

**Agricultural tenancies: implied surrender and regrant and the operation of
the Agricultural Tenancies Act 1995**

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Abstract

Agricultural tenancies arising after 1st September 1995 are mostly governed by the Agricultural Tenancies Act 1995. As such, tenants under this Act do not benefit from the degree of protection conferred on tenancies already in existence, which remain under the Agricultural Holdings Act 1986. Section 4 of the 1995 Act seeks to protect those tenancies which subsequently inadvertently undergo a surrender and regrant and which would otherwise lose the protection of the 1986 Act.

This paper seeks to investigate, by relating recent case law and statute to the situation of agricultural tenancies, the occasions where surrender and regrant might occur and whether in such instances the protection of the 1986 Act will be lost.

Introduction

Most agricultural tenancies created after 1st September 1995 are governed by the Agricultural Tenancies Act 1995 (the '1995 Act'). Introduced in an attempt to revitalise the agricultural let sector, this legislation confers little protection on the tenant, in stark contrast to the agricultural holdings legislation which preceded it. Tenancies already in existence on 1st September 1995 continue to be protected by the Agricultural Holdings Act 1986 (the '1986 Act'), and as such benefit from lifetime security of tenure, up to two generations succession rights, a statutory rent review formula, and numerous other measures during and on termination of the tenancy.

Farm business tenancies, as the agreements under the 1995 Act are called, are by and large devoid of statutory interference (Sydenham and Mainwaring, 1995): freedom of contract dictating the relationship between the parties, with only a few fallback provisions where the agreement is silent. From the landowner's perspective, the new style agreements preserve flexibility over the future management of their farmland portfolios and crucially maintain their vacant possession premiums, as farm business tenants effectively do not have any security beyond their initial term. As an added incentive to landowners, and further distinguishing the two regimes, the Finance Act 1995 extended agricultural property relief from Inheritance Tax to all post-1st September 1995 agricultural tenancies, conferring 100% relief as opposed to the 50% available on existing tenancies (see Inheritance Tax Act 1984 section

116(2)). Not only have these measures motivated the new letting of farmland, but they have also encouraged landlords to attempt to convert pre-1995 agreements into new ones, with potentially very serious consequences for the tenant's security of tenure and rent, because the new tenancy might be deemed to have been granted under the 1995 Act.

This conversion could be explicit: with the landlord and tenant agreeing to a surrender of the old tenancy and the granting of a new one. This by definition would be a farm business tenancy and the tenant would lose his 1986 Act protection. The landlord would gain Inheritance Tax relief at 100% and would shake off the shackles of the 1986 Act. The prudent tenant would presumably need some form of inducement to accept such an arrangement, perhaps the grant of a larger area of land in the replacement tenancy, or a measure of financial consideration. A deed is usually necessary for an express surrender to take place, although no particular form of words is necessary as long as the intention of both parties that the term should immediately cease is sufficiently clear (*Allnatt London Properties v Newton*). Such arrangements should not give rise to any particular difficulties in respect of the 1995 Act, although tenants should be in no doubt that they will forfeit the protection of the 1986 Act.

Implied surrender and regrant

This paper is concerned with the alternative situation, whereby the conversion is effected by operation of law, by means of an implied surrender and regrant, either knowingly, by one or both of the parties, or inadvertently by their joint action. An implied surrender will result from any unequivocal conduct of the parties which is inconsistent with the continuance of the existing tenancy. If the parties to a 1986 Act tenancy vary the terms of that tenancy, it is possible that such variation will effect a surrender of the old tenancy and the grant of a new one. Surrenders arising in this way do not have to be made in writing, nor need they be executed by deed (Law of Property Act 1925 s.53(1) and s.52(2)(c)). Indeed, the common law doctrine of surrender and regrant can be invoked by a relatively simple amendment to a lease, and hence clearly has implications for all agricultural tenants.

Section 4 exemption

The 1995 Act recognises that there are a number of situations where new tenancies can arise after September 1995 but where the tenant should still be entitled to protection under the 1986 Act. These are detailed under Section 4. For the most part, Section 4 covers the exercise of existing succession rights to a 1986 act tenancy (s.4(1)(b) to (d)). Where a tenancy succession occurs (under the 1986 Act Part IV), then by the strict operation of law a new tenancy arises. Section 4 operates to maintain the 1986 Act governance, in the same way that the Agricultural Holdings Act 1986 itself maintained succession rights for pre-1984 Act tenancies (under the 1986 Act Section 34).

Further, Subsection (1)(f) of Section 4 protects the 1986 Act status of the tenancy where it arises:

'...merely because a purported variation of the previous tenancy (not being an agreement expresses to take effect as a new tenancy between the parties) has effect as an implied surrender followed by the grant of the tenancy'.

Thus where the parties knowingly vary an agreement, and such variation gives rise to an unintentional, but implied surrender and regrant, 1986 Act protection will not be lost. As Lord Howe (Parliamentary Secretary for Agriculture, Fisheries and Food) said in the House of Lords (Report Stage 23, January 1995):

"We accept in those circumstances it would be inequitable for the new tenancy to be excluded from the scope of the 1986 Act when the parties had not intended that to happen".

In assessing the extent of the variation of the terms it is necessary to look at the intention of the parties (*Take Harvest v Liu*). If the variation is so fundamental that it goes to the root of the tenancy or is inconsistent with the confirmation of the old tenancy a surrender will take effect.

There are three situations, which are relatively common to agricultural tenancies, where such a surrender and regrant might arise:

a) when land is added to a holding held under an existing tenancy;

b) when an additional tenant is added to the lease;

c) when the term of a fixed-term lease is extended.

These situations will now be examined in more detail.

Adding extra land

Where new land is added to that originally demised, it will almost always invoke the doctrine of surrender and regrant, thereby creating a new tenancy of the whole area. This has been established by caselaw, recently confirmed in *Childers v Anker* and in *Friends' Provident Life Office v British Railways Board*. (But see *Fredco Estates Ltd v Bryant* where the gratuitous use of land in addition to the land demised in the original tenancy was held not to amount to a surrender). It was not the intention of the legislation that such instances of enlargement should continue under the 1986 Act, indeed it is argued that the holding must be substantially the same in respect of both tenancies for section 4 to operate. Under the (somewhat obtuse) wording of Section 4 the old holding must,

'comprise the whole or a substantial part of the land comprised in the new holding.'

As long as a substantial part of the new holding was also in the old tenancy, Section 4 can operate. It is argued (Densham and Evans, 1997) that the section will not operate to preserve 1986 Act protection for tenants who are essentially being moved to new holdings and who retain a small area of land which was in their old tenancy. The land in the 1986 Act tenancy must amount to a substantial part of the land in the new tenancy. There is no statutory guidance on this, although attention is drawn (Densham and Evans, 1997) to the distinction between 'a substantial part' as the section is worded, and 'the substantial part', the former presumably requiring a somewhat smaller proportion. It seems likely that this will be a matter for subsequent interpretation by the courts. In the meantime, the proposed addition of land to an existing 1986 Act tenancy should be considered carefully. A prudent tenant would seek to take extra land only on the basis of a separate agreement for that land.

It is of interest to note here, that a similar situation could conceivably arise whereby extra land is added to a farm business tenancy. This would operate as a surrender and regrant, and the

unwary landlord could be faced with a new tenancy subject to the fallback provisions of the 1995 Act rather than the (presumably less onerous) written provisions of the original lease. This, perversely, could be to the detriment of the landlord, who should therefore ensure that if extra land is to be added to a holding, a new agreement covering the whole demise should be entered into, effectively surrendering the old agreement.

It would appear that if a tenant, for whatever reason, gives up only a part of his holding, that does not operate as a surrender and regrant of the remaining land. Even if it did, it is argued that as the old holding now comprises the whole of the new holding, then by the construction of Section 4(1)(f) the new tenancy would continue to have 1986 Act protection. (But see *Jones v Bridgman*, where a reduction in rent accompanied by the giving up of possession of part of the property did give rise to a surrender and regrant).

Changing the tenant

A change in the tenant, whilst clearly constituting a surrender and regrant, will not be covered by Section 4(f), which states that the new tenancy must be,

'granted to a person who, immediately before the grant of the tenancy, was the tenant of the holding...'

Section 4(1)(f) therefore only operates where the tenancy is granted to the same person. It will not operate where there is a change in the tenant. This is most likely to occur as a result of a succession, either on death, or upon a statutory retirement, and will be covered by other subsections as already mentioned. It should be noted that the addition of a new tenant alongside an existing tenant is, in any case, not necessarily a surrender and regrant (see *Saunders Trustees v Ralph*, where it took effect as a mere variation), and hence such a scenario need not jeopardise the 1986 Act protection anyway. Clearly a tenant contemplating such a change would need the agreement of the landlord, and should seek professional advice.

Extending the term

An extension of the term of a fixed-term lease will always take effect as a surrender and regrant (*Jenkins R Lewis v Kerman*, and *Baker v Merckel*), and, as long as the tenant, and the

holding, remain the same, Section 4 should in theory operate to prevent conversion to a farm business tenancy. But as most 1986 Act tenancies are, by definition, tenancies from year to year, it is difficult to see how the term can be effectively extended (see below).

The question of intent

It would be dangerous for parties to rely on the operation of Section 4 in order to intentionally achieve a regrant within the 1986 Act. The wording of Section 4 echoes the intention of the legislation. There must be a,

‘..purported variation (not being an agreement expressed to take effect as a new tenancy between the parties)..’

Clearly it is the intention of the legislation to ensure that the tenant does not lose his security of tenure through the inadvertent surrender of his tenancy upon what he thought would be a variation (Densham and Evans, 1997). Whether the parties to a 1986 Act tenancy can *knowingly* enter into a variation which will then take effect as a surrender and regrant is questionable. The most likely reason for attempting to effect a surrender and regrant in this way would be to enable the landlord to improve his Inheritance Tax position by obtaining the higher rate of agricultural property relief whilst, at the same time, not depriving the tenant of his security under the 1986 Act.

In general, the only situations where a surrender by implication will arise with certainty (whilst retaining the possibility of using Section 4) are where further land is added to an agricultural tenancy, or where the term thereof is extended. As most 1986 Act tenancies are tenancies from year to year, the term can only be extended by cumbersome substitution of, for instance ‘a letting for a fixed term and thereafter from year to year’. Such an arrangement would be quite different from the previous periodic tenancy, and would be unlikely to fall within the phrase ‘purported variation’ (Sydenham, 1996).. This leaves the addition of a small area of land as the most likely device to succeed. Apparently landowners agents are informing their tenant farmers that by a simple deed of variation of their existing agreements, a new tenancy will be granted without affecting the security of tenure that a tenant has under the 1986 Act (Sydenham, 1996).

However, the outcome of such intentional schemes is by no means certain. The status of the 'new' tenancy may be challenged at a later date by either of the parties, or presumably by the Commissioners for the Inland Revenue.

Firstly, the purported variation may take effect as a variation only. If so, the status quo is maintained, the tenant keeps his 1986 Act tenancy and the landlord fails to get his Inheritance Tax advantage.

Secondly, the variation might take effect as a surrender and regrant under Section 4, whereupon both parties achieve their desired outcome: the landlord gets his Inheritance Tax advantage, and the tenant has a new tenancy but which is still protected under the 1986 Act. In addition, the tenant would retain any succession rights that attached to his pre-1984 tenancy. The new 1986 Act tenancy would be deemed to have been granted post 12th July 1984, but being one of the classes of tenancy covered by Section 34(1)(b) of the 1986 Act, succession rights would pass to the new agreement.

Finally, if the courts elicit that it was the intention of the parties to achieve a surrender and regrant, and that such an outcome was not inadvertent, then the variation could not itself have been purported, i.e. it was not *intended* to take effect as a mere variation. If this is the case, and any clauses in the variation document which express or imply an intention to plan in this way will add weight to such a conclusion, then a surrender and regrant will have occurred- the operation of common law cannot be denied. The landlord will achieve his full Inheritance Tax relief. But because Section 4 does not operate where there is no purported variation, the new tenancy will be a farm business tenancy, and the tenant will lose his rights under the 1986 Act. The tenant's situation cannot be safeguarded by the insertion of a clause to the effect that the landlord confirms that the agricultural tenancy of the premises (as varied and regrant) will be governed by the 1986 Act. Indeed such a clause may add further substance to the argument that there was not a *purported variation*. In addition, It is not possible to contract in to the Agricultural Holdings Act 1986. In order for such a variation to be challenged, the original intention of the parties would have to be considered- did they intend to arrive at a new tenancy or was that an inadvertent outcome?

Clearly, the section 4 exemption will not cover the situation where a 1986 Act tenant is moved to another farm on the estate, or where another tenant is added onto the tenancy agreement (or

the existing tenant is replaced with another), express grants of new tenancies, or any variations which do not amount to a surrender and regrant.

Conclusion

Based on the case law to date, it is probably safe to conclude that an agreement to vary a 1986 Act tenancy, where the variation goes to the root of the contract will result in a surrender and regrant by operation of law. Of distinct consideration is whether such surrender and regrant comes within the exemption in Section 4 (1)(f) of the 1995 Act thereby retaining the protection of the 1986 Act. Each case in this respect will have to be considered on its own facts, not only looking at the variation document, but at the existing tenancy agreements, and surrounding circumstances, including the intention of the parties.

It can be seen that the risks inherent are much greater for tenants than for their landlords. Although they will probably be protected from the inadvertent operation of the doctrine, where deliberate schemes to regrant tenancies are proposed, particularly where assurances are made that variations or the addition of additional land will not affect their security rights under the 1986 Act, tenants should be extremely wary. Landlords cannot force their tenants into signing deeds of variation.

Abuse of the 1995 Act in this way might also inspire the Labour Government to introduce a tightening of the legislation to the detriment of landlords. Hence landlords should also be advised not to attempt to fraudulently gain advantage from their farm tenants.

Table of Cases

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