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Relinquishment and Assignation A new tool in the succession planning box?

After a long wait since the Land Reform (Scotland) Act 2016, we finally saw the right to relinquish and assign come into force at the end of February. Whilst the Land Reform legislation brought with it many new provisions, the right to relinquish and assign 1991 Act secure tenancies was most likely the one that many were waiting on in terms of succession planning.

Many years ago, a tenancy interest was an almost overlooked asset when speaking to clients about Wills and general succession planning for the farming business. In fact, I have to admit that I am old enough to remember the days where a NIL value was put against tenancy interests on estate inventories. That position has gradually changed with tenants becoming more aware of the value of a tenancy interest, assisted over time by an improvement of the tenant's position through legislative change.

Even before the bringing into force of the right to relinquish and assign, the expansion of the near relative group (as a group of better protected assignees) over time was generating many more creative ways in which tenancies could be dealt with upon the death or during the lifetime of a tenant. In the past a tenant may not have been willing or keen to transfer a tenancy interest out with his immediately family (i.e. beyond spouses, children or grandchildren) for fear of loss of value to the tenant's estate and his main beneficiaries. Now that tenants can however transfer a tenancy to a further removed family member within the near relative group, we are seeing agreements entered into with regard to value being paid to the original tenant or his estate upon a successful assignation completing. For example, we have been involved

in an arrangement whereby a tenant agreed to assign his interest in a secure tenancy to a nephew. The tenant did have children of his own but none were really interested in taking on the tenancy. The nephew agreed to pay a sum of money to his uncle in exchange for the assignation (reflecting the tenancy interest and tenant's improvements), thus allowing the tenant to retire from the farming activity but retaining value to pass on to his own family if he wished to do so.

These types of arrangements only really worked well where there was an available and willing (to pay) near relative. Up to now, tenants were often stuck where no such near relative was available. The right to relinquish and assign now brings a further option to the table but may also bring some opportunities for maximising the value of the tenancy interest.

When a tenant reaches retirement age, we now have a number of options to consider.

Firstly, we can opt to assign the tenancy during the lifetime of the tenant. If a near relative successor is available, there are only limited grounds of objection available to the landlord and an assignation is likely to be successful.

Secondly, the tenant can retain the tenancy interest and make provision for the interest to be assigned upon his death. Most written tenancy agreements specifically prohibit the bequest of the lease interest and as such this will mostly be dealt with by way of a Back Letter to the Will and assignation under the Succession (Scotland) Act 1964 where executors have one year from the date of death to assign the tenancy. Again, the aim should be to assign to someone within the near relative group. Thirdly, we can now exercise the right to relinquish and assign both as a stand-alone option or in conjunction with the two earlier options of lifetime assignation or assignation upon death.

Looking at the third option in a bit more detail, the first scenario would be a straightforward use of the right to relinquish and assign. An elderly tenant considering retirement may choose to use the right to relinquish and assign to realise during his lifetime the value attached to the interest in the tenancy, thus allowing him to either return the tenancy to the landlord or assign it to an individual who is a new entrant or an individual progressing in farming (as defined in the legislation).

If the landlord chooses to take back the tenancy as part of this process, the legislation provides a detailed process for calculating the sums due

to the tenant. It is noted that due to the way the calculation is carried out, on older tenant is likely to receive a lower sum than a younger tenant. This flows from the valuer being asked to take into account when a landlord would otherwise likely be able to take back the farm in hand without taking into account the possible assignees available to the tenant.

If, however the landlord declines the offer and an assignation to a new entrant or someone progressing in farming does take place, open market forces will decide the value of the tenancy. It's only over time that we will see some patterns emerging as to values achieved under those circumstances.

Now that we know that the tenant's advancing age may have a detrimental effect on the value of the tenancy upon relinquishment, should we consider ways to improve the tenant's position? It's when we look at succession planning in those terms that other scenarios may be considered, options which are a combination of successive actions by the tenant.

We have seen scenarios where a tenant of advancing years does have a near relative successor available, perhaps a son or a daughter, but that person is not interested in taking on the tenancy. Should an assignation to such a person now be considered both during lifetime and on death as part of a planning exercise to maximise the value of the tenancy interest for the family?

Once the tenancy interest is assigned to a near relative, he or she would then exercise their right to relinquish and assign. It would appear that by

assigning the tenancy to a younger person, we have increased the relinquishment value. Of course, if the landlord does not wish to take the farm back in hand, the new tenant can still assign for value on the open market to a new entrant or someone progressing in farming.

An example may better illustrate the point. Let's say we have a tenant aged 75 who holds an interest in a tenancy of a holding in Aberdeenshire. The tenant has a daughter, aged 38, who farms with her husband in the Borders on a farm held within the husband's family ownership. Due to the distance and other commitments in the Borders, the daughter may not be keen to take on the tenancy. The tenant, aged 75 now has another option of course. He may decide to exercise his right to relinquish and assign. If he does so, and the landlord takes the land back in hand, the sums received by the tenant will be reflective of his age (75). However, if the daughter knew that she would only be taking on the tenancy for a relatively short period of time, would she then be willing to take it on? If the tenant (75) completed a lifetime assignation to his daughter, she could then after a successful completion of the assignation exercise her right to relinquish and assign. The assumption would be that she would then as a 38-year-old be able to generate a higher relinquishment sum than her father (aged 75).

I cannot imagine that the latter was what was envisioned when this legislation was brought in but it will be interesting to see how the right to relinquish and assign is used over the next couple of years.

We would hope that now that the right to relinquish and assign is in place, and where a tenant is genuinely wishing to retire, matters can be resolved between landlord and tenant without the need to revert to such tactical assignments and/or exercises of the right to relinquish and assign. Whereas some landlords in the past have been happy to wait for a tenant to pass away to take a farm back in hand, there has to be a more general acceptance now that there is indeed a value attached to a tenancy. You would therefore hope that if there is a genuine wish at the landlord's end to take the farm back in hand and a wish at the tenant's end to retire, informal discussions could take place to reach an agreement which appears fair and acceptable to both parties.

However, where relationships are not conducive to negotiating a reasonable settlement, tenants now appear to have more options open to them to realise the value contained within their secure tenancy.



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