Notice to Quit: s.27(3)(f) or Case B?

Esther Stirling, Harrison Clark Rickerbys & **Joe Ollech**, Falcon Chambers

The First-Tier Tribunal (Property Division) (hereafter, FTT) gave an important decision in September regarding the Agricultural Holdings Act 1986 and general notices to quit.

If a landlord proposes to use land for a non-agricultural purpose which will require planning permission, but which has not yet been obtained, he or she must wait until that permission has been obtained and then proceed under Case B. It is not possible to proceed earlier under s.27(3)(f) of the Act.

The case of *Herefordshire District Council v Bayliss*[1] concerned a tenancy of agricultural land in Herefordshire, farmed by the tenant's family since 1971. The landlord local authority had earmarked the site, together with adjoining land, for development. The holding amounts to a mere 1.544 acres but included highway frontage rendering it important for the proposed development.

In this case the landlord served a general notice to quit on the agricultural tenant in respect of land which it proposed to use for non-agricultural purposes. At the date notice was given it had applied for, but had not yet obtained, planning permission.

In response to the tenant's counter notice the landlord placed reliance on s.27(3)(f) of the 1986 Act on the basis that its proposed use was non-agricultural "not falling within Case B" as stated in s.27(3)(f).

This was predicated on the argument that Case B applies when the landlord serves notice to quit based on proposed non-agricultural use for which (inter alia) planning permission "has been granted". On a strict literal approach, planning permission had not been granted, therefore Case B did not apply, ergo s.27(3)(f) should be available – because, after all, the land was required for a non-agricultural use.

Stress testing the legislation

Although this approach may not be the way many practitioners would have instinctively approached circumstances such as this, it is fair to say that a very strict literal approach such as this was not impossible. There is always a first time that a piece of legislation needs to be stress tested in anger, even if it has been the better part of 33 years since it was passed.

For the tenant it was contended that the phrase "not falling within Case B" in s.27(3)(f) was to be understood as not capable of falling within Case B. If the proposed use would require planning permission the landlord should have to obtain that permission, and then proceed under Case B.

> "Landlords must proceed with care if they wish to terminate such tenancies expeditiously"

The FTT elected to treat letters of objection from the tenant, raising this issue, as an application to strike out – in effect, a trial by way of preliminary issue on a pure point of law.

The arguments

This is the first decision in the courts of England and Wales on this point, and in a carefully reasoned and detailed judgment Regional Judge Bowles (also familiar to practitioners as Master Bowles, ChD) found in favour of the tenant.

The tenant's interpretation of s.27(3)(f) derived support from the way in which the section has been treated explicitly or implicitly in all the leading academic textbooks, the preponderance of which are of the view that s.27(3)(f) is intended for uses such as forestry, where planning permission is simply not required at all.

Taking two such sources, by way of example, in *Muir Watt & Moss on Agricultural Holdings 15th Ed.*, the authors explained that (emphasis added) "This provision is designed to catch all non-agricultural uses which do not fall within the current Case B. The main use to which this head is put is in order to secure land for private forestry or for landscaping where such is a pre-condition, of but not part of, a planning permission being granted; **or for which no planning consent is required.**"

To the same effect was the view in *Rodgers on Agricultural Law 4th Ed.*, that

> “If a landlord proposes to use land for a non-agricultural purpose which will require a planning permission which has not yet been obtained, that permission must be obtained before proceeding under Case B”

“The present provision, consequently, is confined to cases where the landlord’s proposals **are exempted from planning permission by the terms of the Town and Country Planning Acts themselves**, and are of a non-agricultural use.”

There was further support to be derived from obiter remarks of the Scottish Court of Session in *North Berwick Trust v James B Miller & Co*[2].

To be sure, it could be (and was) argued on the landlord’s behalf that it could not be to the tenant’s detriment if the landlord were to choose to go down the far harder and more uncertain route of a discretionary test under a general notice to quit, and having to persuade the Tribunal that it met the “fair and reasonable” threshold.

Nevertheless, the counter to that argument was that such a choice by the landlord that could result in cases where the FTT would, in effect, to have usurp the function of the planning authority or predict the outcome of the planning process – for example if, at the date of the hearing, planning permission has still not been obtained. It could not have been the intention of the legislators that the FTT should have to assume this role, for which it would be arguably ill-equipped. It would also create the risk of the FTT consenting to a notice to quit where planning permission never did in the end materialise.

The wider issues

But moving beyond this the FTT went on to explain that in its view the tenant’s argument, in other possible scenarios, would also be applying a literal reading of the Act. Regional Judge Bowles considered that there were two situations which may arise where a landlord “goes early” by relying on s.27(3)(f) for consent when it is in fact going to need planning permission before it can proceed.

The first would be that planning permission will have been granted by the time the application for consent to the operation of the notice to quit is to be heard. The second would be, as in this case, that the planning permission would still be awaited.

In the former scenario the claim would automatically have fallen outside the scope of s.27(3)(f) – because the very fact of the planning permission would, by definition, show that this could not be a case that did not fall within Case B. This would not even involve a purposive reading of the relevant sections as it would have ceased to apply.

It is fair to note that this is a First Tier Tribunal decision, and so is strictly speaking not binding as a court of record. But the judgement is carefully reasoned, and the chair of the Tribunal was Regional Judge Bowles, also familiar to practitioners previously in his role as Chancery Master.

It is more than likely that this decision will be an important reference point despite its place in the hierarchy of authoritative decisions, and it provides welcome clarification on this important point.

Consideration of the reported judgment is recommended – it can be accessed on *Lawtel* and *Westlaw*.

In conclusion, it is worth noting that this notice to quit was in fact the second served by the landlord, the first (dating back to 2017) having fallen away when the local authority failed to bring its application to the FTT within the one month time limit from service of the counter-notice. To seek to save time, it was open to the landlord to elect to serve a Case B notice during the above proceedings, without prejudice to the service of the general notice to quit, but it did not.

These points illustrate the care with which landlords must proceed if they wish to terminate such tenancies in an expeditious manner.

---

1 FTT Property Chamber, 6th September 2019, [2019] 9 WLUK 147

2 [2009] Scot CS CSIH 15