Neutral Citation Number: [2020] EWHC 2986 (Ch)

Case No: PT-2020-CDF-000006

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 11/11/2020

Before:

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court

Between:

JENKIN THOMAS REES	**Claimant**
- and -	
(1) THE RIGHT HONOURABLE IVOR EDWARD WINDSOR-CLIVE, EARL OF PLYMOUTH	**Defendants**
(2) LADY EMMA WINDSOR-CLIVE	
(3) THE HONOURABLE DAVID JUSTIN WINDSOR-CLIVE AS TRUSTESS OF THE ST. FAGANS NO 1 AND NO 2 TRUSTS	

Mr Edward Peters (instructed by **Ebery Williams Solicitors**) for the **claimant**
Ms Katherine Holland QC and Dr Christopher McNall (instructed by **Burges Salmon LLP**) for the **defendants**

Hearing dates: 29 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC:

1. The claimant as tenant challenges an arbitration award dated 21 January 2020 under the Agricultural Holdings Act 1986 (the 1986 Act) regarding five 'Case B' notices to quit served on him by his landlords, the defendants. The arbitrator Robert Hicks upheld the validity of three of the notices. The tenant relies on five grounds in seeking to set aside the award and to remit it to the arbitrator for reconsideration. Two of the grounds involve appeals on questions of law under section 69 of the Arbitration Act 1996 (the 1996 Act), and the remaining three grounds allege serious irregularities in the arbitration process under section 68 of the 1996 Act.

2. Subsection (2) of the latter section defines such an irregularity as one or more of the kinds therein set out which the court considers has caused or will cause substantial injustice to the applicant. The kinds set out include failure to comply with the general duty of the tribunal under section 33 of the 1996 Act, exceeding its powers or failing to conduct the proceedings in accordance with the procedure agreed by the parties. Section 33(1)(a) requires the tribunal to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting their case and dealing with that of the opponent.

3. The three notices which were upheld relate to all of the tenant's home and farmland at Maesllech Farm, Radyr, Cardiff, held under two tenancies, one dated 1965 and the other dated 1968. About 187 acres were let under the first tenancy and a further 51 acres let under the second. A notice was given in respect of each tenancy. The third notice relates to a strip of land demised by the 1965 tenancy agreement and overlaps with the 1965 tenancy notice. Each tenancy is protected by the 1986 Act.

4. The first question of law is stated as follows:

> "Under Case B of Schedule 3 to the Agricultural Holdings Act 1986, must the relevant land be required for the relevant use on the expiry of the notice to quit, or within a relatively short time thereafter (as the Claimant contends); or (as the Defendant contended, and the Arbitrator determined) is it sufficient for the landlord to establish that he will require the land for the relevant use at some point in the future."

5. Case B, so far as material, provides:

> "The notice to quit is given on the ground that the land is required for a use, other than agriculture…for which permission has been granted on an application made under the enactments relating to town and country planning… and that fact is stated in the notice."

6. The key part of Case B in the present appeal is the phrase "is required." It was ultimately not in dispute before me that that means that the land must be so required at the end of the period stated in the notice or within a relatively short time thereafter, rather than in the more distant future or at some as yet unascertained time (see *Jones v Gates* [1954] 1 WLR 222 at 224, Muir Watt & Moss's Agricultural Holdings 15th edition (2018) paragraphs 15.73 – 15.74, and Scammell Densham, and Williams's Law of Agricultural Holdings 10th edition (2015) paragraph 39.33). It is also common

ground that the landlords must show an intention to develop and a reasonable prospect of doing so (see *Paddock Investments Ltd v Lory* [1975] 2 EGLR 5).

7. The planning permissions which the landlords obtained in the present case are dated 9 August 2016 and 20 March 2017 and permit the building of 7000 houses on Maesllech Farm and other land. The permitted development, known as Plasdŵr, is to be carried out in a number of phases, within a period of twenty years. The permission extends to development which is ancillary to the new housing, and includes, in the words of the arbitrator in his award:

> "…a new secondary school, three new primary schools, a community centre with one large supermarket and two smaller supermarkets. It entailed the construction of a new ring road, alterations to the Llantrisant Road, alterations to the 125kv power line with associated transformers to permit the cables to be laid underground, the relocation of a 2'6" gas main which was to be sited under the ring road with the appropriate infrastructure as well as all new service roads, services, sustainable urban drainage systems etc."

8. In the hearing before the arbitrator, the landlords called two witnesses, Wayne Rees, the project manager for the lead developers, and Michael Lawley of Cooke & Arkwright, chartered surveyors and agents for the landlords. The arbitrator found them to be sound, reliable and knowledgeable witnesses who, he said in his award, were clearly heavily involved in the matter and all aspects thereof. He found them to be credible witnesses.

9. Unlike the arbitrator I have not seen or heard the witnesses and there was no transcript of evidence put before me. Mr Peters, for the tenant, in his skeleton argument quoted from the evidence of Mr Lawley, and says that he accepted in cross-examination that he could not say year by year what part of the land in respect of which the notices were served would be required in each year, and that would not be known for another two or three months. Moreover, he accepted that the planning for the phasing and programming of tranche 2 of the development was "embryonic." Mr Peters quotes Mr Lawley as follows:

> "Of course we don't know exactly when the parcels [in tranche 2 of the development] will be available for disposal. We need to know first when the roads will be there, and when the services will be there, and once we know that, then we will be able to know a date."

10. Mr Peters submits that it was clear from this evidence and from that of Mr Rees, that decisions concerning the phasing and timescales for most of the infrastructure works had not yet been made and that whilst some elements of infrastructure on some of the land might be built in the next few years, others would not be constructed until much later in the future, on as yet unascertained dates.

11. The real issue on the first question of law in the present appeal is whether the arbitrator applied the correct test to the facts as found by him. Mr Peters submits that the arbitrator, who took advice from Leslie Blohm QC, nevertheless erred in six ways.

First, he determined that it is purely a subjective question for the landlord to decide whether or not he so 'requires' the land. He pointed to parts of Mr Blohm's advice which he says suggest that that was the test. Second, he determined that Case B does not require the relevant land to be required for the relevant use at the expiry of the notice to quit or within a relatively short time thereafter. Third, he determined that Case B could be satisfied even "if the relevant work is to be carried out at some distant date in the future." Fourth, he failed to make determinations of fact as to when the various parts of the land which was the subject of the notices to quit might be so required. Fifth, he found that Case B was satisfied even though he accepted that some of the land contained within the notice to quit will not be developed for a number of years. Sixth, he placed weight on his finding that land would be needed for earth moving, storage and infrastructure works without making any finding as to when such requirement would arise.

12. The findings of the arbitrator on these points are set out in paragraphs 7.2.3-4 of the award. After citing extensively from the advice of Mr Blohm QC, including that the landlords must show that they require all of the land to which the notice applies, subject to the de minimis principle, the arbitrator said this:

> "7.2.3. I was presented with voluminous evidence that the Landlords genuinely wished to take possession of this land for development. The site inspection showed me that the development is already occurring on various sites adjacent to Maesllech Farm which now stands as an island of undeveloped agricultural land within a sea of residential development…Whilst I accept that some of the land contained within this Notice to Quit will not be developed for a number of years and note the 20 year time limit on the planning consent, I take on board the advice given by Mr Blohm QC and note the evidence given by Mr Lawley and W Rees as to how they need availability and access to this land for earth moving and storage, together with the need for carrying out infrastructure works in respect of gas, water and roads etc. The test which I have to put on this are, does the Landlord require the land which I answer yes, does he genuinely intend the develop the land to which I answer yes, does he genuinely intend to develop the land to which I answer yes and is there a reasonable prospect of the land being developed to which I answer yes.
>
> 7.2.4 Therefore I consider that the Landlord has a present and genuine requirement for this land in accordance with the planning consent to the extent that he satisfies the requirements of Case B and confirm that the Notice to Quite is valid and uphold it.".

13. The reasoning set out above follows immediately after the quotation from the advice that the landlord must show he requires all of the land to which the notice applies. The arbitrator expressly had regard to whether there was a genuine intention to develop the land and a reasonable prospect of the land being developed. He also expressly had regard to whether there was a present requirement for the land.

14. The extract of Mr Lawley's evidence upon which Mr Peters relies refers to disposal, namely when the houses would be sold. However, the arbitrator accepted his evidence and that of Mr Rees as to how they need availability and access to the land for earth moving and storage, together with the needs for carrying out infrastructure works. It is true that the land covers many acres and that the arbitrator did not in his award set out when the various parcels of land would be required. In my judgment he did not need to, as he made a general finding that there was a present requirement for the land for earth moving, storage and infrastructure works. It has not been shown that that was a finding which was not open to the arbitrator.

15. As Ms Holland QC for the landlords submits, those findings should be seen in the context that what Case B requires is consideration of a use for which planning permission has been granted. That is what the land must presently be required for.

16. In my judgment, on a fair reading of the award, it has not been shown that the arbitrator did err in law in the ways submitted by Mr Peters. Indeed, on the facts as found by him the stated question of law as phrased does not arise. Accordingly, there is no basis for remitting the matter to the arbitrator in respect of the first question of law.

17. The second question of law arises in respect of the third notice to quit which was confined in its scope to a strip of land subject to the 1965 tenancy which is required for the construction of a cycleway. The question is stated thus:

> "Does the expression 'building development' encompass 'development' even if it does not entail any form of 'building'*"*

18. This notice gave only three months' notice and was given in respect of part only of the land demised by the 1965 tenancy agreement, and accordingly would be invalid under section 25 of the 1986 Act unless the landlords are able to rely on the contractual power of resumption contained in clause 6 of that agreement.

19. Clause 6 provides as follows under the heading "Reservations by the Landlord:"

> "Power of Resumption
>
> 6. Power to take possession at any time of any portion of the holding (except house buildings or gardens) for building development or any purpose mentioned in section 31 of the Agricultural Holdings Act 1948 on giving the Tenant three months' notice in writing paying the Tenant compensation for his interest therein and allowing a proportionate reduction in the rent of the Farm."

20. The early resumption provision in clause 6 is operable for "building development", or for "any purpose mentioned in section 31 of the Agricultural Holdings Act 1948". Mr Peters submits that it falls to be construed strictly, and the conditions for its exercise

must be strictly complied with by the landlord (see Woodfall's Law of Landlord and Tenant, paragraphs 17.285 and 17.289.1).

21. The arbitrator took the advice of Mr Blohm QC on the meaning of this phrase which he cites at length in the award, and who concluded that there was no obvious logic in construing the phrase so as to allow a notice to be given for a portion of the holding to build houses but not for a change of use to something ancillary thereto such as recreation. Accordingly, he took the view that clause 6 could be relied upon if the intended activity is either building work on the land, or development of it by reason of the change of use from agricultural use.

22. Whilst expressly taking note of that advice the arbitrator at paragraph 7.1.8 of the award said:

> "…looking at the practical situation whereby in my opinion the formation of an embankment to carry a cycleway which is to be used as a highway is all part of what is known as "road building." I find that the land was required for building development even though in places the embankment would have been very shallow…It is still, in my opinion, building development and accordingly I uphold the Notice to Quit as valid."

23. Mr Peters submits that the phrase "building development" is a composite one where the word "development" is qualified by the word "building," so that it applies to development which entails building works but not to other forms of development, for three reasons. First, such a construction is the more natural one. Second, otherwise the word building is pointless, as carrying out building also constitutes development (see section 12(2) of the Town & Country Planning Act 1947, in force when the 1965 tenancy agreement was made). Third, the only building development referred to in section 31 of the 1948 Act is the building of cottages or houses for farm labourers. To be able to rely on clause 6 to carry out building development of other houses is an obvious reason why the parties wished to specify building development of any kind as a purpose which could be relied on in addition to those purposes specified in section 3.

24. Although the arbitrator took note of the legal advice he had received, in my judgement the passage from the award set out above makes clear that he found that the development of the cycleway did involve building, looking at the practicalities. He found that as the cycleway is to be part of the highway this was all part of road building, so that even though the proposed embankment was shallow in places it would still amount to building development.

25. This was not just a change of use as envisaged in the legal advice. It involved the building of an embankment. It has not been shown that on the facts this was a conclusion to which the arbitrator was not entitled to come. On these facts this second question of law does not arise either and there is no justification to remit the matter to the arbitrator on this ground.

26. I now turn to the three procedural points.

27. The first of these arises from the fact that in his original award dated 20 December 2019 the arbitrator determined that the 1965 tenancy notice to quit was invalid on the basis that it was given in respect of part only of the land demised by the 1965 tenancy.

28. The landlords' solicitors then corresponded with him and asserted that he was mistaken about the extent of the notice and that it applied to the whole of the land let in the 1965 tenancy. The arbitrator then issued another award "as corrected 21st January 2020 and served on that date" in which he found that the notice was given in respect of the whole of that land.

29. He purported to make that change under section 57(3)(a) of the 1996 Act which provides that:

> "The tribunal may on its own initiative or on the application of a party..
>
> correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award …"

30. Mr Peters submits that such an accidental slip or omission must be an error affecting the expression of the tribunal's thought, rather than being an error in the tribunal's thought processes, and this provision does not entitle the tribunal to reconsider a decision once it has been made. He cites Russell on Arbitration 24th edition (2015), paragraphs 6-167 – 6-169, to that effect. He submits that this is an irregularity within section 68(1)(b) of the 1996 Act which has caused the tenant substantial injustice, namely that the original finding that the notice was invalid has been wrongly substituted with a finding that it is valid.

31. Ms Holland QC submits that the reference in Russell does not restrict the test in the way which Mr Peters submits but makes an observation that this is the position "in general." However, she then goes on to cite authority which she says shows that the power is wide enough to allow the correction of a perceived fact.

32. After a review of the authorities in *Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia* [1985] 1 WLR 625, Robert Goff LJ said at 637:

> "I do not think that it would be right for me to attempt in this judgment to define what is meant by 'accidental slip or omission': the animal is I suspect usually recognisable when it appears on the scene"

33. In *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] 1 Lloyds Rep 713, a failure to use an agreed figure for demurrage was held to be an accidental slip. Langley J said at paragraph 19:

> "[the Arbitrator] wrote what he intended to write but he was mistaken in the substance of what he wrote. Even if that could be described as a 'clerical mistake', it was I think, in common parlance, an accidental slip or at least also an accidental slip. It

> was also because it was wrong. It was accidental because he did not mean to use the wrong figure and he misread some manuscript amendments…"

34. In the present case, the arbitrator said in his letter of 21 January 2020 accompanying the corrected award that when reading the notice to quit served in respect of the 1965 tenancy land he "overlooked and did not consider the wording" of the notice insofar as it related to the extent of the land and the subject of the notice. He described this as an accidental slip or omission.

35. In *Axis v M&E UK Limited & Multiplex Construction Europe Limited* [2019] EWHC 169 (TCC), Roger ter Haar QC, sitting as a Deputy Judge, said at paragraphs 50 and 51:

> "50. Once the door had been opened to correct the initial error, then the effect of that decision permitted and indeed, in the interests of justice, required, that any errors consequent on the correction of that gateway error to be made.
>
> 51. I see no relevant distinction between that situation under arbitration law and the present situation where the correction of what I have called the gateway error required consequential corrections to be made"

36. I do not accept Mr Peters' submission that what the arbitrator did in this case was to review his original decision. He overlooked and did not consider the wording of the notice as to the extent of the land to which it related. In my judgment that was an accidental slip within the meaning of section 57(3)(a) of the 1996 Act which empowered him the correct it in the way that he did. This ground also fails.

37. The second procedural point is that the arbitrator allowed the landlords to advance an unpleaded estoppel case in respect of the same notice, and found for the landlords in respect of it. He held that the tenant was estopped from asserting that the 3 acres of land specified in the notice was the subject of a separate oral agreement and so outside the 1965 tenancy agreement. This involved a finding of fact that when the landlords served the notice they believed that the holding was the subject of the 1965 and 1968 tenancy agreements only and that there had been a common understanding between the parties that there was no subsisting oral tenancy agreement.

38. Ms Holland submits that this should be seen in the context that the arbitrator allowed the tenant at the hearing before him to raise a new argument that the 3 acres was the subject of a separate oral agreement, which had the effect of rendering the notice in respect of the 1965 tenancy land invalid. The arbitrator in allowing the landlords to rely upon the estoppel point was doing no more than allowing them to respond to the tenant's new argument.

39. Again, the arbitrator took Mr Blohm's advice on this point and again cited extensively from it in the award. In that advice, Mr Blohm emphasised that the parties should be able to present their cases fairly, and concluded that although the landlords did not specifically rely on an estoppel, that was the gist of their contention and the tenant had an opportunity to respond to legal matters arising from it. Accordingly, he did not

consider that it would be unfair for the arbitrator to consider this point in coming to his conclusion, although emphasised that it was the arbitrator's final decision.

40. I am not satisfied that the arbitrator's decision to consider the point and to determine it in favour of the landlords amounted to a serious irregularity within the meaning of section 68 of the 1996 Act.

41. The final such point overlaps with the arguments advanced by Mr Peters in support of the first point of law set out above, namely that, the arbitrator failed to make findings as to when the landlords will require each part of the land within the 1965 and 1968 tenancies respectively.

42. I have already dealt with this point and in my judgment it does not amount to a serious irregularity within the meaning of section 68 of the 1996 Act.

43. In conclusion none of the points advanced on behalf of the tenant justifies the remission of the matter to the arbitrator and the appeal is dismissed. Counsel helpfully indicated that they will submit a draft order and written submissions on any consequential matter which cannot be agreed. This should be done within 14 days of handing down. If necessary I shall make a determination on any unagreed consequential matter on the basis of written submissions.