FIRST TIER TRIBUNAL

PROPERTY CHAMBER

(AGRICULTURAL LAND AND DRAINAGE)

Case Reference	**:**	**ALT/E/S/2017/020**
Property	**:**	**Calves Close Culworth Road Chipping Warden Northamptonshire**
Applicant	**:**	**Kathleen Mary Wright**
Respondent	**:**	**Sarah Jane Smith**
Type of Application:		**Section 39 Agricultural Holdings Act 1986 (succession on death)**
Tribunal:		**Regional Judge Andrew Gore** **Mr Richard Drew FRICS FAAV** **Mr Richard Simmons**
Date & Location:		**18 & 19 March, Oxford Combined Court Centre Hearing**
Date of Determination:		**23rd October 2019**

DECISION

UPON HEARING Mr Johnstone, the solicitor for the Applicant, and Mr Thomson, the solicitor for the Respondent

UPON READING the evidence filed and HEARING the oral evidence of the Applicant, Jonathan Perks MRICS FAAV and Judy Pearson MRICS FAAV

AND UPON the application including an application by the Applicant for a determination pursuant to section 41 Agricultural Holdings Act 1986 that if she is not an eligible person pursuant to section 36 (3) of the Act she should be treated as an eligible person for the purpose of sections 36-48 of the Act

AND By reference to the written reasons set out in the attached Schedule of Reasons

The Tribunal DETERMINES that the Applicant is to be treated as an eligible person pursuant to section 41 of the Act and GIVES A DIRECTION entitling the Applicant to a tenancy of the holding

AND IT IS FURTHER DIRECTED that for the purpose of section 46 (2) (b) of the Act the relevant time shall be 25 December 2019

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

(signed)...S. Stockton.....
Tribunal Secretary

Dated: 27/11/19

SCHEDULE OF REASONS

Introduction

1. This is an application by Kathleen Mary Wright ("Mrs Wright") to the Tribunal for a direction entitling her to a tenancy of property which she claims to be an agricultural holding, and known as Calves Close Culworth Road Chipping Warden Northamptonshire ("Calves Close"), pursuant to section 39 of the Agricultural Holdings Act 1986 ("the Act"). Mrs Wright, who was born on 22 November 1945, is the widow of the late David William Wright ("Mr Wright") who was born on 11 October 1940 and died on 26 August 2017. According to her application, Mrs Wright understood the tenancy, which is purely oral, to have been granted in about 1968. The rent is currently £1,140 per annum.

2. The application was opposed by the landlord, Sarah Jane Smith ("Mrs Smith"), in her response dated 24 November 2017. Mrs Smith did not accept that Mr Wright's tenancy constituted an agricultural holding or that part of the land, SP 5049 5816, a spinney with some rough grazing was included in the tenancy. If there had been relevant business activity at an earlier stage it had long since ceased. Nor did she consider that either Mr or Mrs Wright derived their principal livelihood from their agricultural work at Calves Close. She reserved her position regarding Mrs Wright's eligibility and suitability. Mrs Smith's solicitors served a Case G Notice on the same day, intended to terminate the existing tenancy on 31 December 2018.

3. The application was initially stayed for the purpose of negotiations. Following changes in Mrs Wright's representation, Regional Judge Andrew Gore gave case management directions and directions for trial. The Tribunal conducted a site inspection of Calves Close prior to hearing the application over 2 days at the Oxford County Court. Mrs Wright was represented by Michael Johnstone of Loxleys Solicitors Ltd and Mrs Smith by Michael Thomson of Arnold Thomson & Co. The Tribunal is grateful for their written and oral submissions, including the bundle of authorities and extracts from *Muir Watt & Moss Agricultural Holdings, 15th ed* ("Muir Watt"") and *Scammell Densham & Williams Law of Agricultural Holdings 10th ed* ("Scammell") supplied by Mr Johnstone.

Relevant provisions of the Act

4. Section 1:

> (1) In this Act *"agricultural holding" means* the aggregate of the land (whether agricultural land or not) comprised in a contract of tenancy which is a contract for an agricultural tenancy, not being a contract under which the land is let to the tenant during his continuance in any office, appointment or employment held under the landlord.
> (2) For the purposes of this section, a contract of tenancy relating to any land is a contract for an agricultural tenancy if, having regard to—
> (a) the terms of the tenancy,

(b) the actual or contemplated use of the land at the time of the conclusion of the contract and subsequently, and
(c) any other relevant circumstances,
the whole of the land comprised in the contract, subject to such exceptions only as do not substantially affect the character of the tenancy, is let for use as agricultural land.....
(4) In this Act *"agricultural land" means*—
(a) land used for agriculture which is so used for the purposes of a trade or business.....
(5) In this Act *"contract of tenancy"* means a letting of land, or agreement for letting land, for a term of years or from year to year; and for the purposes of this definition a letting of land, or an agreement for letting land, which, by virtue of subsection (6) of section 149 of the Law of Property Act 1925, takes effect as such a letting of land or agreement for letting land as is mentioned in that subsection shall be deemed to be a letting of land or, as the case may be, an agreement for letting land, for a term of years.

5. Section 96 (1):
"agriculture" includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and *"agricultural"* shall be construed accordingly;

6. Section 6:

(1) Where in respect of a tenancy of an agricultural holding—
(a) there is not in force an agreement in writing embodying all the terms of the tenancy (including any model clauses incorporated in the contract of tenancy by virtue of section 7 below).....
the landlord or tenant of the holding may, if he has requested the other to enter into an agreement in writing embodying all the terms of the tenancy and containing provision for all of the said matters but no such agreement has been concluded, refer the terms of the tenancy to arbitration under this Act.

7. Section 7:

(1) The Minister may, after consultation with such bodies of persons as appear to him to represent the interests of landlords and tenants of agricultural holdings, make regulations prescribing terms as to the maintenance, repair and insurance of fixed equipment (in this Act referred to as *"the model clauses")*.....
(3) The model clauses shall be deemed to be incorporated in every contract of tenancy of an agricultural holding except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other.

8. Section 34:

(1) The provisions of this Part of this Act shall have effect with respect to—

(a) any tenancy of an agricultural holding granted before 12th July 1984....

9. Section 35:

(1) Sections 36 to 48 below (except sections 40(5), 42 and 45(8) which are of general application) shall apply where—

(a) an agricultural holding is held under a tenancy which falls within paragraph (a) or (b) of section 34(1) above, and

(b) the sole (or sole surviving) tenant (within the meaning of that section) dies and is survived by a close relative of his.

(2) In sections 36 to 48 below (and in Part I of Schedule 6 to this Act)—

"close relative" of a deceased tenant means —

(a) the wife, husband or civil partner of the deceased....

10. Section 36:

(1) Any eligible person may apply under section 39 below to the Tribunal for a direction entitling him to a tenancy of the holding.....

(3) For the purposes of this section and sections 37 to 48 below, *"eligible person"* means (subject to the provisions of Part I of Schedule 6 to this Act and without prejudice to section 41 below) any surviving close relative of the deceased in whose case the following conditions are satisfied—

(a) in the seven years ending with the date of death his 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, and

(b) he is not the occupier of a commercial unit of agricultural land.

(4) In the case of the deceased's wife the reference in subsection (3)(a) above to the relative's agricultural work shall be read as a reference to agricultural work carried out by either the wife or the deceased (or both of them).

11. Section 39:

(1) An application under this section by an eligible person to the Tribunal for a direction entitling him to a tenancy of the holding shall be made within the period of three months beginning with the day after the date of death.

(2) Where only one application is made under this section the Tribunal, if satisfied—

(a) that the applicant was an eligible person at the date of death, and

(b) that he has not subsequently ceased to be such a person,

shall determine whether he is in their opinion a suitable person to become the tenant of the holding.

12. Section 41:

(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.
(2) A person to whom this section applies may within the period of three months beginning with the day after the date of death apply to the Tribunal for a determination that he is to be treated as an eligible person for the purposes of sections 36 to 48 of this Act.
(3) If 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.

13. Section 45:

(1) A direction by the Tribunal—
(a) under section 39(5) or (6) above entitling an applicant to a tenancy of the holding....
shall entitle him or them to a tenancy or joint tenancy of the holding as from the relevant time on the terms provided by sections 47 and 48 below; and accordingly such a tenancy or joint tenancy shall be deemed to be at that time granted by the landlord to, and accepted by, the person or persons so entitled.

The Issues

14. By the time of the hearing the issues had been narrowed. From his skeleton argument, Mr Johnstone anticipated that the issues would comprise: (i) whether the tenancy was subject to the provisions of the Act, including Part IV; (ii) whether Mrs Wright satisfied the principal or only source of livelihood test; (iii) if she did not, whether she satisfied the test to a material degree and whether it would be fair and reasonable for her to apply for a direction; and (iv) her suitability. In his skeleton argument Mr Thomson also identified Mr Johnstone's issues (ii)- (iv) as matters which the Tribunal would have to determine.

15. However, in relation to Mr Johnstone's first issue, Mr Thomson stated that whilst it was by no means certain that Mr Wright's occupation of Calves Close gave rise to a tenancy subject to the provisions of the 1986 Act, Mrs Smith requested the Tribunal to deal with the application on the assumption that his occupation did so. The Tribunal understood that to mean it was being asked to proceed on the basis that the 1986 Act governed the tenancy at the time of the grant, given the effectively unchallenged evidence about the significant use of the land for livestock purposes in the earlier years of the tenancy, and that it remained the case thereafter until Mr Wright's death given that the status of the tenancy was not the subject of any submissions in Mr Thomson's written submissions. Mr Thomson confirmed that was so in the course of his oral response to Mr Johnstone's opening statement.

16. In these circumstances, the Tribunal's starting point must be that the concession was correctly made. The Tribunal cannot pursue its own enquiries, subject witnesses to the equivalent of a second cross-examination or approach the application in a wholly different manner to the way in which the parties present it. The way in which Mr Johnstone actually presented the application before the Tribunal, must also, of course, have been affected by Mr Thomson's starting point. At the same time, as its jurisdiction is statutory, had the Tribunal concluded that it could not be reasonably argued that the tenancy remained an agricultural holding at the date of Mr Wright's death, it might have had to invite the parties to make further submissions as to what course it should adopt.

17. There was no doubt that the tenancy was granted before 12 July 1984 and, on any view of the unchallenged evidence, that it fulfilled the requirements of section 1 at the time of the grant and was thus an agricultural holding at that date. However, it appears from the opening words of section 35 (1) that for the succession provisions to be available to a potential applicant the tenancy must remain an agricultural holding at the date of the tenant's death.

18. As will be apparent from its consideration of the evidence below, the Tribunal took the view that in terms of commercial activity the activity at Calves Close was above the minimum level necessary to constitute a letting for use as agricultural land and that the other requirements in section 1 for a contract of tenancy to be an agricultural holding were met at the date of Mr Wright's death. It therefore follows that if the issues actually in dispute between the parties are decided in Mrs Wright's favour, the Tribunal must then give the appropriate direction under section 45 (1) (a) and she will become the tenant of Calves Close on the basis that

it is an agricultural holding. In those circumstances it would not be open to Mrs Smith to argue to the contrary in other proceedings in the future unless something happened in the meantime to change the status of the tenancy.

The Inspection

19. The Tribunal inspected Calves Close immediately prior to the hearing in the presence of the parties and their representatives. Calves Close lies in open rolling countryside in the north-western corner of Northamptonshire. It is about half a mile east of the village centre of Chipping Warden, off a made up track which runs north off the Culworth Road, Culworth being the village lying to the east of Chipping Warden. It appears from the plans that the name Calves Close is taken from a spinney that lies to the east of the site. The track provides access to the spinney and to other buildings that originally comprised part of the Chipping Warden airfield as well as Calves Close. A rough drive runs into the site from the track, leading to the main entrance to the permanent building which lies towards the centre of the site. The permanent building is divided into two sections, the northern section being storage used in connection with the horticultural activity on the land and the southern section being the residential accommodation. The northern section comprised large brick blocks externally. The southern section is cloaked in concrete blocks and painted white. The whole building is under a corrugated fibre sheet roof.

20. The main entrance leads into an internal lobby which affords access to the interior. The Tribunal inspected the living accommodation, to the south of the lobby. It comprises a well sized kitchen, a pantry, a hallway, two large sized bedrooms, one en-suite, a separate bathroom, a large living room, a medium sized dining room and a large conservatory which proves direct access to the extensive formal gardens to the south of the building. The northern part of the building, which can also be accessed externally, is still essentially in its original state and the Tribunal observed various items of equipment appropriate to a small scale horticultural enterprise there.

21. The fruit trees and the various horticultural structures, mainly large raised beds, polytunnels and similar structures, lie to the west and east of the building. They were well maintained. The north-western part of Calves Close comprises a grass field which did not appear to contain animals at the time of our visit. The north-east and east of Calves Close is wooded. The polytunnels, greenhouses and raised beds were being used in a manner appropriate to a small scale horticultural enterprise.

The lay evidence

22. Mrs Wright had made a detailed statement. She gave oral evidence and was cross-examined about some aspects of her evidence. She did not call supporting witnesses. Mrs Smith's statement was very short, confirming that she had inherited the freehold of Calves Close in 1998, had not, at least since 2011, seen evidence of livestock or, on her relatively few visits, evidence of agricultural machinery or farming activities. She attended the hearing but was not called to give oral evidence. Her husband said in his short statement that he had visited more frequently since his wife inherited the property, about four times a year. He

had never witnessed any agricultural activity being carried on, or agricultural machinery or specialist equipment for market gardening. Mr Blake, an agricultural surveyor and valuer, made a statement confirming that he had visited Calves Close on 5 July 2013 and had not witnessed agricultural activity taking place. Mr Whitmarsh's statement described seeing Mr and Mrs Wright building compost structures but not seeing agricultural activity or machinery, or market gardening. The rest of his evidence was irrelevant to the issues, relating to personal relationships. None of these witnesses attended the hearing. Neither Mrs Smith nor her witnesses referred to the various structures the Tribunal observed during its inspection.

23. Mrs Wright had explained the layout of the various parts of Calves Close and the way in which the marketing gardening activities were carried on in the course of the Tribunal's inspection. At the hearing she confirmed the truth of her witness statement. She was asked some supplementary questions by Mr Johnstone and cross-examined about certain aspects of her evidence by Mr Thomson.

24. The Tribunal found Mrs Wright to be a straightforward and reliable witness. Given that Mrs Smith was not called to give evidence and that her witnesses did not attend, the Tribunal was not in a position to evaluate their reliability or credibility. In the circumstances, it follows that to the extent that the evidence of Mrs Wright was in conflict with that of Mrs Smith and her witnesses, the Tribunal prefers her evidence. It follows that the Tribunal finds the extent of Calves Close is as stated in the application.

25. In her statement, Mrs Wright confirmed that her late husband and his first wife moved to Chipping Campden in 1967. He worked as an engineering manager. Calves Close had been part of the former village airfield. Part of the building on the property had been a YMCA recreation block, the rest had been a theatre. From discussions with local residents Mrs Wright had gathered that after the airfield ceased being an operational base a local resident had used it for part-time chicken farming, moving to live in the YMCA building on retirement and carrying out basic improvements including cloaking some of the original terracotta bricks with concrete blocks and inserting a ceiling. In the mid-60's the tenancy had been taken over by a young couple who intended to run a market garden. They lived in the converted building. However, their venture did not succeed and they moved away soon after Mr Wright came to the village.

26. On moving to Chipping Warden, Mr Wright and a fellow resident had started a small livestock enterprise on land adjacent to Calves Close. In 1968 they took on the tenancy of Calves Close, initially for a year. At the end of 1968 they agreed a long-term tenancy with the then freeholder, and Mr Wright's widowed mother came to live in the YMCA block. It is common ground that the tenancy was oral. Mr Perks, Mrs Wright's valuation expert, said that some time between 2013 and Mr Wright's death, Mr and Mrs Wright instructed him to act on their behalf in connection with an application by Mrs Smith under section 6 of the Act, although for whatever reason the application did not result in a written tenancy agreement being concluded. In 1970 Mr Wright became the sole tenant and began to devote more time to the enterprise. In 1972 Mr Wright and his family joined Mrs Wright senior as residents of the YMCA block. He did not carry out major work to it at the time as his wife was opposed to spending their money on it. Mrs Wright

senior moved away in about 1975. Mr Wright and his first wife separated in about 1983-4 and after a short time he began living there alone. They were subsequently divorced.

27. Mrs Wright met her late husband in the early 1980's through work, prior to him being made redundant. For a short time after his redundancy he kept a small flock of sheep on Calves Close and worked as a cowman for about five years. It appears from her evidence that his work as a cowman must have ceased by 1990, by which time Mrs Wright had come to live with Mr Wright at Calves Close although they did not marry until 15 April 2015.

28. It is clear from Mrs Wright's evidence that her husband greatly enjoyed farming and kept a variety of livestock over the years, including pigs, calves, cattle, sheep, chickens and rabbits for meat. The sheep and rabbit enterprises seem to have been fairly short lived. The finishing of calves appears to have ceased within a few years of Mrs Wright moving to Calves Close. The pig breeding ceased in the mid-1990's and the last cattle left in 2000. On the basis of this unchallenged evidence, the scale and duration of the livestock enterprise is such that it could not be realistically argued that the land comprised in the tenancy was anything other than an agricultural holding during the period 1969-2000. With the end of livestock keeping in 2000, the grass field was initially licensed to a Mr Thompson for the grazing of horses and then used to provide hay. Since about 2012 it has been occupied by a Ms Hicks who keeps two horses on the paddock on the basis that she collects their droppings and put them into the compost bins on Calves Close.

29. As the livestock enterprise was winding down, Mr and Mrs Wright moved into horticulture. Mrs Wright said, *"as the last animals went the horticultural side stepped up considerably."* As well as growing flowering plants for sale, including some made up into hanging baskets, mainly for a local florist, they constructed raised beds from fabricated concrete panels. They also erected a series of greenhouses and a polytunnel. At some point between 1990 and 1995 Mr Wright began work for a local company based at the old airfield. He finally retired from paid employment in 2005. Thereafter they devoted their energies to the horticultural activity at Calves Close. They had assistance from Mr Wright's nephew, Michael Carter-Walford, at weekends. It is apparent that they were already producing apples and pears when in 2013 they planted two more lines of trees with a view to increasing output of these fruits. By 2018 they were fruiting well. In 2013 they also bought parts to create further raised beds. Six had been completed before Mr Wright was taken ill by the illness which eventually caused his death. The parts for the others remained on site.

30. Mrs Wright summarised the fruit and vegetables grown on Calves Close. They amount to 22 vegetables, including rhubarb and asparagus in that number, strawberries and five types of top fruit. She estimated that about one-third of what they produced was for their own consumption. On the basis of what the Tribunal saw of the scale of production in the course of the site inspection, it seems to follow that their diet must have been substantially derived from production on the holding. Some of the rest was taken by Mr Carter-Walford as payment for his work in lieu of cash. The balance was sold or traded by barter. It is clear that Mrs Wright gains significant support from Mr Carter-Walford and

other members of his family because of the family connection. She had experimented making goods for sale from the raw produce but she explained in cross-examination that it had not been pursued because of uncertainty created by the possible impact of HS2 on the property. Following Mr Wright's death the proportion of produce available for sale or trade will have the potential to somewhat increase. Until 2013 Mr Wright also kept bees. He gave up beekeeping after suffering an anaglyptic reaction, but Mrs Wright had recently restarted production using hives she and Mr Carter-Walford were renovating. 40 lbs of honey were produced in 2018 and further hives were being refurbished to increase production. One unusual aspect of the enterprise is the absence of paperwork since 2000. There are no accounts, and records were not produced. Mrs Wright said that she and her late husband operated largely on a cash basis. Financial matters are discussed further below.

31. In her witness statement Mrs Wright described the work carried out to the house by her late husband. He laid a blockwork outer skin over the original hollow bricks. Internally he battened the outer walls, and then inserted insulating materials before plasterboarding and skimming over. He had replaced almost all the windows with double glazed units. Although not specifically mentioned in her witness statement it was evident from the Tribunal's inspection that Mr Wright had carried out a great deal of internal work to fixtures and fittings as well as decorative finishes to create what Mrs Wright correctly described as a comfortable home.

32. In answer to Mr Johnstone, Mrs Wright said her late husband had worked hard over many year to maintain Calves Close. There had been no need for repairs to the building for the last 10 years. Mr Wright was an engineer and the work done to the property was to engineering tolerances. In cross-examination, she explained that some items had been acquired by way of barter of produce rather than cash. She had always understood that she could succeed to the tenancy.

Business activity

33. Both parties had obtained expert evidence about the activity carried on at Calves Close. Nicholas Dee ICAEW, a partner in an accountancy business, Hazelwoods LLP, who also holds a degree in agriculture and specialises in agricultural work was retained for Mrs Wright and prepared a report dated 16 November 2018. William Tongue, a farm business consultant with Berrys, chartered surveyors, who holds a degree in agricultural business management and membership of BIAC, was retained for Mrs Smith and prepared a report dated 15 November 2018. It is not necessary to refer to the reports in detail as the experts agreed a joint statement covering most of the issue they had been asked to consider and were not required to attend to give oral evidence.

34. According to the experts' joint statement:

    (i) £60 per day was a realistic rate of payment for the work undertaken by Mr Carter-Walford which would equate to £6,240 pa if he worked an average 2 days a week on the holding. Mr Tongue considered, however, that the figure constituted a benefit in kind as the actual rate calculated

on the basis of the barter of produce was much lower, and Mr Johnstone's submissions proceeded on that basis;

(ii) the gross value of produce consumed was £520 pa;

(iii) the total value of produce grown was £1,560 pa on the basis of the produce consumed representing one-third of the total production. They proceeded on the basis that the balance should be equally divided between the value of goods sold or bartered and payment in kind to Mr Carter-Walford;

(iv) the potential output of the holding could be in the region of £3,000 pa;

(v) they could not identify other benefits in kind derived from the holding, other than the residential accommodation with which they were not concerned;

(vi) the direct costs of production were likely to be about 25% of the value of produce consumed. Mr Tongue considered that had to be taken into account when calculating the benefit in kind. Mr Dee did not express a view;

(vii) Mr Tongue believed the activities, including the lack of accountancy records, were not indicative of a commercial enterprise. Mr Dee did not express a view;

(viii) growing of grass would normally be regarded as agriculture but Mr Tongue considered on the basis of the evidence provided the use was not agricultural for the purpose of the Planning Acts.

35. Understandably, few records for the period to 2000 are now available. However, Mrs Wright did produce accounts for 1985 (showing Mr Wright as a sole trader), 1988 (at which time the business was recorded as being a partnership of Mr and Mrs Wright) and 1996. The fact that the 1996 accounts were in Mr Wright's name alone was not explored in cross-examination and the Tribunal notes that, presumably because the business had reduced in scale by that date, consistent with Mrs Wright's evidence, only simplified accounts were produced. It may be the absence of Mrs Wright from the accounts was for tax reasons as her evidence is of the agricultural activity on the land being a joint enterprise from the time she moved to Calves Close. It is therefore clear that up to 2000 the requirements of section 1 were fulfilled.

36. In cross-examination Mrs Wright explained how their capital had been largely spent on the property in earlier years. She was taken to the Coventry Building Society account statements for the period 2010-17. These statements were in the name of Mrs Wright alone but she said it was a joint account and their only account. It appeared from her evidence that the statements were obtained afresh from the building society in connection with this application. Other than regular receipts, such as pensions payments, she confirmed the small number of other significant receipts were from a series of small ISAs held by Mr Wright used for one off expenditures, such as Mr Wright visiting his son in South Africa.

37. It is clear on the evidence that after 2000 the nature of the activity on the land changed. There is no evidence that conventional accounts or other formal business records that one would normally expect to be kept were maintained. Nevertheless, Mrs Wright's evidence points to continuity of purpose. In her witness statement Mrs Wright said *"it may not have been big business but we always viewed it as a business, from the livestock in the earlier years to the horticulture more latterly. You only need to see the scope on which David and I*

have grown and I continue to grow vegetables and the quantities we have produced to appreciate this was much more than a hobby for our own consumption." In cross-examination Mrs Wright acknowledged that it was more a way of life than a business and that they were not making a profit. That, however, is a different question in law from whether an activity constitutes a trade or business. Many smallholders would describe their activities as being more a way of life than a business and many farmers experience significant periods when they do not make profits and rely on capital reserves or borrowing. Charities carry on business activities as part of their fund-raising. The Tribunal also notes that in *Rael-Brook v Minister of Housing and Local Government [1967] 2 QB 65*, referred to in Scammell, Widgery J said, *"It is clear from authority that the making of profit is not an essential feature of carrying on a business unless the particular context so requires."* Unlike, for example, revenue legislation section 1 does not impose such a requirement, though it is a matter to be brought into the overall consideration of the enterprise.

38. Had only an occasional item of produce been traded or labour supplied for goods in lieu of payment, it would be difficult to argue that trading was being carried on. Here, however it was clear from Mrs Wright's evidence, and supported by what the Tribunal saw of early crops having been sown and other areas being prepared for use that the level of activity far exceeded what Mrs Wright would require for her own consumption. According to Mrs Wright, as reported by Mr Dee, there are 15 raised beds approximately 4' x 12', 2 greenhouses 6' x 8' and one 8' x 8', one poly-tunnel 20' x 30' and a second 10' x 30'. The Tribunal noted these structures in the course of our site view. Whilst the experts agree that some areas of the holding were not being used to their full productive capacity, it would make no sense to establish and run an enterprise even of that scale simply to produce crops for consumption by two people.

39. In *Stevens v Sedgeman [1951[2 KB 434*, to which we were not referred but is discussed in the current edition of *Muir Watt,* the Court of Appeal held that a half acre of land used for the growing of vegetables which were sold was an agricultural holding. *Muir Watt* also refers to *Look v Davies (1952) 160 EG 147* where the holding appears to have been smaller. The land currently used for horticulture here extends, according to Mr Tongue, to 2,800 sq. m, a little over two thirds of an acre, of which about two thirds is not for own consumption. Thus, the overall scale of the commercial operation here and in *Stevens* appears similar.

40. In terms of business activity, an interesting question that arises is whether the value derived from the occupation of the residential accommodation on the holding falls to be taken into account in assessing the nature of the activity being carried on at the holding. On the one hand, it is well established that such value is be treated as part of the benefits accruing to the tenant from his work on the holding and thus part of his livelihood for the purpose of the livelihood text in section 36. On the other hand, it might be argued that the benefit is only secured because the holding already qualifies as an agricultural holding for other reasons. In the event the Tribunal does not need to address this issue as we think it is a borderline case if the benefit of accommodation is ignored. On the basis of the evidence and the way in which the case was presented the Tribunal accepts that it falls on Mrs Wright's side of the border. It certainly could not be said that the

concession made on Mrs Smith's behalf was wrongly made. The Tribunal notes, in coming to this conclusion, that in her statement Mrs Wright said that they had intended to expand the horticultural activity by increasing the number of raised beds. However, only six of the additional beds had been completed before Mr Wright was taken ill and the materials for the remaining beds remained stacked on site. Prior to Mr Wright's death, Mr and Mrs Wright were informed that the HS2 railway line, which was previously intended to pass along the edge of Calves Close, would instead pass directly through the property. In those circumstances it is quite understandable that Mrs Wright should not have taken steps to develop the enterprise. To the extent that the possible impact of HS2, at a time her husband was ill and then died, may have reduced the level of activity on the property, the Tribunal notes the passage from the judgment of Sir David Cairns in *Wetherall v Smith [1980] 1 WLR 1290 CA* to which Mr Johnstone referred us:

> *"on principle, it is in my judgment right that the protection of the statute should be lost if agricultural activity is wholly or substantially abandoned during the course of the tenancy even if without consent of the landlord. The object of the legislature is surely to maintain continuity in the conduct of farming and horticultural operations rather than to put people, who have at some time in the past acquired a particular type of tenancy, in a privileged position. At the same time, the cases show that the tenancy is not to be regarded as alternating between being within and outside the Act of 1948 as minor changes of user take place, and that, when the tenancy is clearly an agricultural one to start with, strong evidence is needed to show that agricultural user has been abandoned."* (our emphasis)

41. Having concluded that in the all the circumstances this tenancy was an agricultural holding at the date of Mr Wright's death and remains so, it is necessary to consider the other matters which were still in dispute between the parties at the time of the Tribunal hearing.

Eligibility in principle

42. Given that Mrs Wright satisfied the close relative test in section 36 (2) and is not the occupier of a commercial unit of agricultural land, the initial matter to determine in relation to eligibility is whether Mrs Wright satisfies the test in section 36 (3) (a) and (4) of the Act.

43. In his written submissions, Mr Johnstone referred the Tribunal to the relevant passages in *Muir Watt (at paragraphs 17.43-.45)* and *Scammell (at paragraph 42.26)*. They make it clear that livelihood relates to *"consumption rather than financial entitlement"* (as Muir Watt puts it), citing passages in the judgments of Webster J in *Trinity College Cambridge v Caines [1984] 2 EGLR 17* and Stuart-Smith LJ in *Casswell v Welby (1996) 71 P&CR 137* where he said:

> *"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."*

44. The general approach taken by Mr Johnstone was not disputed by Mr Thomson, although he invited the Tribunal to come to different conclusions.

45. Mr Johnstone annexed a helpful table to his written submissions in which for each year from 2011-17 he set out: (i) income generated cash in hand; (ii) the value of the residential accommodation to Mr and Mrs Wright; (iii) the value of produce consumed on the holding; (iv) the product of (i-iii); (v) their combined pension; (vi) one-half of the combined pension income. His submission was that the effect of the calculations was to show that Mrs Wright satisfied the livelihood test, indeed did so in all of the seven years. By necessary implication Mr Johnstone accepted that Mr Carter-Walford's willingness to work on the holding (it seems to have been generally 2 days a week in the summer and 1 day a week in the winter according to Mrs Wright, so, say, in the region of 70 days a year allowing for public holidays and some time off) for less than the appropriate hourly wage should not be treated as a benefit in kind. Mr Thomson accepted the figures in the table were arithmetically correct but disputed the principles from which some of the figures were derived.

46. The calculations under (i) and (iii) were essentially derived from the joint statement of Mr Dee and Mr Tongue, in turn derived from the factual evidence of Mrs Wright. Given the Tribunal has accepted her evidence generally, it follows that the figurers in (i) and (iii) fall to be applied. Mrs Wright did not seek to distinguish between the proportions of produce going to Mr Carter-Walford and otherwise, but Mr Dee and Mr Tongue proceeded on the basis of an approximately equal split and Mr Johnstone and Mr Thomson adopted that approach.

47. In the course of his closing submissions Mr Johnstone submitted that no deduction from the gross figure should be made. In relation to produce traded he submitted that was because they were cash or barter dealings. In relation to produce consumed he submitted that was because it was a benefit in kind. Mr Thomson did not address this issue directly. In relation to produce traded the Tribunal does not accept Mr Johnstone's submissions. In order to sell produce worth £520 in her hand, the experts agree Mr Wright would have had to meet direct costs of £130 pa. In relation to own consumption, the fact that it is a benefit in kind cannot result in an avoidance of the costs incurred in order to create that benefit. However, the availability of this benefit from the holding itself clearly creates savings, not just in terms of the time and trouble of shopping for a range of fresh fruit and vegetables but in the cost of doing so. One would expect to travel to a town to buy the range of crops produced on the holding. The nearest town is Banbury, a little under 10 miles away. It seems to the Tribunal that such matters reasonably balance out the small sum of £130 pa.

48. The pension income over the relevant period was not disputed and Mr Thomson confirmed in his closing submissions that he agreed with Mr Johnstone that the combined value of the pensions should be divided equally between Mr and Mrs Wright for the purpose of the calculations. When one considers Mr and Mrs Wright's financial arrangements, that agreed approach was clearly correct.

Valuation of property

49. The main difference between the parties lies in the treatment of the value of the accommodation available at Calves Close. The value of the accommodation on the holding can be a significant component in the value of the livelihood derived from the tenant's work on the holding in the case of small agricultural holdings. Mrs Wright relied on the evidence of Jonathan Perks, MRICS, FAAV, an Associate Director of Fisher German LLP based at their Banbury office. He inspected Calves Close on 26 September 2018. Mrs Smith relied on the evidence of Judy Pearson, MRICS, FAAV, who is with Berrys at their Towcester and Kettering offices. She inspected Calves Close on 28 September 2018.

50. In the event the parties' valuers were able to agree a number of matters following the exchange of reports:

(i) The cement roof may contain asbestos;
(ii) The basic, but not the exact, construction of the property;
(iii) The repairing obligations relating to the structure of the original building fall under the Model Clauses prescribed pursuant to the regulations made under section 7 of the Act;
(iv) The property is serviced with mains water, septic tank drainage, mains electricity and electric storage heaters;
(v) The market rent as at 17 August 2017, taking into account the condition of the property but without any discount for mode of construction or repairing obligations, was £9,600 pa (£800 pcm);
(vi) The market rental figures for the period commencing August 2010, on the same basis as (v).

51. In coming to their agreement under (v) above, both Mr Perks' and Ms Pearson's starting point was the cost of leasing a comparable property on an Assured Shorthold Tenancy ("AST"), given that properties in the private residential sector are now habitually let on that basis. However, Mr Perks and Ms Pearson disagreed about allowances for the questions of sub-standard construction and repairing liabilities. Before considering their respective reports, it is helpful to review the case law cited to the Tribunal by Mr Johnstone.

52. The first was *Keene v Trustees of Guys and St Thomas Charity*, an ALT decision in 2004. This decision is much earlier in time than the other decisions he referred to on this point, the question of the value of the accommodation on the holding was a subsidiary one and it was not subject to the same level of analysis as in the more recent cases. The Tribunal has not in the end found it of assistance.

53. In *Roberts v Holmes,* an ALT decision in 2009, the house on the holding was a three bedroomed detached property. The applicant's surveyor approached the valuation issue by reference to comparable properties let under an AST, whilst acknowledging that the farmhouse was unusual and that comparables were not readily obtainable in the area. The Respondent's surveyor advanced alternative approaches to valuation. The Tribunal preferred the approach of the applicant's surveyor. He agreed that it would be right to apply a deduction of 5% to reflect the fact that the tenancy was subject to the Model Clauses. This approach was adopted by the Tribunal.

54. In *Helm v ALIH Properties Ltd*, an ALT decision in 2010, the applicant's valuer approached the valuation issue by looking at comparables on the open market. The landlord's valuer approached the matter on the basis that the condition of the property was such that it had no value. The Tribunal, in its discussion of the issue of value concluded at paragraph 97: *"It is the value of the accommodation to the Applicant which is to be valued and that value must be obtained by considering what the Applicant would pay for that accommodation. That is of course a hypothetical exercise because there is no evidence that the Applicant and [his father] ever considered the question. The Tribunal considers that the best evidence of that value is what the Applicant might have had to pay for alternative accommodation if he had had to move elsewhere. That may result in a very different conclusion than considering the cost to [his father] of providing the accommodation which could be valued by considering what a third party might pay for the accommodation at [the] Farm."* The Tribunal thus preferred the general approach taken by the applicant's valuer. Whilst the comparables he relied upon might *"provide a better standard of accommodation to that at [the] Farm... there was no other evidence available to the Tribunal."* (at paragraph 101). The Tribunal did, however, take the lower end of the bracket of values advanced by the applicant's valuer to reflect the condition of the property. In that case the comparables relied upon by the valuer were of a room available to let in a shared house, reflecting the actual accommodation enjoyed by the applicant in the large farmhouse mostly occupied by his parents. No argument was advanced by the landlord that if the applicant's valuer's general approach was to be preferred, a deduction should be made to reflect the presumably more onerous terms of the written tenancy agreement, but given the nature of the applicant's accommodation in the property, akin to a lodger, it would not, in the Tribunal's view, have been appropriate to do so.

55. In *Pickard v Howard*, an ALT decision in 2011, the applicant had been living with his wife and child in the larger part of the farmhouse, a five bedroomed Grade II listed building in poor condition. The deceased tenant was his brother and the brothers had effectively divided the farmhouse into two separate households under the same roof, save for a shared bathroom. Whilst some elements of the tribunal's approach to the value of the accommodation to the applicant is helpful, such as its approach to division of the benefit between the applicant and other adults in the property, its discussion of the valuation principles to be applied is in some respects rather problematic. The parties' valuers had agreed on a two-stage process involving, first, a determining of the likely rent which the farmhouse as a whole would have achieved if let on an AST and suitably upgraded and then, secondly, estimating the level to which that rent would need to be reduced to reflect its actual condition. At first sight this slightly complex process seems different to the approach adopted by the tribunals in the other cases to which we were referred. The reason may be because of the tribunal's approach to comparables. At paragraph 31.3 it stated: *"Both [valuers] sought to justify their calculations by reference to lettings of what they considered to be reasonable comparable properties, details of which were in their respective reports. However, we think that in a case such as the present, so-called "comparables" can only provide very limited guidance, especially when the question to be decided is how far an agreed starting value*

of £2,000 a month should be reduced to take into account the actual condition of a specific property." Given that no other valuation basis, other than the comparables basis, was advanced by either valuer, if that basis offers only very limited guidance it becomes rather difficult to understand on what basis the tribunal actually calculated value. It is also at odds with its express approval at paragraph 32.5, albeit in the context of a discussion about deductions, of the tenant's submission that the way to determine the value of the accommodation provided on the holding was *"What did the Applicant save by being able to live in the farmhouse instead of having to pay for an AST house elsewhere?"* It is not clear whether *Helm* was actually cited to the ALT in *Pickard* but that submission closely mirrors the approach adopted by the ALT in that case. The approach of the tribunal in *Pickard* to this particular issue may be explicable on the basis that the farmhouse, a large and historic listed building, was clearly in such poor condition, requiring significant repairs, redecoration and modernisation, that it felt that simply adopting a figure close to the bottom of the comparable rental values, as in *Helm*, did not sufficiently reflect its condition. Nevertheless, there is an overall inconsistency of analysis in *Pickard* which causes the Tribunal to approach it with some caution. However, it can be said that at no point in the judgment did the tribunal apply a deduction to reflect the actual mode of construction of the farmhouse.

56. So far as applying a deduction for repairing liability is concerned, the tribunal in *Pickard* declined the landlord's submission that a deduction should be made, for two reasons. First, any liability the applicant bore for the repairs arose out of his farming partnership with his deceased brother and not his occupancy of the household. The position here, of a couple in a longstanding personal relationship leading to marriage during the seven years prior to Mr Wright's death, and where accommodation, income and expenditure were all pooled is quite different. The tribunal in *Pickard* felt its conclusion was reinforced by some other observations at paragraph 32.6 regarding the existence of alternative accommodation, whether subject to conventional AST covenants or not. The Tribunal did not, with respect, find those arguments persuasive, and it appears from the judgment that they were not actually canvassed with the valuers who gave evidence. Mr Johnstone himself appeared to acknowledge the difficulty with those arguments, as his submissions on behalf of Mrs Wright were essentially fact specific. He relied on Mrs Wright's evidence that there had been no significant repairs over the last ten years, that the roof was part of the structure and thus Mrs Smith's responsibility under the Model Clauses and that Mrs Smith had not in fact carried out repairs. The Tribunal takes the view that the similarities between the domestic and farming arrangements in *Roberts* and here are such that in principle some deduction to reflect the effect of the Model Clauses is appropriate.

57. The tenant's submission set out in paragraph 32.5 in *Pickard* was adopted by the applicant, and accepted by the First Tier Tribunal, in *Wannop v Cartmell and others* in 1913. There the applicant had been residing in a bedroom of the farmhouse, of which his father was the tenant, with shared use of the kitchen, bathroom and work room. The applicant's valuer approached the question of value by reference to the cost of renting two rooms with comparable facilities on a lodging basis rather than a shared rental of a house. As in *Helm* the

question of applying a deduction because of the Model Clauses did not arise because the applicant was effectively occupying free lodgings.

58. Taking the recent decisions as a whole, in determining the value of the accommodation to the applicant the general approach has been that which is best summarised in *Helm*. The Tribunal also accepts that as a matter of logic this is normally the correct approach. In the end it comes down to finding the best comparables. If one can find useful comparables which closely reflect the dwelling on the holding, then those are obviously the comparables to use. If, however, the nature, condition or location of the dwelling means that one cannot find such comparables, one must find a set of comparable properties which offer some of the broad characteristics of the dwelling in question. That is how one applies the *Helm* test in the real world. Whether to apply a reduction for the difference between the repairing liabilities under an AST and the Model Clauses depends on the particular facts of each case. In none of the cases referred to above was a reduction applied because of the mode of construction of the property and in the light of the Tribunal's view that the *Helm* test is the appropriate test, there could be no logical justification for applying one.

59. Whilst not the subject of detailed submissions, the Tribunal felt it should consider the question of shared occupation. In *Wannop* and in *Helm* the applicants had been young men occupying particular rooms and sharing certain facilities with their father the tenant- and also with the mother in the case of *Helm*- who largely had the run of the property, so akin to a lodging arrangement. Accordingly, the question of possible deduction for shared occupation was, understandably, not advanced in those cases. By comparison, in *Roberts* the applicant had shared the farmhouse with his widowed mother who had been the tenant since 1980 and his sister and the tribunal divided the value of the benefit by three, apportioning it equally between the three adults. In *Pickard* the tribunal stated that in its experience (and the Chairman in *Pickard* had been an ALT chairman for many years, including the period when contested succession cases were far more common than now) it had always been accepted that no deduction should be made where the applicant shared the accommodation with his wife or partner and/or dependent children. The Tribunal considers that approach is clearly correct. Furthermore, in the case of a spouse applicant, to approach the question of value other than by reference to the cost of a similarly sized property held on an AST would conflict with the provision of section 36 (4) by which *"in the case of the deceased's wife the reference in subsection (3) (a) above* (i.e. the livelihood test) *to the relative's agricultural work shall be read as a reference to agricultural work carried out by either the wife or the deceased (or both of them)."*

Mr Perks' valuation

60. Mr Perks' valuation was of the part of the building comprising the dwelling and its gardens. He confirmed that the property extended to 0.19 hectares, with the residential accommodation amounting to 126.58 sq. m. He set out the history of the building based on his discussion with Mrs Wright (and previously, for other reasons, with her late husband) and the works carried out during Mr Wright's occupation. Mr Perks said that once inside the property there was little to distinguish it from a conventional dwelling, as seen by the Tribunal in the

course of its inspection and the photographs in Mr Perks' reports. He noted that the property had subsequently secured a certificate of lawfulness for use as a residential dwelling. He also noted that the property was liable to demolition in connection with the building of HS2, but took the view that possibility, both in terms of its direct impact on Calves Close and its general impact on the environment of the surrounding area was not relevant for the purpose of its valuation. That was not challenged.

61. In addition to applying recognised valuation standards and assumptions, Mr Perks said that he valued the property, based on his understanding of the case law and information provided by Mr Johnstone, essentially reflecting the case law above which he discussed at some length, on the special assumption of providing a replacement dwelling subject to an AST. He summarised it at paragraph 31.5.1 as requiring *"a valuation of as comparable a property as can be found under an [AST]"*. That is essentially the same as the view of the Tribunal set out above.

62. Mr Perks produced a table in which he set out eleven letting comparables. Eight were two bedroomed bungalows (one is described as two-storied), three in Culworth and Chipping Campden and five in nearby villages. Three were three bedroomed properties in Chipping Warden. The lettings were from the period August 2017-Septebmer 2018. He also set out in a separate table details of local properties which had been let on two or more occasions over the seven year period prior to date of Mr Wright's death and a table setting out the effect of the Experimental Index of Private Housing Rental Prices for the East Midlands during that period on rental values. Whilst he considered in the event that the latter was a more helpful guide to changes in rental values over the seven year period, the Tribunal felt the fact that he had undertaken historic local rental research reflected Mr Perks' generally through approach.

63. Mr Perks provided three valuations:

(1) The market rental of a replacement dwelling subject to an AST but taking into account the property's internal condition and decoration;
(2) As per valuation (1), but amended to reflect unusual construction. In Mr Perks' view that related essentially to the composition of the roof and led him to a deduction of 10%;
(3) As per valuation (1) but amended to reflect the different repairing obligations of the property and an AST, which led him to a deduction of 7.5% if the basic structure was the landlord's responsibility or 10% if it had become the tenant's;

If both the deductions at (2) and (3) were to be applied, he would reduce the deduction under (2) to 5% to avoid over-discounting.

64. In applying the comparable evidence to achieve valuation 1, Mr Perks set out various factors including condition, which led him to conclude that the rental value should be at the bottom of the rental value of the comparables. On the basis of that analysis, Mr Perks concluded that for valuation 1, the market rental value in August 2010 was £8,570 pa and in August 2017 £9,635 pa.

65. So far as valuation 2 is concerned, Mr Perks considered that if the unusual construction of the property, which he considered to be essentially the roofing material, was to be taken into account in assessing an AST equivalent rental, his valuation would be reduced by 10%. In cross-examination he said that he had not come across a property of similar construction before but it was a let property and from a tenant's point of view a nice enough dwelling. Whilst there was a potential likelihood of asbestos in the roofing material and some people might avoid it for that reason, it was a manageable matter and such properties were sold and let. It had a large garden and a rural setting.

66. So far as valuation 3 is concerned, Mr Perks considered that his market rental value would be reduced by 7.5% being the mid-point between 5% in *Roberts* and 10% in *Pickard*, reflecting the poor internal state of the farmhouse in *Pickard*. On the basis of those cases and assuming that responsibility for the structure remained with Mrs Smith, he concluded that the appropriate discount was 7.5%. The Tribunal considers that responsibility for the basic structure must remain with Mrs Smith by virtue of the Model Clauses. In so far as the original composition of the walls was augmented by Mr Wright, those works must be taken to have been carried out with the express or tacit consent of Mrs Smith's predecessor in title, and thus clearly incorporated into the realty of the property.

67. Mr Perks stated that one should not consider isolated discounts in isolation *"as the sum of the parts when such are considered together."* Accordingly, if both discounts fell to be applied he lowered the discount for the nature of the roof to 5%, resulting in an overall reduction of 12.5%. It is a common feature of valuation that the aggregate of separate elements in the valuation process have to be tempered when considered together to avoid an overcorrection of what the market would adopt. Ms Pearson did not, incidentally, mention this point. The Tribunal adopts Mr Perks' approach.

68. The Tribunal found Mr Perks a careful witness. As noted above his report was comprehensive. He had identified a good number of local comparables and, in relation to the calculation of historic rents, had taken the trouble to produce the table of comparables which had been let at least twice during the relevant period. He was a confident but careful witness in oral evidence.

Ms Pearson's evidence

69. Ms Pearson stated her valuation of the benefit in kind in paragraph 3.0 of her report. It was considerably less than Mr Perk's, starting at £3,674 pa in August 2010, and rising to £4,247 pa in August 2017.

70. Ms Pearson produced a greater number of bungalow comparables than Mr Perks, but none were in Culworth or Chipping Campden or nearby villages. The nearest was in Banbury, about seven miles from Calves Close but a large town. In relation to historic values she relied on the same statistical evidence as Mr Perks. She did not refer to specific historic local transactions.

71. Some of Ms Pearson's assumptions for her valuations, as advised to her by Arnold Thompson, were the same as Mr Perks'. However, she summarised her

instructions at paragraph 6.0 of her report thus: *"If the Applicant is receiving a benefit in kind of residential accommodation, the value lies in not having to pay rent for residential accommodation elsewhere. Therefore, the value of the benefit lies is the rental value of the property."* The first sentence appears to adopt the *"Helm"* approach which the Tribunal has followed. However, the second sentence then adopts what appears to be a quite different basis: "Therefore" is thus a non-sequitur. The confusion may be attributable to the advice she was given by her instructing solicitors that *"the value to be determined is the benefit in kind as an annual rental value."*

72. Ms Pearson explained that her methodology was to find evidence of comparables, like Mr Perks, but then adjust it to reflect, primarily, the substandard construction of the property and also the repairing obligations of the tenant. So far as the comparables are concerned, at paragraph 15.2 of her report, Ms Pearson identified a range of £750-990 pcm as at August 2017, although in the next sentence she then appeared to adopt £700-1,000 pcm for reasons which are unclear. In the event she settled on £800 pcm because of lack of demand for bungalows in isolated locations and the attachment of this property to the rest of the building.

73. As explained above, a deduction to reflect the substandard construction of the property, as opposed its actual state of repair, is generally inappropriate in the light of the *Helm* test. Had the Tribunal concluded otherwise, it would still not have felt able to accept the evidence of Ms Pearson. Her description of the bungalow was less detailed and accurate than Mr Perks', stating for example that the main walls comprised rendered single brick walls rather than the hollow terracotta bricks, internally lined and faced with concrete blocks actually employed. She concluded, *"therefore, it would not normally meet the standard for a habitable dwelling."* The report does not identify the standard being referred to, nor in what respect the building fails to meet that standard. Whatever else might be said about the property, the Tribunal would need some evidence before it could properly conclude that the private rental market would so regard it. It was also contrary to the impression gained by Tribunal during its inspection. The inaccuracy in the description of the bungalow also leaves the Tribunal in a position where, whilst it seems likely that the property has relatively poor energy efficiency, it cannot safely conclude how poor the energy efficiency is.

74. In approaching valuation in relation to mode of construction Ms Pearson said that there was no standard formula for the deduction and it was, thus, a matter of opinion. Ms Pearson suggested a discount of 30-70%. Whilst the Tribunal acknowledges that valuation often requires the valuer to express views within a range of values, to propose a bracket as broad as 30-70% is surprising and not particularly helpful, although the Tribunal notes that Ms Pearson eventually settled at 50%. In the course of, at times, her rather combative response to Mr Johnstone's understated cross-examination, Ms Pearson asked Mr Johnstone if they could agree on 50%, and there seemed to be an implication that 50% was more a negotiating figure than a considered conclusion. Ms Pearson made it clear in her report that her deduction of 50% reflected the view of the market regarding the property's low alleged EPC rating and thus higher running costs, including the cost of storage heaters for space heating. In answer to Mr

Thomson she said she had also taken into account the possible presence of asbestos in the roof. In cross-examination she accepted there was no evidence that the property actually had higher heating costs. In her report Ms Pearson fairly said, *"There is no standard formula for this deduction, it is a matter of opinion."* However, to suggest that the property is only worth half its value because of an uncertain degree of energy inefficiency and the composition of the roof is so remarkable that the Tribunal is unable to accept it.

75. So far as a deduction for the differing repairing obligations under an AST and the Model Clauses is concerned, Ms Pearson proposed a bracket of 5-20%, being as she put it *"the range of opinion"* Later she settled on 10%, by analogy with what she referred to as the textbook figure (though the reference was not identified) for the difference between rental values for commercial premises let on an FRI basis and those let on an internal repairing basis, which is not a strictly identical comparison.

Valuation: conclusions

76. For reasons which are apparent from the preceding sections of these reasons, the Tribunal prefers the evidence of Mr Perks to Ms Pearson. Accordingly, and given the Tribunal's approach to the general principles to be applied in the light of the case law, the Tribunal adopts the agreed rental values for an equivalent AST rental in the area contained in the joint statement at page 485 of the bundle and then applies a discount of 7.5%.

Effect of the evidence

77. In the light of the Tribunal's conclusions above, it is possible to set out a modified version of the table annexed to Mr Johnstone's submissions as expressing the Tribunal's conclusions regarding Mrs Wright's sources of income for the purpose of the livelihood test:

Year ending	Income generated from holding	Value of produce consumed	Value of accom-modation	Total livelihood from agricultural work	Combined pension income	50% of pension income
17.08.11	390	520	7,882	**8,792**	16,240	**8,210**
17.08.12	390	520	7,954	**8,864**	17,171	**8,585**
17.08.13	390	520	8,092	**9,002**	17,873	**8,936**
17.08.14	390	520	8,173	**9,083**	18,320	**9,160**
17.08.15	390	520	8,264	**9,174**	19,061	**9,530**
17.08.16	390	520	8,424	**9,334**	19,448	**9,724**
17.08.17	390	520	8,631	**9,541**	19,780	**9,890**

From this table it will be seen that Mrs Wright fails to fulfil the test of eligibility in section 36 (3) (a), only doing so in one continuous period of three years.

Section 41

78. The general principles to be applied were considered by His Honour Edgar Fay QC sitting as a Deputy Judge of the High Court in *Littlewood v Rolfe (1982) 43 P&CR 262* where he said:

> *"no mathematical formula can be laid down. Percentages of fulfilment, when worked out, are a useful guide to put the facts of finance or of time in perspective and to help judge their weight, but I would think it wrong to try to impose a mathematical cut-off point to what is material. After considerable casting about, I do not feel that I can do better by way of definition than to adopt what the Northern Area Tribunal said in Dagg v. Lovett, namely that 'material' means 'substantial in terms of time and important in terms of value.'"*

79. Every case requires a judgment to be made, not a discretion exercised (*Thomson v The Church Commissioners for England [2006] EWHC 1773,* Andrew Nicol QC sitting as a Deputy Judge of the High Court). Here, the analysis is based on annual figures. So far as time is concerned, Mrs Wright's principal source of livelihood was derived from her agricultural work on the holding for three of the seven relevant years. In an appropriate case fulfilment of the time condition for three of the seven years has been found to be capable of amounting to substantial in terms of satisfying the time test (*Raine's Trustees v Raine (1975) 275 EG 374,* cited in *Scammell at paragraph 42.58*). In *Wannop* the Tribunal found the condition satisfied even though the applicant failed to fulfil the condition in every year, and in four of those years the proportion of his income derived from the holding fell below 40%.

80. In terms of value, over the whole of the seven year period, Mrs Wright's income derived from her agricultural work on the holding amounted to £63,790. Her share of the combined pension income during that period amounted to £64,035. Taken overall Mrs Wright's income from the holding was just over 49.9% of the whole income, and in no year did it fall below 48.97%.

81. On the basis of these calculations the Tribunal is satisfied that Mrs Wright clearly fulfils the condition in section 41 (1) (b). Had the Tribunal been wrong in not applying a 5% deduction from the AST rental value to reflect the property's mode of construction, it would nevertheless have been right to find that the requirements of section 41 were satisfied.

82. The Tribunal is thus required to consider whether in all the circumstances it would be fair and reasonable for Mrs Wright to apply for a direction under section 39. Mr Johnstone identified four particular matters:

    (i) The length of time Mr and Mrs Wright had been involved with the holding. In Mr Wright's case that spanned the period from 1968 until his death, and from 1972 in terms of residential occupation. In Mrs Wright's case the period extends over the last thirty years. The Tribunal accepts that in general terms the longer a person has lived in a property the more significant that is, both in demonstrating their commitment to the property and the closeness of their relationship to it. That was clearly demonstrated by Mrs Wright when giving her evidence;

(ii) The investment they had made in the house (and, the Tribunal would add, the pleasant gardens) and the horticultural structures. The Tribunal has already referred to the nature of the house and Mrs Wright's evidence in cross-examination that their capital was spent on the property. It is inherently improbable that the person from whom Mrs Smith inherited holding was unaware of the work which Mr Wright did to create the bungalow, and Mrs Smith's knowledge of the property was, on her own evidence, slight;

(iii) Mrs Wright's dependence on the holding as a home and source of food. The Tribunal accepts the significance of that, particularly in terms of her home. On the evidence available to the Tribunal about Mrs Wright's likely income were she required to vacate Calves Close and the likely cost of accommodation when one considers the rental values of modest properties in nearby villages as identified in Mr Perks' evidence, it is clear that life would be very difficult for Mrs Wright;

(iv) The role the production from the holding continues to play in Mrs Wright's life. The Tribunal is not convinced that adds anything to the other three considerations Mr Johnstone advanced.

In addition to Mr Johnstone's particular matters, the Tribunal also considers the absence of any indication of what Mrs Wright would wish to do with the holding if the application was dismissed is relevant to this issue.

83. Mr Johnstone also sought to rely on the fact that HS2, assuming it proceeds, will destroy Calves Close. Mr Thomson invited the Tribunal not to take the possible impact of HS2 on Calves Close into account. The Tribunal accepts his submission. It is an extraneous matter not attributable to the actions of either party, and it is not yet certain that it will take place. Mr Thomson did not direct the Tribunal's attention to any particular matters he wished us to take into account from Mrs Wright's perspective in relation to this issue.

84. Section 41 (6) identifies cases where the condition might not be fully satisfied as including cases where the failure arose from the size of the holding. This was not advanced by Mr Johnstone and given that on Mr Tongue's analysis it should be possible to generate sufficient income from the holding to place Mrs Wright over the threshold of full eligibility, the Tribunal thinks he was right not to do so.

85. Having taken into account the four matters the Tribunal has decided are relevant, the Tribunal has no doubt that in the circumstances it would be reasonable for Mrs Wright to be able to apply for a direction under section 39. Any other conclusion would be perverse.

Suitability

86. Given the Tribunal has concluded that Mrs Wright is an eligible person, it is necessary to consider whether she is a suitable person to become the tenant of Calves Close pursuant to section 39 (8). In doing so the Tribunal keeps in mind the unusual nature of Calves Close. Mrs Wright dealt with this in her witness statement and in limited cross-examination. Mrs Smith's views as to Mrs

Wright's suitability were expressed through the submissions of Mr Thomson rather than her witness statement.

87. In relation to training or practical experience of agriculture, in her statement Mrs Wright acknowledged that neither she nor her husband had any formal agricultural or horticultural training. She said that it was horticulture rather than livestock which was her great interest and that she obtained good yields of high quality produce having learnt from experience and by reading widely. Mrs Wright conceded in cross-examination that she was aware that the sale or exchange of produce made into foodstuffs required registration as a food business and that she had not sought registration. However, she said it had only been a trial activity over two years which had ceased because of the uncertainty of HS2. She did not know that the use of sprays such as glyphosate now requires an appropriate certificate, whatever a person's age, in a commercial context. These are both matters which are of some concern. However, Mrs Wright said that a five-gallon drum of glyphosate purchased some years ago was still part-used, and the processed food production was small scale and experimental, so these are relatively minor infractions. Having heard Mrs Wright give evidence the Tribunal is confident that she would ensure that such omissions were not repeated if she remained on the holding.

88. As to age and physical health, Mrs Wright is 73. She acknowledged in her statement that she suffered from osteo-arthritis and had had an operation in 1995. She produced a short medial report from a GP at her local health centre expressing the view that her osteo-arthritis did not restrict her ability to run the holding but might do so at some stage in the future. However, she said that the way things were set up- the raised beds the Tribunal saw being an obvious example- minimised her need to bend. In cross-examination she stated that Mr Carter-Walford was in his 50's and acknowledged she relied on Mr Carter-Walford to assist her. She also mentioned that his brother provided some assistance but as he was not otherwise referred to, the Tribunal discounts his presence. Mrs Wright appeared fit and able as she showed the Tribunal around and explained how the growing areas had been laid out to accommodate her condition. On the basis of the medical report and her own evidence and conduct, Mrs Wright is clearly capable of running this holding- and it is her ability to run this particular holding that is relevant- with some assistance from Mr Carter-Walford and there is no reason to suppose that is going to change in the foreseeable future. It is not appropriate to speculate on what might or might not be the position beyond that point, any more than one can speculate whether any tenant or prospective tenant of an agricultural holding might suffer a serious illness or accidental injury some years into the future.

89. With regard to Mrs Wright's financial standing Mr Thomson's submissions referred to the lack of the usually professionally prepared accounts and other financial documentation one would normally expect to find. It seems to the Tribunal that submission relates primarily to the question of whether or not Calves Close is an agricultural holding, a matter which Mr Thomson had conceded on Mrs Wright's behalf, and which has already been discussed above in the Tribunal's consideration of jurisdiction. To the extent it also impacts on the question of suitability, the unusual nature of the holding itself sufficiently answers that submission.

90. Mr Thomson also referred to the fact that Mrs Wright is living, as he put it, hand to mouth and that the holding had made a substantial net deficit/loss in 2016-7. So far as the former is concerned, it is clear from the site inspection and her evidence that Mr and Mrs Wright, and now Mrs Wright, have lived a simple lifestyle for many years and that Mrs Wright's expectation is to continue on the same basis. That is really a matter for her and it is an exaggeration to describe them as having lived, or Mrs Wright as living, hand to mouth. The Tribunal notes that Mrs Wright had managed to build up savings by way of Premium Bonds. She said she had won small sums over the years and had invested those winnings, so that by the time of her husband's death her holding was worth over £21,000. She also had a small ISA, most of which had been called upon to meet her costs in these proceedings rather than general recurring expenditure The Tribunal found it difficult to follow Mr Thomson's submission that Mr and Mrs Wright had made a net loss in 2016/7, given the absence, about which complaint had been made, of formal accounts and financial business records.

91. Having considered Mrs Wright's evidence about the relevant matters in section 39 (8) and Mr Thomson's submissions on behalf of Mrs Smith regarding her suitability, it is helpful to stand back and take an overview. In *Jackson v Barlow*, an ALT decision in 1978 referred to by *Scammell at paragraph 42.105* it was said:

> *"Suitable.....sets its own unqualified standard and we see no reason to superimpose any elaborate qualification upon it when Parliament has furnished us with a test couched in familiar language to apply. We approach our task in an objective way, aware of the importance to the landlord of seeing that his rent is paid, the performance of his covenants is reasonably assured and his farm kept in good heart, well stocked and farmed efficiently..... at the end of the day we have to ask the simple question- Is he suitable to be the tenant of this holding?"*

92. Here, the rent has always been paid, there is no submission by Mrs Smith that Mr and Mrs Wright and subsequently Mrs Wright, have failed to comply with the Model Clauses implied into the agreement by section 7, and the holding, including the main building, is in good heart and order. There is scope for the output of the holding to be increased somewhat, as Mr Tongue notes, but this in itself was not a matter of complaint by Mr Thomson and given the nature of the holding it is difficult to see how it could be said to adversely affect the landlord's interests to a material extent. The Tribunal therefore concludes that Mrs Wright is a suitable person to become the tenant of the holding.

93. As noted above, Mrs Smith had served a Case G notice, but evidence was not called in relation to it and accordingly Mr Thomson did not make it the subject of separate submissions.