

THE AGRICULTURAL HOLDINGS (SCOTLAND) BILL

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The long awaited legislation on Agricultural Holdings in Scotland finally became law when the Bill was enacted on 12 March 2003. Royal Assent is expected to be given after 12 April 2003 and the Act will come into force on such a day (or different days for different provisions) as The Scottish Ministers may order, by means of Statutory Instrument. This will, presumably, not take place until after the May Scottish Parliament Election but the Act is likely to become effective during the summer or autumn of 2003.

Once again, a number of amendments to the Bill were passed, by the full Parliament, at Stage 3. These did not, however, include the much heralded absolute right to buy, which landlords feared. The most important Stage 3 amendments - there are many more minor ones - are summarised as follows:

PART 1 - TYPES OF TENANCY (LIMITED DURATION AND SHORT LIMITED DURATION TENANCIES)

1. Conversion from 1991 Act tenancy to LDT

Conversion of a 1991 Act tenancy to a LDT (for 25 years minimum) is to be by Agreement made not less than 30 days before the 1991 Act lease is to be terminated, but either landlord or tenant may revoke the Agreement, by notice, before it takes effect. The tenant's right to compensation on termination of the 1991 Act lease is to include not only improvements but also compensation arising from diversification and/or cropping of trees.

2. LDT - Rent Review

The provisions for review of rent for Limited Duration Tenancies are brought into line with those applying to 1991 Act tenancies and, accordingly, the Arbiter is to disregard the effect on rent of the tenant being in occupation and scarcity but, on the other hand, to have regard to the terms of the tenancy, information about rents for other agricultural tenancies and factors affecting those rents (other than scarcity) (without geographical limits) as well as the current economic conditions in the relevant sector of agriculture.

3. Right to Withhold Rent

[In Part 7 the Act extends to the Land Court power to grant various remedies, in determining any matter which it is empowered to determine, including the power to order the landlord to fulfil his obligations towards the tenant in respect of fixed equipment]. Where such an order is made in relation to a SLDT or LDT and the landlord has failed, materially, to comply with the order as at the date specified in the order, the tenant may obtain a further order from the Court authorising him to carry out the work which the landlord was required, by the first order, to carry out and authorising the tenant to withhold rent by consigning it to the Court. The Court may, on the tenant's application, from time to time release to the tenant any of the amount consigned to cover costs incurred or to be incurred by the tenant in carrying out the work required and, on the application of the landlord, may terminate a consignment order if it considers that it would not be appropriate for the order to remain in force. In the latter event the Court is to divide the money remaining between the landlord and tenant, as it considers equitable. Work carried out under these provisions is to be treated as having been carried out at the landlord's expense insofar as satisfied by the release to the tenant of any amount consigned.

The landlord is prevented from irritating the lease or removing the tenant for non-payment of rent if non-payment is in consequence of an order made by the Court under these provisions and any contractual provision purporting to deprive the tenant of any right to apply for a consignment order has no effect.

4. Fixed Equipment

There is to be incorporated into every lease constituting a SLDT or a LDT provisions with regard to supply, replacement, renewal, maintenance and repair of buildings and fixed equipment such as are currently to be found in section 5 of the 1991 Act. There are to be no Post-Lease Agreements in relation to SLDT's and LDT's and provisions requiring tenants to pay the whole or any part of the premiums for insuring fixed equipment against fire are void.



5. Irritancy

Any provision in a SLDT or LDT giving the landlord power to irritate the lease on the ground that the tenant is not residing on the land is ineffective.

6. Succession

Where the tenant's interest in a SLDT or LDT is transferred by the executor of the deceased tenant to another person, the landlord is entitled to acquire that person's interest in the lease on terms which are no less favourable than those upon which the lease was transferred to the person concerned.

PART 2 - TENANT'S RIGHT TO BUY LAND

1. Exempt Transfers

Transfers between spouses in pursuance of a separation agreement become exempt transfers.

2. Exercise of the right to buy

The period during which the tenant is bound to give notice of his intention to exercise the right to buy is extended from 14 to 28 days.

3. Valuation

In assessing the value of the land, the valuer is required to assume only that the seller and buyer are "willing", not that they are also "knowledgeable and prudent" (as previously proposed). He is also to take into account when the seller would normally have been likely to recover vacant possession, but is not to take into account any increase in the value of the land resulting from its use for a non-agricultural purpose or for conservation. [Note: It is assumed that this only discounts previous use for such purposes by the tenant, and that it does not rule out future hope or development value. The existence of a "special purchaser" (e.g. a potential developer) is already a factor which must be valued in].

4. Appeals

The decision of the Lands Tribunal in a valuation appeal is declared to be final.

PART 3 - DIVERSIFICATION

No significant amendments were made to Part 3 at Stage 3.

PART 4 - COMPENSATION

1. Compensation for improvements - 1991 Act tenancies

- Write-down compensation agreements are nullified only in the case of those agreements which cover

improvements which the landlord was required to undertake in order to fulfil his obligations to provide, replace or renew fixed equipment under section 5(2) of the 1991 Act - [i.e. all other compensation agreements remain effective].

- In the assessment of compensation for improvements, grants are not to be taken into account unless either the landlord or the tenant has made or is to make a contribution towards the cost of the improvement, in which case grants are to be taken into account in proportion to the respective contributions of the parties.

2. Compensation for improvements - SLDT's and LDT's

The criteria for valuation of an improvement made under a SLDT or LDT (the value to an incoming tenant) are made the same as those for 1991 Act tenancies.

3. Compensation as a result of diversification -

- Conservation activities have been removed from the factors giving rise to claims for compensation for diversification and cropping of trees, by the landlord where the value of the holding has been reduced and by the tenant where the value of the holding has been increased.
- The measure of compensation to a tenant for an increase in the value of the land (or part of it) by a permitted diversification activity is to be such as fairly represents the value of the use, change or carrying out of the activity to an incoming tenant - i.e. the incoming tenant formula is introduced - and in ascertaining the amount of compensation the same criteria are to be applied as those pertaining to an improvement.
- Compensation is not, however, to be payable if, as a result of the conservation activities, the land is unsuitable for use for agriculture by an incoming tenant or if, because of the use of fixed equipment for such activities, the landlord is unable, at the commencement of an incoming tenant's lease, to fulfil his obligations re fixed equipment.

PART 5 - MISCELLANEOUS - AMENDMENTS TO THE 1991 ACT

1. Post-Lease Agreements

- No new Post-Lease Agreements may be entered into.
- Existing Post-Lease Agreements whereby the tenant is to execute on behalf of the landlord, or to bear the

expense of, any work effecting replacement or renewal of buildings or fixed equipment rendered necessary by natural decay or by fair wear and tear are continued in force until nullified by the tenant giving notice to the landlord that the Agreement is to be nullified. Such a notice may, however, only be served following review of the rent by arbitration - i.e. nullification of a Post Lease Agreement is linked to a rent review. Further, it is a condition of a nullification notice that the buildings and other fixed equipment are in a reasonable state of repair or that they are in no worse a state of repair than they were in when the Post Lease Agreement was entered into.

2. Landlords' Improvements - Tenant's right to withhold rent

Where the landlord seeks an increase in rent from the tenant in respect of an improvement carried out by the landlord, the tenant has the right to apply to the Land Court for an order entitling him to withhold (consign) rent on the same terms and subject to the same provisions as are explained earlier. [Part 1, Paragraph 3]

3. Termination of Tenancy - Leases not terminated by variation of terms etc

No lease of an agricultural holding is to be terminated on the ground that a conventional residence clause is replaced by the statutory undertaking by the tenant that he will (if he does not personally reside on the holding) ensure that a person who has the skills and experience necessary to farm the holding in accordance with the rules of good husbandry does so.

4. Assignment and Sub-Letting

The class of persons to whom an agricultural tenant is entitled to assign his lease is restricted to members of his family. The landlord is entitled to withhold consent to the proposed assignment if not satisfied that the proposed assignee would have the ability to pay the rent or pay for adequate maintenance of the land. Contractual provisions against inter-family assignment are to be null and void. An entitlement to the landlord to buy out the tenant's interest in the lease, on assignment by the tenant, proposed at Stage 2 of the parliamentary process has not been enacted.

5. Good Husbandry

Use by the tenant of the land, or part of the land for a permitted non-agricultural purpose is to be treated as being in accordance with the rules of good husbandry.

PART 6 - RIGHTS OF CERTAIN PERSONS WHERE TENANT IS A PARTNERSHIP

NB: The complicated provisions explained below apply where there is a 1991 Act tenancy to a limited partnership in which the limited partner is the landlord himself, an associate of the landlord or a partnership or company in which the landlord has an interest and the tenancy purports to be terminated as a consequence of:

- (a) the dissolution of the partnership by notice served by the limited partner on or after 16 September 2002;
- (b) the renunciation of the tenancy by the limited partner on or after that date; or
- (c) a breach of the tenancy on or after that date by the limited partner.

In these circumstances:

- The tenancy continues to have effect and the general partner becomes the tenant in his own right by giving notice to the landlord, within 28 days of whichever is the later of (i) the purported termination of the tenancy or (ii) the Act being brought into force, that the general partner intends to become the tenant in his own right.
- If the dissolution notice or other event purporting to give rise to the termination of the tenancy was given or occurred before "the relevant date", the landlord may within "the relevant period" apply to the Land Court for an order to the effect that the general partner's right to claim the tenancy in his own right does not apply and the Land Court is bound to make such an order if it is satisfied that (a) the dissolution notice was served or the other event purporting to give rise to the termination of the tenancy occurred otherwise than for the purpose of depriving the general partner of the right to claim the tenancy, as an individual, and (b) it is reasonable for the Court to make the order.

For the purposes of this provision neither "the relevant date" nor "the relevant period" are defined, at this stage, and are to be such date or period as the Scottish Ministers may, by order, specify.

- Where the former general partner has acquired the tenancy in his own right as a consequence of these provisions, he becomes entitled to exercise the preemptive right to buy conferred on tenants by Part 2 of the Act. [He will, therefore, be brought into line with a



former partner of a partnership in which the landlord, his associate or a partnership or company in which the landlord has an interest is a partner, whether limited or otherwise, which becomes a tenant after the Act comes into force and which is dissolved by actings of the landlord, his associate or such partnership or company]. The former general partner will, in addition, of course, acquire security of tenure **BUT**

- In certain cases, where the dissolution notice was served, or the other event which purportedly gave rise to the termination of the tenancy occurred on or after "the relevant date" (again not yet specified but expected to be a date following the passing of the Act) (but only in such cases) the landlord has the right to bring the tenancy to an end by giving to the tenant:

(a) notice of the landlord's intention to terminate the tenancy, served not less than two nor more than three years before the expiry of the lease (or the expiry of any period by which the lease is continued by tacit relocation); and

(b) provided that not less than 90 days have elapsed from the date of the first notice, a (second) notice to quit, served not less than one nor more than two years before the expiry of the lease (or expiry of the period of continuation).

i.e. to follow the procedures required to terminate a Limited Duration Tenancy.

The periods of notice which the landlord is required to give in order to terminate the tenancy may be reduced on an application by the landlord to the Land Court which is to make an appropriate order only if satisfied that service of the dissolution notice or the occurrence of the event purporting to give rise to the termination of the tenancy were otherwise than for the purposes of depriving the former general partner of any right to claim the tenancy as an individual and it is reasonable to make the order.

NB: None of the foregoing provisions relative to limited partnerships apply if:

(i) the notice of dissolution of the partnership was served before 4 February 2003;

(ii) the partnership has been dissolved in accordance with the notice;

(iii) the land comprised in the lease has been sold or let, or is subject to Missives of Sale entered into before 7 March 2003 or is to be let under a lease entered into before that date.

PARTNERSHIPS - RIGHT TO BUY

The Scottish Ministers are imbued with the power, by regulations, to provide that Part 2 of the Act (the pre-emptive right to buy) is to apply to partnerships who are tenants and such partners of partnerships as may exercise or enforce the right to buy with or subject to such modifications as the regulations themselves may specify and to make such further provision in relation to such partnerships or partners as Ministers consider necessary or expedient for the purposes of Part 2 of the Act.

PART 7 - JURISDICTION OF THE LAND COURT AND RESOLUTION OF DISPUTES

Amendments have been made to this part of the Act to clarify what matters are, or are not, to fall within the jurisdiction of the Scottish Land Court and to provide that, when making an order requiring a landlord to fulfil an obligation towards his tenant in respect of fixed equipment, the Court is to specify the date for compliance with the order. The Court is, in addition, empowered to extend that deadline, on application by the landlord.

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The foregoing is not intended to be a comprehensive statement of law. No liability is accepted for errors or opinions. No action should be taken based on this information without seeking professional advice. Amendments noted in this update are not exhaustive of those made by the Rural Development Committee at Stage 3



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