

When developers assess intended development sites, investigations can often reveal existing agricultural interests in the land. This article provides guidance on key considerations for developers when dealing with agricultural tenancies and the options and processes available to obtain vacant possession of the site.

1. Is There a Written Agricultural Tenancy Agreement in Place?

This is a key starting point for a developer. The date of the agreement generally determines which statutory regime applies.

If the agricultural tenancy was granted before 1 September 1995, the Agricultural Holdings Act 1986 (AHA 1986) will apply. If the agricultural tenancy was granted on or after 1 September 1995, the Agricultural Tenancies Act 1995 (ATA 1995) will apply, subject to limited exceptions.

If there is not a written tenancy agreement, questions should be asked to determine if there is any other documentation to evidence the length of occupation (e.g. example rent payment details).

Agricultural tenants governed by the AHA 1986 generally have much greater rights and protection than those under the ATA 1995. The most significant differences relate to freedom of contract, security of tenure and succession rights.

2. Obtaining Vacant Possession Under AHA 1986

a. The 12-month Notice Rule

A notice to quit an agricultural holding, or part of a holding, must give the tenant at least 12 months' notice from the end of the then current year of tenancy, subject to limited exceptions.

The most relevant exceptions to the 12-month notice rule from a developer perspective include:

- The recipient chooses to treat the defective short notice as valid, waiving their statutory rights to the full notice period
- The tenancy agreement contains a clause permitting resumption of possession for non-agricultural use – this exception, again, evidences the importance of reviewing any written agreement
- The tenant's insolvency

Developers should also be aware that if they only intend to develop part of the land occupied by an agricultural tenant, generally a notice to quit part is invalid. This does not apply if there is (a) an express provision for notice to quit part in the tenancy agreement, (b) the notice to quit is served after severance of the landlord's reversion or (c) section 31 AHA 1986 applies.

If a developer decides to rely on the split reversion exception, the transfer must be to another person or entity, not a mere nominee or bare trustee of the landlord. This exception is also useful, as case law suggests that a landlord is likely to fail if it serves a notice to quit in relation to the whole of the land comprised in the tenancy, but it only requires a serious, significant and important part of the land (e.g. planning permission for development only relates to part of the land).

b. Types of Notices

There are two types of notice that can be served, including where the landlord relies on one of the exceptions to the 12-month notice rule. These are known as unqualified notices and Case (or qualified) notices.

An unqualified notice to quit does not give a reason why the landlord wants to recover possession. If this type of notice is served, the tenant is able to serve counter-notice within one month of service of the notice. The notice to quit then does not have effect unless the landlord applies to the First Tier Tribunal within two months after service of the counter-notice and the tribunal gives its consent. If the tenant does not serve a valid counter-notice, the landlord's notice to quit terminates the tenancy on the expiry date stated in the notice.

A Case notice must give a specified reason for the notice to quit being served and there are eight grounds. The most commonly used in a development context is a Case B Notice, whereby the land is required for a "use other than agricultural". In order to rely on this type of notice either planning permission needs to have been granted (outline is generally sufficient) before serving notice or planning permission is not required (e.g. it is a permitted development). The advantage of a Case notice is that the tenant cannot serve counter-notice. A tenant can still, however, contest the validity of most Case notices by arbitration or challenge the validity of the notice at common law.

It is ordinarily advisable to serve both an unqualified notice and a Case notice, as if no counter-notice is served in respect of the unqualified notice, the landlord will be entitled to possession when the notice expires. If counter-notice is served, it is still open to the landlord to go down the Case notice route.

3. Obtaining Vacant Possession under ATA 1995

a. Statutory Rules

A farm business tenancy (FBT) governed by ATA 1995 provides no security of tenure and there are only statutory restrictions on notice periods.

If the FBT is a fixed term tenancy of more than two years, at least 12 months' notice must be given, expiring on the date fixed in the tenancy agreement for expiry of the term. As such, the FBT cannot be terminated before its contractual expiry unless there is a break clause (see below). The tenancy agreement itself can specify a longer notice period, but not a shorter one. If no notice is served, the FBT will continue as a statutory periodic tenancy from year to year.

A fixed term FBT of two years or less will expire by effluxion of time and the landlord does not need to serve a notice to quit.

To terminate a yearly periodic FBT, at least 12 months' notice ending on the end of a year of the tenancy is required. A notice to quit terminating a periodic FBT running for less than a year must be for a notice period at least equal to the period of the tenancy (e.g. a month's notice to end a monthly tenancy) to end at the end of the relevant period. The exception to this is if the parties have specified otherwise in the tenancy.

b. Contractual Provisions

Break clauses are another reason why it is important for developers to see whether there is any written documentation, as they can offer a way to obtain vacant possession without waiting for the contractual expiry of the FBT. For FBTs with long contractual periods, this can be vital.

For an FBT granted for a fixed term of two years or less, or a periodic FBT granted for periods of less than a year, there are no statutory restrictions on break clauses and any notice period can be specified.

There are still statutory requirements in relation to FBTs with a fixed term for more than two years, as the break notice must give at least 12 months' written notice and it is not possible to contract out of this statutory requirement.

4. Practicalities: Surrender and When to Take Possession

As highlighted above, the statutory procedure to obtain possession can be cumbersome. However, neither the AHA 1986 nor ATA 1995 prevent parties from simply contracting to effect a surrender of the agricultural tenancy. If the tenants in question are, therefore, amenable to such an arrangement, this is a possibility to consider, as it provides certainty and efficiency.

Alternatively, the parties could agree a surrender of an existing agricultural holding and put in place an FBT with the necessary break provisions. This may be particularly useful where the developer does not need vacant possession straight away (e.g. if there are a few years before planning permission can be obtained or planning conditions complied with).

As a developer purchaser, it is advisable to ensure as far as possible that the existing landowner deals with any existing agricultural tenancies, whether that be under statute or by surrender. Ideally, the sale should be completed once the tenancies have been terminated. Further, a developer could build provisions into the sale contract concerning the seller dealing with agricultural tenancies so that the developer purchaser still has control behind the landlord.

As set out above, the process to obtain vacant possession can sometimes be lengthy and involved. It makes no sense for the developer to have ownership and possession of the remainder of the site when it cannot develop the land as agricultural tenancies are still in place. In particular, if serving an unqualified notice under AHA 1986, it is sensible to wait until the one month has expired before completing the sale to see if counter-notice will be served or whether the tenancy will end on the expiry of the notice period.

If you are a developer and you require assistance in relation to agricultural tenancies, please contact our property litigation team.

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