

IRRITANCY

Agricultural Tenancies
Short Limited Duration Tenancy
Limited Duration Tenancy

IRRITANCY

Irritancy is the name given to the process whereby a landlord or a tenant can terminate a tenancy if the other party is in breach of a tenancy condition. In practice, this is a remedy for a landlord and what follows is explained on this assumption.

The Agricultural Holdings (Scotland) Act 2003 does not provide for a legal or statutory irritancy for Short Limited Duration Tenancies or Limited Duration Tenancies. Instead, it recognises that the parties may contract for irritancy of the tenancy in the irritancy clause in the lease. This is known as a conventional or contractual irritancy. Such a clause will provide that in the event of specified breaches of terms of the lease the landlord will have the option to terminate the lease or the lease will terminate automatically. What the Act does is to provide certain restrictions to the parties' freedom of contract. These restrictions are –

- the lease may not be irritated on the ground that tenant is not resident on the farm
- if the lease is to be irritated on the grounds that the tenant is not using the land in accordance with the rules of good husbandry, then the rules which apply must be the rules provided for in Schedule 6 to the Agriculture (Scotland) Act 1948: the only modification to this is that, within certain parameters, conservation activities are to be treated as falling within the rules of good husbandry
- the landlord must give the tenant not less than 2 months notice before the date on which the tenant is to be removed.

A key part of the negotiations between a landlord and tenant prior to entering into a lease will be to agree the terms of the irritancy clause.

IRRITANCY IN OPERATION

Once the breach has occurred (as provided for in the irritancy clause in the lease), the correct approach is for the landlord to serve on the tenant a formal notice of the occurrence of the irritancy, with a demand requiring the tenant to remove from the farm. If this is resisted by the tenant the landlord may raise an action of declarator and removing in the Sheriff Court.

The key determinants in a conventional irritancy are what is provided for in the irritancy clause in the lease. This may include matters such as the date the irritancy is to take effect (taking account of the 2 months notice requirement), rent arrears and the rights in relation to such matters as growing crops. The tenant's statutory waygoing claims and his right to harvest a growing crop may be validly excluded by an irritancy clause.

RESPONSE BY THE TENANT

In a conventional irritancy, if the tenant believes he has a valid defence he can have referred to the Scottish Land Court the question of the validity of the irritancy. Alternatively, he can wait until the landlord raises an action for his removal and defend the action at that point. If the latter route is taken, the removal action will have to be “sisted” (put on hold) until the Land Court has resolved the irritancy question.

There are a number of defences open to the tenant, not least denial that the tenant has committed the breach of a term of the lease which purports to trigger the irritancy. Two other popular defences are –

- mutuality of obligations – this is where the landlord is himself in breach of an obligation imposed on him in the lease, and
- acquiescence – this is where the landlord has known about and taken no action in respect of similar breaches in the past.

Disclaimer - The above information is a summary of the main legal provisions and given for general information only. It is not a full statement of the law and detailed advice should always be obtained from a suitably experienced solicitor. Accordingly Gillespie Macandrew LLP does not accept any liability for the information given or any resulting action taken by any person. Gillespie Macandrew LLP is a limited liability partnership, registered in Scotland number SO300743. Authorised and regulated by the Financial Services Authority.