Issued by:
Bob McIntosh,
Tenant Farming
Commissioner

SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

A Guide to Fixed Equipment on Agricultural Holdings in Scotland

This guide provides a summary of legislation relating to fixed equipment in agricultural tenancies and makes recommendations relating to best practice. It provides valuable information for both tenants and landlords and refers to fixed equipment in secure and fixed duration tenancies.

It does not set out every detail of the applicable law, and users of this guide are advised to obtain independent legal advice relevant to their particular circumstances before acting upon any of the information contained in this guide.

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1. Introduction

The extent and condition of the fixed equipment that is part of an agricultural holding has a major impact on the productivity of the holding, but is also a frequent source of disputes between landlords and tenants over the responsibilities for its repair and renewal, and over the eligibility of tenant's additions and improvements to the fixed equipment for compensation at waygo. It is therefore important that, when a landlord and tenant enter into a lease of an agricultural holding, there is a clear understanding of:

- The extent and condition of the fixed equipment supplied by the landlord
- The liabilities of both parties with respect to its maintenance, repair, replacement and renewal
- The opportunities for, and consequences of, additions to the fixed equipment throughout the tenancy by the landlord and tenant.

This guide provides a summary of legislation relating to fixed equipment in agricultural tenancies and makes recommendations relating to best practice. Necessarily, however, it does not try to set out every detail of the applicable law, and readers should take professional advice when appropriate.

2. What is Fixed Equipment?

Fixed equipment is defined in the 1991 Agricultural Holdings (Scotland) Act as per below, and this definition applies to all forms of tenancy:

"fixed equipment includes any building or structure affixed to land and any works on, in, over or under land, and also includes anything grown on land for a purpose other than use after severance from the land, consumption of the thing grown or of produce thereof, or amenity, and, without prejudice to the foregoing generality, includes the following things, that is to say —

(a) all permanent buildings, including farm houses and farm cottages, necessary for the proper conduct of the agricultural holding;

(b) all permanent fences, including hedges, stone dykes, gate posts and gates;

(c) all ditches, open drains and tile drains, conduits and culverts, ponds, sluices, flood banks and main water courses;

(d) stells, fanks, folds, dippers, pens and bughts necessary for the proper conduct of the holding;

(e) farm access or service roads, bridges and fords;

(f) water and sewerage systems;

(g) electrical installations including generating plant, fixed motors, wiring systems, switches and plug sockets;

(h) shelter belts".

3. Provision of Fixed Equipment at the Start of the Tenancy

3.1 The landlord's obligation to provide

The statutory provisions relating to the provision of fixed equipment are set out in section 5 of the 1991 Agricultural Holdings (Scotland) Act and sections 16 and 16A of the 2003 Agricultural Holdings (Scotland) Act.

Although there are some differences in the way that fixed equipment is treated in 1991 Act tenancies and 2003 Act fixed duration tenancies, the obligation on the landlord to provide fixed equipment at the start of the lease is similar in both types of tenancy.

It is important to note that, in the case of both types of tenancy, the landlord is only obliged to provide fixed equipment necessary for the purposes for which the holding is let. If the lease specifies that the farm is let as a hill sheep farm, and the tenant subsequently decides to introduce cattle, there is no obligation on the landlord to provide the fixed equipment necessary to enable cattle to be kept.

3.1.1 1991 Act tenancies (secure tenancies)

Prior to 1 November 1948, the obligation to provide fixed equipment was a matter for the terms of the lease or the implied terms of common law which bound the landlord to put the buildings and fences in tenantable order.

In a lease entered into after 1 November 1948, the landlord is required, whatever the lease may say, to put the existing fixed equipment into "a thorough state of repair" and "to 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, failing such specification, in use to be produced on the holding, and the quality and quantity thereof."

The undertaking in respect of the adequacy of the fixed equipment applies to the needs of a hypothetical occupier and not to the needs of the actual tenant, as that person may have other fixed equipment on other land that they occupy.

The obligation to provide the fixed equipment must be carried out at the commencement of the lease or as soon as is reasonably practicable thereafter.

In circumstances where the landlord fails to provide adequate fixed equipment at the start of the term, the tenant can raise an action to require the landlord to comply with his statutory obligations or can, without notice, carry out the works necessary to provide the necessary fixed equipment and will be entitled to compensation for the value of such fixed equipment at waygo.

3.1.2 2003 Act tenancies (fixed duration tenancies – SLDT, LDT, MLDT)

The landlord must, within six months of the commencement of the tenancy, or as soon as reasonably practicable thereafter:

- 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
- Put the fixed equipment into the condition specified in the schedule of fixed equipment that is required to be produced.

It should be noted that the landlord's obligations in the case of fixed duration tenancies are not as onerous as those required in the case of 1991 Act tenancies, where the landlord's obligation is to put the fixed equipment into a thorough state of repair. In the case of the fixed duration tenancies, the landlord only has to put the fixed equipment into the condition specified in the schedule.

3.2 Recording the fixed equipment

In 1991 Act tenancies entered into after 1 November 1948, and in all fixed duration tenancies, it is mandatory that the parties agree in writing the fixed equipment to be provided by the landlord and its condition. In the case of a 1991 Act tenancy, the record of condition must be made at the start of the lease. The record is to be made by a person appointed by agreement of the parties or, failing such agreement, by Scottish Ministers. There is no penalty for failure to produce such a record and, regrettably, it is absent from many 1991 Act leases. It is also possible for a further record to be made at any time during the tenancy. This can be on the initiative of either party and can be either for the fixed equipment or the cultivation of the land, or both, and can be for part of the farm.

In all 2003 Act tenancies it is mandatory that the parties agree in writing a schedule of fixed equipment to be provided by the landlord and that should include a record of its condition at the time. That agreed schedule is deemed to form part of the lease.

In the case of a MLDT, the schedule must be agreed within 90 days of the start of the tenancy. The legislation does not prescribe a deadline for agreeing the schedule in the case of a SLDT, but landlords and tenants are recommended to adopt the same 90-day period as good practice. (Note that new LDTs are not possible as they have been replaced by the MLDT). The legislation does not specify how the schedule should be produced, or by whom, only that the parties should agree on its contents.

If at any time after the tenancy has commenced, the fixed equipment or its condition is varied, the landlord and tenant can agree to amend the schedule or replace it with a new schedule. The default position is that the cost of preparing the schedule is shared equally.

3.3 The importance of a schedule/record of condition

The record or schedule of fixed equipment provided by the landlord, and its condition, is an important document which provides the baseline for future discussions at, for example, rent review or waygo, over the extent of tenant's improvements and fixtures as well as the possibility of a landlord's claim for dilapidations. In the absence of a record of condition, the landlord in a 1991 Act tenancy will not be able to pursue a claim at the end of the lease for dilapidations arising from inadequate maintenance by the tenant.

The record or schedule will also help greatly in determining whether any work necessary to the fixed equipment is a repair or a renewal. It is therefore worth taking some time over the production of the record or schedule, using digital photography where appropriate, so that changes in the extent and condition of the fixed equipment throughout the tenancy are readily identifiable. The taking of soil samples is also strongly recommended so that changes in the fertility of the land can be monitored.

4. Maintenance and Renewal Obligations

4.1 1991 Act tenancies

Leases entered into before 1 November 1948 are subject to common law, which places on the tenant a duty to maintain the fixed equipment and to leave it in the condition in which it was received, allowing for the impact of fair wear and tear. When the fixed equipment has reached the stage when natural decay requires it to be replaced, that liability rests with the landlord.

In leases entered into after 1 November 1948 the landlord is required to:

"Effect such replacement or renewal of the buildings or other fixed equipment as may be rendered necessary by natural decay or fair wear and tear."

The tenant is required to:

"Maintain the fixed equipment on the holding in as good a state of repair, natural decay and fair wear and tear excepted, as it was in immediately after it was put in repair."

4.2 Short Limited Duration Tenancies (SLDTs) and Limited Duration Tenancies (LDTs)

In every SLDT and LDT lease, there is an undertaking that, during the tenancy:

- The landlord will effect such renewal or replacement of the fixed equipment as may be rendered necessary by fair wear and tear
- The tenant's liability in relation to maintenance of the fixed equipment only extends to maintaining the equipment in as good a state of repair, natural decay and fair wear and tear excepted, as it was in when provided.

4.3 Modern Limited Duration Tenancies (MLDT)

In the case of a MLDT the obligations of landlord and tenant are a contractual matter. Landlords and tenants are therefore free to agree, and to include in the lease, where liabilities lie in respect of maintenance, repair, renewal and replacement. If, however, the lease is silent on this matter, the obligations will, by default, be as for SLDTs and LDTs.

4.4 Repair or renew?

There is no hard and fast definition of what constitutes 'fair wear and tear' and 'natural decay' or of the point when deterioration in condition requires renewal or replacement rather than additional maintenance. This is frequently a source of disagreement between landlord and tenant, as is disagreement over the extent to which the condition of equipment that is beyond repair is the result of lack of maintenance by the tenant, or the result of deterioration due to fair wear and tear. Common examples are slate roofs on traditional steadings and old field drainage systems.

The scope for disagreement will be reduced where:

1. The record or schedule of fixed equipment provides a good record of the condition of the fixed equipment at the time that it was provided.
2. Good records are kept of work carried out by both landlord and tenant on the fixed equipment. A tenant who keeps records of all slate replacement work carried out and ultimately, perhaps, of a note from a reputable slater to say that the roof is nail sick and beyond repair, will have a much better chance of making the case that a new roof should be provided by the landlord.

4.5 Dilapidations

4.5.1 1991 Act tenancies

In 1991 Act tenancies the landlord has the ability, at waygo, to claim for any "dilapidation, deterioration or damage" caused to the holding by failure of the tenant to farm in accordance with the rules of good husbandry. However, such a claim will not be possible unless there is a record of condition. If such a record was drawn up during the tenancy, the landlord cannot claim for any matters arising before that record was made.

4.5.2 2003 Act fixed duration tenancies

There is no statutory provision that enables the landlord to claim compensation for dilapidations caused by the tenant's failure to comply with his maintenance obligations. It is open, however, to both parties to come to an agreement on how this matter will be dealt with and to include an appropriate clause within the lease.

4.5.3 Lease-contract terms

Note that, as well as the rules in the 1991 and 2003 Acts, a lease is a contract between the landlord and the tenant. Unless the statutes provide otherwise, either party can insist on the other carrying out what they have agreed to do in the lease, and this includes repair obligations.

4.6 Post-Lease Agreement (PLA) in 1991 Act tenancies

Prior to the coming into force of the 2003 Act on 27 November 2003 it was not uncommon in 1991 Act tenancies for a post-lease agreement to be drawn up that transferred the obligations of the landlord with respect to replacement and renewal to the tenant. This may have been included at the outset as a requirement of the tenant's acceptance of the lease or may have been added at a later stage as a condition of the landlord consenting to an improvement or a rent standstill.

The 2003 Act prevented the introduction of any new such PLAs and enabled a tenant to have an existing PLA nullified if certain conditions were met. In general, the tenant must give the landlord at least six months' notice of an intention to nullify the PLA at the date at which the next rent review could take place. The tenant can expect that the landlord will seek a rent increase in exchange for the landlord taking on the normal obligations for renewal and replacement. It is also a requirement that, on the rent review date the buildings and other fixed equipment must be in a reasonable state of repair or in no worse a state of repair than when the PLA was made.

4.7 Contracting out – both 1991 Act and 2003 Act tenancies

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 under the statutes. 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.

5. Adding to the Fixed Equipment During the Tenancy

5.1 Introduction

The provision of new fixed equipment throughout the course of the tenancy can arise in three ways:

1. Additional fixed equipment provided by the tenant which qualifies as a tenant's improvement eligible for compensation at waygo
2. Additional fixed equipment provided by the tenant which does not qualify as a tenant's improvement, but which remains the property of the tenant as a tenant's fixture
3. Additional fixed equipment provided by the landlord.

5.2 Tenant's improvements eligible for compensation at waygo

5.2.1 Introduction

The law regarding tenant's improvements in the case of 2003 Act fixed duration tenancies is very similar to that applying in the case of 1991 Act tenancies. Tenants have a statutory entitlement to compensation from the landlord for any improvement carried out which is an eligible improvement under the legislation, and which has complied with any relevant prior consent and notification requirements. If considering carrying out improvements, a tenant should consider taking professional advice at least three months before the intended start of any work, as notice to the landlord may be required.

In addition, the tenant may be entitled to compensation for any works done to provide fixed equipment that should have been provided by the landlord at the start of the lease.

To be eligible for compensation an improvement must:

a) Be on the list of eligible improvements set out in the legislation

b) Have complied with any prior consent or notification requirements

c) Be of a type and scale that is appropriate to the size and nature of the holding.

5.2.2 Eligible improvements

Those improvements that are eligible to be considered for compensation are set out in Schedules 3 and 4 (the so-called 'old improvements') and Schedule 5 (the 'new improvements') of the 1991 Agricultural Holdings (Scotland) Act. Schedule 3 concerns improvements carried out before July 1931, Schedule 4 concerns improvements carried out between 31 July 1931 and 1 November 1948 and Schedule 5 concerns all improvements carried out after 1 November 1948.

To be eligible, an improvement must have been on the appropriate list at the time it was carried out. It is important to note that a number of improvements were added to Schedule 5 with effect from 10 January 2019. So, for example, slurry management systems are now on Schedule 5 but are only eligible for compensation if carried out after 10 January 2019.

5.2.3 The need for notification or consent

All three Schedules are broken down into three parts according to whether consent or notification is required. A tenant seeking consent or serving notice should consider taking professional advice in any but very straightforward situations.

Part I improvements will only be eligible if the prior consent of the landlord is obtained in writing before the work begins.

Part II improvements will only be eligible if the tenant gave three months prior notice to the landlord of the intention to carry out the improvement.

Part III improvements do not require consent to be obtained or prior notice to be given.

In general, the changes in the classification of improvements over time have added to the list of eligible improvements and have reduced the number of improvements requiring the prior consent of the landlord.

The landlord may refuse consent in the case of a Part I improvement or may raise an objection in the case of a Part II notification on the grounds that the improvement is unnecessary, unproductive, inconsistent with the type of farming specified in the lease, or is to be carried out in a manner that would not be in keeping with the character of the holding. The objection must be given within one month of receipt of the tenant's notice and if the tenant wishes to challenge the objection, they must do so by applying to the Land Court for consent to carry out the works. In considering such applications, the Land Court will be guided by the extent to which the proposed improvement is reasonable and desirable on agricultural grounds for the efficient management of the holding.

Should the Land Court grant consent to the improvement, the landlord is entitled to serve notice on the tenant that the landlord will carry out the works and must do so within a reasonable timescale.

5.2.4 What is an appropriate improvement?

In all cases where compensation will be sought there is an overriding requirement that the works done are appropriate to the size and nature of the holding and that they contribute to the productivity and efficiency of the holding. Some examples are given below:

a) A tenant has two adjacent holdings rented from two different landlords, and each holding is capable of carrying 50 cows. The tenant erects a new shed on one of the holdings which is capable of holding 100 cows. On quitting that holding the compensation for the value of the shed could be restricted to half its value to an incoming tenant.

b) A tenant installs central heating and double glazing in the farmhouse. That would generally be considered to be something that is necessary to bring the house up to modern standards and would be likely to be eligible for compensation at waygo.

c) A tenant adds a conservatory or a swimming pool to the farmhouse. Although that may have increased the value of the house, the landlord may rightly claim that it is not eligible for compensation as it is not something that has contributed to the efficiency and productivity of the holding.

5.2.5 Successive tenancies

Compensation is payable when the tenant finally quits the holding. If the tenant (including a family predecessor as tenant in the lease) has been in occupation of the holding during more than one tenancy, then compensation is still payable for improvements made during an earlier tenancy as long as the tenancies are considered to have been continuous. When a tenant is entering into a new tenancy for a holding which the tenant already occupies, it is therefore important to establish whether tenant's improvements can be carried forward into the new tenancy, or whether they should be paid at the termination of the earlier tenancy. If the tenancy is moving from a 1991 Act tenancy to a fixed duration tenancy, the tenant will be entitled, at that point, to compensation for eligible improvements carried out during the 1991 Act tenancy unless it is agreed that they are to be carried forward into the new tenancy.

5.2.6 Valuing tenant's improvements

This is a complex issue, especially where grants are involved. In general terms, compensation paid to the outgoing tenant for eligible tenant's improvements is based on the value of the improvement to an incoming tenant, having taken into account any contribution that the landlord had made in cash or kind. The valuer will have to decide whether the improvement is one which adds to the value of the holding by, for example, increasing its productive capacity, and must establish and take account of the relative contributions of the landlord and tenant and of any grants received. The assessed value of the improvement to an incoming tenant is then reduced to reflect the proportion of the original cost that was met by a landlord's contribution.

The historic cost of the improvement has little relevance. The valuer will generally seek to establish the current cost of providing the improvement and adjust this to reflect the current age and condition, and the value which the improvement adds to the productivity of the holding.

5.3 Tenant's fixtures

5.3.1 1991 Act tenancies

A tenant may carry out works on the holding such as erection of buildings, fences, etc which were not initially provided by the landlord, but which don't qualify as tenant's improvements because – by design or default – they don't meet the eligibility requirements set out in 5.2 above. Such fixtures and buildings remain the property of the tenant and the tenant is responsible for their maintenance, repair, replacement and renewal.

The tenant has the right to remove tenant's fixtures and can do so up to six months after the expiry of the lease if two conditions are met:

a) The due rents have been paid and all other obligations of the tenant have been met.

b) The landlord has been given at least one month's notice of the intention to remove and has not served a counter notice, within that period, stating an intention to purchase the fixture or building on the basis of its value to an incoming tenant. The landlord has an absolute right of purchase and the tenant cannot refuse to sell the fixture or building to the landlord.

If the tenant removes the fixture or building, the removal must not do avoidable damage to any other building or part of the holding, and any such damage must be made good.

5.3.2 2003 Act fixed duration tenancies

There are no similar legislative provisions pertaining to fixed duration tenancies. Landlords and tenants entering into fixed duration tenancies are free to agree how tenant's fixtures will be dealt with and to include appropriate provision within the lease. If no such provision is made, it is unclear whether common law would enable a tenant to remove such fixtures.

5.4 Improvements carried out by the landlord

5.4.1 Introduction

A landlord may wish to improve the extent of the fixed equipment by, for example, adding a modern-style building. Prior to the enactment of the relevant part of the 2016 Land Reform (Scotland) Act, the landlord could object to an improvement proposed by the tenant but could carry out an improvement without the consent of the tenant. That is no longer the case and tenants have, under some circumstances, the right to object to an improvement proposed by the landlord. The law relating to landlord's improvements applies equally to 1991 Act tenancies and all fixed duration tenancies.

5.4.2 Landlord's entitlement to carry out an improvement

A landlord is free to make a "relevant improvement" (i.e. one which is listed in Schedule 5 to the 1991 Act) in the following circumstances:

a) The improvement is carried out at the request of, or in agreement with, the tenant

b) The landlord has elected to carry out a Part II improvement which was proposed by the tenant and approved by the Land Court in the face of an objection by the landlord

c) The improvement is classed as an "emergency improvement" which is necessary to:

   i. Protect public health

   ii. Prevent a danger or potential danger to public safety

   iii. Enable the tenant to comply with animal health and welfare regulations

   iv. Secure the provision of essential services such as electricity and water

   v. Remedy the consequences of an accident or natural cause or *force majeure* that was exceptional and could not have been foreseen.

5.4.3 Requirement for a landlord improvement notice

In other than the circumstances set out in 5.4.2, a landlord wishing to carry out a relevant improvement must give to the tenant a landlord improvement notice in writing which must state:

a) The names and designations of the landlord and tenant

b) The name and address of the holding

c) Details of the intended improvement and the manner in which it is to be carried out

d) The landlord's reasons why the improvement is necessary to enable the tenant to fulfil their responsibilities to farm the holding in accordance with the rules of good husbandry.

The tenant may object in writing to all or part of the proposed improvement, giving reasons why the improvement is not necessary to enable the tenant to comply with the rules of good husbandry. Such an objection must be made within two months of receipt of the improvement notice. The landlord then has two months in which to apply to the Land Court for approval of the improvement which may be denied, approved in whole, or in part, or on such terms as the Land Court considers reasonable.

Where the Land Court gives consent for the improvement, the landlord must give the tenant written notice of the period during which the improvement will be carried out and, unless the parties agree otherwise, the period stated in the notice must not begin earlier than two weeks from the day on which the notice was issued.

5.4.4 Unauthorised improvements

If a landlord carries out an improvement which is not compliant with the conditions set out in paras 5.4.2 and 5.4.3, it is to 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 the landlord may not charge rent on it.

5.5 Improvements carried out as part of a diversification scheme

Where a tenant has entered into a properly consented diversification activity (e.g. bed and breakfast business or farm shop) in the period since the coming into force of the 2003 Agricultural Holdings (Scotland) Act, the tenant's investment in related facilities constitutes an investment in a non-agricultural activity and therefore will not be eligible for compensation in the way that agriculture related improvements are. However, the legislation allows the tenant to claim compensation by another route. On quitting the holding, a tenant who has created a diversification activity that was properly consented by the landlord, and which took place after November 2003, can claim compensation if the impact of the diversification work has been an increase in the value of the holding. The compensation is based on an assessment of the value to an incoming tenant of the diversification activity, after taking account of any benefit that the landlord may have given to the tenant when agreeing to the activity. If the effect of the consented diversification is to reduce the value of the holding, the landlord has a claim against the tenant at waygo for the reduction in the value of the holding.

6. Some Simple Ways of Avoiding Problems

1	Ensure that, at the commencement of a lease, there is an agreed schedule, and condition, of fixed equipment provided by the landlord. In long-term leases this should be updated periodically.
2	Landlords and tenants should ensure that good records are kept of work carried out on the fixed equipment.
3	Tenants should follow the statutory procedures by which tenant's improvements are made eligible for compensation at waygo, and ensure that all agreements made, and consents given, are recorded in writing.
4	Landlords and tenants should periodically update the record or schedule of fixed equipment, and also include an agreed schedule of tenant's improvements eligible for compensation at waygo.
5	As set out in the TFC's Code of Practice on the Maintenance of the Condition of Tenanted Holdings, landlords and tenants should meet periodically to review the state of the fixed equipment, to identify where repairs, maintenance, renewal or replacement are required, and to agree where the responsibility lies for an agreed schedule of works.

SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Contact us

tfc@landcommission.gov.scot
01463 423 300
www.landcommission.gov.scot

Find us on:

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