

## Written submission from Somerled Notley

### Development of Agricultural Tenants' Rights Since 1948

As a solicitor with many years' involvement in agricultural law and the author of the most recent book on the subject, I have been watching closely the progress of the Land Reform Bill and in particular Part 10 of the Bill. I read with great interest Rob Gibson's recent article in Common Space on the subject of the Bill in which he maintains that there has been a shrinking of agricultural tenants' rights since 1948; this is an interesting contention which follows upon similar comments by Mike Russell and which I think is worthy of some detailed analysis. In this regard, I have been fortunate in having practical experience of working with all the legislation to which I refer below.

1948 was indeed a year of great note for agricultural tenants as it saw the passing into law of the Agriculture (Scotland) Act which introduced full security of tenure for agricultural tenants and offered the prospect of potentially perpetual tenancies passing down the generations. This Act was a reaction by the Labour Government of the time to concerns over the shortcomings in food production exposed by the Second World War and the Act was a central element of the strategy to address this through encouraging investment in more efficient and productive farming at a time when the industry was also a major rural employer. It is fair to say that until 2003, the 1948 Act represented a high point for protection of the interests of agricultural tenants.

Between 1948 and 2003, there were various amending measures passed into law which were generally aimed at achieving a sustainable balance between the interests of agricultural landlords and tenants. The Agricultural Holdings (Scotland) Act 1949 re-enacted the 1948 Act along with surviving provisions from earlier agricultural holdings legislation and was therefore no more than a consolidating Act. The main amending legislation was:

1. The Agriculture Act 1958 which (a) enabled a landlord to give a successor to a deceased tenant an incontestable notice to quit, (b) transferred some quasi-judicial functions from the Secretary of State to the Scottish Land Court (most notably the granting of consent to operation of notices to quit where consent was required) and (c) made clear that rent reviews were to be on an open market basis;
2. The Succession (Scotland) Act 1964 which enabled a deceased tenant's executor to transfer the tenancy to a next of kin acquirer where the tenant died without making a Will or an effectual bequest of the lease;
3. The Agriculture (Miscellaneous Provisions) (Scotland) Act 1968 which (a) made provision for one of the near relatives of a deceased tenant (i.e. at that time, the tenant's spouse and children) to succeed to the tenancy provided the landlord did not within a specified period, establish one of certain strictly limited grounds for consent to operation of a notice to quit, (b) introduced reorganisation compensation, an additional payment payable to the tenant on quitting the holding where the landlord recovered possession for a non-agricultural purpose without being able to establish personal hardship and (c)

provided for compensation for loss of profits where a tenant had land resumed at short notice;

4. The Agriculture (Miscellaneous Provisions) Act 1976 which included provisions introducing certain safeguards for tenants in respect of demands on tenants to remedy defects in fixed equipment and notices to quit following upon these; and
5. The Agricultural Holdings (Amendment) (Scotland) Act 1983 which (a) provided, for tenancies entered into on or after 1 January 1984, extended and amended grounds for a landlord obtaining consent to operation of a notice to quit given to a near relative successor, (b) qualified the open market basis for review of rent by allowing certain external factors to be taken account of where the open market had become distorted or difficult to apply e.g. due to a scarcity of lets or of comparables, (c) gave the Land Court an appellate jurisdiction in the case of rent reviews determined by arbiters and (d) reduced the minimum period between rent reviews from 5 to 3 years.

The Agricultural Holdings (Scotland) Act 1991 consolidated the provisions of the 1949 Act with the amending legislation without making any further material amendments. As can be seen from the above, the various provisions amending the 1949 Act in some cases tended to favour landlords, in other cases tended to favour tenants and some changes were largely neutral in effect. Overall, it can reasonably be stated that the 1991 Act did not represent material shrinkage in tenants' rights from the tenants' rights set out in the 1949 Act.

Of course the 2003 Act and subsequent amending provisions have strengthened further the tenants' position. Specifically, provisions:

- (a) Giving tenants the prospect of purchasing their holdings by providing for a tenants' pre-emptive right to buy,
- (b) enabling diversification to give tenants more control over the use of their holdings and to enhance profitability,
- (c) preventing the avoiding of security of tenure by not allowing creation of new partnership (including limited partnership) tenancies,
- (d) preventing future reduction of landlords' fixed equipment obligations and compensation liabilities by removing the availability of new post lease agreements and new compensation write-down agreements,
- (e) removing landlords' veto on lease assignation by providing for assignation to any suitable next of kin,
- (f) strengthening rights of succession by widening the definition of near relatives who could succeed to the tenancy and amending grounds on which the landlord could recover possession,
- (g) restricting landlords' irritancy (lease forfeiture) rights and
- (h) providing tenants with a right to withhold rent in certain circumstances,

have resulted in agricultural tenants now having more rights than ever before and Part 10 of the Land Reform (Scotland) Bill offers the prospect of further significant measures extending tenants' rights; and this somewhat ironically at a time when mechanisation and changes in farming methods have resulted in far fewer people being employed in the industry now than on introduction of security of tenure in 1948 and when the drive now is towards reduction of production rather than increase. Furthermore, there seems now to be an impetus to go beyond and even to depart from, the recommendations of the Agricultural Holdings Legislation Review Group set up in 2014 under the Chairmanship of Richard Lochhead. This Group tried very hard to produce a Report last year which recommended a package of measures to address issues within the industry while striking a balance between tenants' and landlords' interests with a view to helping to secure a better and sustainable future for the tenant farming sector, so its recommendations should attract considerable respect.

I would conclude that the agricultural tenants' rights contained in the 1991 Act taken along with those introduced by the 2003 Act result not in a shrinkage of tenants' rights since 1948 as Rob Gibson and Mike Russell maintain, but rather in a significant increase, with the prospect of Part 10 of the Land Reform Bill strengthening the tenants' position yet further.