

TENANT FARMING FORUM

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STATUTORY PROVISIONS GOVERNING RENT REVIEW IN AGRICULTURAL TENANCY HOLDINGS: HISTORY AND DEVELOPMENT

INTRODUCTION

This paper has been prepared on behalf of the RICS Delegation to TFF, at the Chairman's suggestion, following discussion at the Forum's meeting on 7 December 2009, prompted by criticism of the rent review regime and practice by STFA, published in the national and farming press.

It is purely a "position paper", as an attempt to set out objectively the current situation and statutory provisions affecting the subject matter.

ORIGINS

The Agricultural Holdings (Scotland) Act 1923 provided for arbitration as to rent where written demand had been served, and introduced the now familiar disregards of tenants' improvements and dilapidations¹ but was silent on other considerations which might affect the determination. These references are only brought in under the wider heading of "compensation for disturbance" at termination.

Further detailing awaited consolidation of the existing laws under the Agricultural Holdings (Scotland) Act 1949 essentially perpetuating the same provision, but with more details and disregards.

Indeed Connell² remarks that "prior to 1948, variation of rent by arbitration was an incident of the procedure in connection with compensation for disturbance".

The 1949 Act gave an Arbiter wide discretion on his approach. Apart from certain factors he was directed to ignore, the Arbiter was merely to determine "what rent should be payable in respect of the holding." He could allow (for example) for the "sitting tenant" factor, or the tenant's personal circumstances.³

¹ S.12(5)(a) and (b)

² Fourth Edition, 1951 at p.129

³ Gill, First Edition 1982

This was to be qualified under the Agriculture Act 1958⁴ which introduced what became known as the “market value” rule. The system became one of comparative valuation, whereby rent was assessed by reference to evidence of other lettings in the open market.

Due to the increased security of tenure afforded by the 1949 Act, the number of open market lettings dwindled. Rents obtained were increasingly distorted by scarcity, and which, when applied in evidence, produced reviewed rents which many considered unrealistically high.

THE 1983 ACT

This problem was addressed in the Agricultural Holdings (Amendment) (Scotland) Act 1983 which introduced discount for “scarcity of lets or ... other factors”.⁵ It enabled arbiters to make allowance for “the current economic conditions in the relevant sector of agriculture”; also, the permissible review interval was reduced from five years to three.⁶ These variations reflected the increasing speed and frequency of changes affecting the agricultural economy.

THE 2003 ACT

The formula was further amended and modernised under the Agricultural Holdings (Scotland) Act 2003.⁷ It re-addressed the changes introduced in the 1983 Act, simplifying them to some extent. It provided for the treatment of non-agricultural and diversification uses.

THE STATUTORY FORMULA

Appendix I shows the full text of the statutory provisions now constituting the rent review formula, being a facsimile of S.13 of the 1991 Act, showing the deletions and additions (in bold type) of the 2003 Act.

INTERPRETATION

At the moment of writing, there have been no decided cases from the Land Court in implementation of the formula as it now stands.

As a separate innovation, the 1983 Act⁸ introduced an open right of appeal (to the Land Court) against rental arbitration awards, and in respect of any question of law or fact (including the amount of the award). There followed throughout the 1980’s a series of cases which, in varying degree, dissected and interpreted the provisions of interest within the context of their own circumstances.

Whilst the law has moved on, changes introduced by the 2003 Act are not so radical or extensive as to invalidate the lessons and guidance to be gleaned from these cases. They are commended to those with an interest in the subject, and are listed in Appendix 2. All

⁴ S.2

⁵ S.2(b)

⁶ S.2(d)

⁷ S.63

⁸ S.5

of the standard texts on the subject (*Agnew; Connell, Gill*, and now also *Notley*)⁹ provide at least limited comment and guidance on the valuation aspects.

Some useful guidance is to be found also in “*A Practical Guide to Rent Review of Agricultural Holdings in Scotland*” by *Fraser Barraclough* (W Green/Sweet & Maxwell 2002). There are more limited treatments of farm rent valuation in “*The Valuation of Rural Property*” by *P A B Prag* (Packard Publishing Ltd, 1998) and “*Agricultural Valuations*” by *R G Williams* (Estates Gazette). However, only the first relates entirely to

Scottish Law and practice, and all three pre-date the introduction of our most up to date legislation.

In any event, no work of reference alone can be more than a starting point in the rent assessment and negotiation process. The task is one which requires diligent application of skill, training and experience, none of which is obtainable from written works alone.

**TOM DONALD
FENWICK, KILMARNOCK
JANUARY 2010**

- Appendix 1 Statutory provisions governing rent review of agricultural holdings in Scotland: S.13 of the Agricultural Holdings (Scotland) Act 1991 as amended by the Agricultural Holdings (Scotland) Act 2003.
- Appendix 2 In the Scottish Land Court: Rental Arbitration Appeal cases under the Agricultural Holdings (Amendment) (Scotland) Act 1983, S.5.
- Appendix 3 Text sources and further reading.

⁹ See reading list

c.55

Agricultural Holdings (Scotland) Act 1991

as amended by

Agricultural Holdings (Scotland) Act 2003 (asp 11)
*Part 5 – Miscellaneous amendments to the 1991 Act**Variation of rent*

Variation of rent.

13. – (1) Subject to subsection (8) below, the landlord or the tenant of an agricultural holding may, whether the tenancy was created before or after the commencement of this Act, by notice in writing served on the other party, demand a reference to arbitration of the question what rent should be payable in respect of the holding as from the next day after the date of the notice on which the tenancy could have been terminated by notice to quit (or notice of intention to quit) given on that date, and the matter shall be referred accordingly.

(2) On a reference under subsection (1) above, the arbiter shall determine, in accordance with subsections (3) to ~~(7)~~ (7A) below the rent properly payable in respect of the holding as from the “next day” mentioned in subsection (1) above.

(3) For the purposes of this section the rent properly payable in respect of a holding shall normally be the rent at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing landlord to a willing tenant, ~~there being disregarded (in addition to the matters referred to in subsection (5) below any effect on rent of the fact that the tenant is in occupation of the holding.~~

disregarding -

(a) any effect on rent of the fact that the tenant is in occupation of the holding; and

(b) any distortion in rent due to a scarcity of lets,

~~(4) Where the evidence available to the arbiter is in his opinion insufficient to enable him to determine the rent properly payable or he is of the view that the open market for rents of comparable subjects in the surrounding area is distorted by scarcity of lets or by other factors, the rent properly payable for the purposes of this section shall be the rent which he would expect to be paid, in a market which was not affected by such distortion, having particular regard to the following~~

~~(a) information about open market rents of comparable subjects outside the surrounding area;~~

~~(b) the entire range of offers made as regards any lease of subjects~~

~~which are comparable after regard is had to the terms of that lease.~~

~~(c) sitting tenants' rents fixed by agreement for subjects in the surrounding area which are comparable after regard is had to any element attributable to goodwill between landlord and tenant or to similar considerations; and~~

~~(d) the current economic conditions in the relevant section of agriculture~~

(4) For the purposes of determining the rent payable under subsection (3) above, the Land Court shall have regard to the following -

(a) information about rents of other agricultural holdings (including when fixed) and any factors affecting those rents (or any of them) except any distortion due to a scarcity of lets; and

(b) the current economic conditions in the relevant sector of agriculture.

(5) The Arbiter shall not take into account any increase in the rental value of the holding which is due to improvements -

(a) so far as-

- (i) they have been executed wholly or partly at the expense of the tenant (whether or not that expense has been or will be reimbursed by a grant out of moneys provided by Parliament) without equivalent allowance or benefit having been made or given by the landlord in consideration of their execution; and**
- (ii) they have not been executed under an obligation imposed on the tenant by the terms of his lease;**

(b) which have been executed by the landlord, in so far as the landlord has received or will receive grants out of moneys provided by Parliament in respect of the execution thereof,

nor fix the rent at a higher amount that would have been properly payable if those improvements had not been so executed.

(6) The continuous adoption by the tenant of a standard of farming or a system of farming more beneficial to the holding than the standard or system required by the lease or, in so far as no system of farming is so required, than the system of farming normally practised on comparable holdings in the district, shall be deemed, for the purposes of subsection (5) above, to be an improvement executed at his expense.

(7) The arbiter shall not fix the rent at a lower amount by reason of:

(a) any dilapidation or deterioration of, or damage to, fixed equipment or land caused or permitted by the tenant, or

(b) any reduction in the rental value of the holding resulting from-

(i) the use of the land or part of the land, or changes to the

land for a purpose that is not an agricultural purpose; or

(ii) the carrying out of conservation activities on the land; and

(7A) The Land Court shall take into account any increase in the rental value of the holding resulting from the use of the land for a purpose that is not an agricultural purpose.

(8) Subject to subsection (9) below, a reference to arbitration under subsection (1) above shall not be demanded in circumstances which are such that any increase or reduction of rent made in consequence thereof would take effect as from a date earlier than the expiry of 3 years from the latest in time of the following-

(a) the commencement of the tenancy;

(b) the date as from which there took effect a previous variation of rent (under this section or otherwise);

(c) the date as from which there took effect a previous direction under this section that the rent should continue unchanged.

(9) There shall be disregarded for the purposes of subsection (8) above-

(a) a variation of rent under section 14 of this Act;

(b) an increase of rent under section 15(1) of this Act;

(c) a reduction of rent under section 31 of this Act.

Appendix 2

Scottish Land Court Rental Arbitration Appeal Cases Under Agricultural Holdings (Amendment) (Scotland) Act 1983, S.5

1	Aberdeen Endowments Trust v. Will (“Craigiehill”)	RN66 SLC	1985
2	Earl of Seafield v. Stewart (“Knowes”)	RN70 SLC	1985
3	Dunbar v. Anderson (“Caithness”)	RN 115-130 SLC	1985
4	Buccleuch Estates Ltd. and Kennedy (“The Knowe”)	RN55 SLC	1986
5	McGill v. Bury Management (“North Lissens”)	RN293 SLC	1986
6.	Arneil v. Strathclyde R.C. (“Blairpark”)	RN294 SLC	1986
7	Mackenzie v. Bocardo SA (“Tain”)	RN299 SLC	1986
8	NCB v. Wilson (“Lumphinnans”)	RN7 SLC	1987
9	Shand v. Christies Trs. (“Cairniehillock”)	RN78 SLC	1987
10	British Alcan Aluminium Co Ltd and Shaw (“Inverlair”)	RN171 SLC	1987

Text Sources and Further Reading

Agricultural Law in Scotland by Sir Crispin Agnew of Lochnaw Bt, QC (Butterworths/LSS 1996)

Connel on the Agricultural Holdings (Scotland) Act by Donald G Rennie WS and Sir Crispin Agnew of Lochnaw Bt, QC (now Seventh Edition; T & T Clark, 1996)

The Law of Agricultural Holdings in Scotland by the Hon Lord Gill (Third Edition; W Green/Sweet & Maxwell, 1997)

Scottish Agricultural Law Handbook by Somerled M Notley WS (Avizandum, 2009)

A Practical Guide to Rent Review of Agricultural Holdings in Scotland by Fraser Barraclough (W Green/Sweet & Maxwell, 2002)

The Valuation of Rural Property by P A B Prag (Packard Publishing Limited, 1998)

Agricultural Valuations by R G Williams (Estates Gazette)