

CAAV National Tutorial 2023

MEDIATION

AGENDA FOR DISCUSSION

This is an Outline Agenda for Discussion, covering the points raised in a very broad problem. Further points may be raised throughout the mediation and alternative solutions reached.

This Outline Agenda for Discussion is intended to be read alongside the accompanying Detailed Notes provided.

The parties have agreed to attend a mediation in the hope of resolving the issues between them.

Consider what the Estate's aims will be for each Issue, and how best the Estate can secure a deal at the mediation.

1 ISSUE 1: POTENTIAL TAX ISSUES

- 1.1 The Estate wants to obtain vacant possession of Home Farm (the **Holding**).
- 1.2 The Estate will want to mitigate its tax liabilities as far as possible. The Estate will need to ensure that any settlement and other proposed activities on the Estate are structured in the most tax efficient way and consider any potential IHT liabilities.
- 1.3 In terms of mitigating any IHT liability, the Estate should consider whether Agricultural Property Relief (APR) and Business Property Relief (BPR) is available on any of its assets. The Estate will need to consider whether (if at all) any settlement agreed might impact on this.
- 1.4 One of the key points to consider will be Brian's tenancy. As currently structured, the tenancy of the Holding will attract 50% APR relief as it is a 1986 AHA tenancy.
- 1.5 You have been told that Phil and Jill have never farmed any of the land themselves and have no interest in doing so going forward. There is therefore a risk that if they take the land back in hand (for non-agricultural purposes), they will not secure the available APR. There might of course be other reliefs available and you will need to have considered these (including the availability of BPR).
- 1.6 Given the lack of certainty surrounding taxes and reliefs applicable especially where land is used for newer more "novel" schemes (e.g. the natural capital schemes), the Estate might consider it too big a risk (from a tax perspective) to take the whole Holding out of agricultural use straight away.
- 1.7 The Estate might therefore consider whether it is worthwhile continuing to let *at least part* of the land for agricultural purposes to seek to still secure IHT reliefs in respect of

at least some of the land. This might only be in relation to the part not needed by the Estate for David's lab and so on.

- 1.8 To secure 100% APR relief (on all or part of the Holding), the Estate might consider surrendering the AHA Tenancy in its entirety and re-letting it on an FBT under the ATA 1995 instead.

2 ISSUE 2: VACANT POSSESSION DEVELOPMENT STRATEGY

- 2.1 The Estate wishes to build a lab for David to conduct his research on land which falls squarely within Brian's AHA tenancy.

- 2.2 The Tenancy Agreement contains an early part resumption clause:

"The Tenant shall yield up possession of such part or parts of the Holding as are required by the Landlord for non-agricultural purposes from time to time within six weeks of the date of service of a notice to quit."

- 2.3 The Estate is likely to argue it has the ability to serve a short Case B Notice to Quit and use this as leverage in the mediation.

- 2.4 However, planning permission has not yet been obtained. To serve a valid Case B notice to quit, planning permission must typically have been obtained and there is always a risk that it will not be granted for the lab. These are arguments the tenant is likely to make.

- 2.5 The Estate's planning consultant has lodged an application with the local planning authority and thinks the Estate might be able to achieve *outline* planning permission fairly quickly. However, query whether outline permission will be enough given the Estate would need to be in a position to implement the permission at the date to Notice to Quit expires. All reserved matters must be capable of being dealt with before that date. You should consider how practical this will be. The tenant will argue that the Estate will not be in a position to implement any outline permission even if they successfully obtained that and served a valid Case B Notice to Quit on short notice.

- 2.6 The Estate also falls within the Deben Estuary catchment area for the purposes of nutrient neutrality. This in itself might cause issues with implementation of any permission granted.

- 2.7 As indicated, there is a real risk that the Tenant might use these factors to frustrate the Case B process. Even if the Estate were able to serve a valid notice to quit, the Tenant still has considerable scope to cause delay. The Tenant could refer the matter to Arbitration – staying the notice to quit, pending determination. Arbitration proceedings could take between 12 – 24 months to reach conclusion.

- 2.8 Following that, the Tenant may not vacate, and possession proceedings would be required in to obtain possession.

- 2.9 To avoid litigation risk and delay, the Estate should consider negotiating a surrender with the Tenant to provide vacant possession of the Holding, or at least part of the Holding (that being the part of the Holding required for development). The Estate could offer Brian a surrender premium. If the intention is to only take back part of the Holding, the Estate might offer an FBT over the part of the Holding not currently required by the

Estate (be that to Brian and/or his daughter(s)), rather than agree a part surrender of Brian's AHA tenancy; thereby using this as an opportunity to modernise the arrangement (and rents).

- 2.10 Surveys are often required as part of the planning process. In practice, the Estate would also need to consider whether there are any reservations in the Tenancy Agreement that would allow them to enter the Holding to undertake surveys, should the Tenant refuse access. That could cause delay. You have not been given any details of reservations within the case study facts so would not be able to make that assessment here - but it is something important that you would usually need to consider in practice when dealing with Case B scenarios.

3 ISSUE 3: FARM COTTAGES

- 3.1 The Estate is aware that Brian has sub-let three farm cottages.
- 3.2 Brian's daughter, Jolene, currently lives in one of them. She also currently works on the farm. Jolene's tenancy is likely to be an Assured Agricultural Occupancy.
- 3.3 The second cottage is occupied by a farmworker called Neil, and has been since 1988. This is likely to be a Rent (Agriculture) Act 1976 tenancy.
- 3.4 The third cottage has been occupied by Susan since 2008. She pays a monthly rent but does not work on the Holding. It is probable that Susan has an Assured Shorthold Tenancy.
- 3.5 You have been told at the national tutorial that there is a qualified prohibition on alienation within the tenancy. In light of this, there is likely to be a breach of tenancy. Brian will have inadvertently created at least two residential sub-tenancies which attract security of tenure and succession rights and also an AST **without landlord consent**, all in breach of his AHA tenancy.
- 3.6 The Estate should consider whether it can serve a Case E Notice to Quit or seek to terminate the tenancy. The Estate should use these arguments as leverage to negotiate a surrender of all or part of the tenancy. If the farm cottage lets remain in situ, the Estate could seek to negotiate all or a share of the rent.
- 3.7 Even if the Estate served notice to quit this would not bring the farm cottage tenancies to an end. The relationship would become the Estate as the Landlord and Jolene, Neil and Susan each as the Tenants. That will obviously have ramifications and the Estate needs to think about potentially involving Jolene, Neil and Susan in the mediation; especially if it wants to seek vacant possession from all or any of them too. If the Estate wants to share in the profits, this may not be much of an issue.
- 3.8 It is likely that the Estate will want to secure vacant possession of at least one of the farm cottages as David and his assistant will require on site accommodation once the lab is built. Brian is unlikely to be able to influence Neil and Susan to vacate unless he has a particularly good relationship with them, but it might be worth exploring what can be done about Jolene's occupation, as his daughter.
- 3.9 The comments above regarding the Tenant having considerable scope to cause delay within the notice to quit process apply equally here.

3.10 The Estate might also raise arguments that they are entitled to all rents received from the sub-lets and that Brian has been unjustly enriched; with a view to increasing their bargaining position.

4 **ISSUE 4: RENT REVIEW**

4.1 The rent was last reviewed and set for Home Farm in March 2018.

4.2 On 25 March 2023 a notice to review the rent was served by hand at the Holding, stating that the Landlord required the rent to be reviewed as at 25 March 2024 "*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.*"

4.3 An arbitrator has been appointed and a final hearing has been listed for October 2023.

4.4 Here, Brian's key argument is that the rent notice was not served in time and therefore, the rent review cannot take effect until 25 March 2025.

4.5 The Estate's key argument will be that because 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" are included on the notice, it is was served in time.

4.6 In any event, a rent review arbitration has the potential to be a drawn-out process and there are risks on both sides.

4.7 That said, assuming the Estate can establish that the Notice has been validly served to review the rent as at 25 March 2024, it is likely that the rent will be increased in March 2024 given the market has settled somewhat (in terms of Brexit and agricultural policy).

4.8 Subject to what else is agreed at the mediation, it might be appropriate for the Estate to use the risk of increasing the rent as leverage to try and negotiate a tripartite agreement between Brian and Eulogy Systems so they share the rent from the tenancy in respect of the telecoms mast (rather than increase the rent if the tenancy remains in situ). Similar terms could be agreed in respect of the rents from the farm cottage sub-lets (as discussed above).

4.9 It might also be a point used to persuade Brian to surrender his AHA tenancy and replace it with an FBT of all or part (if that is appropriate in the context of the deal).

5 **ISSUE 5: SUCCESSION**

5.1 Brian wants his daughters to succeed him on the tenancy.

5.2 In practice, all information provided by Jolene and Ruth (or any other applicant), particularly relating to the principal source of livelihood test, should be scrutinised and verified against the supporting evidence. You do not, however, have enough information to do that here.

5.3 We do know, however, that Jolene is likely to have real prospects of succeeding to Brian's tenancy either on Brian's retirement or death. Ruth appears to have weaker prospects.

- 5.4 Jolene succeeding to Brian's tenancy is likely to stand in the way of Jill's plans for the Estate.
- 5.5 As is the case with the service of a case B and Case E Notice to Quit, even if Jolene or (more likely), Ruth's prospects of succession are in any way questionable, they still have the ability to cause the Estate delay and could make a spurious application – in the event of Brian's death or retirement.
- 5.6 The Estate should try to negotiate a deal as early as possible to limit professional costs and the possibility of a succession tenancy.
- 5.7 The Estate should try and negotiate a surrender payment to obtain vacant possession of the Holding, or at least part of the Holding (i.e. the part needed immediately for the lab and accommodation). If a surrender of part is negotiated, the Estate should try and negotiate that the land remaining subject to the tenancy is re-let on an FBT to maximise APR relief (as discussed above).
- 5.8 The Estate might consider granting any FBT to Jolene (instead of Brian) or to Jolene and Brian jointly to deal with the succession point.
- 5.9 In the background, the Estate should continue to be mindful of the stringent deadlines imposed by the AHA 1986 should Brian die or retire. This is imperative to preserve its position and improve its negotiating position.

6 **ISSUE 6: TELECOMS MAST**

- 6.1 There is a telecoms mast in the corner of one of the fields within Brian's tenancy which has been put up without the Estate's consent.
- 6.2 As the tenancy prohibits alienation without landlord consent (not to be unreasonably withheld) (as discussed above), the Estate might consider again whether it can service a Case E Notice to Quit, or use the threat of that as leverage to agree a surrender. See above section regarding farm cottages for further detail.
- 6.3 In addition, this would be a good opportunity to regularise the arrangements with Eulogy Systems going forward and negotiate a share of the rents.

7 **OTHER CONSIDERATIONS**

7.1 **Biodiversity off-setting opportunities**

The local development company, Shark Developers Ltd, has invited the Estate to consider an arrangement where the development company off-set biodiversity targets for a nearby housing development by using land **not** subject to the tenancy.

The Estate could be set to obtain a significant sum of money from this. Having knowledge of this, the Tenant might use this to increase any surrender premium (if a surrender is agreed as part of the settlement).

It is unlikely, however, that this money will be immediately available.

7.2 Other natural capital, BNG and nutrient neutrality opportunities

The Estate has been told that there are likely to be 466.25 credits available to the Estate at £3,000 a credit.

Again, the Tenant might see this as a justification for seeking a higher surrender premium (in the event a surrender is agreed). The potential income might, on the other hand, give the Estate more flexibility in terms of what it can offer as part of any deal.

Again, it is unlikely that this money will be immediately available.

7.3 Compulsory Purchase and Utilities

The Tenant might use this opportunity to seek a part of any CPO compensation claimed by the Estate.

8 DOCUMENTING THE DEAL

8.1 It is important that any deal that is reached is correctly documented so that it is enforceable.

8.1.1 Ensure that a Settlement Agreement is signed by all parties and dated.

8.1.2 Ensure that any Settlement Agreement complies with any of the requirements within the LPA 1925 (if there has been a disposition of any land this will need to be considered).

8.1.3 Consider whether to include a clause allowing the parties to obtain tax advice and amend the deal accordingly post signing of the Settlement Agreement.

8.1.4 Record any agreements made regarding payment of costs.

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