A VIEW FROM THE BAR: MORE ABOUT NOTICES: A CAUTIONARY TALE

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In this article, Christopher McNall of St. John Street Chambers looks at issues surrounding the service of notices under the Agricultural Holdings Act 1986, including the importance of giving the correct date of termination in notice to quit and the use of running words to establish the correct date if the given date is wrong.

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This is my second successive note about notices. *The reader of the previous Article, A view from the Bar: rent arrears under the AHA 1986* and the elusive role of the LTA 1987 could pardonably think that I am a notice-fetishist. They should be reassured that I am not. But I do confess to feeling a slight thrill (of apprehension, not of pleasure) every time a notice purporting to bring a tenancy under the Agricultural Holdings Act 1986 (AHA 1986) to an end lands on my desk.

The law of notices is not always the law of common sense and it cannot be intuited from first principles. Many of the governing principles are of considerable antiquity and reflect a legal environment in which punctilious adherence to form was dominant: justice was often the handmaiden of procedure, and not (as we like to think nowadays) vice versa.

Hence, the law governing notices contains traps for the unwary, and mistakes can and will be seized upon. The ever-increasing value of agricultural land means that the stakes in seeking to recover or retain possession of agricultural holdings subject to the AHA 1986 are ever higher. In turn, that evokes aggressive and technical challenges to the force, meaning and effect of notices. Those are not the rarified stuff of textbooks, but can become part and parcel of working life for the agricultural law practitioner.

The recovery of possession under the AHA 1986 is a notice-based system. That is to say, one cannot conventionally recover possession without a notice to quit of some kind. There are two kinds of notices to quit. The first is a "general" notice to quit. The other is a notice seeking to rely on one of the "special cases" in Schedule 3 to the AHA 1986, sometimes called (predictably) a "special case notice".

If a general notice is to be challenged, then the tenant must give a written counter-notice within one month (*section 26(1)(b), AHA 1986*). That notice must say that the tenant requires section 26 to apply. If that is done, then the notice to quit will only take effect if the landlord refers it to the Agricultural Lands and Drainage Chamber of the Property Chamber of the First-tier Tribunal (England) - or its Welsh counterpart, the Agricultural Lands Tribunal/Yr Tribwnlys Tir Amaethyddol - and the Tribunal gives its consent (*section 27(1)*). To do that, the Tribunal must be satisfied as to one of a whole number of factors - for instance, whether greater hardship would be caused (to the landlord) by withholding consent than (to the tenant) by giving consent to the operation of the notice (*section 27(3)(e)*). Even then, the Tribunal must (not "may") withhold consent if "in all the circumstances it appears to them that a fair and reasonable landlord would not insist on possession" (*section 27(2)*). As an aside, it is an interesting, but perhaps circular question, as to why, if the Tribunal is satisfied that greater hardship would be done to the landlord by withholding consent than to the tenant by granting it, that the Tribunal could nonetheless intelligibly conclude that the fair and reasonable landlord would not insist on possession: but it can happen, and has (at least once, but over 50 years ago, see *Jones v Burgoyne (1963) 188 EG 497*). If nothing else, all this suffices to show that recovery of possession using a general notice to quit is not straightforward. Once a counter-notice is given, the landlord has a number of hurdles to successfully overcome. Success is not assured.

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The routes of challenge to a special case notice are more variegated: some special cases require a counter-notice in order to then go to arbitration. Others have to be challenged in the Tribunal.

This cautionary tale concerns a general notice to quit, given in relation to a large and handsome farm, which had been held subject to an AHA 1986 tenancy for several decades. It was a tenancy capable of carrying lifelong security of tenure for the tenant with up to two successions.

For reasons not satisfactorily explained, the recipient tenant, duly served, put the notice behind the clock on the mantelpiece and ignored it for several weeks. Dawning realisation of the impending catastrophe propelled the tenant (eventually) to go off to see his friendly local solicitor.

Fortunately, the tenant was still (just) inside the month within which a counter-notice could be given. Sigh! (of relief). Unfortunately, the solicitors consulted failed to give a counter-notice. Sigh! (of despair). The time limit for the counter-notice is strict. There is no provision whereby anyone can extend the time for giving the counter-notice. The notice to quit (all other things being equal) would have taken effect on its terms, and the Tribunal has no role to play.

That was a most unfortunate state of affairs all round - on the one hand, loss of the farm in a few months' time; on the other, an embarrassing phone call to the indemnity insurers.

We are therefore thrown back, as the last line of defence (indeed, in the circumstances, the only line of defence) onto the general law of notices, and consideration of whether the notice was a good one at common law.

Fortunately, the lack of savoir-faire at the recipient's end was matched only by that at the givers. There was a written tenancy agreement, in completely conventional form. The term date was clear. However, the notice simply purported to terminate the tenancy "as per the terms of the said tenancy agreement". It did not give any date upon which the tenancy was to come to an end. It did not give any date of termination at all.

Here we get to some law. As a matter of general law, a landlord's notice must require the tenant to quit "at the proper time" (Woodfall, *Landlord and Tenant, 17-252*). At first blush, this sounds weighty and meaningful. But what **does** it really mean? Delving into the footnotes, there are masses of cases, going back centuries, which discuss the use of dates in notices.

In my view, the gist of those cases is that notices to quit **must** contain a date. If that is wrong then, at the very least (or, perhaps, in cases where there is doubt as to the correct date) the notice **must** contain a formula allowing that date to be calculated. Tenancies are contracts; the law of notices is part of the law of contracts, and we can apply the usual contractual formula *id certum est quod certum reddi potest* ("that is certain which can be rendered certain").

The cautious practitioner would have looked at a precedent bank and saw that the specimens invariably leave a gap for the date "being the date fixed for the expiration of the term" to be inserted. The clever practitioner would have recognised, several paragraphs ago, that the real mischief here was perhaps not omission of the date, but omission of conventional "running words" (or "omnibus" words - more Latin), for example, after the date, "or at the expiration of the year of your tenancy which shall expire after the end of 12 months from the date of service of this notice" or "at the expiration of the current year of the tenancy which shall expire next after the end of one half-year from the date hereof" (which, according to Woodfall, *Landlord and Tenant*, 17-256, is sufficient). Even, perhaps or, "at the expiration of the present year's tenancy" would have been sufficient, as, again perhaps, would "at the earliest date after service of this notice that such tenancy can lawfully be terminated".

There are several important lessons to be drawn from this. From the giver's point of view, the first is to put in a date - preferably, the right one. The second is to always use running words of the kind capable of establishing the correct date if you happen to have gotten the date wrong.

From the recipient's point of view, the key lesson is to give a timeous counter-notice. The statutory tests which must be met in order for the Tribunal to give its consent to operation of the notice to quit are sufficient to deter most landlords, once a counter-notice has been given, from going on to refer their general notice to quit to the Tribunal. Hence, the giving of the counter-notice often marks the effective end of that route to recover possession. But general notices are useful as part of an overall strategy to recover possession, simply on the off-chance that the tenant or their advisers may miss the deadline. That then comes down to an action to recover possession, founded on the general notice to quit, in the County Court. That action, if the notice to quit is a good one at common law, is extremely likely to succeed.

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