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Recovery of Possession for Non-Agricultural use

INTRODUCTION

Under the Agricultural Holdings Act 1986 ("AHA 1986"), security of tenure operates by restricting: the situations in which a landlord may serve a notice to quit; when the landlord may serve a notice to quit; and how the landlord may serve a notice to quit.

There are specific circumstances in which a landlord may recover possession of the whole or part of a holding demised under an AHA 1986 tenancy from the tenant.

The landlord must ensure that a valid notice to quit is served to initiate the procedure for recovering possession. The tenant must ensure that they respond appropriately if they wish to contest the notice.

When advising the landlord or the tenant in circumstances where the landlord wishes to recover possession of the holding for non-agricultural use, the statutory procedures by which the landlord can obtain vacant possession, in particular the requirements for serving a valid notice to quit, will need to be considered.

The landlord will also need to carefully consider what rights they have and how far these extend, to access the land for the purposes of conducting surveys.

(A) NOTICE TO QUIT

In order to terminate the tenancy under the AHA 1986 statutory framework a valid notice to quit must be served.

As well as the requirement that the notice be valid at common law and comply with common law requirements as to clarity, the notice to quit must comply with any further contractual requirements contained in the tenancy agreement and comply with the relevant statutory requirements.

There is no prescribed form of a notice to quit. There are, however, specific requirements regarding the substance of the notice to quit.

1 LENGTH OF NOTICE TO QUIT

Section 25(1) of the AHA 1986 provides that a notice to quit whole or part of a holding will be invalid unless it is of at least 12 months duration.

In addition, the notice must expire on the term date of the tenancy.

Example: If the term date of the tenancy is 2 February, notice to quit would have to be given **before** 2 February 2019, for vacant possession on 2 February 2020.

There are some limited exceptions to the 12 month notice rule:

1 if the tenant becomes insolvent – notice period reduced to 6 months;

2 if the written tenancy agreement contains a clause authorising resumption of possession of the whole or part of the holding for some specified purpose **other than** agricultural use **at short notice**.

The AHA 1986 does not specify a minimum period of notice for contractual clauses, however case law has established that it must provide sufficient time for the tenant to make compensation claims upon quitting within the statutory timeframe of the AHA 1986 (1 month before termination date): *Re Disraeli's Agreement [1939] Ch 382; Cleasby v Park Estate (Hughenden) [1939] Ch 382.*

It is important to check any written tenancy agreement to determine whether there is a short notice provision for resumption of possession for a non-agricultural use. Such provisions are invaluable. Always check that it provides for more than 1 month's notice.

This exception is **not** applicable to oral tenancy agreements.

3 if the tenant agrees to waive the 12 month notice requirement and accept short notice from the landlord.

2 CONTRACTUAL PROVISIONS

A notice must comply with any express requirements contained in the lease. For example, Lord Hoffman said in *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited [1997] 3 ER 352* : "*if the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."*

Lewison LJ reiterated the importance of checking and complying with the contractual provisions for giving notices in *Siemens Hearing Instruments Limited v Friends Life Limited [2014] EWCA Civ 382 – "if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause…and follow them precisely."*

3 EXTENT OF NOTICE– NOTICE TO QUIT PART

At common law, a notice to quit part only of a holding is invalid.

As such, any notice to quit must apply to the whole holding **unless:**

(a) *Section 31 AHA* 1986 applies;

(b) the written tenancy agreement contains a contractual clause which expressly allows notice to quit part, known as a resumption of part clause;

(c) a severance of the freehold reversion occurs, allowing the landlord to rely upon *section 140 Law of Property Act 1925.*

(a) Section 31

Section 31 provides that a valid notice to quit part of an agricultural holding under the AHA 1986 can be given by the landlord if it is for one of the purposes specified in *section 31* and the notice to quit states this fact.

The approved purposes are as follows:

(i) adjusting the boundaries between agricultural units or amalgamating units, or

(ii) one of the following "public interest" purposes:

- (a) the erection of cottages or other homes for farm labourers with or without gardens
- (b) the provision of gardens for cottages/houses for farm labourers.
- (c) the provision of allotments
- (d) the letting of land as a smallholding
- (e) the planting of trees
- (f) the opening or working of a deposit of coal etc.
- (g) the making of a water course or reservoir
- (h) the making of a road, railway, a tram-road, siding, canal or basin or connected works.

Section 32 of the AHA 1986 gives a tenant the right to treat a notice to quit part under either *section 31* or *section 140* of the Law of Property Act 1925 as a notice to quit the entire holding. However the tenant is not able to rely on this right of enlargement where the landlord has served a notice to quit part in accordance with a contractual provision within the tenancy agreement.

(b) Contractual clause authorising a notice to quit part

The common law rule prohibiting notices to quit part is overridden if the written tenancy agreement contains a contractual provision which authorises a notice to quit part: *section 25(2)(b).*

This exception only applies if the contractual clause is limited to circumstances where the land is required for a non-agricultural use.

Note that often the contractual clause will restrict the number of acres or percentage of the holding that can be taken back in any one year. In addition, some clauses are worded in a manner which restricts the non-agricultural use to certain specified non-agricultural uses. They can therefore sometimes be quite limited.

(c) Section 140 – Severance of the Reversion

Section 140 provides that in circumstances where the freehold reversion is severed, the landlord of any severed part may give an independent notice to quit in relation to his part only.

"Severing the reversion" means that the landlord sells or transfers his freehold interest in part of the land to a third party. The freehold of the land let under the tenancy agreement is then split between two parties, each of whom owns a defined part of the land. The freehold is then said to have been 'severed' between the two new freehold owners.

NB: this is a different concept to 'joint ownership' where two or more parties jointly own the same parcel of land.

The underlying leasehold interest under which the tenant occupies the land is unaffected. There is still a single lease. The tenant continues to occupy the whole holding under the same tenancy agreement as previously, on the same terms. However, he now has two landlords, each of whom own a defined part which they can deal with separately for the purposes of serving a notice to quit.

There must have been a genuine transfer of part of the reversion to another party and not simply an arrangement engineered to sever the reversion.

The courts will look at the substance of the transaction rather than its form. A severance to bare trustees of the landlord has been held to merely be a device to allow the landlord to serve a notice to quit. The freehold interest in the land therefore needs to be transferred to a third party, although that party can be connected to the landlord provided they are clearly a separate individual/entity.

Section 140 therefore provides a very useful tool for landlords who only need to regain possession of part of the holding for a non-agricultural use, but are faced either with an oral tenancy agreement or a written agreement with no contractual 'part possession' clause.

4 TYPE OF NOTICE TO QUIT

Under the provisions of the *Agricultural Holdings Act 1986,* notices to quit are contestable by the tenant by service of a counter-notice under *section 26* which invokes the provisions of *section 27.*

The counter notice prevents the landlord from relying upon and enforcing his notice to quit until he has applied to the Tribunal (First-tier Property Chamber, Agricultural Land and Drainage) for consent to the operation of the notice, and that consent has been granted. This process is far from straightforward and the landlord must prove:

(a) that the notice to quit falls into one of the specified categories outlined in *section 27*; **and**

(b) that a fair and reasonable landlord would insist on possession: *section 27(2)*.

The key ground under *section 27* for landlords who require possession for a non-agricultural use is *section 27(3)(f)* which provides that the Tribunal must be satisfied that:

`…the landlord proposes to terminate the tenancy for the purpose of the land's being used for a use, other than for agriculture, not falling within Case B."

In addition to *section 27(3)(f)* the AHA 1986 provides for a form of incontestable notice to quit if it falls within one of Cases A – H set out within *Schedule 3.* Case B relates to non-agricultural use.

Under Case B the landlord is entitled to serve a notice to quit without having to obtain the consent of the Tribunal to the operation of the notice to quit.

What sort of notice to quit should the landlord use?

- **Case B** should be utilised if the landlord requires the land for a non-agricultural use which requires **planning permission**.
- **Section 27(3)(f)** applies if the non-agricultural use does not require planning permission, for example for change of use to forestry or for recovery of possession of a farm cottage which is not being used for a farm worker.

5 FORM OF NOTICE TO QUIT

The notice to quit must be in writing. It must be accurate and unambiguous.

It must include/correctly identify the following key points:

- *the parties;*
- *the description of the holding;*
- *the reason*:

  you must make it clear on the face of the notice whether the landlord is relying upon *Case B* or *section 27(3)(f);*

- the part of the holding that is subject to the notice to quit;
- include *a plan*;
- *the expiry date* of the notice to quit –

  always include the running words to protect the landlord if the incorrect expiry date is contained within the notice: *"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."*

  Remember that the notice to quit must be of at least 12 months duration, ending on the term date of the tenancy <u>unless</u> the tenancy agreement contains a contractual provision authorising a notice to quit part for a non-agricultural use at short notice; and

- use a reliable *precedent* to ensure that the notice complies with all of the statutory requirements.

(B) CASE B

6 CASE B

Schedule 3 AHA 1986:

"The notice to quit is given on the ground that the land is required for a use, other than for agriculture:

a) for which permission has been granted on an application made under the enactments relating to town and country planning,

b) for which permission under those enactments is granted by a general development order by reason only of the fact that the use is authorised by:

(i) a private or local Act,

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

(iii) an order made under section 14 or 16 of the Harbours Act 1964

c) for which any provision that-

(i) is contained in an Act, but

(ii) does not form part of the enactments relating to town and country planning,

deems permission under those enactments to have been granted,

d) which any such provision deems not to constitute development for the purposes of those enactments, or

e) for which permission is not required under the enactments relating to town and country planning by reason only of Crown immunity,

and that fact is stated in the notice."

NB: the wording of Case B itself imposes a duty on the landlord to ensure that the notice to quit makes it clear on its face that it is served in reliance upon Case B.

Key Issues:

The key points that must be addressed in relation to the operation of Case B are:

- the extent of the "*land"* subject to the notice to quit;
- whether the land is "*required"*
- whether the use or uses are "*non-agricultural";*
- whether "*planning permission"* has been obtained.

"Land"

The best scenario is that **all** of the land which is subject to the notice to quit is required for the non-agricultural use and covered by the planning permission.

It may be possible to satisfy the requirements of Case B if only a **substantial** part of the land has the benefit of the planning permission, but it is far riskier and this route should not be adopted if at all possible. In *Telford Development Corporation v Heath* [1987] only 38% of the land covered by the notice to quit was subject to planning permission. The court found that the notice to quit was invalid as a consequence.

Key point: make sure that all of the land subject to the notice to quit is covered by the planning permission (i.e. that it is within the red line of the application).

"Required"

The landlord must show a bona fide intention to implement the change of use and a reasonable prospect of achieving it.

- The genuine intention to implement the change of use must be shown at the date the notice to quit is **served**.

  The landlord must then be able to prove that he will have a reasonable prospect of implementing the change of use at the date the notice to quit **expires** or a reasonable time thereafter.

  There has been no decision as to the amount of time after the expiry of the notice to quit which would be deemed "reasonable," but it is generally accepted that it should be within at least 12 months because if it is any longer, the landlord could have served a notice 12 months later than he did.

  Whether the landlord can prove that the land is "required" is a question of fact in each individual case.

- The planning permission must be in place before the notice to quit is served.

- The landlord needs to ensure that everything is in place to allow the permission to be implemented before the notice to quit expires. The satisfaction of planning conditions and the issue of reserved matters under the permission need to be dealt with during the notice period, if not before. Any other external factors which could prevent the landlord implementing the change of use at the expiry of the notice to quit need to be eliminated/ minimised.

  Cunliffe v Goodman [1950] 2 K.B. 237 held that the landlord must do more than merely contemplate and must prove a state of affairs which he intends to bring about and which he has a reasonable prospect of being able to bring about. He does not "intend" if he has too many hurdles to overcome or too little control of events. He must show a firm and settled intention which is not likely to be changed.

  Yoga for Health Foundation v Guest [2002] Chancery Judge stated *"it is not sufficient for the landlord merely to assert that he "intends" since he may*

change his mind once he gets possession. The intention must be firm and settled, not likely to be changed. It must have moved out of the zone of contemplation, the sphere of the tentative, the provision and the exploratory and have moved into the valley of decision. Thus the landlord's intention is composed of two main ingredients; ***a fixed and settled desire to do that which he says he intends to do and a reasonable prospect of being able to bring about the desired result".***

- In *Crossco No 4 Unlimited v Jolan Limited* [2011] EWHC 803 the judge helpfully set out that the law is summarised in *Woodfall's Landlord and Tenant Looseleaf Edition, Vol 2* at paragraphs 22.106-22.109.2. The land can be "required" by either the landlord or an identified third party.

  If the landlord does not intend to implement the planning permission himself, there must be an identified purchaser/developer who is able to show an intention to implement at the date the notice to quit expires.

  An intention simply to find an unidentified purchaser before the notice to quit expires will be insufficient: *Jones v Gates [1954 1 W.L.R. 222].*

  In *Jones v Gates* the court held that in the absence of a definite person willing to negotiate to purchase the development site there could not be said to be a reasonable prospect of implementing the change of use.

  The question is "who" "requires" the land? If the landlord does not require it, because he does not propose to carry out the development, and there is no-one else in the frame except a 'prospective purchaser' who is unidentified and potentially non-existent, the landlord has not shown that the land is required.

  Landlords must therefore ensure that they have entered into a binding agreement with an identified purchaser/developer who is able to show a clear intention to implement the planning permission and a reasonable prospect of doing so.

"Non-agricultural"

In many cases, it will be immediately obvious that the use authorised by the planning permission is non-agricultural – e.g. housing developments; business/retail park.

However, in other cases the position is not as clear cut. Some permissions may include two or more different uses, one or more of which could be agricultural.

Mixed user issues are one of the difficult areas within Case B and provide a prime ground for dispute. Although it is not an express requirement that all of the land is required for uses which are exclusively non-agricultural, it is a difficult area which is open to interpretation.

The best approach is to try and ensure that all of the uses envisaged are clearly non-agricultural. If that is not possible, then the predominant user **must** be non-agricultural.

Many planning permissions (particularly larger scale developments in rural areas) will include amenity areas which often include grassy landscaped sections, parkland,

nature reserves, wildflower meadows etc. These are all areas of land which may be capable of being grazed, although that is not the intention. Provided that they will not be grazed, and will have no utility in terms of productive areas of land for agricultural purposes, the notice to quit should not be open to attack. To be on strong ground, the landlord needs to try and ensure that any potential agricultural element is eliminated. The intention for the maintenance and management of these areas needs to be in a manner which cannot be deemed as agricultural.

One clear example of a situation where this problem may arise is for wind turbine developments. In that case, only the concrete plinths on which the turbines stand will be truly non-agricultural – a Case B notice to quit will need to be limited to these specific turbine areas and any service areas etc.

Another area of difficulty is when the permission envisages two or more consecutive uses, the latter of which is clearly agricultural. This is often encountered with permissions for the extracting of minerals or coal, which require that after the extraction/mining has concluded, the land must be remediated/restored and returned to agriculture or a form of natural habitat. In these circumstances, provided that the key, initial purpose is non-agricultural, the notice to quit will be valid: *Floyer-Acland v Osmond (2000).*

Key point: try and ensure that any elements within the permission which could be interpreted as agricultural are eliminated or intended to be managed in a non-agricultural way. Often the labels attached to things within the permission can be key in minimising the likelihood of a tenant seeking to run the argument (i.e. use of the term "nature reserve" in substitute for "wildflower *meadow*") but an Arbitrator can of course look behind labels to determine the genuine intention.

"Planning Permission"

As noted above, the planning permission must have been obtained by the date the notice to quit is served.

If planning permission has not yet been obtained, the landlord will need to wait until it has been obtained and then proceed to serve a notice under Case B. It is not possible to try to circumvent this and proceed earlier under s27(3)(f) (*Herefordshire DC v Bayliss [2019] 9 WLUK 147*).

In the past, it has been held that an outline planning permission was acceptable for the purposes of Case B. However, this needs to be viewed alongside the requirement that the landlord must be in position to implement the permission at the date the notice to quit expires. If the full, detailed permission has not been obtained, this may cause serious problems. Reserved matters must be capable of being dealt with before the notice to quit expires.

You also need to be wary of any planning conditions which must be dealt with before the permission can be implemented. Commonly matters relating to access and landscaping are left for consultation and agreement after the permission has been granted, but prior to implementation.

In relation to access, a landlord would not be entitled to dig bore holes to test for contamination in reliance upon a clause that provides they are allowed to enter the

premises to inspect and examine the same. Landlords need to be careful that they do not go above and beyond the access provisions that have been agreed.

Lord Justice Lewison in the Court of Appeal decision of *Rees v The Earl of Plymouth* [2020] said: *"The right of entry is not a right to enter for entry's sake. It is a right to enter for a particular purpose. So if a purpose is a reasonable purpose for which the landlords wish to enter the land, the proper interpretation of the right must surely enable them to do what is reasonably necessary to achieve that purpose. "Reasonably necessary" is not the same as "convenient" or "desirable"" But conversely, if what they want to do (or whatever is reasonably necessary to do) in order to achieve a particular purpose is highly intrusive then the purpose may be held not to be a reasonable one".*

The principle that the landlord should not grant a leasehold interest with one hand and take back with the other, through the use of draconian access clauses that would substantially interfere with the tenant's use and enjoyment of the property, remains valid.

Note that there is no deadline for serving a notice to quit once the planning permission has been obtained. The only requirement is that the permission is still valid (3 years after date full permission was granted).

(C) PROCEDURE

7 CASE B PROCEDURE

1. Landlord must serve a Case B notice to quit;

2. If the tenant contests the notice, he/she must serve a notice referring the matter to arbitration <u>within 1 month</u> of receipt of the landlord's notice;

3. By referring the matter to an arbitrator, the tenant will be contesting the **validity** of the notice (i.e. disputing that the Case B requirements have been made out by the landlord);

4. Within <u>3 months</u> of service of the tenant's notice, an arbitrator must have been appointed, or an application submitted to the RICS for an appointment to be made;

5. An arbitrator is then appointed and the matter dealt with in accordance with the *Arbitration Act 1996* and the provisions relating to *Case B* under the *AHA 1986;*

6. The notice to quit is suspended and cannot be relied upon until the arbitration is concluded.

The time limits are strict and cannot be extended.

(D) SECTION 27(3)(f)

8 SECTION 27(3)(F)

If planning permission is **not** required for the proposed non-agricultural use and the circumstances do not otherwise fall within one of the Case B grounds, the landlord can rely upon *s27(3)(f)* which states that:

> *"the landlord proposes to terminate the tenancy for the purpose of the land being for a use, other than for agriculture, not falling within Case B"*

Section 27(3)(f) should therefore be used if the land is required for any non-agricultural use which does not require planning permission and does not otherwise fall within Case B.

Common examples are forestry, tree planting and the direct letting of farm cottages by the landlord.

The landlord must prove to the Tribunal (First Tier Tribunal (Property Chamber) Agricultural Land and Drainage):

(a) that the notice to quit falls into *section 27(3)(f)*; **and**

(b) that a fair and reasonable landlord would insist on possession.

There is therefore a two stage process; each part of the test must be dealt with separately.

First the landlord must show that the land subject to the notice to quit is required for a clear non-agricultural use and will have to satisfy the Tribunal that he genuinely intends to implement the change of use (and therefore that the land is "required" in a similar manner to the Case B criteria).

If the landlord is successful in satisfying the Tribunal of stage 1, he must then satisfy the fair and reasonable landlord test. The Tribunal will not grant consent to operation of the notice unless **both** parts of the test are made out.

For stage 2, the landlord must be able to justify his decision and plans to the Tribunal and show that he has a reasonable objective. Although it is framed as an objective test, its application is subjective and much is therefore left to the discretion and interpretation of the individually constituted Tribunal panel. What is reasonable to one person may be seen as completely unreasonable by another. As a consequence, it is often difficult to predict in advance whether the landlord is likely to be successful.

Issues such as the hardship that the notice would cause to the tenant can be considered: *Evans v Roper [1960].*

In *Collins v Spurway (1967)* the Tribunal held that it was entitled to consider a financial inducement which the landlord had offered and the tenant had rejected when determining whether a fair and reasonable landlord would insist on possession.

The time limits are strict and cannot be extended.

9 SECTION 27(3)(F) PROCEDURE

1. Landlord must serve a section 27(3)(f) notice to quit;
2. If the tenant contests the notice, he/she must serve a counter-notice under *section 26* within 1 month of receipt of the landlord's notice;
3. Within 1 month of receiving the counter-notice, the landlord must make an application to the Agricultural Land Tribunal for consent to the operation of the notice to quit. The application must be made on a prescribed form – Form 1;
4. Within 1 month of receiving the landlord's Form 1 application, the tenant must submit his/her reply to the Tribunal;
5. The Tribunal will then issue directions to bring the matter to a hearing for determination;
6. The notice to quit cannot take effect unless and until the Tribunal grant the landlord consent to its operation.

10 COMPENSATION

The tenant is entitled to payment of both basic and additional compensation for disturbance if the tenancy is terminated pursuant to either Case B or section 27(3)(f): *sections 60, 61 & 69.*

- The **basic** compensation equates to either:
  - one years rent for the holding (at the current rate).

    An entitlement to this sum arises automatically, provided the tenant is able to show a causal link between the notice to quit and his departure. The tenant does not have to prove any loss.

  or

  - the amount of the tenant's actual loss arising from his forced departure or two years rent for the holding, whichever is the smaller.

    The tenant must be able to establish that the loss or expenditure he incurred was directly attributable to the quitting of the holding and was unavoidably incurred in connection with the sale or removal of his belongings/stock/fixtures etc.

- The **additional** compensation is equivalent to four times the annual rent for the holding (at the current rate).

  The entitlement to this additional compensation arises automatically if the notice to quit is served pursuant to Case B or section 27(3)(f).

  It is paid in addition to the basic compensation, so the tenant can obtain five, or in some cases, six times the annual rent upon quitting.

NB: if you are only dealing with a notice to quit part, the amount of additional compensation will = four times the apportioned annual rent.

- In addition to the above, if the tenant quits as a consequence of the landlord's reliance upon a contractual clause authorising a notice to quit at <u>short notice</u>, the tenant is entitled to additional compensation equal to the value of the additional benefit (if any) which would have accrued to the tenant if the tenancy had been terminated on the full 12 months notice: *section 62.*

Consideration should also be given as to whether a claim in respect of Tenant's Improvements and Tenant Right is appropriate.

Procedure:

If the tenant wishes to claim compensation under these provisions, written notice must be served on the landlord not less than one month before the termination of the tenancy: *section 60(6).*