice also may be referred to arbitration: see [The Agricultural Holdings \(Arbitration on Notices\) Order 1987 \(SI 1987 No. 710\) Part II](#) (“the 1987 Order”). Such a notice was served by the landlord on 11 July 2000.

11.. Agreement was reached on none of these issues and, as a result, all three were referred to arbitration. On 4 December 2000, Mr. A.R. Pardoe FRICS FAAV was appointed as Arbitrator. On 1 February 2002, he delivered Awards in relation to each. As to the terms of the tenancy, in consequence, a written form of Tenancy Agreement has been drawn up. By consent, he fixed the rent at £3,000 a year. Finally, in relation to the notice to do work, although Mr Pardoe rejected three items of work which the landlord required completed and allowed five years in relation to one item, he made the following other awards:

“In field 4729 — I find that the remainder of the gorse on the western boundary should be removed within 12 months from the date of this award.

In field 7290 — I find that the tenant should repair the walls on the North and East boundary within 12 months of this award.”

12.. It was thus a term of the Arbitrator's award that the tenant carry out this work by 1 February 2003. In the event, the landlord contended that he did not do so and, in consequence, he served a notice to quit. To understand the impact of that notice and because it provides the statutory background to this application, it is necessary to outline the rather complex provisions dealing with notices to quit generally before turning to what happened in this case.

Notices to Quit: the Law

13.. The award in relation to the terms of the tenancy was in standard form, that is, a tenancy from year to year. At common law, such a tenancy may be terminated by notice to quit but [section 25](#) of the 1986 Act (which was reflected in the terms of the tenancy fixed by the Arbitration) provides that any notice to quit will be invalid if it purports to terminate the tenancy before the expiry of 12 months from the end of the then current year of the tenancy.

14.. Where a notice to quit is served the tenant may invoke the provisions of [section 26](#) of the Act which provides as follows:

“(1) Where —

(a) notice to quit an agricultural holding or part of an agricultural holding is given to the tenant and

(b) not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to sub-section (2) below, the notice to quit shall not have effect unless, on an application by the landlord the [Agricultural Land] Tribunal consent to its operation.”

15.. [Section 27](#) of the 1986 Act sets out in detail the grounds upon which the Tribunal may consent to the operation of the notice. There are two hurdles. The first is that the landlord must establish one of the statutory grounds for possession set out in [section 27\(3\)](#). The second is contained in [section 27\(2\)](#) and is to the effect that the Tribunal may not in any case consent to the operation of the notice “if in all the circumstances it appears to them that a fair and reasonable landlord would not insist on possession”.

16.. The ability of the tenant to compel the landlord to refer a notice to quit to the Tribunal at this stage is excluded if the notice to quit is served within any of the Cases set out in [Part I of Schedule 3](#) to the Act: see [section 26\(2\)](#). Those Cases include Case D —

“At the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord, being either —

(a) a notice requiring him ... to pay any rent due ... or

(b) a notice requiring him within a reasonable period specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with his responsibilities to farm in accordance with the rules of good husbandry,

and it is stated in the notice to quit that it is given by reason of the said matter.”

17.. Thus, on the face of this provision, there is no right to appeal to a Tribunal if notice to quit is given on the grounds of failure to comply with a notice to carry out work. That is because the remedy available in that case is an appeal to an arbitrator pursuant to [paragraph 9](#) of the 1987 Order. To trigger this provision, the tenant must give written notice within one month requiring the question to be determined by arbitration and this notice will cease to be effective three months after the date of service of that notice unless an arbitrator has been appointed by agreement or an application made by the tenant or landlord (in this case, invariably the tenant for the landlord will doubtless be content for the notice to lapse) for appointment under [Schedule 11](#) of the 1986 Act.

18.. These two different mechanisms of challenge to a notice to quit — Tribunal in certain cases (initiated after counter-notice by the landlord), arbitration in others (initiated by the tenant) — date from 1948 and were considered unsatisfactory. As a result, in 1976, it was amended. This amendment is reflected in what is now [section 28](#) of the 1986 Act which applies where a landlord has given notice which includes a statement in accordance with Case D to the effect that it is given by reason of the tenant's failure to comply with a notice to do work. As will be clear, it allows a tenant to re-route the challenge to that notice to quit away from an arbitrator to the Tribunal.

19.. The relevant parts of these provisions are as follows:

“(2) If the tenant serves on the landlord a counter-notice in writing in accordance with subsection (3) or (4) below requiring that this subsection shall apply to the notice to quit, the notice to quit shall not have effect ... unless, on the application of the landlord, the Tribunal consents to its operation.

(3) Subject to sub-section (4) below, a counter-notice under sub-section (2) above shall be served not later than one month from the giving of the notice to quit.

(4) Where the tenant not later than one month from the giving of the notice to quit serves on the landlord an effective notice requiring the validity of the reason stated in the notice to quit to be determined by arbitration under this Act —

- (a) any counter-notice already served under sub-section (2) shall be of no effect, but
- (b) if the notice to quit would, apart from this sub-section, have effect in consequence of the arbitration, the tenant may serve a counter-notice under sub-section (2) not later than one month from the date on which the arbitrator's award is delivered to him.”

20.. The powers of the Tribunal are then set out in [section 28\(5\)](#) in these terms:

“The Tribunal shall consent under subsection (2) above to the operation of the notice to quit unless it appears to them, having regard —

- (a) to the extent to which the tenant has failed to comply with the notice to do work,
- (b) to the consequences of his failure to comply with it in any respect and
- (c) to the circumstances surrounding any such failure,

that a fair and reasonable landlord would not insist on possession.”

It will be clear that this underlying test (“that a fair and reasonable landlord would not insist on possession”) reflects the test adopted in other cases by the Tribunal and injects a very important element of discretion into the process. Although it is not necessary to set out the provisions, that discretion is not available to an arbitrator.

21.. Thus, whatever else might be the effect of these provisions, it is beyond doubt that a tenant can within one month decide that his challenge to a notice to quit should be directed to the arbitrator or to the Tribunal. If he determines to proceed to the Tribunal, within the same month, he can change his mind and obtain a reference to arbitration; the counter-notice referring the matter to the Tribunal then lapses. Furthermore, whether arbitration was started from the outset or after an initial reference to the Tribunal, after the arbitrator's award, the tenant can still go to the Tribunal.

22.. The question in this case is what is the consequence of serving notices referring the matter to an arbitrator and to the Tribunal at the same time. To understand how it arises, I return to the facts immediately surrounding this dispute.

This Notice to Quit

23.. On 2 April 2003, the landlord gave the tenant notice to quit as from 6 April 2004 (or the expiration of the year expiring after the end of 12 months following service of the notice) relying on Case D in these terms:

“At the date of the giving of this notice you have failed to comply with a written notice dated the 11 day of July 2000 served on you by your landlord which required you within the reasonable period specified in the notice to remedy the breaches by you capable of being remedied of the terms and conditions of your tenancy ...”

It was not specific as to the nature of the works to which it was referring of as to the failure alleged. Given the order of the arbitrator, however, it could only refer to the removal of the gorse in relation to one field and the repairing of walls in relation to another field.

24.. By letter dated 8 April, solicitors acting on behalf of the tenant sought to preserve their options. The letter is in these terms:

“[W]e now enclose by way of service upon you tenant's Counter Notice and tenant's Notice in general form referring the Notice to Quit to Arbitration.

Please can you, with specific reference to the Arbitrator's award in relation to the landlord's Notice dated 11 July 2000 provide full details of any works which it is alleged have not been done.

On receipt of that information we can take our client's further instructions and prepare a schedule for attaching to the tenant's Notice referring the matter to Arbitration particulars of issues that we will require the Arbitrator to consider.

We anticipate that any breaches by the tenant (none being admitted) will be such that a fair and reasonable landlord would not insist on possession.”

25.. This letter (which it is common ground enclosed both notices in proper form in the same envelope) does not identify which way the tenant was seeking to proceed. There are references to details being required for arbitration and to the test (“fair and reasonable landlord”) which is relevant only to Tribunal proceedings. It did not elicit a response limited to refusing to provide details of the failure to complete “in accordance with the Arbitrator's notice dated 7 January 200[2]” making it clear that such would follow only with the landlord's statement of case which is part of the arbitration process. That led to a reply (dated 29 April) complaining that it was not acceptable not to give details on the basis that if the information was provided, it was anticipated that the tenant would be more than prepared “to immediately address any outstanding matters in order to avoid the need and expense of formal arbitration proceedings”.

26.. No question in correspondence was addressed to the apparent attempt to pursue arbitration and Tribunal proceedings concurrently. Instead, because the landlord could not wait to see whether or not the tenant would refer to arbitration and he had only one month to deal with the possible Tribunal proceedings, on what I am told was 3 May (the date of the document in my papers being blank), the landlord initiated Tribunal proceedings.

27.. No further steps were taken by the tenant in connection with the prospective arbitration and no referral ever took place. In its reply to the Tribunal it explained the reference to arbitration on the basis that the Arbitrator who had dealt with the matter one year earlier would have been in the best position to hear and resolve the issue but that “the landlord has chosen to ignore that referral”. No point appears to have been intimated by the landlord that the way in which the process was started undermined the reference to Tribunal proceedings.

The Tribunal

28.. On 19 January 2004, the Tribunal (under the Chairmanship of His Honour Robert Taylor) sat to determine the matter. Prior to hearing evidence and arguments on the merits, the landlord took a preliminary point that the tenant had not served an effective counter notice under [section 26](#) of the 1986 Act with the result that the Tribunal

had no jurisdiction to determine the matter. It was argued that, given that no reference to arbitration had been made, the Notice to Quit would take effect on 6 April 2004. The argument was that the scheme of the legislation did not permit the tenant to pursue the two possible ways of contesting a notice to quit at the same time and that the only counter notice served (in the same envelope as the reference to arbitration) had been rendered ineffective by the operation of [section 28\(4\)\(a\)](#) of the Act.

29.. Mr Collins (who represented the tenant both in the Tribunal as before me) submitted that the landlord was seeking to adopt an inconsistent position. It had made the application to the Tribunal (by notice dated 3 May) and thereby invoked its jurisdiction. It was said that the notice in relation to arbitration had only been given because it was not clear whether the landlord was complaining of matters which had not been the subject of arbitration and that, when it had become clear, both parties had treated the arbitration as “of no effect”. Further, the provisions of [section 28\(4\)](#) had not rendered the counter notice of no effect because it had not been “already served” when the request for arbitration was made: both had been in the same envelope.

30.. The Tribunal unanimously accepted Mr Collins' submissions. It put the matter in this way:

“The crux of the argument for the landlord was that the tenant's counter notice was of no effect because of the provisions of section 28(4) of the Act. However, all that this subsection says is that, where a tenant serves on a landlord a notice requiring arbitration, any counter-notice already served under section 28(2) shall be of no effect. We cannot see how this could possibly render ineffective a counter-notice served concurrently with the notice requiring arbitration, not only at the same time but in the same envelope. Furthermore, no question of competing jurisdictions has arisen, since neither party sought to take the referral to arbitration any further. We are therefore satisfied that the tenant's counter notice under section 28(2) is still effective and we have jurisdiction to hear the landlord's application for our consent to the operation of the Notice to Quit.” (The emphasis is that of the Tribunal.)

31.. The Tribunal went on to find the facts and dealt with the merits. In refusing its consent to the operation of the landlord's notice to quit, it is sufficient to pick out the primary findings and conclusions of the majority in this way (at paragraph 46):

“(1) Although the Tenant had initially been somewhat dilatory in seeking to comply with the notice to do work, it had eventually complied to a very substantial extent with its obligations. The gorse had now been completely cleared. The boundary walls in question had to a very large extent been repaired to an acceptable standard. On the northern boundary (a) sections (i) and (ii) had been repaired to Mr Lindley's satisfaction; (b) in the majority view, the Tenant was under no obligation to reconstruct a wall on section (iii) ...; (c) any failure to repair section (iv) was of no practical importance. On the eastern boundary (d) in the majority view, all but sections (i) and (viii) had been repaired to a reasonably acceptable standard ... (e) the failure to repair sections (i) and (viii) was of no practical importance because both were effectively gateways which had been closed by fencing which (although it could perhaps have been somewhat tidier in appearance) was fully effective in preventing escape or ingress of stock

(2) Any failure by the Tenant to comply with the notice to do work had had no adverse consequences for the Landlord ... The Holding had not been damaged or deteriorated in any way. It was the Landlord's voluntary decision to serve the Notice to Quit and bring these proceedings.

(3) In looking at the circumstances surrounding any failure by the Tenant to comply with the notice to do work, account needed to be taken of the size and nature of the Holding. Bearing in mind that it was a small sheep farm, for which the agreed rent was £3,000 a year, it was unlikely that — even if farmed extremely well — it would produce sufficient income for the Tenant to enable it to carry out extensive works of repair within a twelve month period.”

32.. After an extension of time granted by the Tribunal, the landlord then requested the Tribunal to state a case. The application is not in my papers but assuming that it is reflected in the Part 8 Notice in relation to these proceedings, it dealt with two aspects of the decision. First, it challenged the decision of the Tribunal that the tenant had served an effective counter-notice within [section 26](#) of the 1986 Act contending that it erred in its interpretation of [section 28\(4\)](#) . Secondly, it dealt with the conclusion and was to the effect that in concluding that a fair and reasonable landlord would not insist on possession, it erred by excusing the tenant from non compliance with the notice to do work within the time determined by the arbitrator, by taking account of the effect of the outstanding breaches and the amount of the annual rent (and the likelihood that the tenant would have sufficient income to do the work within the time), by ignoring the evidence that grants were available to do the work and that the Arbitrator had determined both the rent, the terms of the tenancy and the time within which the work should be done and by usurping the function of the Arbitrator and, in effect determining that the reasonable time determined by him was unreasonable despite the absence of change of circumstances.

33.. The Tribunal rejected this request. By letter dated 20 May 2004, the Secretary responded in this way:

“After consulting with the other members of the Tribunal the Chairman refuses the Landlord's request dated 13 May 2004 to state a case for the High Court. In the Chairman's view (in which he is supported by Mr Smith) neither of the questions set out in the request raises any reasonably arguable point of law. As to Question 1, they consider that the statutory provisions governing the effectiveness of the Tenant's counter-notice are clear and unambiguous (for the reasons detailed in the Tribunal's written decision). As to question 2, they consider that the issues raised are essentially issues of fact rather than law.”

The Issues

34.. I am now asked to direct the Tribunal to state a case in order that the landlord can challenge each of these conclusions in the High Court. I accept that the test is whether I am satisfied that there is a fairly arguable point of law which would justify ordering the tribunal to refer it to the *High Court for decision*: see, for example, *Clegg v. Fraser* [1982] 2 EGLR 7 at 9M.

The Notice

35.. As to the first issue, Mr Wood submits that it was not the intention of the legislature that the tenant should have the right to invoke both jurisdictions concurrently. The fact that a later notice demanding arbitration would nullify a counter-notice served under [section 28\(2\)](#) which had “already” been served did not produce the result that it is otherwise legitimate to invoke both remedies at the same time. On the contrary, he argued, it was an indication that concurrent jurisdictions are not available.

36.. He went on to point to the practical consequences for a landlord who is served with two notices which he described as “severe”. The landlord did not know what the tenant had in mind and could not take the risk of not applying to the Tribunal, by waiting to see whether the tenant made an application under [Article 10](#) of the 1987 Order for the appointment of an arbitrator. On the contrary, the tenant could do just that. In the further alternative, to be absolutely clear of its position, the landlord might have to initiate both proceedings. As to the argument that the counter-notice had not been “already served” when the notice seeking arbitration was provided, Mr Wood pointed to the startling prospect of concurrent proceedings producing different results and submitted that the only proper construction of the legislation was that it provided the tenant with a choice and that he had to elect which procedure to adopt.

37.. Mr Collins relied on the correspondence and the refusal of the landlord to specify the work which it was contended had not been done thereby depriving the tenant of knowing which was the more appropriate procedure to adopt. I am not impressed with this submission because it is common ground that the notice could only refer to that work ordered by the Arbitrator which I have set out namely the removal of the gorse and reconstruction of a wall.

38.. Neither do I consider there to be force in Mr Harris' first submission that the notice requiring arbitration was not “effective” within [section 28\(4\)](#) of the 1986 Act because it was contingent or conditional on there being new issues raised by the Claimant that were suitable and capable of determination by arbitration. By its notice, the tenant required “all questions relating to the reasons specified in the landlord's notice to quit” to be so determined and the accompanying letter speaks of details of work not done by reference to the arbitrator's award. There is no doubt that an arbitrator was perfectly capable of deciding whether the alleged failure to carry out work was established. Neither is there a basis for arguing (as suggested in writing) that the reference to arbitration was “impliedly withdrawn”. The tenant did nothing expressly or by implication to do so; rather, by not even seeking to agree an arbitrator, it allowed the possibility of arbitration to lapse.

39.. Both Mr Collins and Mr Harris also submitted that the only circumstance in which the reference to arbitration rendered the counter-notice of no effect was if it was “already served” and that it was impossible to argue that a notice contained in the same envelope so that it was served concurrently with the reference to arbitration had “already” been served. Mr Collins argued that Mr Wood's construction entirely avoided the words “already served”. Mr Harris dealt with the submission of competing jurisdiction by pointing to the fact that neither party sought to take the referral to arbitration further and submitted that it was unreal to speak of potentially conflicting decisions.

40.. I can deal with the matter quite shortly. Whereas the legislation contemplated only one decision (albeit that a decision to serve a counter-notice could be overtaken by a subsequent decision to seek reference to arbitration), I do not consider that it is even fairly arguable to construe the provisions as rendering invalid a counter-notice simply because at the same time the tenant also gives notice of reference to arbitration; the legislation simply did not contemplate that possibility. In my judgment, it is significant that neither notice itself initiates any proceedings: after the counter-notice it is for the landlord to institute tribunal proceedings and one of the parties must seek and obtain either by agreement or otherwise the appointment of an arbitrator. Only if both steps are taken is there any question of concurrent proceedings; I consider that prospect to be inconceivable.

41.. Alternatively, let me postulate that such steps were taken and each side (for some unfathomable reason) tried to force its preferred mode of dispute resolution. If the tenant wants an arbitration, an arbitrator can be appointed; it is likely to be the forum of choice of a landlord given the additional discretionary powers of the tribunal. If the tenant wants a tribunal, given that such a route is open after an arbitration in any event, there would be no point in arbitration.

42.. Going back to the moment at which both reference and counter-notice are served, I appreciate that the landlord can be put in something of a dilemma in having to decide whether to institute tribunal proceedings but, again, I do not accept that his dilemma is of great moment. First, because tribunal proceedings can follow arbitration in any event and a landlord is likely to prefer arbitration, the landlord can seek to have an arbitrator appointed. Dialogue with the tenant will be inevitable if only to attempt to reach agreement as to the arbitrator. If it becomes necessary to protect the position by instituting tribunal proceedings, an extension of time can be sought along with directions. In fact, in this case, there was no ultimate dilemma: the landlord instituted tribunal proceedings and both sides proceeded on that basis. In the circumstances, I reject this aspect of the landlord's challenge.

The Approach to section 28(5)

43.. Mr Wood focussed on paragraph 46(3) of the Tribunal decision (set out in paragraph 31 above) and submitted that it appeared that it had taken into account matters that had previously been determined by arbitration and re-opened them. He submitted that it was not open to the Tribunal to suggest that the rent (fixed by consent) could only be justified if the tenant was excused from its responsibility to comply with its repairing obligations or that (in the light of the Arbitrator's decision to fix the period of 12 months for the work to be completed) the economies of the farm were such that it would not produce sufficient income to do so. He also referred to the failure of the Tribunal to have regard to the availability of grants to cover the costs of repair.

44.. Reading that paragraph in isolation, it might be thought that there is potential force in Mr Wood's complaint but, in context, I do not believe that, even arguably, there is. The Tribunal carefully set out those matters to which it had to have regard, that is the extent of failure, the consequences of failure and the circumstances surrounding such failure. That there were failures was clear; the Tribunal was not relieving the tenant of responsibility for them. Rather, it was taking into account all the circumstances in determining whether the failures were such that a fair and reasonable landlord would not insist on possession. The circumstances surrounding the failure did include the profitability of the farm and its size and nature: in my judgment, it is beyond argument that these features were relevant to the decision to be reached. The Tribunal could have mentioned that grants could have been obtained but I do not consider that its failure to do so even arguably erects a question of law fit to be referred to the High Court. This ground also fails.

Conclusion

45.. Although both the legislative background is complex (and I am particularly grateful to Mr Wood for the clear and painstaking way in which he took me through it), the ultimate issues are, in my view, comparatively clear. I do not accept that either question upon which the landlord sought from the Tribunal a reference to the High Court raises a fairly arguable point of law and this application is dismissed.

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