Grazing but not agricultural ?

O'Donnell v. McDonald, Second Division, 25th October 2007

The Facts

A, a farm owner agreed orally with D that D could lease 2 fields to allow D to use them for a riding school. D was allowed to graze his horses and to crop hay for their winter feed. The lease began on 5 February. A sold the land to B. D then moved a caravan onto one of the fields and took up residence there. On that field he also erected some sheds and shipping containers for the riding school which used that field with the lessons at weekends. The other field was used for grass for hay. Horses grazed on the second field. B then sold the land to P. A dispute arose between P and D over maintenance. P served a notice to quit. D served a counter notice under the Agricultural Holdings (Scotland) Act 1991. P applied to the Land Court to enforce the notice but dropped the application. In 2004 P served a further notice to quit on D. The notice as not in the form required by s. 21 of the 1991 Act. It said that it was served on the grounds that D had allegedly breached the lease and the breaches had not been remedied. It sought removal at the end of March some 9 months later.

D claimed that the two fields were an agricultural holding because they were being used for grazing, grazing was the use of land for agriculture, and they were being used for a trade or business. D relied on the English case *Rutherford v. Maurer* [1962] 1 Q.B. 16 and the Scottish case *Crawford v. Dun* 1981 S.L.T. (Sh.Ct.) 66, D also claimed that that the notice to quit was ineffective to terminate the lease on its own.

The sheriff found, applying those cases that the that the lease was of an agricultural holding, that therefore the notice to quit was by itself ineffective and in any event the specification of the wrong ish made it ineffective and D should be absolved.

The sheriff found that the permission to D to graze horses and to grow grass for hay for winter feed was in connection with and incidental to the business of the riding school He also found that "the purpose of the lease was for the running of a riding school with an entitlement to graze the horses on the subjects and to crop hay for the winter feed of the same" and that this came within the definition of agriculture in the 1991 Act. He concluded that as the fields were used to a substantial extent for the grazing of horses, the predominant use of the subjects was for an agricultural purpose

P appealed to the sheriff principal who allowed the appeal finding that for land to be used for agriculture for the purposes of the 1991 Act the substantial purpose of the lease had to be for use of the land for agriculture. In this case the substantial purpose of the lease was not for the grazing of horses but for the non-agricultural use as a riding school. He took

the view that given that adequate notice of the wish to terminate was given the giving of the wrong date did not invalidate the notice. He said that there was no prescribed notice in a common law action of removing.

The Second Division decided that -

(1) for land to be used for agriculture in terms of the 1991 Act, the purpose of the lease must be for the use of the land for agriculture;
(2) in this case the purpose of the lease was the use of the land for a riding school and the rights to graze horses was merely ancillary and dependent on the operation of the riding school;
(3) the use of the land was therefore not for agriculture and the lease could not be of an agricultural holding in terms of the 1991 Act;
(4) the case of *Rutherford v. Maurer* was different in that there the purpose of the lease was the grazing of the horses, the riding school being carried on on premises not covered by the lease;
(5) in passing, *Rutherford v. Maurer* and *Crawford v. Dun* were wrongly decided in that on a common sense interpretation and bearing in mind the definition of "livestock" in the Act, "agriculture" in terms of the Act is the production of or direct contribution to the means of human subsistence or such that a lease of a field for the grazing of camels for the use of a commercial zoo could not involve the use of the leased land for agriculture;
(6) had the lease been of an agricultural holding the notice to quit would have been invalid but since it was not of an agricultural holding given that it gave sufficient notice, it was valid despite the error in the date of ish.

Comment

This is an important case given that use of leased land for "agriculture" is a key pre-requisite for the security of tenure and other benefits given to tenants of agricultural holdings which are not available to other commercial tenants. It is also important for notices to quit but these are not covered in this article.

The case seems rightly decided on the basis that looking the lease as a whole the use of the land was for a riding school which was not use for agriculture and that the agricultural uses that there were were incidental and ancillary to the principal non-agricultural use.

The meaning of "agriculture"- Rutherford v. Maurer

The obiter comments regarding *Rutherford v. Maurer* are not so convincing. Beginning with the 1949 Act Parliament decided on which tenants of leased lands should get the benefits of that Act. As one of the touchstones they decided that the use of the leased land had to be agricultural. However they realized that there might be controversy over what uses were agricultural. They therefore decided to specifically provide that the word

"agriculture" should include certain activities to avoid any doubt as to whether they might be "agriculture".

Parliament did not so much define exclusively the meaning of the word "agriculture" as provided that it should include certain activities for the avoidance of doubt. In order to discover whether an activity is "agriculture" the approach appears to be to first consider whether it falls within the ordinary meaning of that word. If it is clearly within the ordinary meaning then one need go no further. If it is not, or if there is some doubt in the matter, one can go to the definition to see if the word "agriculture" has been specified to include the activity in question.

This is essentially what the Court of Appeal did in *Rutherford*. In *Rutherord* the lease was solely for grazing of horses in connection with the use of a riding school on other premises. There the landlord attempted to argue that if one went to the definition of agriculture in the Act, the specification of grazing land could not cover sheep kept for show or horses kept for hunting. This was met by Ormerod L.J. countering that it did not seem to him to be a proper reading of the definition to distinguish between grazing a lion and a lamb. The Court of Appeal went on to hold that the grazing of horses was use for agriculture within the meaning of the then English 1949 Act whose identical definition of agriculture appears in the Scottish 1991 Act.

On a reading of the Oxford Concise Dictionary the definition of "agriculture" is "the science or practice of farming including the rearing of crops and animals". "Farming" is defined as the making of a living by growing crops or keeping livestock or using land for such purposes. If there had been no definition of agriculture in section 85 then it may be that the court in *Rutherford* would have reached a different conclusion.

Rutherford v. Maurer doubted

In *O'Donnell* the Second Division took issue with *Rutherford* on the basis that because in terms of section 85 (1) "agriculture" includes grazing, it did not follow that all forms of grazing constituted "agriculture".

The Second Division relied on two cases in support of its view that *Rutherford* was wrongly decided. The first *Forth Stud Ltd v. Assessor for East Lothian* 1969 S.C. 1 was a case involving the meaning of the word "agriculture" unencumbered with the inclusive definition in the 1949 Act. It is not inconsistent with *Rutherford*.

The other case was *Belmont Farm Ltd v. Minister of Housing and Local Government* (1962) 13 P & CR 417. In that case the English Divisional court was not dealing with the use for grazing. It was concerned with an almost identical definition as that in the 1949 Act. The question was whether keeping horses for breeding and for show-jumping was "agriculture" in terms of the definition which provided that "agriculture" included

"livestock breeding and keeping". The Divisional court concluded that the words of inclusion in the further definition of livestock acted as a restriction on the meaning of the word "livestock" and that it could only include horses for breeding and show-jumping. How words of inclusion can act as a restriction is not entirely clear to this reader and the reasoning of the Divisional court seems unpersuasive. It seems to be that the ordinary meaning of agriculture must somehow, somewhere be implied into the statute to restrict the section 85 definition of agriculture itself.

Analysis and Conclusion

The obstacle to the Second Division's reasoning is that section 85 (1) does not distinguish between different forms of grazing. In *Rutherford* Ormerod L.J. points out in making his grazing of lions example. This is in contrast to the distinction section 85 (1) makes between use of woodland which is and is not ancillary to the farming of land for other agricultural purposes. The former form of woodland is covered by the "agriculture" definition whereas the latter is excluded.

Parliament felt that to include as agriculture the use as woodland *simpliciter* would give the protection of the Act to too many undeserving tenants. Woodland was thus qualified. No such qualification was inserted for the use of land as grazing land or the other activities such as horticulture and osier land and indeed grazing itself which need not be related to the production of food or drink.

Parliament appears to have made a policy decision that whether or not they would fall within the common sense meaning of agriculture, grazing lets for one year or more (which will be unusual in any event) are to have the protection of the Act if they are for the purposes of a trade or business. Thus Parliament appears to have been content that the commercial zoo which lets a neighbouring field for the grazing of its camels or lions for a lease of one year or more, should have an agricultural holding and protection in terms of the Act.

It is interesting to note that the argument which the Second Division upheld *obiter* in *O'Donnell* was one which was made and rejected by the Court of Appeal in *Rutherford* without even requiring the tenant's Counsel to reply. Furthermore, in fairness to the court in *O'Donnell* neither side took issue with *Rutherford* so it did not have a contradictor.

The result would appear to be that the law has been left uncertain in Scotland, at least for grazing lets of a year or more. The better view would appear to be the one in *Rutherford* (which has been followed until now) but who will challenge the Second Division's *obiter* views ?

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