RURAL ECONOMY AND CONNECTIVITY COMMITTEE

POST LEGISLATIVE SCRUTINY

SUBMISSION FROM THE SCOTTISH TENANT FARMERS ASSOCIATION (STFA)

Introduction
The Scottish Tenant Farmers Association (STFA) is the only organisation dedicated to representing the interests of tenant farmers throughout Scotland. Its stated aim is to support and enhance the tenanted sector and in that role welcomes the opportunity to make comments to the Committee on the Agricultural Holdings (Scotland) Act 2003 and the Crofting Reform Act 2010.

Agricultural Holdings (Scotland) Act 2003, which amends the Agricultural Holdings (Scotland) Act 1991

Introduction of Limited Duration Tenancies (LDTs) to increase area of let land
LDTs were introduced by the 2003 Act to provide a modern alternative to the Limited Partnership tenancy arrangements which had become the common means for letting land since the 1970s. Limited Partnerships were seen as a cumbersome means of avoiding security of tenure, and the aim of the new LDTs was to provide a modern alternative which would result in an increase in the tenanted area. For the last 5 years, according to SG figures, then tenanted area for Scotland has been stagnant at around 1.2 million hectares. Despite the changes made to LDTs in the Agricultural Holdings (Scotland) Order 2011, the introduction of LDTs has not resulted in an increase in the tenanted area.

There are many other factors which affect the letting of land, including support payments and the fiscal regime, which may be acting to limit the tenanted area. STFA believes the issue of new lettings and opportunities for new entrants should be revisited, and welcomes the Scottish Land Commission’s recently published discussion paper which contains many positive ideas for encouraging expansion of the tenanted sector.

Forestry and diversification on tenanted farms.
The 2003 Act gave agricultural tenants the right to plant trees and diversify into non-agricultural activities. Income from diversification is becoming an increasing important source of revenue for Scottish farm businesses, and for tenanted farms which tend to be in the more marginal upland areas, tree planting may prove to be a vital lifeline post Brexit.

However, tree planting remains noticeably absent on tenanted holdings, and anecdotal evidence suggests that diversification in the tenanted sector has not kept up with the owner-occupied sector.

An area of concern for tenants is the uncertainty around the provisions of the 2003 Act for way-go compensation for improvements resulting from tree planting and diversification, and the possibility of dilapidation claims from landlords for loss of agricultural value.

For some leases, the granting of planning permission for a non agricultural purpose can allow the landlord to serve an incontestable notice to quit. Where a diversification requires planning permission, the possibility of a landlord attempting to resume as a result of planning permission is clearly a deterrent to tenants diversifying.
Clarity is required in the legislation to remove that risk, and to recognise planning permission as a non-physical tenant’s improvement.

Resumption, notices to quit, and the value of a tenancy
One of the positive outcomes of the 2003 Act was its effect, through Section 55, to strengthen the recognition that an agricultural lease is a property right with a value, which is now becoming an accepted fact by the industry. Where a tenant relinquishes his tenancy, he can expect compensation for the value of his interest in the lease.

However, there remain some loopholes in the legislation where a ruthless landlord can serve an incontestable notice to quit on the tenant, and the tenant is required to quit the holding with no compensation from the landlord for his lease (as is in the case of a notice to quit following the late payment of rent) or compensation that is so low that it cannot represent fair value to the tenant for the loss of his lease, livelihood and home (as is the case for resumption).

We have seen examples of both these situations in the last 12 months, where despite intervention for the Scottish Land Commission the outcomes for the tenants have not been fair.

Pre-emptive right to buy for secure tenants
The 2003 Act gave 1991 Act secure tenants the right to register with Registers of Scotland a pre-emptive right to buy their holding should the landlord decide to sell. The recent 2016 Act should remove the need to register the pre-emptive right (though the provision is yet to be commenced), but there remains ways in which a landlord can circumvent the tenant’s pre-emptive right, including the use of options to buy, ownership by a company, and the use of interposed leases.

Compensation for improvements, Schedule 5 of the 1991 Act, definition of an improvement
Schedule 5 contains a list of tenant’s improvements which may be eligible for compensation at way-go. Schedule 5 was last updated in 1948 and is in need of urgent review to include a range of modern farm improvements which were not envisaged 70 years ago, including non-physical improvements.

The Tenant Farming Commissioner has made recommendations for the updating of Schedule 5, including non-physical improvements such as planning permissions, consents, licenses, quotas etc. However, STFA have been informed by civil servants that the inclusion of non-physical improvements will not be possible due to the 1991 Act definition of an improvement, which they believe limits Schedule 5 to physical improvements.

The inability to include non-physical improvements as tenant’s improvements represents a set back for the sector, especially for tenants who are looking to make diversifications including forestry.

Compensation for game damage
The problem of game damage from commercial shooting and the associated intensive rearing of game birds is becoming increasingly common for farm tenants. The cause of the problem is increases in the number of game birds reared for commercial shoots, which is driven by economics and the need for increased bird numbers for shoots to remain
viable. STFA have many members who continue to suffer game damage but have not been successful in claiming compensation. The 2003 Act made some changes to the compensation process, but tenants continue to experience difficulties in claiming compensation for game damage.

**Jurisdiction of the Land Court**

The 2003 Act abolished the compulsory arbitration jurisdiction over disputes between landlord and tenant and instead confers jurisdiction on the Land Court. Thus, the Land Court became the primary forum for the resolution of tenancy disputes, and alternative dispute resolution is now only possible with the agreement of both parties.

At the time of the 2003 Act compulsory arbitrations had become slow and expensive processes with the parties in dispute spending ever increasing sums on solicitors, advocates and agents. Also, the panel of arbiters were seen by some as having a bias towards landlords given their obvious connections with landlords through the land agency firms many worked for. Not only was the Land Court seen as being an independent and fair solution to replace compulsory arbitration, but also as an ‘expert court’ could use their specialist knowledge to resolve disputes without the need for expensive professional legal representation, which was how the Land Court had operated decades earlier.

While the Land Court is still regarded as an independent and fair forum, if the Court is to serve its purpose then it should provide for a cost effective means of dispute resolution and one which appears a sensible option for parties who cannot resolve a dispute. In Scotland the threat of the Land Court is often used as a negotiating tactic by the party with the deepest pocket, and there are many tenants who feel they have been pressurised into accepting and unsatisfactory resolution simply to avoid the risk of referral to the Land Court.

Rent reviews are a common source of disputes in the tenanted sector and demonstrate the lack of cost effective resolution through the Land Court: Since 2003 only a handful of rent cases have been heard in the Land Court, and it is inconceivable that all the other thousands of rent reviews carried out have been settled amicably. Over the same period in England hundreds of farm rent reviews have been settled by arbitration at a fraction of the cost of a Land Court determination, typically a few thousand pounds of professional fees per arbitration, instead of the few hundred thousand pounds that a Land Court hearing has cost. If the Land Court was a practical and cost effective means of setting farm rents we would expect to see many more rent cases being heard by the Court.

STFA do not recommend a return to compulsory arbitration, but instead to review the Land Court’s process and how cases are managed in order to reduce professional fees.

STFA believe that the Land Court could provide a cost effective means of dispute resolution by reviewing its process and case management. In particular, consideration should be given to limiting the award of costs at the start of the hearing to ensure that costs are appropriate for the dispute which not only reduces the financial risks for the parties, but also focuses minds on ensuring that parties present evidence in an efficient manner. Also, Court time could be restricted to address points of law with questions of valuation referred to a panel of experts appointed by the Court.

Suggested amendments to Land Court procedure include:
• Joint referral to Court to arbitrate over quantum of rent – use of Court for expert determination.
• Unilateral referral – full statement of act case required before Land Court application accepted. Essential to move away from the current practice of submitting a skeletal statement of case to the Court before applying before a sist, in effect treating a Court referral as another step in the rent negotiation process. If industry agreed guidance is adhered to and correct steps followed a statement of case should be available in adequate form.
• Revival of Early Neutral Evaluation as suggested some years ago by Lord McGhie – a suggestion that a member of the Court could meet informally with parties to identify issues and suggest a remedy for the dispute.
• Court pre-hearing to identify issues and isolate disputes for legal debate if necessary.
• Preference to be given for written evidence and requirement for facts to be agreed with a time limit imposed on Court hearings.
• Supplementary or fresh evidence should not be introduced once the Land Court hearing has commenced except under exceptional circumstances.
• Each party to bear their own expenses unless proof of malpractice, or award of costs to be limited by the Land Court to be appropriate for the quantum of the dispute.

Housing standards on tenanted holdings
To date, no tenancy reforms have addressed the standard of housing under agricultural tenancies. A recent survey of housing in the tenanted sector by Scottish Government has suggested significant shortcomings in housing quality, and The Repairing Standard, as contained in the Housing (Scotland) Act 2006 and covering the legal and contractual obligations of private landlords to ensure that a property meets a minimum physical standard, does not apply to properties occupied by an agricultural tenant.

STFA believe that the poor quality of housing on holdings is a significant problem that needs to be flagged up and addressed by industry stakeholders.

Tenants to date have been reluctant to make improvements to houses due to uncertainty around compensation for those improvements at way-go. The updating of Schedule 5 (list of tenant’s improvements eligible for compensation) may give some encouragement to tenants to make improvements to housing.

The need for consolidation of tenancy legislation
Tenancy legislation is now spread over the three main Acts of 1991, 2003 and 2016, with the latter two often amending the 1991 Act provisions and other supporting legislation. The complexity of the drafted legislation is difficult for professional advisors to follow, let alone landlords and tenants.

Consolidation of the Acts to give a single agricultural tenancy act would provide clarity of the present statute, should highlight some of the problems within it and give an opportunity to address them.
Crofting Reform Act 2010

Small Landholders
Small Landholders, under the Small Landholders Act 1911, have been excluded from reforms to tenancy legislation, but were included in the Crofting Reform Act 2010. The Act makes provision for Small Landholders Acts holdings in newly designated areas of Arran, Bute, Greater and Little Cumbrae and Morayshire to be eligible for conversion to crofts, thus allowing these tenants to benefit from current crofting tenure rights including the absolute right to buy and assignment rights.

In practice the conversion process has proved difficult and easy for a landlord to resist. To date we do not know of any Small Landholders who have successfully converted to crofting status. Moreover, the crofting route will only apply to holdings in the newly designated areas. In considering the plight of the Small Landholders the Land Reform Review Group recommended that there should be major improvements in the position of these tenants and that they, like crofters, should have a statutory right to buy their holdings. This has always been the preferred option of small landholding tenants.

The difficulty of conversion to crofting status lies in the conditions which must be met before conversion to a croft can be considered, in particular that the tenant has paid the owner of the land compensation for the holding being constituted as a croft, either agreed or as assessed by the Scottish Land Court which has proved a lengthy and expensive process beyond the resources of a typical Small Landholder.

STFA believes that a change in the process is required, so that the compensation to the landlord becomes due not on the conversion to a croft, but at a later stage when the tenant, under crofting tenure, exercises the crofting tenure absolute right to buy.

Conclusion
STFA welcomes the REC Committee’s intention to carry out a post-legislative scrutiny of legislation which we consider should be a regular feature on the parliamentary process. Legislation, and its effects it has, evolve over time and its impact can be unpredictable and may not be felt until some time in the future. Agricultural Holdings legislation and agricultural practice in general is constantly undergoing change and the performance of the tenanted sector is affected by a number of influences, of which legislation is one.

Although the Agricultural Holdings Act has had a pivotal role in modernising the tenanted sector, its success has been variable with further reform needed in some areas, new thinking in others and areas where the legislators ran out of time. It is now an appropriate stage to examine the situation and forward plan for the next parliamentary session where we would suggest an Agricultural Holdings Consolidation Act should be contemplated to simplify the agricultural tenancy law whilst preserving the security of tenure which is now an integral part of our tenancy system.

Scottish Tenant Farmers Association
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