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Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 6 March 2013

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
9th Meeting 2013, Session 4

CONVENER

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

DEPUTY CONVENER

*Graeme Dey (Angus South) (SNP)

COMMITTEE MEMBERS

*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Claudia Beamish (South Scotland) (Lab)
*Nigel Don (Angus North and Mearns) (SNP)
*Alex Fergusson (Galloway and West Dumfries) (Con)
*Jim Hume (South Scotland) (LD)
*Richard Lyle (Central Scotland) (SNP)
*Angus MacDonald (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ian Duncan Millar (Rent Review Working Group)
Henry Graham (Rent Review Working Group)
John Mitchell (Rent Review Working Group)
John Ross (Rent Review Working Group)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 6

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 6 March 2013

[The Convener *opened the meeting at 10:13*]

Decision on Taking Business in Private

The Convener (Rob Gibson): Welcome to the Rural Affairs, Climate Change and Environment Committee's ninth meeting in 2013. Members and the public should turn off their mobile phones and BlackBerrys as leaving them in flight mode or on silent will affect the broadcasting system.

Under item 1, the committee must decide whether the consideration of its report on the draft second report on proposals and policies should be taken in private at future meetings. Do we agree to take that in private?

Members *indicated agreement.*

Subordinate Legislation

Water Environment (Drinking Water Protected Areas) (Scotland) Order 2013 (SSI 2013/29)

Wildlife and Countryside Act 1981 (Variation of Schedules A1 and 1A) (Scotland) Order 2013 (SSI 2013/31)

10:14

The Convener: Under item 2, the committee will consider two negative instruments, which are listed on the agenda. Members should note that no motions to annul have been lodged in relation to the orders, and no issues have been referred to us by the Subordinate Legislation Committee.

I refer members to the relevant paper. Does the committee agree that it does not wish to make any recommendations in relation to the orders?

Members *indicated agreement.*

Rent Review Working Group Report

10:15

The Convener: Item 3 is on the review of the agricultural rent review procedures in Scotland. The committee will take evidence on the rent review working group's report on the group's recommendations to the tenant farming forum and the Scottish Government. I apologise for the slight delay in starting, but I am sure that we will make up for it.

I welcome Henry Graham, who was the group's chair, and Ian Duncan Millar, John Mitchell and John Ross. Good morning, gentlemen. Does any of you have a few words to say before we come to questions? It is up to you.

Henry Graham (Rent Review Working Group): It would be good to start in that way. Committee members will all have received the background papers. The working group was set up in July last year, at the tenant farming forum's request, to look at how the rent review procedures were working. We were asked to consider specific questions, on which our report is based.

We thought that it would be sensible to ask all the parties concerned for their thoughts on rent reviews and how those are carried out. We got a good response—more than 100 replies—to the questions that we asked, which helped us to answer the questions that we were asked.

It was interesting to read the comments, which came from landlords, tenants and the different agents involved. A real mix of information came through. We found it interesting that, in a large number of rent reviews, there are no problems at all. If a tenant has been on a secure tenancy for some time, and a landlord is a resident factor, the rent reviews are often carried out amicably and professionally. That is perhaps not the way that is described so technically in some of the relevant acts, but the results seem sensible to both parties.

However, some replies highlighted areas of concern about how reviews have been carried out. In the main, those concerns applied to cases in which the resident factor was not carrying out the rent review and professional agents had been brought in to do so.

We tended to find that a number of rent reviews had not been carried out for some time, because of foot-and-mouth disease, weather conditions or BSE. That meant that, for some reviews that were carried out relatively recently, there had not been a prior review for some time in comparison with the normal pattern. What came through quite strongly in such cases was a lack of understanding of what should happen in a rent review if someone follows the system pretty technically.

First, we identified in our recommendations a need to improve understanding of the whole subject, and members will see that the report covers three major areas in that regard. One is a practitioners guide on how to carry out a rent review, which we feel is crucial and which is already in use south of the border. Another recommendation is that an explanatory note should be sent out when the rent review is intimated to the tenant, rather than just a notice to quit, to explain what will happen. We also highlighted the need for a layman's guide to summarise what is quite a complex subject.

The second area of our recommendations concerned improved knowledge of what is happening in other rent reviews. There is a crucial need for a centrally held and administered rent register that everyone would pay attention to with regard to secure and limited duration tenancies and which would give everyone more information on how rents had been identified for certain types of farms and in different regions.

The third area was improved dispute resolution. The reports that came back to us indicated that although the Scottish Land Court was held to be a trusted body its procedures took quite a long time and were costly. As a result, we looked at whether some dispute resolution mechanism could improve case management in the Land Court, streamline the system and make the process quicker and cheaper. In our report, we suggested some kind of short-form arbitration to speed up the arbitration process if the parties decide that they want to go down that route, and a form of expert determination, which is mainly used for rent reviews in commercial practice. We felt strongly that that area should be explored.

That is a summary of what we were asked to do and the evidence that we asked for. Our task was not to come up with anything completely out of the blue; instead, we examined the contents of the various reports that we received and summarised those comments in recommendations for improving the process. Some matters are still what I have referred to as a black art, and we have tried to get some science and methodology into them to make them less so and ensure that everyone can respond to them.

The Convener: Thank you very much for that introduction. Nigel Don will kick off with a general question.

Nigel Don (Angus North and Mearns) (SNP): Good morning, gentlemen. It is good to see you here; thank you for the introduction.

Mr Graham, your comments lead directly to my question. As a complete outsider to this subject, I went back to chapter 1 of the elementary economics book, which suggests that the value of something productive depends on how productive it is. I am therefore surprised to hear you suggest that a farm's productive capacity is not directly relevant to its rent; I would have thought the converse to be the case. Surely the productive capacity of a patch of land and the assets on it should be the very starting point for any rent. Will you explain why that is apparently not the case?

Henry Graham: Is it okay if we shift the questions around among us, convener?

The Convener: Indeed.

Henry Graham: Ian Duncan Millar might be best equipped to answer the question.

Ian Duncan Millar (Rent Review Working Group): You are quite right, Mr Don. The question revolves around the issue of what something is worth, which, as with all things, is reflected in the market and determined in the rent that farmers are prepared to pay for other pieces of land. We received evidence that, when farmers were offering rent for land in other capacities—through open-market auction or even privately—they were assessing what that land was worth to their business; in other words, they looked at what they could make off it and the profit that they could expect, and they determined from that the rent that they were prepared to pay. If market value is used, that inherently includes what an individual farm will be able to produce.

Another issue that came through clearly in the evidence is that, given the volatility of life in agriculture today, with commodity prices going up and down considerably from year to year, rents could go up and down considerably if a budgetary approach was followed, as you suggest. If the budgetary approach is taken, things vary considerably; if the market approach is taken, things are levelled out and the process is more even: if things are improving, the figures go upwards; if things are not improving, they go downwards or are steady.

If a budgetary approach is followed, a number of other issues will come up. For example, with a budgetary approach, the income that is divisible between landlord and tenant must first be worked out. How is that done? Budgets can be devised based on how the tenant runs the farm or, taking the model of the Agricultural Holdings Act 1986 in England, based on what a hypothetical tenant would do with that piece of land. That immediately opens up a discussion about the best way in which to run a holding. Other issues include environmental schemes and diversification, where a discussion remains to be had about how to work out what the budget should be based on.

When the end point has been reached, it is necessary to say how the split should be made. In England, the rule of thumb is that it is 50:50 between the landlord and the tenant, but nobody could explain to us why that should be or on what that formula was based. When we stepped back from that and asked whether it would achieve a better result than section 13 of the Agricultural Holdings (Scotland) Act 1991, we were not persuaded that it would, because the market itself determines what the rent payable by farmers for a piece of land will be, and that follows their ability to make the calculations and to make a profit from that enterprise. From the evidence that was led to us, our view was that taking a primarily budgetary approach as the first way of calculating rent would not improve the current model or framework.

We have guidance from the Court of Session that, once the calculation is done—however it is done—it is important to stand back at the end of the process and ask whether we have arrived at a sensible position and whether the rent that we have arrived at is a sensible answer. The budgetary approach will be taken in support of the market evidence and, if that is done, it will answer the very important final question whether we have arrived at a sensible answer.

Although what the unit will support is not in the primary framework, it is part of the process of arriving at what the market will pay for a piece of land.

Nigel Don: Indeed. We come to chapter 2 of the economics book, which says, "Never mind your costings, the market will sort it all out." I endorse, understand and respect that, but how does that work when there is no effective market? I am sticking with basic economics—other members will want to pursue the detail. If there is no effective market for an hereditary farm, surely productive capacity is the benchmark for comparing it reasonably with other farms that might be expected to have the same productive capacity. That is for experts to determine, not for me, but surely that provides a better comparison than a hypothetical market that does not exist.

Ian Duncan Millar: There is an interesting point behind your question. No new 1991 act secure tenancies are being offered on the market—that is a fair point to make. However, other forms of tenancy are being offered, from which we can make adjustments and calculate back. A number of 1991 act tenancies are being adjusted, agreed and reviewed regularly, and the point of the rent register to which Henry Graham referred is to make that information known. Although there is no open market similar to an auction for a cow, a heifer or whatever, the marketplace is still in

operation and the knowledge should be freely shared and made available between all parties. The market exists and is operating, and the knowledge should be made freely available to enable us to understand how the market is working.

Nigel Don: You accept that a perfect market requires information to be available. However, the implication of what you have just said—if I have heard you aright—is that the information is not available to both parties.

Ian Duncan Millar: It is fair to say that, at present, the information is not equally available to both parties.

10:30

Angus MacDonald (Falkirk East) (SNP): I will pick up on that final point, which I had intended to ask about later. The response from NFU Scotland concluded that further amendment to the law on rent reviews is required. The NFUS believes that the practitioners guide recommended by the group should be a mandatory code of practice and that the voluntary register with information on rents should be compulsory. What is the group's view on that, given the comments that have just been made about rents?

Henry Graham: John Ross will have a shot at that question.

John Ross (Rent Review Working Group): One issue that we had to consider was whether to recommend a change in the legislation, which a number of groups would have liked us to do. If we had done that, there would have been a considerable time before the changes were tested in court and became enshrined in law. The NFUS submission said that the code of practice should be given more teeth. My understanding is that the tenant farming forum is now busily engaged in drawing up the various parts of the recommendations that we made.

The wider picture is that we were not persuaded as a group that there was a need for significant change, but we felt that the way in which the current act operates needs greater transparency. As a tenant farmer, I have various landlords. Over the years, one of my landlords has operated in a very transparent way, which has meant that there has never been a significant problem in negotiating a rent under the current legislation.

Henry Graham: I will respond to the question whether the rent register should be mandatory. As I mentioned, we did not come up with our own thoughts; we very much recommended what we heard. From the tenants' side, there was no real interest when we asked whether organisations would be happy if all their members had to provide information for a rent register. That is why we said that the register should remain voluntary rather than be made mandatory. However, if it works, more and more people will want to contribute to it. In the information and evidence that we received, we did not hear that the audience wanted it to be mandatory.

Angus MacDonald: Clearly, the transparency that has been called for would be preferable. If the voluntary register works, that will be all well and good. I presume that, if the register does not work, one solution will be to make the provision of rent information mandatory.

Claudia Beamish (South Scotland) (Lab): Good morning to you all. I will go back briefly to the productive capacity of a holding, which the Scottish Tenant Farmers Association commented on. I understand that the STFA wants that to be in the legislation as a factor that must be taken into account by the Land Court. Will you comment on that from the perspective of your findings?

Henry Graham: I will start and then bring in John Ross and Ian Duncan Millar. On productive capacity, what is in place now involves looking at what the market is saying. If we can get the rent register really going well, there will be a lot more transparency and information to feed in about what is happening in secure tenancies as well as what is happening in the open market.

We all realise that the open market is not there, because no new secure tenancies are being made available. Therefore, if we can get information on to a rent register about the existing secure tenancies that are being rent reviewed, that will be a lot more useful information to use.

The existing legislation still contains the requirement to look at whether the rent is reasonable and fit for the unit. Therefore, in assessing whether it is reasonable, the budgetary process can be allowed to come in. If we look at the whole package, we see that the existing legislation allows all that to happen.

The existing legislation refers to economic conditions. That means that if I sell lambs this year, say, and the price has dropped by 25 per cent from last year and if the rent reviews are used as comparables, we will use past information, and then we can use the new information for economic circumstances. Productive capacity is quite different from economic conditions, so we are moving quite a long way.

I have been a banker for about 30 years and I have seen a lot of different budgets with productive capacity. That is just the output. In using only productive capacity, there is no consideration of any costs. If we look only at productive capacity, the information that is used is limited. That is why we had concerns about it. It is

just to do with the output; it has nothing to do with all the other costs in running the business.

Claudia Beamish: Can members of the review group shed any light on why the Scottish Tenant Farmers Association wanted that to be used as a factor? I am listening to what you are saying about inputs and everything.

Henry Graham: I think that the Scottish Tenant Farmers Association referred to what happened south of the border with tenancies under the 1986 act. Negotiations took place, and productive capacity and earning capacity were brought in at that time. As part of the negotiations with other parties then, the tenancies became not secure—they were for only three generations. That is quite a major change from what we have in Scotland. Perhaps the STFA referred to productive capacity because that is what is in the act south of the border.

As Ian Duncan Millar mentioned, we got information from both sides of the border, and we tended to find that the rent reviews for the 1986 act tenancies in England were higher than those in Scotland. We did not make a lot of noise about that, but perhaps that illustrates what happens if we use only an output part without looking at the costs. Over the years, I have found that farmers tend to underestimate costs. They like to think about what they will get for a fat beast or for grain in a year, but they forget a bit about what the total costs are. I have concerns about using just output and productive capacity in rent determinations.

Does Ian Duncan Millar want to follow that up?

Ian Duncan Millar: The slightly dangerous assumption that it is an either/or matter is inherent in the question—the issue is perhaps seen in that way in some cases. In the evidence that we received, we found that the whole picture of the rent of a farm has to be looked at. It is not just about the budgets or the comparables; it is about the whole package.

It has to be understood clearly that when comparables are used and adjusted properly—that is important—that inherently and in the background takes account of the capacity of farms. We use various factors in judging comparable holdings, one of which is the Macaulay soil type. The type of soils on a farm indicates the type of crops that can be grown. That information gives a handle on the capability of a holding.

Such comparisons are being made within the present framework. We were asked to consider whether the framework should be changed, but to do that we would have to come back with something that is better than the present framework. The way in which the present framework works is now pretty well understood. When people dive down into it and use it daily, they find that it takes account of all the issues about budgets and how farms are used. It also compares one farm with another, which means considering how the market is operating. It is important to get the whole picture.

Section 13 of the 1991 act, which is now clearly defined, provides a framework that is workable and that works. Another point that might be pertinent to raise now is that the evidence that we received pointed largely to the fact that the issue seems to be not the framework on which the rent is calculated but the process and discussions that lead to the point of having a negotiation on rent.

Claudia Beamish: To clarify, I said that productive capacity is a factor, but not the deciding factor.

Graeme Dey (Angus South) (SNP): I want to ask about what the Moonzie judgment says on section 13 of the 1991 act. The judgment noted that the inadequacy of the drafting of section 13(1) had already been acknowledged in another case. It went on to say that literal readings of sections 13(3) and 13(4) would produce an "absurd result", and it called the draftsmanship of the amended section "inept". Given that, what was the basis for your group concluding that section 13 does not need further amendment, when learned legal opinion disagrees completely?

John Mitchell (Rent Review Working Group): I can answer that.

The Convener: You are a brave man.

John Mitchell: Well, I will attempt to answer it.

Section 13 of the 1991 act was first adjusted by the Agricultural Holdings (Scotland) Act 2003. Unfortunately, when it was adjusted, there was an omission in that the requirement in section 13(1) to give notice one year before a rent review date was taken out. That was initially dealt with by a Land Court application. Albeit that the words no longer existed post the 2003 act adjustment, the Land Court said that, to make common sense of the legislation, things would proceed as if the words were there. That issue was subsequently corrected in further legislative reform to the 2003 act, under which the requirement for notice was written back in.

Any new legislation is potentially the subject of judicial interpretation. The member referred to section 13(4). Lord Gill certainly does not like the way in which the words in the statute now read, but he has given guidance on the way in which the words should be interpreted in a court of law. I believe that that clarification is now sufficient for any professional who advises a landlord or tenant in the sector to take matters forward under section 13.

In my opinion, the working group did not receive evidence that was focused on subsection (1) or (4) of section 13. Those subsections do not appear to be the ones in section 13 that are attracting concern in the sector. I think that the division of opinion in the sector is over whether the emphasis should be on market evidence, in as much as a market exists, or on budget, or whether it should be a mix of the two.

Graeme Dey: So you are saying that, in practice, it works.

John Mitchell: In practice, it works; yes.

10:45

The Convener: Let us consider another aspect. Why are there apparently such differences between the rents of 1991 act tenancies and the rents of LDTs and SLDTs?

John Ross: The attraction of a limited duration tenancy is that it is often an extension to an existing tenancy. Therefore, farmers are tempted to bid to secure the additional land—the additional tenancy—so that they have the benefits of scale. For example, if a farmer is a tenant of 400 acres and 100 acres become available on a limited duration tenancy, because of its proximity to the main holding and the desire to make better use of fixed equipment, he may well bid a greater price to secure that tenancy than he would be prepared to agree on a tenancy on a secure holding.

It is purely economics and goes back to Mr Don's point that farmers would make an assessment on whether they could bid at a higher level for a small part of land to give them economies of scale.

The Convener: In other words, the productive capacity of the tenancy in the short term is of a higher value.

John Ross: Yes, I think that that is a fair comment. My colleague Ian Duncan Millar may express this better than me, but marriage value and other situations would be taken into account in assessing a rent review for a 1991 act tenancy.

Ian Duncan Millar: A number of other points should be considered in answering your question, convener.

The requirements for an LDT or, particularly, an SLDT are quite different from those for a secure long-term 1991 act tenancy. An SLDT is for five years or a shorter period, and the requirements for the tenant to undertake maintenance or maintenance fertiliser application to the holding are fairly limited. Therefore, in practice, the operator of the land has less cost and is able to bid more to get it. The actual grain capability or sheep-growing capability of the land is probably not different, but, by nature of the duration of the lease, the costs attaching to it are.

Similarly, an LDT starts off with an assumption that the landlord must put the holding in proper order. On the assumption that that is done at the start of an LDT, there is a considerable period over which the farming of the holding would incur very much less cost for the incoming tenant to a new arrangement. The full costs of the maintenance of the fabric and the land itself—drainage, fencing, fertiliser and maintenance of buildings—are incurred only in the longer-term operation of a secure, long-term 1991 act tenancy.

In real, practical terms there are significant differences between the types of tenancy in addition to those to which John Ross referred in relation to farming one piece of land in association with another.

The Convener: Hereditary tenants may have been involved in the farm for generations, as the word "hereditary" suggests. During that time, the land values will have continued to soar, perhaps to levels that are unaffordable for tenants. However, many feel that they have played a strong role in maintaining and raising the value of the land for the landlord by their actions over a long period.

If that is the case, is the productive capacity in a secure tenancy not likely to be maintained whereas, in an SLDT or an LDT, it can be diminished because of the short duration of the tenancy and the limited amount of input that the farmer has to make? Obviously, grazing cattle might add to the productivity of the land. How do you compare those two approaches with regard to the productive capacity of the land?

Ian Duncan Millar: The answer to that lies in the basic understanding of what a lease or tenancy is. A tenancy on a piece of land is a business partnership between two parties to operate that piece of land. The landlord owns the land for his own particular reasons and purposes, but they do not include farming in an agricultural sense, so the landlord takes on a tenant as a partner to farm the land. The farmer, or the tenant, is interested in the business of agriculture and growing crops and livestock, and for that he needs a partner who has the land on which he can work.

The nature of that partnership defines the answer to your question. If it is a long-term partnership that lasts for, possibly, generations, the landlord will be looking at asset value in the long term. For that to happen, he must have a close and positive relationship with his tenant so the tenant is doing what he possibly can to look after the farm for his benefit but also for the landlord's longer-term benefit. In other words, it will be positive and good stewardship, if you want to use that term.

In a shorter-term arrangement, the partnership is not quite as close or as long so, by its nature, it is slightly different. When the landlord will not achieve the same level of uplift in capital value, he will look for a higher rent. We are talking about reflecting the relationship of that partnership between the two types of tenancy that are available.

The Convener: Given that the terms of the SLDT and LDT are so different from 1991 act tenancies, how can rents be adjusted to make them comparable?

Ian Duncan Millar: The adjustment of rent is a very precise process. It is important to understand the various things that make up the value of a rent, whether it be the type of soil, or the fixed equipment such as sheds, fences, drains and so on, that are on the farm. They must be compared one with another and, if adjustments are required, they must be made. The same would apply whether there were additional or fewer costs, longer-term responsibilities or shorter-term responsibilities.

It is not a question of picking figures out of the sky. It is a case of looking at the economics and taking factual cognisance of the differences between different holdings. The process is difficult and complicated; no one is trying to say otherwise. However, the point that our group came to is that the alternative of going back to take a purely budgetary approach would increase the complications and scope for argument and discussion in difficult cases, and the situation would become even more complicated than the present system, which we probably understand tolerably well.

Henry Graham: That is why we have stressed the importance of the practitioners guide. As Ian Duncan Millar mentioned, the problem is often the process. We have heard of the example of an agent who has been employed to carry out a rent review on a particular farm just using SLDTs as the reference point without anything else. That is why we have tried to stress the importance of getting the practitioners guide in place. It will give more information about what the adjustments are and, for example, how to adjust for the marriage value for 500 acres when, as John Ross described, another 100 acres becomes available.

There is also the issue of scarcity. Not a lot of land becomes available to let, which means that it has scarcity value, so people will pay a bit more for it. We should be able to calculate that. Earlier the point was raised about secure tenancies in which the tenants have made a lot of permanent improvements, and they have to be allowed for. That situation is better known and a process is in place already.

The practitioners guide is key to providing much of the actual science behind how the adjustments are made, and that is the bit that needs to be improved. Our report contains a lot of information and recommendations on which there is a need for a lot of action, because the industry is not going through a particularly great time just now following the two summer seasons or climates that we have had. Therefore, a rent review that was not done professionally would not be good. There is a need to take forward a lot of the recommendations in our report as quickly as possible. We all believe that that is crucial.

The Convener: I hear what you are saying, but we know that farmland values have risen on average by around 7 per cent during 2012. According to Knight Frank, as reported in Monday's edition of *The Press and Journal*, that means that

"agricultural land in Scotland has now almost tripled in value in 10 years".

Notwithstanding your arguments about there having been a bad season, we are trying to get to the issue whether in fact rents could go down as well as up to meet the conditions and, indeed, whether there can be any proper comparison between secure tenancies—there is said to be an open market, but there is not—and LDTs and SLDTs. Land values are about saleable value, which is about what people will pay to get into land because of its scarcity. At the same time, you are arguing that there is a way to measure what land is worth because it is competitive.

John Mitchell: First, let me attempt to come in on the issue of comparables.

We have the guidance in the Moonzie appeal decision that, in the opinion of the Court of Session, an SLDT and an LDT can be compared with a 1991 act tenancy. Now, the adjustments required to compare either an SLDT or an LDT with a 1991 act tenancy will be greater than the adjustments required to compare tenancies within the 1991 act group, but we should not lose sight of the fact that it has always been necessary to make adjustments to compare tenancies within the 1991 act group.

Variances within the 1991 act group may include whether the tenant is an individual or a limited partnership—a limited partnership gives a fixed life to a 1991 act tenancy. Also, before the 2003 act, a landlord could contract out of his obligation to replace or renew fixed equipment that was worn out, so there is another material difference in the lease terms within the group of tenancies that are referred to as 1991 act tenancies.

The final issue that my colleague Ian Duncan Millar touched on is how to value the rents on

those farms where the landlord has provided almost all the fixed equipment and those farms where the tenant has provided almost all the fixed equipment. Albeit that the farms may look the same, the rents would be very different depending on who has invested in them.

Over a number of years, a substantial body of case law has developed on how to deal with those variances within the group of 1991 act tenancies. In my personal view, that body of case law can be developed out to SLDTs and LDTs. We have not yet had the case law as to how the variances will be played out, but I anticipate that that will come.

The second issue that you raised was the rising farmland market. It might be Knight Frank's opinion that the value of farmland is rising, but my personal opinion is that it is not falling. It is maintaining its value, notwithstanding last year's difficult weather conditions. My reason for saying that is that an investor in land will not look at last year in isolation, but will look at anticipated climate patterns and trading conditions over a number of years. I suggest that that is the way in which agricultural tenants and landlords should approach the negotiation of rent—on the basis of an average period rather than a snapshot. To my mind, that creates a difficulty for the budgetary approach. I am not saying that it cannot be done, but there is another layer of complexity in how a budget is averaged over a period of years.

11:00

The Convener: Thank you. It is useful for us, as outsiders, to know how those complexities are played out, in your view. We have a lot of other questions and we will try to cover as many angles as we can, but I thank you for that series of comments.

Graeme Dey: Going back to section 13 of the 1991 act, I gather that the group, in deciding that that section did not need further amendment, took account of what were referred to as some "general observations", which included:

> "many rents are reviewed and agreement reached satisfactorily by negotiation".

What evidence is there to support that? As politicians, we like figures. What is out there that backs that up?

John Ross: We took evidence from land agents, factors and tenants. There are about 6,000 secured tenancies in Scotland, and the evidence that we got from land agents, factors and tenants was that the vast majority are settled satisfactorily. We were guarded about using the word "amicably", but the vast majority are agreed satisfactorily. Indeed, only a relatively small number finish up in dispute. I cannot give accurate figures, but there is anecdotal evidence that the vast majority are settled without the need to find other ways to resolve the problem.

Graeme Dey: Anecdotally, are we talking about 10 per cent, or 20 per cent, that are not settled in that way?

John Ross: I would say that it is even less than 10 per cent.

Ian Duncan Millar: It may help if I put some figures on that. Over the last period of time, one case has gone the full course in the Scottish Land Court—as we all know, that is the Moonzie case. It has been there twice. That is one case out of 6,000. I think that 23 or 24 cases—I forget the figure, but it is of that order—have gone to the Scottish Land Court and are currently sisted pending further discussion. We do not know how many of those will finally go the course.

A small case that is currently being heard in the court demonstrates why it is the process that is wrong rather than the formula. It is being heard in the Scottish Land Court as we speak—not today, but in the current period. I understand that the case involves a fairly small farm and that the difference between the two parties is less than £1,000. With all due respect to the two parties, they are probably not going to agree which day of the week it is, never mind how they are going to sort out the rent. I do not say that with any disrespect. When people go and employ lawyers for a difference of less than £1,000 over a three-year period, that is not sensible. We do not need to change the law for that. We need to change the process.

We have the Scottish Land Court, and there has to be a backstop to force people to come to an agreement, but at the end of the day virtually all cases are settled, bar only 20 out of 6,000. If we bear it in mind that we are looking at several repeats of a three-year cycle, that is not very many.

Henry Graham: The Bank of Scotland's annual survey of agriculture puts some percentages on the number of rent reviews that are carried out without any issues. The survey that was issued about three weeks ago shows that the negotiations went fine in a high percentage of cases.

Graeme Dey: In your opening remarks, you suggested that there was perhaps a disparity in the level of dispute that arises between situations in which there is almost an internal dispute, with a factor who is involved locally, and situations in which external factors or land agents are involved. From the evidence that you took, what is the level of that disparity?

Henry Graham: Where there is a resident factor, negotiations can work well because of the

relationship that has been built up over the years. When an outside agent comes in, there is no relationship. As I said, some processes that we have seen were not satisfactory with regard to the way in which the rent review is carried out.

At the moment, there is no literature for agents that sets out how a rent review should take place. That is available in England for tenancies under the 1986 act and the farm business tenancies. We have stressed the importance of getting that in place so that, if a dispute arises, both sides can consult the practitioners' guide and see what should happen. It would be helpful to have some timescales set out, so that, for example, discussions for rent that is due in November do not start in October. We need to get some timelines for what should happen in the 12 months before the rent is agreed.

John Ross: I have in front of me a letter that I received from one of my landlords. If you are not aware of the process, receiving such a letter would cause you concern. It says that a certain date is

"the next ensuring term at which the Trustees could terminate a tenancy by Notice to Quit".

If you are a tenant and that comes through your door, you think, "Goodness me. What's the next stage in the process?" However, this particular landlord also sent another letter, in the same envelope, that explains that I have been sent a statutory notice and sets out the steps that will be taken, in the expectation that the rent will be agreed satisfactorily. Such guidance is often missing when notices are served. That there should be such guidance is one of our strong recommendations. There should be a layman's guide to how the process should go from the receipt of that letter.

Jim Hume (South Scotland) (LD): I declare that I have a farming interest.

You recommended that there should not be any adjustment of or amendments to section 13 of the 1991 act. However, the judgment in the Moonzie case was critical of the drafting of that section. It said that a literal reading of subsections (3) and (4) of section 13 would produce "an absurd result" and it calls the draftsmanship of the amended section "inept". Those are quite strong words. Given all of that, what was the thinking behind the conclusion that the section required no further amendment?

John Mitchell: Although Lord Gill criticised the drafting of those subsections in his judgment, he explained how he saw them operating. I have not seen a lot of evidence that the sector has on-going concerns about the operation of the subsections, as interpreted by Lord Gill through the Moonzie judgment.

Jim Hume: On a slightly different point regarding the Moonzie case, the fact that the single farm payment is allocated on a historic base seemed to be important. With common agricultural policy reform, payments have moved from a historical base to an area base. How relevant do you think that that will be?

Ian Duncan Millar: The answer lies in the operation of the market. The farmers will work out the various incomes that they can gain from farming a piece of land, whether that be by production of stock crop or by the gaining of available subsidies. The point of the Moonzie judgment was that that already happens. The first decision of the court was overturned by the Court of Session, and that was the judgment that eventually held sway. It relied on the fact that the farmers were taking all those things into account in reaching decisions on what they can make from a piece of land.

That is why we take the view that the market, operating in its widest and best sense, will say what the appropriate rent for a piece of land is, taking into account subsidy, farming interest, diversification or anything else that could be gained from the land. If you take a purely budgetary approach, you then have to take account of each individual element in the way that you suggest and almost enshrine that in law, which becomes complicated beyond belief and would lead to far greater arguments than you would have from going through the fairly clinical process of comparing the various aspects that make up rent.

The Convener: Thank you. There are a few more points on the general provisions.

Claudia Beamish: I want to take us back to the comments about the 6,000 secure tenancies. You highlighted that only in a small minority of cases are there concerns about disputes. Did you find any evidence of a concern from tenant farmers that they could not go to the Scottish Land Court because of the costs? That has been highlighted to me. Was there evidence of other concerns about the relationship with the landlord that might prevent tenant farmers from pushing on the negotiations?

Henry Graham: You are absolutely right to say that there were concerns about the cost of the Scottish Land Court route. On the plus side, there was trust in the court, compared to what we had before with the arbitration process. With the move to the Scottish Land Court, there is a definite feeling of trust in that process.

The process can be lengthy as well as costly—sometimes, it is almost time for another rent review before the previous one has been sorted out. There is definitely a concern, and that is why

we spent some time with Scottish Land Court members and others, trying to find ways to streamline the process if a case lands in the court. In all our recommendations, we have tried to avoid cases getting to the Scottish Land Court, but the court is necessary as an end point. There are opportunities to smooth the Land Court process. Even those involved in the court itself have seen that; they, too, believe that there are opportunities to move forward. Perhaps John Mitchell wants to comment further.

John Mitchell: The cost and, potentially, the effect on the relationship between the parties are concerns for the tenant should a rent review be taken to the Scottish Land Court. They are also concerns for the landlord. It has to be a reasonably significant farm in Scotland for the parties to be £10,000 apart on the rent. Sadly, if you run a Moonzie-type application through the Land Court, irrespective of which side wins, the financial and professional costs and the emotional drain on both sides will far exceed the benefits.

11:15

We have engaged with the Land Court and it has stated its intention to operate as a court. It has given guidance on past decisions in that regard. That is a decision for the Land Court. When the 2003 act was introduced, some held the view that people would simply be required to approach the Land Court and ask it to tell them what the rent for a particular farm should be. The Land Court considered that proposal and stated that that was not how it would operate. However, there is still an appetite within the sector for that outcome to be delivered.

The group proposes that that outcome could be delivered through expert determination and the formation of a panel of experts. The parties would be required to agree what the farm was, the basis of its occupation and who had provided what fixed equipment. If that expert determination form of alternative dispute resolution was created, the parties would put their trust in the expert to tell them what, in his expert opinion, the rent should be. That would be a summary but cost-effective way of solving the rent dispute. The risk to both parties would be that if they did not like the result, they would have to live with it for three years until they were entitled to review the rent again.

Ian Duncan Millar: An important element is that, often, all that is in dispute is the quantum of rent. When that is the case, a reasonably straightforward arbitration or expert determination is simple—it is not a problem. We should not confuse such situations with the likes of the Moonzie case, which took the headlines and involved some complicated issues of law. The court's role in that situation was to resolve those issues prior to resolving the rent. We should bear it in mind that section 13 of the 1991 act is about resolving the quantum of rent on a farm; other questions of law are covered elsewhere in the act. Our brief was to consider the mechanism for the quantum of rent.

The Convener: Can the Land Court tell the parties that it will not have a recess to go into the issue in more detail because it wants a quick decision? In your discussions with the Land Court, did you express people's frustration that many will not go to the court because of the threatened cost? The Land Court should be doing more to ensure that the parties get the issues sorted out quickly.

Henry Graham: You are absolutely right. We mentioned that issue in meetings with different people from the Land Court—the point was definitely put to them, there is no doubt about that.

The Convener: What was the Land Court's response?

Henry Graham: Areas in which the Land Court would be happy to work with the Tenant Farmers Forum to move things forward are included in the report.

John Mitchell: There is a spectrum of outcomes. My opinion on dialogue with the Land Court is that it will be more proactive and more interventionist, with a view to speeding up the process of an application to fix an agricultural rent through the court. However, it will not take the step of moving to a completely expert court. By way of example, party X comes in and says, "The rent should be £10,000," and party Y says, "It should be £15,000," and the Land Court discards the evidence of both parties and states that the rent should be something else. In such cases, it is still mediating between the evidence of two competing parties.

The Convener: We will reflect on those remarks. Does Alex Fergusson have any points on arbitration?

Alex Fergusson (Galloway and West Dumfries) (Con): I am happy to raise them now.

I want to consider arbitration and what the report calls expert determination. The 2003 act allowed arbitration to continue. I think that I am right in saying that the then Scottish Executive spoke of doing away with it altogether and transferring all dispute resolution to the Land Court. However, from what we have heard this morning, it is probably a very good thing that that did not happen.

Henry Graham said in response to a question from Claudia Beamish that the plus point of the Land Court is that there is considerable trust in it—unlike, I think he said, the arbitration process. I am

therefore interested in why the group is recommending greater use of the arbitration process, given the highlighting of the fact that the tenants in particular do not trust that process.

Henry Graham: I will take that point first, but I am sure that Ian Duncan Millar will want to come in on it as well. What we recommend on the arbitration side of things is very much about the valuers and arbitrators who are in place, who have been moving forward with a short-form arbitration process that is different from what was there before. We have not spent a huge amount of time on that, because everyone we talked to was happy with that process and regarded it as a move forward.

Both sides can agree to arbitration but, as, as I said, the process is different from what existed before the Arbitration (Scotland) Act 2010. Expert determination is an alternative route to short-form arbitration, so we are not saying that either one or the other should happen: we would like both to be taken forward because we believe that there is room for both.

Ian Duncan Millar: I can give a bit of historical background. In the 1980s and 1990s, arbitration was run by what was known as the Secretary of State for Scotland's panel, and appointments were made to it on the basis that someone was a fine fellow and true, and had the respect of their peers. Unfortunately, that respect did not always carry with it the professional ability to carry out an arbitration properly and correctly. As a result, a number of arbitrations became as costly and as lengthy as the Moonzie case itself, which generated distrust in the system.

Since then, we have had the Arbitration (Scotland) Act 2010, which sets out clearly and properly how arbitrations can be carried out. In conjunction with that, the professional body—the Scottish Agricultural Arbiters and Valuers Association—has started the process of having professionally qualified arbitrators, with continuous professional development to match, so that they understand how to operate the current arbitration process within the confines of the 2010 act. The world has therefore changed and moved on, and the 2010 act, together with the panel of professionals who are qualified and undertake CPD, is a very different scenario from the previous one. It is because of that capability that we think that arbitration has a positive role to play in sorting out rents in today's climate.

Alex Fergusson: I am delighted to hear that, and thank you for that very clear explanation.

I have another point that I want to clarify. I think that I am right in saying that in your recommendations you suggest that there should be no appeal against the determination of an arbiter or expert determinator, if that is the correct term. That is unlike any of the Land Court's processes. Can you talk us through the rationale behind your suggestion?

Henry Graham: Again, Ian Duncan Millar will come in on this, and perhaps John Mitchell will as well. There is still a short-form arbitration appeal procedure, but there is no appeal procedure in the expert determination route, which means that there is an opportunity for it to be speedier and more efficient.

With arbitration and expert determination, there is the need for training and for experts and arbiters to meet regularly to exchange views on how rent reviews are being carried out and rent levels are being determined, so that there is a knowledge transfer between the experts and the arbiters in the same way as would happen with the rent register. They are slightly different animals—am I right, John?

John Mitchell: I will amplify that answer. Ian Duncan Millar's history is correct relative to the sweeping away of statutory arbitration in the 2003 act. The primary dispute resolution forum is the Land Court. After a dispute has arisen, the parties can only opt into an alternative dispute resolution mechanism by agreement. Neither party can force the other into ADR.

The Arbitration (Scotland) Act 2010, subject to minor legislative change to align it and the Agricultural Holdings (Scotland) Act 2003 because there are a couple of tensions between the two acts, gives a potential platform for settling rent disputes. I say a "potential" platform because the product needs to be developed, the market will require an opportunity to use it, and it will either succeed or fail.

Under the 2003 act, there is a statutory right of appeal from an arbiter's award to the Land Court that cannot be contracted out of. We received some evidence from parties in the sector that, if they went to an arbiter, they would want that decision to be final. Our recommendation, therefore, is to make the compulsory right of appeal an option, and the parties would then decide whether they wanted to retain the right of appeal or waive it.

Expert determination is much more commonplace in the commercial sector than it is in the agricultural sector. My simple view is that if you use an expert to settle some of the expensive rents in office blocks in close proximity to this building, it should be also possible for an expert to settle rents on a farm. The general rule is that an expert's decision is final and binding on the parties without a right of appeal, but the parties exercise judgment and are prepared to take that risk when they appoint an expert.

Henry Graham: That goes back to Claudia Beamish's point about the cost of the Land Court. Short-form arbitration or expert determination takes a lot of the cost out.

Alex Fergusson: I am very grateful for that explanation. I am not at all surprised that I was confused, but I am less so now.

John Mitchell mentioned that the Arbitration (Scotland) Act 2010—coupled with the Agricultural Holdings (Scotland) Act 2003, and subject to a bit of fine tuning—is a potential platform for dispute resolution. Are you proposing that as a desirable option and a potential way forward?

John Mitchell: I, personally, and the group support the development of arbitration and expert determination as alternatives. If the alternatives are created, the litmus test will be whether the sector buys into them. They will be alternatives that the sector must opt into, but the evidence that we received suggested that there is an appetite to try the alternatives if those products existed.

Jayne Baxter (Mid Scotland and Fife) (Lab): I note that one of the group's recommendations is to establish and maintain a voluntary rent register to improve access to information about comparable rents. It seems to me, as a layperson, that that can lead only to better informed decision making, which is a good thing for everybody concerned. However, why is such information so scarce? Who would develop and keep a register of comparable rents? Who would supply details of rents—the landlords or the tenants?

11:30

John Ross: On your first question, the farming community is relatively small. Not every farmer would want to disclose the rental agreed with his or her landlord in case other farmers said, "He's paying far too much," or, "How on earth did he manage to negotiate such a small rent?" It is a question of confidentiality. That is why we came to the view that it should not be compulsory for every rent to be recorded, at least at this stage; it should be voluntary.

On who would keep the register, it would be awfully convenient if the Scottish Government were to keep it. However, we are aware that that might not find favour with your good selves and others. The professional bodies would be capable of keeping the register. Going back to the previous point that expert determination could be a route, as my colleague Ian Duncan Millar has said, someone who wanted to be an expert would need to attend meetings and CPD. However, there could be a good informal understanding of how rents were going in different parts of the country.

Henry Graham: We did not want to be definite about where the rent register should be held. We wanted to keep that open because there might be within Government a fair rents office, or other places that might want to hold that information. That is why we were not saying definitely that it should be held in a certain place; we wanted there to be an opportunity to look at the most sensible place for it to be located.

Jayne Baxter: That is helpful. Thank you.

The Convener: Let us move on to other areas that we have not covered yet.

Richard Lyle (Central Scotland) (SNP): Good morning, gentlemen. I have looked at your qualifications, and they are excellent. I am interested in the point that John Mitchell made earlier about negotiation and valuation—I will speak about the "black art" shortly. How do you feel about the reaction to your group's report? A Scottish Land & Estates news release welcomed it, but the NFU Scotland has

"voiced its disappointment with the group's conclusion that no amendments were required"

to the law on rent reviews. The Scottish Tenant Farmers Association has criticised it, calling for

"a fair deal for tenants".

The STFA's news release goes on to state that the report

"has failed to recognise the dangers of an open market driven rent system which depends on what the Group's chairman referred to as the 'black art' of valuation".

I am sure that you regret saying those words. Is the valuation of a farm's rent a "black art"? I do not think that it is. What is the problem with using the open market as a benchmark for rents? The point made earlier is that most valuers look at what a farm could sell for, what comparable rents are and so on. In my experience, they sit down and agree. Where does the "black art" come in? Do you double the first number you thought of, halve it and then multiply it by X, Y or Z?

John Mitchell: If I kick off the answer to that question, maybe one of my valuation colleagues can come in behind me. The "black art" sits in the valuation notions of scarcity and marriage value. In the past it would have been sufficient for a chartered surveyor to say, when giving expert evidence, that in their opinion the open-market rent for an LDT type of farm is X. However, they would deduct 20 per cent from that open-market figure to adjust to a 1991 act tenancy. Therefore the comparable rent for a 1991 act tenancy farm is open-market value less 20 per cent. That is purely an illustrative example, so do not hold me to it.

The difficulty is that subjective opinion is no longer sufficient for the courts, which require a

repeatable methodology with regard to how the expert surveyor exercised that judgment. My opinion—and, I think, the opinion of the group—is that the repeatable methodology that one applies when making such an adjustment is simply not well documented at this stage and that if through the professional bodies we can document it in the way that professionals document these things and then put it in layman's language that the tenant farmer can read and understand, it will take a lot of tension out of the rent review process.

Valuation has been called a black art perhaps because you cannot pick the valuer's manual off the shelf and find out how it is done. If, in future, you were able to do so, the black art aspect—and, one would hope, some of the sector's current difficulties—would fall away.

Richard Lyle: Given the panel's wide range of experience, which I have witnessed this morning, are any of you disappointed with the reaction to your report?

John Ross: Although my colleagues might wish to say otherwise, my view is that we were disappointed but not entirely surprised. Various bodies expressed strong views about the exercise before we had even started it; in particular, NFU Scotland, whose membership includes landlords and tenants, has to steer a fairly neutral course to satisfy the expectations of its fairly wide and diverse membership.

Graeme Dey: I have a small supplementary question. It would appear from my colleague Richard Lyle's line of questioning that the tenants—by which I mean the STFA and the NFUS's tenanted element—are unhappy with you. Do you accept that the tenanted sector might well be the issue here?

John Ross: We have to recognise that there are 6,000 tenant farmers.

The Convener: By which you mean hereditary tenant farmers.

John Ross: Indeed. I note, however, that the STFA has 600 or 700 members. Although it is a relatively vocal organisation and although I think that it is good to have a diverse range of opinion, its view should not be taken as the view of all tenant farmers. Instead, it is the view of a group that is raising specific issues.

Ian Duncan Millar: In response to Mr Lyle's comments, I must point out that when we received evidence we tried to analyse and evaluate it. In their evidence, the STFA and, indeed, the NFU team said that they wanted the productive capacity of the holding to be the basis for evaluating rent and we evaluated the proposal on the assumption that it had been suggested because they felt that it would benefit their members.

However, even with that assumption, we still had to challenge in our minds the meaning of that evidence in real terms. Following the process through, we looked at farms under hereditary tenancies on either side of the border—to the south under the 1986 act, which contains the formulation in question, and to the north under the 2003 act that we have been discussing—and found that on balance rents south of the border were marginally higher. If we were to take the Moonzie case, which is very much in the public domain, and—regardless of whether we felt it to be right or wrong—apply the budgetary formula that the Scottish Land Court applied in its first decision, we would find that in three years the rent of that particular holding would increase by a factor of three. I do not think that it would be sensible to put in place a new formula for calculating rent that gives such extreme hikes and downs in the value of rent. To us, it would seem more sensible to have a steadier progression, albeit that the rent tends to follow rather than lead the economic conditions of any particular sector. That would seem to be a more sensible way for the market to evaluate what is going on.

We looked carefully at and evaluated what the STFA and others said to us and we concluded that if we had followed what they said to us and presented that set of proposed changes to the committee and others, it would not have had the effect that they were looking for.

Henry Graham: I would like to follow that up. We were asked to look at what is a fairly complex subject. None of us has any axe to grind. We tried to be as professional as possible in looking at and analysing what we were provided with so that we could offer the committee and the TFF what we believed was a reasoned judgment. We also made some recommendations that still require a fair amount of work. That is why I keep stressing that there is work to be done on them and that it is important that that happens.

The Convener: Claudia Beamish wants to come in—on those points, I hope, and not to steal anyone else's questions.

Claudia Beamish: I want to ask Henry Graham about the guide for practitioners, which he has already touched on and which, from the discussions that we have had, seems to be emerging as quite fundamental to the process of ensuring a consistent methodology. I have seen some suggestions that it might also be important for ensuring geographical consistency. Who would put forward the guide for practitioners? How would it be developed? Who would be responsible for it?

Henry Graham: We have put forward our recommendations to the TFF and the Scottish Government as requested. We can recommend only what we believe is important. It is important

that the various members of the TFF believe that that is the right way to go. There has been consensus on most of the things that we have suggested anyway. As you mentioned, the practitioners guide is key to a lot of the rest of what we are talking about. Given that the TFF and the Scottish Government believe that it is important, I believe that the professional bodies will take it forward.

Ian Duncan Millar: There is a precedent for how the issue might be handled. South of the border, the Central Association of Agricultural Valuers has a thick booklet that covers precisely the points that we are discussing, so a template already exists. If that were adapted to take account of Scottish conditions and Scots law, a practitioners guide could be developed reasonably easily and quickly.

The Convener: As you will understand, we have heard about voluntary codes that stretch to hundreds of pages in other contexts. When a voluntary code is of such length, it is extremely difficult to get it applied without some statutory underpinning. I can understand where Claudia Beamish is coming from. It might be unsuitable for people to have to think about that, but we know that voluntary codes do not work.

Ian Duncan Millar: At the moment, if an agent is asked to review a rent on behalf of his client, who is the landlord, and goes to see a tenant farmer and he and the farmer have a conversation round kitchen table, there is nothing by which the tenant farmer can judge what is being said to him.

If either party was aware of what was in the code and the person across the table was perhaps trying to pull a fast one or conduct things in a different way, they could place the code on the table and say, “You’re not following that.”

11:45

In most cases, that should bring the conversation back on to the agenda. If it did not, the same problem would exist whether it was a statutory code or a voluntary code: how does somebody start reporting procedures against the person with whom they are not happy and put the matter right? Do they go back to his professional association, the Royal Institution of Chartered Surveyors, Scottish Land & Estates or the STFA?

Those issues and questions would not necessarily be resolved by having a statutory code or a voluntary code.

The Convener: Well, if it were a statutory code, it would have to have a means of resolution or it would not be worth the paper on which it was printed.

Claudia Beamish: I have a specific and different question that may not fit with the context of the review; I apologise if it does not. The matter is sub judice, but do you have any comment in the context of the review of the Salvesen v Riddell judgment, which, as you know, the Scottish Government is appealing?

John Ross: No, none at all.

Henry Graham: I return to the earlier point about a code, which is quite important. We believed that, if we could suggest a code that the industry felt that it could support, such an industry-wide voluntary code would be far better than our bringing in sticks to make it happen. It is exactly the same with the rent register. We were trying to make sure that the industry in total wanted those things to happen.

Nigel Don: I think that it was mentioned earlier that some of the rent reviews have been delayed. I get the impression that the current process and, possibly, what you suggest for the future is, to some extent, biased towards the landlord. I do not want to use that term in too pejorative a way. It is simply that, if economic circumstances are not good and seem to be getting worse, the landlord can simply delay the review so that the rent does not fall. He can carry on with the current rent until it turns out to be convenient to him to have the review.

Am I overplaying the case or is that fair?

John Mitchell: In my opinion you are overplaying the case. In agricultural tenancies—specifically, 1991 act tenancies—there is a statutory three-year review cycle and either party, landlord or tenant, can serve the notice to review the rent. If the economic situation is such that rents are declining, the landlord may choose to do nothing, but the tenant could pre-empt that by serving a notice to review the rent. In those circumstances, the tenant would be seeking a downward adjustment.

Nigel Don: Would it be fair to say that history suggests that some tenants might be reluctant to do that for personal relationship reasons?

John Ross: We had evidence from one landlord that they had agreed a reduction in rent because they felt that the rental had been set at a level that meant that the farmer was unlikely to be able to sustain his operations. The landlord had decided to reduce the rent so that the tenant could continue to operate satisfactorily.

Nigel Don: I find that encouraging, but the world as we see it from here divides into the large majority who try to do reasonable, sensible things and the small minority who take advantage of their position and for whom we must legislate. We are

always dealing with the obstructive minority because most people will look after themselves.

I come back to the basic point that, if a tenant feels that they are disadvantaged, they might not want to press the opportunity to have a rent review. Does that happen? If it does, what might we do to better the situation?

Ian Duncan Millar: Taking our report as a whole, we have looked at the way in which the process works and made some good recommendations on dispute resolution. When the dispute resolution process is simpler, easier and cheaper, and therefore more open for anyone to use, tenants can easily take more advantage of it.

There will probably be some situations in which tenants feel awkward in serving notice on their landlords; I accept that. However, we also need to be aware of the history that has seen agricultural inflation, by which I mean the inflated value of agricultural inputs and outputs, moving ahead quite steadily since the mid-1980s. During that period, there has been a rise in most of the values associated with agriculture.

If we were to enter a period in which those values went the other way, a simpler, easier and more effective dispute resolution process would mean that there would be absolutely no reason why the tenants could not say that, as the market was moving in a different direction, rents would need to be reviewed and adjusted downwards instead of upwards.

Nigel Don: That reinforces what I have heard as a central argument. This is all about process, and we need to keep it simple before we can make progress.

Ian Duncan Millar: Absolutely.

The Convener: Alex Fergusson has a question.

Alex Fergusson: I simply want to put on the record the fact that I am not one who believes that the statutory route is necessarily the right way to go. The simple reason is that, as soon as something is made compulsory through legislation, the lawyers go out of their way to find a way around it. That is sometimes as true in agricultural rental holdings legislation as it is in any other. However, I can see that it might have to be used as a backstop.

I have a general point to put to the witnesses. We have all been pretty polite this morning about some of the stuff that has been seen in the press and some of the stories that we have heard. Some of it has not made for happy reading for anyone on either side of the argument. We have been talking about landlords and tenants, but I have always believed that there is a third partner in the equation, which is the land that is being farmed and the good of that land, because it is not a short-term commodity; it has to be considered in the long term. I can understand why some of the unpleasantness that has been in the press recently is there. Do you believe that your recommendations, if they were carried through, would significantly reduce the level of unpleasantness? I am sure that the answer to that is yes, because we are talking about dispute resolution. Is the trend towards what are in effect short-term rental agreements good for the land that is being farmed?

John Ross: We genuinely believe that our recommendations for greater transparency and better understanding of how the act operates, along with a code of conduct that will see land agents, factors, and tenants operating correctly, will see the small number of disputes diminish. I would be disappointed if that was not the case. The TFF is pressing ahead with implementing those particular parts of our recommendations, so I hope that the press reports of difficulties between landlords and tenants will diminish. They will never disappear, but they should diminish.

You raised the wider issue of short-duration and limited-duration tenancies. It is a major commitment for an owner of land to let that land in perpetuity, because one never knows when land will have to be sold or retrieved. The benefit of short-duration tenancies is that the landlord is required to put the fixed equipment into good order and make sure that it is suitable for how the land is being farmed. I am therefore not persuaded that such tenancies are detrimental to the long-term viability of the land because they would give landlord and tenant the option to review whether the business arrangement continues.

In the context of the world food situation and the desire that land must be used to produce food, it will always be the case that the land is likely to be tenanted and farmed effectively, even if that is on a shorter duration tenancy. Certainly, such tenancies are significantly better than the mechanism that was used to circumvent security of tenure through partnership arrangements. However, that issue was outwith the remit of our group.

Alex Fergusson: I am quite surprised that the convener allowed the question, because it was completely outwith the remit, but I am grateful for the answer because the issue is quite important.

The Convener: I alluded to that at the beginning when I asked about the productive value of land. The issue will also be important when we meet the stakeholders in a fortnight's time.

We need to cover one or two other points. Graeme Dey wants to ask about hotspots.

Graeme Dey: Gentlemen, from the evidence that you received and your own clearly extensive knowledge of the sector, can you tell me whether there are particular areas of the country where rent reviews tend to be contentious? If so, where are those areas?

Henry Graham: I will have a first shot at the contentious question. As I said right at the start, the information that we received suggested that, rather than being geographical, the issue was more about whether a resident factor was in place and whether good relationships had been established over a period. There were some examples in which, even though there was a resident factor, a rent review had not taken place for a number of years and the relationship had waned a bit. The rent review is what tends to bring the landlord, tenant and factor together. Therefore, rather than being geographical, the issue is more whether the relationship is strong, or poor and weak for some reason—that might be due not to a dispute but to time. I think that the issue is the relationship, rather than the geography.

Graeme Dey: Do you not accept the STFA's description of hotspots in Scotland where this is an issue?

Henry Graham: There might be hotspots because of what I have described.

The Convener: Might tenants on islands such as Bute and Islay see themselves in a geographical sense that fits into this discussion about hotspots?

Henry Graham: Again, those are situations in which a professional agent has probably been brought in, in which case the relationship that I mentioned is not nearly as strong as it is in a situation in which there is a resident factor. It comes back to that relationship. It may be that landlords and tenants in remoter areas have a more distant relationship than in areas in which the factor is living among the tenants.

The Convener: I understand that, but people who live on islands often tend to be as indigenous as some of the stock that they breed. That is one of the reasons why the hot-spots thing could be geographical. People move in and out, but there is still a core of people who are islanders and who see themselves as being under particular pressures because of that.

Ian Duncan Millar: Perhaps I can answer that in terms of the evidence that was led to us. Clearly, personal relationships are important. I do not think that island tenants see themselves differently from tenants in other parts of the country; I think that personal relationships are the key difference. As Henry Graham has pointed out, some island estates have parachuted in external agents to negotiate the rent. That has immediately put considerable tensions on the interpersonal relationships during that process. In some cases, it is fair to say that the evidence that we received was that the conduct of those discussions did not follow any textbook that has ever been or would be written.

That is why we suggested that there be a standard format and that at the outset of the discussion all the facts concerning the case of a particular farm and its rent be put on the table to diminish the areas of difference, if you like, so that people can start by agreeing what the benefit is, what the farm is and what the terms of the lease or post-lease agreement are, and the conversation on the rent can go on from there. That is preferable to the facts coming out piecemeal and the parties playing games with each other; although that happens, it simply does not work.

12:00

Henry Graham: I will give an example of that. We had evidence from Islay, I think, of a rent review in which the comparable farm was an arable farm in the Borders. That is an example of the process being wrong and it being wrongly carried out.

John Ross: We have heard of circumstances in which the process was that the tenant got the one-year notice of the rent review by letter, but nothing happened until two weeks before the date when a notice to quit could have been handed over. That situation puts the tenant under enormous pressure to agree whatever rent the agent wishes to take. Our code of practice and layman's guide should address that issue.

The Convener: Do you want to follow up on that point, Angus?

Angus MacDonald: Yes. I will pick up on points that were touched on earlier. My question has two parts. What are the panel's views on the STFA's call for a code of practice for conducting rent reviews and for there to be a complaints procedure?

Picking up on the point about outside agents, what are your views on how the RICS operates? Would you say that the RICS code of practice is fit for purpose? I ask that because I believe that the current code of practice weighs a ton, and assurances were given to this committee that it would be made into a more manageable document. However, that does not seem to have happened, at least as far as the committee is aware. I am therefore interested in hearing your views on the RICS code of practice and on the STFA's call for a code of practice and a complaints procedure.

Ian Duncan Millar: The RICS code of practice does not of itself cover the process of rent review; it covers the conduct of RICS members in their dealings with clients and the people with whom they do business. We suggested in our report that there be a clear guide for all parties to follow on the process of reviewing a farm rent, which is a slightly different issue.

Angus MacDonald: Have you suggested a timescale for having that in place?

Ian Duncan Millar: Yes, but there are two timescales, one of which is the timescale for the review process. However, as Henry Graham said, work needs to be done urgently to get the code of conduct into working practice. We are already into the time period for the detailed discussions on reviews to be done in May, and very soon we will be into the period for detailed discussions to be done in November. We suggest that the discussions should open in earnest at least six months before the review date. If that is to be in process before the November reviews are due to be carried out, we need some fairly urgent action. I think that the TFF is aware of our concerns on the matter.

Angus MacDonald: That is good to hear. What are your views on the complaints procedure?

Ian Duncan Millar: Clearly, there has to be a way of addressing complaints. At the moment, it would be a complicated process to do that through the RICS or any other professional body. We should be clear that it is not just about complaints being addressed to one side or the other, because there are as many difficult landlords as difficult tenants, and there are as many difficult agents in the middle. So, whatever complaints process we have, it should be applied equally to all.

The situation is quite difficult at the moment. For example, a complaint against a RICS agent can be taken to their professional body. However, what would be the effect of taking a complaint to the STFA that a tenant was being unreasonable if they were not a member of that organisation? The same point applies to taking complaints to Scottish Land & Estates. In that regard, there are issues to be sorted out for a complaints procedure. However, given the evidence led to us, our view is that if there was a written methodology for going through the process of rent review, then more parties, if not all, would follow that in an organised and sensible fashion, which would be to everybody's advantage.

The Convener: Thank you very much for all that, which has given us plenty of food for thought. I thank you, gentlemen, for indulging us with some of the experiences that you have had in trying to reach your proposals. We may, on reflection, come back to you with further questions, but your evidence will be helpful when we speak to stakeholders, as I mentioned earlier. I thank you for being able to be here as witnesses.

I close the public part of the meeting.

12:06

Meeting continued in private until 12:48.

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