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A GUIDE TO – The 2016 Land Reform (Scotland) Act

Part 10 of the Land Reform (Scotland) Act 2016 introduces some significant changes to agricultural holdings legislation. These changes will be introduced gradually since some require further work by the Scottish Government to clarify certain aspects so it is likely to be well into 2018 before all the parts are enacted.

This guide summarises the main features of the legislation and the implications for landlords and tenants of agricultural holdings.

Tenancies

Once enacted, this part of the Act introduces a new type of tenancy, the Modern Limited Duration Tenancy (MLDT) which replaces the Limited Duration Tenancy. An MLDT is for a minimum of 10 years but there is provision for termination after 5 years if the tenant is a new entrant (the Scottish Government has yet to define what a new entrant is). A current SLDT or LDT can be converted, by agreement, into a MLDT. There will also be provision for a 91 Act Tenancy to be converted into an MLDT, by agreement, by means of a simultaneous termination of the 91 Act tenancy and the creation of an MLDT with a term of not less than 25 years. A tenant may assign the MLDT subject to a limited right of objection by the landlord. The parties must agree on a schedule of fixed equipment that is included within an MLDT within 90 days of the start of the lease. A MLDT can be sub-let if the lease expressly allows this. Termination at the end of the lease by the landlord requires a double notification procedure whereas a tenant wishing to terminate has only to give notice once.

The Act will also introduce a Repairing Tenancy. This is intended to encourage the long term letting of land which requires a significant amount of input to bring it into a condition where it can be farmed according to the rules of good husbandry. The lease must be for at least 35 years and the first 5 years (or more by agreement) is designated as the 'repairing period', during which the tenant is exempt from liability to farm in accordance with the rules of good husbandry. The rules relating to continuation, termination and extension are the same as those for a MLDT.

Tenants Right to Buy

Once enacted this section removes the need for a 91 Act tenant to register an interest in buying the farm should it come up for sale. Until this part of the Act comes into force tenants should continue to register and renew their pre-emptive rights to buy registrations.

Sale Where Landlord is in Breach

Once enacted this will allow a tenant to apply to the Land Court for an order of sale of the holding where the landlord is in breach of obligations under the tenancy and where this is affecting the tenant's ability to farm in accordance with the rules of good husbandry and that the greater hardship would be caused by not making the order rather than making it. The breach must be material and the landlord must have failed to comply with an earlier order to remedy the breach. The owner may appeal but if the appeal is rejected the tenant has the right to buy the land at a price agreed between the buyer and seller or, if no agreement is possible, a price determined by an independent valuer.

Rent Reviews

Once enacted, these provisions will significantly change the basis for rent reviews. The open market test has often proved difficult to apply because of the dearth of appropriate comparables and the use of evidence of open market rents is to be discontinued. Instead rents will be based on determination of a 'fair rent' by reference to the productive capacity of the land, the rent at which surplus accommodation (defined as being surplus to the accommodation required for the standard labour requirement of the holding) might be

let on the open market and the market rent at which the landlord's fixed equipment and land used for non-agricultural purposes might be let on the open market. The Scottish Government is working on the procedure for determining the productive capacity and on how the standard labour requirement is to be determined. A rent review may be initiated by a landlord or tenant, but no more frequently than every 3 years, by serving a rent review notice which must state, amongst other things, the proposed rent and an explanation of how the figure has been arrived at. A referral to the Land Court can be made when there is a failure to agree.

Assignment and Succession to Agricultural Tenancies

The class of person that a tenancy can be assigned to has been extended to include other relatives and descendants. A landlord's grounds for objection to an assignment remains where there are reasonable grounds for doing so but in the case of assignment to a near relative (defined in the Act) the landlord's grounds for objection are restricted to:

- The person is not of good character
- The person does not have sufficient resources to enable him/her to farm the holding efficiently
- The person does not have adequate training expertise in agriculture (not a valid objection if the assignee is engaged, or intending to enrol, in a course of relevant training).

The rights of a landlord to serve an incontestable notice to quit on a successor tenant are repealed. In the case of a proposed succession to a near relative, the landlord is entitled, within one month, to give to the legatee a counter notice objecting to the proposed new tenant and declaring the lease to be null and void. It is the landlord's responsibility to refer the issue to the Land Court. In the case of objections to a successor who is not a near relative, it is the responsibility of the legatee to appeal to the Land Court against the counter notice.

Amnesty for Tenants Improvements

In force from June 2017, the amnesty provides an opportunity for landlords and tenants to agree on a definitive list of tenant's improvements eligible for compensation at termination of the tenancy, even though the proper procedures for notifying and recording the improvements may not have been carried out. The amnesty will last for 3 years and is a valuable opportunity not to be missed. The amnesty procedure cannot be used to claim improvements which required the landlords consent but where this consent was not given, nor can a claim be made for improvements which were carried out in a manner significantly different from that which was agreed or notified. Only improvements contained in schedule 5 of the 1991 Act are eligible for consideration under the amnesty so several significant investments such as slurry pits and grain driers will not be able to be taken into account. However, the Act allows for tenants and landlords to construct an amnesty agreement which enables compensation to be payable for improvements which are not within the scope of the amnesty agreement. This allows, but does not require, landlords and tenants to include modern improvements not listed in schedule 5 and those improvements not allowable under the amnesty provisions.

Landlords Improvements

This section of the Act provides for a formal process of notification and objection when landlords intend to carry out certain improvements and applies to 91 Act tenancies, SLDTs, LDTs and, when introduced, MLDTs. Other than in cases of an emergency improvement, a landlord must give written notice of an intention to carry out a schedule 5 improvement and must explain why the improvement is necessary for the tenant to be able to farm in accordance with the rules of good husbandry. The tenant has two months to object and the landlord may apply to the Land Court to have the objection overturned. If a landlord carries out the improvement without serving notice or in contravention of a Land Court judgement the improvement will be disregarded for rental calculation purposes.

Diversification

This section changes the procedures that apply to a tenants wish to carry out diversification activity on the farm. When a landlord objects to a notice of diversification the land may be used for the non-agricultural use specified in the notice if:

- The landlord withdraws the objection
- The landlord has not applied for a determination by the Land Court
- The Land Court has determined that the landlord's objection is unreasonable.

The onus is now on the landlord, not the tenant, to make the application to the Land Court and the landlord may now only make one request for further information instead of repeated requests as was previously allowed.

Irritancy for Non-Payment of Rent

This section amends the 2003 Act as it relates to irritancy for non-payment of rent. A landlord may now not give notice of an intention to remove the tenant unless the landlord has given the tenant a demand in writing requiring the tenant to pay the rent due within 2 months and the demand has not been complied with.

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