



The Tenants Improvements Amnesty Supplementary Guidance from The Tenant Farming Commissioner

Introduction

We are now over a third of the way towards the end of the 3-year amnesty period and activity is thankfully building up, though some tenants have yet to begin the exercise. This document reinforces the importance of the amnesty and provides, on the basis of experience to date, some supplementary guidance on the conduct of the amnesty negotiations. It should be read in conjunction with the Code of Practice on the Amnesty on Tenants' Improvements published by the TFC in June 2017 and available at https://landcommission.gov.scot/wp-content/uploads/2018/01/AMNESTY-CODE_web-Jan-2018.pdf

The Importance of the Amnesty

The importance of this opportunity cannot be overestimated. It is a once and for all opportunity to agree a definitive list of tenant's improvements eligible for compensation at waygo and with an opportunity to claim for some improvements for which the correct notification procedures were not carried out at the time.

But the value of the amnesty extends beyond the waygo issue. The principle that rents for agricultural holdings can only be charged on fixed equipment provided by the landlord is a well established one which will continue to be a fundamental principle within the new system for agreeing rents which is scheduled to come into being next year. The starting point for the new system is agreement on a statement of facts about the holding and this includes agreement on the relative contributions of the landlord and the tenant to the provision of fixed equipment. Without this agreement it will not be possible in many cases to proceed to the next stages in the new rent review process.

The Key Principles

The introduction of the amnesty was intended to help landlords and tenants arrive at an accurate and up to date schedule of tenants' improvements eligible for compensation at waygo. Claimed improvements should be of value to an incoming tenant and should be within the boundaries of what is acceptable as an improvement (see



schedule 5 (and in a few cases also schedules 3 and 4) of the 1991 Agricultural Holdings (Scotland) Act) and in accordance with the notification and approval procedures as modified by the amnesty legislation (see TFC Code of Practice - Amnesty on Tenants' Improvements). Although there are always likely to be grey areas where the acceptability of a claimed improvement can be debated, it is important that tenant and landlords do not attempt to unduly push, or restrict the, the scope of what is acceptable. Agreement should be based on what is fair and equitable to both parties and in the context of any existing and relevant post lease agreements.

Experience to Date

A number of issues have been raised with the TFC to date regarding the way that the amnesty is being implemented. Some guidance on these is provided below.

Relative responsibilities of the landlord and tenant

It is the responsibility of the tenant to initiate the exercise (but nothing to stop a landlord from doing so) but there are benefits to both tenant and landlord from successful completion and the Code of Practice is clear that both parties should be prepared to bring to the table any evidence from records about the origin and 'ownership' of claimed improvements. The tenant should not expect the landlord to be solely responsible for checking the validity of claims but nor should the landlord put all the onus on the tenant. It is unlikely that both parties will have full and accurate records and only by sharing openly and honestly will it be possible to speedily and amicably arrive at a final list that is fair to both parties.

The Importance of a Site Visit

If the claim submitted by the tenant can be accepted without questions by the landlord a site visit can perhaps be avoided but if there are significant questions about some of the items claimed, a site visit will normally be the best way to discuss and resolve these. Undisputed items can be quickly 'ticked off' and those requiring further discussion or evidence identified. Landlords or their representatives should be prepared to meet on site and should not use repeated requests for more



detail as a substitute for an on-site discussion and tenants should ensure that they provide enough detail to negate the need for lengthy correspondence in advance of a site meeting.

Value to an Incoming Tenant

The question of value is primarily one for discussion at waygoing but it is important to note that not all improvements which appear to be consistent with the schedule 5 list will be eligible for compensation when and if a waygoing takes place. The improvement should clearly be of value to an incoming tenant and be appropriate for the size and nature of the holding.

A tenant of farm A, who also owns the adjoining farm B, and runs cattle on both, may have decided that, for operational reasons, it is sensible to build a shed on farm A that is capable of inwintering all the cattle. In such a situation his eligibility for compensation may only extend to the proportion of the new shed that would have been necessary for farm A only.

Similarly, a hypothetical incoming tenant is only likely to be interested in an improvement that increases the productive capacity of the holding. Clearly there is a spectrum of usefulness for any improvement which runs from essential to an “extravagance” (such as, perhaps, an indoor swimming pool) that would be of little or no value to the hypothetical incoming tenant.

Level of Detail Required

Tenants should be prepared to offer more than just a long list of claimed improvements without some indication of the origin and justification for each as to how they come within the relevant Schedule to the 1991 Act. While the tenant may have been in occupation of the holding for a substantial period, the landlord and/or his agent may have changed several times in that period and does not have a memory of what has been agreed in the past.

Only improvements listed in Schedule 5 (and in the case of some very old improvements, Schedules 3 and 4) of the 1991 Agricultural Holdings (Scotland) Act are eligible for compensation and only those which have complied with the necessary consent and notifications procedures,



allowing for the dispensations provided by the amnesty. Claims which are outside of this scope will only prolong the process and increase the possibility of dispute so tenants should ensure that items claimed are fair and reasonable and within the scope of what is allowed.

Both parties should remember that the objective is to agree that a claimed improvement exists, that it is eligible for compensation at waygo and to ensure that there is agreement about the relative financial contributions of landlord and tenant. Issues to do with the quality and value of the improvement are for discussion if and when a waygo takes place. Similarly, the cost of the improvement is only of relevance if the information is needed to confirm who paid for it. Landlords should not request information beyond what is necessary to establish existence and eligibility (including establishing who paid for it).

New Improvements not at present within Schedule 5

The list of eligible improvements is currently being updated to reflect changes in farming practice since the list was last updated. Items such as slurry stores, which are an essential part of some farming systems, will be included in the new list which is shortly to be published but only items currently listed in Schedule 5 are eligible for consideration under the amnesty. Items such as slurry stores can be the subject of a discussion and landlords may agree, but are not required, to have them recorded as tenant's improvements.

Breaks in The Lease

Tenants should be aware that where the lease has been renewed or the name on the lease has changed, there may be implications for eligibility for compensation for improvements that took place before the change was made. In such circumstances tenants are advise to seek legal advice that is specific to their circumstances.

Submitting Amnesty Claims

There is no prescribed method of submitting a schedule of claimed improvements but a useful template has been produced by the CAAV/SAAVA and can be accessed at



<https://landcommission.gov.scot/tenant-farming/codes-of-practice/tenants-amnesty-campaign/>

The Ideal Process

1. The tenant submits a list of claimed improvements which are within the scope of the eligibility rules and provides sufficient notes against each to enable the landlord to understand and, if necessary, verify the legitimacy of the claim.
2. Landlord and tenant (and/or their representatives) meet on the farm to review the list, to tick off agreed items and identify any items where there is dispute or uncertainty and where reasonable further evidence is required to verify the claim. The site meeting is an opportunity to take photographs if these have not been provided and where it is felt that they would be useful. It is also an opportunity to agree on whether or not this is a good opportunity to record tenant's fixtures as well as tenant's improvements. This is not a requirement of the process but is a useful step towards ensuring that a full record exists of the 'ownership' of all items of fixed equipment.
4. The tenant and landlord contribute such evidence as they can assemble to resolve the remaining disputed items with the primary onus being on the tenant. If it is impossible to establish 'ownership' the default position is that the item is part of the landlords fixed equipment.
5. Landlord and tenant record their agreement to the final list, which may be by use of the amnesty agreement template provided by CAAV/SAAVA. Both parties to retain a copy.

Bob McIntosh
Tenant Farming Commissioner