

TENANT FARMING FORUM

(NFUS, RICS, SEBG, SRPBA, STFA)

NFU Scotland
c/o Kate Scott
Rural Centre – West Mains
Ingliston
Newbridge
Midlothian
EH28 8LT
(0131 472 4124)

TENANT FARMING FORUM (SCOTLAND) – A GUIDANCE NOTE*

AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003

Section 16 “Fixed equipment etc”

Introduction

The provisions of the Agricultural Holdings (Scotland) Act 2003 were brought into force on 27th November, 2003, under exception of the sections about Limited Partnerships which were already in force, and Part 2 (Tenant’s right to buy land) for which a start date is still awaited.

The Act introduces Short Limited Duration Tenancies (SLDTs) and Limited Duration Tenancies (LDTs), which are new tenancy arrangements for either not more than 5 years or not less than 15 years respectively.

It goes, almost without saying, that the key to implementing the Landlord/Tenant relationship under the 2003 Act, is for both parties to work together to formulate practical solutions to issues which will, inevitably, arise.

Section 16

Section 16 of the new legislation has the scope for causing much head scratching in both the Landlords’ and Tenants’ sectors, so this note will hopefully give practitioners some pointers. As a preliminary, the phrase “agricultural holding” is no longer used, and is replaced by “agricultural land”, which is defined as “land used for agriculture for the purposes of a trade or business”.

Section 16 is entitled “Fixed Equipment etc.”

Section 16 (1)

“When a lease constituting a short limited duration tenancy or a limited duration tenancy is entered into, any fixed equipment on the land comprised in the lease is to be specified in the lease.”

We are used to the terms of Section 5(1) of the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”) which states “When a lease of an agricultural holding to which this section applies is entered into, a record of the condition of the fixed equipment on the holding shall be made forthwith, and on being so made shall be deemed to form part of

The Tenant Farming Forum is committed to help promote a healthy farm tenanted sector in Scotland. Its membership comprises the National Farming Union of Scotland; the Royal Institution of Chartered Surveyors in Scotland; the Scottish Estates Business Group; the Scottish Rural Property and Business Association and the Scottish Tenant Farmers Association . It has an independent Chairman, Professor T Jeff Maxwell, OBE FRSE

the lease.” Records under this sub-section have no place for SLDTs and LDTs, and neither does its principal raison d’être, the substantiation of a claim for dilapidations under Section 45 of the 1991 Act (Gill 3rd Ed 7.33). While the new Section 45A of the 1991 Act (compensation for diversification etc.) has been imported to the 2003 Act, Section 45 itself has not. However, claims for high farming under Section 44 of the 1991 Act have been imported to the 2003 Act, with reference to a Record being replaced with a reference to fixed equipment under Section 16 of the 2003 Act.

Accordingly, it is essential that a Schedule of Fixed Equipment under Section 16(1) is completed, and is prepared as if it were a record under Section 5(1) of the 1991 Act. If there is none, that should be stated.

Section 16(2)

“At any time after the commencement of the tenancy, the landlord and tenant may by agreement in writing –

- (a) specify any fixed equipment not specified under subsection (1); or***
- (b) vary the terms of any specification of fixed equipment.”***

This is a new version of Section 8(2) of the 1991 Act, which states “The tenant may, at any time during the tenancy, require the making of a record of -

- (a) existing improvement carried out by him or in respect of the carrying out of which he has, with the consent in writing of his landlord, paid compensation as an outgoing tenant;
- (b) any fixtures or buildings which, under Section 18 of this Act, he is entitled to remove.”

The provisions under 16(2) are voluntary only, but should have a use in keeping the Schedule of Fixed Equipment prepared for 16(1) up to date following upon additions, or buildings becoming redundant etc. These provisions are not, however, to be used as a substitute for post lease agreements in the case of no fixed equipment, or less than necessary. It is to be noted that neither Section 8, nor Section 18, of the 1991 Act have any application to SLDTs or LDTs.

Section 16(3)

“There is incorporated in every lease constituting a short limited duration tenancy or a limited duration tenancy an undertaking by the landlord that the landlord will –

- (a) at the commencement of the tenancy or as soon as is reasonably practicable thereafter, put the fixed equipment on the land into a thorough state of repair and will provide such buildings and other fixed equipment as will enable an occupier reasonably skilled in husbandry to maintain efficient production as respects both –***
 - (i) the kind of produce specified in the lease, or (failing such specification) in use to be produced on the land; and***
 - (ii) the quality and quantity of such produce; and***

The Tenant Farming Forum is committed to help promote a healthy farm tenanted sector in Scotland. Its membership comprises the National Farming Union of Scotland; the Royal Institution of Chartered Surveyors in Scotland; the Scottish Estates Business Group; the Scottish Rural Property and Business Association and the Scottish Tenant Farmers Association. It has an independent Chairman, Professor T Jeff Maxwell, OBE FRSE

- (b) ***during the tenancy effect such replacement or renewal of the buildings or other fixed equipment as may be rendered necessary by natural decay or by fair wear and tear.***

It will be noted that this sub-section repeats, almost verbatim, the provisions of Section 5(2)(a) of the 1991 Act.

Section 16(5)

“There is also incorporated in every such lease a provision that the liability of the tenant in relation to the maintenance of fixed equipment extends only to a liability to maintain the fixed equipment on the land in as good a state of repair (natural decay and fair wear and tear excepted) as it was in –

- (a) ***immediately after it was put in repair as mentioned in subsection (3)(a); or***

- (b) ***in the case of equipment provided, improved, replaced or renewed during the tenancy, immediately after it was so provided, improved, replaced or renewed.***

It will also be noted that this sub-section repeats, almost verbatim, the provisions of Section 5(2)(b) of the 1991 Act.

Section 16 of the 2003 Act cannot be contracted out of for either SLDTs or LDTs (in passing, post 2003, Section 5 of the 1991 Act cannot be contract out of either). It is necessary therefore to look at 16(3) and 16(5) with a more critical eye.

As stated, 16(3) largely repeats Section 5(2)(a) of the 1991 Act. 16(3)(a)(i) and (ii) could, it is suggested, have been brought up to date by being replaced with the phrase “for the purposes of the let” rather than using the 1949 wordage (Taylor –v- Burnett’s Trustees 1966 SLR 139) and (Gill 7.17-21). The Land Court, to whom all disputes will go in the first instance, will no doubt be looking afresh at this phraseology.

Two examples are given.

- (a) A let of bare land for cropping, accepted as such by both parties, should state just that, and the tenant can accept, in the lease, that the landlord has complied with his undertaking under 16(3), with reference to the Schedule of Fixed Equipment attached to the lease, which would probably only specify roads, drainage and fencing.
- (b) The let of a hill farm for a ewe flock would state that as being the purpose of the let. The Schedule of Fixed Equipment would detail the cottage, shed, folds, fencing etc. and the tenant can accept in the lease that the landlord’s undertaking under 16(3) has been fulfilled. However, in two years’ time, when the tenant wants to put some cattle on the land, there would be no obligation on the landlord to provide any fixed equipment for that venture, because it is not part of the purpose of the let.

As with 16(3), Section 16(5) will no doubt be interpreted against previous case law (Gill 7.22). There is, however, a more pressing practical aspect to 16(5), in that with no

The Tenant Farming Forum is committed to help promote a healthy farm tenanted sector in Scotland. Its membership comprises the National Farming Union of Scotland; the Royal Institution of Chartered Surveyors in Scotland; the Scottish Estates Business Group; the Scottish Rural Property and Business Association and the Scottish Tenant Farmers Association . It has an independent Chairman, Professor T Jeff Maxwell, OBE FRSE

contracting out, and no Section 45 1991 Act for dilapidations claims, the only measure of standard as to whether the tenant has maintained the fixed equipment sufficiently as required by this sub-section will be the Schedule of Fixed Equipment. That is why it is suggested that that Schedule, required for 16(1), is more akin to a record as we presently understand it, and thus assumes a greater and higher importance for both landlord and tenant.

There are, however, differing views on the connection between 16(1) and 16(3). Some consider that there is no linkage between the two, and indeed that there should be two record lists, one for 16(1) and another for 16(3). Others take the view, for which there is substantive support, that while accepting 16(1) is poorly drafted, it cannot be contemplated that 16(1) and 16(3) would not be interpreted together. Experience on drafting LDTs thus far indicates that the legal profession is following this latter view. It is clearly a matter for which professional advice must be sought.

Section 16(6)

“Any agreement between the landlord and tenant which purports to provide for the tenant to bear any expense of any work which the landlord is required to execute in order to fulfil the landlord’s obligations under the lease is of no effect.”

Any attempt to oblige the tenant to bear the cost, or part of the cost, of the provision of fixed equipment required under Section 16(3) is struck down.

The combined effect of Section 16 sub-sections (1), (3) and (6), is the situation where the land let does require additional fixed equipment, and the parties advisedly and freely wish to proceed on the basis that the Landlord is not to provide the additional fixed equipment or at least pay for it. The terms of 16(6) appear to preclude such an arrangement. This, it is submitted, creates a strong disincentive both to diversified activity on agricultural land as well as to perfectly reasonable shorter term arrangements for stock and arable purposes. The effect of this could be that, particularly with regard to SLDTs, the parties will simply ignore 16(3), but otherwise, where the obligations of 16(3)(a) are inappropriate, the parties do not proceed because of it when they otherwise would have done so.

For completeness, Section 16(4) defines “produce” for the purpose of 16(3)(a)(i) in identical terms to the definition contained in Section 85 of the 1991 Act, and Section 16(7) is similar to Section 5(4) of the 1991 Act preventing the passing of fire insurance premium responsibility to the tenant.

***Caveat**

This guidance note reflects information reviewed at the time of its publication. Accordingly, account must always be taken of any relevant changes in law, policy or circumstances since that time. It is for general information only, and must never be relied upon as any substitute for appropriate professional advice, which should always be taken in any situation in which financial or other interests may be at stake. No liability can be accepted by TFF or any other member of TFF for any mis-statement in it or omission from it.

The Tenant Farming Forum is committed to help promote a healthy farm tenanted sector in Scotland. Its membership comprises the National Farming Union of Scotland; the Royal Institution of Chartered Surveyors in Scotland; the Scottish Estates Business Group; the Scottish Rural Property and Business Association and the Scottish Tenant Farmers Association . It has an independent Chairman, Professor T Jeff Maxwell, OBE FRSE