FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(AGRICULTURAL LAND & DRAINAGE)

Case Reference	**:**	**ALT/N/S/114**
Property	**:**	**Garth Head Farm, Castle Carrock, Brampton, Cumbria CA89NF**
Applicant	**:**	**Edward James Wannop**
Representative	**:**	**Ward Hadaway, Solicitors**
Respondent	**:**	**John Cartmell; Timothy Henry Cartmell and Mrs Gillian Mary Harris**
Representative	**:**	**Cartmell Shepherd, Solicitors**
Type of Application	**:**	**Agricultural Holdings Act 1986** **Section 39(1) – Succession on death**
Tribunal Members	**:**	**Mrs Shirley M. Evans (Chairman)** **Mr Thomas G. Bowring (Landowners Panel)** **Mr Simon A. Thompson (Farmers Panel)**
Date and venue of hearing	**:**	**17 and 18 October 2013, Stocklund House, Carlisle, Cumbria**
Date of Decision	**:**	**2 December 2013**

DECISION

First Tier Tribunal **ALT/N/S/114**
Property Chamber
(Agricultural Land and Drainage)
Northern Region

AGRICULTURAL HOLDINGS ACT 1986
Section 39(1) – Succession on death

HOLDING: Garth Head Farm, Castle Carrock, Brampton, Cumbria, CA8 9NF

BETWEEN: Edward James Wannop

Applicant

AND

John Cartmell, Timothy Henry Cartmell and Mrs Gillian Mary Harris

Respondents

The Tribunal sat at Stocklund House, Carlisle, Cumbria on Thursday 17 October and Friday 18 October 2013 to consider an application made on 14 October 2010 by the Applicant Edward James Wannop under Sections 39(1) and 41 of the Agricultural Holdings Act 1986 for a direction giving entitlement to a tenancy of the holding known as Garth Head Farm, Castle Carrock, Brampton, Cumbria, CA8 9NF ("the Holding") amounting to 92.545 hectares or thereabouts.

The Tribunal having considered the application and other documents relating to it and having inspected the Holding and having heard the evidence given on behalf of the Applicant and the Respondents does hereby dismiss the said application for the reasons set out in the following Schedule.

Signed this 2nd day of December 2013

(signed) Shirley M Evans
SHIRLEY M. EVANS
CHAIRMAN

The members of the Tribunal were Mrs Shirley M. Evans (Chairman), Mr Thomas G. Bowring (Landowners' Panel) and Mr Simon A. Thompson (Farmers' Panel).

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

(signed) Deborah Linning
TRIBUNAL SECRETARY

SCHEDULE OF REASONS FOR THE DECISION

Introduction

1. In this matter we are concerned with an application by Edward James Wannop ("the Applicant") under Section 39(1) of the Agricultural Holdings Act 1986 ("the Act") or alternatively under Section 41 of the Act, for a direction entitling him to a tenancy of the agricultural holding known as Garth Head Farm, Castle Carrock, Brampton, Cumbria CA8 9NF ("the Holding"). The application arises on the death of the Applicant's father, Ian Edward Wannop ("the Deceased"), formerly the tenant of the Holding, who died on 25 July 2010. The application is opposed by the landlords of the Holding; John Cartmell, Timothy Henry Cartmell and Gillian Mary Harris ("the Respondents").

2. The hearing of this application took place at Stocklund House, Carlisle, Cumbria on Thursday 17 October 2013 and Friday 18 October 2013.

3. The witnesses on behalf of the Applicant were: the Applicant himself, his brother Jonathan Wannop, David Robin Peat FRICS of George F. White LLP (Chartered Surveyor and Valuer) and Lindsay Anne Marrs ACA of Armstrong Watson Accountants and Financial Advisors (Chartered Accountant). The witnesses on behalf of the Respondents were: Alan Moore Bowe FRICS FAAV of H&H Land and Property (Chartered Surveyor) and Robert Hitch ATT, MBIAC of Dodd & Co Chartered Accountants (Chartered Accountant). In addition, various documents were produced to the Tribunal, which are contained in the Trial Bundles.

4. On the afternoon of 16 October 2013 the members of the Tribunal, accompanied by the Applicant and representatives of the Applicant and the Respondents, carried out an inspection of the Holding, including the farmhouse and farm buildings.

Background

5. The Holding is a hill farm consisting of approximately 92.545 hectares of land and is suitable only for grass and stock. On the Holding there is a farmhouse and farm buildings consisting of barns and workshops. The Holding has been farmed by members of the Wannop family for three generations. The Applicant's grandfather, Arthur Wannop, was the first generation. By a Tenancy Agreement dated 1 November 1979 the Applicant's father, the late Ian Edward Wannop, was granted a succession tenancy commencing on 2 February 1980.

6. The Applicant grew up on the farm. He was employed there by his father as soon as he left school, becoming his partner in the farming business in 2001 and carrying out the vast majority of farming activities after that date. Between 2001 and 2010 he lived at the farmhouse with his father and his brother Jonathan. (Jonathan did not work on the farm). The partners in the farming business also carried out contracting work from the farm, consisting of the hire of machinery and/or the provision of driver/operator services. The proceeds were paid into the farm account. For a number of years prior to Ian Edward Wannop's death, the Applicant earned a supplementary income from work carried out other than on the farm. The income derived from this work was either invested in the Holding or in investments. He was employed as a plant operator for various contractors working for Rail Track and subsequently Network Rail. He also carried out non-agricultural contracting work. He owns two investment properties which he purchased in 2006 and 2008.

7. Ian Edward Wannop died on 25 July 2010. By his Will dated 16 July 2010 he gave the Applicant his interest in the farming partnership and designated him as the person he wished to succeed him as tenant of the Holding.

8. On 14 October 2010 the Applicant applied to the Agricultural Land Tribunal under Section 39(1) of the Act for a direction entitling him to a tenancy of the Holding and in the alternative under Section 41 of the Act. His application was made on the basis that he was eligible, or should be treated as eligible, to be granted a new tenancy; and that he was also a suitable person to become the tenant of the Holding.

9. By their Reply of 20 October 2010 the Respondents disputed that the Applicant was eligible or should be treated as eligible, and that he was suitable to become the tenant. On 21 October 2010 the Respondents served a Case G Notice to Quit the Holding on the personal representatives of the Deceased.

10. Under the provisions of the Transfer of Tribunal Functions Order 2013, proceedings in respect of the Applicant's application continued on and after 1 July 2013 as proceedings before the First Tier Tribunal (Property Division) Agricultural Land and Drainage.

11. The proceedings have been conducted in accordance with the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 including the 'overriding objective'.

The Legislation

Eligibility

12. Part IV of the Agricultural Holdings Act 1986 ("the Act") together with Schedule 6 contain the relevant provisions for a statutory succession in the event of a tenant's death. The principal "eligibility" test is found in Section 36. This states that the Applicant must:

    (a) be a surviving "close relative" of the deceased (as defined in Section 35(2))

    (b) satisfy the "principal source of livelihood test" for five of the preceding seven years (in accordance with Section 36(3)(a)) and

    (c) not be the occupier of a commercial unit of agricultural land (Section 36(3)(b))

13. The "principal source of livelihood test" is contained in Section 36(3)(a) and the condition which the Applicant is required to satisfy is as follows:

    "In the seven years ending with the date of death [of the deceased tenant] [the Applicant's] only or principal source of livelihood throughout a continuous period of not less than five years, or two or more discontinuous periods together amounting to not less than five years, derived from his agricultural work on the holding or on an agricultural unit of which the holding forms part."

14. An applicant who is unable to fully satisfy the above condition but who would otherwise be eligible, may apply under Section 41 of the Act to be "treated" as eligible. Section 41 reads:

    "(1) This section applies to any surviving close relative of the deceased who for some part of the seven years ending with the date of death engaged (whether full- time or part-time) in agricultural work on the holding, being a person in whose case—

    (a) The condition specified in paragraph (b) of the definition of "eligible person" in section 36(3) above is satisfied, and

    (b) The condition specified in paragraph (a) of that definition, though not fully satisfied, is satisfied to a material extent."

15. Sections 41 (3) to (6) read as follows:

“(3) lf on an application under this section—

(a) the Tribunal are satisfied that the applicant is a person to whom this section applies, and

(b) it appears to the Tribunal that in all the circumstances it would be fair and reasonable for the applicant to be able to apply under Section 39 above for a direction entitling him to a tenancy of the holding,

— the Tribunal shall determine that he is to be treated as an eligible person for the purposes of Sections 36 to 48 of this Act, but shall otherwise dismiss the application.

(4) In relation to a person in respect of whom the Tribunal have determined as mentioned in subsection (3) above Sections 36 to 48 of this Act shall apply as if he were an eligible person.

(5) A person to whom this section applies may make an application under section 39 above as well as an application under this section; and if the Tribunal determine as mentioned in subsection (3) above in respect of a person who has made an application under that section, the application under that section shall (without prejudice to subsection (4) above) be treated as made by an eligible person.

(6) Without prejudice to the generality of paragraph (b) of subsection (1) above, cases where the condition mentioned in that paragraph might be less than fully satisfied include cases where the close relative’s agricultural work on the holding fell short of providing him with his principal source of livelihood because the holding was too small.”

Suitability

16. By Section 39(2) of the Act, if the Tribunal is satisfied that the Applicant was an eligible person at the date of the Deceased’s death, and has not subsequently ceased to be such a person, they “shall determine whether he is in their opinion a suitable person to become the tenant of the holding”

17. Section 39(8) of the Act states:

“In making a determination under subsection (2) above the Tribunal shall have regard to all relevant matters including—

(a) The extent to which the applicant...has been trained in, or has had practical experience of, agriculture,

(b) The age, physical health and financial standing of the Applicant…, and

(c) The views (if any) stated by the Landlord on the suitability of the Applicant...”

The Tribunal’s Inspection of the Holding

18. From our inspection of the Holding we find that although little work appears to have been carried out to the interior or exterior of the farmhouse in recent years, it is in basic but sound condition with the exception of some damp to the gable end wall and stairwell. We find the farm buildings to be tidy and in satisfactory condition and the gates and fences adequately maintained. The land is found to be in good heart.

The Applicant's Applications

19. The Applicant's applications are under Section 39 of the Act and in the alternative under Section 41. The burden of proof is on the Applicant who has to prove his case on the balance of probabilities. The first issue to be determined by us is that of eligibility.

Eligibility

20. In relation to the Applicant's eligibility, the issues before us are whether he satisfies the livelihood condition in Section 36(3)(a) of the Act, either fully or to a material extent; and in the latter event, whether it would be fair and reasonable for him to be able to apply for a direction entitling him to a tenancy of the Holding. There is no dispute that the Applicant satisfies the other requirements for eligibility specified in the Act, as it is accepted by the Respondents that he is a close relative of the deceased and is not the occupier of a commercial unit of agricultural land.

Eligibility – "Livelihood"

21. As stated in Scammell and Densham's "Law of Agricultural Holdings", Ninth Edition, paragraph 35.39:

"There is a general consensus amongst ALTs that 'livelihood' is a term wider in its implication than mere income and that it covers not merely benefits which are measurable directly in cash terms, such as wages, but also benefits in kind. Therefore if the applicant has enjoyed rent and rate free living accommodation, with electricity, oil and other services paid for through the farm account and free, or subsidised, motoring, meals and the like, provided those benefits have been granted to the applicant by reason of his agricultural work upon the subject holding...then they fall to be evaluated and added to the income received by the applicant in determining the applicants principal source of livelihood."

22. In this case the parties agree that livelihood means both income and benefits in kind, but the total value of the benefits in kind and the method of valuation of certain types of benefit in kind is disputed. In dealing with this issue we have been assisted by the following guidance of Stuart-Smith LJ in *Welby and another v Casswell* [1995] 2 EGLR 1:

"Livelihood can be defined as, "means of living" (See *Shorter Oxford Dictionary*), that is to say what is spent or consumed for the purpose of living. The source of one's livelihood in so far as it is money, is income; in so far as it is the use or consumption of goods, it is benefits in kind. An applicant may have income derived from one or more sources. If so in order to qualify under Section 36(3)(a) the income derived from work on the agricultural holding must be greater than his income from other sources."

23. We also note the guidance in *Trinity College Cambridge v Caines* [1984] 2 EGLR 17 that with regard to the eligibility test "source of livelihood" means "what the Applicant spends or consumes on his ordinary living expenses from time to time in money or in kind." In this case, the Applicant himself has invested money in the farm from his own resources. However, as stated by Stuart Smith LJ in *Welby and another v Casswell supra*, "if injections of capital are made and invested in the business, whether it be in the form of plant, machinery, stock, seeds, fertiliser or work on the Holding, expenditure on such items is expenditure of the business: it matters not whether the source of the capital is the partner's own resources, the bank or a generous relative."

24. In determining the value of the income and benefits in kind enjoyed by the Applicant we have derived great assistance from the work carried out by the parties, their representatives and the expert witnesses, in identifying areas of agreement and issues in dispute. This

resulted in the production to us of a schedule of figures for each of the seven years in issue, detailing agreed and disputed figures and making provisional comparisons of the total livelihood of the Applicant with his livelihood derived from agricultural work on the Holding. After making the findings of fact set out below we have amended the schedule to reflect those findings, thereby producing the "Proportion of livelihood derived from agricultural work on the Holding calculation" ("the Calculation") set out in the First Schedule. An annual percentage figure has been produced representing our finding as to the proportion of the Applicant's total livelihood which was derived from his agricultural work on the Holding during each of the seven years preceding the death of Ian Edward Wannop.

Eligibility – Livelihood – The Agreed and Disputed Items

25. The agreed annual figures produced to us include those relating to the Applicant's income and certain heads of expenditure together with the value to the Applicant of the provision of meals and the number of hours which he worked off the Holding.

26. The schedule of figures provided by the parties includes an agreed figure for livelihood/living expenditure. However the parties have not been able to agree whether to allocate unattributable chequebook expenditure to livelihood expenditure, or non-livelihood, that is investment, expenditure. The Respondents submit that insofar as the nature of the Applicant's chequebook expenditure is unknown, this should be allocated to livelihood expenditure. The Applicant disagrees, submitting that unattributable chequebook expenditure should be allocated to non-livelihood expenditure. We prefer the Respondent's argument – the burden of proof is on the Applicant – if he cannot prove that the expenditure was non-livelihood it has to be allocated to livelihood expenditure and included in the Calculation. These items of expenditure have not been proven to relate to agricultural work on the Holding and we have therefore added the "unidentified chequebook expenditure" figures to the "Elements derived from other sources" section of the Calculation.

27. The parties have been unable to reach agreement with regard to the value to the Applicant of the benefit in kind of his free accommodation in the farmhouse and his use of farm vehicles. These are therefore considered below.

The Value of the Applicant's Residence in The Farmhouse

28. Throughout the period under consideration the Applicant lived rent free at the farmhouse with his father and brother. The Council Tax and utilities were paid by the farming partnership, as were the costs relating to the provision of telephone and the internet. There is no dispute that the Applicant's rent-free occupation of the farmhouse constitutes a financial benefit to him which was derived from his agricultural work on the Holding. However, there are considerable differences between the parties as to how the value of this benefit should be calculated, what deductions (if any) should be made to take account of such matters as shared occupancy, and what uplifts (if any) should apply in respect of the extra facilities enjoyed by the Applicant. (The issue of disrepair is not in issue in these proceedings.)

29. On behalf of the Applicant (following *Pickard v Howard* ALT/Y/S/99) it is submitted that the question to be asked is what the Applicant saved by being able to live in the farmhouse instead of having to pay for accommodation elsewhere? The accommodation enjoyed by the Applicant has been exclusive occupation of a double bedroom in the farmhouse, shared use of the kitchen and bathroom facilities and shared use of the "back kitchen" where he stored and repaired his high value bikes.

30. Mr Peat values the benefit of the accommodation by reference to the cost of renting two rooms with comparable amenities (council tax, utilities and telephone) on a lodging basis elsewhere in 2010. He then adjusts the figure downwards for previous years using the retail element of the consumer price index. By contrast Mr Bowe bases his valuation on a comparable for renting a house with two co-tenants. The comparable rent for a house let on an assured shorthold tenancy is then divided by three to reflect shared occupation by three occupants. He then adds to the resulting figure a 1/3rd percentage of the costs of council tax, heat and light, based on figures from the farm accounts.

31. Despite the fact that the valuers disagree as to the methodology for valuing this benefit in kind, they agree that "a maximum of £400 per calendar month would be a fair assessment for a double bedroom letting in 2010 if inclusive of council tax and other services."

32. We prefer Mr Peat's methodology, based on considering what the Applicant had saved by not having to rent a double bedroom with shared facilities on a lodging basis elsewhere. We find that this most closely equates to the actual benefit enjoyed by him – if he had been forced to leave the farmhouse he would have been more likely to seek an all-inclusive double bedroom with similar facilities to the farmhouse than to seek an assured shorthold tenancy of a house and then look for two house-sharers. We therefore base our benefit in kind valuation on the agreed figure for an all-inclusive double bedroom letting of £400 per calendar month.

33. The Applicant initially contended that this figure should be doubled to take into account the additional facility of non-exclusive use of the back kitchen in which he repaired and stored his high value bicycles. However he later acknowledged that this was too high a multiplier and invited us to apply such different multiplier as we found appropriate. Mr Bowe agreed that a minor uplift to the rental figure may be appropriate for this additional facility. Although we accept that an uplift is appropriate, we find the multiple of two to be very significantly too high. On the evidence, the back kitchen contained a freezer which was available for use by any of the three occupiers at the farmhouse. Insofar as the room was not occupied by the freezer or the Applicant's bicycles it was available to other occupants of the farmhouse for storage. Whilst we accept that the Applicant may have used this room more than the other occupants, he by no means had exclusive use of it.

34. The multiple of two would have been excessive even if the Applicant had had exclusive use of the room, as in evidence he stated that the back kitchen was only half the size of his bedroom. Had the Applicant had exclusive use of the back kitchen, and had the back kitchen had similar amenities to the bedroom, the appropriate uplift figure could not in any event have exceeded 50%. However, he did not have exclusive use of this room and a back kitchen is unlikely to have the same level of amenity as a bedroom. Further, many shared houses would have this "additional facility" of available space for bicycle storage and repairs available at no extra charge. Taking into account the size of the back kitchen, the fact that it would not have the same amenity as the bedroom, its non-exclusive use, the use to which it was put by the Applicant and the fact that this facility would be available free of charge in many rented properties, we determine that only a small uplift is appropriate. The figure which we determine to be the appropriate uplift to be applied to the agreed comparable rental figure for the double bedroom is 10%. Applied to the monthly rental figure of £400, the resulting monthly rental figure is £440 and the annual figure £5,280. This figure has been used in the Calculation for 2010 then has been reduced for previous years using the retail element of the consumer prices index. The annual figures are included in the Calculation, described as "Value of living in the house".

The Value of Use of the Farm Vehicles

35. The Applicant's evidence is that from 2003 to 2010 he at all times enjoyed the use of one or more vehicles belonging to the farming partnership for farm work and for private travel. The running costs of the vehicles were paid for by the partnership and his father kept the vehicles full of diesel and ready for use. When the Applicant worked for others, like Jarvis or Hydrex, he was supplied with a van for travel to and from his workplace and in connection with that work. He purchased diesel for those vans but it was reimbursed. His use of the farm vehicles for private use included driving to visit, "friends, family, cinema, pubs and restaurants and engaging in my hobby of cycling." He would put diesel in the vehicle he was using if he was travelling a long distance, but otherwise would use the diesel already in the vehicles, paid for by the farming partnership.

36. The parties agree that the Applicant had unrestricted use of farm vehicles and that insofar as this relates to the use of cars for his private use this constitutes a benefit in kind. The expert witnesses agree that the appropriate source of data to be used in calculating the value of this benefit is "AA Motoring Costs 2009 – Diesel Cars" ("the Guide"). The Guide provides estimated standing charges per year and running costs per mile for cars, based on the purchase price of the car in question when new. It is agreed that in using the Guide the valuation of the benefit in kind should be based on an estimated mileage of 10,000 miles per annum and that in order to reflect shared use between the Applicant and his father (agreed at 70:30) a 30% discount should be applied to the figures produced by the Guide on both standing charges and running costs.

37. During the period under consideration a number of cars had been bought and sold. We have been supplied with details of various sale/purchase prices but mileages and trade in values are not available. The information supplied to us is incomplete and it is therefore impossible to calculate actual depreciation figures. The Applicant's evidence is that at all times he had a 4x4 vehicle and a smaller car available for his use. In practice he had used the 4x4 at all times except when he drove long distances, when he would choose to use the smaller car for reasons of economy. We find that the Applicant had a 4x4 vehicle available to him at all times throughout the period under consideration and that the appropriate vehicle on which to carry out the benefit in kind calculation is therefore the relevant 4x4.

38. The Guide contains five columns of figures based on "As new" prices in ranges from "up to £12,000" on the left to "over £32,000" on the right. It is based on the value of the vehicle when new, but calculates the costs of running a four year old car. The only 4x4 used by the Applicant which was less than 4 years old was the Toyota Hilux purchased in the year before his father died. This was purchased for £8,500 but was valued at £17,500 when new. For that one year, that particular vehicle satisfies the criteria of the third column of the Guide (£16,000-£24,000 purchase price when new) and the calculation, following the above mentioned valuers agreed formula, produces a figure of £4,204 for 2010. This is appropriate as this car was less than four years old. The Applicant contends that the third column of the Guide should be used for all of the years under consideration. We find that it is not appropriate to use the third column of the Guide throughout the whole of the seven year period because, for all of the previous years, the Guide would produce an inappropriate figure as the cars were either over 4 years old or of unknown age.

39. The Respondents do not agree that the third column should be used, arguing that most of the cars were more than four years old at the date of valuation. Their argument is that as depreciation and cost of capital make up the bulk of the standing charges in the Guide, (and that these would be lower with an older car,) the first column in the Guide (up to £12,000) would provide a more accurate valuation of the "benefit in kind". Figures have been produced showing that the actual depreciation on a number of the farm vehicles was much closer to the figures in the first column than those contained in the third column and to

suggest that the "cost of capital" on the actual farm vehicles was closer to those in the first column than those in the third column. The Respondents also contend that there should be a deduction from the figures produced by the Guide to reflect the fact that the Applicant sometimes put diesel in the vehicles at his own cost. Whilst accepting that some of his disclosed diesel expenditure was reimbursed by Jarvis and Hydrex, they contend that there was a significant balance of unaccounted for diesel expenditure which must have related to the Applicant's personal use. (The Applicant's evidence on this issue is that he would buy diesel himself when travelling long distances but that usually diesel was paid for by the partnership).

40. We accept the Applicant's evidence that diesel that he bought for the Jarvis and Hydrex vans was reimbursed and that diesel for the farm vehicles was usually paid for by the farming partnership. We also accept that there is certain unaccounted-for diesel expenditure which must relate to the Applicant's personal use and in respect of which it is appropriate for a deduction to be made from the valuation of the benefit in kind figures derived from the Guide. The Applicant submits that the deduction of 50% proposed by the Respondents is unreasonably high. Whilst there is some evidence of private diesel expenditure, we have not been supplied with a breakdown of the figures. We accept that for most of the time the farming partnership paid for the diesel. In the absence of firm figures, accepting the Applicant's evidence as to his pattern of private usage and noting the existence of the unaccounted-for diesel expenditure, we determine that 25% is the appropriate and fair deduction from the figure calculated from the Guide to reflect the value of diesel purchased by the Applicant for his private use.

41. As stated above, we find that in 2010 the figures in the third column of the Guide are appropriate, but that in earlier years, they are not. We note the comment in the Guide that "Actual running costs will vary by individual depending on car choice, age, type of use and driving style". The Guide is therefore found to be a useful starting point but not a formula for producing definitive figures for the value of this benefit in kind over the seven years under consideration.

42. In the absence of complete data and a definitive mathematical formula we have sought a fair and even-handed way of evaluating the benefit to the Applicant of unrestricted use of the farm vehicles. We find the submissions of both sets of experts to have some merit, but neither have provided an unchallengeable mathematical method of valuing the benefit in kind. Further uncertainty exists because throughout the period in question, cars were bought and sold and neither trade in values nor mileage figures are available.

43. After detailed consideration of the submissions of both parties and the resulting figures, we find that the most fair and reasonable way to value the benefit in kind relating to the Applicant's use of the farm vehicles is to use the average of the figures provided by the Applicant and the Respondents, and then to apply a 25% reduction to the resulting figure for the reasons referred to above. In our opinion this reflects the strengths and weaknesses of both suggested methods of calculation and provides the fairest result for both parties. The resulting figures are set out in the Calculation, described as "Value of use of cars".

Apportionment of Value of Benefits in Kind to Reflect Time Spent by the Applicant Working Away from the Holding

44. The Respondents have raised the issue of whether the whole of the Applicant's livelihood (including benefits in kind) could fairly be said to result from his work on the Holding when during the years 2007 to 2010 he was spending considerable amounts of time working off the Holding (including on non-agricultural work). They submit that only the cash and "benefits in kind" which derive from work which is both agricultural, and on the Holding, are to count in his favour. They have produced agreed figures showing the hours

spent by him working off the Holding in 2007 (100 hours), 2008 (366.5 hours), 2009 (361 hours) and 2010 (650 hours). After some discussion Mr Peat agrees (based on ABC figures) that the annual amount of time needed to carry out the necessary farming work on the Holding is 865 hours. It is therefore clear that the Applicant spent an appreciable percentage of his time working away from the Holding in these years. However he contends that there should be no apportionment of the value of benefits in kind as arrangements with regard to the benefits in kind were well in place before he started the off farm contracting work.

45. We prefer the Applicant's argument – the benefits in kind were enjoyed throughout the seven year period with no alteration being made to the facilities enjoyed by him when his working hours on the Holding changed. We are satisfied that throughout the period in question he continued to make a significant contribution to the farming of the Holding. We accept his evidence that he carried out the vast majority of the farming activities himself and that he always completed all necessary tasks (including checking the stock) on the farm before leaving to engage in off-farm work. He continued to earn the right to enjoy the benefits in kind throughout the relevant period as a result of his agricultural work on the Holding. We find that no apportionment is appropriate.

Eligibility – S.36(3)(a) – "The Calculation"

46. Having made the above findings we have updated the Calculation with the resulting figures. This has produced the following annual percentage figures as to the proportion of the Applicant's principal livelihood which was derived from agricultural work on the Holding during each of the years 2004 - 2010:

	2004	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**
Percentage of Applicant's livelihood derived from agricultural work on the Holding	39.15	35.95	36.85	43.58	36.39	41.52	49.59

In order to satisfy the principal livelihood test the Applicant needed to achieve more than 50% in five of the seven years preceding the death of Ian Edward Wannop. *Thompson v Church Commissioners* [2006] EHWC 1773 (Admin) held that 50.1% is sufficient. The Applicant did not achieve this in any of the years in question. We therefore find that the Section 36(3)(a) "principal livelihood" condition is not satisfied by the Applicant.

Eligibility – The Applicant's alternative application – Section 41

47. Having determined that the Applicant does not satisfy the principal livelihood test in Section 36(3)(a) and is therefore not eligible, we have considered whether he can be "treated" as eligible under Section 41. This section requires that, in the relevant period, the Applicant worked full or part time on the Holding and that although the Section 36(3)(a) livelihood test is not satisfied in full, it is satisfied to "a material extent" and that, it appears to the Tribunal that "in all the circumstances" it would be, "fair and reasonable" for the Applicant to be granted a direction entitling him to a succession tenancy.

48. In interpreting the "material extent" provisions, we have derived assistance from case law. In *Littlewood v Rolfe* [1981] 2 All ER 51 his Honor Edgar Fay QC stated that, "percentages of fulfilment are a useful guide to put the facts of finance or time in perspective and to help judge their weight, but I would think it wrong to impose a mathematical cut off point to what is material." His guidance is that Section 41 should not be construed narrowly, applying only to "bare miss" cases, but that the word "material" should be given a wider

interpretation. He approved the definition of the Northern Area ALT in *Dagg v Lovett* [1980] 256 Estates Gazette 491 EGLR, that “material extent” meant, “substantial in terms of time and important in terms of value.” with time meaning the five out of seven year requirement and value meaning the 51% requirement for each of these years. In *Littlewood v Rolfe supra* the Court of Appeal ruled that the fact that the “material extent” condition was satisfied when the tenancy period was less than 75% of the required period of 5 years, did not require Tribunals to decide that the “material extent” requirement was satisfied when the proportion of income derived from the Holding exceeded 74% of the 50.1% requirement.

49. We also note from *Raine’s Trustees v Raine* (1985) 275 Estates Gazette 374, that “important” does not refer to the significance to the applicant but whether there is an important satisfaction of the livelihood test. In *Wilson* v *Earl Spencer’s Settlement Trustees* [1985] 1 EGLR 3 Hodgson J stated:

“What the Tribunal has to consider is the extent to which the condition is not satisfied, or put another way, the extent of the failure. If on the facts it is shown that there has been, “a really large failure” then the applicant cannot bring himself within the Section. Clearly the test requires a comparison between the value of what the applicant derives from the Holding and her total livelihood. It is not the importance of the “Holding Value” to her, which is relevant, but whether the “Holding Value” is an important satisfaction of the requirements of 51%. This I think clearly follows from the wording of Section 31(1)(b) itself, [now section 41(1)(b) of the Act] which begins with the postulate that the condition, namely 51% was not fully satisfied.”

50. Looking at the percentages achieved by the Applicant in the Calculation for the best five years in the seven-year period, there has been a consistent failure to reach the 50.1% figure but there has never been a “really large failure”. Following the guidance of Edgar Fay QC in not imposing a mathematical cut off point and applying the rules “purposively”, we find that the principal source of livelihood test in Section 36(3)(a), though not fully satisfied, is satisfied to a material extent.

The “Fair and Reasonable” Test

51. Having made this determination we have to decide whether, “in all the circumstances” it is “fair and reasonable” for the Applicant to be “treated as an eligible person” and to be granted a direction entitling him to a new tenancy. The is the “further hurdle to the successor tenant” described by Stuart Smith LJ in *Welby v Casswell supra* who went on to say that “if the jurisdiction is given over a wide spectrum of facts by a beneficial interpretation of the word “material” the Tribunal will have a real task in deciding where lies fairness and reasonableness”.

52. The “fair and reasonable” test requires us to consider “all the circumstances”. This enables us to look at all of the facts of the case, including the Applicant’s income (as set out in the Third Schedule) and actual expenditure, rather than being restricted to the technical “consumption based” test of livelihood referred to previously. We have however borne in mind the words of Mr Justice Forbes in *Raines Trustees v Raine supra* (a case relating to section 20 of the Agriculture (Miscellaneous Provisions) Act 1976) that, “the provision is directed at the narrow issue of whether it is fair and reasonable to treat the applicant as satisfying the principal test rather than a general consideration of the merits of the application.”

53. The Oxford Dictionary defines “fair” as “treating people equally without favouritism or discrimination” and “reasonable” as “sensible” and “based on good sense”. The inclusion

of both words in the legislation makes clear our obligation to weigh up the competing arguments of the parties in reaching a just decision.

54. We have first considered three arguments put forward on behalf of the Applicant:

(a) That his circumstances are precisely those intended to be covered by Section 41(6).

55. This Section refers to cases where the applicant's agricultural work on the holding falls short of providing him with his principal source of livelihood because "the holding was too small". On the Applicant's own evidence, this Section does not apply. Whilst throughout most of the seven-year period the disclosed accounts reveal that the farming partnership made a net annual loss, in 2008 and 2010 it made a profit. The Applicant has produced budgets showing that the Holding is capable of supporting a person's livelihood and these have been accepted by the Respondents. We find that farmed and stocked with appropriate investment of time and money as evidenced by the accounts and agreed budgets, a principal source of livelihood could be provided from the Holding. The Applicant has chosen not to make the level of investment which he suggests could have made the Holding consistently profitable. Section 41(6) does not apply.

(b) That Littlewood v Rolfe *is a supportive authority for the Applicant's application.*

56. The circumstances in *Littlewood v Rolfe* supra were quite different from the Applicant's circumstances. In *Littlewood* a young couple took on a farm with a view to making it their permanent home and bringing up their children there. Whilst the farm business was becoming established they both worked part time outside the farm. During part of the time under consideration they had derived 100% of the family income from the farm. Unfortunately the husband died before the couple had been on the farm for five years. The words "material extent" as to time, were construed widely, so a period of 44.5 months was accepted, and it was found to be fair and reasonable that the widow should be entitled to a succession tenancy.

57. By contrast, the Applicant's family have farmed the Holding for generations. The Applicant was brought up on the Holding and started working there when he left school. From 2001 he carried out most of the farm work himself. However, during the period under consideration the majority of his time was spent working, or contracted to work, elsewhere – either on the railways or carrying out contracting work, much of which was non-agricultural. Whilst he informed us in evidence that for much of the time he only worked away on Saturday nights and was on call during the week, it is apparent from the high disclosed earning figures as set out in the Third Schedule that this off-farm work represented a substantial commitment and source of income to him. Where his budgets demonstrate that adjustments to farming practices and stocking could make the Holding consistently profitable, those changes were not implemented before his father's death even though the Applicant appears to have had sufficient income to do so.

58. The couple in *Littlewood* had focussed their attentions on building up their farming business to create their principal source of livelihood and worked outside the farm only to support that objective. By contrast, the Applicant appears to have been content to maintain the Holding, functioning at a broadly similar level, throughout the period under consideration, whilst he focussed his attention on earning and investing his main income elsewhere.

(c) That the Applicant had lived on the farm since birth and it was his home.

59. We accept that the Applicant lived on the farm until his father's death although we note that after his father had died the Applicant moved out to live at one of his investment properties

with his partner and child. This is an entirely different scenario from that in *Welby v Casswell supra* or *Littlewood supra* where the farm was the only place available to the son or wife respectively to live. Here the Applicant has shown by his own actions that, should the farmhouse no longer be available to him, he would have no difficulty in finding and financing alternative accommodation.

60. We have also considered the following Respondents' arguments:

(a) Economic dependence

61. The Respondents contend that this is not a case where the farm provided or supported the Applicant's livelihood, but a situation where the Applicant's off-farm earnings supported the farm. As seen from the "Applicant's Income" figures in the Third Schedule he only drew cash from the farming business in three years of the seven year period with the vast majority of his cash income coming from sources other than the farm. The Respondents contend that, far from being economically dependent on the Holding, the Respondent was economically dependent on his work on the railways and in 2008-2010 on his off Holding contract work. The total cash and benefits in kind from his agricultural work on the Holding only constitute a small fraction of his actual annual income. Considering all the circumstances, including the Applicant's earnings from elsewhere, we find that although he has satisfied the technical consumption-based livelihood test to a "material extent", he is not economically dependent on the Holding. The technical consumption-based test produces an inaccurate representation of the real source of livelihood because it fails to recognise that a substantial part of the Applicant's expenditure including that on holidays, social events and his hobby of high value bikes, was financed from his off farm work. We have asked ourselves the question asked in *Judge v Umpleby (Deceased)* (July 1978, unreported), that is whether the Applicant would have been "materially worse off throughout this period", if he had not received the income and benefits in kind from the Holding. We find that he would not have been "materially worse off".

(b) Time spent working off the farm

62. As referred to in paragraph 44 above, the Respondents sought an apportionment of the value of benefits in kind to reflect the substantial amount of time spent by the Applicant working off the farm and on non-agricultural activities. For the reasons stated earlier we have not applied the requested apportionment. However, in the context of the "fairness and reasonableness" test which enables us to take account of "all the circumstances", we find the substantial amount of time spent working off the farm, and the resulting earnings, to be evidence of the Applicant's focus on off-farm matters rather than on building up the farming business at the Holding for his future livelihood.

63. We have then considered the following:

(a) The policy of the agricultural tenancy succession legislation

64. His Honour Edgar Fay QC in *Littlewood v Rolfe supra* stated that the policy of agricultural tenancy succession legislation was "to create new rights in deserving persons with a view ... to preserving the family continuity which has long been a feature of English farming life". In all the circumstances we do not find the Applicant to be one of those persons intended to be protected by the legislation.

(b) The purpose of the "fair and reasonable" test.

65. As stated in Muir, Watt & Moss' Agricultural Holdings Fourteenth Edition 14.71:

"A wide consideration of circumstance directed to this question might lead a Tribunal to conclude that it is not fair and reasonable to allow an applicant to qualify if, for example, he is really a person whose case on livelihood is of the most technical type and he has a vast outside income available to him which he chooses not to live on in order to attempt qualification for the purposes of Section 39".

66. We find some similarity in the Applicant's circumstances to those described above. Despite the fact that he has satisfied the technical consumption-based principal livelihood test to a material extent, he has a vast outside income. He has chosen not to invest all of this in developing the farming business to a level which would have been consistently profitable and which could have provided his principal livelihood. He has instead invested considerable sums elsewhere and financed much of his actual expenditure from off-farm income.

(c) The "jury like" approach

67. Finally we have considered the guidance of Stuart LJ in *Welby v Casswell supra* where he stated that matters of construction are largely a "matter of impression." To adopt the non-legalistic or jury-like approach which he recommended, we have asked ourselves the question which he asked; "From what is the [Applicant's] income derived". In that case the answer was, "from the farm". By contrast, we find in this case that the answer is, "from other than the farm".

Fair and Reasonable: The Conclusion

68. The above findings lead us to the conclusion that, notwithstanding the fact that the Applicant satisfies the livelihood condition to a material extent, it is not "fair and reasonable" for him to be granted a direction entitling him to a succession tenancy. In our opinion, his circumstances are not those which the succession provisions in the Act are designed to protect. He is a man of many skills, industrious and entrepreneurial and with proven substantial earning capacity off the farm. He has chosen to focus his attentions away from the Holding, by working on the railways, buying investment properties and carrying out contracting work, much non-agricultural, away from the Holding. Whilst some of the money earned from these activities has been invested on the Holding, he has chosen not to invest to the level which would have, according to his budgets, led the farm to sustainable profitability. Instead he has kept the farm in order, invested sufficient capital and farmed it adequately to maintain its existing level of profitability, but not taken steps to improve it or increase its activity levels or profitability despite having the necessary knowledge and funds to do so. He is not economically dependent on the farm. Much of his expenditure on holidays, cycling and socialising has been financed from his off-farm earnings. The farm has been economically dependent on inputs of money from him, which he earned elsewhere. His commitment has been to maintain the farm at a broadly similar level as a part-time activity, not to build it up to produce his principal source of livelihood. We therefore find that it is not fair and reasonable for him to be granted a direction entitling him to a succession tenancy. He therefore cannot be treated as eligible under Section 41 of the Act, and his application is dismissed.

Suitability

69. As we do not find the Applicant to be eligible we are not required to find as to his suitability. However we wish to make a number of brief comments on this issue. There is no dispute as to Applicant's good health, financial standing and practical experience of agriculture. The "suitability" issues raised by the Respondents are the historically low stocking levels and levels of profit achieved by the Holding, the Applicant's late declaration of rents from his investment properties to the tax authorities and his conviction

for assault causing actual bodily harm. We accept that with suitable investment of time and money, the Holding could generate consistent profit. We accept the Applicant's explanations with regard to the late declaration of rental income and that the assault was entirely out of character. None of the issues raised by the Respondents therefore persuade us that, if the Applicant had been found to be eligible, he would have been an unsuitable person to become tenant of the Holding.

Decision

70. For the reasons given we unanimously find that the Applicant is not an eligible person within Section 36 of the Act and cannot be treated as eligible under section 41 of the Act. We accordingly dismiss his application and find that he is not entitled to a direction entitling him to a tenancy of the Holding.

(signed) Shirley M Evans
SHIRLEY M EVANS CHAIRMAN

THE FIRST SCHEDULE

PROPORTION OF LIVELIHOOD DERIVED FROM AGRICULTURAL WORK ON THE HOLDING

Total Livelihood								
	2004	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**Totals**
Current account – Agreed living expenditure	13,881	14,257	15,809	12,020	18,608	14,494	11,117	100,186
Current account – Unknown expenditure		3,398	401	476		232		4,507
Drawings from farm for living expenses		704			378			1,082
Value of living in the house	4,494	4,652	4,796	4,950	5,113	5,206	5,280	34,491
Value of use of cars	2,248	2,323	2,364	2,298	2,548	2,496	2,786	17,063
Value of provision of meals	2,190	2,232	2,297	2,403	2,604	2,751	2,870	17,347
Total value of benefits in kind	22,813	27,566	25,667	22,147	29,251	25,179	22,053	174,676
Livelihood derived from agricultural work on the Holding								
Drawings from farm for living expenses		704			378			1,082
Value of living in the house	4,494	4,652	4,796	4,950	5,113	5,206	5,280	34,491
Value of use of cars	2,248	2,323	2,364	2,298	2,548	2,496	2,786	17,063
Value of provision of meals	2,190	2,232	2,297	2,403	2,604	2,751	2,870	17,347
TOTAL	8,932	9,911	9,457	9,651	10,643	10,453	10.936	69,983
Elements derived from other sources								
Current account – Agreed living expenditure	13,881	14,257	15,809	12,020	18,608	14,494	11,117	100,186
Current account – Unknown expenditure		3,398	401	476		232		4,507
TOTAL	13,881	17,655	16,210	12,496	18,608	14.726	11,117	104,693
Percentage derived from agricultural work on the Holding								
% derived from Agricultural work on the Holding	39.15	35.95	36.85	43.58	36.39	41.52	49.59	

THE SECOND SCHEDULE
CALCULATION OF VALUE OF USE OF CARS

	2004	2005	2006	2007	2008	2009	2010	TOTAL
Average of Hitch and Peat	2,997	3,097	3,152	3,064	3,397	3,328	3,714	22,749
Less 25% for private use	749	774	788	766	849	832	928	5,686
Value of use of cars	2,248	2,323	2,364	2,298	2,548	2,496	2,786	17,063

THE THIRD SCHEDULE
APPLICANT'S INCOME

	2004	2005	2006	2007	2008	2009	2010	TOTAL
Cash from farming	–	3,000	–	180	1,770	–	–	4,950
Cash from other sources	20,766	36,024	24,360	65,752	88337	36,962	51,465	323,666
TOTAL INCOME	20,766	39,024	24,360	65,932	90,107	36,962	51,465	328,616