

## National Tutorial 2023

### RENT REVIEW

### MODEL ANSWER

This Outline Answer Sheet is intended to be read alongside the accompanying Detailed Notes provided.

*You have been asked to consider what arguments both the landlord and the tenant would raise in support of their positions. The notice to review the rent was served by hand on 25 March 2023. You have also been asked to consider the likely sum the arbitrator would award.*

***What do you need to check in terms of the notice before you will be satisfied that it is valid and can be relied upon?***

- Has the correct period of notice been given?
  - the review date must be the next *available* termination date falling **at least 12 months after service** of the section 12 notice;
  - the notice must be of at least 12 months but no more than 24 months duration;
  - the serving party therefore must ensure that they have identified the correct term date of the tenancy;
  - always include the running words rather than specifying the precise date to avoid invalidity;
  - although some might argue otherwise, if the tenancy started on 25 March, the last day of the annual period would be 24 March 2024, and as such it will have to have been served and received, at the latest, **by or on 24 March 2023**.
  - Here, the Tenant's key argument is that the notice was not served in time and therefore, the rent review cannot take effect until 25 March 2025.
  - The Landlord should rely on the running words "*or at the expiration of the year of your tenancy which shall expire next after the end of 12 months from the date of service of this notice*".

- Is the notice in compliance with *section 12*?
  - in writing;
  - requiring “rent payable to be referred to arbitration from the next termination date”.
- Does the notice correctly identify the parties and the holding?
- Was the notice correctly served?
  - *Section 93 AHA* –
    - delivered to recipient personally;
    - left at his proper address (last known address);
    - sent by recorded delivery post.
  - Here, the notice was served by hand at the holding which is the last known address of the Tenant.
  - It is therefore likely he has been correctly served.

### ***How often can rent reviews take place?***

There is a statutory 3 year cycle for rent reviews.

- *Schedule 2 para 4(1)* provides for a minimum 3 year period between rent reviews.
- Reviews can take place less frequently than every 3 years.
- Section 12 notice can of course be served **before** the expiration of three years from the last rent review because at least 12 months notice must be given.
- 3 year cycle runs from:
  - commencement of tenancy;
  - date from which previous review took effect (increase or reduction, but **not** a standstill review);
  - date of arbitrator’s decision that rent should remain the same.
- A section 12 notice served to review the rent before 3 year cycle has run its course will be rendered ineffective unless the running words are effectively used.
- Here, the rent was last reviewed with effect from 25 March 2018, so the new rent review is not more frequent than the permitted 3 year cycle.

**WHEN CONSIDERING THE LIKELY SUM AN ARBITRATOR WOULD AWARD:**

## **What is the rent review formula?**

- Schedule 2 paragraph 1(1):

*“the rent at which the holding might reasonably be expected to be let by a prudent and willing landlord to a prudent and willing tenant, taking into account:*

*...all relevant factors, ...*

*...including the terms of the tenancy (including those relating to rent), ...*

*...the character and situation of the holding (including the locality), ...*

*...the productive capacity of the holding and its related earning capacity, ...*

*...and the current level of rents for comparable lettings”*

- **Key concept:** *the sum for which the holding might reasonably be expected to be let by a prudent and willing landlord to a prudent and willing tenant*
- Hypothetical parties *not* the actual landlord and tenant:
  - ‘hypothetical tenant’ is considering the holding with its opportunities and handicaps and the opportunities and obligations offered by the tenancy agreement at the review date;
  - ‘hypothetical landlord’ is offering the farm as it stands at the review date
- “All relevant factors”
  - any factor whose relevance to the rent can be shown

## **What factors must the arbitrator disregard?**

*Schedule 2, paragraphs 2 & 3.*

- tenant’s improvements (including improvements by tenant under previous tenancy if carried over and not compensated at expiry);
- tenant’s fixed equipment;
- grant funded element of any landlord’s improvements.
- effect on rent of the tenant’s actual occupation;
- dilapidations caused or permitted by the tenant;
- high farming;
- anything adding value which is *personal* to the sitting tenant – e.g.

<p>supermarket contracts; planning permissions limited to the tenant</p> <ul style="list-style-type: none"> <li>improvements financed by the landlord for which the tenant makes payments in return (both the payments and improvements are disregarded).</li> </ul>	
<p><b>For each of those 4 factors, explain what you need to be looking for/considering</b></p>	
<p>(a) terms of tenancy</p>	<p>Identify the terms of the tenancy</p> <ul style="list-style-type: none"> <li>terms of written agreement – <u>including terms as to rent</u></li> <li>any memoranda, letters of consent or other documents varying terms</li> <li>any acts of waiver/variation of terms</li> <li>any overriding statutory provisions</li> <li>if oral agreement – behaviour of parties; statutory provisions on terms – model clauses etc</li> </ul> <p>Then – consider the impact of those terms:</p> <ul style="list-style-type: none"> <li>repairing obligations</li> <li>specific user clauses or requirements as to stock levels;</li> <li>BPS provisions;</li> <li>diversification consents;</li> <li>farmhouse residency clauses;</li> <li>agricultural worker/prohibition on subletting clauses on cottages;</li> <li>ELS/HLS schemes in force which incomer would take on.</li> </ul>
<p>(b) character and situation of holding</p>	<p>(1) <u>the physical nature of the holding:</u></p> <ul style="list-style-type: none"> <li>size;</li> <li>soil type;</li> <li>topography;</li> <li>climate;</li> <li>layout;</li> <li>drainage;</li> <li>buildings + fixed equipment (quality + quantity);</li> <li>dwellings;</li> <li>any public access across holding;</li> <li>SSSI's, NVZ zone and other statutory designations.</li> </ul> <p>(2) <u>locality of the holding:</u></p> <ul style="list-style-type: none"> <li>attractiveness of area;</li> <li>access to additional land;</li> </ul>

	<ul style="list-style-type: none"> <li>• access to markets;</li> <li>• landscape;</li> <li>• BPS region</li> <li>• restrictions or schemes available as consequence of its location.</li> </ul> <p>List is not exhaustive and anything relevant to the particular holding should be considered. Some factors may be more significant than others in certain cases.</p> <p>What are the <u>key</u> features of <u>this</u> holding?</p>
(c) productive capacity and related earning capacity	<p>= an appraisal of the physical and financial farming potential of the holding</p> <p><i>Schedule 2, paragraph 1(2).</i></p> <p>The two concepts are separate and should be appraised in sequence.</p> <p><b>Productive capacity</b> = a <u>physical assessment</u> of holding's potential for production in hands of competent tenant using a farming system suitable to the holding. Take holding as it stands with all its fixed equipment and facilities (whether provided by L or T).</p> <p>Expressed in terms of physical output (tonnes of wheat; litres of milk etc.)</p> <p>"competent tenant" introduces a hypothetical tenant</p> <p>"farming system suitable to holding" – may not be actual system current tenant has adopted</p> <p><b>Earning capacity</b> = the expected profits arising from that level of productive capacity.</p> <p>This comprises the second stage, once you have determined productive capacity.</p> <p>It is essentially a measure of the financial return that would be obtained from the suitable system of farming adopted by the hypothetical competent tenant.</p> <ul style="list-style-type: none"> <li>•</li> </ul>
(d) comparables	<p><i>"the current level of rents for comparable lettings"</i></p> <p>Rents payable in respect of tenancies of comparable <b>agricultural holdings</b> let on terms similar to those of this tenancy.</p>

	<p>The admissible comparables are not confined to open market lettings, but include rents fixed by agreement or arbitration, and rents likely to become payable.</p> <p>Must disregard any elements of the rents which are due to:</p> <ul style="list-style-type: none"> <li>• premiums within comparable rents</li> <li>• scarcity</li> <li>• marriage value</li> </ul> <p>Comparables offer essential market evidence but care must be taken to ensure that they are relevant and provide a true comparable.</p> <p>You may need to strip out differences between the physical nature of the holdings and/or the terms of the tenancies and make adjustments accordingly to the rental value of the comparable.</p> <p>Check no specific circumstances which caused the rent of your comparable to be set as it was – i.e. provision of new fixed equipment/improvements; an agreed succession.</p>
<p><b><i>The rent review formula requires the arbitrator to consider “any other relevant factors” in addition to the 4 mandatory factors.</i></b></p> <p><b><i>What sort of thing may fall under this final head?</i></b></p> <ul style="list-style-type: none"> <li>• non-agricultural income;</li> <li>• BPS income and obligations;</li> <li>• FBT rental comparables which do not fall within the specific ‘comparables’ criteria;</li> <li>• Agri-environment scheme income and obligations;</li> <li>• marriage value of subject holding;</li> </ul>	
<p><b><i>Do any of these 5 factors carry more weight than any of the others?</i></b></p> <p>No. None of them formally take precedence over any other and in each individual case the arbitrator will have to determine how much weight to place on each point in the particular circumstances.</p> <p>Often see reviews dominated by budgets and the productive capacity/related earning capacity limb. However, in actual fact, this limb has equal weight to the others.</p>	