



Conducting Rent Reviews

Updated Guidance from the Tenant Farming Commissioner

Introduction

In 2015 the Scottish Government's Independent Adviser on Tenant Farming published, jointly with NFUS, STFA and SLE, a guide to Negotiating and Conducting Rent Reviews. The guide is principally aimed at 91 Act tenancies but may have relevance in the case of LDTs which do not contain a contractual rent review mechanism. No new codes or guides relating to rent reviews are planned until deliberations over the introduction of the proposed new 'Fair Rent' system have concluded so this guide remains current and relevant. However, feedback from some recent rent reviews for secure tenancies suggests a need to reinforce and clarify some aspects of the processes set out in the guide, particularly those relating to the provision of evidence and the use of the inflation linked sense check.

There is agreement between the industry bodies that long periods between rent reviews can have a detrimental impact on the farm business in question, and parties are encouraged to meet when a rent review is due, even where there is no variation sought in rent payable.

The Inflation Linked Sense Check

The sense check is just that, it is one of the factors to be taken into account when considering rent proposals but it is not intended as a 'rule' which prevents rent movements which are higher or lower than the current rent adjusted for inflation as measured by the Consumer Price Index (CPI).

As a general rule, in circumstances where the rent has recently been reviewed and was agreed by both parties to be at or around the 'market rate' it might be expected that, in the absence of any other appreciable and verifiable changes in circumstances, the rent would move in line with the CPI. If, however, there have been material changes to, for example, the fixed equipment provided by the landlord or if the rent has not been reviewed for a long time, or can be shown to be out of step with the market rate, then rent proposals may be at a level which is outside of the CPI sense check.



Making and Responding to a Proposal

The Guide emphasises the importance of avoiding surprises so a preliminary conversation on the holding in advance of the issue of a rent proposal is helpful in exposing for discussion the issues that will be relevant in a review and in indicating the likely basis of the proposal.

The proposer should consider delivering their proposal at a face to face meeting so that the basis of the proposal can be explained and any potentially contentious issues identified at an early stage.

It is important that the person in receipt of the proposal responds timeously. Sitting on an unwelcome proposal will not help to improve the situation and a response that the proposal is unsatisfactory, without further analysis and explanation, will not move things forward. The response should be in the form of a counter proposal which provides reasoned arguments in favour of the counter proposal and is supported by appropriate evidence.

Providing Evidence

Where a rent is proposed that is outside of the range of the current rent adjusted for CPI, the proposer should always be prepared to provide a detailed and transparent explanation for the figure that is proposed. The industry bodies are agreed that a rent proposal that contains a figure that is without explanation or justification represents unacceptable practice and is only likely to make the rent negotiation process more protracted and more difficult for both parties. The need to provide evidence is relevant both in the case of a rent proposal and in the case of any counter proposal made.

The 2015 guide sets out the procedures that should be followed when rents from other farms are used for comparison purposes and emphasises the need for well researched, analysed and presented data which enable the other party to understand, and challenge if necessary, the basis of the rent proposal. Clear guidance is provided on the use of comparable rents in recent case law but there are some features worth emphasising: -

1. The proposer should request permission from the landlord and the tenant of a comparable holding before including the comparable rent in the rent proposal. Landlords and tenants of agricultural holdings are encouraged to



make rent levels available to enable the proposer to provide the necessary comparable evidence.

2. In the absence of evidence from open market lettings of secure tenancies, the use of rents from open market lettings of LDTs and SLDTs will, in many cases be the best evidence available but where such rents are used the proposer should ensure that this is made clear and should show what adjustments have been made for marriage value, scarcity and any other factors.

3. A less satisfactory method is to use rents which have been negotiated and agreed between landlords and sitting tenants of existing secure tenancies. The proposer may also use rents which have been negotiated and agreed under existing LDTs and SLDTs as legitimate comparables subject to any necessary adjustments. In practice however, it is recognised that in many cases rents which have been negotiated and agreed between landlords and sitting tenants of secure tenancies will be the only relevant comparables available.

4. If there is a reluctance to have individual rents identified, and appropriate efforts have been made to persuade landlords and tenants to allow identification, the proposer can consider the following alternative options:

a) The proposer could use the average of the rents from three identified holdings without revealing the individual rents.

b) The proposer could use rent levels from one or two comparable farms on a non-attributable basis. This should only happen when data from 3 comparable farms is not available. Unless the holdings are identified it is difficult for the other party to verify the value of the holding as a comparable. This approach should only be used where it is accepted by both parties as being the only source of utilisable data.

5. In the absence of an agreed methodology for making adjustments to account for differences from the farm where the rent is under discussion, the onus is on the proposer to clearly show the nature and extent of adjustments and to be prepared to discuss and agree them. This is particularly relevant in cases where the comparable farm has a different level of provision of landlord's fixed equipment. The nature and extent of adjustments made to reflect this should be clearly shown.



6. In circumstances where reasonable comparables cannot be obtained, the parties may wish to consider, as a last resort, using a farm budget approach to provide evidence towards determining the reasonable expectation of the rent for the holding. A budget should be consistent with the rent review process in disregarding the benefits of certain improvements and in recognising that the rent is such as would be agreed between a hypothetical landlord and tenant, not the actual landlord and tenant. The budget therefore may look different to that which the actual tenant uses for his business planning.

Conclusion

7. Arriving at a rent is a process requiring agreement based on discussion and analysis of evidence provided by both sides. Rent determination is not an exact science and rent proposals should therefore never be presented on a take it or leave it basis that precludes the opportunity for discussion and negotiation. In circumstances where agreement cannot be reached, the parties are recommended to use some form of alternative dispute resolution mechanism such as expert determination or arbitration in preference to resorting to the Land Court.

8. Once the new rent has been agreed it would be helpful if both parties would consent to the rent being used as a comparable in other rent reviews.

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