Get Off My Land

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Abstract
This article argues that whilst the Agricultural Holdings Act 1986 had good intention in giving lifetime security of tenure to tenants for the object of food production, it has since had unintended results of placing tenants in a privileged position contrary to legislature's object.

Key words: get off my land; property and trusts; landlords and tenants; full agricultural tenancies; Agricultural Holdings Act 1986

Introduction

In a letter that appeared in *The Times* of 20 April 1889, reproduced by the Royal Statistical Society in 1891, it was written: "Sir, – In these times, when the rental and marketable value of land are in such an unsatisfactory and uncertain state that the savings of the community run riot on the Stock Exchange, it is interesting to those who are connected with the land to bring to light all facts bearing on the question."[1] It is on that note that this article brings to light all 'facts' on the plight of small landowners under the Agricultural Holdings Act 1986.

This article discusses the implications that English law has on the right of the landlord to quit an agricultural tenancy. An agricultural tenancy is a lease of agricultural land for the purpose of running a farming business. There are two main types of agricultural tenancies: those made before 1 September 1995, which are governed by the Agricultural Holdings Act 1986 (AHA 1986), referred to as AHA tenancies or Full Agricultural Tenancies (FATs); and those made on or after 1 September 1995, which are governed by the Agricultural Tenancies Act 1995 (ATA 1995), referred to as Farm Business Tenancies (FBTs). The main difference in the 1986 and 1995 Acts is in the security of tenure. Nowhere is the contrast starker between past and present legislation than in relation to the AHA 1986 and the ATA 1995 – the AHA 1986 does provide comprehensive security of tenure for a tenant of an agricultural holding, in contradistinction to the lack of security afforded to a farm business tenant.[2]

The key feature of the AHA 1986 is security of tenure for a tenant who farms the land. In providing great security of tenure to tenants, the AHA 1986 placed landowners in a position of great insecurity, as landowners lost the ability to reclaim their land. It is the security of tenure to tenants and restrictions to landlords' ability to quit under the AHA 1986 that led to the introduction of flexibility under ATA 1995. Landowners who had not let their lands were avoiding doing so under the restrictive AHA tenancies. This was noted during the passage of the 1995 Act that brought flexibility in the tenanted land market. It was said, in a paper on the 1995 Bill, that under the AHA 1986, "the greater security offered to tenant farmers was a strong disincentive to any landlord considering letting his farms, because if he

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[*] Durham Law School, Durham University. I am grateful to Durham University for allowing me a period of research leave during which I conducted the initial research for this article. I am grateful to Professor Tom Allen for his comments on the earlier draft of this article. I am also grateful to the anonymous *Conveyancer and Property Lawyer* referees, whose observations improved this article immeasurably. The usual disclaimers apply.

[1] Editor, 'A century of land values: England and Wales' (1891) 54 Journal of the Royal Statistical Society 528.

[2] P Williams (ed), *Scammell, Densham and Williams Law of Agricultural Holdings* (1st Supplement to 10th edition, LexisNexis 2018) para 1.89.

or his children wanted to farm the land themselves at a later date, they would be unable to reclaim it."[3]

It is still the case today that AHA tenancies are not flexible as FBT tenancies. In the 2019 Consultation Paper issued by the Department of Environment, Food & Rural Affairs (Defra), a comparison of AHA and FBT tenure was made. It was reported that the AHA "tenancies are subject to regulated rent, have lifetime security of tenure and most granted before 12 July 1984 also carry statutory succession rights for up to two generations of eligible close relatives on death or retirement of the incumbent tenant (except for council farm AHA agreements which do not have statutory succession rights);" in comparison, "FBTs provide a flexible framework, can vary in length and do not have statutory succession rights."[4]

This article argues that a landlord of an AHA tenancy may yell all they want to the tenant, – 'get off my land!' – but unless the tenant commits one of the seven deadly sins (die without successor, practice bad husbandry, etc), they are unlikely to get their land back. It argues that the 1986 Act, intending to give lifetime security of tenure to tenants for the object of food production, has had unintended results of placing tenants in a privileged position contrary to legislature's object. It observes that landowners under the 1986 Act who genuinely want to farm their tenanted land are unable to reclaim it from the tenants.

This article proceeds as follows. The second section is an overview of the restrictive nature of the AHA 1986. The third section is a case study illustrating the plight of a landowner who wish to end the AHA tenancy to farm the land herself but unable to do so under the AHA 1986. The fourth section examines how the AHA 1996 creates unintended consequences of putting tenant farmers in a privileged position at the exclusion of landowners who genuinely want to farm their land. The fifth section suggests an amendment to section 27(3) of the AHA 1986. The sixth concludes.

Restrictive crucible of the AHA 1986

A person who holds a freehold title of the land tenanted under the AHA 1986 is, as it were, in a crucible, if they cannot reclaim it to farm it themselves. Unlike the ATA 1995 that permits the landlord and tenant to negotiate freely a contract of tenancy upon terms acceptable to both parties, the AHA 1986 mandates terms in favour of the tenant – (a) a tenant has lifetime security of tenure and succession rights on death and retirement for up to two generations, and (b) a landlord has very limited scope for recovering their property.[5] It is worth analysing the restrictive nature of the AHA 1986, which analysis is not seen in the literature.

The restrictive nature of the AHA 1986 lies both in the formation of the tenancy and in its provision of security of tenure to a tenant while restricting the freedom of a landlord to quit the tenancy. The AHA 1986 starts from a mandatory formation of the tenancy which is not based on the voluntary contractual freedom of the parties. The mandatory contract under the AHA 1986 takes threefold steps: first, stating that the Act applies to "agricultural holding … comprised in a contract of tenancy which is a contract for an agricultural tenancy"; second, mandating, with few exceptions, that all agricultural tenancies of more than a year must be treated as tenancies running "from year to year;" and third, declaring that a tenant of any land whose "interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding" to which the AHA 1986 applies.[6] In light of those steps

[3] C Barclay, 'Agricultural Tenancies Bill [Bill 40,1994/95]' (Research Paper 95/15, House of Commons Library, 30 January 1995).

[4] Defra, Agricultural tenancy consultation and call for evidence on mortgage restrictions and repossession protections for agricultural land in England (April 2019) pp 5-6.

[5] M Pawlowski, 'Agricultural farm tenancies' (2002) 6 Landlord and Tenant Review 79.

[6] See sections 1, 2 and 3 of the Agricultural Holdings Act 1986.

for the mandatory formation of the AHA tenancy, the letting of land under section 2 of the AHA 1986 was a wholly involuntary activity on the part of the landlord. The overall result of the operation of s 2 was to convert many informal or short-term agreements, which were never intended to have security of tenure, into yearly tenancies with full protection.[7]

Having mandated what an agricultural tenancy is, the AHA 1986 proceeds to provide a comprehensive security of tenure to a tenant while restricting the freedom of a landlord to end that tenancy. For the landlord to terminate an agricultural tenancy, they must give at least 12 months' notice to quit.[8] A notice to quit may be any of the two types, namely, either an Unqualified notice,[9] where the landlord need not give reasons, or a Case notice, falling within the specified Cases.[10] One would be naïve to think the Unqualified notice gives freedom to a landlord who wish to farm her own land to terminated the tenancy and reclaim her land, but that is not the case. Common law applies to make void a notice to quit that is unclear and ambiguous.[11] Under the AHA 1986, upon receiving the Unqualified notice to quit, the tenant is entitled to serve a counter-notice.[12] The right to serve a counter-notice is the real security of tenure for the AHA tenant. A counter-notice renders the notice to quit ineffective unless the landlord successfully applies to the Land Tribunal for consent to the operation of the notice to quit.[13] The Tribunal may give consent if any one of the six grounds in the AHA 1986 is established.[14] Even if any such a ground is established, the Tribunal must withhold consent to the operation of the notice to quit if in all the circumstances it appears to them that a fair and reasonable landlord would not insist on possession.[15]

If the landlord fails to terminate the AHA tenancy due to the formidable notice to quit process, the AHA tenancy could continue up to the third generation of the tenant. The AHA tenancy may continue by virtue of the tenant's right of succession for two successions. The right of succession applies in two ways, namely, the eligible person applies to succeed either on the death of a tenant,[16] or on the retirement of a tenant.[17] The tenancy ends after two successions.[18] The death of the original tenant marks the first generation, the first succession marks the second generation, and the second succession marks the third generation.

Case study illustrating plight of small landowners under AHA 1986

In England, applications on legal issues relating to notices to quit AHA tenancies are heard by the First-tier Tribunal (Property Chamber) ("FTT"). Hearings are held in public unless directed to be held in private.[19] Unfortunately, decisions are normally not published. As such, unless the FTT case is appealed, there is no public access to those decisions. Thus, this article uses an anonymous case study to illustrate the plight of the small landowner.

Although the case study approach is unusual to legal study, it provides a practical way of appreciating an agricultural problem to which agricultural law responds. It is hard to find in the case law reports any in-depth exploration of the harshness of the AHA 1986 upon

[7] C Rodgers, *Agricultural Law* (fourth edition, Bloomsbury 2016) 177.
[8] AHA 1986, s 25.
[9] AHA 1986, s 26.
[10] AHA 1986, part I of schedule 3.
[11] *Mills v Edwards* [1971] 1 QB 379.
[12] AHA 1986, s 26.
[13] AHA 1986, s 27(1).
[14] AHA 1986, s 27(3).
[15] AHA 1986, s 27(2).
[16] AHA 1986, s 36.
[17] AHA 1986, s 50.
[18] AHA 1986, s 37.
[19] Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, r 33.

small landowners who wish to end an agricultural tenancy to farm their land themselves. The use of this case study fills that gap. The case study approach is particularly useful to employ when there is a need to obtain an in-depth appreciation of an issue in its natural real-life context.[20] This case study illustrates that the restrictive nature of the AHA 1986 is not a theory or a mere academic argument, but a reality that affects citizens.

In this case study, Dorcas is a citizen directly affected by the system. Her story provides a practical understanding of how 'get off my land' is easier yelled than achieved under the law. The law's apathetic answer to an AHA landowner is to wait until the death of all the eligible tenants to reclaim her land. In examining incontestable notices to quit and exploring the six grounds specified under the AHA 1986, this case study provides a practical appreciation of how it is almost impossible for a landowner to terminate an agricultural tenancy. In showing how all the grounds for terminating an agricultural tenancy could not help Dorcas, this case study provides a practical analysis of how harsh is the AHA 1986.

In this case study, a young woman who owns one hectare of land, and who wishes to remain anonymous, gave an interview to this article. To honour the interviewee's anonymity, we will call her Dorcas. Having saved a little money whilst working in London, she started searching for rural property with land to buy and intended to give up her job in London to start a small farm of fruit and vegetables to earn her livelihood. It was in 2018 that Dorcas purchased a property, comprising of a house, a garden and one hectare paddock.

Dorcas acted without legal advice in the transaction. Dorcas purchased the property with the one-hectare paddock subject to unwritten AHA tenancy. Dorcas, acting without legal advice, naively assumed that the tenant would agree to end the tenancy. Intending to use her one-hectare land to grow fruit and vegetables for her livelihood, Dorcas set out to reclaim her land. Dorcas offered to buy out the tenant, but the tenant unwilling to quit, refused the offer.

Dorcas sought legal advice to end the tenancy. It was ascertained that the tenancy is governed by the AHA 1986, having been created before 1 September 1995. The legal adviser said to Dorcus: 'you may yell to the tenant all you want, – "get off my land!" – but unless the tenant commits one of the seven deadly sins (die without successor, practice bad husbandry, etc), you are unlikely to get your land back, for the law gives tenants a lifetime security of tenure.' The problem faced by any purchaser of a tenanted land subject to AHA tenancy is that it is almost impossible to prove any of the six grounds for Unqualified notice to quit. In this case study, had Dorcas sought legal advice before purchasing the land, she would have appreciated that it is almost impossible to evict an agricultural tenant under the AHA 1986.

But to appreciate the extent to which the AHA 1986 militates against landowners who genuinely want to farm their land themselves, which is the premise in this case study, and for practical and academic knowledge of this area, we proceed to critically assess Dorcas' plight. Before assessing the restrictiveness of AHA tenancies, we assess the savviness of the tenant in question. Evidence on the AHA tenancy in question revealed: (a) the first tenant (Tenant A) had assigned it to his son (Tenant B), and both held it as joint tenants until the father died; and (b) in 2017, just before Dorcas purchased the one hectare paddock, the surviving second tenant (Tenant B) assigned the tenancy to his son (Tenant C), and both held it as joint tenants until when in 2022 Tenant C died leaving Tenant B as the sole surviving tenant.

The assignment by Tenant A to Tenant B, where Tenant A remained in situ without retiring or becoming an outgoing tenant, and the subsequent assignment by Tenant B to Tenant C on the same pattern, was mere variation of the original tenancy, and did not affect the two statutory successions under section 37 of the AHA 1986. In *Trustees of Saunders v*

[20] S Crowe, K Cresswell, A Robertson, G Huby, A Avery, and A Sheikh, 'The Case Study Approach' (2011) 11 Medical Research Methodology 100.

Ralph,[21] by a memorandum of agreement, the landlord had allowed the tenant to be joined by his son, so that father and son were joint tenants. The issue was whether the memorandum was a variation of the original tenancy or had the effect of succession. It was held that: (1) as a matter of law it was possible to vary a tenancy by adding an additional tenant, so that the tenancy as varied became a joint tenancy; (2) on true construction of the memorandum, there had been no succession within the meaning of section 37; and (3) the joint tenancy did not constitute a succession within section 37(2) of the AHA 1986 as that section did not apply to the grant of a person who was the original tenant and a person who was a close relative.

Dorcas is up against a savvy tenant who seems to have used a legal loophole of assignment to bypass the old rules that applied prior to the Agriculture Act 2020 on succession to sustain the tenancy. In the old rules under the AHA 1986, at the death or retirement of the incumbent tenant, a close relative was not eligible to apply for succession to the tenancy if they were also “the occupier of a commercial unit of agricultural land”.[22]

Under the old rules under the AHA 1986 prior to the 2020 Act, in the above situation where the tenants, besides renting one hectare occupies another “commercial unit” of 360 hectares of agricultural land, Tenant B would be ineligible for succession, and so would be Tenant C. To bypass this rule, Tenant A simply assigned his tenancy to B and subsequently B assigned to C. The use of assignments not only bypass scrutiny of succession application process but also leaves intact the two statutory successions of eligible tenants under the AHA 1986. For completeness, suffice to mention that the restriction that the applicant is ineligible for succession if they farm another commercial unit, is with effect from September 2024 removed by the Agriculture Act 2020.[23]

To close the legal loophole of assignment, which exists because the unwritten tenancy does not preclude assignment, Dorcus was advised to issue a section 6 Notice to Tenant B to put the tenancy in writing. Dorcus issued a section 6 Notice in 2023. Pending the process of a written tenancy, the effect of a section 6 Notice was to put an immediate statutory end to further assignment by Tenant B, to offer protection to Dorcus so that the tenant cannot assign, sub-let or part with possession of the holding or any part of it without the landlord’s consent in writing.[24] Whilst Dorcus closed the assignment loophole, the tenancy continues with Tenant B as the sole surviving tenant, and the two statutory succession rights remains intact.

To terminate the tenancy by a notice to quit, prior to the end of the two successions, Dorcas is advised that she can only give incontestable Case notice “if the tenant committed one of the seven deadly sins,”[25] such as: Case C (failed to operate in accordance with the rules of good husbandry), Case D (failed to pay rent), Case E (committed an irremediable breach), Case F (has become insolvent), or Case G (has died without a successor).[26] As the tenant has not committed any of the deadly sins, Dorcas cannot use any of these Cases to quit the tenancy. But invoking these Cases is often beset with drawbacks. Take for instance Case C, which requires a certificate of bad husbandry form the FTT, on the landlord’s application. One drawback here is that the FTT “will usually inspect the holding immediately prior to the hearing, which will be some time after the Landlord’s initial application, a factor that gives the tenant some time to rectify obvious instances of poor husbandry where this is possible.”[27]

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[21] (1993) 66 P & CR 335.
[22] AHA 1986, s 36(3)(b) and s 50(2)(b).
[23] Agriculture Act 2020, schedule 3 para 11(2)(c).
[24] AHA 1986, s 6 and Schedule 1 para 9.
[25] P Williams (ed), *Scammell, Densham and Williams Law cf Agricultural Holdings* (1st Supplement to 10th edition, LexisNexis 2018) para 1.33.
[26] AHA 1986, part I of schedule 3.
[27] C Rodgers, *Agricultural Law* (fourth edition, Bloomsbury 2016) 302.

Turning to the Unqualified notice to quit, the FTT may give consent to the operation of the notice to quit if any one of the six grounds specified under the AHA 1986 is established.[28] Dorcas is advised that the six grounds are unsuitable for her particular purpose of simply wanting to farm the land herself. It is almost impossible for a landowner to evict AHA tenant, even for the purpose of continuing farming productivity on the land, unless the tenant has committed one of the 'deadly sins.' To be sure, the legal advice briefly examines and discounts each ground of the six grounds specified under the AHA 1986, as follows:

One, (a) terminating the tenancy in the interests of good husbandry. This requires the landowner to prove to the satisfaction of the FTT that they would provide better husbandry than provided by the tenant. In other words, that farm production would be better under the landowner than it currently is under the tenant. If the tenant is successfully farming the land, it is a toll order for a new purchaser of the land to unseat the tenant. This is unsuitable for Dorcas' case, as she would need to first prove bad husbandry of the tenant and then prove better husbandry she will have on the paddock.[29] This takes a similar approach to Case C in the context of first proving that that the tenant has committed the 'sin' of bad husbandry. But the fact that a landowner needs to first prove a negative against her tenant to reclaim use of her own land, goes to prove the strict extent by which the AHA 1986 protects tenants.

Two, (b) terminating the tenancy in the interests of sound management of the estate of which the land is part of. The landowner would need to present plans for managing the estate of the land, and to satisfy the FTT that the plans would improve estate management of the land. This is unsuitable for Dorcas' case, as the provision is best applied in the context of obligations within a partnership in managing the farm itself, where "the obligation of the tenant is to observe the rules of good husbandry; the obligation of the landlord is to manage the estate properly"; in that context, the FTT "cannot look simply to the landlord's pocket" but to "what effect the purpose would have on the management of the farm," which in Dorcas' case "would have no effect whatever on the management of the farm itself."[30]

Three, (c) terminating the tenancy for the purpose of agricultural research, education, etc. This is unsuitable for Dorcas' case. It is also unsuitable for a landowner who wants their land back for subsistence farming. This ground is usually for universities or institutions.[31]

Four, (d) terminating the tenancy for purposes of the enactments relating to allotments. These enactments are Allotments Acts 1908 to 1950. This tends to apply to public landlords who tend to have land they let out to tenants to use as allotments or gardens. Exceedingly rare for private landlords to let out allotments. This is unsuitable for Dorcas's case.

Five, (e) that greater hardship would be caused by withholding than by giving consent to the operation of the notice. This is the only ground where a landowner may succeed in reclaiming their land. Ordinarily, the disparity of landownership, the tenant owning 360 hectares and Dorcas owning only one hectare, would favour Dorcas. "The availability of other land to the tenant will be an important factor, for if he has alternative land that in itself will support a viable agricultural business, he will have difficulty establishing that hardship will flow from the giving of tribunal consent."[32] However, as Dorcas knew on purchase that the paddock was subject to AHA tenancy, that knowledge is likely to defeat her claim of greater hardship, as the FTT is likely to find, as a fact, that she brought the hardship upon herself by purchasing land under AHA tenancy and she knew that the tenant had security of tenure.

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[28] AHA 1986, s 27(3).

[29] For similar reasoning, see the Scottish decision in *Austin v Gibson* [1979] SLT (Land Court) 12.

[30] See *National Coal Board v Naylor* [1972] 1 WLR 908 at 913 per Lord Widgery CJ.

[31] See for example the Scottish case of *Edinburgh University v Craik* [1954] SLT 45.

[32] C Rodgers, *Agricultural Law*, (fourth edition, Bloomsbury 2016) 386.

In general, when assessing what is 'hardship,' the FTT is unrestricted in matters to consider. In *Purser v Bailey*, it was said, "the word hardship was wholly unrestricted as a matter of language, and there was no possible ground for limiting the word 'hardship' in any way."[33] Greater hardship turns on facts. The FTT "have to look at the situation as displayed before them, and they have to ask themselves whether, if the notice is allowed to take effect or not allowed to take effect, as the case may be, any hardship will result to the tenant in the first instance and to the land-lord in the second" and "the Tribunal must then prepare, as it were, a balance sheet of hardship."[34] In this balance sheet, "while in cases of greater hardship the court may take account of personal and financial difficulties, these however are only relevant where they would be alleviated if consent were to be granted to the operation of the notice to quit and the landlord has discharged the overall onus of proving that her hardship is greater than that of her tenant."[35] As Dorcas has not yet farmed the paddock to show actual loss, the FTT may give less weight to her potential loss, giving much weight to tenants' actual loss of use of the paddock for livestock farming, tenants' loss of subsidies (basic payment and environmental schemes), and find greater hardship for tenants.

Although Dorcas would not succeed to invoke greater hardship due to her prior knowledge of the paddock being under AHA tenancy, greater hardship is the most suitable ground for the small landlords to invoke, albeit success still depends on the facts. One such example is found in the Scottish decision in *Lindsay-MacDougall v Peterson*.[36] The small landlord of an agricultural holding consisting of three acres and a small house applied to the Land Court for consent to the operation of a notice to quit served on her tenant on the ground of greater hardship. She lived in London and wished to return to the area to run the local village shop. She wanted the small house to use for her family of three. The tenant had another modern house available to him and various other holdings extending to over sixty acres. It was held, that consent should be granted, and that the landlord was entitled to her expenses. It is here argued that she may have succeeded because she only wanted the small house, and it is unlikely that she would have succeeded if she wanted the tenant to vacate the three acres.

Six, (f) terminating the tenancy for non-agricultural purpose and which does not fall within Case B. Reclaiming land for non-agriculture is not Dorcas's purpose, as she wants land for growing fruit and vegetables. It is unsuitable for Dorcas' case, as this ground has limited application, and "is only available in the limited class of cases (the usual example is forestry) where the intended user, when implemented, would not require planning permission and would not otherwise fall within any of the limbs of Case B."[37] Even if Dorcas wished to reclaim her 1-heactare paddock for forestry, to access the £10,000 per hectare trees planting grants under English Woodland Creation Offer (EWCO) available to landowners with "areas as small as one hectare,"[38] she would fail simply because "the Tenant Farmers Association (TFA) has had a win with its lobbying in this regard, in that landlords who repossess land from a tenant under a disputed notice to quit will not be eligible for funding under the English

[33] [1967] 1 QB 526 at 534 per Lord Parker CJ; [1967] 2 QB 500 at 509 per Lord Denning MR.
[34] *Cooke v Talbot* [1977] 243 EG 831 at 835 per Widgery CJ.
[35] See the persuasive Scottish decision in *Clamp v Sharp* [1986] SLT (Land Court) 2.
[36] [1987] SLCR 59; [1987] 12 WLUK 54; [1988] CLY 3712.
[37] *Hertfordshire District Council v Jean Baylis* (2019) First-tier Tribunal (Property Chamber) [43].
[38] Forestry Commission, 'Guidance: England Woodland Creation Offer' (2021) available at <https://www.gov.uk/guidance/england-woodland-creation-offer> last accessed 16 August 2022.

Woodland Creation Offer."[39] Indeed the TFA "had a win", the EWCO application form asks if the land for trees is subject a notice to quit or was under tenancy in the last 12 months.[40]

Dorcas could sell her 1-hectare paddock and buy land elsewhere, but she is likely to make a loss, as few buyers may fancy buying a farmland that is subject to AHA tenancy. A landowner of a farmland subject to AHA tenancy might get better value and have good prospects of selling to a sitting tenant than selling such land on the open market. But it is unlikely that the livestock AHA tenant would want to buy from Dorcas, as it is cheaper to rent than to buy, which may explain why "sales to sitting tenants remained at a low level."[41] With farmland price rising by 14% in March 2022,[42] FATs rent witnessing "the largest fall in average rent to 6% lower than in 2019" in the 2020/2021 data,[43] the AHA 1986 not only gives tenants too much security of tenure, but also indirectly gives tenants land at undervalue. Anecdotal evidence shows that land with FATs (AHA tenancy) sell lower than market price. In *Willett v IR Commissioners*,[44] AHA land was valued at 59% of its vacant possession value.

The foregoing shows that it is almost impossible under the AHA 1986 provisions in respect of notices to quit for a landowner to reclaim her land for the purpose of farming it herself. It also goes to show that land subject to AHA 1986 is not accessible to new entrants to farming, and it is irrelevant that the potential new entrant to farming has become the proprietor of the land. As Maxwell observed, "the security of tenure afforded to tenants by the Agricultural Holdings Act 1986, combined with a benign subsidy environment, is widely considered to discourage older farmers from leaving the sector and to be a barrier to new entrants."[45] Moreover, as discussed below, the AHA creates unintended privilege for tenants.

How the AHA 1986 creates unintended class of privileged tenant farmers

The use of farmland has significantly changed thirty-six years on since 1986 but AHA 1986 remains unchanged for potential new entrants. We are reminded that the total utilised agricultural area in England is just over 8.8 million hectares in 2021, of which 1,224,000 hectares are occupied on full agricultural tenancies and 1,242,000 hectares on farm business tenancies.[46] With the very slow phasing out of AHA tenancies, coupled with the restrictive nature of AHA 1986, AHA tenancies are, "on current trends, and with remaining successions, likely to be a significant force until after 2050, with some final successions and company tenancies running into the next century."[47] Users of farmland have changed from food producers to include lifestyle buyers, sporting, and environmental buyers who are motivated

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[39] TFA Adviser, 'landowner estates pushing tenants out for tree planting' (2022) <https://tfa.org.uk/tfa-blog-106-landowner-estates-pushing-tenants-out-for-tree-planting/> last accessed 16 August 2022.
[40] Forestry Commission, 'EWCO application form – part A' (2022) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1088992/EWCO_Application_Form_Part_A_v1.6_issued_07.07.2022.pdf > last accessed 18 August 2022.
[41] CAAV Land Occupation Survey 2020, para 2.7.
[42] Knight Frank (a firm), 'farmland index' (2022) available at <https://content.knightfrank.com/research/157/documents/en/english-farmland-index-q2-2022-8918.pdf > last accessed 16 August 2022.
[43] Defra, 'farm rents – England 2020/21' (2022) available at <https://www.gov.uk/government/statistics/farm-rents/farm-rents-england-2020> last accessed 16 August 2022.
[44] [1982] 2 EGLR 234.
[45] J Maxwell, 'the future of agricultural tenancies' (2019) available at <https://www.farrer.co.uk/news-and-insights/the-future-of-agricultural-tenancies/> last accessed 16 August 2022.
[46] Defra, 'Farming Statistics: Land use …. – England' (National Statistics, 28 October 2021) p 11, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051056/Structure-jun2021final-england-27jan22.odt> last accessed 20 September 2022.
[47] P Williams (ed), *Scammell, Densham and Williams Law cf Agricultural Holdings* (1st Supplement to 10th edition, LexisNexis 2018) para 1.92.

by the ambitious targets set by government and companies to reduce their environmental impact.[48] The restrictive AHA 1986 remains out of step with the changing use of farmland.

To appreciate how the AHA 1986 is a barrier to new entrants, it is worth to go back in time and take an overview of the legislative trend to see how major legislations passed between 1875 and 2020 have not helped landowners who genuinely want to farm their own land. The history of legislation on agricultural tenancies goes back to the Agricultural Holdings Act 1875. The 1875 Act was facilitative and underpinned by contractual freedom. The core feature of the 1875 Act was to facilitate compensation for improvements made on the land by the tenant, but this compensation was not compulsory.

The 1875 Act was founded on the principle of contractual freedom. Introducing the 1875 Bill, Benjamin Disraeli stated: "Something has been said about the introduction of freedom of contract in the clause, by which owners and occupiers will be allowed to come to any agreement they like. All I can say is that in my belief it would be totally impossible to pass a Bill which did not admit that principle. It would be repugnant to the feelings of the English people, and especially of that class with which this measure has most to do."[49]

But in the passing of the 1875 Act, not all were convicted that contractual freedom should govern agricultural tenancies, and called for compulsion, to compel landlords to compensate tenants, instead of leaving the matter up for bargains between landlord and tenant. Hansard records shows advocates for compulsory measures, for example, Edward Knatchbull-Hugessen, who said: "But why should compulsion be injurious – and if not – why distasteful to landowners? If it was distasteful, and if its effect would be to induce landowners to farm their own lands, he was not sure that such a result would be entirely unfortunate."[50]

It is said that the 1875 Act "did not prohibit contracting out; as a consequence, landlords who did not take kindly to the imposition of obligations on them exercised their right to contract out."[51] Few years later, the trend changed, and the principle of contractual freedom was replaced with compulsion when the Agricultural Holdings Act 1883 was passed. The core feature of the 1883 Act was the compulsory compensation for improvements made on land by the tenant. The 1883 Act "marked for the first time the compulsory intervention of the law in the supposedly voluntarily bargains made between tenants and landlord"[52]

After the 1883 Act, Parliament enacted legislations that affected the relationship between landlords and tenants. It is not necessary to review those legislations but suffice to fast forward to the Agriculture Act 1947. "The Agriculture Act 1947 was a product of the post-war period, when the emphasis was on improving production and producing food as cheaply and efficiently as possible."[53] As a policy to secure food production in the post-war period, the Agriculture Act 1947 gave tenant farmers security of tenure, which continues today. Notice, in passing the 1875 Act, it was believed that it "would be repugnant to the feelings of the English people" to pass a Bill not based on contractual freedom; but how quickly the feelings changed in a perceived food crisis and seeking to secure food production.

But in addition to the security of tenure granted by the 1947 Act, came the succession rights in the Agriculture (Miscellaneous Provisions) Act 1976. The 1976 Act allowed close relatives to succeed the deceased tenant for "two occasions when there died a sole (or sole

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[48] Emily Norton and Andrew Teanby, 'Historic farmland values in Britain' (Savills 2021), available at <https://www.savills.co.uk/landing-pages/rural-land-values/rural-land-values.aspx> accessed 10 August 2022.

[49] Hansard, HC Deb 24 June 1875 vol 225 col 457.

[50] Hansard, HC Deb 24 June 1875 vol 225 col 464.

[51] P Williams (ed), *Scammell, Densham and Williams Law of Agricultural Holdings* (1st Supplement to 10th edition, LexisNexis 2018) para 1.15.

[52] FML Thompson, *English landed society: in the nineteenth century* (Routledge 1971) 196.

[53] C Rogers, *Agricultural Law* (fourth edition, Bloomsbury 2016) 73.

surviving) tenant of the holding or of an agricultural holding"[54] – that is, two generations of successors after the original tenant. This effective lifetime security of tenure with two statutory successions, were continued into the AHA 1986. It worth noting that, during legislative debate on the 1995 Bill, it was said of the negative effect of the AHA 1986, that "by taking the land out of the landlord's control for three generations, this went almost as far as it was possible to go in the direction of security short of actually transferring the title from the landlord to the tenant."[55] What rationale is given for the effect of AHA 1986, that would give tenants such security short of "transferring the title from the landlord to the tenant"? It was, as explained by Lord Salmon in *Johnson v Moreton*, to keep us fed after World War II:

"During the last war, the submarine menace was such that it would have been virtually impossible to import into this country any more goods vital for our survival than we, in fact, did. Accordingly, it is extremely doubtful whether we could have survived had it not been for the food produced by our own farms. Even in 1947 when the Agriculture Act of that year was passed, food rationing was still in existence. It must have been clear to all that it was then and always would be of vital importance, both to the national economy and security, that the level of production and the efficiency of our farms should be maintained and improved. This could be achieved only by the skill and hard work of our farmers and the amount of their earnings which they were prepared to plough back into the land from which those earnings had been derived. A very large proportion of those farmers were tenant farmers. They were tenants because they did not have the necessary capital to buy land or they could not find any land which they wanted that was for sale – or for sale at a price which they could afford. …. The security of tenure which tenant farmers were accorded by the Act of 1947 was not only for their own protection as an important section of the public, nor only for the protection of the weak against the strong; it was for the protection of the nation itself."[56]

It is here argued that the AHA 1986 served a good purpose by then, giving security of tenure to farmers to keep us fed in the wars. That rationale was later reinforced by the policy of subsidies for tenant farmers to produce more food. Sure, subsidies to increase productivity of food is a good objective, but opportunistic tenant farmers saw an opportunity to make more money in subsidies than in actual production of food. The AHA 1986 intended for food security has had unintended consequences of putting tenant farmers in a privileged position of making more money from subsidies than from farming.

Subsidies have for years incentivised AHA tenants hoarding large lands. "The EU changed the system of payments. Instead of being encouraged to grow extra food, farmers were paid directly according to how much land they manage. So, the bigger the farm, the bigger the subsidy."[57] This is partly because the land eligible for subsidies included "land that is maintained in good agricultural condition where it is not being actively farmed at the time."[58] "The Basic Payment is based on land area."[59] The AHA security of tenure meant for food production gave rise to unintended results of privileged tenants hoarding land to make more money in subsidies than in actual food production. In 2015, "the average farm made £2,100 from agriculture and £28,300 from subsidies."[60] "Between 2017/18 and 2019/20 the average profit for all farms was £48,800, with Direct Payments equivalent to the

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[54] Agriculture (Miscellaneous Provisions) 1976, s 18.
[55] Hansard, HL Deb 28 November 1994 vol 559 col 486.
[56] *Johnson v Moreton* [1980] AC 37 at 52 per Lord Salmon.
[57] R Harabin, 'why farmers get paid by taxpayers' (2020) BBC, 22 September.
[58] C Rogers, *Agricultural Law* (fourth edition, Bloomsbury 2016) 674.
[59] Defra, 'Analysis of the impacts of removing Direct Payments' (September 2018) 11, available at <https://assets.publishing.service.gov.uk/government/uploads/attachment_data/file/740669/agri-bill-evidence-slide-pack-direct-payments.pdf> last accessed 18 September 2022.
[60] O Moody, 'Sow the seeds now for the future of farming' (2016) *The Times*, 4 August.

largest share of this (53%)."[61] This state of play, lifetime security of tenure under the AHA 1986, coupled with subsidies for simply hoarding large lands without actual food production, have contrary to legislature's objective put tenants in a privileged position. For the small landowners of say one hectare, who by their small acreage would not qualify for subsidies, and therefore would not be merely hoarding land, and who genuinely want to farm their own land, the unintended privileged position of tenants prevents them from reclaiming their land. In the words of Sir David Cairns in *Wetherall v Smith*, "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."[62] But privileged tenants is now the unintended effect of AHA 1986.

Moreover, subsidies tend to favour holders of large lands, who by virtue of the AHA 1986 tend to be tenant farmers, and subsidies, in the way they are administered, have tended to exclude small landowners from entering farming. In the UN study, it was said that 90% of farm subsidies "drives inequality by excluding smallholder farmers, many of whom are women."[63] It is here argued that for many years in England, the security of tenure under the AHA 1986 have been fused with the system of subsidies, which in turn have incentivised AHA tenant farmers hoarding large lands. The implication of this fusion of AHA security of tenure and subsidies to small farmers is seen in the above case study where the potential small farmer, wishing to farm her one hectare, is excluded. Yes, policy is changing, for DEFRA has said: "we are phasing out subsidies so that we can invest the money in farm productivity, the environment, and animal health and welfare."[64] But the way this money is administered and fused with AHA tenancy still excludes small landowners such as in our case study, as for example, she would not be eligible for the £10,000 grant for planting trees under EWCO available to landowners with "areas as small as one hectare,"[65] if her land is subject a notice to quit or was under tenancy in the last 12 months.[66]

All would have changed by the ATA 1995 if all had returned to the genesis of the principle of contractual freedom that was begun in the 1875 Act. "The 1875 Act was the first in a long line of Agricultural Holdings Acts spanning more than one hundred years and developing significant protection for tenants of agricultural holdings, before coming to an abrupt stop with the enactment of the Agricultural Tenancies Act 1995."[67] It came "to an abrupt stop" between ATA landlord and FBT tenant, but not between the AHA landowner and the FAT tenant. Certainly, it was not all change in 1995, at least not all change for small landowners who genuinely want to farm their land, as seen in the case study above, for they are still left behind under the restrictive AHA 1986. The ATA 1995 was a missed opportunity to amend the AHA 1986. Rather than amending the AHA 1986, the ATA 1995

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[61] Defra, 'Agriculture in the UK Evidence Pack' (October 2021) 3.1 available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027599/AUK-2020-evidencepack-21oct21.pdf> last accessed 18 September 2022.

[62] *Wetherall v Smith* [1980] 1 WLR 1290 at 1299.

[63] D Carrington, 'Nearly all global farm subsidies harm people and planet – UN' (2021) *The Guardian*, 14 September; full UN study available at <https://doi.org/10.4060/cb6562en> last accessed 25 August 2022.

[64] Defra, New farming policies and payments in England (July 2022) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1096744/payments-for-farmers.pdf> last accessed 25 August 2022.

[65] Forestry Commission, 'Guidance: England Woodland Creation Offer' (2021) available at <https://www.gov.uk/guidance/england-woodland-creation-offer> last accessed 16 August 2022.

[66] Forestry Commission, 'EWCO application form – part A' (2022) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1088992/EWCO_Application_Form_Part_A_v1.6_issued_07.07.2022.pdf > last accessed 18 August 2022.

[67] P Williams (ed), *Scammell, Densham and Williams Law cf Agricultural Holdings* (1st Supplement to 10th edition, LexisNexis 2018) para 1.13.

brought "to an abrupt stop" the making of new AHA tenancies after 1 September 1995 save in limited exceptions.[68]

Another missed opportunity is seen in the recent reforms, in the Agriculture Act 2020 ("AA 2020"), which too left behind the small landowners who genuinely need to farm their own land but are restricted by the AHA 1986. If small landowners who genuinely need to farm their own land thought the AHA 1986 succession rights put a heavy yoke on them, the AA 2020 made that yoke even heavier! Until the AA 2020, tenants' application for statutory two succession rights under AHA 1986 was subject to a "commercial unit test", meaning that "any surviving close relative of the deceased" had to satisfy a condition that "he is not the occupier of a commercial unit of agricultural land,"[69] but the AA 2020 repealed all provisions relating to the "commercial unit test."[70] If landowners fancied a chance of tenant's succession "coming to an abrupt stop" due to the "commercial unit test," that chance is curtailed by the AA 2020.

The consolation is said to be that "the policy of the 1995 Act is to eventually phase out security of tenure under the 1986 Act tenancies, by providing that (in general) as 1986 tenancies disappear they can only be replaced with farm business tenancies under the 1995 Act."[71] But the disappearance of the AHA tenancies is slow and may never happen in the lifetime of small landowners such as in the case study above. Statistics show "the rate of decline in the number of AHA tenancies ending has tailed off and has been at a more or less consistent level since 2004."[72] It is estimated that, "tenancies under the AHA 1986 are, on current trends, and with remaining successions, likely to be a significant force until after 2050, with some final successions and company tenancies running into the next century."[73]

That the owner intends to farm himself

It is here argued that the alternative to waiting for the slow disappearance of AHA tenancies is to amend the AHA 1986 to benefit the landowner who intends to farm the land themselves. To this end it is worth noting that the Agriculture Bill 1947, in introducing security for tenant farmers, had not intended to restrict landowners who genuinely want to farm their land themselves. The Agriculture Bill 1947 had intended to make an exception to the security of tenure granted to tenants. In introducing Clause 30 of the Agriculture Bill (which later become section 31 of the Agriculture Act 1947), after stating that a tenant receiving a notice to quit would have the right to appeal, the then Minister of Agriculture, Thomas Williams, stated that there would be one important exception: "If the Minister is satisfied that the owner intends to farm himself, or that he intends it for his child or grandchild to farm, then the Minister has power to exercise his discretion in such a case."[74] This exception never made it into the Agriculture Act 1947, and it is here suggested that it was lost in the final drafting.

Whilst it would be open to the legislature to re-enact the exception of a landowner who intends to farm himself, by amending section 27(3) of the AHA 1986 to read: "(g) that the owner intends to farm himself, or that he intends it for his child or grandchild to farm," it would require balancing interests of landlords and tenants. Amending AHA 1986 to benefit landowners may interfere with tenants' property rights, raising the question as to whether it is

[68] ATA 1995, s 4.
[69] AHA 1986, s 36(3)(b).
[70] Agriculture Act 2020, s 57(1)(b)(c), schedule 3 para 11(2)(c).
[71] C Rogers, *Agricultural Law* (fourth edition, Bloomsbury 2016) 54.
[72] CAAV Land Occupation Survey 2020, para 5.1.
[73] P Williams (ed), *Scammell, Densham and Williams Law of Agricultural Holdings* (1st Supplement to 10th edition, LexisNexis 2018) para 1.92.
[74] Hansard, HC Deb 27 January 1947 vol 432 col 638-639; British Information Services, *British Speeches of the Day* (New York, British Information Services, January – February 1947 [volume V, number 1]) 56.

within the competence of the legislature to make such interference – this question has been answered in the affirmative in the courts,[75] albeit in the context of Scottish land law.[76] England could draw lessons from Scotland in amending the AHA 1986. This exception would be based on the principle of protecting 'farmers' as such, not to privilege tenant farmers, but protecting whoever may farm the land, including landlord farmers.

A careful close reading of the House of Lords' decision in *Johnson v Moreton* reveals that the above suggested new exception would fall within the legislative purpose underlying the security of tenure in the AHA 1986 – to facilitate food production and food supply "for the protection of the nation."[77] Although majority of farmers have historically been tenants, the legislative spirit is to promote food production without requiring that farmers must be tenants and without discriminating landlord farmers. In *Johnson v Moreton*, the reference to "tenant farmers" should be understood in the historical context, meant for the "protection of the weak against the strong" in the times when tenants were often very poor with "no money with which to buy the land they wanted to farm."[78] Since the times of the 1947 Act and the AHA 1986, fortunes have changed that there is hardly a pure tenant who own no land of their own. In England, the average farmer holds 87 hectares of which only 33% is rented,[79] which is not the pure tenant the 1947 Act and AHA 1986 meant to protect.

This new ground (g) would help small landowners who otherwise would "not have the necessary capital to buy land or they could not find any land which they wanted that was for sale – or for sale at a price which they could afford,"[80] thus facilitating new entrants to farming and doing so whilst ensuring the object of the legislature is maintained. This new ground would also help to remove the unintended consequence that the AHA 1986 has created by putting "people, who have at some time in the past acquired a particular type of tenancy, in a privileged position,"[81] who by virtue of lifetime security of tenure would rather hoard large lands than give way to small landowners who genuinely need to farm their own land. The new ground would sit along the existing six grounds in section 27(3) without overhauling the AHA 1986 on the security of tenure and the succession rights to tenants.

But this new ground may generate two types of case: (a) the genuine landowner who need to farm her own land, and (b) the rogue landlord who merely want to evict his tenant. In the words of Lord Silken in a debate on the Landlord and Tenant Bill in the House of Lords, there would be cases in "which the landlord requires possession only to enter into Naboth's vineyard. The question is: how can we distinguish between the two types of case?"[82]

To avoid using ground (g) to enter 'Naboth's vineyard,' it would operate as does the current six grounds (a to f). Upon receiving ground (g) notice to quit, the tenant would be entitled to serve a counter notice under section 26 of the AHA 1986, which counter-notice would render the ground (g) notice ineffective unless the landlord obtains the section 27(3) consent from the FTT. The FTT would consider whether the landlord genuinely requires possession of the holding to farm it and not merely to evict the tenant. As ground (g) would still be subject to section 27(2) of the AHA 1986, that the FTT is satisfied that a reasonable landlord would insist on possession, then any abuse of the new ground by an opportunistic

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[75] *McMaster v Scottish Ministers* [2017] SLT 586; *Salvesen v Riddell* [2013] UKSC 22; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46.
[76] The equivalent of AHA 1986 in Scotland is the Agricultural Holdings (Scotland) Act 1991.
[77] [1980] AC 37 at 52.
[78] [1980] AC 37 at 51-52.
[79] Defra, 'Defra Statistics: Agricultural Facts – England Regional Profiles' (March 2021) p 7, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972103/regionalstatistics_overview_23mar21.pdf> last accessed 19 September 2022.
[80] *Johnson v Moreton* [1980] AC 37 at 52 per Lord Salmon.
[81] *Wetherall v Smith* [1980] 1 WLR 1290 at 1299 per Sir David Cairns.
[82] Hansard, HL Deb 8 July 1954 vol 188 col 613; 'Naboth's vineyard' alludes to a Bible story in 1 Kings 21.

landlord who have no genuine intention to farm the holding, would be stopped by the FTT. If the FTT has any doubt as to whether the landowner intends to farm the holding, or if the FTT simply need to ensure that the new ground is not abused, it is open to the FTT to impose an appropriate condition under section 27(4) of the AHA 1986. If the legislature were to amend the AHA 1986, the FTT would thus distinguish between the genuine and the rogue types of case.

What about genuine potential new entrants to farming who have no money to buy costly farmlands, who may buy cheaply a farmland that is subject to AHA 1986 tenancy, and then immediately serve a notice to quit upon the tenant, successfully invoking ground (g); would that not be an abuse of the new ground? First, the land market having information about the new ground (g) is likely to quickly adjust farmland prices so that AHA farmland may not be sold at undervalue and it unlikely this new ground would be abused by buyers on the open market. Second, if the AHA farmland is put on the open market, the AHA tenant would have equal opportunity, and might even be favoured, to buy outright the AHA farmland and prevent being served with a notice to quit by a new landlord. Third, as the FTT would be satisfied, in giving consent to the operation of the notice to quit, that productivity of the land would not suffer in the hands of the new owner when the AHA tenancy is terminated, then the object of the legislature in adding ground (g) should still be met. Fourth, it should not matter that the landowner who invokes ground (g) is a recent purchaser of the holding, for all the safeguards under section 27 of the AHA 1986 would apply to prevent abuse. Fifth, it is good that genuine potential new entrants to farming buy AHA farmlands, as it may encourage young people to enter farming and discourage old tenant farmers from hoarding farmlands.

Conclusion

This article has argued that the Agricultural Holdings Act 1986 militates against landowners who genuinely want to farm their own land, as they are unable to reclaim the land from the tenant. This has been illustrated using the anonymous case study that has shown that small landowners who genuinely want to farm their land are unable to do so under the AHA 1986.

The article has further argued that, whilst the 1947 Act, and the 1986 Act, in giving lifetime security of tenure to tenants intended to increase food production that kept us fed during the wars, it has had unintended consequences of placing tenant farmers in a privileged position. After life in England went passed the times of food rationing, with surplus food within the EU, food production was no longer the primary reason for tenant farmers managing land, but rather EU subsidies incentivised tenants hoarding large lands. This state of play, the article has argued, lifetime security of tenure coupled with subsidies for hoarding large lands, have put tenants in a privileged position to deprive landowners of farming their land contrary to legislature's object. In enacting the 1995 Act, with its flexible tenure, Parliament did not amend the AHA 1986. Thus, until the remaining AHA tenancies tail off, which might run into the 22nd century, landowners may yell all they want to the tenant, – 'get off my land!' – but unless the tenant commits one of the seven deadly sins (die without successor, practice bad husbandry, etc), landowners are unlikely to get their land back.

The article observed that during the passage of the 1947 Act, the legislature had intended to allow landowners to reclaim their tenanted land for the purpose of faming the land themselves, as an exception to the security of tenure granted to tenants, but that intended exception was never enacted. It is in this context that the article has suggested that it would be open to the legislature to amend section 27(3) of the 1986 Act to alleviate the plight of small landowners who genuinely want to farm their land but restricted by the 1986 Act.

To cite this article: Mukwiri, J. (in press). Get Off My Land!. The Conveyancer and Property Lawyer

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