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CAAV NATIONAL TUTORIAL 2023

AGRICULTURAL HOLDINGS ACT 1986 – SUCCESSION

SUCCESSION

1 **WHAT TYPE OF TENANCY?**

1.1 First check that the *Agricultural Holdings Act 1986* (the '**AHA**') definitely applies because no succession rights attach to farm business tenancies under the *Agricultural Tenancies Act 1995* (the '**1995 Act**').

Look at the date tenancy was granted. As a general rule, any tenancy granted before 1 September 1995 will take effect as an AHA tenancy.

1.2 However, watch out for tenancies granted on or after 1 Sept 95, which do fall within the AHA regime rather than the 1995 Act, because of section 4 of 1995 Act which contains the following exceptions:

1.2.1 Tenancy is itself a succession tenancy derived from an AHA tenancy and was obtained by virtue of either a direction of the Tribunal or an agreed succession between the parties;

1.2.2 Tenancy granted by written contract entered into before 1 September 1995 (although it commenced after 1 September 1995) and written agreement indicates that AHA is to apply;

1.2.3 Tenancy arises by virtue of a surrender and re-grant of the whole or a substantial part of the land comprised in holding under previous AHA tenancy to the same tenant.

1.3 The final exception covers express surrender and re-grant situations, where a new written agreement is entered into; and also implied surrender and re-grants, where the parties are unaware that the effect of their arrangements, e.g. altering boundaries or adding land to the tenancy is to cause a surrender and re-grant at law.

Section 4 reduces the scope for tenants to inadvertently lose AHA protection.

2 **IF YOU ARE DEALING WITH AN AHA TENANCY, DOES IT CARRY SUCCESSION RIGHTS?**

2.1 Succession rights under Part IV of the AHA do not attach to all AHA tenancies.

They were introduced by the *Agriculture (Miscellaneous Provisions) Act 1976* on 14 November 1976. That Act conferred succession rights on all tenancies of agricultural holdings granted before or after that date. So it was retrospective and granted succession rights to tenancies already existing as at 14 November 1976.

2.2 BUT succession rights were later abolished by the *Agricultural Holdings Act 1984* (now consolidated within the AHA). The abolition took effect from **12 July 1984 (KEY DATE)** for tenancies created after that date. The Act left rights within existing tenancies untouched. It only had future application.

So if the tenancy was granted before 12 July 1984 it will carry succession rights. Any tenancies granted after that date will not, *subject to* some limited exceptions in

section 34(1) of the AHA (v. similar to 1995 Act provisions outlined in section 1 above).

3 DO ANY RIGHTS OF SUCCESSION REMAIN?

3.1 The AHA confers two statutory rights of succession (s.37 AHA). i.e.:

Original tenant - - - > Son (1st successor) - - - > Granddaughter (2nd successor)

3.2 Check how many rights of succession remain. Have there been any potential succession events to use up your quota?

Examples of succession events (set out in full within section 37 of the AHA):

- Previous direction of Tribunal granting a succession tenancy;
- Grant of an agreed succession tenancy by landlord to person(s) who would satisfy the "close relative" test laid down within the AHA (see below).
- Assignment of previous tenancy to a close relative of former tenant.

Note – if a joint tenancy is granted or assignment to joint tenants takes place, only one of the tenants needs to satisfy the close relative test. Also, one of them can be the former tenant. It will still count as a succession.

3.3 If there is a potential succession event to consider, **when** did it take place? Only succession events which occurred after 14 November 1976 will count (as that is the date the 1976 Act created the concept of succession) – *Kemp v Fisher [2009] High Court.* In addition the statutory provisions have been amended and consolidated since then, so you would need to check the provisions that were in force at the time, as well as those in force now.

4 APPLICATION OF SUCCESSION RULES

4.1 Two statutory schemes under Part IV of the AHA:

4.1.1 Succession on death (ss. 35-48 and Schedule 6 of AHA)

4.1.2 Succession on retirement (ss. 49-58 and Schedule 6 of AHA)

4.2 Succession applicants under either scheme must satisfy the First Tier Tribunal Property Chamber (Agricultural Land and Drainage) in England, and the Agricultural Land Tribunal in Wales, (together the "Tribunal") that they are:

4.2.1 Eligible; and

4.2.2 Suitable

to succeed to the tenancy.

4.3 Plus, if dealing with a succession on **death** application and Landlord has made an application for consent to operation of Case G notice to quit – the Tribunal must rule that consent should not be granted.

OR:

If it is a succession on **retirement** application and Landlord has made a greater hardship application – the Tribunal must have ruled that the Landlord has not succeeded in proving greater hardship.

5 ELIGIBILITY TEST – OVERVIEW

Applicant must satisfy a three stage eligibility test:

5.1 Close relationship.

5.2 Livelihood Test.

5.3 Commercial unit Test (until 1 September 2024, see below).

6 SUITABILITY TEST – OVERVIEW

If the eligibility criteria are made out, the applicant must then satisfy a three stage suitability test. The Tribunal will consider the applicant's:

6.1 Training and/or practical experience of agriculture.

6.2 Age, physical health and financial standing.

6.3 Any views of the Landlord on suitability – effectively limited to any comments Landlord has on the first two limbs of the test.

(The revisions of the Suitability Test will take effect from 1 September 2024, see below).

7 ELIGIBILITY TEST – RULES & PRACTICAL APPLICATION

7.1 Close Relationship Test

Applicant must be a "close relative" of the deceased/retiring tenant defined as:

- Wife, husband or civil partner;
- Sibling;
- Child of the deceased (not children-in-law);
- Person "treated as child" in relation to a marriage/civil partnership of which deceased was a party (must be a marriage/cp).

Sections 35 and 49 AHA

Practical points to be aware of:

Nieces and nephews excluded.

Children-in-law rule - may come into play if for example daughter of tenant farmer marries and her husband then farms in partnership with his father-in-law. On the father-in-law's death, only the daughter would satisfy the close relationship test. Only she could apply.

Grandchildren – Will not qualify. Care needs to be taken in long-living agricultural families that succession rights not lost by longevity; **cannot** skip a generation.

7.2 **Principal Source of Livelihood Test:**

In at least 5 out of the 7 years ending with the date of death/date of retirement notice, the applicant's **agricultural work** on the **holding** or a **unit of which the holding forms part** provided his principal source of livelihood.

Section ***36(3)(a) and s.50(2)(a)***

The Tribunal will compare all sources of livelihood, wherever they come from, and set outside sources of livelihood against internal sources.

Key point = *origin* of the income source.

'**Principal**' means more than 50%. The Applicant has to have 51% on-holding, agricultural income, as a minimum, in at least 5 of the 7 years.

Discontinuous periods are okay – provided the applicant satisfies the 51% threshold in at least 5 years in total.

3 years can be at college/university, but the applicant does **not** have to have studied agriculture or an agriculture related course. Those years will count towards the 5 years minimum period of principal source of livelihood.

Useful provisions:

If the applicant is the widow/civil partner of the deceased/retiring tenant, they can derive their principal source of livelihood from their own work, their partner's work, or both: ss.36(4) and 50(3). This allows you to clump together both their earnings from the holding.

NB: these provisions do not apply to widowers – Equality Act issue?

7.3 **Practical application of the test:**

7.3.1 **Agricultural Work**

No real consensus about what this means among the various Tribunal decisions. Some cases found that the work has to be manual to count as 'agricultural'. Others have said that it could be a mixture, so book

keeping/secretarial work would count. Others still have held that manual work is not essential at all.

This area was often an issue when the applicant was the former tenant's widow. However ss.36(4) and 50(3) have remedied that problem in many cases.

The best approach is that any form of work which contributes to the promotion of the farming/agricultural business and income of the business will count.

In addition, be aware of diversified enterprises which may not be 'agricultural' – e.g. livery or solar. See explanation below re. impact of diversification.

7.3.2 **Work on the holding/home unit**

NOT LIMITED TO THE SUBJECT HOLDING. Look at the whole unit farmed by the applicant at date of death/date of retirement notice. What land did it comprise *at that point in time*? Income derived from that entire unit will qualify as 'internal' on-holding income – so it counts towards the applicant's 51%.

NB: If, during the relevant 7 year period, more land was originally owned but was disposed of or a tenancy came to an end, any income derived from that former land will be treated as an outside source of livelihood for the whole period.

7.3.3 **Outside income v Internal income:**

Key Question: Does the source of income come from 'agricultural' work **and,** if yes, was that agricultural work undertaken **on the holding**?

Possible problem areas (non-exhaustive): contracting; haulage; livestock dealing; holiday lets; solar.

Contracting work - although agricultural, may not be agricultural work on the holding so may not count towards applicant's principal source of livelihood.

It is possible that it could count though, depending on how closely connected it is to the main holding. It will be a question of fact and degree in each case. For example, is all the machinery stored on the holding and also used there? How is the income from the contracting dealt with? Are the two enterprises entirely separate?

Outside contracting was held to be qualifying agricultural work on the holding for the purposes of the principal source of livelihood test in *Sandercock v Sandercock (2000) ALT,* but Tribunal decisions are not binding and each case will be very dependent on its own facts. It could easily go the other way as well.

Look out for clearly non-agricultural, outside income e.g. investment properties. That would be an external source which must be set against on-holding income for purposes of meeting 51% threshold.

7.3.4 **Diversification:**

Since the TRIG reforms in October 2006 (and with effect from 19 October 2006), income derived from off-holding agricultural work, or non-agricultural work carried out on or from the holding, can count as "internal" income for the purpose of the source of livelihood test, provided that specific written consent has been obtained from the landlord.

So income from diversified enterprises which would otherwise be treated as an external source of livelihood can count towards the 51% threshold in some circumstances.

NB: The reforms were not retrospective: pre-existing consents in place before October 2006 are insufficient.

It is often the most vibrant and successful enterprises that diversify. Prospective applicants need to obtain consent from landlord – it should form part of the succession planning exercise. However there is arguably little incentive for landlords to provide consent if that then helps a succession case. Although there would be a commercial argument in favour if it would assist with rental receipts.

7.3.5 **Livelihood:**

This looks at how the applicant funds his **day to day living costs**.

Trinity College, Cambridge v Caines (1983)- In that case the court held that 'livelihood' meant "what the applicant spends or consumes on his ordinary living expenses". Capital expenditure on things like pensions, savings and capital mortgage payments would not count as money spent on 'livelihood'.

ALSO – KEY POINT: 'Source' of livelihood is not just limited to cash wages or drawings. All **benefits in kind** that are obtained by virtue of the applicant's work on the holding will count: *Littlewood v Rolfe [1981]*. As such, benefits such as rent free accommodation; food; fuel/motoring costs; utilities would all contribute towards the 51% principal source of livelihood test provided they came from the holding. The reasoning is that they are all day to day living expenses funded by the holding.

7.3.6 **Pooling of spousal income:**

In the case of *Littlewood v Rolfe [1981],* the court added the income of the applicant and her spouse together because that was how their income was dealt with in practice. The case established a precedent that where husband and wife do live on an entirely joint basis, you can't approach the question of source of livelihood in two separate compartments. You may need to look at all of their income in the round.

When applying the principal source of livelihood test, you need to assess whether each item of 'livelihood' was paid for by money/benefits in kind derived from the applicant's agricultural work on the holding (drawings/benefits in kind). Adding all of those items up, is the 50% threshold satisfied then for the requisite 5 years?

If applicant's spouse has a high paying job elsewhere, that could cause problems. A detailed analysis of where all their income comes from and what it is used for will be required. Ideally, the applicant needs to use all of his/her income from the holding for day to day living expenses/livelihood items, and focus the spouse's off holding income into long term capital investments like pensions.

This is a potentially important area to consider if your clients are succession planning.

7.3.7 **Actual Wages/Drawings:**

It is what the applicant has actually been living off that is important, so undrawn profits if the applicant is a partner in the farming business will not count because they have not formed part of his livelihood/day to day cost of living. Although he had that money available to him, he did not actually spend it.

However wages/drawings financed by an overdraft will count, provided the applicant only has access to them because of his work on the holding/as payment for his work. It is not a problem if the business was doing poorly for the purposes of the livelihood test – even if wages were funded by an overdraft, they contributed to the applicant's livelihood. The funding problems may be relevant to the Suitability test though (see below).

Succession planning may affect how money is re-invested in the business. It may be more important to draw it out and use it.

7.3.8 **Married Daughters:**

If her husband works on the holding, his income will not count towards her principal source of livelihood. Sections 36(4) and 50(3), which help widows of former tenant in this situation, are not applicable to daughters.

Applicant daughter has to satisfy the Tribunal that her own principal source of livelihood has come from her agricultural work on the holding, rather than their husbands. Husband cannot apply because he does not satisfy close relative definition.

7.4 **Application to be treated as eligible (section 41)**

NB: only available in application for succession on death (not retirement).

If the applicant is concerned that they may not satisfy the principal source of livelihood test, they can apply to be *treated as eligible* under section 41 AHA.

The section 41 application will only come into play if applicant fails to satisfy the main test. It only relates to 'source of livelihood', so the applicant would still have to satisfy the other limbs of the eligibility test.

Under s41, applicant must satisfy the Tribunal that he meets the principal source of livelihood test to 'a material extent'.

> *'material extent'* = contribution to the applicant's livelihood derived from his agricultural work on the holding must be substantial in terms of time and important in terms of value.

In considering the application the Tribunal will take an overall view across the whole 7 year period. A shortfall of as much as 50% from compliance with the full test can, in some cases, amount to compliance 'to a material extent'. Also, satisfying it in 3 out of 7 years was sufficient in *Raines Trustee v Raine (1985)*.

If the Tribunal is satisfied that the principal source of livelihood test **is** satisfied to a material extent, **then** the Tribunal moves on to stage two and applies a *'fair and reasonable test'* to decide whether the applicant should be treated as eligible. This second limb of the test is discretionary.

Timing: the application must be made within 3 months of date of death (so effectively at the same time as the main application): *Townson v Execs of Waddington Dec. (2009) Tribunal.* This is a strict statutory time limit.

Always apply under s41 as well! It is a very wise precaution and should be done at the outset – the application can simply be drafted in the alternative, without prejudice to the applicant's primary contention that he is eligible. The application cannot be made out of time if it transpires later on in proceedings that the principle source of livelihood test is not satisfied.

7.5 Commercial Unit Test

7.5.1 Reform Under the Agriculture Act 2020

Pursuant to the Agriculture Act 2020, Regulations abolishing the Commercial Unit Test will take effect from 1 September 2024.

From then, applicants will only have to satisfy a two-stage eligibility test; the close relationship test and the principle source of livelihood test.

The changes will apply to applications where the date of death or the date of the giving of the retirement notice is on or after 1 September 2024. The existing rules will apply to all applications in advance of that date.

The new Regulations relate to England only. New provisions are expected to be brought in for Wales.

7.5.2 The Commercial Unit Test Currently in Force (up to 1 September 2024)

The applicant must show that he is not the occupier of a commercial unit of agricultural land: s.36(3)(b) and s.50(2)(b)

The test EXCLUDES THE SUBJECT HOLDING. You are considering what other land, beyond the subject holding the succession application relates to, is being farmed by the applicant/partnership/farming company the applicant is linked to.

'Commercial Unit' = a unit capable, when farmed under competent management, of producing a net annual income equivalent to the average annual earnings of two full time male agricultural workers.

No published figures for what = "average annual earnings of two full time agricultural workers". In 2011, in *Horton v Crown Estate Commissioners,* it was accepted as being just under £41,000.

The net annual income is calculated on the basis of a notional productive capacity, by reference to Units of Production Orders. These Orders are produced by Parliament annually, so the figures change year on year. What year an application is made can affect whether an enterprise is deemed to be a commercial unit, as the profitability of farming and commodity prices fluctuate.

The commercial unit test looks at what enterprise would be adopted/established on the land by competent management, taking account of current economic or other relevant conditions, and then considers what the **notional** annual income for that enterprise would be in the year in question.

Note therefore that it may not be the enterprise actually undertaken on the unit that the assessment is based on, and it certainly won't be based on actual income, but instead on the notional income as per the relevant Units of Production Order.

Subsidies/CAP payments are taken into account and form part of the figures set out within the Order.

When applying the test, you need to look at the unit the applicant/partnership farms at the date of death **and** at the date of the Tribunal hearing. The applicant must satisfy the Tribunal that he has not occupied a commercial unit throughout that entire period.

This rule can cause problems if the deceased tenant owned land which is then left to the applicant under his will. If it is a big enough unit, the newly inherited land could disqualify the applicant. Succession planning is very important!

7.5.3 **Application of Test: STAGE 1:**

Start off by considering what land is farmed or occupied beyond the subject holding

You then need to establish the **basis of occupation** of that land.

Some forms of occupation are disregarded because the applicant does not enjoy *security of tenure (see paras 6 and 7 of Schedule 6 AHA), e*.g.:

- Grazing agreements;
- licences;
- contract farming agreements;
- Periodic FBTs;
- FBT for fixed term of **less than** 5 years.

Note that FBT's for a term of 5 years or more but with less than 5 years remaining do count and will be considered. All AHA tenancies will count.

Be aware that this approach to short term/non-secure occupation works both ways. Although it can work in applicant's favour and provides a way to structure land occupation in a non-disqualifying manner, the flip side is that land owned by an applicant and let on a short term/non-secure basis to a 3rd party, (i.e. a 3 yr fixed term FBT, or grazing licence), will be deemed to be occupied by the applicant for the purposes of the commercial unit test, although at the relevant time he isn't actually in occupation of it. So, applicants cannot divest themselves of a potentially disqualifying commercial unit by letting it on a non-secure, short term basis whilst application is ongoing.

If the applicant occupies the land in question (e.g. through ownership or fixed term FBT/AHA tenancy) the position is clear

BUT beware also the concept of 'deemed occupation' in the following situations:

- Occupation by spouse = occupation by applicant.
- Occupation by company **controlled** by applicant or spouse = occupation by applicant
- Joint occupation – e.g. Joint tenancies or joint land ownership.

  Applicant treated as occupying whole, but income attributable to the land is split between the joint occupiers (% split dependent on their respective shares);

  So if applicant has 60% ownership stake and brother a 40% stake, income will be split on that basis.

  This means that if a unit is jointly owned by three people in equal shares, it will have to be a commercial unit three times over to disqualify the applicant. **But,** remember that if one of the joint owners

is the applicant's wife, two thirds of the income would be attributed to the applicant in that scenario.

- Sole occupation – If tenancy is in name of one partner or land is owned by one partner in the business, **but it is occupied by the partnership and the rent paid by partnership,** the partner who is named tenant/owner is deemed to be holding it on trust for the other partners. The applicant, in his capacity as a partner, will then be deemed to occupy the whole alongside his other partners, and the income derived from that land will be split according to their partnership shares: *Keene v Guys & St Thomas'(2005) ALT* (so if 40/40/20 split in partnership profits, income from land will be split on those lines too). Effectively it works in the same way as the joint ownership/tenancy scenario.

Applicants in succession on death situation are often worse off because commonly left land by deceased tenant under his/her Will – means they become an owner/occupier and that could be a disqualifying commercial unit under Stage 2…

7.5.4 **Application of Test: STAGE 2:**

Combine all the land that has not been disregarded and consider what enterprise 'competent management' would conduct from that unit.

Then, taking into account the applicant's shares in the land in question, apply the relevant Units of Production Order to that enterprise.

Does the land generate enough income to be a disqualifying commercial unit?

Generally you need a large acreage (over 400 acres as **very** rough guide) and good facilities BUT intensive farming enterprises on a much smaller unit could generate enough income.

You will need to run the figures using the current Units of Production Order before you can advise.

8 SUITABILITY TEST – RULES & PRACTICAL APPLICATION

8.1 Reform Under the Agriculture Act 2020

Pursuant to the Agriculture Act 2020, a new suitability test will be introduced from 1 September 2024. The existing provisions will be revoked and replaced with the following:

"When determining … whether a person is suitable to become the tenant of a holding … the Tribunal must have regard to all relevant matters including—

(a) the person's likely capability and capacity to farm the holding commercially, with or without other land, taking into account the need for high standards of

efficient production and care for the environment in relation to managing that holding;

(b) the person's experience, training and skills in agriculture and business management;

(c) the person's financial standing and their character;

(d) the character, situation and condition of the holding;

(e) the terms of the tenancy,

and having had regard to all relevant matters, the Tribunal must be satisfied that, if the applicant had applied in an open competition for [a 1986 Act tenancy of the holding]…, a prudent and willing landlord could reasonably be expected to regard the applicant as among the candidates to whom they would be willing to grant the tenancy."

The new provisions state that *"the Tribunal must disregard—*

(a) all offers as to rent in relation to the holding;

(b) the age of the person applying."

The new regulations relate to England only. New regulations for Wales are also expected.

8.2 **The Current Suitability Test in Force Until 1 September 2024**

Suitability is a 3 limb test - (s.39(8) and s.53(6) AHA 1986):

- Training and/or practical experience of agriculture;
- Age, physical health and financial standing;
- Views of landlord on suitability.

It is for the applicant to provide evidence to prove that he is suitable.

The Tribunal has wide discretion in considering suitability. They must have regard to 'all relevant matters'.

8.2.1 **Training/Practical Experience:**

NB: it is an either/or provision.

Factors to consider: practical experience on the holding/farming generally; extent of applicant's involvement in management decisions and day to day farming decisions; any relevant agricultural qualifications.

The Tribunal will look at how competent the applicant would be to take on tenancy, having regard to his experience/training to date.

8.2.2 **Age, Health and Financial Standing:**

Any health issues will be considered but if they are properly managed, even quite severe problems may not be an issue.

The fact that an applicant may be beyond retirement age or very young will not necessarily be a determining factor.

The Tribunal will consider the future business plans of applicant, his available capital etc. They will want to be satisfied that a viable business can be run from the holding/the unit it forms part of.

If there is an existing partnership or farming company which will continue under new tenancy/tenant and it is adequately capitalised that is sufficient. The applicant himself does not have to have capital at his sole disposal.

8.2.3 **Landlord's Views:**

IE: Landlord's views on suitability of the applicant (effectively on the first two limbs of the test). This part of the test does not introduce any additional criteria, but confirms that the landlord's views/opinion should be taken into account.

No one factor likely to be conclusive, the Tribunal will look at matters in the round and take an overall view.

9 PROCEDURAL RULES - SUCCESSION ON DEATH

AHA 1986 sections 35-48 & Schedule 6

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (Applicable in England)

The Agricultural Land Tribunals (Rules) Order 2007 (Applicable in Wales)

9.1 Since 2013, the rules have been different between England and Wales; this impacts on procedural time limits and application forms and it is vital that the correct Regulations are referred to when dealing with an application.

9.2 Appropriate Tribunal:

- **England –** The First-Tier Tribunal (Property Chamber) (Agricultural Land and Drainage).
- **Wales –** Agricultural Land Tribunal Wales.

Application must be made within 3 months of date of death of deceased tenant on prescribed form: TASD111 in England, TA10 in Wales.

- Strict time limit for making application – statutorily prescribed; cannot be extended

- **NB:** time limit for s41 application is the same
- Application must be served on landlord at same time that it is lodged with Tribunal
- If landlord wishes to oppose application, must complete and file Reply with Tribunal:
    - within 28 days of receiving application (in England) on Form TASD121;
    - within 1 month of receiving application (in Wales) on Form TA11.

Well advised landlords should always serve a reply opposing application in order to protect position, even if they are intending to agree a succession. It allows time to consider the applicant's case/supporting documentation in case anything further comes to light. Often only minimal paperwork is lodged by the applicant at the outset. Reply allows landlord to request further information to allow him to assess strength of application.

10 LANDLORD'S CASE G NOTICE TO QUIT

10.1 The Case G Notice

Landlord can and always should serve a Case G notice to quit on the Executors of the deceased tenant who held an AHA tenancy. The right to serve the notice arises because of the death of the tenant. It is served on the Executors because legally the tenancy vests in them upon the tenant's death.

It is not directly linked to succession and should be served in relation to **all AHA tenancies**, not just succession tenancies.

Timing: Case G Notice must be served within 3 months of receiving formal written notice of the tenant's death from or on behalf of the Executors **or** notice of an application for succession (whichever happens first)

Case G notices are incontestable, and once served, will bring to an end the current tenancy once the relevant notice period expires, regardless of whether a successful succession application is made. But they do not have a direct impact on any **new** succession tenancy granted.

If advising the Landlord, you must serve a Case G in case no succession application lodged or because it might not succeed. Otherwise you are left with a tenancy vested in the Executors indefinitely.

10.2 Application for Consent to Operation of Case G Notice

A landlord who has served a Case G notice to quit can bring it into play in the succession proceedings, by 'seeking consent' from the Tribunal for the operation of his notice to quit.

If the applicant is then found eligible and suitable as a result of the Tribunal process, the landlord can seek to pursue his application for consent to operation of the Case G notice to quit. In doing so, he will be arguing that despite the Tribunal ruling that the applicant is entitled to a succession tenancy, for reasons linked to the landlord's circumstances, the new tenancy should not be granted. The landlord will effectively be saying that his position should override that of the successful applicant.

Landlord must satisfy one of the six grounds in s.27(3) of AHA:

- good husbandry;
- sound estate management;
- agricultural research/education;
- greater hardship;
- land required for a non-agricultural use;
- allotments.

If landlord satisfies one of those grounds, the Tribunal will only grant consent if it is also satisfied that a "fair and reasonable landlord would insist on possession:" (s.27(2)).

It is for Landlord to provide his case and produce evidence in support. Applications for consent are very rarely deployed successfully but should always be considered.

Greater hardship is the only ground really used, and due to the two stage test, there are very few examples of it being used successfully. Particularly bearing in mind that the applicant will have already satisfied the Tribunal that he should be granted a succession tenancy. The Tribunal is effectively balancing hardships, and the balance very rarely falls on the side of the landlord.

Timing: Landlord must make application to Tribunal for consent to operation of notice to quit within 2 months of the expiry of the deadline for lodging the succession application itself (i.e. within 5 months' of date of death).

If there are multiple applications, the time-limit is 2 months after the number of applications is reduced to one.

NB: Deadlines are 4 months and 1 month respectively in WALES

Landlord can make an application to protect his position, but it is usually only advisable if he thinks he will manage to make out one of the grounds. The test is hard to satisfy and the landlord has to adduce a large amount of evidence, so it is not just an application to throw in on the off chance. Consider carefully whether it has a prospect of success. May still be worth it as a protective measure.

In retirement applications, landlord can make an application on the basis of greater hardship only (see notes below)

11 SUCCESSION ON RETIREMENT:

11.1 The retiring tenant must nominate one proposed successor only cf. death applications, when multiple people can apply separately.

11.2 Eligible & Suitable?

The same tests must be satisfied by the applicant as is the case in a succession on death application re. eligibility and suitability (see discussion above).

However, there are some minor differences to be aware of -

- No ability to make **section 41 application** on retirement succession – so no opportunity to apply to be treated as eligible as a fall back.
- **Principal Source of Livelihood** – has to be satisfied in at least 5 out of 7 years ending with date of retirement notice. That is the relevant date to look at. *Shirley v Crabtree [2008]; Downs v Kingsbridge [2017].*
- **Commercial unit test** – If the retiring tenant owns a commercial unit, that will not disqualify the successor on retirement. So a possible reason to opt for a retirement application if a potentially disqualifying commercial unit will be inherited by successor on tenant's death – it would prejudice a succession on death application.

12 SUCCESSION PLANNING – DEATH OR RETIREMENT APPLICATION?

12.1 The point relating to inheritance of land and the commercial unit mentioned in Section 11 above is one reason why succession on retirement may be preferred.

In addition, succession on retirement is a useful tool for long-living farming families where it is possible that the successor could be reaching the age of retirement/suffering from ill health by the time the original tenant dies. The successor can satisfy the tests now, it may be worth considering making an application on retirement. If there are eligibility issues though, the lack of opportunity to apply to be treated as eligible under s41 may mean it is sensible to wait and apply on death.

Retirement successions are also very important if the tenancy is currently in the name of joint tenants, and only one of them has sons/successor. In the retirement scenario, the applicant only has to satisfy the close relationship test as regards **one** of the tenants. This allows families to secure the succession for the next generation before either of the joint tenants die. Because if the wrong one dies first, no succession on death is possible, as you can only make succession on death application in relation to the sole surviving tenant.

12.2 Reforms Under the Agriculture Act 2020

Pursuant to the Agriculture Act 2020, there is no longer a minimum age requirement for serving a retirement notice. The retirement age of 65 is still in force in Wales.

12.3 **Trial Run**

If the applicant is **unsuccessful** at a retirement succession hearing, he cannot apply again **on death.**

BUT if the application is **withdrawn** before the hearing he will not be barred from making a further application.

12.4 Succession on retirement therefore represents a good opportunity to have a trial run at the succession process. If it becomes clear that the applicant will fail the eligibility or suitability test as the matter proceeds, he can withdraw prior to the hearing. The application is then treated as if it had never been made. The applicant can then make a new retirement application in due course, or an application on death when the time comes. Consider legal and professional costs of aborted application though.

13 **PROCEDURAL RULES - SUCCESSION ON RETIREMENT**

13.1 The retiring tenant must serve a retirement notice (at least 12 months duration, expiring on term date – as per notices to quit) nominating one proposed successor only.

The nominated successor must apply to Tribunal for new tenancy within 1 month of retirement notice (on form TASR211 in England; Form TA14 in Wales).

If landlord wishes to oppose application, must complete and file Reply with Tribunal:

- within 28 days of receiving application on Form TASR221 (in England);
- within 1 month of receiving application on Form TA14 (in Wales).

13.2 **Greater Hardship**

If the applicant is found eligible and suitable, the landlord has opportunity to establish 'greater hardship'. These are very similar to the provisions for Case G notices on death, but only the greater hardship ground is available on retirement.

The landlord must make the application for greater hardship at the time of filing his reply. If the applicant is successful, the landlord may then able to make representations to try and satisfy Tribunal that greater hardship would be caused to the landlord by granting a succession tenancy than would be caused to the applicant by refusing the application.

As with applications for consent to notice to quit on death, the landlord must present evidence to show the hardship that he would be caused, and as in that situation, it is very difficult to establish greater hardship. It may not be sensible to pursue if there is in fact no prospect of succeeding.

14 **TERMS OF NEW SUCCESSION TENANCY**

14.1 Starting position: the new tenancy will be on the same terms as the previous tenancy.

14.2 However, either landlord or tenant can refer the terms of the tenancy to arbitration, or they can agree new terms between themselves: sections 46 & 47 and s.56.

They can also refer the rent payable from start of new tenancy to arbitration under these provisions.

Any reference to arbitration must be made within 3 months of grant of new succession tenancy.

14.3 Reasons to seek to agree new terms:

- If oral tenancy, seek to put it in writing for certainty (could also achieve this by serving a section 6 notice on the new tenant – no time limits then);
- Do the terms of the tenancy require updating/modernising/adding to?
- An Arbitrator will look at what variations in the terms are justifiable having regard to the circumstances of the holding now and the length of time since the holding was let on the original terms.
- It may be beneficial to seek a rent review at grant of new tenancy, otherwise have to wait for usual 3 year cycle. Arbitrator will apply usual section 12 provisions for rent review.

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