



Review of Buccleuch Estate Agricultural Tenancy Negotiations

Background

1. Buccleuch Estates is undergoing a major restructuring of its land holdings involving the sale of some properties and an increase in the area of land devoted to forestry. Included in this exercise was a review of 26 arrangements involving tenants operating without secure tenancies but within a Limited Partnership Agreement or with a Short Limited Duration Tenancy.
2. Following adverse publicity associated with the outcome of some of the reviews, the Chief Executive of Buccleuch Estates asked the Tenant Farming Commissioner (TFC) to review cases where the tenant had expressed dissatisfaction with the way that the case was handled by the Estate.

Terms of Reference

3. The review by the TFC was confined to how the cases were dealt with and not directly with the ultimate outcomes. It is not the function of the TFC to question the Scottish Government's forestry policies or to suggest that landowners cannot take business decisions that may involve the legal termination of tenancy arrangements. However, it is the function of the TFC to promote good relations between landlords and tenants of agricultural holdings and to develop and promote codes of practice and guides which help to achieve that aim by ensuring that interactions between the parties, whether based on legal processes or not, are carried out in a manner which is fair and reasonable to both parties and are in accordance with best practice. The full terms of reference is attached to this report (Appendix 1).

Review Process

4. Through contacts with agents acting for the tenants, contact with the Scottish Tenant Farmers Association (STFA) and following a letter from the Estate to all affected tenants, names of tenants wishing to express concern about the handling of their case were obtained. 7 tenants came forward initially but one later withdrew, leaving 6 cases to be investigated. Another tenant withdrew after the investigation stage, leaving the 5 cases on which the report is based.
5. Each 'complainant' was interviewed by the TFC or by a senior member of the Scottish Land Commission staff to establish their perceptions of the way that the estate handled their case. In addition, the estate made available the files for each tenancy and, on the basis of these investigations a timeline of events was drawn up and agreed with both parties so that the facts were not in dispute. The 5 tenants were asked to set out the reasons why they

were unhappy with the handling of their case and the estate was asked to provide a response to the complaints. The summaries of each case are attached to this report (Appendix 2). To preserve anonymity, no names or places have been provided. The tenant or general partners are referred throughout as the 'tenant', any agents assisting the tenant as the 'tenant's agent' and the estate staff as 'the estate'.

The Benchmarks Used to Assess the Cases

6. The conduct of the Estate was assessed in terms of how it measured up to the standards set by the law, by Codes of Practice and by best practice guides.

(a) Legal

7. Limited Partnership Agreements and agricultural tenancies are legal entities and their method of termination by one party or the other is generally subject to statute or to contractual arrangements written into the agreement. The notice period associated with termination of Limited Partnerships (LP) is not controlled by statute but is a matter of contract. Limited Partnership agreements generally stipulate a notice period of between 6 and 12 months. However, following dissolution of the LP, the law allows a General Partner to claim a tenancy in their own right and also allows the landlord to then issue a notice to quit by way of a double notice procedure which effectively gives the tenant around 3 years further occupation of the holding.
8. There is no prescribed notice period for a Short Limited Duration Tenancy (SLDT). It automatically expires on the due date but landlords are advised to draw the tenant's attention, in advance of the expiry date, to the need to vacate the holding by the due date.

(b) Codes of Practice

9. Prior to the creation of the TFC post, the Scottish Government's Independent Adviser on Tenant Farming (IATF) published, in most cases in association with the key industry representative bodies, a series of guides on recommended practice. In 2015 the IATF issued, in conjunction with NFUS, SLE and STFA, an interim Code entitled 'Limited Partnerships – Planning for the Future' and in 2016 published 'A Brief Guide to Maintaining Good Relationships for Landlords, Tenants and their Agents'.
10. The TFC is empowered to produce Codes of Practice and to investigate, and adjudicate on, alleged breaches of the Codes. In September 2017 the TFC published a Code of Practice on 'Planning the Future of Limited Partnerships' which was published by the TFC with the support of NFUS, SLE, STFA, and RICS. The aim is to ensure that discussions over the future of a LP take place well in advance of a dissolution date and that the wishes of both parties are fully discussed, along with options for the future, before any notice of dissolution is issued.

(c) Best Practice

11. The final version of the Scottish Government's 'Land Rights and Responsibilities Statement' was published in September 2017. It seeks to inform policy and practice around land issues in Scotland, it requires the Scottish Government to promote the principles set out in the Statement when exercising its functions and exhorts others to do likewise,

particularly those with significant responsibilities over land. It is a reminder that there are responsibilities, as well as rights, in relation to land and encourages all landowners to consider how their decision making powers could contribute to realising the vision of **“A Scotland with a strong and dynamic relationship between its land and people, where all land contributes to a modern and successful country, and where rights and responsibilities in relation to land are fully recognised and fulfilled.”** The Statement stresses the importance of:

- Promotion, fulfilment and respect towards human rights in relation to land.
- Achieving an appropriate balance between private and public interests.
- Enabling people to have confidence that there is a fair and balanced system of decision making in relation to land and that they have the opportunity to be engaged in decisions relating to land that impact on them and their local natural and man-made environments.
- Taking account of how decisions about land can affect a variety of factors including housing, employment, the viability of local businesses and the quality of the environment.

12. The ‘Landowners’ Commitment’ published by Scottish Land and Estates (SLE) points landowners to the need to ‘act sustainably, economically, socially and environmentally’, to ‘have regard to community aspirations’, ‘to treat everyone with courtesy, politeness and respect’, ‘to be aware of how their actions and decisions will affect those who live and work in rural Scotland’ and ‘to work with tenants and the wider community to encourage and support enterprise and business development where this fits with the estate or farm objectives.’

Tenant Farming Commissioners Observations

Legal Compliance

13. I could not identify any action that was in contravention of agricultural holdings legislation. The required 6 months’ notice was given in the case of the Limited Partnerships and in reality, all of the general partners finished up with arrangements which took their occupation beyond the 6 month period and they could have exercised their right to claim a tenancy in their own name. SLDTs are intended to terminate on the planned date without further notice having to be given. However, in the case of the SLDT, the estate did begin discussions with the tenant 6 months prior to the termination date and was prepared to discuss the way forward and some possible options.

Codes of Practice

14. The Code of Practice on ‘Planning the Future of Limited Partnerships’ was published in September 2017 which was after discussions had been initiated in all the cases reported here. The aim of the code is to ensure that meaningful dialogue and discussions of options takes place before any notice of termination is issued. The interim Code published in 2015 seeks the same end and both versions recommend the use of mediation where no agreement can be reached. In all the cases reported here the situation was more complex than a straightforward ending of the LP in the respect that all cases ultimately involved

transition to a new arrangement with continued occupation for differing lengths of time. This makes it more difficult to judge the degree of Code compliance but the following observations can be made: -

a) In Case 2, and possibly in Case 5, it is likely that the estate's actions could be said to be contrary to the principles in the interim code and, had the TFC Code been in existence at the time, the estate may have been in breach because the notice of termination was issued shortly after the first meeting and before there had been adequate discussions over, and attempts to agree on, the way forward.

b) The use of mediation was not considered or offered.

Best Practice Compliance

15. While landowners are not required to follow the guidance in the best practice sources, they should acknowledge and recognise the societal and political concerns and aspirations that have prompted their production and the widespread support for the principles contained in them. A disregard for guidance in relation to best practice in land management will leave landowners and managers open to criticism that will be damaging both to themselves and to the landowning sector generally, and which will strengthen the calls for further legislation or Codes of Practice that constrain freedom of action.

16. In respect of best practice issues, a number of issues common to all the cases were identified and which are useful learning points for any landowner or tenant involved in a similar business restructuring: -

a) A major exercise such as this, by a major landowner, which is likely to have significant implications for land use, for communities and for the circumstances of individual tenants requires to be well planned and needs a good communications and engagement plan. A careful appraisal of the wider impacts and implications should accompany the appraisal of the business implications and implementation should seek to find an appropriate balance between delivery of the business objectives and avoidance of, or mitigation of, the wider impacts. It will not always be possible to find outcomes that suit all stakeholders but an internal and external communication strategy which seeks to explain the rationale, allows time for discussion and consultation with key stakeholders, in advance of any actions being taken, is always likely to be more successful than unleashing difficult messages on an unprepared audience. I believe that this exercise would have benefitted from more thorough pre-planning and a more comprehensive communication and engagement strategy.

b) Though published after the majority of the Buccleuch discussions with tenants had taken place, the Scottish Government's publication 'Guidance on Engaging Communities on Decisions Relating to Land' sets out the Government's expectations that people have the opportunity to be involved in decisions about land that affect them. It contains guidelines on when and how engagement should take place and with whom and is a primary source of advice and help for any landowner embarking on a change programme that will impact on local communities.

c) Forms of tenancy that have a limited duration have many advantages but can create uncertainty if there is not regular discussion between the landlord and tenant about their respective aspirations and intentions. Allowing Limited Partnership arrangements to just roll

on without periodic review risks creating a sense of security that may not be justified. When SLDTs and LPs are being entered into, and at periodic intervals during their tenure, it would be good practice for both parties, perhaps when meeting for other reasons, to discuss the hopes and intentions of both parties with respect to the arrangement and to record the outcome of that discussion. Where one or other party has clear intentions regarding the long term future of the arrangement that should be made clear to the other party. If there is genuine uncertainty on the part of either party about their future intentions, that should be recognised and recorded too. The aim should be to avoid, wherever possible, sudden surprises for either party.

d) In some of the cases the estate representative changed once or more times during the discussions. While it is appreciated that staff changes do take place, it would be desirable for one point of contact to be maintained throughout such discussions and negotiations.

e) While the estate deserves credit for being prepared to discuss options with most of the tenants and for being willing to consider ways forward, a clearer estate position, based on more pre-planning, could have avoided the need for changes of mind, such as in Case 4, where the initial offer to the tenant was rescinded and changed after only one month.

f) It is important to allow adequate time for discussions to take place without the pressure of a notice of termination. An apparent hurry, on the part of the estate, to finalise arrangements appears to have contributed to what some tenants perceived as a 'take it or leave it' approach and to the ultimatum described in para. 15 of Case 1. While the estate considered that this was necessary to ensure that the tenant continued to have a legal basis for occupation beyond the 28th February, I believe that this issue could have been handled more sensitively.

Some Reflections

17. At the heart of this issue lies the difficult issue, faced by many land-based businesses, of balancing the need to maintain a viable enterprise with the need to have regard for the effect of their actions on the wider community. The latter is not a legal requirement but no landowner who is in touch with Scottish politics can fail to recognise the importance of this issue. A succession of Land Reform Acts, the establishment of the Scottish Land Commission and the publication of the Scottish Government's Land Rights and Responsibilities Statement demonstrate the current impetus behind encouraging a balance between public and private interest in land and these principles are reflected in the Landowners' Commitment published by Scottish Land and Estates.
18. Land based enterprises must be able to take business decisions that maintain and enhance the security of their business and the people employed within it but in doing so are encouraged to assess, communicate and, if possible, mitigate, any adverse effects on the wider community, including tenants and others directly affected by the actions of the landowner. There is no right answer to the question of how much consideration should be given to external impacts but the wrong answer would certainly be to give them no consideration at all. While this may not always change the ultimate outcome, it is likely to influence the process, and timing, by which change is brought about.

19. It is clear that, to many Buccleuch tenants, the current business driven strategy appears to be a reversal of a previously relatively paternalistic approach by the estate. They had come to believe, rightly or wrongly, that the estate would 'see them right' and would be prepared to extend their occupation. Indeed, many of the Limited Partnerships had been allowed by the estate to run on beyond their planned expiry date and, while security of tenure was not guaranteed, the tenants had come to believe that this situation would continue. Against this background, and facing, in some cases, the loss of their home and job, and with genuine concerns for the impact on local communities, it is perhaps not surprising that some tenants felt hurt and surprised by the actions of the estate and have sought ways to question and challenge the decisions made. Unhappiness with the ultimate outcome has also exacerbated any of their frustrations related to the process.

Conclusions

- None of the actions by the estate was in contravention of agricultural holdings legislation.
- A failure to allow sufficient time for discussion before the notice of termination of the LPs was issued may have been contrary to the principles in the interim code and, had the Code of Practice on Planning the Future of Limited Partnerships been in existence from the start of the estate's discussions, it is possible that the general partner would have been justified in alleging a breach of the Code.
- While the estate made efforts in most cases to agree a way forward that provided a degree of continued occupation for the general partners or tenants, the handling of the discussions and negotiations could have been handled more sensitively at times.
- A greater degree of pre-planning, associated with a good communications strategy, appraisal and mitigation, where possible, of the external impacts and allowing enough time for implementation, are the essential ingredients of a change programme and better application of those principles would have avoided some of the issues that have occurred.

Bob McIntosh
Tenant Farming Commissioner

July 2018