UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 237 (LC)
Case No: ALT/27/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Landlord and tenant – Agricultural Holdings Act 1986 – right to succession on retirement of tenant – eligibility dependent on nominated successor deriving principal livelihood from the holding for five years "in the last seven years" – whether this "livelihood condition" must be satisfied for the seven year period prior to the Tribunal's determination of the successor's application for a new tenancy as well as for the seven year period prior to the tenant's retirement notice

BETWEEN :

THE KINGSBRIDGE PENSION FUND TRUST **Appellant**

- and -

DAVID MICHAEL DOWNS

Respondent

Re: Milstead Farm, Gilstead,
Bingley, West Yorkshire,
BD16 4QU

Hearing date: 15 March 2017

The President

Royal Courts of Justice, London WC2A 2LL

- -

Stephen Jourdan QC instructed by Michelmores LLP for the Appellant
Oliver Radley-Gardner instructed by Loxley for the Respondent

The following cases are referred to in this Decision:

Shirley v Crabtree [2008] 1 WLR 18
Johnson v Gore Wood [2002] 2 AC 1
Gilchrist v Revenue and Customs Commissioners [2015] Ch 183
Secretary of State for Justice v RB [2010] UKUT 454 (AAC)
Willers v Joyce (No 2) [2016] 3 WLR 534
R v Montila [2004] 1 WLR 3141
Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231
R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Ltd [2001] 2 AC 349
Pepper v Hart [1993] AC 593
Jackson v Hall [1980] AC 854
R (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin)
R (Akram) v Secretary of State for the Home Department [2015] EWHC 1359 (Admin)
R v Mark [2016] EWCA Crim 1639

DECISION

Introduction

1. The Appellant is the freehold owner of the agricultural holding known as Milnerfield Farm, Gilstead, Bingley, West Yorkshire, BD16 4QU ("the holding"). The tenant of the holding is Keith Downs ("the tenant"). He is the Respondent's father. The tenancy is one to which Part IV of the Agricultural Holdings Act 1986 ("the 1986 Act") applies.

2. On 30 March 2011 the tenant served on the Appellant a notice under section 49(1)(b) of the 1986 Act stating that he wished the Respondent to succeed him as tenant of the holding as his "nominated successor". On 19 April 2011 the Respondent applied to the First-tier Tribunal ("the FTT") under section 53 for a direction entitling him to a tenancy of the holding. The Appellant opposes the Respondent's application.

3. In paragraph 36 of its Statement of Case the Appellant said that the Respondent had to satisfy the "livelihood condition" in section 50(2)(a) of the 1986 Act *both* at the date of the retirement notice *and* when the application is determined. Section 50(2) provides:-

> "(2) For the purposes of sections 49 to 58 of this Act, "eligible person" means (subject to the provisions of Part I of Schedule 6 to this Act as applied by subsection (4) below) a close relative of the retiring tenant in whose case the following conditions are satisfied –
>
> (i) in the last seven years his only or principal source of livelihood throughout a continuous period of not less than five years, or two or more discontinuous periods together amounting to not less than five years, derived from his agricultural work on the holding or on an agricultural unit of which the holding forms part, and
>
> (ii) …."

By its Notice No. 5 dated 27 June 2016, the FTT ordered that the relevant part of paragraph 36 be struck out. The Appellant appeals against that decision with the permission of the Upper Tribunal.

4. According to paragraph 4 of the Statement of Facts and Issues agreed by the parties, the issue on the appeal is whether, under section 53(5) of the 1986 Act, the FTT must be satisfied that the Respondent fulfilled the livelihood condition:

> (i) solely in respect of the period of 7 years up to the retirement notice as the Respondent contends; or

(ii) in respect of both the period in (a) and also the period of 7 years up to the determination of the Respondent's application, as the Appellant contends.

5. In Shirley v Crabtree [2008] 1 WLR 18 Beatson J (as he then was) decided that the livelihood condition need only be satisfied for the period of 7 years expiring on the date of the retirement notice. That decision was, of course, binding on the FTT.

The background to this appeal

6. In fact the issue raised by paragraph 36 of the Appellant's Statement of Case and the FTT's Notice No. 5 had already been raised before and determined by the Tribunal in the same proceedings. Unfortunately, it is necessary to set this out in some detail.

7. In its Notice No 1 dated 26 November 2015 the FTT ordered the Respondent to disclose documents relevant to the livelihood condition from 31 March 2004 "up to date." Understandably, the Respondent made an application dated 3 December 2015 asking the FTT to vary that order for disclosure so that it was limited to the seven year period ending on 31 March 2011 (the date when the retirement notice was given), so as to accord with the decision in Shirley v Crabtree. On 11 January 2016 in its Notice No 2 the FTT acceded to that application. That order noted that the Appellant had failed to respond to the tenant's application.

8. However, seven weeks later, by letter dated 29 February 2016 the Appellant's Solicitor asked the FTT to revisit its decision on disclosure relating to the livelihood condition by raising the very issue which is now the subject of this appeal, the correctness of the decision in Shirley. In its Notice No 3 dated 15 March 2016 the FTT decided once again that, following Shirley, the relevant 7 year period ended with the date of the retirement notice. The Appellant did not seek to appeal that decision. Given that Shirley was binding on the FTT it should have been obvious from the moment that the Respondent's application was made in 2011, and certainly when Notice No 2 was issued, that an appeal to the Upper Tribunal was going to be necessary if the Appellant wished to have the correctness of the decision of Beatson J reconsidered. It is necessary to bear in mind that throughout this litigation the Appellant has been represented by a Solicitor with great expertise in this area and, indeed, someone who has edited one of the leading textbooks in this field

9. But the Appellant did not seek permission to appeal. Instead, in its Statement of Case dated 1 April 2016 the Appellant contended that as a matter of law the FTT would have to consider whether the livelihood condition is satisfied for the 7 year period leading up to its determination of the Respondent's application. Ironically, the Appellant sought to support its argument by reference to "the very significant delay" which had occurred. The Respondent objected to this contention being raised in the pleading and the FTT issued Notice No 4 on 2 June 2016 warning the Appellant that it was minded to strike out

paragraph 36 of its Statement of Case as an abuse of process and giving the Appellant an opportunity to make representations on that point.

10. In these circumstances, it is highly surprising that the Appellant's Solicitor responded to the FTT simply by sending a further copy of his letter dated 29 February 2016, which, of course, had not dealt with the abuse of process point. In the absence of any proper explanation, this conduct was not only grossly discourteous, it reflected the abusive manner in which the litigation was still being conducted by the Appellant, a matter to which the FTT had drawn attention in its Notice No 3. Although by letter dated 17 June 2016 the Respondent's Solicitors even took the trouble to query with the Appellant's Solicitors whether the latter had made an error in re-sending to the FTT their letter of 29 February 2016, the response the same day indicted that no such error had been made. On 27 June 2016 the FTT struck out the relevant part of the Appellant's case.

11. The Appellant next made an application to the FTT for permission to appeal against the strike out, albeit 2 days out of time. Even at this stage the grounds put forward still failed to deal with the abuse of process point. So it was hardly surprising that the FTT refused permission to appeal. But the FTT went on to consider the merits of the proposed grounds of appeal. It appears that the judge was influenced to some extent by its belief that Shirley had been a decision of the Court of Appeal. In fact, it was a decision of the High Court and so would not be binding on the Upper Tribunal, to whom any appeal would lie. The fact that Shirley was binding on the FTT would not in itself have been a good reason for refusing permission to appeal, but the judge went on to explain why, in any event, he did not consider that the Appellant had put forward a proper basis for departing from Shirley, Quite rightly, he was unimpressed by the Appellant's reliance upon the 5 year period which had elapsed since the service of the retirement notice to support its contention that the Respondent's financial circumstances needed to be "brought up to date".

12. On 23 September 2016 the Appellant's Solicitor sent to the Upper Tribunal an application for permission to appeal against the decision to strike out. He still made no attempt to deal with the abuse of process point. Instead, the grounds of appeal set out briefly why there were said to be important legal issues on the correct construction of section 50(2)(a) and why Shirley needed to be reconsidered. The Respondent made written submissions explaining why Shirley had been correctly decided.

13. When the application for permission to appeal came before this Tribunal for determination, it appeared that the date for the substantive hearing in the FTT had been vacated, and that the trial was unlikely to take place before March 2017. I took the view that the point of construction of the 1986 legislation was properly arguable, notwithstanding the decision in Shirley, and that it could be said that (a) an error of law on this point would go to the FTT's jurisdiction and so (b) the correctness of Shirley could be raised in any event after the trial in an application for permission to appeal any direction made by the FTT entitling the Respondent to a new tenancy. In these circumstances, it seemed preferable for the point of law to be determined in the Upper Tribunal, if possible

before the substantive hearing in the FTT, despite the FTT's decision that the Appellant's attempt to appeal the strike out involved an abuse of process, and notwithstanding the Appellant's failure to deal with this point.

14. Unfortunately, the situation presented to this Tribunal involved a tension between the Appellant's abuse of process and the existence of an arguable error of law going to the jurisdiction of the FTT. The parties did not address this point or make submissions on whether an appellate tribunal could or should decline to determine an arguable point of law going to the jurisdiction of a lower tribunal, because of the abusive manner in which that issue had been pursued.

15. Part of the rationale for the abuse of process jurisdiction is to enable tribunals to control proceedings before them so as to achieve finality in the litigation of a case or a particular issue (see eg. Johnson v Gore Wood [2002] 2 AC 1). The re-litigation or re-determination of an issue can involve an improper use of a tribunal's finite resources and can delay the final determination of the proceedings. Here, it was abusive, at the very least, for the landlord not to have appealed the FTT's decision in Notice No. 2 and *a fortiori* in Notice No 3, but instead to advance its point of law, in blatant disregard of those earlier decisions, by the inappropriate means of its Statement of Case. This then resulted in further delay while the FTT had to deal with the abuse of process issue. An appeal route was only subsequently pursued when on 29 July 2016 the Appellant made an application to the FTT for permission to appeal albeit in relation to the decision to strike out in Notice No 5, some 4½ to 6½ months after the earlier decisions which ought to have been appealed.

16. Even at the hearing of this appeal, Mr. Stephen Jourdan QC, who appeared on behalf of the Appellant, had been given no instructions to enable him to justify, or even explain, the course of conduct previously followed by the Appellant and its Solicitors, although this matter had plainly been referred to in the order granting permission to appeal. That was a wholly unsatisfactory state of affairs.

17. It should not be thought that, because this Tribunal granted permission for an appeal to be brought on the point of law, the same course will be taken if similar circumstances should arise in future. Where a party fails to apply for and obtain permission to appeal on a point of law at the appropriate stage, but seeks to do so in relation to a later decision, there will need to be proper argument and citation of authority on the relationship between the jurisdiction to control an abuse of proceedings (including appeals from the First-tier Tribunal to the Upper Tribunal) and the resolution of points of law going to the jurisdiction of the court or tribunal from which it is sought to appeal. In the field of public law, for example, a legal error by a tribunal or public body in reaching a particular decision may go uncorrected, notwithstanding the effect on its jurisdiction, simply because the time limits in CPR 54.5 for the bringing of a claim for judicial review are not respected.

18. Before proceeding further, I do wish to record my gratitude to Mr. Jourdan QC and to Mr. Oliver Radley-Gardner (who appeared on behalf of the Respondent) for the considerable assistance they gave on the issue I have to determine.

Precedent

19. The decision of Shirley was a decision of the High Court on a case stated by the Agricultural Lands Tribunal, the statutory predecessor in this jurisdiction of the Property Chamber of the First-tier Tribunal.

20. The parties are agreed on the status of that decision in this appeal to the Upper Tribunal. The point has been authoritatively dealt with in Gilchrist v Revenue and Customs Commissioners [2015] Ch 183, a decision of the Upper Tribunal (Tax and Chancery Chamber) (David Richards J (as he then was) and Julian Ghosh QC), at paragraphs 85 - 101, referring also to the decision in Secretary of State for Justice v RB [2010] UKUT 454 (AAC) (Carnwath LJ (as he then was), HHJ Sycamore and UTJ Rowland) at paragraphs 39 - 43). As a matter of judicial comity, the Upper Tribunal should follow a decision given in the High Court on the same point, unless "convinced" or "satisfied" (there being no difference between these two tests) that the earlier decision was wrong. In Willers v Joyce (No 2) [2016] 3 WLR 534 the Supreme Court held that a judge "should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so" (see paragraph 9). Where the issue falls within the specialist expertise of the Upper Tribunal, then in a proper case it may feel less inhibited in revisiting issues decided at High Court level, if there is good reason to do so. But it was not suggested at the hearing that this qualification applies to the issue now before the Tribunal.

Statutory framework

21. The 1986 Act confers security of tenure in respect of tenancies of agricultural holdings. This Act consolidated previous legislation with amendments to give effect to recommendations of the Law Commission. Those recommendations have no bearing on the present issue (Law Com. No. 153: Cmnd. 9665).

22. A right to succeed to the tenancy of an agricultural holding on the death of the tenant was introduced by the Agricultural (Miscellaneous Provisions) Act 1976. This enabled certain "close relatives" of a deceased tenant to apply to the Tribunal for a direction that a successor should be entitled to a tenancy of the holding. A Committee of Inquiry chaired by Lord Northfield into "The Acquisition and Occupancy of Agricultural Land" reported in July 1979 ("the Northfield Report" – Cmnd. 7599). Certain of the recommendations were taken up in the Agricultural Holdings Act 1984. Thus, the Act conferred a right to succeed on the retirement of a tenant for tenancies granted before 12 July 1984 and certain tenancies granted thereafter (eg. succession tenancies, written tenancy agreements providing for succession rights to apply, and tenancies granted to a person who was a

tenant of the holding immediately before that grant). The 1984 Act also confined the right to succeed on death to broadly the same types of tenancy.

23. As part of the package of changes introduced by the 1984 statute, what is now section 4 of the 1986 Act provides in relation to tenancies granted on or after 12 September 1984, that where no effective notice to terminate on the term date has been given under section 3 and the tenant dies a year or more before the term date, the tenancy will come to an end on the term date (or if the death occurs at any other time, 12 months after the term date). This disapplies section 3, which would otherwise provide for the tenancy to continue unless and until brought to an end in accordance with the provisions of the Act.

24. It is common ground between the parties that the provisions for succession on the death, or the retirement, of the tenant are parallel codes with a great many similarities. Plainly the code for succession on retirement has been modelled on the code for succession on death. The parties have also referred to certain differences between the two codes, the materiality of which I will return to below.

25. The codes for succession on death and on retirement are contained in Part IV of the 1986 Act. Sections 35 to 48 deal with succession on death. Sections 49 to 58 deal with succession on retirement. Section 34, which is common to both codes, defines the tenancies to which they apply. Section 59 is an interpretation provision for the purposes of Part IV. The issue in this case relates to "the livelihood condition," one of the qualifications for being an "eligible person". For the retirement code "eligible person" has the meaning given by section 50(2) (see section 59(2)). For succession on death, "eligible person" has the meaning given by section 36(3) (see section 59(1)).

26. It is important to note that the structure and sequence of the two codes is very similar:

Succession on death

(i) The circumstances in which the code applies, including the death of the existing tenant (section 35);

(ii) The right of an eligible person to apply for a new tenancy, including the definition of "eligible person" (section 36);

(iii) Cases where statutory succession on death is excluded (sections 37 and 38);

(iv) Procedure for making an application to the FTT for a direction entitling an "eligible person" to a new tenancy (section 39(1));

(v) The FTT's decision whether to make a direction depends upon whether the applicant (i) was an eligible person at the *date of death*, (ii) has not subsequently ceased to be an eligible person, and (iii) is a "suitable person" to become the tenant of the holding (section 39(2) to (10));

(vi) The effect of a section 39 direction giving an entitlement to a new tenancy (section 45).

Succession on retirement

(i) The circumstances in which the code applies, including the service of a retirement notice by the tenant nominating an "eligible person" to succeed him (section 49);

(ii) The right of an eligible person to apply for a new tenancy, including the definition of "eligible person" (section 50);

(iii) Cases where statutory succession on retirement is excluded (section 51);

(iv) Procedure for making an application to the FTT for a direction entitling the "eligible person" to a new tenancy (section 53(1) to (3));

(v) The FTT's decision whether to make a direction depends upon whether the applicant (i) was an eligible person at the date *when the retirement notice was given*, (ii) has not subsequently ceased to be an eligible person, and (iii) is a suitable person to become the tenant of the holding (section 53(5) to (10));

(vi) The effect of a section 53 direction giving an entitlement to a new tenancy (section 55).

27. It can be seen from this comparison that under each code the definition of, and the qualifications for being, an "eligible person", are embedded in the provisions *conferring the right to apply* for a new tenancy (sections 36 and 50), and not in the subsequent procedural provisions by which such applications are made and then determined (sections 39 and 53). That is expressly reinforced by the interpretation provisions contained in section 59 (and see also section 49(3) in the case of the retirement code). Although Mr Jourdan QC suggested during the hearing that the Appellant's arguments do not depend upon the subsequent procedural provisions contained in section 53, it is nonetheless plain

that they do rely upon them to a substantial extent (see eg. paragraphs 4 - 5, 33, 38 and 50 of the Appellant's skeleton argument).

Succession on death

28. By section 35 the succession on death code applies where the sole tenant of a relevant tenancy dies and is survived by a "close relative", namely the tenant's wife, husband, civil partner, brother, sister, child, or any person who was treated as a child of the family in relation to the tenant's marriage or civil partnership.

29. Headings and sidenotes to legislation are admissible as aids to the construction of a statutory provision, albeit attracting less weight than the text of the provision itself (R v Montila [2004] 1 WLR 3141, at paragraphs 34 - 6). The heading to section 36 reads:-

> "Right of any eligible person to apply for new tenancy on death of tenant"

That description is accurate. Section 36(1) confers a right on any "eligible person" to apply to the FTT for a direction under section 39 entitling him to a new tenancy of the holding (subject to the exclusions in sections 36(2), 37 and 38).

30. Section 36(3) is the key provision defining an "eligible person" for succession on death:-

> "For the purposes of this section and sections 37 to 48 below, "*eligible person*" means (subject to the provisions of Part I of Schedule 6 to this Act and without prejudice to section 41 below) any surviving close relative of the deceased in whose case the following conditions are satisfied –
>
> (i) in the seven years ending with the date of death his only or principal source of livelihood throughout a continuous period of not less than five years, or two or more discontinuous periods together amounting to not less than five years, derived from his agricultural work on the holding or on an agricultural unit of which the holding forms part, and
>
> (ii) he is not the occupier of a commercial unit of agricultural land."

Thus, to be "eligible" a person must not only be a "close relative," but must also satisfy both of the conditions set out in sub-paragraphs (a) and (b). The first is referred to as the "livelihood condition" (see eg. paragraph 1 of Schedule 6). The second is known as the "occupancy condition". In the case of the livelihood condition the wife (or husband) or civil partner of a deceased tenant may rely upon agricultural work from which they derived their sole or principal source of livelihood over the relevant period, irrespective of whether the work was carried out by the deceased tenant, or by themselves, or a combination of the two (see section 36(4) and (4A)).

31. It is important to note straight away three striking differences between these two conditions for qualification as an "eligible person":-

(i) First, the livelihood condition relates to livelihood derived from a person's work on the agricultural holding the subject of a claim to succession, whereas the occupancy condition is not so limited;

(ii) Second, the livelihood condition relates to an overall *finite* period of seven years. It is also plain beyond argument that the succession on death code refers to a single period of seven years *preceding* a single specified date. Within that seven year "window" the condition must be satisfied over a period or periods amounting to not less than five years. By contrast the "occupancy condition" does not employ any finite period. As explained below, the "occupancy condition" has to be satisfied as at the death of the tenant and thereafter on a continuing basis until the determination of the application for a section 39 direction;

(iii) The third striking difference is that the livelihood condition is expressed as a requirement which a person must *positively* satisfy in order to be eligible, whereas the occupancy condition is expressed *negatively* by reference to a characteristic which disqualifies a person from eligibility during the period which follows the death of the tenant.

32. The "occupancy condition" refers to a "commercial unit" of agricultural land. This relates to the "productive capacity" of land as defined in Part I of Schedule 6 to the Act (see section 36(5)). "Commercial unit" is defined in Schedule 6 paragraph 3(1) as "a unit of agricultural land which is capable, when farmed under competent management, of producing a net annual income of an amount not less than the aggregate of the average annual earnings of two full-time, male agricultural workers aged twenty or over". By Schedule 6 paragraph 4, the Minister is required to make orders prescribing units of production and the amount to be regarded as the net annual income from each such unit for these purposes. Such orders have been made yearly since 1984 when the Agricultural Holdings Act 1984 first enacted the provisions now contained in Schedule 6. The first such order was The Agriculture (Miscellaneous Provisions) Act 1976 (Units of Production) Order 1984. More recent examples are the Agricultural Holdings (Units of Production) (England) Order 2010, which related to the 12 months beginning with 7 November 2010, and the Agricultural Holdings (Units of Production) (England) Order 2016, which relates to the 12 months beginning with 7 November 2016. By Schedule 6 paragraph 5, the Minister shall, if requested by the FTT or parties to proceedings, determine (for the purposes of paragraph 3) the net annual income which, in his view, is capable of being produced by land occupied by a close relative.

33. Under section 39(1) an eligible person may apply for a direction from the FTT entitling him to a tenancy of the holding within 3 months from the death of the tenant. Section

39(2) deals with the situation where only one person applies for a direction, in which case the FTT must be satisfied:-

> "(a) that the applicant was an eligible person at the date of death, and
>
> (b) that he has not subsequently *ceased to be* such a person" (emphasis added)

Criterion (a) is expressed as a requirement that the applicant was "eligible" at the date of the tenant's death. By contrast, criterion (b) is expressed negatively so as to deal with a *loss* of eligibility after that date. One of the key issues is which characteristics of eligibility are capable of being lost under criterion (b)?

34. Provided that the applicant satisfies both criteria (a) and (b), the FTT must then go on to consider whether he or she is also a "suitable person" to become a tenant of the holding. Thus, an applicant cannot obtain a direction that he is entitled to a new tenancy unless he is both "eligible" and "suitable" (section 39(5)). Where more than one person applies to become the new tenant, the same criteria in section 39(2) fall to be applied subject to a set of rules which determine which person is to succeed (section 39(4) to (10)).

35. Section 45 provides for the effect of a direction made under section 45. The successful applicant is entitled to a new tenancy of the holding (on the terms determined in accordance with sections 47 and 48) as from the "relevant time" (section 45(11)). The new tenancy begins one year after the end of the year of the tenancy in which the deceased tenant died (save in those cases where the FTT's direction is given within the last three months of that one year period or thereafter) (section 46(1) and (2)).

Succession on retirement

36. By section 49 the succession on retirement code applies where the tenant (or joint tenants) of a relevant tenancy gives a notice to the landlord of the holding that he (they) wishes a single "eligible person" named in the notice (referred to in the legislation as "the nominated successor" – see section 49(3)) to succeed him (or them) as tenant of the holding as from the date specified in the notice (being a date on which the tenancy could have been determined by a notice to quit given on the same day as the tenant's notice and falling between one and two years after that day). Such a notice given by a tenant under section 49(2) is referred to as a "retirement notice" and the "retirement date" is the date specified in the notice as the date from which the proposed succession is to take place (section 49(3)). The party giving a retirement notice is referred to as the "retiring tenant".

37. The heading to section 50 reads:-

> "Right to apply for new tenancy on retirement of a tenant."

Section 50(1) confers a right on the "eligible person" named in the retirement notice to apply to the FTT for a direction under section 53 entitling him to a new tenancy of the holding, subject (inter alia) to section 57(2). The latter provision prevents a section 53 application from being made, if the retiring tenant dies after having served a retirement notice, and it brings to an end any application under section 53 if the retiring tenant dies before those proceedings are finally disposed of by the FTT. In such cases the object is to require the succession on death code to be applied instead of the succession on retirement code. The death of the tenant of the holding is treated as a supervening event.

38. Both the right of a retiring tenant to nominate a successor and of that person to apply under section 53 for a direction depend upon the definition of an "eligible person", which appears in the immediately following section 50(2). Without this definition of eligibility a retiring tenant would not be able to identify a successor. This key provision states:

> "(2) For the purposes of sections 49 to 58 of this Act, "eligible person" means (subject to the provisions of Part I of Schedule 6 to this Act as applied by subsection (4) below) a close relative of the retiring tenant in whose case the following conditions are satisfied –
> (a) in the last seven years his only or principal source of livelihood throughout a continuous period of not less than five years, or two or more discontinuous periods together amounting to not less than five years, derived from his agricultural work on the holding or on an agricultural unit of which the holding forms part, and
> (b) he is not the occupier of a commercial unit of agricultural land".

As in the case of the code for succession on death, an "eligible person" must be a "close relative" (under the definition in section 49(3) which equates to that in section 35(2)) and must satisfy an "occupancy condition" (cast in the same language as section 36(3)(b)) and also a "livelihood condition". The meaning of the occupancy condition is elaborated by essentially the same provisions in Part I of Schedule 6, subject to relatively minor adaptations contained in Part II (section 50(4)).

39. In the case of the livelihood condition, section 50(3) and (3A) provides that a nominated successor who is the wife (or husband) or civil partner of the retiring tenant may rely upon agricultural work from which he or she derived their sole or principal source of livelihood over the relevant period, irrespective of whether the work was carried out by the retiring tenant, or by themselves, or a combination of the two. These provisions parallel section 36(4) and (4A) in the code for succession on death.

40. The issue in this appeal focuses on the opening words of the livelihood condition:-

> "in the last seven years"

which may be compared with the parallel language in section 36(3)(a):-

"in the seven years ending with the date of death".

Both of these provisions refer to finite periods of time and not to indeterminate periods of time. In section 50(2)(a) the word "last" plainly indicates that the legislature has an end date in mind, so that the seven year period may be defined. The difference between the parties can be simply expressed. The Respondent submits that section 50(2)(a) refers to only *one* end date (as is plainly the case for section 36(3)(a)). The Appellant submits that section 50(2)(a) refers to *two* end dates, and hence two different seven year periods (see paragraph 4 above). The answer to this issue cannot be found in the wording of section 50(2)(a) alone. It is necessary to read this provision by reference to other key provisions. In this respect, section 36(3)(a) is not different. The expression "ending with the date of death" depends for its meaning on definitions contained in section 35. In other words, each of the two codes operates as a set of interlocking provisions.

41. As in the code for succession on death, the same three striking differences exist between the livelihood condition and the occupancy condition for the eligibility of the nominated successor under the code for succession on retirement (see paragraph 31 above). Although the parties differ as to whether the livelihood condition relates to one or to two finite periods of seven years, they agree that this condition differs from the occupancy condition in that the latter has to be satisfied on a *continuing* basis.

42. The Appellant in the present case, unlike the landlord in Shirley v Crabtree (see paragraphs 69 - 70 below), does not argue that the livelihood condition must be satisfied on a continuing or rolling basis for each day between the giving of the retirement notice and the determination of the nominated successor's application. The legislation does not require the applicant to satisfy the livelihood condition for each day of the relevant seven year period. Instead, Parliament has decided that it is sufficient for the applicant to satisfy the livelihood condition for a continuous period of five years, or even *discrete* periods totalling at least five years, *within* that seven year period. Plainly, that is intended to be a less onerous test for an applicant to meet. Parliament cannot have intended that he or she should have to demonstrate compliance with this five year measure on a rolling basis. Such an interpretation could make the application of section 50(2)(a) in tribunal proceedings unworkable in practice, especially where the period which elapses between the giving of the retirement notice and the determination of the application substantially exceeds seven years (in the present case it is likely to exceed thirteen years).

43. Under section 53 (1) and (2) the "nominated successor" may apply to the FTT for a direction entitling him to a new tenancy of the holding provided that he applies within one month from the date on which the retirement notice was given. Any such application must (inter alia) be signed by the nominated successor and the retiring tenant(s).

44. Ordinarily, no right to apply under section 53 for a direction can be conferred by section 50(1) where the existing tenant would be aged under 65 at the retirement date which may be specified in a retirement notice under section 49(2). But section 51(3) allows that restriction to be overcome if the retiring tenant is, or will at the retirement date be

incapable, by reason of *bodily or mental infirmity*, of conducting the farming of the holdings so as to fulfil the tenant's responsibility to comply with the rules of good husbandry, and that incapacity is likely to be *permanent*. Reliance upon this exception must be stated in the retirement notice. Where such a notice is served, the FTT must decide whether the retiring tenant's claim to incapacity through infirmity is made out, before proceeding further with the application under section 53.

45. Section 53(5) contains the following key provisions:-

> "(5) If the Tribunal are satisfied –
> (a) that the nominated successor was an eligible person at the date of the giving of the retirement notice, and
> (b) that he has not subsequently *ceased* to be such a person,
> the Tribunal shall determine whether he is in their opinion a suitable person to become the tenant of the holding" (emphasis added).

As in the case of section 39(2), provided that the applicant satisfies both criteria (a) and (b), the FTT must go on to consider whether he or she is a "suitable person" to become a tenant of the holding. The applicant cannot obtain a direction of entitlement to a new tenancy unless he demonstrates the requirements for both eligibility and suitability (section 53(7)). As is the case of section 39(2)(b) one of the key issues is which characteristics of eligibility are capable of being lost under section 53(5)(b)?

46. Section 55 provides for the effect of a direction made under section 53(7) in favour of the nominated successor. He is entitled to a tenancy of the holding on terms determined in accordance with section 56 as from the "relevant time" (section 55(11)). The new tenancy begins on the retirement date specified in the retirement notice, unless the FTT's direction is given within the 3 month period leading up to that date (in which case the Tribunal may specify a commencement date up to 3 months after the retirement date), or if the direction is made subsequently a commencement date specified by the FTT up to 3 months after its direction. In other words, the legislature envisaged that ordinarily the new tenancy would start on the retirement date, or otherwise, within a relatively short time after the FTT's direction. There is no reason to think that the legislature contemplated that the resolution of issues as to eligibility and suitability would require the sort of timescales involved in the present case.

Principles of statutory interpretation

47. Mr. Jourdan QC relied upon Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231 and R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Ltd [2001] 2 AC 349.

48. The "golden rule" of statutory construction is that statutory words and phrases are to be applied according to their natural and ordinary meaning, in their context and according to

the appropriate "linguistic register", without addition or subtraction, unless that meaning produces injustice, absurdity, anomaly or contradiction, in which case the natural and ordinary meaning may be modified so as to obviate such injustice, etc but no further (Stock at p. 235H). Lord Simon added that where there is ambiguity in the drafting, then it is open to the Court to choose between potential meanings by various tests which throw light on the intention of the legislature (p. 236 B-G), the "purposive" rule. As I have already said, it is obviously impossible to construe the phrase "the last seven years" without reference to the surrounding context. By itself the phrase is incomplete: "the last seven years" before what?

49. The correct approach to the construction of consolidating legislation was discussed in Spath Holme by Lord Bingham at pp. 385 – 388. The initial approach is to construe the consolidating statute rather than the legislation it replaces. The court places itself in the draftman's chair and considers what facts were available to him (including those available to the draftsmen of the legislation to be consolidated) and the statutory objectives of the legislation (including official reports in the light of which the statute was framed). The court will then "ascertain and tune in to the linguistic register of the statute". But the overriding aim of the court must always be to give effect to the intention of Parliament as expressed in the words used. If, even in the absence of overt ambiguity, the court is unable to interpret a provision in the social and factual context which originally led to its enactment, it is legitimate, or even incumbent, on the court to consider the earlier, consolidated provision, in its social and factual context for such help as it may give, on the assumption that no change in the law was intended in the absence of amendment. In this case, both parties found it necessary to refer to the statutory antecedents of the 1986 Act.

50. In Spath Holme Lord Nicholls stated that ascertaining the "intention of Parliament" as expressed in the language used in the legislation, is an objective, not a subjective concept. The phrase is shorthand for the intention which the court reasonably imputes to the legislature in respect of the language it used. It is not the subjective intention of the persons promoting the legislation or of the draftsman (p. 396). The court also uses non-statutory material, or external aids, to assist in identifying the purpose of the statute, including any mischief it was intended to cure, and also to assist in seeing whether the statutory language used is either clear or ambiguous. But given that citizens should be able to regulate their affairs on the basis of what has been enacted in legislation and that external aids do not form part of the language through with Parliament has expressed its intention, a cautious approach to the use of such aids is necessary (pp. 397D – 398D).

51. Parliamentary materials may be used as an external aid to statutory construction, subject to the rules laid down in Pepper v Hart [1993] AC 593, which should be applied strictly (Lord Bingham in Spath Holme at p. 392 D-E; Lord Hope at p. 408C; Lord Hutton at p. 413G). I am grateful to both Counsel in the present case for the researches they have undertaken on Hansard. It is common ground that there is no material which would assist and be admissible under Pepper v Hart. From the material shown to the Tribunal, I agree. The only external aid which both parties have drawn upon in their submissions, is the report of Lord Northfield's Committee of Inquiry.

Jackson v Hall

52. Sections 18 to 24 of the Agriculture (Miscellaneous Provisions) Act 1976 introduced the code for succession on the death of the tenant of an agricultural holding. Section 18 dealt with the circumstances in which the code should apply. Section 18(1) defined the close relatives who could make a claim to succeed. Section 18(4) and (5) defined the exclusions from the code. Section 18(2) defined an "eligible person" as a survivor of the deceased tenant falling within one of the categories of "close relatives", who also satisfied the livelihood and occupancy conditions (section 18(2) (b) and (c)).

53. Section 20(1) enabled an eligible person to apply to the Tribunal for a direction entitling him to a new tenancy. Section 20(2) set out the matters about which the Tribunal had to be satisfied in the following terms:-

> … "the Tribunal, if satisfied that the applicant is an eligible person, shall determine whether he is in their opinion a suitable person to become the tenant of the holding".

Thus, the legislation which the House of Lords had to construe in Jackson v Hall [1980] AC 854 simply required the Tribunal to consider whether the applicant "is an eligible person", before going on to the suitability test. At that stage it did not require the Tribunal to address the dual questions set out in section 39(2) of the 1986 Act, namely whether the applicant was an eligible person at the date of death and whether he has *subsequently ceased to be* such a person.

54. In Jackson a family partnership farmed two adjacent holdings. Following the death of the father one of his sons assigned away his interest in the farm which had been *owned* by his father and which was large enough to constitute a "commercial unit" under the legislation, so that he could make an application to succeed under section 20(1) of the 1976 Act in relation to the other farm which had been *let* as an agricultural holding to his father. In this way he claimed that he satisfied the occupancy condition in section 18(2)(c) (now section 36(3)(b)) by the date when he applied for a new tenancy and the date when the application was determined by the Tribunal. He argued that it was sufficient that he had *become* an "eligible person" by satisfying the occupancy condition after his father's death. The Tribunal rejected the application on the basis that the son had not also satisfied the occupancy condition on the date when his father died. The Court of Appeal by a majority allowed the son's appeal, but their decision was overturned by the House of Lords who reinstated the Tribunal's decision.

55. The two leading speeches were given by Viscount Dilhorne and Lord Fraser. Lords Edmund Davies and Lane agreed with both speeches. Lord Russell agreed with that outcome for the reasons given in the "cogent" dissenting judgment of Brandon LJ in the Court of Appeal (p. 893H-894B). Viscount Dilhorne also expressed his complete agreement with the reasoning of Brandon LJ (p. 884C).

56. It is to be noted that the issue before the House of Lords in Jackson was simply whether it was necessary for the occupancy condition to be satisfied as at the date of the tenant's death as well as subsequently, or whether it was sufficient that the applicant began to satisfy that condition before applying for a new tenancy. As Beatson J observed in Shirley (at paragraph 40), Jackson was a case about the acquisition of eligibility, rather than its loss, through a change in circumstances after the tenant's death. There was no issue before the House of Lords for determination about the livelihood condition, and in particular whether it had to be satisfied not only at the date of the tenant's death but also subsequently through to the determination of the son's application.

57. Lord Fraser held (pp. 591C to G):-

> "If a person in the position of the respondent is not eligible at the date of his parent's death, he cannot in my opinion acquire eligibility thereafter. The whole of section 18 seems to be defining and referring to a state of affairs existing at or before the parent's date of death. The scene is set by the opening words of section 18 (1) which are: "Where . . . the sole . . . tenant . . . dies and is survived by any of the following persons: – . . ." Plainly that is looking at the date of death. It then defines "the following persons" by their relationship to the deceased, which obviously cannot change after his death. Then in subsection (2) the definition of "eligible person", after referring back to the family relationship, sets out the two economic qualifications that I have already mentioned in relation to the *Williamson* question. The qualification set out in paragraph (*b*) is necessarily dependent on events that have occurred "in the seven years ending with the date of death . . ." Nothing occurring after the date of death can affect that qualification. The qualification in paragraph (*c*) is that the person "is not" the occupier of a commercial unit, and the present tense must, I think, mean "is not at the date of death." Any other meaning seems to me hardly possible. Similarly the use of the present tense in section 20 (2) in the phrase ". . . the tribunal, if satisfied that the applicant *is* an eligible person, shall determine whether he *is* in their opinion a suitable person . . ." must mean that the applicant must be eligible and suitable also at the date of the tribunal's decision. Accordingly he may lose eligibility before that date. But it is accepted that the applicant must have been eligible for at least some period before the date of the decision. The respondent says that the period begins with the date of his application to the tribunal, but, for the reason I have stated, I consider that it begins with the date of death."

58. Lord Fraser treated both the "livelihood condition" and the "occupancy condition" as being economic conditions, the former positive and the latter negative (p. 888C). He acknowledged the distinction between some qualifications for eligibility which are *acquired* prior to the triggering event, the death of the tenant, and cannot be *lost* thereafter, as opposed to the occupancy condition which had to be satisfied at the date of death and until the date of the Tribunal's decision. In the code for succession on death created by the 1976 Act, eligibility could be lost after the death of the tenant but *only* in relation to the *negative* occupancy condition (i.e. if that ceased to be satisfied). The occupancy condition relates to a "commercial unit", an objective measure of a "substantial

agricultural unit" (p. 888G). Lord Fraser also held that eligibility based on (i) the relationship of the applicant to the deceased tenant and (ii) the satisfaction of the *positive* livelihood condition must be acquired prior to the death of the tenant and cannot be lost thereafter (p. 891E). It is common ground between the parties that that remains the law today under the code for succession on death contained in the 1986 Act.

59. Viscount Dilhorne held that by virtue of section 18 the qualifications for eligibility as regards (a) the relationship to the deceased tenant, (b) the livelihood condition and (c) the occupancy condition all have to be satisfied as at the date of the tenant's death (p. 884A-B). He went on to state that eligibility must *continue* to exist at the date of a successor's application and also at the date of the hearing before the Tribunal (p. 884C), but that was in the context of rejecting the contention which the House of Lords had to determine, namely whether it was sufficient for someone to satisfy the occupancy condition after the tenant's death, albeit ineligible in that respect on that date. It was not suggested by Mr. Jourdan QC, nor could it be, that this part of Viscount Dilhorne's speech should be treated as requiring the livelihood condition to be satisfied on a continuing basis after the tenant's death. That would have been at odds with the views of Lord Fraser and the other members of the committee who agreed with him. In any event Viscount Dilhorne expressly endorsed the reasoning of Brandon LJ (p. 884B). The latter held that the relationship and seven year livelihood qualification had to be satisfied as at the date of the tenant's death and on a natural interpretation the same applied to the occupancy condition, despite the use of the present tense in sections 18(2) and 20(2) of the 1976 Act. The question of whether a person is *presently* "eligible" or qualified may well depend upon whether certain conditions were satisfied in his case *in the past* (p. 866B-H).

60. It should also be noted that Viscount Dilhorne, like Lord Fraser, treated satisfaction of the "close relative" test at the date of the tenant's death as a qualification which could not subsequently be lost (p. 884A).

61. Accordingly, Jackson v Hall decided that the relationship with the deceased tenant, the seven year livelihood condition and the non-occupancy of a commercial unit condition all had to be satisfied as at the date of the tenant's death, and that eligibility could subsequently be lost at any stage up to the Tribunal's determination of the application for a direction but *solely* by ceasing to satisfy the negative occupancy condition.

The Agricultural Holdings Act 1984

62. The Northfield Committee considered a number of ideas for reforming the code on succession in the 1976 Act. One proposal was to *encourage* succession to a holding before the death of the existing tenant (paragraph 627). Except by agreement between landlord and tenant the succession provisions operated only on the tenant's death. Some tenants had hung on to their tenancies into old age and at the expense of standards of good husbandry. Therefore, a tenant aged 65 or more should be able to nominate a successor to his tenancy.

63. In addition, the Northfield Committee saw the object of the occupancy condition (in section 18(2)(c) of the 1976 Act) as being to prevent an applicant succeeding to another tenancy where he already occupied an "adequate" area of agricultural land.

64. Section 2 of the Agricultural Holdings Act 1984 excluded rights of succession on death for tenancies granted on or after the passing of the Act, 12 July 1984, subject to certain exceptions. Section 3 made amendments to the existing code for succession on death.

65. Section 3(5) gave effect to the "minor" amendments introduced in Schedule 1. Paragraph 4 of that schedule, altered the matters about which the Tribunal had to be satisfied in relation to "eligibility," by substituting in section 20(2) for the words "that the applicant is an eligible person" the following text which is now to be found in section 39(2) of the 1986 Act:-

> "(*a*) that the applicant was an eligible person at the date of death, and
> (*b*) that he has not subsequently ceased to be such a person".

In my judgment, this alteration gave effect to the reasoning in Jackson v Hall that (i) survivorship as a close relative, the seven year livelihood condition and the occupancy condition all had to be satisfied at the date of the tenant's death, but (ii) eligibility could subsequently be lost by ceasing to comply with the occupancy condition at any point up to the Tribunal's determination of the application under section 20(1). This understanding of the amendment is reinforced by its heading which reads "*Continuing* eligibility of applicant" (emphasis added). For the succession on death code the description "continuing" could only apply to the occupancy condition.

66. Section 4 of the 1984 Act introduced a new code for the nomination of a successor by a retiring tenant, as set out in the detailed provisions within Schedule 2. Paragraph 1(2) expressed the occupancy condition in the same terms as for succession on death. But the livelihood condition was expressed in the terms now to be found in section 50(2)(a), using the phrase "in the last seven years…".

67. Paragraph 5(4) of Schedule 2 to the 1984 Act set out the matters upon which the Tribunal must be satisfied, using the language now to be found in section 53(5) of the 1986 Act:-

> "If the Tribunal are satisfied –
> (*a*) that the nominated successor was an eligible person at the date of the giving of the retirement notice; and
> (*b*) that he has not subsequently ceased to be such a person;
> the Tribunal shall determine whether he is in their opinion a suitable person to become the tenant of the holding."

The phrase "he has not subsequently ceased to be such a person" corresponded precisely with the language in paragraph 4 of Schedule 1 to the 1984 Act, which was used to deal

with "continuing eligibility" in relation to those qualifications which are capable of being lost. Once again the language reflected this same aspect of the reasoning in Jackson v Hall.

Shirley v Crabtree

68. In Shirley v Crabtree [2008] 1 WLR 18 the tenant gave a retirement notice under section 49(1) of the 1986 Act in March 2004. He nominated his daughter, with whom he had farmed in partnership, to succeed him. The landlord objected to her application for a new tenancy on the basis that she did not satisfy the livelihood condition. The daughter's application for a direction was not heard until July 2006, over two years later. The Tribunal decided that the livelihood condition related solely to the seven year period ending with the giving of the retirement notice and that it was unnecessary for the applicant also to satisfy this condition in relation to the seven year period ending with the hearing.

69. The landlord argued in the High Court that the phrase "the last seven years" in section 50(2)(a) did not define a fixed period but expressed a period "in relative terms", the temporal limits of which depend on the point in time at which the inquiry is to be made, so that the period can vary. Those points were defined by section 53(5), so as to refer to (a) being an eligible person when the retirement notice was given and (b) not *ceasing to be such a person* before the determination of the application (paragraph 25). Rhetorically the landlord posed the question why, if Parliament had wanted the period in section 50(2)(a) to be a fixed period ending with the retirement notice, had it not said so in just those terms (paragraph 26)?

70. But as the tenant's Counsel rightly pointed out (paragraph 29), the landlord's reliance upon section 53(5)(b) would have the effect of requiring the tenant to satisfy the livelihood condition on a *rolling* basis. Thus, the words in section 53(5)(b) "has not subsequently ceased to be…" refer to a *continuing* requirement and therefore cannot support the landlord's argument in the present case, which rests on the proposition that the livelihood condition need be satisfied for only *two finite periods* of seven years and not on a *rolling* basis.

71. Beatson J upheld the decision of the Tribunal. He decided that, on an "ordinary and natural meaning" of the legislation, the livelihood condition must be satisfied in respect of one finite period of seven years ending with the giving of the retirement notice and that once established in that way, that particular qualification for eligibility cannot subsequently be lost (paragraph 38).

72. The reasoning of Beatson J may be summarised as follows:-

(i) The reference to the retirement notice in section 50(1) provides the temporal context for the definition of "eligible person" in section 50(2)(a). The nominated successor must be "eligible" at the time when the retirement notice is given. Section 49(3) provides that "eligible person" has the meaning given by section 50 and not merely section 50(2). That definition of "eligible person" applies for the purposes of the retirement code in sections 49 to 58, but sections 49 and 51 to 58 do not affect that definition (paragraph 38);

(ii) Section 53(5) does not affect the meaning and content of the eligibility test. It requires the Tribunal to determine whether eligibility has been lost (section 53(5)(b)), but does not give any guidance for identifying which of the eligibility or status conditions can be lost and which cannot. Compliance with the occupancy condition can be lost, but that is because of the use of the present tense in section 50(2)(b). The status of being a close relative is capable of being lost in the case of a wife, husband, or civil partner, but not in the case of a sibling or child. Plainly that follows from the nature of the relationship and has nothing to do with the content of section 53(5)(b) (paragraph 39);

(iii) The legislation does not indicate that eligibility through compliance with the livelihood condition at the date of the retirement notice can subsequently be lost. The use of the present tense in the phrase "are satisfied" in the introductory part of section 50(2), just before conditions (a) and (b), was not such an indication. Jackson v Hall was concerned with the use of the present tense in the occupancy condition in what is now section 36(3)(b), which is in identical terms to section 50(2)(b). Instead, the livelihood condition in section 50(2)(a) uses the past tense when referring to the "last seven years" [and I would add in the use of the word "derived"] (paragraph 40);

(iv) There is nothing in section 50(2)(a) to indicate that it requires to be satisfied in two separate seven year periods (paragraph 41);

(v) The retirement code is stricter in several respects than the succession on death code. This may be justified because generally retirement, unlike death, may be planned, but that is not always the case. The retirement code may apply because of the tenant's incapacity to farm his holding through bodily or mental infirmity. Moreover, in a retirement case there is a greater need for certainty, because, save in limited circumstances, there is no opportunity for more than one retirement notice and application (sections 51(2) and 53(10)). If an application based on a retirement notice fails the existing tenancy continues (paragraphs 32 and 42);

(vi) Although uncertainty is created for the tenant and nominated successor through the prospect of losing eligibility under the occupancy condition, the

argument that the livelihood condition needs also to be satisfied as at the date of the Tribunal's decision (or on a rolling basis) would significantly increase that uncertainty and make it more difficult to plan for retirement (paragraphs 43 - 45);

(vii) It would be unsatisfactory if delays that may occur in the preparation for and listing of Tribunal hearings could result in the applicant having to satisfy the livelihood condition for a second seven year period up to the determination of his application or lose eligibility (paragraph 46).

Discussion

73. This part of the decision draws upon the analysis of the legislation and case law set out above without necessarily repeating the same.

The linguistic register

74. As Mr. Jourdan QC submitted, the starting point is the linguistic register of the legislation. He emphasises that the only difference between the language of the livelihood condition in section 36(3)(a) and that contained in section 50(2)(a) lies in the opening words used to describe the seven year period. The former refers to "the seven years ending with the date of death," whereas the latter refers "to the last seven years". Mr. Jourdan submits that it is significant that the draftsman has not added in section 50(2)(a) the words "ending with the date of the giving of the retirement notice". He points out that the legislature has explicitly referred to that date elsewhere (see eg. section 51(1)(c) and (4) and section 52(1) and (2). I see no real merit in this line of argument. These references to parts of sections 51 and 52 are concerned with (i) the interface between the succession on retirement code and provisions for the service of a notice to quit by the landlord (whether to nullify a retirement notice already served or to exclude section 50(1)) and (ii) the exclusion of section 50(1) where two statutory successions have occurred. Sections 51 and 52 simply refer to "the date of the giving of the retirement notice" because that is the triggering event equivalent to the death of the existing tenant, a single date or reference point for determining which set of provisions is excluded or prevails. Sections 51 and 52 have nothing whatsoever to do with understanding the nature of the livelihood condition as a qualification for "eligibility" in the code for succession on retirement.

75. Likewise, I am unimpressed by the suggestion that the incomplete nature of the phrase "the last seven years" was a deliberate piece of drafting designed to enable the livelihood condition in section 50(2)(a) to be applied to two, rather than one, seven year periods. Taken by itself the natural reading of the words "*the* last seven years" refers to a single finite period of that length, the only question being what is the single end date? As I have explained in paragraph 40 above, for both section 36(3)(a) and section 50(2)(a) it is necessary to look at the statutory context to define their respective end dates. The words in section 36(3)(a) "in the seven years ending with the date of death" are also incomplete.

It is necessary to look elsewhere, in section 35(1) and (2), to find out whose death is referred to in the phrase "any surviving close relative of the deceased," and thus to define the end date.

76. The Appellant's case is that the applicant must satisfy the livelihood condition at least in relation to the seven year period ending with *the date on which the retirement notice was given*. Section 49(3) provides that "eligible person" has the meaning given by section 50. Section 50(1) confers the right to apply for a new tenancy on the "eligible person" named in the retirement notice ("the nominated successor"). Thus, for the scheme to be workable it is plainly essential that that person satisfies the eligibility requirements on the date that the notice is given. On that date the nominated successor must:-

(i) be a "close relative of the retiring tenant", and

(ii) satisfy the livelihood condition within the 7 years ending on the date of the retirement notice, and

(iii) satisfy the occupancy condition on that same date.

The phrase "the last seven years" is immediately preceded and followed by text referring to a "close relative of the retiring tenant." Both the terms "close relative" and "retiring tenant" are defined in section 49(3). "Retiring tenant" refers to "the tenant by whom the retirement notice was given." Section 50(1) adds that to be eligible a "close relative" also has to be the person nominated by the "retiring tenant" in his "retirement notice", ie. "the nominated successor" (these all being terms defined in section 49(3)). Thus, I entirely agree with Beatson J in Crabtree (paragraph 38) that the reference in section 50(1) to the retirement notice, as part of the phrase "the eligible person named in the retirement notice", gives the temporal context for the phrase "the last seven years" in section 50(2)(a).

77. The Appellant argues that Beatson J's point that the retirement notice provides the "temporal context" for section 50(2)(a) is "bad" (paragraph 38 of skeleton), because that would also apply with equal force to the occupancy condition in section 50(2)(b), which cannot be correct because of the operation of section 53(5)(b). With respect, it is the criticism which is "bad". It fails to observe that the occupancy condition operates in a different way from the livelihood condition (see paragraphs 31 and 41 above). The applicant must avoid disqualification under the occupancy condition *from* the date of the triggering event (whether the death of the tenant or the giving of a retirement notice) and thereafter on a continuing basis until his application is determined. There is no fallacy in seeing the retirement notice as providing the temporal context for both paragraphs (a) and (b) of section 50(2). It provides the end date for the seven year period in the livelihood condition and the start date for the operation of the occupancy condition.

78. Thus far, there is nothing in the legislation to indicate that section 50(2)(a) refers to more than one seven year period, or even to just one additional seven year period.

79. Mr. Jourdan QC then relied upon the words "are satisfied" which immediately precede both the livelihood and occupancy conditions in section 50(2)(a), as showing by the use of the present tense, that the livelihood condition "must be assessed by reference to the date when the question arises as to whether the close relative is an "eligible person", and not to some earlier date" (paragraph 33 of the Appellant's skeleton). At this point the Appellant also relies upon section 53(5) in order to supply the second assessment date, namely the date of the FTT's determination. It is plain that by itself the phrase "are satisfied" is insufficient to indicate that the nominated successor must satisfy the livelihood condition in relation to a second seven year period (or indeed to define the end date for that period). First, the same phrase appears in section 36(3), where the livelihood condition needs only to be satisfied in relation to *one* seven year period ending with the date of the tenant's death (and thereafter that qualification cannot be lost). Second, the use of the present tense to describe a qualification is entirely consistent with, and may often depend upon, the applicant having satisfied certain conditions in the past (see Brandon LJ in Jackson v Hall at [1980] QB 866 E-H approved by the House of Lords at 884 C and 894B). Thus, in Jackson's case the use of the present tense was consistent with a requirement that the occupancy condition had to be satisfied at the earlier date when the tenant died and not merely at some later date, such as when the application for a direction was made or that application was determined.

80. One of the problems with the Appellant's argument is that, although it purports to "tune in to the linguistic register", it either relies upon parts of the legislation which have no real significance for the issue in this appeal, or else refers to only a small part of the relevant waveband. To tune in properly it is necessary to look at the statutory context relevant to section 50(2)(a) as set out in earlier parts of this decision.

81. In summary, the position is as follows:-

> (i) The definition of, and qualifications for, being an eligible person are embedded in the provisions conferring the right to apply for a new tenancy under both succession codes (see sections 36, 49, 50 and 59 of the 1986 Act);
>
> (ii) Sections 39(3) and 53(5) do not deal with the definition of eligibility. Instead they simply require the FTT to be satisfied (a) that the person was an "eligible person" either at the date when the tenant died or the date when he gave his retirement notice, and (b) that he has not ceased to be an eligible person solely as regards those qualifications for eligibility which are capable of being lost;
>
> (iii) Although the livelihood and occupancy conditions in both codes have both been described as economic conditions they operate in very different ways. The livelihood condition must *positively* be satisfied in order to *qualify* for eligibility,

whereas the occupancy condition is expressed *negatively* so that where it is not satisfied a person is *disqualified* from eligibility;

(iv) The occupancy condition applies in the same way under both codes, that is to say it must be satisfied continuously from the triggering event (whether the death of the tenant or the service of a retirement notice) until the determination by the FTT of the application for a direction of entitlement to a new tenancy. If that continuous requirement ceases to be met at any point before the determination of the application, eligibility is lost. There is no requirement for the occupancy condition to be satisfied *before* that triggering event under either code;

(v) Under the succession on death code, the livelihood condition must be satisfied during the seven year period ending with the triggering event, the death of the tenant, and if so satisfied, that particular qualification cannot be lost thereafter. Under that code there is no temporal overlap between the livelihood and occupancy conditions, other than, perhaps, the date of the tenant's death itself;

(vi) Under both codes the livelihood condition must be satisfied by reference to the agricultural holding the subject of the claim to succession, whereas the negative occupancy condition is not so limited;

(vii) Under the succession on death code the livelihood requirement relates to a single finite period of seven years, whereas under both that code and the retirement code the occupancy condition is a rolling requirement;

(viii) The true issue is a fairly narrow point, namely whether the language used to describe the livelihood condition in the retirement code is sufficient to show that Parliament intended to depart from the "linguistic register" for the livelihood condition in the code for succession on death, and in particular to require that condition to be satisfied for more than one seven year period, and to overlap temporally with the operation of the occupancy condition.

82. Other references in the 1986 Act to the "livelihood condition" clearly state that this term refers to paragraph (a) of the definition of "eligible person" contained in either section 36(3) or section 50(2) (see paragraphs 1(1) and 12 of Schedule 6 to the Act), without drawing any distinction between the two codes in this respect. Paragraphs 2 and 13 of Schedule 6 provides that a period of up to 3 years spent by a close relative of the deceased tenant, or the "nominated successor", in full-time higher or further education shall be deemed to be a period throughout which his only or principal source of livelihood derived from his agricultural work on the holding. Paragraph 2 plainly refers to "*the* period of seven years mentioned in" the livelihood condition for the purposes of the succession on death code. Paragraph 12 of Schedule 6 applies to the retirement code *the same language*

in paragraph 2 without any further adjustment. That language refers to a single period of seven years. When the retirement code was introduced by Schedule 2 to the 1984 Act, paragraph 1(3) contained the same provision as is now to be found in paragraph 2 of Schedule 6 to the 1986 Act. However, paragraph 1(3) applied solely to the retirement code and in that context referred to "*the* period of seven years mentioned in [paragraph 1(2)]". The linguistic register used by Parliament indicates that the livelihood condition in the retirement code refers to a single period of seven years.

83. Once it is concluded that the phrase "the last seven years" in section 50(2)(a) refers only to a single period of seven years, rather than two (or more) such periods, the Appellant's construction is impossible. There is no room left for this phrase to refer to a period of seven years ending with the determination of the successor's application, given that it must refer (as is common ground) to the seven year period ending with the retirement notice in order to make the legislation workable. It also follows that there is no merit in the Appellant's forensic point that the draftsman could have drafted section 50(2)(a) so as to refer explicitly to the seven year period "ending with the date of the giving of the retirement notice". He could have done. But in any event that meaning is sufficiently clear from the wording of that provision when it is read properly in context.

84. Although Mr. Jourdan QC suggested that Beatson J had failed to pick up and deal with the forensic gauntlet thrown down by Leading Counsel for the landlord in Shirley (see paragraph 69 above), the real point made by Beatson J (at [2008] 1 WLR 28 (paragraph 41), which the Appellant has not tackled, is that there is nothing in section 50(2)(a), or I would add in the relevant context, to indicate that in the case of the retirement code the livelihood condition is required to be satisfied for *two* separate periods of seven years, rather than *one* seven year period, as in the case of succession on death.

85. This flaw in the Appellant's argument is not overcome by its reliance upon section 53(5)(b). The language here is the same as section 39(2)(b):-

> "that he has not subsequently ceased to be such a person".

The predecessor provisions were enacted at the same time in the 1984 Act when the retirement code was first introduced. These provisions do not differentiate between the two codes. The language used is insufficient to indicate that the livelihood condition in the retirement code must be satisfied in relation to two seven year periods rather than just one.

86. As explained in paragraphs 65 and 67 above, the text now contained in sections 39(2)(b) and 53(5)(b) gives effect to the distinction drawn in Jackson v Hall between eligibility qualifications which are satisfied once and for all at a certain date (eg. the tenant's death) and cannot thereafter be lost, as opposed to those which must be satisfied on a continuing basis after that date, so that if they cease to be met eligibility is lost. In Shirley Beatson J decided, rightly in my respectful view, that section 53(5) gives no guidance as to which of the eligibility qualifications can, and which cannot, be lost (paragraph 39). This is another

key conclusion in Shirley which the Appellant has made no attempt to dislodge. We know that sections 39(2)(b) and 53(5)(b) apply to those kinds of relationships to the tenant which are capable of being lost and also to the occupancy condition which the applicant may cease to satisfy. Section 39(2)(a) applies to the livelihood condition in section 36(3)(a). None of these conclusions are influenced by either section 39(2) or section 53(5). They are simply determined by the nature of the qualifications themselves.

87. Once it is concluded that section 50(2)(a) refers to a *single* period of 7 years, and that that period ends with the giving of a retirement notice, there is no basis for distinguishing the decision of the House of Lords in Jackson v Hall that once the qualification in section 36(3)(a) is achieved, it cannot subsequently be lost (see paragraphs 58 - 59 above). The same logic must apply to section 50(2)(a) and therefore section 53(5)(b) is incapable of applying to the livelihood condition in the succession on retirement code. Instead the satisfaction of the livelihood condition must be considered by the FTT under section 53(5)(a), which refers solely to eligibility as at the date when the retirement notice was given.

88. Indeed, if it were to be assumed for the sake of argument that the cessation of eligibility provision in section 53(5)(b) applies to the seven year livelihood requirement in section 50(2)(b), the outcome would be inconsistent with the Appellant's case. Section 53(5)(b) refers to a qualification, such as the occupancy condition, which is capable of being lost *at any time* between the retirement notice and the determination of the nominated successor's application. In other words, as counsel for the tenant pointed out in Shirley (paragraph 29), the livelihood qualifications would have to be demonstrated on a *rolling* basis between the seven years ending with the retirement notice and the seven years ending with the FTT's determination, and *not* by reference to just *two* separate 7 year periods, as contended for by the Appellant in this case.

89. If Parliament had intended to impose a requirement that the livelihood condition must be satisfied in relation to two separate seven year periods, so as to depart from the model of the single seven year requirement in section 36(3)(a), it would have used plain language in section 50(2)(a) to that effect. It did not do so. Furthermore, the language used by Parliament when it introduced the succession on retirement code in the 1984 Act shows a plain intention to adopt a single seven year period for the livelihood condition (see paragraph 82 above).

Differences between the codes for succession on death and on retirement

90. I do not think that the differences between the two codes which the parties have identified lend any support to the Appellant's argument. Undoubtedly, the retirement code is stricter in a number of respects than the succession on death code. First, in the case of succession on death there may be more than one application (section 36(1)) so that if one applicant fails on the grounds of eligibility or suitability, another may succeed. In the case of retirement, only a single person may be nominated in the notice served by the tenant to

succeed him (section 49 (1)(b)) and only one application may be made in respect of a holding (section 51(2)). Second, in the case of retirement, the application to the FTT must be made within one month of the retirement notice being given (section 53(1) and (2)) whereas an application to succeed on death must be made within three months of the tenant's death (section 39(1)). Third, the code for succession on death provides for succession to part only of the holding (section 39(10)), but there is nothing similar in the case of retirement. The nature of these differences sheds no light on whether Parliament intended to depart from the model of a single finite period of 7 years when enacting the livelihood condition for the retirement code and to make the satisfaction of that condition overlap temporally with the occupancy condition.

91. It has been said that a reason for the stricter code in succession on retirement is that generally retirement may be planned, whereas death is not. However, as Beatson J pointed out (paragraph 42 of Shirley), this is not a clear distinction, because the retirement code also applies in cases of incapacity to farm through bodily or mental infirmity, an event which might or even could not have been foreseen.

92. Mr Jourdan QC placed some emphasis on section 41 of the 1986 Act which applies to succession on death but has no parallel in the retirement code. In succession on death cases a close relative of the deceased tenant who (a) engaged in agricultural work on the holding for some part of the seven year period ending with the tenant's death, (b) satisfies the occupancy condition, and (c) meets the livelihood condition to a "material extent", but not fully, may apply to the FTT to be treated as an eligible person, if the Tribunal considers that it would be fair and reasonable in all the circumstances for that person to be able to apply for a direction under section 39 (section 41(1) to (3)). Section 41 may be relied upon if (inter alia) the livelihood condition was not met because the holding was too small (section 41(6)). At least it can be said that section 41 is directed to the livelihood condition itself. But I do not follow why the absence of such a provision in the retirement code gives any indication that Parliament intended to depart from the model for succession on death cases by requiring the nominated successor to satisfy the livelihood condition in relation to two, rather than one, seven year periods, and impose a qualification which overlaps temporally the occupancy condition.

93. Mr Jourdan QC also relied upon the fact that where, following the service of a retirement notice and before any direction is issued by the FTT in favour of the nominated successor, the retiring tenant dies, the succession on death code is applied in place of the succession on retirement code (section 57(2)). Consequently, the nominated successor would not be able to obtain a tenancy unless he could show under section 36(3)(a) that he satisfied the livelihood condition within the seven year period ending with the tenant's death (ie. a later, or more up to date, seven year period). He suggested that this was an indicator lending support to the Appellant's construction of section 50(2)(a) rather than the Respondent's. I am not impressed by this argument. First, it is not of general application. Second, even where this situation arises, the nominated successor may still be able to satisfy the livelihood condition because of the 5 year provision in section 36(3)(a). Third, and somewhat ironically, in this scenario the nominated successor would be able to rely

upon section 41, albeit that he had not been able to do so when the matter had been proceeding under the succession on retirement code.

94. Consequently, I do not consider that any of the differences between the two codes to which I have been referred assist in resolving the issue of construction in this appeal.

Factors relating to a purposive construction of the livelihood condition

95. The arguments in this case, and the various differences between the two codes, are said to reflect the balance struck by Parliament between tenants of agricultural holdings and the interests of potential successors on the one hand and the freedom of landlords to deal with their land according to their own best interests on the other. But that is not the only consideration which, it must be assumed, Parliament had in mind. Despite the various differences to which reference has been made, a key question is why would Parliament have intended to make the livelihood condition more difficult to satisfy under the retirement code by requiring it to be met over two periods of seven years rather than one, as in the code for succession on death, given that one of the objectives arising from the report of the Northfield Committee was that planned retirement and succession should be facilitated so that tenants need not hang on to their tenancies into old age at the expense of standards of good husbandry (see paragraph 62 above)? It might be said that a decline in farming standards would be against the wider public interest, if not also against the interests of landlords.

96. Moreover, the retirement code was introduced in the 1984 Act at the same time as Parliament removed succession rights for many tenancies granted after July 1984. Both codes apply to essentially the same range of tenancies. The new right of succession on retirement was granted on a restrictive basis. The tenant can nominate only one successor in respect of his holding and if the application is made and fails (eg. because the nominee fails the livelihood test in the seven year period to the date of the retirement notice or is found to be unsuitable), no further notice may be served by the tenant who wishes to retire because he has reached the age of 65 or more (see section 51(2)). Instead, the tenancy continues. If on the other hand the nominee meets all of the statutory qualifications at the date of the retirement notice, makes his application under section 53(1) within one month of the retirement notice and then continues to satisfy the occupancy condition, it is difficult to understand why an intention should be imputed to Parliament to make this "single shot" at succession on retirement even stricter, by requiring the applicant to satisfy the livelihood condition again in relation to the seven years leading up to the date of determination. It is even more difficult to understand why any such legislative intention should be imputed, where a retirement has had to take place because of the bodily or mental infirmity of a tenant younger than 65.

97. It was suggested by Mr Jourdan QC that Parliament may have considered that for succession on death a livelihood condition based upon a single seven year period leading up to the tenant's death is appropriate because there may be difficulties in the relationship

between the administrators and one or more of the applicants to succeed which could affect the ability of the latter to continue to satisfy the livelihood condition, whereas continuing satisfaction of the occupancy condition generally lies within the control of the applicant(s). He suggested that the same issue was unlikely to arise under the retirement code where a succession is likely to be planned and involve co-operation between the retiring tenant and his or her successor. I attach little weight to this argument. It is possible to imagine relationship difficulties which may arise after a retirement notice has been given. Co-operation may come to an end. There is no evidence or indication in official publications or background materials related to the legislation that this supposed distinction explains why the approach to the livelihood condition should be different in the two codes. Moreover, the argument does not amount to a *positive* reason why Parliament should have wanted to introduce a stricter or additional requirement when enacting the succession on retirement code.

98. The only positive justification suggested for the additional hurdle for which the Appellant contends, is that in the case of succession on retirement it is appropriate for decisions on eligibility (including the principal source of livelihood) as well as suitability to be based on information which is up to date, so as to take into account changes in circumstance, particularly as succession rights interfere with a landlord's ability to control his own property. But this argument assumes that substantial delays in the handling of such applications to the FTT cannot in general be avoided. I return to this issue in paragraph 108 below.

99. The Appellant's reliance here upon the "suitability" criterion involves a confusion of thought. The legislation makes it clear that "suitability" is a criterion which only falls to be applied if an applicant is found to be eligible. Suitability is not considered as at the date when the tenant died or the retirement notice was given, but by reference to the position when the matter comes before the FTT to be determined. Furthermore, under both codes the occupancy condition only falls to be considered from the date of the triggering event to the date of determination.

100. Furthermore, the Appellant's argument is also confused in that on its own construction, the applicant's principal source of livelihood may have been derived from his agricultural work on the holding for a period of 5 years ending up to 2 years before the date of the FTT's determination. By the time the matter is heard by the Tribunal the holding may have ceased to provide the principal source of livelihood for the applicant. The applicant would not have to demonstrate that the holding *currently* provides his principal source of livelihood.

101. The difference which would be made by the Appellant's argument that the livelihood condition must be satisfied in relation to a second seven year period can be seen by comparing the position where the applicant succeeds in establishing the livelihood condition *before* the date of the retirement notice. Even on the Appellant's construction, if the evidence meets that condition for the last five years immediately preceding the retirement notice it will also satisfy section 50(2)(a), so long as the FTT's determination is

made within 2 years of the retirement notice. Section 55(8) suggests that in many cases the expectation of Parliament was that the determination would be made at such a time that the new tenancy would start on the retirement date or shortly thereafter (sections 49(1)(b) and 55(8)). Where that timescale is achieved, the construction of section 50(2)(a) put forward by the Applicant on the facts assumed above would make little or no practical difference to eligibility. No practical purpose would be served by requiring the applicant to prove the livelihood condition for a second seven year period ending with the determination.

102. Next, if the applicant met the livelihood condition up to the date of the retirement notice but not in respect of one or two years in the five years immediately preceding that date, (as appears to have been the situation in Shirley), the Appellant's construction of section 50(2)(a) would make the outcome of the application turn on the evidence supplied by the applicant for the period between the retirement notice and the FTT's determination. Otherwise it would appear that the Appellant's construction would only make a real difference if the determination of the FTT were to be significantly delayed for more than about 2 years after the retirement notice. It is difficult to understand why Parliament should be concerned about those two scenarios under the retirement code, where the FTT only has to deal with one application by the nominated successor, but not under the succession on death code, where the Tribunal may be faced with multiple applications. Indeed, if Parliament had been concerned about delay to the Tribunal's determination caused by applicants rather than by landlords, it is not easy to see why that might not also have been a matter of concern under the code for succession on death (where the general expectation for when a new tenancy will begin is given by sections 45(1) and 46). In any event, the argument is inherently unattractive, because it disregards the use of case management powers by Tribunals to ensure the timely and efficient disposal of applications (and assumes that Parliament has approached the matter in a similar way). I see no justification for taking that approach.

Delay in the resolution of succession applications

103. Instead, it is a matter of great concern that if the Appellant's construction were to be adopted, there would be an incentive for landlords to adopt delaying tactics as part of a process of attrition in order to make it more difficult and costly for an applicant to satisfy the livelihood condition. In this regard I share the concern expressed by Beatson J in Shirley (at paragraph 46). In that case the delay between the retirement notice and the hearing was just over two years. Here the delay is of the order of six years, which is extraordinary.

104. On the information given to me I am unable to apportion blame to one side or the other for each and every part of the overall delay. However, on 3 November 2013 a three member panel of the FTT issued its decision on a preliminary issue raised by the Appellant landlord. The latter argued that the Respondent was not entitled to apply for a succession tenancy because two successions had already taken place (sections 37 and 51(1)). This

necessitated a two day hearing and a site inspection. The FTT rejected the Appellant's contention in forthright terms (paragraph 49):-

> "We regret that so much time and money should have been spent on determining a preliminary issue which, in our view, should never have been raised in the first place. It should never have been raised because, for the reasons we have already given, we do not consider that the Respondent's case on this issue ever had any realistic prospect of success. ….. Succession application can sometimes develop into wars of attrition, and it is important that this should be avoided in the present case."

105. Undaunted, and notwithstanding the fact that over 2 ½ years had already elapsed since the Respondent's application for a direction had been launched, the Appellant applied for permission to appeal to the Upper Tribunal against that decision on the preliminary issue. That was refused by the FTT in a decision dated 24 March 2014. It appears that some of the proposed grounds of appeal were misconceived or even unparticularised. In a further decision dated 24 March 2014 the FTT exercised its power to award costs against the Appellant in respect of the preliminary issue, a power which at that stage only arose if it had acted "frivolously, vexatiously or oppressively." The Tribunal decided that that test was satisfied because even on the factual issue their case had been "hopeless" and they had pursued "to the bitter end" a case which had "no realistic prospect of success putting the opposing party to unnecessary expense." I also note that the Appellant persisted in making applications for permission to appeal against the FTT's decision to award costs by attempting to challenge its conclusions quoted in paragraph 104 above. That aspect of the litigation came to an end with the refusal of permission to appeal by the Upper Tribunal on 1 July 2014. Unfortunately, I was unaware of these matters at the time when the application for permission to appeal came before me.

106. Given that the Appellant pursued the preliminary issue in this manner, despite being represented throughout by a Solicitor with great expertise in this area, I share the FTT's view that it was raised simply for tactical reasons, as part of a process of delay and attrition. I also note that it took until 29 February 2016 for the Appellant to raise the argument that Shirley v Crabtree had been wrongly decided. It is difficult to see why this point could not have been taken nearly 5 years earlier when the Appellant's reply to the Application had been served. This is all of a piece with the more recent conduct of the litigation for the Appellant described in paragraphs 6 - 16 above.

107. If behaviour of this kind is persistent, it does raise the question whether more vigorous action is needed to regulate and deter any abuse of the Tribunal's procedures, including the deliberate or unreasonable pursuit of hopeless applications or arguments. Such conduct puts a great strain both on other litigants and on the finite resources of tribunals and courts. In other jurisdictions it has been necessary to develop a range of sanctions to address such problems (see eg. R (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin); R (Akram) v Secretary of State for the Home Department [2015] EWHC 1359 (Admin); and R v Mark [2016] EWCA Crim 1639 at paras. 59-63).

It is to be hoped that such measures will not become necessary for cases concerned with succession under the 1986 Act and that in future all parties will comply with their duty under the Tribunal Procedure Rules to help the FTT further "the overriding objective," rather than in engaging in wholly inappropriate "wars of attrition".

108. Looking at the issue more generally, I would not be willing to treat a timescale exceeding one to two years from retirement notice to determination of the application for a tenancy as supporting the Appellant's construction of the livelihood condition in the succession on retirement code. Quite the reverse. In this, just as in other areas of work of the First-tier Tribunal, robust case management is called for in order to eliminate unjustified delays. If a landlord believes that an applicant is indulging in delaying tactics for whatever reason, he may have recourse to the First-tier Tribunal's case management armoury. The same goes for a landlord who seeks to delay the resolution of an application. Generally, it should be possible for the issues determining entitlement to a tenancy by succession, including financial issues relating to the livelihood or occupancy conditions, to be resolved in less than 2 years. Complex valuation issues in other areas of the law involving disclosure and analysis of accounting information are regularly decided within those timescales.

109. The Respondent's application had already reached the stage when it was ready to be heard at a substantive hearing, but for the Appellant's appeal. Plainly that hearing ought now to take place without further delay to the FTT's process.

Conclusion

110. The issue in this appeal has now been argued comprehensively by experienced specialist counsel on two occasions, once in the High Court and now in the Upper Tribunal. The arguments which have been advanced by the Appellant have come nowhere near demonstrating that the conclusion of Beatson J in Shirley v Crabtree was wrong or that there is a powerful reason for not following it. Indeed, for the reasons I have set out above, I have no hesitation in arriving at the same conclusion as the judge. I also agree in substance with his reasoning and reject the Appellant's criticisms of it. The livelihood condition in section 50(2)(a) of the Agricultural Holdings Act 1986 need only be satisfied in relation to the seven year period running up to the date when the retirement notice was given.

Dated: 6th June 2017

The Hon. Sir David Holgate