FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(AGRICULTURAL LAND AND DRAINAGE)

Case Reference	:	**ALD/M/NQ/2018/002**
Holding	:	**Grazing Land adjoining the Former Highways depot in Bromyard, Hereford Road, Bromyard, Herefordshire**
Applicant	:	**The County of Herefordshire District Council**
Representative	:	**Ms H Taller of Browne Jacobson LLP**
Respondents	:	**Mrs Jean Bayliss**
Representative	:	**Ms E Stirling of Harrison Clark Rickerbys**
Type of Application	:	**Notice to Quit** **Section 26(1) Agricultural Holdings Act 1986**
Tribunal Members	:	**Regional Judge T Bowles** **Sir Richard Fitzherbert Bt** **Mr FG Gent**
Date and venue of Hearing	:	**26 June 2019, Birmingham Tribunal Office**
Date of Determination	:	**6 September 2019**

DECISION & REASONS

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1. The Respondent, Mrs Jean Bayliss, is the tenant of an agricultural holding of 1.54 acres of grazing land adjoining the former Highways Depot in Bromyard, Herefordshire (the holding). The Applicant, Herefordshire County Council is the landlord of the holding. The holding is protected under the Agricultural Holdings Act 1986 (the 1986 Act).

2. By a notice to quit, served on and dated 26th September 2018, the Applicant purported to terminate the Respondent's tenancy of the holding, as from 28th September 2019. The Respondent served counter-notice under the 1986 Act on 19th October 2018.

3. By sections 26 and 27 of the 1986 Act and by reason of the counter-notice it is common ground that, on the facts of this case, the Applicant's notice can only effect in the event that the Tribunal consent's to the operation of the notice upon one of the grounds set out in section 27(3) of the 1986 Act and then only if it appears to the Tribunal that a fair and reasonable landlord would, in all the circumstances, insist upon possession being delivered up (section 27(2) of the 1986 Act).

4. The Applicant's notice stated that the Applicant relied upon section 27(3)(f) of the 1986 Act; namely that the Applicant proposed to terminate the Respondent's tenancy of the holding for the purpose of the land's being used for a use, other than for agriculture, not falling within Case B. For present purposes nothing turns upon the form of the notice.

5. The reference to Case B is a reference to Case B of Schedule 3 of the 1986 Act. That Schedule sets out a number of Cases where, if the matters specified in the Case in question are made out, the effect of section 26(2) of the 1986 Act is that the consent of the Tribunal to the operation of the notice to quit is not required. The determination as to whether the matters specified in the Case in question have been made out is allocated not to the Tribunal, but, in the event that the recipient of the notice challenges the facts in the notice which are said to bring it within a particular Case, to an arbitration, brought into play by the service by the tenant of a notice calling for such an arbitration.

6. As to Case B, itself, that Case applies, in circumstances where the 'notice to quit is given on the ground that the land is required for a use, other than for agriculture, and where the non-agricultural use falls within one of the categories, or classes, of user set out in paragraphs (a) to (c) of Case B. For purposes of the current proceedings and these Reasons, the relevant limb of case B is limb (a), which applies in circumstances where the ground given for the service of notice to quit is that the land is required for a use, other than for agriculture, 'for which permission has been granted on an application made under the enactments relating to town and country planning'.

7. At the date of the notice, the Applicant had applied for planning permission for the residential development of land including the holding, but planning permission had not been granted.

8. By application to the Tribunal, dated 17th December 2018, the Applicant applied for the consent of the Tribunal to the operation of the notice to quit, relying, as it had done in the notice previously served, upon the ground set out in section 27(3)(f).

9. The application explained that planning permission had been applied for in respect of a residential scheme comprising 45 dwellings in total, that that application was to come before the relevant planning committee on 18 December 2018, that the land comprised in the holding was essential to the scheme, that the proposed developer expected to be in a position to start the development by the termination date specified in the Applicant's notice to quit and that, had it been possible to secure planning permission, prior to the date upon which it was necessary to serve the notice to quit, in order to secure the September 2019 termination date, then notice would have been served under Case B; that is to say using the procedure for termination of the tenancy of a holding set out in Case B of Schedule 3 of the 1986 Act, as set out above.

10. Planning permission has now been granted. The Tribunal was not told whether that planning permission was granted on 18 December 2018, or some other date. That permission, however, was in place at the date of the hearing (26th June 2019) to which these Reasons relate.

11. In response to the application and in correspondence; by letter dated 18 January 2019; the Respondent, has contended that, in circumstances where, as in this case, the proposed non-agricultural use is a use for which planning permission is required, it is not open to a landlord to pre-empt the grant of planning permission and rely upon section 27(3)(f), in procuring a Tribunal's consent to the operation of a notice to quit, but, rather, that, in those circumstances, the landlord must wait upon the grant of planning permission and serve notice, in reliance upon Case B of Schedule 3 of the 1986 Act.

12. By letter dated 16 April 2019, the Tribunal directed that the Respondent's letter of 18 January 2019 be treated as an application to strike out and convened the hearing, on 26th June 2019, for the determination of that application. , The basis upon which the application is put by the Respondent is that, in the circumstances outlined above, the Applicant's application for consent, founded upon section 27(3)(f), has no reasonable prospects of success, or, put another way, is doomed to failure.

13. The Applicant's core submission is that its application for consent to the operation of the notice that it has served is underwritten and supported by the language of section 27(3)(f) of the 1986 Act and by a literal construction of that language. What is said is that the circumstances, in which notice was given and the

circumstances obtaining as at the date of the application for consent, fall squarely within the language of the sub-section. At those dates and each of them, the Applicant landlord proposed to terminate the tenancy for the purposes of the land's being used for a purpose, other than for agriculture, and, at those dates and each of them the non-agricultural use in question; namely residential development; did not fall within Case B, because, at each of those dates, planning permission had not been granted.

14. In further support of that submission, the Applicant landlord submits that there is no sound reason as to why the literal analysis of section 27(3)(f) of the 1986 Act, as last set out, should not be given effect. The point is made that where Case B, or any other of the 'special' Cases applies, the Tribunal is deprived of jurisdiction and, in particular, is deprived of its discretion to override the operation of a notice to quit, even where one of the grounds for the operation of such a notice are made out, in circumstances where, in the view of the Tribunal, a fair and reasonable landlord would not insist upon the operation of the notice and of possession, therefore, being given up by the tenant of the holding.

15. Accordingly, as it is submitted, the effect of the landlord's founding its application for the operation of a notice to quit upon one of the section 27(3) grounds (specifically, in the context of this application, section 27(3)(f)), rather than, delaying the service of notice until planning permission has been granted and until, therefore, Case B can be brought into play is that the landlord is submitting itself to a higher statutory threshold than that which would have obtained had reliance been placed upon Case B. Such an approach, it is said, cannot be contrary to the policy and purpose of the 1986 Act and should not, therefore, afford proper grounds for a non-literal, or purposive, construction of the 1986 Act, such as to preclude the course that the landlord, in this case, has taken.

16. The Tribunal is not persuaded by the Applicant landlord's submissions, attractively argued although they were, by Mr Sutherland, upon behalf of the Applicant.

17. Mr Ollech, for the Respondent, submitted that the phrase 'not falling within Case B', in section 27(3)(f) of the 1986 Act, meant, when properly construed, not capable of falling within Case B, with the result, as he submitted, that the Tribunal could only give its consent to the operation of a notice to quit, upon the ground set out in section 27(3)(f) of the 1986 Act, in circumstances where the proposed non-agricultural use was one which could not fall within any of the classes, or categories of non-agricultural use set out in Case B. On that footing, the residential use contemplated in this case and for which planning permission was plainly required and, in fact, granted could not fall within section 27(3)(f) of the 1986 Act and, for that reason, the current application for the Tribunal's consent to the operation of the notice to quit, on the section 27(3)(f) ground could not be sustained and must fail.

18. In support of that submission, Mr Ollech prayed in aid various text book citations which, he contended, adopted, or accepted, his construction. He pointed out that, in each of Scammell Densham &Williams (10th Edition), at 36.47, Rodgers on Agricultural Law (4th Edition), at 7.33-7.34, Muir Watt & Moss (15th Edition), at 15.31 and Woodfall, at 21.144, the authors had concluded that the section 27(3)(f) ground is only available in circumstances where planning permission is not required and where, therefore and for that reason, the facts do not bring the case in question within the ambit of Case B. Implicit in that conclusion, Mr Ollech submitted, was, or must have been, the a fortiori conclusion that the phrase 'not falling within Case B' had the extended meaning for which he contended and that a non-agricultural use fell within Case B if it was a use for which planning permission would, in due course, be required.

19. Mr Ollech was, also, able to derive support from a decision of the Scottish Court of Session, cited in Woodfall; North Berwick Trust v James B Miller & Co [2009] CSIH 15. In that case, the Lord Justice Clerk, Lord Gill, in dealing, on appeal, with a decision made by the Scottish Land Court, in respect of the comparable and, substantially, identical provisions of the relevant Scottish legislation; the Agricultural Holdings (Scotland) Act 1991 (the 1991 Act); expressly disagreed, at paragraph 18 of his judgment, with what he had termed, in paragraph 17, the 'surprising conclusion' reached by the Land Court, in that case, to the effect that, under the kindred provision to section 27(3)(f) (section 24(1)(e) of the 1991 Act) and because, as the Tribunal understands it, the Scottish equivalent (section 22(2)(b) of the 1991 Act) of the relevant limb of Case B (limb (a)), is, as with limb (a), only available where planning permission has been granted, a landlord could apply for consent to the operation of a notice to quit in circumstances where planning permission would be required for non-agricultural use in question but had not yet been obtained.

20. The Lord Justice Clerk, with whom the two other members of the Court of Session agreed, was clearly of the view that the Scottish equivalent of section 27(3)(f) of the 1986 Act could not be invoked in that way and that the relevant provision was only available to meet the case where a landlord proposed to put the land to a non-agricultural use for which no planning permission was required.

21. In support of that view, the Lord Justice Clerk drew attention, at paragraph 19, to the potential consequences of the conclusion formed by the Land Court, namely that, if right, it would (a) enable a landlord who needed planning permission for a non-agricultural use, but who was unlikely to obtain it, to, nonetheless, apply for consent to the operation of a notice to quit, even in circumstances where the landlord had no realistic prospect of fulfilling the purpose for which it was said the notice had been served; and (b) require the Land Court, in any case where planning permission had not been granted at the date when the Land Court had to consider the application for consent, and, in order for the Land Court to make an informed decision as to whether it would be fair and reasonable for the landlord to insist upon possession, under the provisions (section 24(2) of the 1991 Act) equivalent to section 27(2) of the 1986 Act, to assess the likelihood that planning permission would be granted and, in so doing,

trespass upon the province of the planning authority with, perhaps, inadequate knowledge of relevant considerations.

22. In the view of the Lord Justice Clerk and of the Court of Session, the Scottish legislation could not have been intended to have that effect and did not have that effect.

23. North Berwick Trust is not binding on this Tribunal, albeit, given the substantial similarities of language, as between the Scottish and the England and Wales legislation it is plainly relevant and persuasive.

24. Its persuasive quality, however, is mitigated and, to an extent, put in question by the fact that Lord Gill, writing extra-judicially, in his own book, Agricultural Tenancies 4th Edition (2017), appears to have resiled from the views expressed in North Berwick. At paragraph 36-69, Lord Gill endorsed what he had termed, in North Berwick, the surprising conclusion of the Land Court, in that case, to the effect that, because section 22(b) of the 1991 Act requires (as does the relevant limb of Case B), for its availability, that planning permission has already been granted, section 24(1)(e) of the 1991 Act (the identical equivalent of section 27(3)(f) of the 1986 Act) is available to a landlord seeking consent to the operation of a notice to quit in circumstances where planning permission is required but has not yet been granted.

25. This Tribunal agrees with the consensus view expressed in the text books cited by Mr Ollech and agrees also with the views expressed by the Lord Justice Clerk and the Scottish Court of Session, in North Berwick, as applied to the equivalent England and Wales legislation, rather than Lord Gill's view, as expressed in his 2017 text book. Section 27(3)(f) of the 1986 Act is not available in a case where, in due course, planning permission will be required.

26. There are, in the view of this Tribunal, two distinct situations which may arise in a case where section 27(3)(f) is relied upon as a ground for the Tribunal's consent to the operation of a notice to quit, in circumstances where planning permission is required for the non-agricultural use in question.

27. The first is that which would arise, in the Applicant's current application for consent to the operation of its notice to quit, were that application brought to a full hearing; namely where, at the date of the hearing, planning permission had already been granted. The second is that contemplated by the Lord Justice Clerk and in much of the argument before this Tribunal; namely where at the Tribunal hearing the question of the grant of planning permission, although required, for the implementation of the non-agricultural use in question, remains unresolved.

28. In relation to the former case, it is the clear view of the Tribunal that, in circumstances where, at the hearing of the application for consent, the required planning permission has already been obtained, then, for that reason and regardless of

wider considerations of construction, or statutory intention, the section 27(3)(f) ground for consent is plainly unavailable.

29. The question for the Tribunal, on any application for consent to the operation of a notice to quit, is not a question as to the validity of the notice, when served, such that the question might fall to be determined as at the date of service, but, rather, the question is as to whether, when the application is heard, the Tribunal is satisfied, under section 27(1) of the 1986 Act 'as to one or more of the matters mentioned in sub-section (3) ..'

30. Accordingly, in this case and in any case purportedly falling within section 27(3)(f), before the Tribunal can give its consent to the operation of a notice to quit, the Tribunal must be satisfied, on the hearing of the application for consent and at the hearing of that application, that, as at that hearing, the landlord's position is that its purpose in terminating the tenancy is to enable the land the subject of the tenancy to be used for a non-agricultural use not falling within Case B and, therefore, for a purpose for which, in the context of this case and the Tribunal's current discussion, planning permission has not been granted.

31. If, therefore, at the date of that hearing planning permission has been granted, so that, as at that date, the non-agricultural use falls squarely within Case B, it would not be open to the Tribunal to give its consent on the section 27(3)(f) ground. At the relevant date (the hearing date) the Tribunal could not be satisfied that the non-agricultural use in question did not fall within Case B. The fact of the grant of planning permission would show that it did.

32. The foregoing is enough to determine the current application. Planning permission has been granted and, in consequence, it is no longer open to any Tribunal that might hear the Applicant's application for consent to give that consent under the only ground advanced by the Applicant in its application. The current application must be dismissed.

33. In the view of the Tribunal, the same conclusion would arise even if the circumstances, as at the date of any substantive hearing for consent to the operation of the notice to quit, were that planning permission, although required for the non-agricultural user in question, had not, at that date been granted.

34. This conclusion does not, as the Tribunal sees it, involve any deviation by the Tribunal from the language of section 27(3)(f) of the1986 Act, or the application of a purposive, or non-literal, construction.

35. The language of section 27(3)(f) looks to the future. The question for the Tribunal is whether the purpose for which the demised land would be used following the termination of the tenancy of the relevant holding would be 'for a use, other than for agriculture, not falling within Case B'. The post-termination use must, accordingly, be

a non-agricultural use for which, in the current context, planning permission will not have been granted. A proposed use for residential purposes will not, on any view, be such a use. It will be a use for which planning permission will have been granted and which will, in consequence, be a use falling squarely within Case B.

36. The result and effect of the foregoing is that, in a case such as the present, where the contemplated user requires planning consent, and even if it be the case that, at the date of any Tribunal hearing, planning permission has not been granted, section 27(3)(f) will remain unavailable as aground for consent for the operation of a notice to quit. The position which the tribunal has to determine, under section 27(3)(f) of the 1986 Act, is the position which will arise if and when the contemplated user is brought into effect. If, at that stage, planning permission will have had to be granted (as with the residential user in this case), then that contemplated user will be one which falls within Case B and, for that reason, not within section 27(3)(f) of the 1986 Act.

37. Considerable support, for what is, in the view of the Tribunal, ultimately, the clear construction of the 1986 Act, can be derived from the matters highlighted by the Lord Justice Clerk, in North Berwick, as potential consequences of the Applicant's suggested construction of the Scottish equivalent of section 27(3)(f), as set out in paragraph 19 of his judgment, in that case, and outlined in paragraph 21 of these Reasons.

38. An important aspect of those matters, specifically, the prospect, if the Applicant's view were to prevail and if section 27(3)(f) were to be available in a case where planning permission would be required but had not yet been granted, that the Tribunal, in determining whether a fair and reasonable landlord would insist upon possession, would have to 'second guess' whether that permission would, in due course, be granted (it would plainly not be reasonable for a landlord to insist upon possession for its intended non-agricultural use, if permission for that use would not be granted), is the position, not discussed, as such, in North Berwick, which would arise if the Tribunal, 'second guessing' the planning authority, were to determine that planning permission would be granted and, so, gave consent to the operation of a notice to quit, when, in fact, in due course, that permission was refused.

39. In that situation and if the Tribunal had taken no steps to meet the possibility that planning permission might be refused, an agricultural tenant could lose his tenancy, the Tribunal having consented to the operation of the notice, in circumstances where, in the event, the landlord's intended non-agricultural user could not, in fact, be achieved.

40. If, to meet that possibility, the Tribunal elected to adjourn its determination to await the outcome of the planning application and that application was refused, then, of course, as stated above, the Tribunal would refuse consent, under the fair and reasonable landlord proviso. If planning permission was granted, the tribunal could not, for the reasons explained and set out in paragraphs 28 to 31 of these Reasons, give its consent and the landlord's application for consent would, also, fall to be refused.

41. The only possible basis, upon which the Tribunal might be able to give its consent to the operation of a notice without putting the tenant at risk of losing his tenancy, in circumstances where the intended purpose of the termination of his tenancy turns out not to be one that can be achieved, is if the Tribunal gave its consent to the operation of a notice to quit conditionally upon the grant of planning permission within a particular period, while postponing the operation of the notice to quit, under the Agricultural Holdings (Arbitration on Notices) order 1987, to a date prior to the date upon which planning permission had to be granted if the notice to quit was to have effect.

42. It is highly unlikely, as it seems to this Tribunal and as it did to the Court of Session, in North Berwick, that parliament would have intended any of the consequences identified, in North Berwick, or any of the complications, arising out of the Applicant's proposed construction of section 27(3)(f), as last discussed, and, therefore, to have intended that section 27(3)(f) of the 1986 Act be available to a landlord whose intended non-agricultural use requires planning permission, but where that permission is yet to be obtained. The Tribunal's construction of the provision both gives effect to the language of the provision and obviates the problems and consequences arising out of the Applicant's alternative construction.

43. In the result, this Tribunal is satisfied, as set out in section 25 of these Reasons, that section 27(3)(f) of the 1986 is not available in any case where the intended non-agricultural user requires the grant of planning permission and, correspondingly, is only available in the limited class of cases (the usual example is forestry) where the intended user, when implemented, would not require planning permission and would not otherwise fall within any of the limbs of Case B.

44. The consequence of that conclusion and of the other matters discussed and explained in these Reasons is that the current application for consent does not fall within the terms of section 27(3)(f) of the 1986 Act, as properly construed, and is not one upon which the Tribunal could be satisfied that the requirements of that sub-section have been made out.

45. The Tribunal, accordingly, directs that the Applicant's application be dismissed and that the parties lodge an agreed draft direction, in implementation of that direction.

Dated as above.