

NATIONAL TUTORIAL 2023

RECOVERY OF VACANT POSSESSION FOR DEVELOPMENT

MODEL ANSWER

This is an Outline Answer, covering the points raised in a very broad problem.

Please see the separate, Detailed Notes for further information- the detailed notes are essential for setting out the basics and the procedural matters which should be set out in answering a question about this.

Jill is seeking advice on securing vacant possession of land in Home Farm for David's proposed development. Home Farm is subject to an AHA 1986 tenancy.

The Brookfield Estate wishes to build a lab for David with accommodation to conduct research. No planning permission has been granted but the planning consultant believes that outline planning permission may be obtained fairly quickly. An application has been lodged with the local planning authority.

There is an early resumption clause in the tenancy agreement:

"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."

Consider the following:-

- **What would you advise Jill in term of the best strategy to adopt in order to obtain vacant possession of the land?**
- **Is there anything Jill needs to do before he serves a notice to quit on Brian, the tenant?**

1 WHAT WOULD YOU ADVISE JILL IN TERMS OF THE BEST STRATEGY TO ADOPT IN ORDER TO OBTAIN VACANT POSSESSION OF THE LAND?

1.1 The starting point is that Brian has a tenancy that is governed by the Agricultural Holdings Act 1986 (the "AHA 1986").

1.2 Jill is therefore restricted in terms of the situations in which she could seek to recover possession and serve a notice to quit. We need to consider the details of this proposal and then set out the scope under AHA 1986 to recover possession for non-agricultural use. The strategy very much depends on the legal possession which will inform the strength of each parties' position and how best to approach matters.

1.3 Can Jill obtain possession of part under the AHA 1986?

Notice to Quit Part:

1.3.1 Jill is only seeking to recover part of Home Farm (a small amount for the laboratory development and associated residential accommodation).

1.3.2 At common law, a notice to quit part is invalid.

1.4 Are there any exceptions? **Yes.**

1.4.1 The AHA 1986 provides for 3 circumstances in which a notice to quit part can be given in relation to tenancies protected by the act. Those are:-

1.4.1.1 Where the required use is one falling within section 31 of the AHA 1986: known as the public purposes ground. The approved purposes are either adjusting the boundaries between the agricultural units or amalgamating units, or one of the 'public interest purposes' (see *the detailed notes*).

1.4.1.2 By severing the freehold reversion in accordance with section 140 Law of Property Act 1925. Section 140 LPA 1925 provides that where the freehold reversion is severed the landlord of any severed part may give notice to quit in relation to his part.

1.4.1.3 Where there is a contractual provision in the tenancy agreement which permits notice to quit to be given in respect of part.

The early resumption clause in the tenancy agreement makes express provision for a notice to quit of part to be given.

1.5 What type of Notice to Quit should Jill serve to get the land back for the laboratory?

1.6 There are essentially two types of notice to quit which Jill may serve.

1.7 The type of notice to quit to be served depends on whether planning permission is required for the non-agricultural use intended. That will in turn determine the procedure for responding to the notice to quit.

1.8 The types of Notice to Quit are:

- A Notice to Quit pursuant to Case B: to be served where the landlord requires the holding/ part of the holding for a non-agricultural use which requires planning permission OR otherwise falls within Case B; and
- A Notice to Quit pursuant to section 27(3)(f): to be served if the landlord

requires the holding/ part of the holding for a non-agricultural use which does not require planning permission and does not otherwise fall within Case B.

- 1.9 The Landlord may also serve an Open Notice to Quit but this is unlikely to withstand a counter-notice from the tenant.

Jill should serve a Case B notice in relation to this land, as planning permission is required for the proposed development. However, Jill has not yet applied for planning permission. She has however, lodged an application with the local planning authority for outline planning permission.

- 1.10 Can Jill satisfy the Case B requirements?

Jill must establish whether the "land", is "required" for "a use other than for agriculture" and that "planning permission" has been obtained.

1.10.1 "The Land"

- All of the land specified in the notice to quit will need to be required for non-agricultural use. The notice to quit may be open to challenge if only part of the land is required for non-agricultural use.
- All of the land in the notice will need to be covered by the planning permission.

Jill will need to make sure that the notice to quit contains all of the land required for the change of use and all of that land should be covered by planning permission.

1.10.2 "Required"

- The land can be "required" by either the landlord or an identified third party.
- The landlord/ third party needs to show a genuine intention to implement the change of use at the date the notice to quit is served.

This would be difficult for Jill to demonstrate as planning permission has not been acquired yet.

Even if planning permission had been obtained, if Jill is not in a position to implement the planning permission when the notice to quit expires then that may provide an avenue to challenge the notice.

1.10.3 "A use other than for Agriculture"

There is no dispute that the development is going to be a non-agricultural use.

1.10.4 "Planning Permission"

- 1.10.4.1 Planning permission must be in place before the notice to quit is served.

1.10.4.2 All of the land specified in the notice to quit needs to be covered by the planning permission or Brian may be able to contest the notice on that basis.

1.10.4.3 The planning permission must also be valid.

Jill has not obtained planning permission. She has applied for outline planning permission. Will this be sufficient?

It has been held in the past that outline planning permission is acceptable for Case B notices. However, this needs to be viewed alongside the requirement that Jill will need to be in a position to implement the permission at the date that the notice to quit will expire – Jill will need to consider how long the notice to quit should be, in order to provide enough time to implement the permission.

Also, Jill will need to consider any planning consents that may need dealing with before the permission can be implemented.

1.11 How long should the Notice to Quit give for Brian to vacate?

1.11.1 **Section 25(1) of the AHA 1986** sets out that a Notice to Quit of the whole or part of a holding will be invalid unless it is at least 12 months in duration expiring on the term date.

1.11.2 **Section 25(2)(b)** provides an exception to the general rule. "Short" notice is permitted where the notice to quit is given pursuant to a provision in the tenancy which authorises the resumption of possession of the holding or part of it for a specified non-agricultural purpose.

The early resumption clause in the tenancy agreement sets out that the landlord is permitted to obtain possession of part of the holding for a use other than agriculture, at short notice.

This gives Jill a contractual entitlement to recover possession of part of the holding.

1.11.3 There is no minimum period of notice under the statutory provisions of the AHA 1986. However, the period of notice must allow Brian sufficient time to make a compensation claim within the statutory timeframe of the AHA 1986 (*Re Disraeli's Agreement [1939] Ch 382; Cleasby v Park Estate (Hughenden) [1939] Ch 382*). The notice therefore will need to be at least one month to enable the tenant to make any appropriate claims for compensation.

Short notice of 6 weeks would satisfy this requirement.

Does the 6 weeks' notice need to end on a term date? The early resumption clause does not specify whether the notice has to expire on the term date, which would suggest that it may be done at any time of the year.

1.11.4 However, would that give Jill enough time to implement planning permission by the time the Notice to Quit expired?

Probably not. Jill will need to consider how long this would take. She should be mindful that if the permission would take more than 12 months to implement, the notice may be criticised if she serves the notice 12 months earlier than she needed to.

Given that Jill is able to serve a notice to quit giving 6 weeks' notice and that she needs to be in a position to implement the permission by the expiry of the notice to quit, Jill should wait until she has planning permission and is in a position to implement it before serving the notice to quit. That way, she would be able to satisfy the requirements of a Case B notice at the point of serving the notice to quit and would be able to get the land back in hand quickly.

- 1.12 It may also be relevant to consider setting out the process following the service of a Case B Notice to Quit, it will be important to advise Jill of the implications of serving a Case B NTQ

CASE B PROCEDURE

- 1.12.1 Landlord must serve a Case B notice to quit;
- 1.12.2 If the tenant contests the notice, they must serve a notice referring the matter to arbitration within 1 month of receipt of the landlord's notice;
- 1.12.3 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);
- 1.12.4 Within 3 months 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;
- 1.12.5 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;
- 1.12.6 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.

- 1.13 What else should Jill consider?

1.14 **Access**

- 1.14.1 Will access be required to carry out any pre-commencement surveys or surveys required for a full planning permission application? She would need to check the tenancy agreement for any provisions that would permit her to enter the holding if Brian refuses to give Jill access for those purposes. If there is no contractual basis for Jill to conduct surveys during the term of the tenancy this can present real difficulties for landlords who cannot undertake

surveys required for planning permission.

Compensation for the Tenant

- 1.14.2 What compensation may be due to Brian? Basic and additional compensation under the AHA 1986 – relevant provisions under s60, 61 & 69 AHA 1986. *(see detailed notes paragraph 10).*
- 1.14.3 The likelihood that Brian will make a claim in respect of Tenants Improvements or Tenant Right.
- 1.15 Another option Jill could consider is whether there is any scope to negotiate a surrender of the land required from Brian. This is a key consideration and will likely be the way to proceed sensibly, particularly as there is scope for Brian to delay Jill getting the land back in hand, by refusing access or refusing to vacate the land requiring Jill to seek an order for possession.

S27(3)(F)- Recovery of Possession for Non-Agricultural Use where Planning Not Required

- 1.16 Part of the development proposals may not require planning permission. It may be necessary to set out the procedure under s27(3)(f) - *see detailed notes.*

2 IS THERE ANYTHING JILL NEEDS TO DO BEFORE SHE SERVES A NOTICE TO QUIT ON BRIAN?

- 2.1 Should Jill wait until she obtains full planning permission before serving a Case B notice to quit?

As covered above, if Jill obtains outline planning permission only and serves a notice to quit giving only 6 weeks notice, as per the tenancy agreement, she is unlikely to be able to demonstrate that he “required” the land and is in a position to implement planning permission at the date of expiry of the notice to quit.

She should therefore wait until she receives planning permission and then serve the notice to quit.

Jill will also need to consider whether there are any planning conditions that will need to be dealt with or whether access will be required to the holding for surveys.

In terms of the actual notice, Jill must make sure that the substance of the Notice to Quit is correct.

- 2.2 A valid Notice to Quit must comply with:

- 2.2.1 the relevant statutory requirements pursuant to the AHA 1986;

- 2.2.2 as well as complying with common law requirements as to clarity; and
 - 2.2.3 any further contractual requirements contained in the tenancy agreement (it does not appear to be any further requirements in this case).
- 2.3 The notice to quit must be in writing. It must be accurate and unambiguous. It must identify the following:
- 2.3.1.1 The parties;
 - 2.3.1.2 The description of the holding;
 - 2.3.1.3 The reason i.e. is it Case B or s27(3)(F);
 - 2.3.1.4 The part of the holding that is subject to the notice to quit including a plan; and
 - 2.3.1.5 MOST IMPORTANTLY**
 - 2.3.1.6 The expiry date and the "running words".
- IT IS KEY TO INCLUDE** the "running words" which will protect a landlord if the incorrect expiry date is contained in the Notice to Quit:
- "...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."*
- 2.6 The notice also needs provide the required notice period (discussed above).

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