AGRICULTURAL LAND TRIBUNAL **ALT/M/SR/5**
MIDLANDS AREA

SUCCESSION TO A TENANCY ON THE RETIREMENT OF JOHN SAMUEL FOSTER

HOLDING: Shirley Hall Farm, Shirley, Ashbourne, Derbyshire

BETWEEN: Mrs Ruth Elizabeth Mary Crabtree (Applicant)
Thatched Cottage
Shirley
Ashbourne
Derbyshire

and

The Hon Andrew Shirley, Mrs Tamara Shirley, Mr Jason Bowerman
and The Rt Hon Countess Ferrers (Landlords)
c/o Mills and Reeve
Francis House
112 Hills Road
Cambridge CB2 1PH

The Tribunal sat at the Quality Hotel, Derby Road, Ashbourne, Derbyshire, DE6 1XH on the 24th July 2006 to consider an application dated 19th April 2004 made under section 53(1) of the Agricultural Holdings Act 1986 for a direction giving entitlement to a tenancy of Shirley Hall Farm, Shirley amounting to 80.893 hectares or thereabouts and situated in the county of Derbyshire.

The Tribunal having considered the application and the documents relating to it, the evidence given by and on behalf of the Applicant and the submissions given by Counsel for both parties, found that the Applicant is eligible and suitable to become tenant of the holding and give a Direction pursuant to paragraph 53(7) of the said Act, entitling the Applicant to succeed to the tenancy of the holding for the reasons set out in the following Schedule. The “relevant time” under S55(8)(b) shall be 29th September 2006.

Signed this 15th day of September 2006

(signed) Nigel Thomas **NIGEL THOMAS**
Chairman of the Tribunal

1. The members of the Tribunal were Mr N M Thomas (Chairman), Mr M Seals (Farmers Panel) and Mc C H C Coaker (Landowners Panel).

2. Mrs S R Howdle, member of the Council on Tribunals, was present as an observer throughout the hearing and throughout the deliberations of the Tribunal. She took no part in the discussions between the members of the Tribunal about the case and made no observations to members of the Tribunal about the matters in issue.

3. I hereby certify that this is a true record of the decision of the Tribunal.

(Signed) P A Donn
P A DONN
Tribunal Secretary

SCHEDULE OF REASONS

1. This is an application by Mrs Crabtree ("the Applicant") dated 19 April 2004 for a direction entitling her to a tenancy of the holding known as Shirley Hall Farm, Shirley, Ashbourne, Derbyshire ("the Holding"). The Application arises as a result of a retirement notice given by the tenant of the Holding, John Samuel Foster ("Mr Foster"). The Holding was let to Mr Foster by a tenancy agreement dated 5 March 1963 made between (1) Earl Ferrers and (2) Mr Foster.

2. The retirement notice is dated 21 March 2004 whereby Mr Foster gave notice of his intention to retire as from 25 March 2005. The Applicant, who was born on 25 February 1960, is the daughter of Mr Foster and his nominated successor.

3. We should say at the outset that no issue was taken as to the Applicant's suitability which had been accepted by the Respondents in their reply dated 18 May 2004. Accepted, too, by the hearing date was the fact that the Applicant is not an occupier of a commercial unit of agricultural land. At the hearing the Respondents called no evidence, and instead simply required the Applicant to prove her entitlement to succeed to the tenancy. The only issue was the Applicant's eligibility to make an application, specifically the need to satisfy the principal source of livelihood test.

4. The hearing took place at the Quality Hotel, Ashbourne, Derbyshire on 24 July 2006 and as there was no challenge to the Applicant's suitability, we were not invited to make a farm visit. Evidence was given by the Applicant, Mr Foster and Mr Neil Coupland, the expert accountant instructed by the Applicant.

<u>The Facts</u>

5. The basic facts are as follows: the Holding runs to some 80.893 hectares comprised of 65.364 hectares of arable land, 12.425 hectares of permanent pasture and 5.104 hectares of other land. The annual rent is £13,500. In addition to the Holding, the family farming partnership farms under the terms of a farm business tenancy 195 acres at New House Farm, Mercaston, Derbyshire and a further 174 acres of land known as Common Farm, Shirley, had also been occupied under a farm business tenancy from September 2003 until it was surrendered in October 2004.

6. By a written partnership agreement dated 5 April 1997 and made between (1) Mr Foster and (2) the Applicant a farming partnership was formed with a profit sharing ratio of 51:49 for Mr Foster and the Applicant respectively. Immediately prior to the partnership agreement Mr Foster had assigned 49% of his farming business to the Applicant. With

effect from 1 April 2004 the profit sharing ratios were altered as to 90% for the Applicant and 10% for Mr Foster.

7. Since the Applicant's marriage, her husband, Ian, has been employed full time on the Holding, first by Mr Foster and then by the partnership. In her witness statement the Applicant says that she has over many years been employed full time in the business, namely arable work, including tractor driving and sometimes driving the combine harvester, she has considerable experience of handling livestock, such as calf rearing, milking and calving cattle, and foot trimming, injecting and lambing sheep and keeping the farm records.

8. The farming business carried on by the partnership comprised a dairy unit and arable at the Holding, beef cattle and arable at Mercaston and arable alone at Common Farm. The business of the partnership is not confined to agriculture as the farmhouse at Mercaston is divided into two and each part is let on an AST. In addition, Mrs Foster runs a bed and breakfast and holiday letting business at the Holding, in return she pays rent to the partnership; although it must be said that the Applicant insisted that such sums were not rent but rather reimbursement for expenses incurred by the partnership in respect of the Bungalow and Saddlery used by Mrs Foster for the purposes of this business. It seems to us that on any basis the payments must be regarded as rent.

<u>Suitability</u>

9. On the basis of the evidence presented by the Applicant, which was not challenged, we find that if she can establish eligibility then she is a "suitable" person for the purposes of s.53(5) of the Agricultural Holdings Act 1986 ("the 1986 Act").

<u>Eligibility</u>

10. As noted above the issue for determination by the Tribunal is whether we are satisfied that the livelihood test is satisfied. Of relevance to this issue is the fact that the Applicant stated in paragraph 5 of the Application that the Holding is not part of a larger agricultural unit, notwithstanding that the partnership occupies Mercaston and had occupied Common Farm. The Applicant's case thenceforth proceeded on this basis.

<u>The Legal Issues</u>

11. Two points of law were raised by the Respondents in this regard. First, that the proper approach to the source of the Applicant's livelihood is to recognise that Mr Crabtree has an income derived from his employment by the partnership, that both he and the Applicant have their respective incomes paid by the partnership into a joint single

account, and that their expenditure is met from that account. Therefore, one has to treat the Applicant's livelihood as being from these pooled resources rather than to divide their income and expenditure into separate entities. This issue was raised in Mr Rodger's opening note dated 21 July 2006. The second point [is that the] principal source of livelihood qualification in retirement cases must be satisfied at all times during the period beginning with the date Mr Foster gave the retirement notice and ending with the Tribunal hearing.

12. At the conclusion of oral submissions, it was agreed that Ms Hutton would make her submissions on these two points of law in writing which she did by submissions dated 26 July 2006. In the meantime the Tribunal had invited Written Submissions from both parties on the second point with reference to the passage dealing with the matter in Scammell and Densham's Law of Agricultural Holdings (8th ed) at pages 291-292. Mr Rodger produced Written Submissions on this issue dated 25 July 2006, and then subsequently served further Written Submissions dated 1 August 2006 in reply to those of Ms Hutton dated 26 July 2006.

13. We have, of course, considered these Submissions in coming to our determination, and we would wish to record our thanks to Counsel for their helpful arguments.

14. Of those two legal points, it seems to us that the one of greater significance is the second issue, namely the relevant period or periods during which the livelihood condition has to be satisfied, because if Ms Hutton's argument is correct then, as we explain below, and for the reasons which we give, we consider that the Applicant has proved that in the seven years prior to the giving of the retirement notice (which it is common ground begins on 22 March 1997) her principal source of livelihood for a period of five years was derived from her agricultural work on the Holding.

The Livelihood Qualification

15. Mr Rodger in his Written Submissions dated 25 July 2006 drew our attention to the different positions which apply on succession on death and on retirement.

16. The definition of an eligible person as it relates to succession on retirement is contained in Section 50(2) which contains two conditions, and in contrast to the position which applies on death (see s.36(3)(a)) the livelihood condition does not include a date by reference to which the seven year period is fixed. That omission, he says, is filled by s.53(5) which requires that the Tribunal must be satisfied both that the applicant was an eligible person at the date of the retirement notice and "that he has not subsequently ceased to be such a person" (see. S.53((5)(b)). The second requirements means that

each of the conditions necessary to qualify an applicant as an eligible person must be satisfied at the date of the retirement notice, at the date of the hearing and at all points in between.

17. He cites in support of his argument Woodfall Landlord and Tenant para. 21.195. It must be said, however, that the excerpt from Woodfall puts the argument slightly differently i.e. the rolling period of seven years must follow because no end date is specified for the qualifying period in the case of a succession on retirement (as opposed to one on death) so it would seem (sic) to follow that the principal source of livelihood test has to be satisfied up to the time of the Tribunal hearing. Section 53(5)(b) is not relied upon in support of this argument as it is by Mr Rodger.

18. We hope it does no injustice to Mr Rodger's submissions to say that the effect of Section 53(5)(b) is central to his argument.

19. Ms Hutton, on the other hand, points to the practical difficulties of a rolling period of seven years that stretches beyond the date of the retirement notice to the Tribunal hearing (which itself may be adjourned part heard over several weeks), the danger of injustice that might be caused by a malicious retiring tenant, and the problems in continually proving the livelihood condition at different points in time. If, she says, Mr Rodger is right in his argument, it would make a retirement notice too risky an option for most tenants and their nominated successors faced as they would be with the need to establish the livelihood condition well into the future. Bearing all these factors in mind it is inconceivable that Parliament could have intended that an applicant should have to prove that he or she satisfied the livelihood test over several different periods, and the more so when one recalls that if an application consequent upon a retirement notice fails then there is no chance of renewing that on death. She relies on the extract from Scammell and Densham pg. 291 to which we have referred.

20. Ms Hutton sought to introduce in support of her argument extracts from the relevant debates in both Houses of Parliament pursuant to Pepper v Hart. Mr Rodger in his Submission dated 1 August 2006 objected to these citations arguing that the criteria which have to be met before such material can be taken into account had not been satisfied. Putting to one side Mr Rodger's objections we do not in fact find this material of much assistance and consequently it forms no part of this decision. It is accepted that there is no authority on the point.

Conclusions as to the relevant period

21. We consider that the Applicant needs to show only that she derived her principal source of livelihood from her agricultural work on the Holding during a total of five years of the seven years ending with the date on which Mr Foster gave the Respondents the retirement notice.

22. We arrive at this conclusion for the following reasons:

(1) We do not construe Section 53(5)(b) of the 1986 Act as requiring the Applicant to prove that the principal source of livelihood test has to be satisfied at all times. That is not what the subsection says, rather it requires that once the eligibility qualification has been established then it is not subsequently lost. In the case of some criteria the qualification can be lost e.g. an applicant wife or husband may be divorced. Conversely, some criteria cannot be lost e.g. a sibling or child will always be so.

(2) An "eligible person" is described in Section 50(2) and is the person named in the retirement notice (S.50(1)) who complies with certain criteria, inter alia that "in the last seven years his only or principal …" (S.50(2)(a)). The period described as "the last seven years …" can, it seems to us, only refer to the last seven years up to the retirement notice naming the eligible person who is defined by reference to qualifications that are in place at the date of the retirement notice.

(3) The relevant period under Section 50(2)(a) is "the last seven years" i.e. the seven years prior to the retirement notice and no other period is referred to.

(4) We consider that the statutory scheme as it relates to this point indicates that the livelihood test must be satisfied in respect of that period of seven years ending with the retirement notice; and that that qualification once established cannot be lost.

23. We also refer to the prescribed form applicable where an Application is made for a direction giving entitlement to a tenancy. The form, i.e. Form 5, is prescribed by rule 23 of the Agricultural Land Tribunals (Succession to Agricultural Tenancies) Order 1984. Paragraph 10 is in the following terms:

> "10.(a) During the seven years ending with the date on which the tenant(s) gave the retirement notice to the landlord my only or principal source of livelihood was derived from –
>
> (i) my agricultural work on the holding …"

The notes to the form at paragraph 3 state:

> "(3) To qualify under paragraph 10(a)(i) the applicant should have derived his only or principal source of livelihood from his agricultural work on the holding (or on a larger unit of which the holding forms part) during a total of five years of seven years ending with the date on which the tenant(s) gave the landlord notice."

24. We, of course, acknowledge that the terms of a prescribed form cannot overrule the clear words of the Act, but in the case of doubt we consider that we are entitled to look to its terms as an aid to construction. If Mr Rodger's interpretation is right then the terms of Form 5 both at paragraph 10 and in the explanatory notes are at best very misleading, and at worst wrong. This form has been in use for over 20 years and so far as we are aware its contents have never been challenged as not being drafted in line with the requirements of the 1986 Act. It might be said that the terms of Form 5 do not preclude the need to prove the livelihood condition for other periods of seven years but if so that is not the basis upon which the Form is drafted or the notes promulgated.

25. We also agree with Ms Hutton that a construction such as contended for by the Respondents could hardly have been intended by Parliament requiring as it would the continual need to update the complex process of producing accounts demonstrating livelihood for a period which at the start of the process (i.e. when the retirement notice is served) has no certain end date.

<u>Accounts</u>

26. Expert evidence was given by Mr Neil Coupland on behalf of the Applicant; his report was dated 21 March 2006. He also produced a supplementary report dated 23 July 2006, for the purposes of replying to Mr Rodger's introductory note, the inclusion of 1999 data for income and livelihood and thirdly the question of "stripping out" Mercaston and Common Farm.

27. In giving evidence, Mr Coupland stated that his original instructions were to comment upon the calculations prepared by the Applicant's solicitors. He examined these and the supporting records. He admitted that much of the data upon which he based his report was supplied by the Applicant but he felt that there was no reason why he should not regard such data as being as accurate as the circumstances allowed.

28. In particular, the schedules of income and expenses appearing at pages 994-999A Bundle 3 were figures provided by the Applicant and she was tested on these schedules at some length during cross examination, as to their accuracy. The Applicant admitted that they were approximate figures, that there were margins of error that might be 5% or

10% but that essentially they were in her view that best that she could do and were in broad terms accurate. We accept the evidence of the Applicant in this regard, and we find that they do broadly represent an accurate summary of income and expenditure as that relate to the three farms. We doubt, and certainly no other evidence was presented, that anyone could do better. We found the Applicant to be an honest and straightforward witness who did her best to assist the Tribunal.

29. On the information available to Mr Coupland, he concluded in his main report that the Applicant's livelihood, in the five years out of the seven years immediate preceding the date of the giving of the retirement notice, was derived from her agricultural work on the Holding.

30. In his introductory note, Mr Rodger took issue with this conclusion because he submits that it does not, or does not adequately, differentiate between the proportion of the partnership business attributable to Shirley Hall Farm and the proportion attributable to Mercaston and Common Farms, does not take account of the letting income at Common Farm and Mercaston and that it ignores the fact that the Applicant and Mr Crabtree pay or have paid all their income into a single joint account.

31. Taking these objections into account, Mr Rodger, at paragraph 28 of his introductory note, produces figures to show (where the "letting" income is stripped out and Mr Crabtree's contribution to the household included) that the Applicant fails to establish the livelihood condition because for the year 2003 the agricultural portion of the income she derives from the partnership drops below 50%, i.e. 48.77%. Moreover, submits Mr Rodger, this takes no account of the fact that there has been no apportionment between the contribution made to the partnership business by the three holdings.

32. In his supplementary report, Mr Coupland provides a revised calculation using the Respondents' methodology as set out in their introductory note. That appear at paragraph 15 of his supplementary report except that in his reworking of the figures he excludes Mr Crabtree's contribution (which Mr Rodger says is impermissible).

33. The percentages thus produced by Mr Coupland for the five years 2000-2004 are not in fact very different from those appearing in the Table at paragraph 28 of Mr Rodger's note. Mr Coupland also produces an equivalent percentage figure for the year 1999. We have already, for the reasons appearing above, decided that the Applicant is entitled to rely upon the year 1999 in calculating the livelihood period. On Mr Coupland's calculations using the Respondents' methodology (but excluding Mr Crabtree's income) the Applicant succeeds as she is able to demonstrate that in the years 1999 to 2004, but excluding 2003, her livelihood is principally derived from agriculture.

34. The Respondents’ figures show the same result with the inclusion of Mr Crabtree’s income but their calculations omit 1999. Mr Coupland, however, on his reworking of the figures using their methodology told us that for the year 1999, too, the Applicant would have qualified as 51.3% of her livelihood was derived from her agricultural work. So it is the case that even on the Respondents’ methodology the Applicant would succeed.

35. That this leaves the question of what apportionment, if any, ought to be made between the three farms as the Applicant relies only upon her work on the Holding.

36. In paragraph 19 of his supplementary report, Mr Coupland points out that any apportionment between the three farms will, in practical terms, make no difference to the end result of these calculations because the profits at Mercaston were so small and Common Farm made no profit. We accept that the information upon which this view is based was supplied by the Applicant but we have ruled that this information is, for these purposes, accurate. We therefore agree with Mr Coupland (in the absence of any evidence to the contrary) that any apportionment as suggested by Mr Rodger would have no discernable impact.

37. Therefore we find that the Applicant has satisfied the condition set out in section 50(2)(a) of the Act in that in the seven years prior to the giving of the retirement notice her only or principal source of livelihood for a period of five years out of those seven years was derived from her agricultural work on the Holding.

38. In his report, Mr Coupland produced calculations to show that the Applicant’s personal income in each year is sufficient to cover the total cost of her livelihood (we deal with pooled resources below) and that the percentage of her livelihood derived from her farm income is never less than 74.99%. In his supplementary report he then transferred these figures to Mr Rodger’s table (set out at paragraph 28 of his introductory note i.e. stripping out the letting income) and this produces, for the years1999-2004, a greater than 50% contribution to the Applicant’s livelihood derived from the agricultural percentage of the total partnership contribution. We see no reason why we should not accept Mr Coupland’s reworked calculations in his supplementary report, absent any evidence as to why it could be said that Mr Coupland’s approach was flawed.

39. For these reasons we consider that on any basis (i.e. whether adopting Mr Coupland’s approach or the Respondents’) the Applicant is entitled to a direction entitling her to succeed to a tenancy of the Holding.

Pooled resources

40. In the light of the decision above it is strictly unnecessary to go on to consider whether the proper approach is to have regard to Mr Crabtree's income and his contribution to the Applicant's livelihood and to pool all their resources. That was the submission of Mr Rodger as outlined in his introductory note and analysed in the source of livelihood calculations appended to his note.

41. Mr Rodger relies upon two authorities in support of his argument, namely <u>Littlewood v Rolfe</u> [1968] 2 All ER 51 and <u>Wilson v Earl Spencer's Settlement Trustees</u> [1985] 1 EGLR 3, although it was not suggested that either case is binding upon us. Nevertheless, both cases gave indications that in the case of husband and wife operating a joint bank account the Applicant's spouse may be beneficially entitled to half of the Applicant's contribution to the pool, thus reducing what on the face of it would otherwise be the Applicant's contribution. As to how this in practice impacts upon the calculations can be seen from the Appendix to Mr Rodger's Introductory Note.

42. It is our view on the facts of this case that:

    (1) it would be wrong to ignore that fact that it is the Applicant who is the partner in the farming partnership and that she is a fully working partner who actively farms the land;

    (2) it was the evidence of the Applicant that she received an identifiable and differentiated cash sum each month from the partnership in respect of her earnings from it;

    (3) it was, said the Applicant, a mere matter of convenience that she and her husband had a joint account into which this sum was paid;

    (4) any benefits in kind received or receivable by the Applicant and Mr Crabtree arose only because of the Applicant's status as a partner;

    (5) as Mr Coupland points out, the Applicant does not need Mr Crabtree's wages to meet her living costs.

43. The Tribunal considers that in these circumstances it would be an overly narrow view of the matter to base our consideration of the principal source of livelihood of the Applicant as being cut down because it might be thought that "Husbands and wives usually pool their income" per <u>Littlewood v Rolfe</u> [1981] 2 All ER 51 at 58J.

44. We do not consider that Parliament could have intended such a technical or restrictive view to be taken of livelihood where the whole statutory scheme seems to be to measure the Applicant's livelihood as derived from her agricultural work.

45. We therefore consider that the approach adopted by Mr Coupland to his calculations in his supplementary report are correct and we accept them.

46. Consequently, we shall make the direction as sought by the Applicant.