

**TENANT FARMING
FORUM GUIDE
TO THE
AGRICULTURAL
HOLDINGS
(SCOTLAND) ACT 2003**

JULY 2007

THE MEMBERS OF THE TENANT FARMING FORUM (TFF)

The Tenant Farming Forum is committed to help promote a healthy farm tenanted sector in Scotland. Its membership comprises the NFU 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 a representative from the Law Society of Scotland as Technical Adviser, an observer from SEERAD, and an independent Chairman.

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FROM THE CHAIRMAN

The primary purpose of the Tenant Farming Forum (TFF) is to help promote a healthy farm tenanted sector in Scotland. The Forum believes that this requires that the relationship between landlord and tenant is based on a common understanding of each others responsibilities and obligations, and one of trust and respect for each others aspirations for the future. This requires that there is clarity about the new legislation and is why the TFF published this Guide in 2004 to help both landlords and tenants to achieve that.

Since 2004 we are aware that the Guide has been used extensively by landlords and tenants, and in particular those advising them. Experience working with the new legislation has required an updating of the Guide which the TFF is now making available through its member organisations and on its Web Site. An addendum has been included, which provides guidance to those who require to undertake multiple valuations when, for example, several properties on one estate are put up for sale and where tenants have registered a right to buy.

The Agricultural Holdings (Scotland) Act 2003 is a far-reaching and radical milestone and will have inevitably an impact on the evolving relationships between all landlords and tenants in Scotland. Of central importance is the introduction of two new types of tenancy – the Short Limited Duration Tenancy (SLDT) and the Limited Duration Tenancy (LDT). Because it is not a Consolidating Act, and relies significantly on the provisions of the Agricultural Holdings (Scotland) Act 1991, the 2003 Act is not easy to follow – another reason why we are publishing this Guide.

The Guide aims to assist landlords and tenants to understand the full implications of the 2003 Act and guide them through all its provisions and the alterations to the 1991 Act that will apply. It draws attention to those matters about which both a landlord and a tenant should be aware when entering into any type of agreement between them.

The Guide is designed to help each party identify those issues that each will require to discuss with their professional advisors. **The Guide is not a substitute for legal advice – it is a guide to those who need to prepare for meaningful and constructive dialogue with their advisers and when negotiations take place between the interested parties.** It aims to help landlords and tenants identify and agree what they wish to achieve in their relationship, and place them in a position whereby they can, with the help of their professional advisers, achieve a satisfactory outcome for each of them within the law.

We hope that the Guide will lead to agreements that not only comply with the provisions of the Act, but more importantly lead to landlord - tenant relationships

where there is a 'minimum' of uncertainty as to the future security of each party's interests, and which achieve sustainable outcomes for both parties as well as for the land, buildings and environment that they 'hold in trust'.

Jeff Maxwell, on behalf of the Members of the Tenant Farming Forum

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GENERAL INTRODUCTION

Historical Background to Agricultural Holdings Legislation

The relationship of landlord and tenant in Scotland has been regulated by a series of Acts of Parliament, commencing with the Agricultural Holdings (Scotland) Act 1923. There followed some piecemeal legislation, such as The Sheep Stocks Valuation (Scotland) Act 1937, and the introduction of the Rules of Good Husbandry and Good Estate Management in The Agricultural (Scotland) Act 1948. Consolidating legislation came with The Agricultural Holdings (Scotland) Act 1949, although some items were still omitted. Inevitably, with the passage of time and other legislation since 1949, in particular The Succession (Scotland) Act 1964 and The Agriculture (Miscellaneous Provisions) Act 1968, the 1949 Act required further radical updating. That came with The Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”) which was stated to be a Consolidating Act of enactments relating to agricultural holdings from 1949 to 1991.

Leases available under the 1991 Act were:-

- Full agricultural tenancies with security of tenure and succession rights (“a 1991 Act” tenancy)
- “Section 2” lets for less than one year, approved by SEERAD and
- Grass lets for less than a year.

As the 1991 Act was primarily a Consolidating Act, it was recognised within the industry that further legislation would be needed to update some elements of the legislation. The number of new tenancies being offered for let had fallen markedly. Where tenancies were offered to tenants, Limited Partnership tenancies were being used increasingly as a means of avoiding the security of tenure provisions and to enable occupation to be granted for defined terms. Issues such as diversification, compensation for improvements, provision of fixed equipment and resumption for non-agricultural use were also causing difficulties. There was concern that arrangements for resolving disputes between a farm tenant and landlord were possibly slower and more expensive than they needed to be.

Accordingly, the Scottish Executive published a White Paper in May 2000, which set out proposals for reforming Agricultural Holdings legislation. At the same time, Ministers asked NFU Scotland and the Scottish Landowners Federation (now the SRPBA) to develop proposals for a new type of tenancy that might prove attractive to landlords and tenants alike. They also asked the Scottish Law Commission to review arrangements for resolving disputes between landlord and tenant.

These recommendations formed the basis for the draft Agricultural Holdings (Scotland) Bill, which was published for consultation in April 2002. Importantly, however, two significant proposals were included in the Bill which had not been covered in either the White Paper or the work of NFUS/SLF or the Scottish Law Commission:

- Pre-emptive right-to-buy for 1991 Act tenants
- Discouragement of the use of new Limited Partnership tenancies

During the passage of the Bill further substantial amendments were introduced to address many of the concerns which had been raised by some sections of the industry. The Agricultural Holdings (Scotland) Act 2003 ("the 2003 Act"), in its final form, proved therefore to be more far-reaching and radical than had been envisaged at the time of the White Paper.

How to Use the Guide

The format of the 2003 Act is difficult to follow, as it is not a Consolidating Act, but is a combination of amendments to the 1991 Act, and the introduction of two new types of fixed term tenancy. In addition, the amendments to the 1991 Act do not come in the order of the provisions in the 1991 Act, repeals are partly in the body of the text and partly in the Schedule to the 2003 Act, and some, but not all of the provisions of the 1991 Act apply to the new tenancies.

The purpose of this Guide is therefore to highlight, first, **in Part A, the main practical alterations to the 1991 Act** by the 2003 Act and, second, **in Part B, the new types of tenancy introduced by the 2003 Act.**

All the provisions of the 2003 Act, unless otherwise stated, came into force on 27th November, 2003. Arrangements entered into before the coming into force of the 2003 Act are referred to as pre-2003 and those after as post-2003.

In the interests of accuracy the text of the Guide has retained a legal style and where necessary quoted directly from the Acts, but otherwise has focused on ensuring that essential information is accessible to the reader, giving further references and cross references where this is deemed to be helpful.

To obtain information quickly about specific provisions refer to the Table of Contents.

Legal Formalities

Professional Advice

It is always to be recommended that any agricultural lease be entered into in writing before the arrangement starts, so that the basic provisions of rent, repair obligations, compensation, and any other matter requiring agreement between the parties are fully recorded. **While the landlord's agent prepares the lease, it is essential that the tenant takes his own professional advice on the terms of the lease.**

Stamp Duty

Stamp Duty Land Tax (SDLT) applies to the grant of a lease, to assignments of a lease, and to increases of rent under an existing lease. It is the tenant's responsibility to complete a land transaction return (SDLT 1) within 30 days of the 'effective date' (usually the date of commencement of the lease) and to pay the tax. The tax is calculated using a multiplier of the total rent plus VAT and any premium over the term of the lease. For a commercial or mixed use lease, such as an agricultural lease, the SDLT is at a flat rate of 1% on the figure arrived at by the multiplier of term/rent, but only chargeable on the excess of that figure over the nil-rate band of £150,000. As indications, the SDLT on a 15 year lease at £42,200 p.a. is £3,360, and at £20,000 p.a. is £803. There are further provisions if a premium is payable on entry. For full details refer to Inland Revenue guide SD3 available on the website below.

www.inlandrevenue.gov.uk

PART A
THE 1991 ACT AND 1991 ACT TENANCIES

1 INTRODUCTION

There are four important points to make as a preliminary:

- a) 1991 Act full agricultural tenancies remain valid, subject to amendments noted below, and new 1991 Act tenancies can be entered into.
- b) Section 2 lets for less than one year, approved by SEERAD, are abolished (although similar arrangements could be through SLDTs under the 2003 Act, – see Part B).
- c) Grass lets now require to be done under the provisions of the 2003 Act, although arrangements covered by S22(2)(a) of the 1991 Act, course of cropping, are unaltered.
- d) Dispute resolution is now with the Scottish Land Court, and accordingly all references in the 1991 Act, and pre-2003 leases, to “arbitration” are replaced by “Land Court”. However, it is still open to the parties to refer a dispute to arbitration by agreement at the time a dispute arises, other than on certain specified issues, such as succession. (See para 8.4 below).

2 FIXED EQUIPMENT

2.1 Repair and Renewal Obligations (1991 Act S5 and 2003 Act S60)

- 2.1.1 Section 5 of the 1991 Act contains the obligation of the landlord to put the fixed equipment on the holding into a thorough state of repair at the commencement of a lease and to be responsible for renewal of the fixed equipment caused by fair wear and tear during the tenancy.
- 2.1.2 Section 5 also contained a provision which allowed the landlord and tenant to contract out of those obligations after the commencement of the lease. The 2003 Act repeals that contracting out provision (S5(3)), thereby requiring the landlord to fulfil the obligation in relation to fixed equipment at the date of entry, and thereafter. The new provisions are S5(4A-4D), introduced by S 60 of the 2003 Act.

There is also a provision that any such pre-2003 contracting-out agreement (commonly known as a post-lease agreement), which placed the responsibility on the tenant to undertake replacement or renewal of buildings or other fixed equipment rendered necessary by natural decay or by fair wear and tear, shall be nullified, where:

- a) following a determination of the rent payable for the holding, in accordance with Section 13 of the 1991 Act as amended by Section 63 of the 2003 Act, the tenant gives notice to the

landlord that the agreement is to be nullified from (date to be specified) and that

- b) on that specified date, either the buildings or other fixed equipment are in a reasonable state of repair, or that they are in no worse state of repair than they were at the time the original post-lease agreement was completed.

In cases where a tenant elects to revert to S5 renewal obligations this may have implications on the rent payable for the holding.

2.1.3 There are three points to make about these provisions:

- a) This procedure can only be used if the rent has been fixed under S13 by the Land Court, with the Land Court replacing the arbitration procedure in S13.
- b) Because the alteration is “ following” a determination of rent, it follows that the rent cannot be adjusted again until the next review in three years time; and
- c) In view of these difficulties, it is in both parties’ interests to reach agreement.

2.1.4 Any agreement made post-2003 for the tenant to bear any expense of any work which the landlord is required to execute under Section 5 shall be null and void.

2.2 Improvements (1991 Act S33 et seq. and 2003 Act S43 & 44)

(See also paras 4.3 & 4.4 below for compensation for tree planting and diversification)

2.2.1 The 1991 Act contained a parallel provision for contracting out of the provisions for compensation for improvements. This provision for contracting out has also been repealed.

2.2.2 The 2003 Act introduces, by a new 1991 Act S33A, compensation provisions which apply to any terms in pre-2003 leases or post-lease agreements which provide for compensation for Part II or Part III improvements (1991 Act Schedule 5) **and** where a tenant has undertaken work which was the landlord’s responsibility under S5 of the 1991 Act i.e. where the tenant bears the cost of replacing an item of fixed equipment necessary for the holding because of fair wear and tear. Any such term which provides that the compensation that the tenant is to receive is less than the tenant would be entitled to receive under 1991 Act S33 (value to an incoming tenant) shall be invalid. In other words, a tenant shall in these cases receive compensation for improvements based on the value to an incoming tenant regardless of any alternative arrangement which may have been previously agreed with the landlord.

2.2.3 In calculating the value of the improvement, there will be discounted

- a) any benefit which the landlord has agreed to give the tenant for the tenant carrying out the improvement, and
- b) any grant which the tenant might have received if the improvement has been financed jointly by the landlord and tenant.

If the tenant paid wholly for the cost of any improvements any grants received by the tenant will be disregarded in relation to calculating the compensation due to the tenant.

2.2.4 There are views that if a **writing-down agreement** period has come to an end before the 2003 Act came into force, then the contract in that agreement is finished. However, it can also be said that 1991 Act SS 43 & 44 apply in all cases, whether or not the period had expired. Reference is also made to 1991 Act S53, which states that compensation is payable notwithstanding any agreement. That provision cannot now be contracted out of, with the repeal of 1991 Act S38(5) by 2003 Act S43(2)(c). It will probably be for the Land Court to decide.

2.3 **Record** (1991 Act S8 and 2003 Act S61)

The 1991 Act formalities of a Record, which required it to be completed by a Recorder appointed by SEERAD, have been repealed. It can now be made by a person agreed by both parties, and in such a form as shall be agreed, failing which as shall be determined by a Recorder. This simplifies the making of a Record of the condition of the holding.

3. **RENT**

3.1 **Rent Review** (1991 Act S13 and 2003 Act S63)

The 1991 Act provisions governing the 3 yearly interval between reviews remain but the basis for assessing a rent at review has been changed. The criteria to be applied are now as follows:

Disregarded (a) effect on rent of the fact that the tenant is in occupation of the holding, (b) any distortion in rent due to a scarcity of lets, and (c) any reduction in rental value due to diversification activities on part of the land and

Regarded (but not in any order of preference) (a) information about rents of other agricultural holdings and any factors affecting those rents (except for distortion due to scarcity) (b) the current economic conditions in the relevant sector of agriculture and (c) any increase in rental value due to diversification activities on part of the land.

3.2 Withholding Rent New Provision (2003 Act S64)

3.2.1 A new provision has been introduced as 1991 Act S15A to the effect that, if a tenant obtains an Order from the Land Court under the S15A in relation to the failure of the landlord to fulfil an obligation towards the tenant in respect of fixed equipment, and the landlord has failed to meet that Order, the Land Court may allow the tenant to, either or both (a) carry out the work and (b) withhold rent on consignment to the Land Court. In such circumstances any landlord's irritancy clauses for non-payment of rent are unenforceable.

3.2.2 It is specifically stated that contracting out of this provision is not permitted.

4. COMPENSATION FOR DISTURBANCE AND DIVERSIFICATION (2003 Act S50-51)

4.1 The two years' rent "cap" on compensation for disturbance (in cases relating to resumption or termination by the landlord) contained in 1991 Act S43 is abolished.

4.2 The period within which the tenant is required to provide the landlord with details of damage by game is extended from one month to six months from the date of first intimation.

4.3 There is a **new provision** (2003 Act S51, by a new 1991 Act S45A) for compensation payable by the tenant to the landlord for any reduction in the value of the holding due to diversification, and also for compensation payable by the landlord to the tenant for any increase in the value of the holding due to diversification.

4.4 There are detailed **new provisions** for compensation payable to or by either landlord or tenant in respect of trees planted post-2003 Act (S42).

5. DIVERSIFICATION New Provision (2003 Act S39-42)

(See also para 3.1 above for rent implications and para 4.3 above for compensation provisions)

5.1 New provisions are introduced permitting, for the first time, diversification activities by an agricultural tenant (or by a sub-tenant where the use is ancillary to the tenant's use of the land for the non-agricultural purpose). The overlap between agricultural and non-agricultural use is covered in two key provisions:

5.1.2 An agricultural tenancy does not cease to be such a tenancy by reason only that it is used for a non-agricultural purpose and,

5.1.3 Any provision in a lease which prohibits the use of land or the sub-letting of land for a non-agricultural purpose is of no effect.

- 5.2 The procedure for notification of, and objection to, diversification proposals is as follows:
- 5.2.1 The tenant must supply to the landlord details of the proposal, usage, and, if appropriate, finance and management arrangements. Details must be given in writing 70 days before diversification is due to begin.
 - 5.2.2 The landlord may only object to the notice of diversification on specific grounds which are laid down in the 2003 Act. These relate to any detrimental or prejudicial effect or undue hardship to the landlord's interest. A tenant may seek a reference to the Land Court for determination of the diversification proposal in the event of a landlord's objection.
 - 5.2.3 Diversifications previously approved by the landlord are not affected. The procedures cannot be used to validate any diversifications that the tenant had entered into before the provisions came into force that did not have the consent of the landlord.
- 5.3 Timber planted by the tenant post-2003 belongs to the tenant, and he has the right to cut it.

6. COMPENSATION FOR VACANT POSSESSION

New Provision (2003 Act S55)

- 6.1 A new permissive measure is introduced which does not impose a statutory obligation on either landlord or tenant. It provides that compensation may be payable to a tenant where a tenant voluntarily gives up possession of a holding.
- 6.2 If a landlord wishes to sell the land with vacant possession, the landlord **may** enter into an agreement in writing with the tenant that the tenant will give Notice of intention to quit and vacate, and the landlord will pay to the tenant an amount of compensation for doing so based on one half of the difference between the sale price and the estimated value with the tenant still in occupation.
- 6.3 If a tenant wishes to quit the land, the tenant **may** enter into an agreement with the landlord that the tenant will give Notice of intention to quit and vacate, and the landlord will pay the tenant compensation for doing so based on one half of the difference between the estimated value of the land if sold with vacant possession and the estimated value of the land if sold with the tenant still in occupation.
- 6.4 It is to be noted that both the foregoing provisions are permissive by using the word "may" i.e. there is no statutory obligation on either the tenant or landlord to conform to these clauses.

7. ASSIGNATION

New Provision (2003 Act S66)

- 7.1 New provisions are contained in the 2003 Act, as 1991 Act S10A, allowing assignation of a 1991 Act tenancy to a near relative. The provisions governing assignation and compensation for giving up vacant possession were closely linked when introduced as amendments to the Bill in the Scottish Parliament.
- 7.2 The relevant section is headed "Assignment and sub-letting of tenancy". However, in the new section there is no reference to sub-letting. The only reference in the 2003 Act to sub-letting for 1991 Act tenancies comes in the diversification provisions referred to in para 5.1 above.
- 7.3 Provided the proper procedures are followed, a tenant may assign his tenancy to anyone who would, in any circumstances, be entitled to succeed to his estate on intestacy, e.g. spouse, brother, sister, son, daughter, grandchildren.
- 7.4 The landlord has similar rights to object as on death, and the requirements of the assignee are similar, and these objections can be passed to the Land Court for their consideration. The successor on assignation must be able to demonstrate financial capability and suitable agricultural experience.
- 7.5 Prohibitions on assignation in a 1991 Act tenancy are now null and void.

8. MISCELLANEOUS AMENDMENTS

8.1 Residence

New provision (2003 Act S65)

Leases cannot now be terminated on the grounds of non-residence by the Tenant (new 1991 Act S16A). Any such clause in a pre-2003 lease is deemed to be replaced by an undertaking by the tenant that, if he does not reside on the holding, he will ensure that a person who has the skills and experience necessary to farm the holding in accordance with the rules of good husbandry does reside on the holding. That person does not need to be an employee.

8.2 Notices to Quit (1991 Act S21-22 and 2003 Act S67)

(See also para 4.1 above governing the amended provisions relating to compensation for disturbance on resumption).

8.2.1 Consent of the Land Court to a Notice to Quit is required in most circumstances. If the Notice to Quit is for resumption for non-agricultural purposes, that consent is not required only if planning permission for the alternative use has been obtained.

8.2.2 When considering consent to a Notice to Quit, the Land Court is also now to take into account, where the Notice to Quit relates to the whole of the holding, whether or not the purpose for which the landlord proposes to terminate the tenancy would or would not create greater economic and social benefits to the community than would exist if the tenancy was not terminated.

8.2.3 Where land has been resumed from a 1991 Act tenancy for mineral extraction and has been reinstated to agricultural use the land must be restored to the tenancy provided the landlord and tenant remain the same.

8.3 **Good Husbandry** (2003 Act S69)

The definition of good husbandry is extended to include conservation activities and diversification, as permitted under the 2003 Act.

8.4 **Dispute Resolution** (2003 Act S75-90)

8.4.1 Reference is made to the comments in the Introduction in para 1(iv). Transferring dispute resolution to the Land Court from arbitration is an attempt to reduce the costs of dispute resolution, with new 1991 Act SS60,61,61A&B.

8.4.2 The application can be by either party, or jointly.

8.4.3 Arbitration by agreement is still permitted by agreement between landlord and tenant at the time the dispute arises, but there are certain cases where only the Land Court can resolve disputes. Any party to the arbitration may appeal to the Land Court against the Arbiter's award on a question of law within 28 days of the Arbiter's award.

8.4.4 If a private arbitration is proposed the parties may use any agreed arbiter, preferably using the Scottish Arbitration Code.

9. **TENANT'S RIGHT TO BUY** **New Provision** (2003 Act SS24-38)

9.1 The provisions, Part 2 of the 2003 Act, were brought into effect in December 2004. Nothing in Part 2 prevents a landlord and tenant from agreeing a transfer of land voluntarily and not using these statutory provisions.

9.2 The provisions constitute a pre-emptive right of a tenant under a 1991 Act tenancy to buy land tenanted by him if the landlord intends to sell i.e. if a landlord wishes to sell tenanted land he must first offer the land to the tenant, provided the tenant has registered his interest.

9.3 Registration by a tenant of his interest in buying land tenanted by him is with the Keeper of the Register of Community Interests in Land using the prescribed form and on payment of a fee. Registration will contain details of the tenant, landlord and the land. A landlord can challenge any information provided within a registration. Registration will require renewal every 5 years to remain on the register.

9.4 The landlord is required to notify tenants who have registered interest with the Keeper when the landlord intends to sell. There is then a detailed procedure for purchase and valuation set out in Part 2 of the 2003 Act. This involves certain critical time limits in relation to notice periods.

9.5 If the landlord and tenant cannot agree a price then a valuer may be appointed. The guidelines for the valuation process are detailed in the 2003

Act S34-36, and either landlord or tenant may appeal to the Land Court against the valuation carried out. Any planning permission will have an effect on value.

- 9.6 It is to be noted that the pre-emptive right to buy is available, in most instances, to a general partner within a Limited Partnership.
- 9.7 The right to buy terminates with the lease. Thus if a landlord has resumed land or terminated the tenancy before putting the land on the market, the tenant loses the right to buy the land no longer within the tenancy. But if the landlord has served Notice to Quit and has the required planning permission when the land is put on the market, the right to buy remains.

10. PARTNERSHIP TENANCIES (2003 Act Part 6)

- 10.1 The provisions are contained in Part 6 of the 2003 Act, and Sections 72 and 73, which were brought into force on 22 May and 1 July 2003. This part of the Act, and the early bringing into force of Sections 72 and 73, support the Scottish Executive's intention that Limited Partnerships should no longer be used to get round the provisions of the Agricultural Holdings Acts.
- 10.2 Full Partnership Leases (i.e. those entered into with no limited partners) pre 22 May 2003 are not affected.
- 10.3 Limited Partnership Leases, where Notices of Termination were given between 16 September 2002 and 30 June 2003, even though the termination date may be many years hence, are subject to the provisions of Sections 72. In certain circumstances where such notices of termination were given, the General Partner may be eligible for a secure 1991 Act tenancy, on giving notice to the landlord within 28 days of the purported date of termination.
- 10.4 Limited Partnerships Leases, where Notices of Termination were given on or after 1 July 2003, give the General Partner the right to claim a 1991 Act tenancy, but subject to Section 73.
- 10.5 Section 73 permits the landlord to terminate such a tenancy by the double notice procedure introduced for LDTs (see para 15.2.2 below), which is, in effect, between 2 and 3 years' notice. The landlord can seek an Order from the Land Court to reduce this notice period in certain instances.
- 10.6 Partnership leases post 27 November 2003 are still permitted but are not advised unless to take account of special circumstances.
- 10.7 There are no provisions adverse to the extension or continuation of Limited Partnerships and the consequential Lease
- 10.8 In all cases dealing with Partnership Leases of any kind, professional advice **must** be sought. However, in any future discussions between landlord and tenant, the following points should be borne in mind:
- The significance of the holding to other property or business interests of each partner.
 - The financial standing of the partners.

- The attitude to risk of each partner.
- The long-term objectives of each partner.
- The personal and family aspirations of each partner.
- The succession factors affecting each of the partners.

PART B

NEW TENANCY ARRANGEMENTS UNDER THE 2003 ACT

11. INTRODUCTION

There are three important points by way of preliminary:

- a) While definitions of agriculture, fixed equipment etc. are as in the 1991 Act, there is no definition in the 2003 Act of “agricultural holding”. Instead there is reference to “agricultural land” which is defined as “land used for agriculture for the purposes of a trade or business”.
- b) Dispute resolution is by reference to the Land Court, as introduced into the 1991 Act, as in para 8.4 above.
- c) It is advised that all the following Leases should be in writing **before** the start date (see SDLT in General Introduction)

12. PERMISSIBLE LEASES

There are four forms of new leases permitted under the 2003 Act:

- 12.1 A new 1991 Act tenancy (2003 Act S1)
Although likely to be used only rarely given the new types of tenancy introduced under the 2003 Act, it is still possible to grant a new agricultural tenancy under the 1991 Act.
- 12.2 Grazing or mowing lease for not more than 364 days (2003 Act S3)
The land may not be let for the same purpose to the same tenant until at least one clear day has elapsed. The general view is that an agreement to grant a succession of grazing leases over a number of seasons, irrespective of whether continuous occupation does not, in each period, exceed 364 days, is not competent. Failure to ensure that the land is vacated at the end of each grazing period is that, at worst, it becomes a 5 year SLDT.
- 12.3 Short Limited Duration Tenancy (SLDT) (2003 Act S4) – **maximum** 5 years, but no minimum. See para 13 below.
- 12.4 Limited Duration Tenancy (LDT) (2003 Act S5) – **minimum** 15 years, but no maximum. See para 14 below.

13. SHORT LIMITED DURATION TENANCY (SLDT) (2003 Act S4)

- Maximum 5 years.
- Defaults to a new 15 year LDT if it exceeds 5 years with the consent of the landlord or if the same tenant continues under a succession of SLDTs exceeding 5 years (but a spouse or associate could take a new SLDT).
- Rent negotiable by agreement.

- Prohibition on assignment and sub-letting.
- Termination by agreement.
- The lease must not be connected to the tenant's employment etc. with the landlord, so for example, a let of land to a gamekeeper is excluded from the provision.

Detailed provisions are set out in the undernoted sections relating to assignment and termination (para 15.1), rent (para 16.1), fixed equipment (para 17), resumption (para 18), irritancy (para 19), and succession (para 20).

14. LIMITED DURATION TENANCY (LDT) (2003 Act S2 & S5)

- Minimum 15 years except on conversion from a 1991 Act tenancy where the minimum term is 25 years.
- Rent negotiable by agreement or, if lease is silent on rent terms, review in accordance with the provisions of 2003 Act S9.
- Assignment permitted with landlord's consent.
- A lease between 5 and 15 years is deemed to be for 15 years.
- The lease must not be connected to the tenant's employment etc. with the landlord – as with SLDT.
- Termination by way of two notices:
 - Intention to terminate (served 2 – 3 years prior to expiry)
 - Notice to quit (served 1 – 2 years prior to expiry) or by agreement

Detailed provisions are set out in the undernoted sections relating to assignment (para 15.2), rent (para 16.2), fixed equipment (para 17), resumption (para 18), irritancy (para 19), and succession (para 20).

15. ASSIGNATION, SUB-LETTING AND TERMINATION (2003 Act S6-8)

15.1 SLDTs (2003 Act S6)

Assignment and subletting - SLDTs may not be assigned or sub-let.

Termination - SLDTs may be terminated by the landlord and tenant by agreement. No notice to quit is required.

15.2 LDTs (2003 Act S7 & 8)

15.2.1 Assignment and Subletting

- Assignment is permitted with the landlord's consent.
- No restriction on who the assignee may be. This contrasts with a 1991 Act tenancy as in para 7 above.
- Landlord has the same grounds for objection as for 1991 Act tenancies i.e finance and ability. These objections can be passed to the Land Court for its consideration.
- It is open to the landlord to acquire the tenant's interest in the lease, instead of assignment, upon terms no less favourable to the tenant than any terms for the proposed assignment.
- Sub-letting is only permitted as the lease expressly permits, subject to the diversification provisions.

15.2.2 Termination

This can be by agreement, reached after the commencement of the LDT, and provided that the agreement makes provision for compensation payable by one to the other at the end.

At the end of the 15 year period, provided the landlord:-

- Gives written intimation of the landlord's intention to terminate the tenancy not less than 2 years nor more than 3 years before the expiry.
- Serves notice to quit not less than 1 nor more than 2 years before the expiry of the tenancy; there being at least 90 days between the giving of the two notices.

If the lease is not terminated at the end of the 15 years, there comes into effect:-

- A first short continuation of 3 years.
- A second short continuation of 3 years.
- A long continuation of 15 years, and so on.

During the first short continuation the landlord can terminate as at the end of the 15 years, and in the second short continuation the notice can be given at any time and for quitting at the end of this second short continuation. The tenant must have a minimum period notice of 2 years.

16. RENT (2003 Act S9-12)

16.1 SLDTs

The parties are free to negotiate the rent and rent review provisions.

16.2 LDTs

The parties are free to negotiate the rent and provisions for rent review in the lease. If there are no such provisions the statutory provisions apply as follows:

- Not more than 2 nor less than 1 year's notice is required prior to review date using prescribed style.
- Not more often than every three years except for landlord's improvements.
- Disregards and regards are as in para 3.1 above relating to 1991 Act tenancies.
- The rent review is to disregard any reduction in rental value from diversification, but to take account of increase in rental value due to diversification.
- No account is to be taken of improvements by the tenant unless assisted by the landlord.
- Rent can be increased from landlord's improvements.
- The tenant has the right to withhold rent as in 1991 Act , see para 3.2 above.

**17. PROVISION OF FIXED EQUIPMENT FOR SLDTs AND LDTs
(2003 Act S16)**

17.1 Any fixed equipment on the land comprised in the lease is to be specified in the lease.

17.2 In every lease there is deemed to be an undertaking by the landlord that the landlord will:-

- 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:
 - The kind of produce specified in the lease or in use to be produced on the land.
 - The quality and quantity of such produce.
- 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.

- 17.3 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 above or (b) in the case of equipment provided, improved, replaced or renewed during the tenancy immediately after it was so provided.
- 17.4 Any agreement between the landlord and tenant, which purports to provide for the tenant to bear any expense of any work, and which the landlord is required to execute in order to fulfil the landlord's obligations under the lease, is of no effect.
- 17.5 The fire insurance is to be paid by the landlord.

Attention is drawn to the Tenant Farming Forum briefing on S16, which suggests reference is made in the lease to a statement of the purpose of the let, and the use of a record of condition for the schedule of fixed equipment. This briefing note can be obtained from the Forum.

18. RESUMPTION (2003 Act S17)

- 18.1 For both SLDTs and LDTs resumption is allowed if, and only if:-
- The resumption is for non-agricultural purpose in respect of which Planning Permission requires to be obtained, and has been obtained, under the enactments relating to Town and Country Planning.
 - The lease does not expressly prohibit resumption for that purpose.
 - Appropriate notice has been given which must be a minimum of one year.

19. IRRITANCY (2003 Act S18)

- The landlord and tenant are free to negotiate their own irritancy clause.
- Non-residence is not grounds for irritancy.
- Good husbandry is to be construed according to the 1948 Act as amended, i.e. to include conservation activities and diversification, as permitted under the 1991 Act as amended.
- No irritancy can be exercised except subject to not less than 2 months' notice.

20. SUCCESSION (2003 Act S20)

- 20.1 The existing provisions under the 1991 Act S11 allow a tenant to bequeath the lease to a person entitled to succeed on intestacy, primarily a child and spouse, but also including son/daughter-in-law. If the lease is not

bequeathed, under the Succession (Scotland) Act 1964 S16 the executors can transfer the lease to persons entitled to succeed on intestacy and those with statutory (prior and legal) rights to a part of the deceased's estate, which include spouse and children, but not son/daughter-in law. The landlord has rights to object based on ability and finance.

20.2 These provisions are largely imported for SLDTs and LDTs, but subject to the following differences:-

- The class for the nominated successor under intestacy includes "any other person", i.e. it departs from the closed group of those entitled to succeed on intestacy or claim legal or prior rights, but
- In that case, the landlord can acquire the tenant's interest under the lease on no less favourable terms, as he can on assignment.

20.3 For compensation purposes the death of the tenant is deemed to be the termination of the SLDT or the LDT.

20.4 It remains more favourable for a tenant to allow a lease of an SLDT or LDT to fall into intestacy rather than to bequeath it because the timings and onus of proof are more favourable to the inheriting tenant.

22. DILAPIDATIONS AND RECORD OF CONDITION

There are no provisions for dilapidations or the making of a Record of condition in the 2003 Act for SLDTs or LDTs. It is advisable to make sure that 2003 Act S16 (para 17 above) is used fully, so that any claim for dilapidations can be substantiated/defended for the purpose of S16(5) – the responsibility of the tenant to maintain fixed equipment. The preparation of a Record is strongly recommended.

Claims under 1991 Act S44, high farming, are imported into the 2003 Act, by S53, referring to the S16 schedule of fixed equipment, but again a Record of condition is recommended.

23. COMPENSATION, DIVERSIFICATION AND MISCELLANEOUS PROVISIONS

23.1 There are similar provisions for LDTs and 1991 Act tenancies with regard to:

Diversification	<u>2003 Act</u> SS39-42
Compensation for diversification	S53
Compensation for vacant possession	S55

23.2 There are similar provisions for LDTs, SLDTs and 1991 Act tenancies with regard to:

Improvements	<u>1991 Act</u> S33 et seq
Temporary pasture	S34

Payment by incoming tenant	S35
Amount of compensation	S36
Consent for Part I improvements	S37
Notice of Part II improvements	S38
Compensation for disturbance	S43
Compensation for high farming	S44
Compensation for game damage	S52
Dispute resolution	S60
Arbitration	S61A

GENERAL LEGAL DISCLAIMER

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