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# A GUIDE TO — The Essential Features of the Modern Limited Duration Tenancy

This guide summarises the essential features of the legislation relating to Modern Limited Duration Tenancy's (MLDT's) and every care has been taken to ensure that it accurately reflects the main features of the current legislation. Users of the guide are advised, however, to obtain independent legal advice relevant to their particular circumstances before acting upon any of the information contained in this guide.

## 1. Introduction

The Modern Limited Duration Tenancy (MLDT) came into effect on the 30 November 2017 and continues the efforts made by the Scottish Government to provide a range of flexible tenancy options which are of sufficient duration to make investment by the tenant worthwhile but not of such duration as to deter landlords from letting land. The MLDT is less prescriptive than the Agricultural Holdings (Scotland) Act 1991 secure tenancies and allows a degree of freedom of contract over issues such as rent reviews and fixed equipment. It is also intended to provide a route for new entrants to gain a foothold in farming from which they can progress as their business grows.

The MLDT is a development of the Limited Duration Tenancy (LDT) introduced by the 2003 Agricultural Holdings (Scotland) Act and now that MLDTs are in force it will no longer be possible to enter into LDTs. The main points of difference are:

- In the MLDT there can be a break clause where the tenant is a new entrant to farming
- If the tenancy is not validly terminated at the end of the contractual term, it will automatically continue for a period of 7 years
- The parties must agree on a schedule of fixed equipment, and its condition, within 90 days of the start of the tenancy
- There is a wider right to assign the tenancy
- The lease may be irritated only if the tenant fails to comply with a notice to remedy a breach of the irritancy provisions within not less than 12 months.

With the ending of LDTs and the unlikelihood of a new 1991 Act tenancy being offered, the MLDT will be the main vehicle now for letting land for more than 5 years. (The Short Limited Duration Tenancy (SLDT) is still available for short term lets).

**This guide summarises the essential features of the legislation relating to MLDTs and every care has been taken to ensure that it accurately reflects the main features of the current legislation. Users of the guide are advised, however, to obtain independent legal advice relevant to their particular circumstances before acting upon any of the information contained in this guide.**

## 2. Duration

The length of term of a MLDT is open to agreement between landlord and tenant. There is no maximum term but the lease must be for a period of no less than 10 years. The lease may be extended by agreement in writing between the landlord and the tenant at any time during the term of the lease.

## 3. New Entrants

In essence a tenant entering into a MLDT is classed as a new entrant unless one of the following exclusions applied to the tenant within the last 5 years: -

- The tenant was a tenant of a LDT, MLDT or 1991 Act tenancy
- The tenant was a smallholder or crofter
- The tenant was a tenant under an SLDT for a continuous period of 3 years or more
- The tenant owned more than 3 ha of agricultural land
- The tenant had control of a legal entity (such as a company) to whom any of the above would apply

In the case of joint or shared tenancies the tenants will not qualify as new entrants if the majority of the tenants are disqualified by one or more of the above exclusions.

Prospective new entrant applicants who own part of a company or other legal entity are advised to look carefully at the rules governing who is classed as having a controlling interest in the entity. The rules are intended to prevent persons who would not otherwise meet the new entrant test from having effective control over the tenant(s).

## 4. Fixed Equipment

Every MLDT must include an undertaking by the landlord that the landlord will, within 6 months of the commencement of the tenancy: -

- Provide such fixed equipment as will enable the tenant to maintain efficient production as respects the use of the land as specified in the lease; and
- Put the fixed equipment so provided into the condition specified in the required schedule of fixed equipment.

Where fixed equipment is part of the lease the parties must agree in writing a schedule of fixed equipment, specifying: -

- a) The fixed equipment which the landlord will provide; and
- b) The condition of the fixed equipment.

The schedule is deemed to form part of the lease and must be agreed within 90 days of the start of the tenancy. If at any time the fixed equipment or its condition is varied, the landlord and tenant may agree to amend the schedule or substitute a new one.

Landlord and tenant are free to make their own arrangements with regard to maintenance, renewal and replacement of the fixed equipment but, unless otherwise specified in the lease, the landlord must undertake, during the tenancy, to effect such renewal or replacement of the fixed equipment provided as may be rendered necessary by natural decay or fair wear and tear. The tenant is required to maintain the fixed equipment in as good a state of repair (natural decay and fair wear and tear excepted) as it was in immediately after it was installed, renewed or replaced.

The cost of making and agreeing the schedule of fixed equipment must, unless otherwise agreed, be shared.

The lease may not contain anything that purports to put the onus on the tenant to bear any expense which is properly the responsibility of the landlord. The lease cannot, therefore, require the tenant to provide the fixed equipment at the start of the tenancy and the lease may not require the tenant to pay the whole or any part of the cost of fire insurance covering the fixed equipment.

If the tenant has other fixed equipment available to him elsewhere he may only require limited fixed equipment on the let land and the lease can be written to include recognition of this.

### 5. Compensation for Tenants Improvements

On quitting the land on termination of the tenancy the tenant is entitled to compensation from the landlord for any improvement carried out by the tenant which is listed in Schedule 5 of the 1991 Act tenancies and where the applicable procedures for notice and consent under the 1991 Act tenancies have been followed.

The rules relating to the need for landlord's consent for Part 1 improvements are the same as for 1991 Act tenancies. In the case of such improvements the consent of the landlord, in writing, is required before the improvement can be carried out.

In the case of Part 2 improvements, where the tenant is required to notify the landlord of his intention to carry out the improvement, the time allowed for a landlord to object is 60 days, as opposed to one month in the case of 1991 Act tenancies.

### 6. Landlord's Improvements

The law allows a landlord to carry out a "relevant improvement" which is defined as an improvement that would count as a new improvement under schedule 5 of the Agricultural Holdings (Scotland) Act 1991 if it were carried out by the tenant. Unless it is an emergency improvement the landlord must give to the tenant, in writing, a landlord improvement notice. The notice must specify: -

- The names and designations of the landlord and tenant
- The name and address of the land that is the subject of the lease
- Details of the intended improvement, including the manner in which it is to be carried out
- The landlord's reasons why the improvement is necessary to enable the tenant to fulfil his responsibilities to farm the holding in accordance with the rules of good husbandry.

The tenant can object to all or part of the landlord's proposed improvement by giving a written notice of objection which must be given within two months of receipt of the landlord's improvement notice. It must be dated and must state the reasons why the improvement is not necessary to enable the tenant to fulfil his responsibilities to farm the land in accordance with the rules of good husbandry.

When the tenant serves a notice of objection the landlord can apply to the Land Court for approval of the proposed improvement but must apply within two months of receipt of the notice of objection. The Land Court may approve or fail to approve the proposed improvement or may approve it subject to such conditions as it considers are appropriate.

If the proposed improvement is agreed to by the tenant, or has been permitted following a Land Court decision, the landlord must give written notice to the tenant specifying the period during which the improvement will be carried out and, unless agreed otherwise, the work should not begin until two weeks after the notice is given.

If the landlord carries out an improvement without the agreement of the tenant or without the approval of the Land Court, and it was not an emergency improvement, the improvement will be disregarded for the purposes of assessing the tenant's responsibilities for farming in accordance with the rules of good husbandry and for maintaining the fixed equipment, and may not be taken into account in rent reviews.

The above rules do not apply to an "emergency improvement" which is an improvement necessary for any of the following purposes: -

- Protecting public health from infectious diseases, contamination or other hazards that constitute a danger to human health
- Preventing a danger or potential danger to public safety
- Enabling the tenant to comply with the requirements of the Animal Health and Welfare (Scotland) Act 2006
- Securing the provision of essential services, including electricity and water supply services
- Remedying an accident or natural cause or force majeure which was exceptional and could not reasonably have been foreseen.

If the landlord or tenant considers that an emergency improvement is required the landlord is free to carry it out without having to serve an improvement notice or specify the period during which the work will be carried out.

## 7. Subletting

A tenant may sublet the land that is the subject of a MLDT but only if the lease expressly permits this.

## 8. Termination

### By the landlord

A landlord may terminate a MLDT, at the end of its contractual term, by notice to quit but must do this in two stages. A written notice of intention to terminate the tenancy must be issued not less than 2 years nor more than 3 years before the expiry of the lease. This must be followed up by a written notice to quit which is to be given not less than 1 year nor more than 2 years before the expiry of the lease. There must be a period of at least 90 days between service of the notice to quit and notice of the intention to terminate.

If the lease is not validly terminated by notice at the expiry of the contractual term it will automatically continue for a further 7 years.

In the case of a new entrant, where there is provision for a break clause, the landlord may terminate the tenancy after 5 years by giving a notice to quit not less than 1 year nor more than 2 years before the expiry of the 5-year period. The landlord may give a notice to quit to a new entrant at 5 years only if: -

- The tenant is not using the land in accordance with the rules of good husbandry
- The tenant is otherwise failing to comply with any other provision of the lease.

### By the tenant

The tenant may terminate the tenancy at the end of its contractual term by giving notice in writing of his intention to quit the land at the expiry of the tenancy. The notice must be given not less than 1 year nor more than 2 years before the expiry of the term of the tenancy. Similar arrangements apply in the case of a new entrant who wishes to terminate the tenancy after 5 years.

### By agreement

The tenancy may be terminated at any time by agreement in writing between landlord and tenant as long as the agreement is entered into after the commencement of the tenancy and it makes provision as to compensation payable by either party to the other.

## 9. Resumption

The landlord of land let under a MLDT has a statutory right of resumption under certain circumstances. He may resume all or part of the land if the following 3 conditions are met:

1. The resumption is for non-agricultural purposes for which planning consent has been obtained by anyone other than the tenant
2. The lease does not expressly prohibit resumption for that purpose (in agreeing the lease at the outset, landlord and tenant can agree to prohibit resumption for a non-agricultural purpose)
3. The landlord has given the required notice to the tenant.

The landlord must give the tenant written notice of his intention to resume and must do so not less than 1 year before the date of resumption and must specify the date on which resumption is to take place.

If a partial resumption makes the remaining enterprise less profitable the tenant is entitled to terminate the tenancy by giving written notice to the landlord within 28 days of receiving the notice of intention to resume.

Where part of the land has been resumed for the mining of coal or other minerals or for a stone or sand and gravel quarry, and the land is subsequently restored to agricultural use, the land is restored to the tenant as long as neither the tenant or landlord has changed in the interim and compensation paid to the tenant in consequence of the resumption was calculated on the basis that the tenant would get the land back.

Where partial resumption takes place, the tenant is entitled to a rent reduction proportionate to the area of land resumed and to an amount in respect of any depreciation of the value to the tenant of the remainder of the land.

In the case of resumption of the whole area the tenant is entitled to compensation for disturbance and to additional compensation related to early resumption of the land.

## 10. Rent

The parties to a lease under a MLDT are free to make their own arrangements with respect to rent reviews so can agree to include, in the lease, contractual arrangements relating to such issues as the frequency of rent reviews and the factors to be taken into account when considering the amount of the rent.

If the lease does not make provision for the above, the default position will be the fair rent for the holding once the system for establishing a fair rent has been introduced by Scottish Ministers (expected to be during 2018).

Both landlord and tenant have the right to initiate a rent review and upward only rent reviews are not permitted.

In circumstances where a rent review fails to reach agreement on a figure the rent will be established by the Land Court unless the parties agree to arbitration or some other form of dispute resolution.

## 11. Assignment

A tenant may assign a MLDT to another party with the landlord's consent. The tenant must give notice in writing to the landlord of his intention to do so and must include the particulars of the proposed assignee and the date and terms on which the assignment is to be made. The tenant is entitled to assign to any person if the landlord consents but special provisions apply where the proposed assignee is a near relative.

If the landlord wishes to withhold consent he must do so in writing within 30 days of receiving the notice. The landlord may withhold consent (to a non-near relative) if there are reasonable grounds for doing so. "Reasonable grounds" is not defined in the act but is likely to include, among other possible grounds of objection: -

- The proposed assignee would not have the ability to pay the rent due or to pay for adequate maintenance of the land, or
- The proposed assignee does not have the skills or experience necessary to manage the holding in accordance with the rules of good husbandry.

In the case of a near relative, the grounds for objection are restricted to: -

- The proposed assignee is not of good character
- He does not have sufficient resources to enable him to farm the land with reasonable efficiency; and
- He has neither sufficient training or experience to enable him to farm the land with reasonable efficiency
- This ground of objection will not be applicable where the proposed assignee is engaged in, or will be within 6 months, a relevant training course and has made reasonable grounds to ensure that the land is farmed with reasonable efficiency in the meantime.

The service of a notice of intent to assign a MLDT does not give the landlord the right to acquire the tenant's interest. If the landlord fails to respond within 30 days to the tenant's written notice of intention to assign he is deemed to have consented.

In relation to assignation a near relative means: -

- A parent of the tenant
- A spouse or civil partner of the tenant
- A child of the tenant
- A spouse or civil partner of such a child
- A grandchild of the tenant
- A brother or sister of the tenant
- A spouse or civil partner of such a brother or sister
- A child of a brother or sister of the tenant
- A grandchild of a brother or sister of the tenant
- A brother or sister of the tenant's spouse or civil partner
- A spouse or civil partner of such a brother or sister
- A child of such a brother or sister
- A grandchild of such a brother or sister.

## 12. Succession

Prior to the introduction of the Land Reform (Scotland) 2016 Act the range of people to whom a tenancy could be bequeathed was restricted to immediate family members. The list of potential legatee has now been substantially extended and two classes of legatees are recognised: a wider class of eligible legatees and a class consisting of near relatives. The grounds on which a landlord can object to a proposed legatee differ according to which class the proposed legatee belongs to.

The wider class of potential legatees is as follows: -

- Any person who would have been entitled to succeed to the tenant's estate on intestacy by virtue of the Succession Scotland Act 1964
- A spouse or civil partner of a child of the tenant
- A spouse or civil partner of a grandchild of the tenant
- A spouse or civil partner of a brother or sister of the tenant
- A brother or sister of the tenant's spouse or civil partner
- A spouse or civil partner of such a brother or sister
- A child, including a stepchild, of such a brother or sister
- A grandchild, including a step grandchild of such a brother or sister
- A stepchild of the tenant
- A spouse or civil partner of such a stepchild
- A descendant of such a stepchild
- A stepbrother or stepsister of the tenant
- A spouse or civil partner of such a stepbrother or stepsister
- A descendant of such a stepbrother or stepsister.

The grounds on which a landlord can object to a proposed legatee from the wider class of potential legatees are not restricted and may include, among other grounds, concerns about the character, financial resources and agricultural knowledge of the proposed legatee.

The near relative class of potential legatees is as follows: -

- A parent of the tenant
- A spouse or civil partner of the tenant
- A child of the tenant
- A grandchild of the tenant
- A brother or sister of the tenant
- A spouse or civil partner of such a brother or sister
- A child of a brother or sister of the tenant
- A grandchild of a brother or sister of the tenant
- A brother or sister of the tenant's spouse or civil partner
- A spouse or civil partner of such a brother or sister
- A child of such a brother or sister
- A grandchild of such a brother or sister.

The grounds on which a landlord can object to a proposed legatee who is a near relative are restricted to: -

- The person is not of good character
- The person does not have sufficient resources to enable the person to farm the holding with reasonable efficiency
- The person has neither sufficient training in agriculture nor sufficient experience in the farming of land to enable the person to farm the holding with reasonable efficiency
- This ground of objection will not be applicable where the person is engaged in, or will begin within 6 months of the start of the tenancy, a course of relevant training in agriculture which the person is expected to satisfactorily complete within 4 years and has made arrangements to ensure that the holding is farmed with reasonable efficiency until the person has completed that course.

In the case of a testate succession (i.e. where the lease has been left in a will to a named person) where the legatee is a near relative, the legatee (the person to whom the tenancy has been bequeathed) must give notice of his acceptance of the bequest within 21 days of the death of the tenant. If the landlord wishes to object to the transfer he must give to the legatee a counter notice intimating that he objects to the transfer and must do so within one month of receipt of the legatee's notice. It is for the landlord to apply to the Land Court for an order declaring the bequest to be null and void and he must do so within one month of issuing the counter notice. Failure to do so within the time period will result in the counter notice having no effect and the legatee will become the tenant. The onus is on the landlord to establish his objection to the satisfaction of the Land Court.

Where the legatee is not a near relative, the landlord is entitled, within one month of receiving notice of the bequest, to give to the legatee a counter notice stating that the landlord objects to the proposed tenant and declaring the lease to be null and void.

In this case it is for the legatee to apply to the Land Court to appeal against the counter notice and he must do so within one month of receipt of the counter notice. The onus is on the legatee to establish to the satisfaction of the Land Court that the bequest should not be declared null and void.

In the case of intestate succession (where the deceased tenant failed to nominate a successor) the executor may be able to transfer the tenancy to someone who would have been entitled to succeed to the deceased's estate in normal circumstances. It is for the executor, normally in discussion with the deceased's next of kin to identify a suitable person. The executor must transfer the deceased's interests in the tenancy to the named person within one year of the death and the acquirer must notify the landlord within 21 days that the acquisition has taken place.

### 13. Diversification

A tenant of an MLDT is allowed to use the land for non-agricultural purposes as long as the diversification is a permitted activity which has been consented by the landlord or has been approved by the Land Court in the face of an objection by the landlord.

A tenant wishing to use all or part of the holding for a non-agricultural purpose must first send to the landlord, at least 70 days before the proposed start of the diversification activity, a written notice of diversification which must specify: -

- What the non-agricultural purpose is
- The land that the tenant proposes to use for the activity
- Any change to the land that the tenant proposes in order to carry out the diversification activity
- The date on which the tenant proposes to begin the activity.

The notice must also address the possible grounds for objection by the landlord that are set out below.

Where sub-letting is expressly prohibited in the lease, the tenant may still sub-let the land provided that the purpose for which it is sub-let is ancillary to their own use of it for the non-agricultural purpose, and subject to them having gained consent for the diversification activity. It is important to note that a tenant may not sub-let to a third party if that party is undertaking diversification activity for their own purposes.

The landlord is entitled to ask for further relevant information relating to the diversification activity but may only make one such request and must make the request within 30 days of receiving the notice of diversification. Information is classed as relevant if relates to: -

- The intended use of the land, including any changes to the land
- The finance or management of any business that the tenant intends to set up
- Any information that is necessary to enable the landlord to consider whether there are grounds for objection to the notice.

The tenant must provide any information that is reasonably requested within 30 days of the date on which it was requested.

The landlord must notify the tenant in writing within 60 days of receiving the notice of diversification, or within 60 days of making a request for further information, that he: -

- Does not object to the proposal
- Does object, in which case the grounds for the objection must be set out
- Agrees to the proposal subject to any reasonable conditions he may wish to impose.

The landlord may object to the notice of diversification only if: -

- The landlord reasonably considers that the intended use of the land would lessen significantly the amenity of the land or the surrounding area, or would substantially prejudice the use of the land for agricultural purposes in the future, or would be detrimental to the sound management of the estate of which the land forms part of, or would cause the landlord undue hardship
- The landlord reasonably considers that it fails to demonstrate that any proposed changes, or businesses to be set up, are viable
- The tenant has failed to provide, within the specified time, any relevant information sought by the landlord.

If no notification is given by the landlord within the time set out above the landlord is deemed to have consented. The exception to this is where the diversification activity relates to the planting of trees. In this case the tenant must receive the written consent of the landlord before proceeding.

If the landlord objects to the notice of diversification and the tenant does not accept the objection, the landlord may, within 60 days of giving the notice of objection, apply to the Land Court for a determination that the objection is reasonable. If the Land Court does not uphold the objection the tenant may use the land for the proposed purposes from a date fixed by the Land Court and subject to any conditions imposed by the Land Court.

Should the landlord consent to the diversification subject to conditions which the tenant feels are unreasonable, the tenant may refer the matter to the Land Court which may uphold the conditions, remove them or replace them with such reasonable conditions as the Land Court feels are appropriate.

## 14. Conversion from a Short Limited Duration Tenancy

A SLDT is converted to a MLDT: -

- Where the parties agree in writing to do so at any time before the expiry of the SLDT
- Where the tenant of a SLDT for 5 years remains in occupation after the expiry of the term, with the consent of the landlord
- Where a SLDT is for more than 5 years but less than 10 it is in effect a MLDT.

The tenancy has the effect as if it were for a term of 10 years from the start of the SLDT.

## 15. Conversion from a Limited Duration Tenancy (LDT)

Landlord and tenant can agree to convert a LDT into a MLDT by making an agreement in writing that specifies the date of termination of the LDT and which is made not less than 30 days before the date of termination. The parties must enter into a MLDT lease for a term not less than that remaining on the LDT and the MLDT must include the same land and must have effect from the date on which the LDT is terminated.

On conversion to a MLDT any entitlement to compensation for tenants' improvements is carried forward into the MLDT.

## 16. Conversion from a 1991 Act Tenancy

There is an option for a 1991 Act tenant to convert the tenancy into a MLDT by agreement. This is brought about by two linked transactions that terminate the 1991 Act tenancy and create a new MLDT.

The 1991 Act tenancy must be terminated by an agreement in writing which must specify the date of the termination and which must be made not less than 30 days before that date. At the same time the parties must enter into a MLDT, comprising the same land, for a term of not less than 25 years and which starts on the day of termination of the 1991 Act tenancy. The double notification to quit procedure does not apply in this case.

Termination of the 1991 Act tenancy entitles the tenant to such compensation for improvements as he would have been entitled to if he was quitting the holding as a result of termination of the tenancy.

## 17. Irritancy

The landlord and tenant may agree between them, and include in the lease, what grounds there are for irritancy of the lease. However, the lease may not be irritated solely on the grounds that the tenant is not resident on the land.

If the lease is irritated on the grounds of failure to use the land in accordance with the rules of good husbandry, what is good husbandry is to be construed by reference to schedule 6 of the Agriculture (Scotland) Act 1948. However, conservation activities which are carried out by the tenant in response to a legal requirement, or in compliance with the conditions of a grant from public funds for the delivery of such activities, will be treated as being in accordance with the rules of good husbandry, as will use of the land for non-agricultural purposes which is in accordance with a permitted diversification activity.

A landlord wishing to irritate the lease must give the tenant written notice of the alleged breach and must give the tenant at least 12 months to remedy the breach. This period may be extended by agreement or by the Land Court on application by the tenant. If the tenant fails to remedy the breach within the specified period, the landlord may give written notice of his intention to remove the tenant on a specified date which must be at least 2 months from the date on which the notice is served.

## 18. Land and Buildings Transaction Tax Liabilities

Entering into a MLDT may result in the tenant having to pay Land and Buildings Transaction Tax. The extent of any such tax will depend on the size of the rental figure and the length of the lease. Landlords and tenants considering entering into a MLDT are advised to check the Revenue Scotland website [www.revenue.scot](http://www.revenue.scot) for the current rules and rates.

## 19. Pre-emptive Right to Buy

The right of a tenant of a 1991 Act tenancy to have the pre-emptive opportunity to buy the holding if the landlord decides to sell does not apply in the case of MLDTs.



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