Neutral Citation Number: [2020] EWHC 2640 (Ch)

Case No: BL-2018-002164

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PROPERTY & BUSINESS COURT

The Rolls Building
7 Rolls Buildings
Fetter lane
London EC4A 1NL

Date: 07/10/2020

Before :

THE HONOURABLE MR JUSTICE MEADE

- -

Between :

JOHN SYDNEY KIRBY & OTHERS	**Claimants**
- and -	
BAKER & METSON LIMITED	**Defendant**

- -
- -

Catherine Taskis (instructed by Loxley Solicitors) for the **Claimants**
Richard O'Sullivan (instructed by Irwin Mitchell Solicitors) for the **Defendant**

Hearing dates: 22nd September 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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THE HONOURABLE MR JUSTICE MEADE

The Honourable Mr Justice Meade :

1. This is an appeal by the Claimants under s. 69 of the Arbitration Act 1996, from the award of 6 September 2018 of Mr Jeremy Zeid ("the Arbitrator").

2. The appeal raises a short, discrete point of law about the interpretation of Case B(b)(ii) of Schedule 3 to the Agricultural Holdings Act 1986 ("AHA 1986").

3. Permission to appeal was given by Fancourt J by his Order of 21 February 2020. His Order also included an "INFORMATIVE" section, to which I will refer further below.

The point at issue and how it arises

4. Schedule 2 AHA 1986 specifies certain "Cases" where the consent of the First-tier Tribunal is not needed in relation to a notice to quit agricultural land. The limits of the Cases' scope are important because if they apply the tenant cannot serve a counter-notice under s. 27 AHA 1986, and there is no requirement that a fair and reasonable landlord would insist on possession.

5. There are 8 such Cases in Schedule 3, and this appeal concerns Case B, which is now (following amendment as a result of the Town and Country Planning Act 1990 ("TCPA 90") described further below) as follows:

> *CASE B*
> *The notice to quit is given on the ground that the land is required for a use, other than for agriculture—*
> *(a) for which permission has been granted on an application made under the enactments relating to town and country planning,*
> *(b) for which permission under those enactments is granted by a general development order by reason only of the fact that the use is authorised by—*
> *(i) a private or local Act,*
> *(ii) an order approved by both Houses of Parliament, or*
> *(iii) an order made under section 14 or 16 of the Harbours Act 1964,*
> *(c) for which any provision that—*
> *(i) is contained in an Act, but*
> *(ii) does not form part of the enactments relating to town and country planning, deems permission under those enactments to have been granted,*
> *(d) which any such provision deems not to constitute development for the purposes of those enactments, or*
> *(e) for which permission is not required under the enactments relating to town and country planning by reason only of Crown immunity,*
> *and that fact is stated in the notice.*

6. Within this, the part relied on by the Defendant landlord (hereafter, "D") is B(b)(ii).

7. The facts relevant to this appeal are (unsurprisingly, since it is on a point of law) not in issue and are as follows (taken essentially from D's skeleton argument):

(a) The Claimants ("C") are the tenant of the agricultural holding at Grange Farm, Little Dunmow, Essex CM6 3HY ("the Land") under an AHA tenancy.

(b) D is the owner of the Land and C's landlord in respect of it.

(c) Pursuant to a notice to quit dated 27 September 2017 ("the Notice") D sought possession of the land from C under Case B.

(d) D's proposed non-agricultural use for those purposes was a permitted development under the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the 2015 Order").

(e) C sought an arbitration on the Notice resulting in the appointment of the Arbitrator on 2 January 2018.

(f) In the Arbitration C argued that the 2015 Order was not "an order approved by both Houses of Parliament" within Case B(b)(ii) and therefore that D could not rely on the permitted development for the purposes of Case B.

8. The point of law at issue is this: do the words "an order approved by both Houses of Parliament" in Case B(b)(ii) require that the order be made law by what is called the affirmative procedure, or do they permit the use of either the affirmative procedure or the negative procedure? I explain below what the affirmative and negative procedures are.

9. C submits that only the affirmative procedure will do, while D says that either the affirmative or the negative procedure satisfies the requirement of Case B(b)(ii).

10. Since it is common ground that the 2015 Order was made law by the negative procedure, if C is right on the point of law then Case B(b)(ii) is not met in the present case.

11. It would then not be necessary to consider whether, on the facts, the Land is required for the relevant non-agricultural purpose, or whether D's intended purpose falls within the scope of the 2015 Order. That is why the Arbitrator, with the agreement of the parties, considered the point as a preliminary issue.

12. The Arbitrator held that D was right and that the 2015 Order satisfies Case B(b)(ii). Hence this appeal, on which Ms Catherine Taskis appears as Counsel for C and Mr Richard O'Sullivan as Counsel for D.

13. The parties' submissions on the point may be considered under the following points:

(a) The legislative history of Case B.

(b) Consideration of Hansard under the principles in *Pepper v. Hart*.

(c) The ordinary meaning of the words of Case B(b)(ii) in context.

(d) The structure of Case B(b)(ii).

(e) Consistency of limbs (i) to (iii) of Case B(b).

14. As will appear below, I did not find any assistance either way from points (a) or (b). I list them first not for their actual or potential importance, but because in a purely chronological sense that is where they come. In putting them first, I do not imply that (c), the ordinary meaning, is less important. It is much more important, and it is from (c) and (d) primarily that I think the answer comes.

Relevant provisions

15. Before I deal with the parties' submissions I will set out the relevant provisions and provide some minimal commentary.

16. First, Case B is set out above. The form in which it was originally enacted is given below.

17. Second, (and I take this essentially from Mr O'Sullivan's skeleton, it not being controversial):

(a) The affirmative procedure requires a proposed Statutory Instrument to be laid before both Houses of Parliament and each to pass a resolution in favour of the instrument before the order passes into law.

(b) The negative (or annulment) procedure requires the laying before both Houses of Parliament of the statutory instrument with the proviso that unless it is annulled by resolution the order passes into law.

18. I should make it clear that I do not consider it appropriate or necessary to my task on this appeal to decide whether the negative procedure is undesirable in general, or inadequate in any particular situation, or in the situation in the present dispute.

19. Although Ms Taskis' submissions initially hinted that that the negative procedure may in general be lacking in the scrutiny that it provides, and in particular if used on a wide scale, I do not see how that can have any force when Parliament quite clearly has frequently provided for its use, including in the field to which this case relates, as I will consider next. I thought that Ms Taskis backed away from the argument as the hearing went on. What one can say is that the negative procedure will provide, in general, a lower level of scrutiny than the affirmative procedure, and I return to that in the last section of this judgment.

20. S. 94 AHA 1986 is an example which describes at subsections (2) and (3) what is agreed to be the negative procedure and affirmative procedures, respectively:

> *(2) Any statutory instrument containing an order or regulations made under any provision of this Act (except section 22(4), 84(4) or 91) shall be subject to annulment in pursuance of a resolution of either House of Parliament.*

(3) No regulations shall be made under section 22(4) above or section 84(4) above unless a draft of the regulations has been laid before and approved by a resolution of each House of Parliament.

21. Other examples were referred to by the parties.

22. Third, the definition of "general development order" is to be found in Sch. 3 paragraph 8A of AHA 1986 as "an order under s.59 of the Town and Country Planning Act 1990 which is made as a general order".

23. S. 59 TCPA 90 provides (with irrelevant words in (2)(b) removed):

59 Development orders: general.
(1) The Secretary of State shall by order (in this Act referred to as a "development order") provide for the granting of planning permission.
(2) A development order may either—
(a) itself grant planning permission for development specified in the order or for development of any class specified; or
(b) in respect of development for which planning permission is not granted by the order itself, provide for the granting of planning permission by the local planning authority … in accordance with the provisions of the order.
(3) A development order may be made either—
(a) as a general order applicable, except so far as the order otherwise provides, to all land, or
(b) as a special order applicable only to such land or descriptions of land as may be specified in the order.

24. Fourth, s. 333 TCPA 90 provides for the making of a general development order. It is unnecessary to set this out, but it is common ground that that the 2015 Order was made under the provisions of s. 333(5) using the negative procedure. That is the general approach under s. 333, subject to certain limited exceptions of no present relevance contained in s. 333(6). Mr O'Sullivan accepted (skeleton, paragraph 32) that there is no mechanism to make a general development order within the meaning of AHA 1986 other than by the negative procedure.

25. Fifth and finally, the most relevant parts of the 2015 Order are Paragraph 3(1) and the definition of Permitted Development in Sch. 2 Part 18.

26. Paragraph 3(1) is as follows (irrelevant words again omitted):

3.- Permitted development

(1) Subject to the provisions of this Order … planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.

27. And Part 18 provides as follows:

PART 18

Miscellaneous development

Class A – development under local or private Acts or Order

Permitted development

A. *Development authorised by—*

(a) a local or private Act of Parliament,

(b) an order approved by both Houses of Parliament, or

(c) an order under section 14 or 16 of the Harbours Act 1964 (orders for securing harbour efficiency etc, and orders conferring powers for improvement, construction etc of harbours),

which designates specifically the nature of the development authorised and the land upon which it may be carried out.

28. With the relevant provisions now set out, I can turn to my reasoning.

Points (a) and (b): legislative history and Pepper v. Hart

29. As originally enacted in 1986, Case B was as follows:

> *CASE B*
> *The notice to quit is given on the ground that the land is required for a use, other than for agriculture—*
> *(a) for which permission has been granted on an application made under the enactments relating to town and country planning, or*
> *(b) for which; otherwise than by virtue of any provision of those enactments, such permission is not required,*
> *and that fact is stated in the notice.*

30. It will readily be seen that (a) was the same as in Case B as it stands now. But (b) was very different.

31. In *Bell v. McCubbin* [1990] 1 QB 976, the Court of Appeal held that limb (b) of the original form of Case B allowed a landlord to take back possession of a dwelling house on an agricultural holding for the purpose of letting it out, on the footing that because that was a use already established by the tenant, no planning permission was needed.

32. Ms Taskis said that prior to *Bell v. McCubbin* the view of practitioners in this area of the law was that limb (b) of Case B as enacted was very narrow, and applied really only to where the Crown, being exempt from the requirement of planning permission, was the landlord. Accordingly, she said, the decision in *Bell v. McCubbin*, which clearly gave limb (b) much broader application, came as a shock.

33. There is support for Ms Taskis' submission that that was the perception of the profession in the last 5 paragraphs of the judgment of O'Connor LJ in *Bell v. McCubbin*, and Mr O'Sullivan did not disagree.

34. In any event, the above is just context to what happened next: it is clear that *Bell v. McCubbin* caused widespread concern because legislation was swiftly brought to reverse its effect. This started as a private members' bill and led in due course to the Agricultural Holdings (Amendment) Act 1990 ("AHAA 90") amending Case B into its present form.

35. Ms Taskis' submissions in the context of this legislative history were twofold.

36. First, she said that it can be seen that AHAA 90 was intended to restore the position as it had been understood prior to *Bell v. McCubbin*. In other words, she submitted that the mischief to which the AHAA 90 was directed was the broader scope of Case B revealed by *Bell v. McCubbin.* This is what I refer to as point (a) above.

37. Second, she submitted that support for her position could be found in the speeches made in Parliament during the passage of the AHAA 90. She relied on *Pepper (Inspector of Taxes) v. Hart* [1993] 1 AC 593 as interpreted in, for example *Christianuyi v. Revenue and Customs Commissioners* [2018] UKUT 10 (TCC). This what I refer to as point (b) above.

38. The problem with the first of these submissions is that it is clear that the AHAA 90 was not intended only to reverse the decision in *Bell v. McCubbin*. It was intended to change limb (b) of the original Case B to limit it to Crown Immunity, and this was done in the new Case B(e), so that on the same facts as in *Bell v. McCubbin* it would no longer be possible to rely on the mere fact that planning permission was not needed to continue use begun by the tenant. But the AHAA 90 also introduced parts B(b), (c) and (d). They were new. The point of law before me arises under B(b), and whether C or D is right about the negative procedure sufficing for part B(b)(ii), the specific mischief from *Bell v. McCubbin* will have been removed.

39. The (related) problem with the second of these submissions is that the statements in Parliament relied on do not descend to the level of detail of whether Case B(b)(ii) requires the use of the affirmative procedure. The closest was a statement by the Minister (Hansard HC Deb 16 February 1990 vol 167 cc614-24):

> *"The amended Bill before the House will, it is hoped, make absolutely clear the circumstances when an incontestable notice to quit can be served where land is to go for use other than agriculture. In effect, the Bill provides three circumstances where an incontestable notice to quit can be served under case B. The first is where planning permission has been obtained. That is the same as under existing legislation, the second deals with cases where Parliament has given an effective permission for a particular development. It seems clear that the current Agricultural Holdings Act 1986 also covers the use of land for which an Act of Parliament not dealing generally with town and country planning grants planning permission. That is where the developer does not have to obtain planning*

> *permission from the local authority. Those circumstances, together with Crown immunity, are covered by the 1986 Act.*
> *The Bill therefore covers circumstances in which an Act gives planning permission. It provides for private and local Acts as well as the various ways in which Parliament may, in Acts or parliamentary orders not forming part of the general town and country planning legislation, remove the need for a planning application."*

40. I do not in general find these paragraphs particularly clear, I have to say, but to the extent that they bear on Case B(b) the reference to e.g. "Parliament has given an effective permission for a particular development" provides no basis for thinking that the Minister had turned his mind to whether the negative procedure would suffice. The requirement for clarity in *Pepper v. Hart* must, it seems to me, call not only for language which is itself clear (which I also think is lacking), but for a clear answer to any ambiguity arising from the legislation under consideration.

41. So I reject Ms Taskis' submissions under headings (a) and (b) above; to be fair, she did not press them very hard at all and had they not been part of the argument before the Arbitrator (who also rejected them) I suspect she would not have bothered with them.

42. My rejection does not advance D's case, but merely means that I can get no help from the legislative history either way.

Point (c) - ordinary meaning

43. I therefore turn to consider the much more central and important issue, of what Case B means on its ordinary, contextual meaning. Consistently with my analysis above, I do so on the basis that the mischief from *Bell v. McCubbin* is cured on either side's analysis.

44. In terms of the purely acontextual or dictionary meaning of "approved", I agree with Ms Taskis' submission that there is a clear connotation of active approval. Mr O'Sullivan submitted that the withholding of disapproval (as happens with the negative procedure) is also a form of approval. I found this much less convincing, and overly complex. I do not think it is consistent with the ordinary meaning of "approved".

45. In any event, my task in interpreting Case B is not limited to the acontextual or dictionary meaning but must include the surrounding language and statutory context.

46. The provisions of s. 94 AHA 1986 that I have set out above (see also s.333 TCPA 1990) make clear that Parliament had in mind the existence of, and distinction between, the affirmative and the negative procedures.

47. It is true that Case B(b)(ii) would be unambiguous with respect to the issue before me had it used the full expression "approved by *a resolution of* each House of Parliament", and there is nothing to inform me why the reference to "resolution" was not included.

48. Mr O'Sullivan understandably therefore submitted that had Parliament intended to refer to only the affirmative procedure in Case B(b)(ii) it would have used the full expression "approved by a resolution of each House of Parliament".

49. It is always possible when there is a debate over the meaning of a document, including an Act or Order, to say that if result X had been intended, wording Y would have been used. The strength of such an argument depends, among other things, on whether wording Y was readily to hand, and how close wording Y was to the actual language.

50. In the present case, the clear distinction in s. 94 between the negative and affirmative procedures arises from the difference in the expressions "subject to annulment" for the former and "approved" for the latter. Each refers to a resolution. So I think Mr O'Sullivan's point on this aspect of the issue before me is very weak.

51. I consider it more telling that in Case B(b)(i), when referring to use authorised by a private or local Act, there is no equivalent reference to the procedure by which such Act was made (it would be by the full parliamentary procedure, including First, Second and Third Readings, a Committee Stage, and the approval of both Houses). All that is required is (implicitly) that the Act is in force. Had the intention behind Case B(b)(ii) been that the procedure by which the order was made did not matter so that either the negative or affirmative procedure would do, parallel language would have been used, perhaps along the lines (as Ms Taskis submitted) of "in force".

52. On this aspect of the debate, the Arbitrator seems in essence to have accepted a point made by Counsel in an independent advice of 25 May 2018 which he obtained for the purpose of considering this issue, that C's argument "confuses the journey (or procedure) with the destination (approval)". For the reasons I have just given, I disagree, and it seems that Counsel did not specifically consider the difference between Case B(b)(i) and B(b)(ii).

Point (d) – structure of Case B(b)(ii)

53. So in my view the words used favour C's argument. I turn to point (d), which is also a facet of the meaning of the words used, albeit one which focuses on the interaction of the separate parts of Case B(b)(ii) rather than the individual words. I must in my overall assessment therefore take (c) and (d) together; I have split them out in this judgment for readability and because the parties' submissions were made that way.

54. If one has regard to the whole of the language of B(b)(ii), including the introductory wording of (b), it reads as follows. The non-agricultural use must be one "(*b) for which permission under those enactments* [i.e. relating to town and country planning, referenced in (a)] *is granted by a general development order by reason only of the fact that the use is authorised by … (ii) an order approved by both Houses of Parliament*".

55. This language specifies two things: permission given by a general development order, and authorisation by an order approved by both Houses of Parliament. I think it is clear, and I accept Ms Taskis' submission in this respect, that the reader would consider them to be separate.

56. However, the effect of D's position is that since any general development order will be made either by the affirmative or the negative procedure, (ii) will always be satisfied whenever the introductory words of (b) calling for a general development order are met. So (ii) becomes redundant.

57. I understood Mr O'Sullivan's response to this to be twofold.

58. First, he submitted that the introductory language of Case B(b) is simply cumbersome and uses too many words. I do not accept this. I consider one must assume as a starting point that words are there for a reason, and on the face of Case B it appears that two separate things are needed, as I have said above.

59. Second, he submitted that the requirement in (ii) that the order be approved by both Houses of Parliament excluded the situation envisaged by, for example, s. 59 TCPA 1990 where an order allows a local authority to grant authority, and limited it to cases where the order itself authorised the use. He submitted in that way, (ii) was narrower than the introductory words of Case B(b).

60. The problem with that submission is that it would require the introductory words of Case B(b) to cover both cases (delegation to a local authority and direct authorisation by the order concerned), otherwise (ii) would be no narrower than the introductory words and still be redundant. But the introductory words do not say that. They say that permission is granted by the general development order; they do not extend to the situation of delegation. I did not feel that Mr O'Sullivan had any answer to this.

61. I consider point (d) to be a very telling point in favour of C's position. Taken together with my analysis of the ordinary meaning, in context, it leads me to conclude that C is right, and the Arbitrator was wrong in law in his conclusions. It is fair to say that point (d) was argued to him barely if at all, just possibly being wrapped up with the journey/destination argument that I have mentioned above, although in any case I differ from him in relation to the ordinary meaning.

62. Before leaving the structure of Part B, I should mention the point of information referred to in the judgment of Fancourt J giving permission to appeal.

63. Fancourt J referred to a similar issue with the language of the 2015 Order itself, and in particular Sch. 2 part 18 (Art 3(1) and Sch. 2 Part 18 are set out above). He pointed out the very close similarity to Case B(b)(ii) and invited the parties' submissions.

64. I did not understand Ms Taskis for C or Mr O'Sullivan for D to submit that Sch. 2 part 18 made a material difference to the answer to the point of law before me, or gave them separate assistance. Rather, they treated it as raising broadly the same issue of potential redundancy as with Case B itself that I have addressed above. In this context Ms Taskis also expressed the matter as one of circularity: that the 2015 Order would be authorising itself on D's approach to interpretation of Case B.

65. For myself, I consider that Sch. 2 Part 18 is potentially narrower in a conceptual sense than is Case B(b) because it has the closing two lines requiring that the Act or order concerned must designate specifically the nature of the development authorised and the

land upon which it may be carried out. Nonetheless, it certainly grants planning permission for a very broad sweep of authorised development.

66. I do not however see how the language of Sch. 2 part 18 (a statutory instrument) can determine the proper interpretation of the earlier provision of Case B of AHA 1986 (an Act), and nor can its use of similar language somehow imply that it must itself be an order approved by both Houses of Parliament within the meaning of Case B(b)(ii). I do not understand Mr O'Sullivan to have submitted that in any event.

67. As to Ms Taskis' circularity point or characterisation, I must say that I found it rather hard to grasp, but I do agree with her that the clear implication in Sch. 2 part 18 at A.(b) is that the order approved by both Houses of Parliament is something outside of, and separate from, the 2015 Order itself.

68. In summary, neither side submitted that the issue raised by Fancourt J made a material difference, and I do not either. But it was clearly worth consideration and the submissions made have enabled me to satisfy myself that it does not undermine my overall analysis.

Point (e) – consistency of limbs (i) to (iii)

69. Finally, I need to consider what I have called point (e) above – consistency of limbs (i), (ii) and (iii) of Case B(b).

70. What I mean by consistency is this: Ms Taskis submitted that if B(b)(ii) were interpreted as D submits and the Arbitrator found, then it would allow valid notice to quit to be given without the need for the permission of the Tribunal in a very wide range of cases (she pointed to the width of the 2015 Order itself) and under orders which, by virtue of being made by the negative procedure, would have had little parliamentary scrutiny.

71. She contrasted this with B(b)(i) and (iii) which, she submitted, required much more scrutiny.

72. In the case of B(b)(i) the scrutiny involved would be that accorded to primary legislation as I have described above. In the case of B(b)(iii) (on which I invited the parties to put in further written submissions after the oral hearing of the appeal) there would be a variety of mechanisms under the Harbours Act 1964, which include an environmental impact assessment, a consultation process, and the possibility of an public inquiry.

73. It is true that on D's interpretation of Case B(b)(ii) there is the possibility of the lower level of scrutiny attaching to the negative procedure, but there is no reason to suppose that in drafting Case B or AHA 1986 or TCPA 1990 in general the legislature regarded the negative procedure as necessarily inadequate. Nor is there reason to think that at the time AHA 1986 was amended in 1990 there was a concern that the negative procedure would be used with great or undue breadth or frequency, so that it should be excluded from Case B(b)(ii).

74. Furthermore, (i), (ii) and (iii) cover very different situations of very different likely frequency of application.

75. Therefore, while I recognise that C's interpretation of Case B(b)(ii), which I have accepted, does in fact require a kind of parliamentary scrutiny which is inherently more exacting (as I have said above), and that is perfectly sensible, I do not think that this drives its interpretation.

76. So point (e) does not assist Ms Taskis' arguments in my view. My rejection of it does not set back her arguments under points (c) and (d), though. As I have already said, I accept them and they are my basis for deciding that the Arbitrator was wrong, and allowing the appeal.

Conclusion

77. I allow the appeal and invite Counsel to try to agree the form of Order. I will direct written submissions within 7 days in the event that agreement is not possible.