A VIEW FROM THE BAR: WHEN IS A FARM NOT A FARM?

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As the trend for farm diversification continues, and seems likely to continue to do so in light of Brexit, Christopher McNall of 18 St John Street Chambers looks at where diversification could jeopardise a tenant's status under the Agricultural Holdings Act 1986. This article examines case law on the substance of tenancy and at some claims for abandonment of agricultural activity. It also discusses what indicators, if any, are relevant in establishing when a farm is not a farm.

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WHAT IS AN AGRICULTURAL TENANCY?

A tenancy can only be a tenancy of an agricultural holding, subject to and protected by the Agricultural Holdings Act 1986 (AHA 1986), if it meets all the statutory conditions laid down by section 1 of that Act. Importantly, this must be so not only at the beginning of the tenancy, but thereafter at all times during the tenancy. Just because a tenancy was an AHA 1986 tenancy at the beginning does not necessarily mean that it is one now.

A contract of tenancy relating to any land can only be a contract for an agricultural tenancy if, having regard to (amongst other things) "the actual or contemplated use of the land at the time of the conclusion of the contract and subsequently ... the whole of the land comprised in the contract, subject to such exceptions only as do not substantially affect the character of the tenancy, is let for use as agricultural land" (*section 1(2)(b)*).

"Agricultural land" means "land used for agriculture which is so used for the purposes of a trade or business" (*section 1(4)(a)*). "Agriculture" "includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and 'agricultural' shall be construed accordingly" (*section 96(1)*).

There are significant advantages in being the tenant of an agricultural holding under the AHA 1986. Not least is lifelong security of tenure, which is bolstered by the need in most instances for the landlord to obtain the approval of the Tribunal or an arbitrator to the operation of a notice to quit. In addition, there is the possibility (in relation to tenancies first granted before 1984) for an eligible and suitable person to succeed to the tenancy on the tenant's death or retirement. Agricultural tenants are sometimes very long-lived: I have recently seen applications for a first succession in relation to tenancies first granted in 1959! Given that AHA 1986 rents are traditionally quite modest (and subject to statutory rent review) there are correspondingly powerful incentives for a landlord to establish that the tenant is no longer the tenant of an agricultural holding under the AHA 1986.

In reality, this means that the landlord has to try to establish that the tenant no longer meets the statutory conditions. For instance, the landlord can argue seek that, having regard to the actual use of the land, the whole of the land (subject only to such exceptions only as do not substantially affect the character of the tenancy) is no longer let for use as agricultural land.

Diversification of activity

Against this background, we have to bear in mind that it is increasingly common (and has been for some years) that many AHA 1986 tenants, whether by choice, economic compulsion, driven by falling farm incomes, or a combination of the two, diversify the activity being undertaken on their holdings. This can be farm shops, car boot sales, paint-balling,

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glamping, taking in paying guests in the farmhouse on a B&B basis, or converting a shed or two into self-catering cottages.

In doing so, are they jeopardising their status as AHA 1986 tenants? Are they exposing themselves to a claim by the landlord that their tenancy is no longer subject to the AHA 1986? The consequences of that could be calamitous since it is clear though that the test is binary: either the whole of the land is entitled to the protection of the AHA 1986 or none of it is. There cannot be severance of the non-agricultural part from the agricultural part.

This article examines the reported decisions (which are fairly few and far between) and will assess what those decisions really tell us about the relevant principles to apply in a scenario of this kind.

Howkins v Jardine: substance of tenancy

In *Howkins v Jardine [1951] 1 KB 614* the landlord let seven acres of land and three cottages. The cottages were (sub)let out by the tenant to non-agricultural occupants. It was a case on the materially identical provisions of the Agricultural Holdings Act 1948 and whether the statutory test was still satisfied.

The Court of Appeal thought that the question was whether the tenancy was "in substance" an agricultural tenancy. But what does that actually mean? According to the *OED*, the "substance" of something is "that which constitutes the essential part or aspect of something; that which gives a thing its character; that which constitutes the essence of a thing; the essential part, essence." But this is not an empirical test. It is more a matter of impression. What is "the essential part" of an agricultural holding? What gives an agricultural holding its character? Does it retain its essence or its agricultural character, and hence its legal status, for so long as it still has fields or animals, or the tenant receives Single Payment? Looked at another way, as long as it has fields and/or animals, does the tenancy keep its status irrespective of whatever else happens on the property?

Wetherall v Smith: abandonment of agricultural activity

In *Wetherall v Smith [1980] 1 WLR 1290*, the Court of Appeal considered the status of an agricultural tenant of a single field, about an acre in size, which, it was contended, was mainly being used to graze and school horses and ponies over portable jumps (not an agricultural user). The tenant (perhaps incautiously) brought proceedings for an injunction restraining the landlord from interfering with the tenant's quiet enjoyment. The landlord counterclaimed for a declaration that the tenant was no longer an agricultural tenant.

It was common ground that the character of a tenancy can change. But the tenant argued that there was a strong presumption that, if at the start of the tenancy it was an agricultural one, it would take clear evidence to justify a finding that there had been such a change.

In a well-known passage, Sir David Cairns remarked:

> "The matter has to be decided by considering the whole history of the tenancy, and that the question is one of degree, depending on the extent to which agricultural use has been abandoned, and to which any other use has been adopted ... It is in my judgment right that the protection of the statute should be lost if agricultural activity is wholly or substantially abandoned during the course of the tenancy even if without the consent of the landlord. The object of the legislature is to maintain continuity in the conduct of farming and horticultural operations rather than to put people, who have at some time in the past acquired a particular type of tenancy, in a privileged position. At the same time, the cases show that the tenancy is not to be regarded as alternating between being within and outside the Act as minor changes of use take place, and that, when the tenancy is clearly an agricultural one to start with, strong evidence is needed to show that agricultural user has been abandoned."

So, the touchstone is whether agricultural use has been "wholly or substantially abandoned". As with *Howkins v Jardine*, there is an obvious judicial inclination towards maintaining the status of AHA 1986 tenants, except where there is "strong evidence" of abandonment of agricultural user. It is not entirely clear where this leads us, since the Court of Appeal does not articulate the difference (if any) between "strong" evidence and ordinary (weak?) evidence?

Be that as it may, *Wetherall* should have been an easy case at first instance, and should never have found its way to the Court of Appeal (as an aside, it would not do so nowadays, since first appeals from multi-track cases tried by circuit judges now lie to a single judge of the High Court and not to the Court of Appeal). It involved an extremely small, discrete, holding: one

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small field. It should have been easy to tell, as a matter of fact, whether any agricultural user was still going on or not. Unfortunately, we do not know whether the facts in that case did amount to such an abandonment. That is because the appeal was allowed, but on the basis of inadequate findings of fact at first instance. It was remitted for rehearing by the trial judge, with the following list of questions for him to consider (and how pleased he must have been to have had the Court of Appeal assist him in this way!):

- To what extent during about two years up to service of the notice to quit was the paddock used for:
  - cattle;
  - horses; or
  - any other agricultural purpose?
- To what extent was it used for riding lessons and jumping?
- Were the horses, when grazed there, used only or mainly for recreation?

The judge was then exhorted, on the basis of those findings, "to consider whether, during the two years or so leading up to the notice to quit, the land was or was not substantially used for agriculture for the purpose of trade or business, or whether that user had been wholly or substantially abandoned by the tenant".

Like the requirement for "strong" evidence, the two year "or so" period is itself something of a mystery. It is not in the statute, whether expressly or by necessary implication. It first emerges in an unreserved decision of the Court of Appeal, *Hickson & Welch v Cann (1977) 40 P & CR*. Although that appeal was decided in 1977, it was not seen (rightly) as sufficiently interesting or important, or as laying down any new principle of law, or authoritatively articulating some existing law, so as to be reported at the time. It was only reported after it was disinterred (by Cairns LJ, who had been in it) for passing mention in *Wetherall* three years later: *[1980] 1 P & CR 218.*

Jack Cann was the tenant of half an acre. He was stabling a horse or pony there, and keeping some pigeons. His allegation that he was running a business earning £80 a month (a lot in the early 1970s!) was dismissed by the trial judge as "nonsense". On the facts of that case, as found, there was no evidence of any activity of any kind from 1972 to 1975 (service of the notice to quit). All three judges mentioned the "abrupt" stop of activity in 1972 but only Cairns LJ based his judgment on "what happened during the period of approximately two years up to the date of the notice to quit".

In my view, the two year "or so" period is not a rule of law. It simply reflects the evidence in *Cann* as to the period during which there had been a complete abandonment of all activity, including anything which could even remotely be described as agricultural activity. It happened to be just over two years. On the facts of that case, it could simply be said that the inactivity had lasted for so long that it could fairly be treated as abandonment (in the sense of a permanent cessation of use), as opposed to a temporary cessation of use. The actual period of abandonment, whether 23 months, 24 months, 25 months, or something else, was neither here nor there. "Two years or so" is not a rule. It is just a factor to be considered.

Coming back to *Wetherall*, it is certainly arguable that the case is authoritative only for the uncontroversial proposition that failure to satisfy the statutory conditions means that the protection of the AHA 1986 is lost. But, beyond that, it does not offer much useful guidance at all.

Short v Greeves: relevance of turnover

The final decision is *Short v Greeves [1988] 1 EGLR 1.* Like the other decisions referred to, it is not a glorious monument of the judicial art, handed down with an eye to posterity. Rather, it is a short extempore decision of a two-man Court of Appeal. The parties were landlord and tenant of a six-acre garden centre in Surrey. It had a greenhouse, coming to about one acre, part of which was used as a shop. Some plants, mainly roses, were grown, potted up, and then sold on site. But the garden centre changed radically, in that it came to also sell a lot of other things not grown on site, such as garden gnomes, bird tables, and sheds.

The landlord brought proceedings seeking to end the tenancy under Part II of the Landlord and Tenant Act 1954; that is, on the footing that the tenant was a business tenant. The tenant challenged the validity of the 1954 Act notice on the basis that he was the tenant of an agricultural holding. The judge at first instance considered that the business takings were relevant, found that about 60% of the takings were from "bought-in" goods rather than "home-grown" goods (mainly, roses) but found that it was still an AHA 1986 tenancy.

The Court of Appeal thought that it was a "borderline case". They considered the turnover figures to be

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relevant, but only as "an indication" which could be used in order to see if the nature of the tenancy had in fact changed. Lord Justice Dillon remarked:

> "the holding and all the circumstances have to be regarded as a whole ... this is still the business of a garden centre that it always was. Although the sales of bought-in plants and other goods have increased, it is still based on the sale also of Mr Short's roses. The court is not lightly to treat a tenancy as having ceased to be within the protection of the AHA 1986."

Short v Greeves is elevated in the leading practitioners' works to a status which it does not self-evidently enjoy. It is a decision which obviously turned on the facts. It does not obviously articulate any novel or generally applicable principles of law. It certainly does not lay down any empirical test as to whether there is a threshold of percentage turnover (say, for the sake of argument, 50%) from non-agricultural activities so as to justify an argument that the user of the whole is no longer agricultural within the meaning and effect of the AHA 1986.

Indeed, such an argument would be difficult to sustain:

- As a matter of fact, segregation of agricultural or non-agricultural moneys would entail either keeping two sets of books, or engaging in some tortuous and disproportionate retrospective auditing exercise.
- The turnover from even a modest non-agricultural business such as a B&B in the farmhouse would probably, given the fall in farming incomes, at least rival the turnover from the farming (indeed, making money from the B&B would be the whole object of the enterprise).
- In and of itself, turnover is not a reliable indicator of anything without looking to profit.
- Profit does not really help either since the figures would probably just end up showing you that most things are more profitable than farming.
- If it is a question of physical area, it would be hard to say that the operation of a B&B in the farmhouse, occupying only a small physical proportion of the farm, was such as to alter the essence or substance or character of the holding. Presumably, the farmhouse would still be in use as the farm office, and hence there would still be agricultural use of it.

The danger of *Short v Greeves* is that it is sometimes seen as mandating a forensic or actuarial approach, usually aiming to demonstrate that more than half of the farm's turnover derives from non-agricultural activity. But, in my view, that is not the right approach. It is not what the statute says. Moreover, it is the type of over-legalistic construction which has been expressly discouraged by the Court of Appeal in the context of other parts of the AHA 1986 (for example, in relation to the livelihood condition: see *Caswell v Welby (1996) 71 P&CR 137*). Ultimately, whilst figures of this kind could perhaps shed some light (but as no more than indicators) on the question of essence, character or substance of the holding, it cannot be answered conclusively by them.

However, landlords do still sometimes try.

So, when is a farm not a farm?

I have recently emerged from a case in which the long-standing AHA 1986 tenant of a 78-acre holding, used for sheep, had started (with the landlord's knowledge and consent) a B&B in the farmhouse. Relying on this, the landlord sought a declaration and argued that the non-agricultural use was no longer of such minor consequence as to not substantially affect the character of the tenancy.

The landlord explained the presence of about 175 sheep (both breeding ewes and lambs) in this way: "The reality of the Defendant's sheep enterprise is that he acquires some store lambs and fattens them in the course of the year, effectively amounting to no more than mobile lawn mowers". It was also argued that the keeping of lambs was on such a small scale as to amount to no more than a pastime, and that, since the tenant did not make enough money from the sheep to cross the self-assessment threshold, that this was not really a trade or business at all.

At first blush, all those arguments appear ambitious.

The answer was this: sheep are livestock; the keeping of sheep is agriculture; the breeding of sheep is agriculture; the fattening of lambs is agriculture; the use of land as grazing land is agriculture. Moreover, "mobile lawn mowers" is tautologous. All lawn mowers are mobile. Immobile lawn mowers are of no use to anyone. But, and in any event, a lawn "is a close mown turf covered piece of pleasure ground or garden" and none of the land being grazed at the farm was a lawn.

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After some time-consuming and expensive interlocutory skirmishing about disclosure and the provision of further information, all along the lines of the landlord seeking to audit the farm's receipts so as to engage in the sort of forensic exercise described above, this was all set for some lucky judge of the Business and Property Court to decide.

But (you guessed it) it settled.

That is perhaps one reason why there are so few reported cases: they settle. That is not necessarily because the answer is so legally or factually obvious that it is not worth fighting though to trial. It may be because the state of the reported authorities is such that, whichever way it goes at first instance, there may always be enough to justify an appeal.

There is a potential sting in the tail. A landlord brings a claim for a declaration that the tenant is not (or is no longer) a tenant under the AHA 1986. The tenant defends the claim, but does not counterclaim. The tenant loses. The landlord gets the declaration it seeks. But what then? It is res judicata that the tenant is not a tenant under the AHA 1986, but there has been no judicial determination as to whether, having left that code, the tenant is in fact nonetheless now a business tenant under the 1954 Act, with the extensive rights bestowed on tenants under that Act (not quite as good as under the AHA 1986, but still quite desirable). That is more than merely a pleading point, and it has to be borne in mind before embarking, whether for landlord, or tenant, on litigation.

Answer: When the sheep are not sheep, but are mobile lawn mowers.

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