THE PUBLIC SERVICES REFORM (AGRICULTURAL HOLDINGS) (SCOTLAND) ORDER 2011

INFORMATION NOTE

Introduction

This information note has been prepared by the Tenant Farming Forum in order to help explain the changes made to Agricultural Holdings legislation by the Public Services Reform (Agricultural Holdings) (Scotland) (Order) 2011 (the "Order"). They do not form any part of this Order and have not been endorsed by the Scottish Government or the Scottish Parliament.

Background

The Cabinet Secretary for Rural Affairs and Environment asked the TFF[1] to consider what aspects of agricultural tenancy legislation were restricting the availability of agricultural land coming onto the market for letting to tenant farmers and to provide recommendations to the Scottish Government for changes to the 1991 Act [2] and 2003 Act [3].

Subsequently, the TFF recommended a package of measures to the Scottish Government that included reducing the minimum term of Limited Duration Tenancies (LDTs) to 10 years and allowing the conversion of Short Limited Duration Tenancies (SLDTs) to LDTs at any time. Changes were also proposed to current agricultural holdings law in relation to fixed equipment and post-lease agreements. All these measures were designed to remove restrictions contained within current agricultural tenancy legislation and to encourage more land to be made available by landlords to tenant farmers in the agriculture industry through enhancing the confidence and security of both parties in the tenanted sector. The Cabinet Secretary considered the package and agreed to implement these changes through revising the existing legislation.

In order to make these changes recommended by the TFF and agreed by the Cabinet Secretary, specific sections of the 1991 and 2003 Acts had to be amended. The main changes to the legislation focus around the two types of agricultural tenancies introduced by the 2003 Act. The other amendments seek to remove ambiguity from the legislation with a view to reducing the potential for dispute.

[1] - Tenant Farming Forum
[2] - Agricultural Holdings (Scotland) Act 1991
[3] - Agricultural Holdings (Scotland) Act 2003

Amendment of the Agricultural Holdings (Scotland) Act 1991 (the 1991 Act)

Article 3 - Substitution of definition of "two-man unit" in Schedule 2

The intention behind the two-man unit test in Schedule 2 of the 1991 Act was to assess the viability of the agricultural land in question. The "two-man unit" test was no longer an accurate measure of viability. As a result of changes in farming practices, particularly increased mechanisation, viability could no longer be accurately measured by reference to the physical labour of two men. In practice, few farms now have two or more workers earning a full-time living. It followed that a holding may be economically viable but incapable of providing labour for two full time men, in which case it would fail to satisfy the "two-man unit" test of viability. In practical terms, it was more difficult to satisfy that test in today's market than it would have been when the definition was devised. In effect, the "two-man unit" test set the measure of economic viability too high.

Article 3(b) (i) of the Order replaces the definition of "two-man unit" with that of "viable unit". Viability is predicated upon the capability of the agricultural unit to provide an individual occupying it with full time employment, the means to pay the rent and to pay for adequate maintenance of the unit. Article 3(a) and (3) (b) (ii) makes changes consequent to that substitution.

A "viable unit" is defined as an agricultural unit which, in the opinion of the Scottish Land Court, is capable of providing full time employment for the individual occupying it and of giving that individual the ability to pay (a) the rent due under the lease and (b) for adequate maintenance of the unit.

The changes made will make it easier for a Tenant to persuade the Land Court to refuse consent to a Notice to Quit served by a Landlord (Part I Case 2 and Part II Case 6 of Schedule 2 of the 1991 Act) on the grounds that the Holding was not large enough to be a two man unit and the Landlord intended to amalgamate it with other land. The Tenant now only has to show that the Holding is a viable unit.

On the other hand if a Tenant rents or owns another farm that is a viable unit it may now be easier for a Landlord to persuade the Land Court to consent to a Notice to Quit (given in terms of Part 1, Case 3 and Part II Case 7 of Schedule 2 of the 1991 Act,) whereas previously the Landlord had to persuade the Land Court that the other farm was a two man unit.

Article 4 - Annulment of post lease agreements under section 5

It was apparent that subsections (4A) and (4B) of section 5 of the 1991 Act had not achieved the intended aim. There was a construction problem in that (4A) and (4B) did not sit well in relation to each other with the result that, the determination of rent would have been made at a time that the tenant farmer still bore financial responsibilities under a post lease agreement (and would perhaps be set lower to reflect this). The tenant farmer could then annul the post lease agreement, thus shifting those financial burdens back onto the landlord. There was no provision which would allow the landlord to instigate a rent review after the post lease

agreement had been annulled until the next rent review date which would usually be three years later.

Article 4 of the Order substitutes section 5(4B), to provide that a tenant farmer who wishes to have a post lease agreement nullified must notify the landlord of that fact in writing no later than 6 months before a variation of rent takes effect, where that rent is to be reviewed in accordance with the terms of the tenancy or is determined in accordance with section 13.

The date on which the agreement is nullified is the date on which the variation takes effect. The period of notice must be at least 6 months, except (as provided by new section 5(4BA)) where a rent review is initiated less than 6 months before any variation of rent would take effect and giving 6 months notice is therefore not possible in which case notice must be given when the rent review process is initiated or as soon as practicable thereafter.

On the date the variation takes effect, it remains a requirement that the buildings and other fixed equipment are in a reasonable state of repair; or if the buildings and other fixed equipment were in an unreasonable state of repair when the post lease agreement was made, they are not in a worse state of repair than they were then.

Article 5 - Amendment of section 13

In the original version of section 13(1) of the 1991 Act, it was explicit that the party seeking the Land Court's determination should give notice of that fact to the other party in writing but the requirement for written notice was deleted by paragraph 15(a) of the Schedule to the 2003 Act.

In the case of Morrison-Low v Paterson's Executors 2005 SLT (Land Ct) 2 it was held that the Courts should read in the missing wording. This case illustrates the practical problem which could arise as a result of the missing wording, namely, because the first reference to "notice" which appeared in the original version had been deleted and the word "notice" when it first appeared in the second version had no ascertainable meaning. Thus, a rent could be fixed but it would be impossible to say from what date it was to run. That section therefore could not be applied in practice.

Article 5 of the Order therefore amends section 13 to reinstate the wording that was deleted by paragraph 15(a) of the Schedule to the 2003 Act, to clarify that intimation of intention to make such a referral to the Land Court must be made by written notice. Therefore, subsection (1) of section 13 now reads as follows:

"(1) Subject to subsection (8) below, the landlord or the tenant of an agricultural holding may, whether the tenancy was created before or after the commencement of this Act, <u>following notice in writing served on the other party</u>, have determined by the Land Court the question what rent should be payable in respect of the holding as from the next day after the date of the notice on which the tenancy could have been terminated by notice to quit (or notice of intention to quit) given on that date.".

Amendment of the Agricultural Holdings (Scotland) Act 2003

Article 7 - Reduction in the minimum term of a limited duration tenancy from 15 years to 10 years

Section 5(1) of the 2003 Act defined an LDT as an agricultural tenancy (other than a 1991 Act tenancy) for a term of at least 15 years' duration.

Article 7(1) (a) of the Order reduces the minimum term of an LDT from 15 years to 10 years. Article 7(1) (b) and (2) make amendments consequential to this provision to change other references to 15 years in the Act to 10 years.

Article 8 - Conversion of a short limited duration to a limited duration tenancy by agreement

Section 5(2) of the 2003 Act provided for conversion of an SLDT which had run for 5 years to an LDT where the tenant farmer continued to occupy the land after expiry of the 5 year term of the let with the consent of the landlord.

Article 8 of the Order substitutes a new 5(2) which continues to provide for the possibility of converting an SLDT to an LDT where the tenant farmer remains in occupation with the consent of the landlord at the expiry of the 5 year term of the SLDT. In addition, section 5(2), as amended, gives the parties the option to agree in writing to convert an SLDT to an LDT, at any time prior to the expiry of the SLDT.
In both cases, the resultant LDT will have effect as if it had commenced at the start of the SLDT.

Article 9 - Amendment to section 16 (fixed equipment etc)

There was a tension between section 16(1) of the 2003 Act, which called for quite a rigid specification of fixed equipment, and 16(3) which gave rise to an expectation by some tenant farmers that further fixed equipment would be provided during the tenancy but that section only provided a limited indication of how to establish what additional fixed equipment the landlord was obliged to provide and on what basis. This tension caused confusion amongst tenant farmers and landlords alike as to what was to be specified in the lease and what "other" fixed equipment (if any) the landlord was required to provide, and whether any such "other" fixed equipment should be added to the list specified in the lease.

In addition, the reference to "produce specified in the lease" also gave rise to confusion regarding how to deal with lets of bare land where the parties agreed that no fixed equipment is required. It was decided that the onus should be on the parties to ensure that what is included in the lease by way of fixed equipment, and its condition, is specified at the outset in a schedule of fixed equipment.

Article 9 of the Order substitutes subsections (1) to (5) of section 16 of the 2003 Act.

New section 16(1) provides that the landlord's responsibilities in relation to fixed equipment are to be determined by reference to the maintenance of "efficient production as respects the use of the land as specified in the lease". The fixed equipment is to be provided and has to be put into the condition specified in the schedule of fixed equipment within 6 months of the commencement of the tenancy.

There is an exception provided to the 6 month timescale but only in the limited circumstances where it is not reasonably practicable for the landlord to comply with this requirement by virtue of an obligation on the landlord arising under another enactment (for example, if the landlord requires to obtain a local authority or Scottish Water consent before the fixed equipment can be put on the holding). As soon as the legal obstacle is overcome, the landlord must provide or put the fixed equipment into the specified condition as soon as reasonably practicable . The landlord has to renew and replace the fixed equipment which has been provided as is rendered necessary by natural decay or by fair wear and tear.

New section 16(2) provides that the parties are to agree in writing a schedule of fixed equipment specifying the fixed equipment which the landlord will provide and its condition. On being agreed that schedule is deemed to form part of the lease.

New section 16(3) makes provision for the parties after the start of the lease, if the fixed equipment is or its condition has varied, to agree to amend the schedule of fixed equipment or substitute a new schedule.

New section 16(4) sets out the extent of the tenant's liability for maintenance of the fixed equipment specified in the schedule. The tenant has to maintain the fixed equipment in as good a state of repair as it was in immediately after it was put into the condition as specified in the schedule or if it is improved, provided, renewed or replaced during the tenancy the condition it was in immediately thereafter.

New section (5) makes it clear that the cost of preparing and agreeing the schedule is to be borne by the parties equally unless otherwise agreed.