

RENEWABLE ENERGY GENERATION & AGRICULTURAL LEASES

Agricultural law is a topic that is highly relevant to energy developers as many developments are affected by agricultural, forestry or sporting leases. In this briefing we take a look at the main types of agricultural leases and some of the key issues for developers.

The Law of Agricultural Leases in Scotland, previously based primarily on the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”) was consolidated and amended by the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”). Some provisions of the 2003 Act were seen as controversial, particularly the provisions giving certain agricultural tenants the right to buy the land that they farm if, and when, the Landlord wants to sell it.

Main types of Agricultural Leases

- **Grazing leases** - these are leases for less than a year, for the purposes of grazing. If there are consecutive grazing leases, it should be noted that it is now critical that the farmer physically removes his stock for at least a day before the lease is renewed (otherwise a full agricultural lease, giving the tenant security of tenure, may be established.)
- **Full agricultural leases under the 1991 Act** – these usually must have commenced prior to 27.11.03, when the 2003 Act came into force. Such leases give the tenant *security of tenure* meaning that the tenants can effectively stay indefinitely, subject only to (a) a limited number of statutory exceptions and (b) the reservation by the Landowner of a right of “*resumption*” (meaning the right to take parts of the lease subjects back).
- **Limited Partnership Leases** - these arrangements were a way of sidestepping the security of tenure provisions under the 1991 Act. Although they cannot now be created many still survive. Instead of leasing the land directly to a tenant, a limited partnership agreement was signed up between the landowner as the “limited partner” and the tenant as the “general partner”. A lease was then signed up between the landowner and the limited partnership. Although there *notionally* was security of tenure this could be avoided in practice by the landowner bringing the limited partnership to an end.
- **New Leases under the 2003 Act : no more security of tenure** – the new types of lease introduced by the 2003 Act are Short Limited Duration Tenancies (SLDTs) which are for a maximum of 5 years and Limited Duration Tenancies (LDTs) which are for a minimum of 15 years. However care must be taken to ensure that SLDTs are brought to an end correctly, otherwise they can ‘default’ becoming a 5 year SLDT or even a 20 year LDT !

Key Issue for Developers: Vacant Possession

The key issue for renewable energy developers is whether or not the presence of an agricultural Lease will inhibit, or indeed even block, the ability to use the land for renewable energy development. Here a distinction must be made between 1991 Act Leases and SLDTs and LDTs under the 2003 Act.

If development is to proceed then the Landowner normally needs the ability to remove certain parts of the leasehold property from the terms of the Lease (via resumption). The difficulty with certain 1991 Act Leases is that, unless there is a specific power to resume contained in the Lease then the agricultural tenant effectively has a veto over any such development taking place.

A further difficulty arises because of a long standing doctrine that restricted the Landowner's ability to resume the land : the extent of the resumption could potentially be challenged by the tenant on the basis that it was a "*fraud on the Lease*", if large areas of land were involved. Additionally it should be noted that case law suggests that the tenants must be given a minimum of two month's notice of resumption. This therefore has implications for developers : where there is an agricultural lease in place the Option Agreement between developer and landowner should specify that the developer requires to give the landowner *more than* two month's notice (we suggest a minimum of ten weeks) that the developer wishes to go to lease.

The resumption position has improved to some extent under the 2003 Act. This is because, for 2003 Act tenancies, resumption of part *or the whole* of the land let is possible for a non-agricultural purpose for which planning permission has been obtained – even where there is no resumption clause in the written Lease; there is further good news for developers in that the "*fraud on the Lease*" principle does not apply to 2003 Act tenancies. However, the bad news is that for SLDTs and LDTs it is now necessary to give a minimum of one year's notice of resumption.

WJM Expertise

Agricultural law is an area of considerable complexity and ongoing development. David Bone and Nick Mackay both have extensive experience of dealing with agricultural Lease situations, on behalf of developers. Nick Mackay is a member of the Agricultural Law Association and has acted for rural landowners, as well as developers, for many years. We have drafted Resumption Agreements and otherwise helped find pragmatic solutions in a large variety of situations, allowing our developer clients to successfully build their projects.

Advice for Developers

Establish at an early point whether there are any leases, whether written or not, that affect the development land. The type of Lease and the bargaining strength of the tenant may be a factor in the negotiation of Heads of Terms and have a bearing upon the project timescales. We recommend that you speak to us at an early point once you become aware that the land is, or may be, affected by an agricultural, sporting or similar Lease, such that we may give you the best possible advice, at an early point.

Our view is that the onus should always be firmly placed upon the Landowner to provide the developer with vacant possession of the land required for energy development. However, equipping our developer clients with full and accurate advice right from the outset gives our client a head start in the negotiation process.

If you require advice on a specific point please contact a team member through:

renewables@wjm.co.uk

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