

National Tutorial 2023

SUCCESSION

MODEL ANSWER

This is an Outline Answer, covering the points raised in a very broad problem, covering more content than might be covered in an exam question tackled in 40 minutes.

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

USUAL FOCUS POINTS IN EXAM:

- (a) **Process** for making a succession application and **action** an applicant/ landlord would need to take.
- (b) The **legal tests** an applicant will need to satisfy.
- (c) The applicant's prospects **of success** – *apply facts in the exam question to the legal tests*. Identify any problem areas and draw conclusions.
- (d) **Case G process**– Where you are looking at succession on **death**, action points + deadlines for landlord.

1 THE BASIC STATUTORY FRAMEWORK

1.1 Identifying whether the tenancy has succession rights

- 1.1.1 If the tenancy was granted before 1 September 1995 (so AHA applies); and
- 1.1.2 Before 12 July 1984 (when the AHA 1984 abolished succession rights) then there are potentially **two** rights of succession.
- 1.1.3 **NB:** there are exceptions to the above: section 4, Agricultural Tenancies Act 1995 and section 34(1) of AHA 1986. [See Detailed Notes]

1.2 What is the AHA 1986 criteria for succession?

- 1.2.1 Succession on death is set out in ss 35-48 and Schedule 6 AHA 1986.
- 1.2.2 Succession on retirement is set out in ss. 49-58 and Schedule 6 of AHA 1986.
- 1.2.3 Succession applicants must satisfy the test that they are both **Eligible** (Close Relative; derive their Principal Source of Livelihood from the Holding/wider unit; and Commercial Unit Test (until 1 September 2024, when

the Commercial Unit Test will no longer form part of the eligibility test) and **Suitable** (Training/ Practical Experience; Age, Physical Health and Financial Standing; and Landlord's Views on Suitability) to succeed to the tenancy. (The Suitability test will also be revised from 1 September 2024).

1.3 We would need to review the tenancy agreements to confirm the position but on the face of it, as the tenancy to Brian's father was granted in 1965 then the tenancy would carry two succession rights. Brian succeeded to the tenancy in 1990 so there would be one potential succession remaining.

1.4 Here, we could be dealing with a succession on retirement or death.

1.5 **Could a Retirement Notice be served?**

1.5.1 Where an existing tenant wishes to retire, they must serve a retirement notice (at least 12 months duration, expiring on the term date – as per notices to quit) nominating one proposed successor only. Brian could only nominate one of his daughters.

1.5.2 The Agriculture Act 2020 ("AA 2020") deleted s.52(3) AHA 1986 so that an applicant can now refer a succession on retirement application to the Tribunal regardless of the age or state of health of the retiring applicant (NB: Prior to the amendments made by the AA 2020 a retiring tenant had to be at least 65 years of age at the date when the retirement notice was to take effect, or permanently physically or mentally incapacitated).

1.5.3 A valid retirement notice could be served.

1.6 **Succession on Death**

1.6.1 The succession application must be made within 3 months of the date of death of the deceased tenant in the Tribunal's prescribed form. The time limit is strict and cannot be extended.

[NB: time limit for s41 application is the same.]

1.6.2 The application must be served on the landlord at the same time that it is lodged with Tribunal.

1.6.3 If the landlord wishes to oppose the application, they must complete and file the Reply with Tribunal: within 28 days of receiving application (in England).

2 **AN EVALUATION OF POSSIBLE SUCCESSORS – JOLENE AND RUTH**

2.1 The qualifications on both succession applications on retirement and death follow each other closely, although there are some important distinctions.

2.2 Jolene and Ruth would need to satisfy the Tribunal that they are both **eligible** and **suitable** to succeed to the tenancy.

2.2.1 **Eligibility Limb 1 = Close relative test (wife/ husband/ sibling/ child of the deceased (person treated as child. Not children-in-law)**

As Brian's daughters, both Jolene and Ruth satisfy the close relative test.

2.2.2 **Eligibility Limb 2 = Livelihood test**

In at least 5 out of the 7 years ending with the date of death [or the date of the retirement notice] the applicant's agricultural work on the holding, or the unit it forms part of, constituted his/ her principal source of livelihood.

2.2.2.a At least 5 years in total: discontinuous periods are OK.

2.2.2.b **Education:** A period not exceeding 3 years out of 7 which the applicant was engaged on a full time course at university, college or other establishment of further education is to count towards the 5 year minimum period of principal source of livelihood.

2.2.2.c **Livelihood:** What the applicant spends or consumes on his ordinary living expenses. It is wider than monetary income – includes **benefits in kind**. E.g. provision of accommodation; vehicles; payment of bills. Vital component in many applications. Capital expenditure on pensions, savings and capital mortgage payments do not count as "livelihood".

2.2.2.d **Agricultural Unit:** Look at income/livelihood derived from whole agricultural unit not just the subject holding. In this case, we are not aware that Home Farm forms part of a wider agricultural unit. However, we would need to ask about this.

2.2.2.e **Principal:** = more than 50%.

2.2.2.f **Agricultural work:** = manual agricultural work; bookkeeping and accounts; management/strategic decisions. Must be **on the agricultural holding** or the unit of which it forms part.

2.2.3 **REMEMBER:** You need to consider what the applicant has actually been living off and what proportion of that 'livelihood' has been derived from the applicant's agricultural work on the unit

2.2.3.a It is a test of **economic dependence**. It is not sufficient for the applicant to be entitled to the partnership drawings; undrawn profits do not count. The applicant must take a wage/ draw from the business and use that money to fund livelihood expenditure.

2.2.3.b Tribunal is looking at **livelihood** – what the applicant has used to live off, in terms of day to day living expenses.

2.2.3.c General consensus is that life's luxuries and long term planning e.g. pension contributions, do not = livelihood. **So**, if an applicant's income has always been channelled towards luxury one off holidays, savings/pensions, payment of school or university fees, that will not form part of his livelihood for

purposes of principle source of livelihood. A key point to check and a key point to advise clients if they are at the start of this process in terms of planning.

2.2.4 Quick review of Jolene's position

2.2.4.a We know that Jolene works full time on the Farm and has done so for a period of over 10 years. We do not know whether the Aldridge family are farming under a family partnership by which Jolene is a partner and receiving drawings from the Partnership or whether she is employed and paid wages.

2.2.4.b In practice a detailed analysis of such income/benefits in kind would be needed so that can be compared against any "external income". For example: What salary does Jolene take? What benefits in kind is she receiving and what value can be ascribed to those.

2.2.4.c In terms of benefits in kind, we know she lives in a farm cottage but it may be she is provided with other benefits in kind such as motor vehicles and fuel. Either way, if Jolene does not receive any other form of income other than that derived from her work on the Farm then it is unlikely that she funds her livelihood from other sources.

2.2.4.d It is likely that Jolene would satisfy this limb of the test.

2.2.5 Quick review of Ruth's position

2.2.5.a Ruth is 25, so it is very possible that she has been engaged in further education in 3 of the last 7 years, in which case, that will count towards the 5-year minimum period for the principle source of livelihood test. The applicant can still utilise this even if they have not studied agriculture or a related course.

2.2.5.b However, we know that she works full time as a primary school teacher. We would need to consider Ruth's position further on receipt of further information as we do not know if she derives any income or benefits in kind from her limited work on the Farm. It is probably unlikely that she is economically dependent on the Farm given that she works full time as a primary school teacher. As such, it is looks unlikely that Ruth will satisfy the principal source of livelihood test at present

2.2.6 **DON'T FORGET Spousal income** – We are not told that Jolene has a spouse. If she does, any income her spouse has may be pooled with applicant's income and the Tribunal may consider their joint income in the round if that reflects how the income is dealt with in practice. If applicant's spouse has a high paying job off the holding that may present problems. It must be the applicant's income from the holding that is used for livelihood expenditure.

2.2.7 On death - Section 41 application to be treated as eligible

If this is a succession on death application, Jolene and Ruth could ask to be treated as eligible if they don't satisfy the principal source of livelihood test, but satisfy it to a material extent.

THIS DOES NOT APPLY TO RETIREMENT APPLICATIONS.

2.2.8 Eligibility Limb 3 = Commercial Unit test

Jolene/Ruth must show Tribunal that they are **not** the occupier of a commercial unit of agricultural land EXCLUDING THE SUBJECT HOLDING

NB: *Following the introduction of new regulations pursuant to the Agriculture Act 2020, from 1 September 2024 the commercial unit test will no longer form part of the eligibility test. The changes will apply to applications where the date of death/ is on or after 1 September 2024.*

"Commercial Unit" = a unit capable, when farmed under competent management, of producing a **net** annual income equivalent to the average annual earnings of 2 full time male agricultural workers (£42k approx.). NOT an assessment of how the land is currently farmed but how it could be farmed (notional productive capacity).

2.2.8.a You need to look at all of the land occupied by the applicant **except for Home Farm**. We are not told that Jolene or Ruth occupy any other land. We would need to make enquiries to establish this.

NB: Any occupation arrangements which do not provide longer term security to the applicant will be disregarded for purposes of Commercial Unit Test, **e.g.** Grazing Agreements/Licences; Fixed term FBTs of less than 5 years; Periodic FBTs.

2.2.8.b **Remember that there are 'Deemed Occupation' rules as well**

***Occupation by Spouse** = occupation by Applicant.

***Joint occupation** = Applicant treated as occupying whole, but income attributable to the land is split between the joint occupiers (% split dependent upon their respective shares).

***Occupation by Partnership** = same as joint occupation rules. Income will be split between partners, depending upon their % shares in partnership.

***Land owned by the Applicant:** will be deemed to be occupied by the applicant for the purposes of the commercial unit test even if the applicant is not occupying the land if it is let on a short term/ non secured basis to a third party.

Again, we have no information about Jolene or Ruth's position but this will not be an issue if an application is made after 1 September 2024.

N.B. 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 is if a potentially disqualifying commercial unit will be inherited by successor on tenant's death – it would prejudice a succession on death application. We have not been given any details of what other land is occupied or owned by Brian as the potential retiring tenant to see if this would be a relevant consideration here.

2.3 Suitability Test

Another 3 limb test:

2.3.1 **Training and/or practical experience of agriculture;**

2.3.2 **Age, physical health & financial standing;**

2.3.3 **Landlord's** views on suitability.

2.3.3.a Tribunal has a wide discretion when determining suitability: will consider "*all relevant matters*"

2.3.3.b Tribunal will want to look at how competent the applicant is to take on the tenancy – it will consider their future business plan and budgets – Tribunal needs to be satisfied that Applicant can run a viable business from the Holding/unit it forms part of and that the Applicant is of good financial standing. The Tribunal will consider whether there is an existing business that will continue under new tenancy? Crucially, is applicant adequately capitalised / financially supported?

We have very little information regarding Jolene's suitability. However, we know that she has farmed the holding since finishing agricultural college at 18 and has worked full time on the Farm ever since.

This is likely to stand her in good stead, but the Estate would need to request further information as to her financial position and ability to manage the business moving forwards, including her business plans. We do not have any further information as to her physical health or fitness.

As regards Ruth, there are questions over her suitability given that it appears she has far less practical experience of agriculture than Jolene and she works full time as a primary school teacher. We do not have any further information as to her physical health or fitness. We would also need further information as to her financial standing.

Given Ruth's present work off the Farm, the Landlord is likely to put forward a strong view as to her suitability.

NB: Regulations brought in pursuant to the Agriculture Act 2020, set out the details of the revised suitability test which comes into effect from 1 September 2024. The changes will apply to applications where the date of death/retirement notice is on or after 1 September 2024 (see Detailed Notes for information on the new test).

2.4 Overall conclusion

- 2.4.1 Whilst there are two possible successors, it certainly looks likely that Jolene has a real prospect of succeeding to the tenancy either on retirement or death.
- 2.4.2 Remember it could be some years until an application has to be made and if financially viable for the farming business, steps could be taken to make Ruth a more viable prospect.

3 ADVICE ON STRATEGY

- 3.1 The Estate need to accept that there is a real prospect that Jolene would be able to succeed to the tenancy.

IF BRIAN DIES:

3.2 Case G Notice to Quit

- 3.2.1 If Brian dies, the most important advice for the Estate is to ensure that a Case G Notice to Quit is served following Brian's death.
- 3.2.2 **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).
- 3.2.3 The Landlord must serve a Case G in case no succession applications are lodged or because an application might not succeed. Otherwise, the landlord is left with a tenancy vested in the Executors indefinitely.

3.3 Succession Application – on death

- 3.3.1 If Jolene and Ruth make an application to succeed, the Estate must ensure that a response is filed within 28 days of receiving the application.
- 3.3.2 The information provided by Jolene and Ruth, particularly related to the principal source of livelihood test, should be scrutinised and verified against the supporting evidence (i.e. bank statements and tax returns).

3.4 Application for Consent to Case G Notice to Quit

- 3.4.1 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.
- 3.4.2 Landlord must satisfy one of the six grounds in s.27(3) of AHA:
 - 3.4.2.a good husbandry;
 - 3.4.2.b sound estate management;

- 3.4.2.c agricultural research/education;
 - 3.4.2.d greater hardship;
 - 3.4.2.e land required for a non-agricultural use;
 - 3.4.2.f allotments.
- 3.4.3 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)).
- 3.4.4 It is for the landlord to prove his case and produce evidence in support. Applications for consent are very rarely deployed successfully but should always be considered.
- 3.4.5 **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.
- 3.4.6 In this case, whilst we know the Estate has aspirations for various developmental and environmental schemes across the entire portfolio and that there is part of Home Farm required for David's research lab, that is not required for agricultural research. It is very difficult for landlords to establish the grounds required to satisfy the Tribunal and should not be pursued lightly given the cost and uncertainty of the outcome. Further, pursuing a Case B Notice to Quit is likely to be more straightforward than a consent to the operation of the Case G Notice to Quit even if Jolene (or less likely, Ruth) was successful in her succession application.

IF BRIAN RETIRES:

3.5 Succession Application – retirement

- 3.5.1 We know that Brian has had a health scare so there is a possibility he could serve a retirement notice and its likely in those circumstances his nominated successor would be Jolene.
- 3.5.2 Jolene would need to apply to the Tribunal for a new tenancy within 1 month of the retirement notice.
- 3.5.3 If the Estate wish to oppose the application, they must complete and file a Reply with the Tribunal within 28 days of receiving the application.

3.6 Greater Hardship

- 3.6.1 If Jolene was found eligible and suitable the Estate would have the opportunity to establish 'greater hardship'. THIS IS ONLY AVAILABLE ON APPLICATIONS TO SUCEED ON RETIREMENT.

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

3.7 **Settlement**

3.7.1 Given the risk of there being a further potential successor, settlement is attractive to try to achieve a negotiated deal ASAP given the Estate's desire to recover possession of the Farm.

3.7.2 This all needs to be factored into the considerations as part of the wider settlement discussions.

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