Resolving rural disputes: Tenant's amnesty issues

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This article, by Hamish Lean, Head of Rural Property and Business, examines common contentious issues arising from the Tenant's Improvement Amnesty and how to resolve them.

Firstly, it is important to note that the Amnesty period has been extended until 12 December. This is a very welcome extension and will make a lot of difficult situations much easier to resolve. Our rural disputes team experienced a large increase in enquiries about the Tenant's Amnesty as we approached the original cut-off date of 12 June of this year, so what are the common problems we have faced?

Not everyone is prepared to engage in negotiations

We have a number of clients who have approached their landlords with draft Amnesty Schedules and invited dialogue to see if an Amnesty Agreement can be reached. Often these approaches begin a period of negotiation and the parties are able to reach agreement about what should be included in the amnesty. On a number of occasions, the initial discussion is in fact initiated by the landlord who approaches the tenant to suggest it might be a sensible thing to put in place.

However, where there is no engagement by the landlord in the negotiation process, tenants are forced into serving an Amnesty Notice simply to preserve their position. Sometimes service of the Notice is sufficient to get a discussion going, which then leads to agreement.

Incorrect Tenant's Amnesty Notices

A common issue we have noticed in regard to the form of Tenant's Amnesty Notice is that not everybody has served a technically correct notice. The notice must specify:

- the various improvements the tenant claims are subject to the Amnesty and the manner in which they were carried out; and
- why it is fair and equitable that the tenant receives compensation for the particular improvement when the tenancy comes to an end.

On occasion, notices fail to contain this information and that might be sufficient to invalidate the notice. Where that happens it would be possible to serve a fresh notice. However, care should be taken at the initial drafting stage.

From a landlord's point of view, the fact that a tenant has served an Amnesty Notice means that there is a strict two-month clock running within which time the landlord must object to the notice. Failure to object will mean that the notice effectively qualifies the various improvements listed as improvements that will be subject to compensation at the end of the tenancy. If the landlord does serve an Objection Notice, it must state one of three objections:

- why it is not fair and equitable that the tenant receives compensation for the particular improvement;
- that the landlord carried out the improvement in whole or part; or
- that the tenant received a benefit for carrying out the improvement.

Failure to do that might mean that the Objection Notice is invalid.

Once the Objection Notice is served, another strict two-month clock starts running and the tenant must make an application to the Land Court before these two months have elapsed, seeking approval of the Court to the list of improvements that require to be compensated at the end of the tenancy.

Lack of written evidence

One of the most common problems is a lack of written evidence to prove the status of a particular improvement. This is not surprising because sometimes the improvement will have been carried out by the previous generation or, in some cases, even a generation earlier than that.

This can be problematic but it is often the case that where there is a lack of vouching, the landlord is not able to provide any vouching either to demonstrate the contrary. Where this is the case and the matter has reached the Land Court, the Land Court would have to weigh up the evidence carefully. If the only evidence is from the present tenant explaining that he or she remembers as a child a particular building going up at their parents' expense and the landlord is not in a position to contradict that then, on the face of it, there is no reason why the Land Court would not accept the particular building as a tenant's improvement.

Certification

Tenants are often asked for up to date certification in relation to a building, for example planning permission, a building warrant or, sometimes, an electrical certificate. None of those documents is necessary in order to qualify something as suitable for the Tenant's Improvement Amnesty. They may or may not have an impact when it comes to value the improvement at the end of the tenancy but, in my view, they have no part to play in identifying whether or not something is suitable to be included.

Tenant's improvements are valued on the basis of their value to a hypothetical incoming tenant. It will be for a valuer to take a view when the tenancy comes to an end – whenever that might be – on the value of a particular improvement, with or without the documentation that the landlord might have sought at the beginning of the Amnesty process. However, that documentation is not necessary in order to include the improvement in the Amnesty.

Writing Down Agreements

Another frequent problem in relation to the Tenant's Amnesty is how to deal with a Writing Down Agreement: an agreement whereby the amount of compensation a tenant is to receive for a particular improvement is written down over a fixed period of time to a nominal sum, or sometimes to zero.

Writing Down Agreements are no longer possible since the introduction of the Agricultural Holdings (Scotland) Act 2003 on 28 November of that year. However, there remain a number of Writing Down Agreements where the writing down period had expired prior to that date, as well as a number of Writing Down Agreements that straddle 28 November 2003.

In my view, a Writing Down Agreement that has expired before 28 November 2003 will have the effect of meaning that the particular improvement does not qualify under the Tenant's Improvement Amnesty, save for one exception that I will discuss shortly. It might still be relevant to include this improvement in an Amnesty Agreement subject to making clear that no compensation is actually payable for it by reference to a particular Writing Down Agreement. This is because although no compensation is to be paid for it, it is still a tenant's improvement and tenants should not be rented on their own improvements. The Writing Down Agreement deals with compensation only.

As far as Writing Down Agreements that straddle 2003 are concerned, there are differing views on whether or not the 2003 Act had the effect of rendering such agreements null and void. Save for a very limited exception there is no specific case law on this and it remains something of a moot point. However, perhaps it is significant that the question has not been litigated upon since 2003; that might suggest that either parties reach a practical agreement about such improvements or that tenants take the view that resolving the matter by litigation is too risky a prospect.

As previously mentioned, there is an exception whereby Writing Down Agreements whether they expired before or after the 2003 Act are not enforceable. That is where, in accordance with Section 33A of the 1991 Act, introduced by the 2003 Act, the improvement was something the tenant provided at their own expense but was something

that the landlord should have provided at the start of the tenancy to comply with obligations to provide sufficient fixed equipment in a thorough state of repair to allow the tenant to farm with reasonable efficiency. Accordingly, if the Writing Down Agreement relates to such an improvement it will not be enforceable.

Strictly speaking it is not necessary to include such improvements in an Amnesty Agreement because the tenant's right to compensation arises quite separately from the amnesty procedure provided in the 2016 Act. However, it might be relevant to include such improvements for the sake of clarification.

Post lease agreements

Another common problem is in respect of post lease agreements (PLAs). While each agreement needs to be construed carefully for its proper meaning, generally post lease agreements place not only the repairing liability on the tenant but also the liability to replace and renew items of fixed equipment that have failed due to fair wear and tear.

Work carried out by a tenant in compliance with a PLA is not covered by the amnesty except where there is an element of betterment in the work done. Replacing single glazed windows with double glazed units would be a good example of that, likewise replacing an old tile drain with a modern drainage system, or replacing a small, traditional steading with a larger general purpose agricultural building.

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