RURAL DEVELOPMENT COMMITTEE

Tuesday 28 January 2003
(*Afternoon*)

Session 1

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RURAL DEVELOPMENT COMMITTEE
4th Meeting 2003, Session 1

CONVENER

Alex Fergusson (South of Scotland) (Con)

DEPUTY CONVENER

*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

COMMITTEE MEMBERS

*Rhoda Grant (Highlands and Islands) (Lab)
*Richard Lochhead (North-East Scotland) (SNP)
*Mr Jamie McGrigor (Highlands and Islands) (Con)
*Mr Alasdair Morrison (Western Isles) (Lab)
John Farquhar Munro (Ross, Skye and Inverness West) (LD)
Irene Oldfather (Cunninghame South) (Lab)
*Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD)
*Elaine Smith (Coatbridge and Chryston) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE SUBSTITUTES

*Nora Radcliffe (Gordon) (LD)
*Mr John McAllion (Dundee East) (Lab)
Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)
John Scott (Ayr) (Con)

*attended

THE FOLLOWING ALSO ATTENDED:

Allan Wilson (Deputy Minister for Environment and Rural Development)

CLERK TO THE COMMITTEE

Tracey Hawe

SENIOR ASSISTANT CLERK

Mark Brough

ASSISTANT CLERK

Catherine Johnstone

LOCATION

Committee Room 2

Scottish Parliament

Rural Development Committee

Tuesday 28 January 2003

(*Afternoon*)

[THE DEPUTY CONVENER *opened the meeting at 14:02*]

Agricultural Holdings (Scotland) Bill: Stage 2

The Deputy Convener (Fergus Ewing): Good afternoon, ladies and gentlemen. I welcome committee members, witnesses and members of the public to today's meeting of the Rural Development Committee. I have received apologies from Alex Fergusson, who has a severe dose of flu and so has left the committee in my charge today. I have also received apologies from Irene Oldfather and John Farquhar Munro.

I welcome Nora Radcliffe as the committee substitute for John Farquhar Munro. Richard Lochhead will be joining us shortly.

We are continuing our stage 2 consideration of the Agricultural Holdings (Scotland) Bill. I welcome Allan Wilson, Deputy Minister for Environment and Rural Development, who will be addressing the bill from the Executive's perspective. I welcome also the Executive officials.

Members should have before them a copy of the bill as introduced, the third marshalled list of amendments, which was published yesterday, and the third list of groupings of amendments. Spares are available if any member does not have those documents.

Members are reminded that although the amendments have been grouped to facilitate debate, all amendments will be called from the marshalled list in strict order. Today's target is to complete consideration of part 7. I imagine that we will achieve that.

Section 59—Jurisdiction of the Land Court

The Deputy Convener: Amendment 66 is grouped with amendments 67, 70, 71 and 72.

The Deputy Minister for Environment and Rural Development (Allan Wilson): Amendments 66 and 70 clarify the jurisdiction of the Land Court under sections 59 and 61 of the bill. In particular, they make clear that the Land Court can hear and consider matters as well as determine on them. That is all very sensible and logical, as I am sure the committee will agree.

Executive amendments 67 and 72 build on the provisions in sections 60 and 63 that give a landlord and a tenant the right to have a dispute determined by arbitration—or another form of dispute resolution—instead of by the Land Court, provided that both the parties involved in the dispute agree. As members know, our aim is to make dispute resolution arrangements simpler, quicker and cheaper than they are at present. To ensure that delay is kept to a minimum in such proceedings, our policy intention is that disputes should not be transferred from arbitration to the court in the course of arbitration proceedings.

Part 7 assumes that the parties to a dispute will assess carefully the nature of the matter to be determined before they choose the forum in which it is to be determined. If the dispute centres on a practical issue, the parties might want to resolve the matter through arbitration, but if the issue at stake is a legal one, we would expect the parties to refer the matter to the Land Court. Either party may approach the Land Court without the consent of the other party.

If the parties agree to take a matter to arbitration but it turns out to require a determination on a matter of law, the parties should not have access to stated case, which means asking the Land Court for its findings on a legal question that arises during the arbitration. To allow such access might cause delay, which is why the matter will instead proceed directly to the issue of the arbiter's award. Thereafter, either party may appeal to the Land Court on a question of law within 28 days of the award under new section 61A(6) of the Agricultural Holdings (Scotland) Act 1991 in the case of 1991 act tenancies, or under section 63(6) of the bill in the case of tenancies under the bill.

Executive amendments 79 and 81 will give the Land Court more flexible powers of disposal in the case of such an appeal. The Land Court may either resolve the dispute or remit it to the arbiter with a direction as to the law.

The Deputy Convener: Did you say amendment 79?

Allan Wilson: Yes. I am talking about amendments 79 and 81.

To reinforce that policy, new section 61A(2)(a) of the 1991 act and section 63(2)(a) of the bill are intended to prevent the parties from transferring the matter to the Land Court once an agreement to go to arbitration has been reached. The amendments will help to ensure that, before the parties agree on how to resolve the matter, they understand the issues of dispute and whether, in terms of expertise or cost or both, arbitration or the Land Court is the more appropriate route to address the issues.

Amendment 67 will make it clear that the parties' freedom to agree their own procedure with the arbiter under new section 61A(4) of the 1991 act does not allow them to override the terms of section 61A(2)(a). Amendment 72 will make the equivalent adjustment to section 63 of the bill.

Section 61(5) of the bill preserves any specific Land Court jurisdictions under section 61 in relation to agricultural leases in the case of a conflict with other provisions in the bill. Amendment 71 will extend the scope of that preservation so that it is without prejudice to jurisdictions given to the Land Court under another enactment. That means that, should provision as to the Land Court's jurisdiction be made in future legislation, it will not restrict the powers that are given to the court by virtue of section 61, unless the provision specifically amends section 61.

All the amendments are technical, but I assure members that they are worth while.

I move amendment 66.

The Deputy Convener: Stewart Stevenson has indicated that he wishes to speak, but before I call him, I welcome John McAllion, who is again with us as a substitute member.

Stewart Stevenson (Banff and Buchan) (SNP): I am perfectly content with what the minister has said. I suspect that he will agree that the Scottish Land Court is an effective forum in which to resolve many of the issues that arise. I am conscious that in this and other recent bills, we have increased the remit and perhaps the work load of the Land Court. Will the minister take this opportunity to assure the committee that the additional responsibilities that are being given to the Land Court will not lead to unacceptable reductions in the excellent service that it provides?

Allan Wilson: The question is not dissimilar to a written question that the deputy convener lodged. I am pleased to answer Stewart Stevenson's question in the affirmative. My answer to the deputy convener is not yet in the public domain, but I can confirm that that is our intention.

The Deputy Convener: Thank you. My question was published in today's business bulletin so if I get an answer today, that will be a very welcome first and a happy precedent.

As no other member wishes to speak to the amendments in the group, does the minister want to say anything to wind up?

Allan Wilson: I do not think so. As I said, amendment 66 is a technical amendment. Its purpose is to speed up dispute resolution and to ensure that the appropriate channel for dispute resolution is adopted by the parties at an early stage, which will, in itself, assist in dispute resolution.

Amendment 66 agreed to.

The Deputy Convener: We will vote later on the other amendments in the first grouping.

Amendment 78 is grouped with amendment 80.

Rhoda Grant (Highlands and Islands) (Lab): Amendments 78 and 80 would allow the Land Court to order a tenant to withhold their rent until the owner fulfilled their obligations. Amendment 78 is very similar to amendment 61, which Richard Lochhead pressed to a vote last week. In his response to that amendment, the minister said that if a landowner did not fulfil their obligations, the Land Court had the power to grant a contempt of court order. We know that in many areas of Scotland estates and landowners can be companies, some of which are registered offshore. Therefore, it will be very difficult for the Land Court to pin down who is responsible, so that that person can be held in contempt of court if they do not follow a court order.

The amendments would give the court the power to allow tenants to withhold their rent until the obligations are fulfilled and would protect tenants against irritancy of their lease, if the Land Court should so order. In effect, the amendments would give tenants the powers that the minister spoke about last week, and the additional power to withhold rent if no other solution to their problems can be found.

I move amendment 78.

Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD): My comments today will be similar to those I made last week. Amendments 78 and 80 are unnecessary and wrong. The contractual arrangements between a landowner and tenant are subject to the normal remedies under the law. As the minister explained last week, the Land Court has perfectly adequate powers to deal with the situation.

It irritates me no end to hear about unscrupulous landlords, as we often do. I say to committee members that there are unscrupulous tenants—that is a fact of life. The bill tries to redress the balance between the landowner and the tenant to get the balance right. Amendment 78 seeks to drive a coach and horses through that: it is completely unnecessary and I hope that the committee rejects it.

Stewart Stevenson: I am minded to take a rather similar view. Perhaps Rhoda Grant, when she sums up, will give us her view on whether tenants already have the necessary powers to withhold rent. I will also be interested to hear the minister's view on the matter. I am advised that the Alexander v the Royal Hotel case indicates that the powers already exist.

There is another issue that interests me. In the event that a tenant withholds rent under the provisions of Rhoda Grant's amendments 78 and 80, the rent may or may not offset the loss that the tenant experiences due to the failure of the landlord to undertake the necessary works. It would not be sensible for the tenant to invest the rent in making the improvements, because there would be no way to get the money back at the end of the tenancy. I support amendments 78 and 80, but what happens if the provisions spring into action? In what way would it be possible to force the landlord to do the works that are necessary, other than by the loss of rent?

14:15

Nora Radcliffe (Gordon) (LD): I have come to this matter late, but it crosses my mind that if we give permission to tenants to withhold rent in this bill, we might expose them to penalties under other legislation. The ramifications might be wider than we are aware of, and we might place people in jeopardy by encouraging them to take a course of action that fits this bill, but which falls foul of other legislation.

Elaine Smith (Coatbridge and Chryston) (Lab): I want to clarify whether there will be an opportunity to come back with questions after we have heard from the minister, as Rhoda Grant will be summing up as amendments 78 and 80 are hers.

The Deputy Convener: They are Rhoda Grant's amendments, so she will sum up. Normally, I would take contributions from members at this stage, but I am empowered to take further contributions after the minister has commented, if he chooses to comment.

Elaine Smith: It is just that I would like to hear what the minister has to say about the amendments, but I might then have a question.

The Deputy Convener: You will certainly have an opportunity to contribute after the minister has made any comments. Before he does so, I will ask a question of my own, which relates primarily to amendment 78. Is the point that Rhoda Grant made last week relevant? Last week, she stated that the amendment that we were considering then—I believe that it was amendment 61, in the name of Richard Lochhead—would place in legislation a provision that already exists. Amendment 61 would have meant that a tenant would not have to go to court to withhold rent.

Am I right in saying that the effect of amendment 78 would be that the tenant would have to go to court before being entitled to withhold rent? If that is the case, would that affect in any way the existing law, as stated in the case of Alexander v the Royal Hotel, which, as far as I understand it, allows a tenant to withhold rent on the basis that there is no liability to pay rent in the circumstances as set out in that case? Does the member want to answer that question now or answer all the questions at the end?

Rhoda Grant: I am happy to answer now. Do you want me to answer that specific question or to answer some of the others?

The Deputy Convener: If you answer the points now, I am advised that you will get a chance at the end to wind up and deal with any other points that arise.

Rhoda Grant: Your question was: would the provision affect case law? As I understand it, it would not, because it is different from the case law. Amendment 78 would give the tenant protection. If they felt that their case might not be set in stone, as it would have to be if they were to use case law to withhold their rent, they could go to the Scottish Land Court. It could examine the problems and order the tenant to withhold their rent. That means that they would not have to take a decision to risk withholding their rent without the protection of the Land Court. That was perhaps the point that Nora Radcliffe was getting at. Tenants themselves would not withhold rent; the Land Court would order them to withhold their rent as part of a disposal.

Stewart Stevenson asked about repairs. I do not envisage that repairs would be paid for out of the rent that is withheld. The aim of amendments 78 and 80 is for the lack of income from the tenancy to push the landowner to do the work that is required.

I agree that provisions that allow tenants to withhold their rent without referral to the Land Court already exist in case law. However, if a tenant has any concern about the strength of their case, they would still be able to go to the Land Court to obtain an order, which would not put them in any danger of irritancy of their tenancy.

Mike Rumbles says that my amendments 78 and 80 are against the balance of the bill, but I do not agree. We all know that there are unscrupulous tenants as well as unscrupulous landowners, but the Land Court, in giving rulings, offers protection. Unscrupulous tenants could not abuse the situation to withhold their rent.

Mr Rumbles: Amendment 78 twice refers to a "claim". It would allow the Land Court to determine

"any claim by the tenant of a holding to which section 5 applies",

and

"whether as a consequence of that claim the tenant is entitled, notwithstanding any provision of the lease to the contrary, to withhold the rent until the landlord has either carried out that work or otherwise taken such action as is necessary to comply with the undertaking".

It seems that Rhoda Grant is investing one party to a dispute with a tremendous amount of power, which any person in a contractual agreement could use unscrupulously. The inclusion of the word "claim" twice in the amendment would open up the system to abuse in a tremendously bad way, and would have a bad effect on the industry.

Rhoda Grant: We should be clear that the power that we are discussing is a power for the Land Court, not for the tenant. The Land Court could order the tenant to withhold their rent; it would not be for the tenant to do that unilaterally.

Mr Rumbles: I return to my point: the use of the word "claim" in amendment 78 indicates that the Land Court would have to go down that route. The amendment refers to "any claim by the tenant", regardless of whether that claim is proven.

The Deputy Convener: Rhoda Grant may wish to respond again when she comes to wind up. I think that we have had a fair kick of the ball on that point.

Allan Wilson: We have listened with interest to the exchanges between committee members. I, too, in common with what I think the deputy convener was about to argue, believe that amendments 78 and 80 are unnecessary to tenants and potentially damaging to the effect of part 7. For those reasons, we cannot support them.

Members will recall that we debated similar amendments last week, which the committee voted to reject. At the heart of this issue are situations in which a landlord has not fulfilled his or her responsibility to maintain the quality of buildings and fixed equipment under section 5(2) of the 1991 act. What remedy can the tenant seek? The answer surely lies in the fact that the tenant will want to ensure that the landlord maintains the fixed equipment in satisfactory order as quickly as possible.

I do not think that Stewart Stevenson's question was answered. There appears to be a misunderstanding about the common-law right to withhold rent, to which the deputy convener referred and to which I will return later. The right to withhold payment of rent is not a right to avoid paying rent; it is a right to delay making payment until a requirement has been complied with. I assure Rhoda Grant that, as I explained to the committee last week, the bill provides the tenant with remedies to achieve precisely that result. We can take this opportunity to go into those remedies in detail. The Land Court has jurisdiction over such matters under the terms of the bill, under new section 60 of the 1991 act, which will be inserted by section 59 of the bill, and under section 61 of the bill.

I accept that there have been difficulties for tenants under the present system because, unless the landlord agrees to submit the matter to the court, the tenant has to obtain from an arbiter a ruling on whether the landlord is in breach before they can apply to the sheriff court for a decree of specific implement. That will no longer be the case. The tenant will be able to take the matter to the Land Court straight away, without the landlord's consent. He or she will therefore have access to the forum that can grant the remedy of implement more quickly and cheaply than before. The landlord will have to comply with such an order.

When we discussed the matter last week, I introduced the added issue of irritancy. I believe that our amendments have dealt with that question. However, the committee asked me to clarify the sanctions that would be available if a landlord should fail to comply with an order. Having reflected on the question, I am able to offer that further clarification and to reassure Rhoda Grant and other members that a number of very effective remedies are available.

As I said last week, the court may find the landlord who fails to comply with a court order in contempt of court and therefore subject to penalties that may be imposed under the Contempt of Court Act 1981. Obviously, the flouting of a court order is a serious matter in any court and there is no reason to suggest that the Land Court would treat such a case any less seriously. The sanction will be imposed by the court itself, not by the tenant, but the tenant can also take his or her own action. For example, he or she can apply to the court under section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, which provides for the enforcement of such decrees. In fact, under that provision, the court can impose a penalty of imprisonment or recall the decree and make an alternative order for payment of a specified sum or take other appropriate action.

As a result, if the tenant remains dissatisfied, or if the court does not proceed under the Contempt of Court Act 1981, considerable sanctions up to and including imprisonment exist. In response to Stewart Stevenson's question, I should point out that the very same provisions would apply to any awards against companies. If the landlord does not comply with an order, the threat of such proceedings is a more powerful weapon for tenants than the withholding of rent.

Moreover, subject to the general rules that apply to the availability of damages for breach of contract, the tenant might have a case for making an action for damages for loss suffered as a result of the landlord's failure to comply. Again, the new improved jurisdiction procedures provide the tenant with direct access to the Land Court, where such a remedy will be available more quickly and

more economically than it was previously. I accept that, in the past, tenants might have found it difficult or too expensive to pursue actions for damages through the arbitration system. I believe that amendments 78 and 80 are unnecessary because sanctions and very speedy remedies are available with reference to the Land Court and its jurisdiction.

As the deputy convener pointed out, it is inappropriate for an amendment of this type to be located in part 7. Part 7 sets out the powers of the Land Court in making a determination on disputes between landlords and tenants and assessing the rights and responsibilities of both as stated in the Agricultural Holdings (Scotland) Act 1991, elsewhere in the bill or under common law. Provisions setting out such rights and responsibilities should be located elsewhere in the bill, as indeed were Richard Lochhead's amendments on this issue last week.

Agreeing to such an amendment to part 7 could put into question the scope of the Land Court's jurisdiction by virtue of section 59 in general. One of the bill's primary purposes is to improve the parties' access to the Land Court's expertise on agricultural matters. The Land Court's jurisdiction has intentionally been drafted in very broad terms in order to catch all forms of dispute between landlord and tenant. There is no need to refer to such a narrow and particular type of dispute because, as the provision stands, the Land Court already has jurisdiction. Separately identifying something so specific in section 59 might cast doubts on the generality and breadth of that jurisdiction, which would be undesirable. We want to avoid the risk that the Land Court's jurisdiction might be unintentionally constrained in such a way, and I suspect that most tenants who might have the need to turn to the Land Court in the future would agree with us.

I was not going to address the point about freedom of contract but perhaps I should, now that it has been raised. The principle extends to all issues that the Parliament touches, not just to agriculture. We must recognise that the Parliament and the Executive have the responsibility to uphold the confidence of the general public that agreements into which they enter freely will be respected, unless there are strong and unavoidable reasons for not doing so. Obviously, where parties have entered freely into a contractual arrangement, a test of public interest would have to be applied. We are talking about situations in which the tenant has given up the common-law right to retain rent under the terms of the lease.

14:30

There have been times during the development of the bill when we have decided that the bill should override contractual terms if they are contrary. Before deciding that, we have employed and stood by the test of whether public interest would merit and require such action. We cannot see a public-interest justification for amendments that would strike at freely reached agreements for which adequate remedies are already available.

The bill's drafting already ensures that tenants will have other significant remedies of disposal, even if they have contracted out of their common-law right to withhold rent. The Land Court will be able to order the landlord to take action, and both court and tenant will have the means to enforce that action. Tenants will have improved access to the Land Court, and that will be the appropriate place in which to exercise appropriate remedies. For all those reasons, I ask Rhoda Grant to withdraw amendment 78.

The Deputy Convener: That was a long and no doubt helpful statement about several complicated factors. I am sure that members will want to clarify some points with the minister. I certainly have one or two points to make.

Elaine Smith: I was listening to what the minister said, and it made a lot of sense. However, I should like one point clarified.

Everyone wants a speedy resolution when there is a need to have repairs carried out; that is why I have sympathy with Rhoda Grant's amendment. The spirit of the amendment is to try to protect the interests of the tenant. Its purpose is obviously not to save the tenant money on rent, as the rent will have to be paid at some point regardless of whether it has been withheld. The minister said something about the Land Court being able to take other action as it considers appropriate. Will he clarify whether that could include ordering the withholding of rent?

I should also like to clarify something with the clerks.

The Deputy Convener: Let us hear the minister's response first.

Allan Wilson: That would depend on whether the parties involved had previously contracted out of the right to withhold rent. If they had, the Land Court would have to uphold any agreement. We have already referred to overriding contractual terms.

The Deputy Convener: When you refer to a right that has previously been contracted out of, are you referring to the contractual terms that would exist if a tenant had agreed under the terms of the lease not to have the right to withhold rent even if the landlord was in breach of his obligations under section 5 of the 1991 act? Were your remarks about freedom of contract designed to be relevant to such a provision?

Allan Wilson: Yes. That was the point that you raised.

The Deputy Convener: I am not sure that I made the point in quite the same way. I am sorry to have interrupted Elaine Smith; I wanted to clarify what the minister was saying in response.

Elaine Smith: I am still not sure that I am clear about the matter. That leads into my next question, which is for the clerks as it concerns procedure. If Rhoda Grant were to press amendment 78 and it were to fall, would that be the end of the matter? Or, were she to withdraw the amendment with the agreement of the committee, could it be pursued further if necessary?

The Deputy Convener: I am advised that if amendment 78 were withdrawn by agreement—of course, that may or may not occur—it might be difficult to find a place where it could be reintroduced at stage 2, but that members would be free to bring it back at stage 3. I gather that it is for the Presiding Officer to determine which amendments are selected at stage 3.

Mr Rumbles: Perhaps the clerks will correct me if I am wrong, but it is my understanding that if an amendment is withdrawn—not defeated—the Presiding Officer does not have a reason to exclude it at stage 3, but that if the amendment is defeated at stage 2, the Presiding Officer is unlikely to select it at stage 3.

The Deputy Convener: I am advised that the Presiding Officer does not usually give reasons for rejecting an amendment. I seem to recall that that has been stated in the chamber from time to time, not least in respect of my own rejected amendments. I hope that that deals with the point.

Does Elaine Smith have further questions?

Elaine Smith: No. That is fine, thanks.

Allan Wilson: A point that we have not covered is when a pre-existing contractual agreement between the parties not to withhold—

The Deputy Convener: I ask the minister to speak up. I am having difficulty hearing him.

Allan Wilson: I think that Elaine Smith was trying to establish whether the Land Court would have powers, within the range of remedies that it could order, to justify the withholding of rent as a legitimate remedy. The answer to that is yes. The Land Court would have that power within the range of remedies, under its acceptable jurisdictions, in the absence of the contractual agreement to which I referred. The answer to Elaine Smith's question is in two parts; it depends whether there is an agreement between the parties. We do not believe that the Land Court would have jurisdiction to override an agreement, but if there were no such agreement, the Land Court would have that power within its range of remedies.

Rhoda Grant: If a tenant goes to the Land Court to seek a remedy, the landowner is already in breach of the contract that they have signed up to because they are not upholding their responsibilities under the contract. Does that mean that the tenant is bound by that contract under the remedies of the Land Court?

Allan Wilson: It would be for the Land Court to determine whether there had been a breach; there is not a predetermined breach prior to the matter reaching the Land Court. That is partly why we argued last week that that would leave the tenant open to the prospective charge of irritancy of the lease. I fail to see why someone would seek such a jurisdiction. If someone went to the Land Court for remedy, it seems to me that the preferred remedy would be to order the landlord to abide by the terms of the contract as they had read it and to make the necessary investment. That would seem to me to be their first port of call.

Rhoda Grant: I do not disagree with that. The purpose of the amendment is to enable the tenant, when the landlord is not fulfilling their obligations, to go the Land Court to get a ruling; the amendment would add another tool to the box of the Land Court. You explained the landlord's obligations to fulfil the Land Court's rulings, which are good and have a lot of strength, but the problem is that, in some cases, land is owned by companies that are registered in places such as Liechtenstein. The Land Court—indeed, anyone in Scotland—does not know who owns the company, so how could the people in question be imprisoned if they were in breach of the Land Court's order? Will the minister look at that matter and consider remedies that would allow the Land Court to deal with such cases? I would be happy to withdraw amendment 78 if the minister could come up with remedies for the Land Court at stage 3.

Allan Wilson: I am not sure what we are being asked to look at, because the order would apply in the same way that other orders would apply in other circumstances.

I have nothing to add to that.

The Deputy Convener: Will you remind us of the legal position in relation to the problem of an absentee landlord who is based in a foreign jurisdiction? Frustrations are felt in cases involving such landlords, who are basically beyond the law. We thought that the days of those landlords were past. What are the usual legal provisions in such circumstances, and how do they provide a proper remedy for a community or a tenant farmer, for example?

Allan Wilson: I have already referred to the powers that exist under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, which provides for the enforcement of such decrees. Under those powers, the court could impose imprisonment, it could recall the decree and make an alternative order for payment of a specified sum, or it could take other action that it considered appropriate. Those awards could all be applied against companies or individuals. They are the traditional legal remedies that apply in other jurisdictions.

The Deputy Convener: Are you saying that the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 provides the court with the power to order the imprisonment of a director of a company that is based in Liechtenstein who is in default of his or her obligations? Do the powers under the 1940 act allow a director—as opposed to a natural person—to be imprisoned in such circumstances?

Allan Wilson: No. I suspect that you are probably aware that we are not saying that. We are saying that the same provisions would apply in such circumstances as would apply in relation to any foreign ownership of a commercial lease. In those circumstances, problems of default would be dealt with under other appropriate pieces of legislation.

The Deputy Convener: I think that that deals with the point that Rhoda Grant raised.

Stewart Stevenson: I want to pursue a couple of aspects. The minister has said that, if parties to a lease or to a contract of any kind have provided for breaches and remedies, it would not be appropriate for us to legislate to break such agreements that have been entered into freely. I accept that.

Reference has been made to leases in relation to which the tenant would not be permitted to withhold rent as a remedy for a breach on the part of a landlord. Do we know how many or what proportion of leases that have been made under the 1991 act have such provision? If the minister cannot answer that question today, it would be useful for his officials to make whatever inquiries are possible and to give us that information before stage 3, as it might inform members of the committee about further action.

The Deputy Convener: Would it be helpful for the minister to deal with one point at a time?

Stewart Stevenson: With your consent, it would be easier if I put both my points at once.

We are creating two new tenancies—the short limited duration tenancy and the limited duration tenancy. If we cannot deal with the issue in the way that has been proposed today, do the minister and his advisers feel that it would be legally proper for us to consider incorporating in the bill at stage 3 provisions that would prevent the removal of the remedy of rent withhold from the new LDTs and SLDTs? If so, would the Executive be minded to support or to lodge such an amendment?

14:45

Allan Wilson: No, we cannot give statistical information on the proportion of existing contractual arrangements in which the tenant has waived their right to withhold rent or agreed contractually that they have no such right. No, I cannot foresee us getting that information prior to stage 3—or at all. No, I do not envisage us lodging any such amendment to make such a right a condition of LDTs or SLDTs because we do not see any added value in so doing. The Land Court has a sufficient range of remedies to deal with the problem.

Stewart Stevenson: I cannot anticipate what Rhoda Grant might say, but I reserve the right to pursue the matter at a later date. That will not surprise the minister.

Mr John McAllion (Dundee East) (Lab): As a mere substitute member of the committee, I have been trying to understand the minister's objections to amendments 78 and 80. Would it be right to say that you are arguing that the Land Court cannot have the power to override any previously agreed legal contract between landlord and tenant? Are you saying that that would be outwith the powers of any land court?

Allan Wilson: Yes, unless we could demonstrate a public interest.

Mr McAllion: The Land Court could have that power only if it was in the public's interest?

Allan Wilson: Yes.

The Deputy Convener: Am I right in saying that some of the bill's provisions will have the effect of altering contractual arrangements that have been entered into previously, but that those provisions are justified because you feel that there is a public interest?

Allan Wilson: That is what I said.

The Deputy Convener: The difference is that you feel that giving the tenant an additional power of withholding rent—whether before or after a declarator of court—would not be in the public interest.

Allan Wilson: We have not been able to establish the public interest.

The Deputy Convener: What attempts have you made to establish the public interest, given that you do not know how many such contractual arrangements there are?

Allan Wilson: It is the same as the question whether the process would add value to what we are trying to secure—the preservation of the delicate balance between landlord and tenant when stimulating the tenanted sector. Considered from that perspective, the measures that are proposed by amendments 78 and 80 would not add value to the objective of stimulating the tenanted sector. Unless you can point to the public interest in the overriding of fully agreed contractual terms, which we have not been able to establish, that remains our position.

The Deputy Convener: I have a few questions following on from your statement about the remedies that will be available to the tenant when a landlord has failed to fulfil his obligations under section 5 of the 1991 act. In case those who are listening to the debate have forgotten what that is about, I remind them that section 5 is the essential condition that sets out the landlord's obligations in a secured tenancy. Those obligations, which are to ensure that there is adequate fixed equipment and buildings, go to the root of the contract.

We are not talking about something legalistic; we are talking about something that is essential to tenants. We all accept that many good landlords are fulfilling their obligations, so we do not want to create a false impression by probing the minister on these points.

The tenant has to raise an action under the 1940 act rather than go before the Land Court if he wants to pursue matters to the extent of obtaining a decree against the landlord for a sum of money in lieu of specific implementation of an ad factum praestandum obligation.

Allan Wilson: The tenant would be required to obtain the decree in the first instance and then, if the landlord failed to abide by the terms of that decree, the tenant would turn to a subsequent action to find a remedy.

The Deputy Convener: To get any action, the tenant must undergo two court actions. First, he must get a decree. Which court would that decree come from? Would it be the Scottish Land Court?

Allan Wilson: Yes.

The Deputy Convener: Once the tenant has the decree from the Scottish Land Court, he has to go back to court a second time to get a decree under the 1940 act. The tenant must have two court actions and two sets of legal fees, I presume. [*Interruption.*] I should have reminded everybody at the beginning of the meeting to switch off their mobile phones—mea culpa. A mobile would have to ring in the middle of my questions, but there we are. We learn something new every day.

Minister, you are saying that, to get a remedy under the 1940 act, the secure tenant must bring a second court action.

Allan Wilson: No, that is not what I said. We would expect the landowner—if he were the party at fault in contractual terms—to abide by the original decree of the Scottish Land Court.

The Deputy Convener: However, we are talking about a situation where he does not abide by the original decree.

Allan Wilson: That is no different from any other area of jurisdiction where a party to a judicial decision fails to abide by it. I explained what remedy the tenant would have in those circumstances. In that respect, the bill is not distinct from any other piece of legislation.

The Deputy Convener: There would be a clear difference, because if I am owed a sum of money, I go to court and get a decree for that money and that is it—one court action, one decree. However, you say that there must be two court decrees for a tenant to persuade a recalcitrant, non-responsive landowner to implement the decree.

Allan Wilson: That is not what I said.

The Deputy Convener: I think that we might have to agree to differ. Can you say how many orders there have been under section 1 of the 1940 act?

Allan Wilson: No.

The Deputy Convener: Has anyone been imprisoned under that provision?

Allan Wilson: Not in 1999 or in 2000.

The Deputy Convener: Right, we will not ask you about the previous 61 years.

Allan Wilson: Perhaps you are envisaging a deluge of imprisonments.

The Deputy Convener: Finally, you argued that amendment 78 could be damaging. Your argument was that, if the Scottish Land Court were given the power to determine the matter, as it would be if the amendment were passed, that might cast doubt on its general jurisdiction. Is that your argument in support of the conclusion that amendment 78 could be damaging?

Allan Wilson: That was the generality of the argument, but, as you know, there are other arguments against the measure, because there are better and more easily obtainable remedies than the one that is proposed. In general terms, as we have explained, the amendment would be undesirable for those reasons.

Rhoda Grant: I am not convinced that the Scottish Land Court has all the remedies that it requires, especially when it deals with offshore

companies that are made up of people about whom we have no knowledge—we might not even know where they live. However, I do not want to limit the jurisdiction of the Scottish Land Court, so it would be in my interest to withdraw the amendment. I reserve the right to come back at stage 3 with an amendment that would both meet the minister's concerns and give the protection that I seek to provide.

The Deputy Convener: The clerks have just drawn to my attention something that I should put to the committee before we determine what to do with amendment 78. I will quote from a note that the legislation team supplied to the Justice 2 Committee in December. It says:

"Any amendment that has been lodged at Stage 2 may be lodged again at Stage 3 … the Presiding Officer has the power to select amendments for debate".

The part that might be of particular relevance is:

"There is a widespread misconception that withdrawing an amendment at Stage 2 rather than pressing it to a division guarantees (or at least makes it much more likely) that the same amendment will be selected at Stage 3. However, this is not so."

I thought that I should draw that to members' attention. The note also states:

"In practice, amendments that are narrowly defeated on division are almost always selected, since the closeness of the division is a clear indication of a level of support for the amendment. Similarly, it may be that an amendment that is withdrawn at Stage 2 is not selected if it is clear from reading the debate on it that there was little support for it."

I was asked to read that guidance out. I hope that all is suddenly clear. Can you now say, Rhoda, whether you wish to press amendment 78 or to seek leave to withdraw it?

Rhoda Grant: You are telling me that I have second sight and that I can tell what the vote would be. If it were very close, I would be better to press the amendment, rather than to withdraw it, and hope to lose the vote by a close margin. I cannot second-guess the committee, however. I would be safer to withdraw the amendment and come back at stage 3.

Amendment 78, by agreement, withdrawn.

Section 59, as amended, agreed to.

Section 60—Arbitrations etc

Amendment 67 moved—[Allan Wilson]—and agreed to.

The Deputy Convener: Amendment 68 is grouped with amendments 69, 73 and 74.

Allan Wilson: I shall try to keep this short and sweet. Amendment 68 makes a minor adjustment to new section 61A(4) of the 1991 act as inserted by section 60 of the bill, so that an arbiter's "determination" becomes his or her "award". That provision relates to 1991 act tenancies.

Section 63(4) of the bill provides parallel provision for tenancies under the bill and amendment 73 makes the corresponding adjustment. The reference to an arbiter's "determination" in new section 61A(6) and section 63(6) are also changed to "award" by virtue of amendments 79 and 81.

Executive amendment 69 clarifies the scope of an arbiter's powers under new section 61A of the 1991 act, which applies to 1991 act tenancies and is inserted by section 60 of the bill. Amendment 74 makes equivalent provision in section 63 in relation to tenancies under the bill.

Under the bill, the Land Court will be able to consider and determine a dispute on the application of either landlord or tenant with or without the agreement of the other party. A landlord and tenant will be able to take a dispute covering most types of tenancy-related issue to an arbiter or, indeed, as we have just discussed, to an alternative form of dispute resolution such as mediation, provided that the parties agree to it.

Where a landlord and tenant agree to take a dispute to arbitration instead of to the Land Court, the rules that are to apply to arbiters will be the same as those that govern how the Land Court would determine the same matter. New section 61A(5) of the 1991 act and section 63(5) of the bill provide for that.

Concern has been expressed that the section goes further and might be read as conferring on an arbiter the powers of disposal available to the Land Court under section 68. That is not the intention, which is why the amendments clarify, for the avoidance of doubt, that only the Land Court's powers of consideration and determination extend to an arbiter.

I move amendment 68.

Amendment 68 agreed to.

Amendment 69 moved—[Allan Wilson]—and agreed to.

15:00

The Deputy Convener: Amendment 79 is grouped with amendments 81 and 82.

Allan Wilson: The bill introduces new section 61A(6) to the 1991 act, which provides for the Land Court to hear appeals against arbiters' awards on questions of law in respect of 1991 act tenancies. That simplifies and streamlines appeal procedures. Until now, appeals have been made either to the Land Court or to a sheriff court under stated case, or to the Court of Session.

Executive amendment 79 first clarifies that, on appeal, the Land Court can quash, confirm or vary an arbiter's award or any part of it. However,

amendment 79 will also extend the power of the Land Court so that it can return a case to the arbiter for final decision. In doing so, the Land Court can issue a direction on the law, which might relate to the legal issue at the heart of an appeal or to any other question of law that is relevant to the case. Similar appeal procedures apply to tenancies under the bill by virtue of section 63(6). Executive amendment 81 makes equivalent change to that provision.

Where a case is determined at first instance by the Land Court, the route of appeal is to the inner house of the Court of Session. That is governed by section 72 in relation to all tenancies under the 1991 act and the bill. Executive amendment 82 makes equivalent change to that section.

I move amendment 79.

Amendment 79 agreed to.

Section 60, as amended, agreed to.

Section 61—Resolution of disputes by the Land Court

Amendment 70 moved—[Allan Wilson]—and agreed to.

Amendment 80 not moved.

Amendment 71 moved—[Allan Wilson]—and agreed to.

Section 61, as amended, agreed to.

Section 62 agreed to.

Section 63—Arbitration: procedure etc

Amendments 72 to 74 and 81 moved—[Allan Wilson]—and agreed to.

Section 63, as amended, agreed to.

Sections 64 and 65 agreed to.

Section 66—Amendment of the Scottish Land Court Act 1993

The Deputy Convener: Amendment 75 is grouped with amendments 76 and 77.

Allan Wilson: Amendments 75 to 77 are modest technical amendments. Amendment 75 will add to the Scottish Land Court Act 1993 a reference to this legislation. Amendment 76 makes a technical correction to section 66(a)(i). Amendment 77 makes a necessary technical modification, as the bill refers to a line in the 1993 act in which the word "shall" appears twice.

I move amendment 75.

The Deputy Convener: In his formal submission and his oral evidence, Lord McGhie referred to some of the practical consequences that the bill and other legislation might have for the work load of the Land Court and/or the Lands Tribunal. The argument is that three or four pieces of legislation might place an additional burden on the Land Court and the Lands Tribunal. Lord McGhie is in charge of both and switches between them. He made the practical point that another judge on the Land Court is close to the age at which he will be compulsorily retired and the question arose of whether the upper age limit could be relaxed.

I have explored with the clerks whether that could be the subject of an amendment, and a written question about the matter should be in the business bulletin. The clerks have advised me that dealing with Lord McGhie's practical point might be outwith the bill's scope. Will the minister let us know today or when he has had an opportunity to think the matter over—if he needs such an opportunity—whether Lord McGhie's point can be taken account of before he faces the possibility of such additional work? The age limit smacks of ageism.

Allan Wilson: Those comments reflect a parliamentary question that you lodged and to which we are responding. We expect to respond to the question in the foreseeable future, but we do not envisage that response providing for the removal of the maximum age limit.

Mr Rumbles: Can I ask what on earth that has to do with amendments 75 to 77? Absolutely nothing.

The Deputy Convener: You can ask, but my ruling is that the matter is relevant.

Mr Rumbles: You asked the question. The situation is bizarre.

The Deputy Convener: The matter is relevant because it pursues an important piece of stage 1 evidence from Lord McGhie, who has no axe to grind. I am grateful for the minister's clarification.

Amendment 75 agreed to.

Amendments 76 and 77 moved—[Allan Wilson]—and agreed to.

Section 66, as amended, agreed to.

Section 67 agreed to.

Section 68—Power of the Land Court to grant remedies etc

The Deputy Convener: Amendment 83 is grouped with amendment 84.

Allan Wilson: I hope that amendments 83 and 84 will not prove controversial. I stress at the outset that the power of specific implement is covered in the generality of section 68(1). Section 68 sets out the remedy-making powers of the Land Court in its determination of a dispute

between landlord and tenant. That has exercised our minds already.

Our view is that the generality of the first part of section 68(1), which gives the court power to

"grant such remedy as it considers appropriate"

in relation to the parties' rights, already covers orders of specific implement, which are orders to one of the parties to take specific action to address the point of dispute. We just discussed that.

However, orders of specific implement are a similar remedy to orders ad factum praestandum—Latin scholars among the committee will know what that means—and mentioning one without the other later in that section might cause the question to be asked why specific implement was not referred to directly. Amendment 83, therefore, seeks to add a direct reference to specific implement for the avoidance of doubt.

Amendment 84 clarifies the scope of the new power given to the court under the bill to order caution. The power is intended to be used to guarantee the potential liability of one party to the other, which may subsequently be found due on account of continued occupation of the land during the process of litigation. The power may be necessary because the Land Court would not have the power to grant interim orders of rejection or removal pending the outcome of the case.

I move amendment 83.

Amendment 83 agreed to.

Amendment 84 moved—[Allan Wilson]—and agreed to.

Section 68, as amended, agreed to.

Sections 69 to 71 agreed to.

Section 72—Appeal from Land Court to Court of Session

The Deputy Convener: Amendment 85 is grouped with amendments 86 to 89 and 91 to 94.

Committee members will recall the evidence of Lord McGhie, which we heard on 12 November. It followed a fairly detailed statement of evidence that Lord McGhie submitted to the committee, in which he stated that prior to the publication of the bill, he had a considerable amount of input into the bill and offered advice to the Scottish Executive environment and rural affairs department on various aspects of the bill, some of which might be regarded as technical and some of which might be regarded as fairly important. When he came before the committee he informed us that he was there as chairman of the Scottish Land Court, and he is also president of the Lands Tribunal for Scotland, so he wears two fairly important hats. The two bodies work from the same building—one upstairs and one downstairs.

In his written submission, which is referred to at column 3762 of the *Official Report* of the committee's meeting on 12 November 2002, Lord McGhie made some fairly important comments about the impact of the bill on the Land Court and the Lands Tribunal. In particular, he pointed out that

"The expertise of the Court is in agricultural matters rather than valuation of land. The Lands Tribunal is the expert Tribunal regarded for nearly all other purposes as the proper body to determine issues of valuation. They have a recognised expertise in that field. Although the Land Court does, from time to time require to make assessments in relation to valuation evidence in crofting matters this is not their primary area of expertise … One specific reason for concern about the nomination of the Court is that it is the Lands Tribunal which is to be given the jurisdiction in relation to the pre-emptive right given to the community under the first part of the Land Reform (Scotland) Bill. Both types of pre-emptive right will be triggered at the same time and by the same event ie a proposal to sell all or part of an estate. If there are disputes on valuation it is entirely foreseeable that they will involve individual farm and community bodies at the same time."

To encapsulate, the chairman of the Land Court and the Lands Tribunal is basically saying that it is the Lands Tribunal that has the expertise to deal with issues of valuation, not the Land Court. The purpose of the amendments is to give effect to that opinion, which comes straight from the horse's mouth, so that the Lands Tribunal deals with points of valuation.

15:15

As well as making that suggestion, Lord McGhie set out what could be an anomaly. Under the Land Reform (Scotland) Bill, as passed, the valuation process for the community right to buy is to be carried out by the Lands Tribunal. However, a tenant farmer could arguably seek to exercise the right to buy or challenge a valuation in relation to the same land, in which case the issue would go the Land Court. I think that members would agree that it would be ridiculous if both the Lands Tribunal and the Land Court could provide a determination of the valuation of the same land for two different purposes at the same time. That seems to me to be impractical and to put the process in danger of being brought into disrepute.

The remaining amendments in the group deal with other technical matters that Lord McGhie raised. Not the least of those points is his clear argument that the imposition of the time limit in section 33(6) would reduce flexibility, which might result in delays, which are the very thing that we seek to avoid. I mention that issue, although we will not vote on amendment 90 today.

I move amendment 85.

Allan Wilson: I recognised the source of the amendments as Lord McGhie's evidence to the committee at stage 1. Many of the amendments pre-empt similar amendments that we intended to lodge for next week's meeting. As the deputy convener stated, Lord McGhie argued that jurisdiction for at least some of part 2—particularly appeals and valuation under section 33—should lie with the Lands Tribunal and not with the Land Court.

Jurisdiction for part 2 has been apportioned between the two bodies in a number of ways. Our preferred approach parallels that of the deputy convener. We propose that the Lands Tribunal should have responsibility for questions of valuation under sections 31 to 33 and Lord McGhie has confirmed that he would be satisfied with such an arrangement. Under that approach, matters relating to the registration process, the activation of the right-to-buy process and the appointment of a valuer under sections 23 to 30 would continue to rest with the Land Court. The convener's amendments parallel that structure and, as a result, I happily support amendments 88, 89, 91 and 92, which would give the Lands Tribunal jurisdiction in relation to valuation appeals under section 33.

I support amendment 87 in principle. However, the Executive is considering an amendment to section 29(2) to parallel amendments to the Land Reform (Scotland) Bill. In those circumstances, I hope that the deputy convener will agree not to move amendment 87, on the understanding that we will pursue the point next week in forthcoming amendments. We propose to give the two bodies a power to transmit cases from one to the other to deal with cases that raise valuation issues and the wider aspects of the right to buy. That power will assist the smooth and efficient management of cases that are before the two bodies and address the issue of confusion about which body is appropriate, to which Fergus Ewing referred.

I recognise amendment 93 from section 58(10) of the Land Reform (Scotland) Bill and I am happy to support the principle of an extension to ministers' power to make provision under the Lands Tribunal Act 1949 to include such rules as are necessary or expedient to allow the Lands Tribunal to conduct its business under the Agricultural Holdings (Scotland) Bill.

I should highlight a minor point on the wording of amendment 93: the reference to "ministers" should be to "Scottish ministers". As we still have to discuss section 33, perhaps the deputy convener might be prepared to withdraw his amendment on the understanding that we will lodge an alternative version for next week.

I am happy to support in principle amendment 94, which clarifies the definition of the Lands Tribunal. However, I suggest that it would be better located in part 2 and on that basis I ask that it not be moved.

That leaves amendments 85 and 86. Although the deputy convener is quite right to raise questions about the routes that should be available for appeal against a decision of the Lands Tribunal, we cannot support these amendments. First, they should not be located in part 7, which focuses on the jurisdiction of the Land Court and is therefore not the most suitable place to provide for appeal from the tribunal. We believe that part 2 would be the more appropriate place for such amendments.

Furthermore, as far as the substantive point is concerned, we have been considering which appeal routes, if any, should be available beyond the tribunal. As members will appreciate, that issue is not easy to resolve. On the one hand, one of the bill's general principles is that only a single right of appeal should be available, to cut down on the time and costs that are associated with dispute resolution. For example, if a party appealed against a decision made by an arbiter to the Land Court, neither party could appeal to the Court of Session against the Land Court's judgment. On the other hand, we must be clear about the implications if the bill provided that the only available appeal route was to the tribunal, which is what the amendments in question seek to do.

I should point out that the general routes of appeal will be available for valuations applying to the community right to buy under part 2 of the Land Reform (Scotland) Bill. That provision will allow parties to appeal to the tribunal against the valuer's decision; however, a right of appeal against the tribunal's verdict might then be available to the Court of Session on a point of law. As members might recall, that very point exercised the Justice 2 Committee during its deliberations on part 2 of the Land Reform (Scotland) Bill.

I assure the deputy convener that we are considering how we can resolve the matter and will deal with it in amendments that will be lodged in due course. Given that we will return to the issue next week, I hope that he will withdraw amendment 85 and not move amendments 86, 87, 93 and 94. I have already indicated my support in principle for amendments 87, 93 and 94 and am happy to reiterate my support for amendments 88, 89, 91 and 92 as writ.

The Deputy Convener: Given your remarks, I am minded to withdraw amendment 85 and not move the amendments that you indicated will be the subject of Executive action. Instead, I will simply move amendments 88, 89, 91 and 92 at the appropriate time.

Amendment 85, by agreement, withdrawn.

Amendment 82 moved—[Allan Wilson]—and agreed to.

Amendment 86 not moved.

Section 72, as amended, agreed to.

Sections 73 and 74 agreed to.

The Deputy Convener: That concludes day 3 consideration of the bill. We have already agreed that the target for day 4 will be the completion of stage 2. That means that we will deal with part 6, on the rights of certain persons where the tenant is a partnership; part 2, on the tenant's right to buy land; part 8, which concerns general provisions; the schedule; and the long title. An announcement to that effect will appear in tomorrow's business bulletin. Any further amendments must be lodged by 2 o'clock on Friday 31 January if they are to be included for consideration. If the committee does not complete stage 2 next week, there will have to be a day 5, which would have to start at the point at which we stop.

I thank the minister and his officials for their attendance.

Meeting closed at 15:24.

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