A VIEW FROM THE BAR: RENT ARREARS UNDER THE AHA 1986 AND THE ELUSIVE ROLE OF THE LTA 1987

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In this article, Christopher McNall of 18 St John Street Chambers considers rent arrears under the Agricultural Holdings Act 1986 and the application of section 48 of the Landlord and Tenant Act 1987 to an agricultural holding that includes a dwelling. It looks at recent case law and the court's interpretation of notices. It also gives some practical housekeeping tips for landlords seeking to recover possession if the tenant is in arrears.

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Tenants of agricultural holdings held under the Agricultural Holdings Act 1986 (AHA 1986) usually enjoy lifelong security of tenure. However, the recovery of possession is permitted in a number of so-called "special cases" which are set out in Schedule 3 to the AHA 1986, such as bad husbandry (Case C), remediable breach (Case D), irremediable breach (Case E), and insolvency (Case F).

The recovery of possession under the AHA 1986 is principally a "notice based" system. This means that even when the tenant is in clear breach of one of his statutory or contractual obligations (for instance, the obligation to pay rent as and when due) that breach, in and of itself, is not sufficient to allow the landlord to recover possession. The landlord must also, in most instances, give a notice. Hence, under the scheme of the AHA 1986, it is the giving of the right notice which entitles the landlord to recover possession - not the underlying breach.

An important illustration of this is Schedule 3 to Part I of Case 'D' which entitles a landlord to give a notice to quit if, when giving that notice to quit, the tenant had failed to comply with a notice in writing, in the correct statutory form, requiring him within two months of that notice to pay any rent due. This makes it clear that it is not the non-payment of rent which entitles the landlord to give the notice to quit. Rather, it is the tenant's failure to comply with the earlier notice to pay. The bottom line is that no valid notice to quit can be given unless there has been a failure to comply with an earlier notice to pay.

A notice to pay has to be given in the correct statutory form. That is what regulation 3 of the Agricultural Holdings (Forms of Notice to Pay Rent or to Remedy) Regulations 1987 (*SI 1987/711*) says: "A notice to pay rent '*shall be in Form 1*'". That is a mandatory provision. Hence, a failure to use the correct form will render the whole exercise invalid. The statutory forms are to be found in the Schedule: Form 1 is for rent; Form 2 is for other breaches of a remedial character.

Form 1 contains important "Act now" and three other prescribed notes. Note 2 reads as follows:

> "At that stage [that is, after service of the notice to quit] under Article 9 of the Agricultural Holdings (Arbitration on Notices) Order 1987 (*SI 1987/710*) you have one month...within which you can serve on your landlord a notice in writing requiring the question [as to the validity of the Notice to Quit] to be determined by arbitration under the Agricultural Holdings Act 1986"

Hence, upon receiving the notice to quit, the tenant has the right to give a counter-notice requiring the notice to quit to be referred to arbitration. What happens if a tenant sits back and does nothing: does not pay the rent, and does not issue a counter-notice?

It is here that we encounter one of the traps for the unwary with which the AHA 1986 is littered. From the landlord's point of view, compliance with the AHA 1986, as set out above, and the giving of a notice to pay in the correct statutory form is not - in and of itself - sufficient.

LINDSEY TRADING PROPERTIES INC V DALLHOLD ESTATES (UK) PTY LTD (1993) 70 P & CR 332

After a period of some doubt, in 1993 the Court of Appeal decided that the provisions concerning notices set out in the Landlord and Tenant Act 1987 (LTA 1987) also apply to notices given under the AHA 1986 where (as very often is the case) the holding includes a dwelling: *Lindsey Trading Properties Inc v Dallhold Estates (UK) Pty Ltd (1993) 70 P & CR 332.*

This was perhaps a slightly surprising conclusion given that the LTA 1987 makes no mention of the AHA 1986 and it is hard to imagine that the AHA 1986 had slipped the mind of the Parliamentary draftsman barely a year later.

Section 48 of the LTA 1987 reads as follows:

> "(1) A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.
>
> (2) Where a landlord of any such premises fails to comply with subsection (1), any rent ... otherwise due from the tenant to the landlord shall ... be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection."

There is no standard or prescribed form for such a notice; but that is the statutory requirement which must (one way or another) be met. If the requirement is not met, then it is possible for the tenant of an agricultural holding to argue that the giving of a notice to quit founded on a notice to pay is invalid if section 48 of the LTA 1987 had not been complied with at the time of the giving of the notice to quit.

In *Dallhold*, and despite the fact not only that the lease contained an address to which payments of rent should be directed, but also that the tenant had sent counter notices to that address, it was nonetheless disputed whether any notice complying with section 48 of the LTA 1987 had been given until a letter which read "we would confirm on behalf of our client and for the purposes of section 48 ... that our client's address for service of all Notices, including Notices in proceedings, is care of this firm". It was common ground (we can assume rightly) that the letter was good section 48 notice. The Court of Appeal agreed with the trial judge that, "In short, the tenant is to be told at what address notices, including notices in proceedings, may be served" (paragraph 341).

But what does that really tell us? *Dallhold* is definitely good and binding authority for the proposition that notice has to have been given under section 48 of LTA 1987 if the landlord of an agricultural holding including a dwelling wishes to rely on a Case D notice to quit.

But *Dallhold* does not go so far as to set out what form that notice should assume, or how it should be given. In this regard, the situation becomes less clear. For example, a letter may be properly construed for the purposes of section 48 in the light of the preceding correspondence, and so might be held to satisfy the requirement of section 48(1) even though the terms of the letter itself, without the help of that context, could not be so construed (paragraph 342). That is an intriguing argument which, in effect, throws open the whole of the correspondence passing between the parties in an attempt to piece together, or otherwise, the giving in substance, if not in form, of a section 48 notice.

Given the consensus on the letter already referred to, the Court of Appeal expressly declined to rule whether an earlier letter (which read "various notices served by this firm on behalf of L establishing us as a service address and, of course, you have served purported counter notices to L upon ourselves") was itself sufficient as a notice. So we do not know from *Dallhold* whether, if the later letter had not been written and/or it had not been agreed that it was an effective notice, the earlier letter might have been good enough for the purposes of section 48(1) of the LTA 1987. It is arguable that it was, even though it did not mention section 48 at all, nor mentioned (even in broad terms) that, for the avoidance of any doubt, statutory notices should be given to that particular address.

To my mind, it is important that Peter Gibson LJ (as then was) remarked that strict compliance with the statutory provisions is required, because of the potentially serious consequences for a tenant. But he went on to say:

> "I would be sorry to see the law in this field develop the unattractively rigid features that disfigured at least one other area of the law where strict compliance was necessary ... and I welcome the approach ... whereby errors in completing a statutory notice which could not reasonably have misled the tenant to whom it was addressed may be held in appropriate cases not to invalidate the notice."

ROGAN V WOODFIELD BUILDING SERVICES LTD (1995) 27 HLR 78

It is possible, from reading the leading practitioners' works, to form the impression that *Dallhold* is the beginning and end of the relevant law. But it is not. Almost exactly a year later, a different composition of the Court of Appeal (including Ralph Gibson LJ, who had been a member of the panel which had sat in *Lindsey Trading*, and who had given the leading judgment) had occasion to revisit it: *Rogan v Woodfield Building Services Ltd (1995) 27 HLR 78*.

Rogan was a case involving a residential tenancy. The tenant, possessed of a rent book which showed the landlord's name and address, nonetheless (and doubtless drawing encouragement from the Court of Appeal's apparently firm statement of the law in *Dallhold*) sought to advance the ambitious argument that no section 48 notice had been given, hence rendering possession proceedings a nullity.

Ralph Gibson LJ again delivered the leading judgment. He started by remarking, a little dolefully: "I must regret that in my own judgment (in Dallhold) I did not achieve greater clarity and that I thereby caused trouble and uncertainty" (at parapgraph 86). But the same was not to happen again. He rejected the tenant's argument that no section 48 notice had been given.

The appearance in the tenancy agreement (let alone the rent book) of the landlord's address was self-evidently sufficient notice to the tenant as to the address at which all notices, including notices in proceedings, could be served. Any reasonable person in the tenant's position would understand that the address in the tenancy agreement was an address at which notices could be served. This was doubly clear insofar as there was no suggestion in the tenancy agreement that any other address should be used for the service of notices. Moreover, on the evidence the tenant had understood the address with which he had been thus furnished as the address for notices and had demonstrated by his conduct that he so understood it. Of course, none of this could be reconciled with *Dallhold*, by which the Court of Appeal was to all practical intents bound. The circle is roughly (and not entirely convincingly) squared with the assertion that *Dallhold* was in any event distinguishable and limited to its facts.

The following observations of Stuart-Smith LJ (at 27 HLR 78 at 88) are particularly important:

> "What the section requires is that the tenant is told, so that he knows, the landlord's name and address in England and Wales at which he can be served with notices. If the name and address is stated in the lease or tenancy agreement without limitation or qualification, it is a necessary implication that he, or in the case of a corporation, it can be communicated with at that address and hence it is a place to which notices can be sent. The section does not require that the notice shall state that it is the address at which notices can be served. The mischief at which this section was aimed was the problem created where the landlord's identity was not known and/or the tenant did not know of an address within the jurisdiction to which notices could be sent and proceedings served ... provided the name and address is communicated to the tenant in writing, which it is if it stated in the lease or tenancy agreement, there is no need for a separate notice."

This passage was relied upon and approved by the Court of Appeal in *Glen International Ltd v Triplerose Ltd [2007] EWCA Civ 388*. However, the Court then had to analyse the whole course of correspondence to ascertain whether the reasonable recipient of certain letters would have understood them as saying that a particular address should be used as an "all-embracing address" not only for general correspondence relating to the lease, but also for notices.

The Court rejected the landlord's argument that the sentence "Regarding the correspondence address, please write to us at the address below", even "construed against the matrix of supporting fact", was good enough for the purposes of section 48.

CONCLUSIONS

We can draw some conclusions:

- In relation to an agricultural holding including a dwelling, the landlord must give the tenant a notice which answers to section 48 of the LTA 1987. Otherwise, his reliance on the statutory procedures is seriously jeopardized.

- Contrary to *Dallhold*, the notice required is not very onerous. The tenant must be told of an address in England and Wales at which he may serve notices on the landlord: no more, no less.

- That notification can be by way of inclusion of the address in the tenancy agreement, so long as it can

fairly be said that is what the reasonable tenant would have understood: *Rogan*.

- But not dealing with it in the tenancy agreement, or by means of a clearly worded letter (preferably one using the word "notices" and mentioning section 48 of the LTA 1987), risks exposing the landlord to the sort of interpretative exercise engaged in by the Court of Appeal in *Glen International* - something well worth avoiding.
- If you act for landlords of agricultural holdings under the AHA 1986, do some housekeeping and make sure that this particular requirement is not going to rear up and imperil any attempts to recover possession.