RURAL DEVELOPMENT COMMITTEE

Tuesday 12 November 2002
(*Afternoon*)

Session 1

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RURAL DEVELOPMENT COMMITTEE
27th Meeting 2002, Session 1

CONVENER

*Alex Fergusson (South of Scotland) (Con)

DEPUTY CONVENER

*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

COMMITTEE MEMBERS

*Rhoda Grant (Highlands and Islands) (Lab)
Richard Lochhead (North-East Scotland) (SNP)
Mr Jamie McGrigor (Highlands and Islands) (Con)
*Mr Alasdair Morrison (Western Isles) (Lab)
*John Farquhar Munro (Ross, Skye and Inverness West) (LD)
Irene Oldfather (Cunninghame South) (Lab)
*Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD)
Elaine Smith (Coatbridge and Chryston) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE SUBSTITUTES

George Lyon (Argyll and Bute) (LD)
Mr John McAllion (Dundee East) (Lab)
Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)
John Scott (Ayr) (Con)

*attended

WITNESSES

Robert Cumming (National Farmers Union of Scotland Tenants Working Group)
Lamont Hair (National Farmers Union of Scotland Tenants Working Group)
John McDiarmid (Scottish Agricultural Arbiters and Valuers Association)
Lord McGhie (Scottish Land Court)
Judith Morrison (Scottish Law Commission)
Malcolm Strang-Steel (Scottish Agricultural Arbiters and Valuers Association)

CLERK TO THE COMMITTEE

Tracey Hawe

SENIOR ASSISTANT CLERK

Mark Brough

ASSISTANT CLERK

Catherine Johnstone

LOCATION

Committee Room 2

Scottish Parliament

Rural Development Committee

Tuesday 12 November 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:02*]

The Convener (Alex Fergusson): Good afternoon, ladies and gentlemen. I welcome members to this meeting of the Rural Development Committee. I have received apologies from Irene Oldfather, Elaine Smith, Jamie McGrigor and Richard Lochhead. I remind everyone to ensure that mobile phones are switched off. I welcome the members of the public and the witnesses who have joined us this afternoon. We might also be joined by members of staff of the North East Assembly, who are visiting the Parliament. I will welcome them warmly when they come.

Item in Private

The Convener: Agenda item 1 is to consider whether to take in private item 3, which is consideration of the committee's forward work programme. Do members agree to take the item in private, which is in common with our normal practice?

Members *indicated agreement*.

Agricultural Holdings (Scotland) Bill: Stage 1

The Convener: Agenda item 2 is continued consideration of the Agricultural Holdings (Scotland) Bill. Today is our third day of evidence taking at stage 1. At next week's meeting, we will consider oral evidence from the Scottish Gamekeepers Association and the Minister for Environment and Rural Development. Today we will hear from three panels of witnesses. After a brief opening statement from each panel, members will ask questions. Before we commence, I declare an interest: I have a registered landholding with a tenant under a partnership agreement. I do not think that any other member has an interest to declare.

I welcome our first panel. John McDiarmid and Malcolm Strang-Steel are from the Scottish Agricultural Arbiters and Valuers Association. We have received written evidence from the association. I ask Mr McDiarmid to give a brief two-minute statement, after which members will ask questions.

John McDiarmid (Scottish Agricultural Arbiters and Valuers Association): Thank you, convener. My name is John McDiarmid and I am a farmer from central Scotland. I undertake quite a lot of valuation and arbitration work and I am the immediate past president of the Scottish Agricultural Arbiters and Valuers Association. The association has around 250 members, of whom about half are practising farmers. Perhaps 20 to 30 per cent of our members are members of the Royal Institution of Chartered Surveyors in Scotland and the rest are lawyers, advisers and others. Our secretary, Malcolm Strang-Steel, is a lawyer with Turcan-Connell in Edinburgh. We are considering the bill with a great deal of interest in our role as arbiters and valuers.

The Convener: Thank you. We will move straight to members' questions.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): In your written submission, you recommend that it should be possible for a tenant farmer to buy the farm without having to purchase the sporting rights. You claim that, from the purchasing tenant farmer's point of view, the benefit is that the price would be lower and that, from the estate's point of view, the benefit is that the shooting rights could still be exercised on the land and would not be broken up.

John McDiarmid: It is our view as valuers—and my view in particular—that a tenant farmer who was exercising the pre-emptive right to buy would want to buy the farming right. The sporting rights would complicate the issue and could be divorced from the right to buy. I have known tenants to buy

their farms without the shooting rights, which were on lease at the time of buying and have continued to a party for a lease period of 15 or 20 years. In my experience, that has worked satisfactorily.

Malcolm Strang-Steel (Scottish Agricultural Arbiters and Valuers Association): As a fellow solicitor, Fergus Ewing will know that the ownership of sporting rights passes with the land over which they are exercised. There are a number of cases that say that those rights cannot be divorced from the land. However, section 102 of the Title Conditions (Scotland) Bill contemplates such a divorce in certain circumstances, and it would be perfectly competent for the Scottish Parliament to legislate for that in the circumstance of a tenant exercising his right to buy. That has been a topic of discussion at previous committee meetings. It would certainly be possible, and I believe that it is worthy of consideration. Of course, valuation consequences would flow from that.

Fergus Ewing: I thank the witnesses for those answers. I am pleased that you think that such a measure would be workable and practicable. I hope that we will be able to explore the possibility later.

I have a more general question about the levels of rent that have been payable by tenant farmers over the past 10 years. Although farm incomes have plummeted—the average farm income in Scotland is now below the minimum wage—the level of rent has increased substantially. There has been a decoupling of the average level of rent payable and the average farm income. Do you agree?

John McDiarmid: Things have changed dramatically in the past two to three years. In that time, I have not been involved in a rent increase anywhere, because of the downturn in agriculture. The situation in the immediate past has been fairly stable.

Demands have been made of me by various tenants who feel that they ought to have a rent reduction. As Fergus Ewing said, 10 years ago arable agriculture in particular was fairly buoyant. Rent increases were the norm and some of them were fairly dramatic. The current economic situation leads me to believe that increases in rent are most unlikely.

Fergus Ewing: In your experience, have there been reductions in rent?

John McDiarmid: I have not experienced any reductions in rent.

Fergus Ewing: I do not know the answer to this question, so can you tell me what it is? Are there provisions in agricultural leases for upward-only rent reviews or, conversely, provisions to prohibit reductions in rent as, of course, there are in standard commercial leases?

John McDiarmid: There is no reason why there should not be a reduction in rent, but one must examine the overall situation. Let us take an average farm and pick a rent out of the air of £20,000. A 10 per cent reduction or increase in anything is quite substantial, but 10 per cent of £20,000 is £2,000, which will not take a businessman in any direction. My advice if one is acting for a tenant is not to go for a reduction in rent, but to negotiate with the landlord on long-term improvements to the farm that will increase the tenant's income. That approach is much more practical than going for a percentage reduction in rent.

Malcolm Strang-Steel: Mr Ewing asked whether agricultural tenancies have upwards-only rent reviews, as is the norm for commercial leases. The answer is no, because most leases run from year to year on tacit relocation. Where that happens, section 13 of the Agricultural Holdings (Scotland) Act 1991 kicks in for rent reviews, and either the landlord or the tenant can demand a rent review every three years. The rent can go up or down.

The Scottish Land Court has decided that where a lease runs on tacit relocation from year to year, one cannot contract out of section 13. If one happens to be in the mid-term of a lease that is for 10 years and there is a rent review clause in it, the situation might be different. However, as I said, the vast majority of leases are now run on tacit relocation from year to year, and often have done so from the beginning, especially where there is a limited-partnership tenant and a term of the limited partnership in effect determines the term of the lease.

I add that I have been involved in one case recently—actually, it was two cases in one, with two separate leases for the same tenant—where, by agreement, the rent was reduced.

Fergus Ewing: I thank both gentlemen for their evidence. It is my impression—and it is endorsed by statistics that were researched by the Scottish Parliament information centre—that while rents have gone up over the past five to seven years, farm incomes have plummeted. It seems to me that rents should perhaps have matched incomes. Rent levels should really have been corrected, as there have been harsh times and difficult financial circumstances, which have resulted in lower incomes. Is that a fair point?

John McDiarmid: I must return to what I said. A rent reduction will not resolve a financial problem, because a rent reduction is not an enormous factor in any business's turnover. Increasing turnover might be a way out of a financial problem.

Cutting costs is difficult, so a business must try to increase its profitability. I will give a small example. A farm might need a new potato shed. A rent reduction of £2,000 would not get the farmer that building, but an input through the bank and the landlord to a joint venture could substantially help that farming business.

14:15

Rhoda Grant (Highlands and Islands) (Lab): I wonder why you are concerned that the provision to disregard the value of improvements that a tenant has made goes further than present legislation. If a tenant improves their farm, why should the landowner benefit at the point of sale, especially if the sale is to the tenant?

John McDiarmid: I take it that you are referring to waygo valuations of improvements. If one studies the 1991 act, one finds that things go wrong because neither landlord nor tenant understands their rights under the act. My experience is that almost all dissatisfaction occurs because a landlord or a tenant has not used the provisions that are available to them under the 1991 act.

I strongly object to the write-down of any building over 10 or 15 years. It is wrong that that should ever happen. I am no legal expert, but I think that if a tenant does not want a new building or a new capital improvement to be written down over a 10-year period, he can immediately appeal against that as a single party to the Land Court. That might take time, but if a tenant planned a large improvement, such as a new building, which could easily cost £50,000 to £80,000, and their landlord wished to impose a 10-year write-down, the tenant could object to that and obtain the value that the improvement would have to an incoming tenant.

I see no problem with the 1991 act as it stands, provided that both parties study it and obtain the proper legal advice. I always advise clients to obtain the proper legal advice. I have many such examples. At present, I am negotiating 28 November waygos for two parties. I hope that one will be satisfied, but the other might be disappointed. One tenant farmer has studied the 1991 act or taken proper legal advice and will have a good waygo but, unfortunately, the other gentleman will not be as happy.

Rhoda Grant: You say that section 31 of the bill will mean that when a tenant exercises the pre-emptive right to buy and the land is valued, no account should be taken of the increased value from investments made by the tenant. You say that that provision goes too far and does not recognise that, in some circumstances, the tenant is obliged to make improvements. I do not understand why improvements that the tenant has made by choice should be different from those made by obligation. If the improvements increase the value of the tenancy, the tenant should have to pay more to buy the farm.

Malcolm Strang-Steel: There are a number of different circumstances in which a tenant might spend money on an improvement to a farm. First, when he enters into the tenancy, it might be part of an obligation, which he is prepared to take on. I have no doubt that the rent that he agrees to pay will be adjusted downwards accordingly. In those circumstances, the money spent on an improvement is, in effect, part of the rent that the tenant pays for occupation.

The tenant might also have done something without going through the necessary formalities that would entitle him to compensation at waygo. He might have spent the money and perhaps not taken the advice that Mr McDiarmid mentioned or, for whatever reason, not put himself in a position to have a waygoing claim.

Thirdly, the tenant could have a waygoing claim and could expect to receive a payment at the end of the tenancy.

As a lawyer, I leave it to people such as Mr McDiarmid to take part in the negotiations between landlord and sitting tenant when a sitting tenant has entered into negotiations to purchase. I would have thought that the third of the situations that I mentioned, where a tenant is entitled to money at the end of the lease, would undoubtedly—and quite rightly—be taken into account in assessing the figure that is paid for the farm.

It is equitable that the first situation that I mentioned, where the tenant has spent money under an obligation to do so, should not be taken into account. The difficult area is the second circumstance—the one in the middle. The way in which the bill is drafted means that all three circumstances have to be disregarded when reaching the valuation. That is what was behind the comment.

Stewart Stevenson (Banff and Buchan) (SNP): I want to follow on from where Fergus Ewing started and ask for your opinion, drawing on your experience where appropriate, of the effect on valuations of separating ownership of mineral, sporting and agricultural uses of land. Is dealing with those rights separately likely to increase the overall value of the land? What effect might it have on the remainder of an estate when part of it is dealt with under those three headings as a result of the bill's proposals?

John McDiarmid: You raised quite a lot of complex issues there. Sporting rights could greatly enhance the value of a farm on the fringes of a

reasonably large estate. I tend to see tenants as farmers first and sportsmen second, so a tenant farmer is buying a farm; he is not buying a sport. Depending on how the right to buy lands, he might find that he is buying the sporting rights, which might well put the farm beyond his reach. That is one scenario in which separating out the rights could create a problem for the right to buy for a tenant farmer.

On a bigger estate, where sporting rights play an integral part, taking a farm out of the middle of the estate could affect the overall value of the estate, and the value of the shooting rights within the farm could be substantial. Divorcing sporting rights from the value of the farm should and could be possible. I do not see any serious problem with that in the long term.

I have to defer to Malcolm Strang-Steel on mineral rights, because I do not have enough experience of them. Separation of rights tends to happen in agriculture—the set of circumstances is so diverse.

Stewart Stevenson: Before Malcolm Strang-Steel comes in, I make the point that I am asking a financial question rather than a legal one, but if Malcolm wishes to comment, I am happy to hear from him.

Malcolm Strang-Steel: I am not really the person to answer on the financial side of mineral rights. They can be separated. That is quite a common situation. You will have to ask somebody else what effect that has on the valuation.

Stewart Stevenson: I will simplify my question. If the value of the sporting rights is established at £A and the value of the farm at £B, is the value of the two added together the same as if the two were valued together, or is there more value in their being separated? There must be an opinion on that.

John McDiarmid: It is really horses for courses. One would have to take each case on its merits. I can envisage a case in which the value of the sporting rights is substantial. In another scenario, they might account for a small percentage of the holding's overall value. I can remember a case in which a farming unit was bought with the sporting value included. That would be 20 years ago. The sporting value was insignificant, but I know that farming unit today, and the value of the sporting rights is probably 50 per cent of the overall value—they are of equal value to the farm. I am sorry that I cannot be definitive on that.

Malcolm Strang-Steel: The effect on the value of adjoining ground to the farm if the sporting rights have historically been exercised over the whole estate must be addressed. I say no more than that.

Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD): It is my understanding—and that of committee members—that when a farm is being valued, if it has a sitting tenant, it is only worth about 50 per cent of what it would get on the open market without a sitting tenant. That is the broad figure. Is that correct?

John McDiarmid: There or thereabout.

Mr Rumbles: Correct me if I am wrong, but I assume that, if that is the case, the pre-emptive right to buy in the bill is a win-win situation as far as the valuation of the farm is concerned. If a landowner sells to a sitting tenant, the value that he will receive from the sale will be somewhat more than were he to sell it without selling it to the sitting tenant. Is that correct?

John McDiarmid: The value takes into account the fact that there is a sitting tenant who has a secure tenancy. Therefore, the value that is placed on the land is the value bearing in mind that the sitting tenant is secure.

Mr Rumbles: I will pursue the point. We all know that there are other reasons why people sell land, but it seems clear that, far from having something to fear about the pre-emptive right to buy in financial or valuation terms, the landowner will gain by selling a farm to a sitting tenant. Is that correct?

John McDiarmid: I do not think that that is particularly the case.

Mr Rumbles: Will you explain to me why? You have just said that the value would be increased, because normally, if the farm was sold with a sitting tenant, the value would be only 50 per cent.

John McDiarmid: No. I do not think so. The value would be, as I have said, 50 per cent—or 40 per cent or 60 per cent. It would be somewhere in that category.

Mr Rumbles: I am slightly confused now. My question was about the pre-emptive right to buy, which would mean that, if the sitting tenant wanted to buy the farm, the landowner would have to sell it to them. There would be a willing seller and a willing purchaser. Would not the value be increased?

14:30

John McDiarmid: I do not think so.

Mr Rumbles: The farm would be sold at the same price even though it had a sitting tenant.

John McDiarmid: Yes.

Mr Rumbles: That is how you interpret the bill. Is that correct? The point is fundamental.

John McDiarmid: I am sorry—I have a hearing problem and I cannot hear you terribly well.

Mr Rumbles: It is my understanding that the bill would be financially beneficial for landowners because the valuation of the farm would be increased when it was sold to a sitting tenant. The bill is in the financial interests of landowners. They will benefit financially from it.

John McDiarmid: They could well do so. I am sorry that I did not hear you clearly.

Mr Rumbles: I just wanted to get that clear. In purely financial terms, the bill will be beneficial to landowners who wish to sell their farm.

John McDiarmid: That could be the case. Time will tell.

Mr Rumbles: Your reticence tells me something. Forgive me for saying so, but surely it is blindingly obvious that landowners will benefit from the bill if the farm is sold as though it does not have a sitting tenant on it.

John McDiarmid: It is difficult to be definitive about that. We will have the proof of the pudding when the bill is enacted and such transactions begin to take place.

Malcolm Strang-Steel: The logic of what you say is that it will be to the landlord's benefit to sell to his sitting tenant, if his sitting tenant is willing to buy, but is not that issue independent of what is in the bill? That might explain Mr McDiarmid's reticence. We are talking about a situation that pertains today.

Mr Rumbles: We are talking about a fundamental aspect of the bill. Today, the landowner can sell to whomever he wants to sell. That is the law of the land. The bill will create a situation in which, if the tenant farmer wants to buy the farm, he will be able to register his interest in buying it and the landowner will not be able sell it above his head. The farm will receive a higher valuation because it will be sold to the sitting tenant. Is not it the case that its value will rise?

Malcolm Strang-Steel: I do not want to comment on whether the proposal is desirable. The point is that a landowner who wishes to sell a tenanted farm will be able to sell it to anyone, including his sitting tenant. His sitting tenant is likely to pay more than anyone else for the reasons that we have discussed.

Mr Rumbles: I do not know why we are being so reticent about the matter. The situation is blindingly obvious to me. Previous witnesses have said that they had wanted to buy their farm, but had been unable to do so because it was sold over their heads. The bill will give the tenant farmer the right to buy when the landlord wants to sell the farm. My point is that the value to the landowner will increase. You seem terribly reticent about agreeing with a straightforward point. Why are you being reticent?

John McDiarmid: I find the question difficult to answer. The situation is almost 50:50. The circumstances of each unit will differ. The tenant is the best-placed person to offer the best price. I would not argue with that. It depends, however, on the fixed equipment, situation and desirability of the farm in question and I do not believe that one can adopt a broad-brush approach and state whether a farm will have an enhanced value. It is horses for courses; it depends on each case.

Mr Rumbles: I am a bit worried if that is the evidence from the Scottish Agricultural Arbiters and Valuers Association. I am not terribly impressed. The point seems obvious and I do not quite understand your reticence in accepting the logic of what is being proposed, but there we are.

The Convener: It might help if we move to supplementary questions on the same point.

Fergus Ewing: I wish to pursue the point about evaluation. Section 31 sets out the process to be followed when a farm is being valued in cases where tenants seek to exercise a pre-emptive right to buy. Essentially, the price is to be the market price, which will take into account the fact that there is a sitting tenant.

There is one important caveat—this may or may not be what Mr Rumbles was driving at. Where the secure tenancy is a farm forming part of an estate, regard should be given to the fact that the sale of one of 10 or 12 farms on an estate may diminish the value of the remainder of that estate. That specific factor is written into section 31. Indeed, subsection (7) provides that the price payable by a tenant under such circumstances would be the higher of the market value and the value plus the loss to the owner of the estate of one farm. Is that broadly correct?

Malcolm Strang-Steel: I would say so, yes.

Fergus Ewing: I think that I understand your evidence quite well, then.

Malcolm Strang-Steel: We are talking about the new element, as opposed to the current situation, in which two parties—landlord and tenant—might voluntarily agree on a purchase and sale. I believe that the committee has heard evidence that that is what regularly happens.

Fergus Ewing: I am sorry—could you say that again?

Malcolm Strang-Steel: I think that the committee has already heard evidence from other people that, in cases where somebody wishes to sell a tenanted farm, it is regularly sold to the sitting tenant rather than to anybody else. Under the bill, it is not possible to sell the farm to anybody else without talking to the tenant—hence the new valuation to take account of a particular circumstance in cases where a farm is part of a larger whole.

Stewart Stevenson: I would like to continue for a little longer on the same theme. Let me start by confirming that the valuation of a tenanted farm sold with a tenant on it will almost invariably be lower than the valuation of the same land without a tenant. Is that correct?

John McDiarmid: Yes.

Stewart Stevenson: On the sale of the tenanted land to the tenant, there will be an immediate profit—if all other things remain unchanged—if that tenant, having become the owner, sells. How do you believe that the release of value resulting from that transaction, which the bill will enable, should be shared between the tenant and the owner, if it should be shared at all?

John McDiarmid: I accept what you say about the tenant buying the farm and then immediately deciding to sell it. There will indeed be a mark-up. You are asking how that should be shared out, if it is shared out.

Stewart Stevenson: That is correct.

John McDiarmid: In the case of a council house that has been bought, there is a period during which a clawback may be made. I think that I am right about that. I wonder whether that is the fairer way to treat the situation.

On the other hand, the tenant will probably have been the sitting tenant for a long time and, in many ways, he is entitled to that mark-up. I do not think that the association has discussed the matter in detail, but a turnover immediately after a tenant takes advantage of the pre-emptive right to buy—and then resells within a short period of perhaps a few months—would probably not be right. That does not seem to be a terribly satisfactory way of proceeding.

Rhoda Grant: You say that there should or could be some clawback if a tenant exercised their pre-emptive right to buy, bought a farm and then sold it on. They would buy the farm as a tenanted farm and would sell it on with vacant possession, which would increase its value. The pre-emptive right to buy would have no effect on the farm's value to the landowner who sold it in the first place because, if the tenant had not bought it, the landowner would have had to sell it on the open market and receive less for it than they would have done from the tenant.

However, I can see where you are coming from. If the tenant could exercise an absolute right to buy at any point, like a council house tenant—to use the example that you used—and they sold straight away, they would take somebody else's property away from them and then make a profit. Perhaps a clawback over a period of time would be fairer in such situations, but I do not see how that could be fair in relation to a pre-emptive right to buy.

John McDiarmid: I am relaxed about the matter. I am here as a valuator and arbiter. In my profession, I would not become involved in such matters. In many ways, you are asking for a personal opinion. From a landlord's point of view, the landlord will know the value of his farming units with secure tenancy. In his mind, he should have marked down the value to 50 per cent. He will know their value if a sitting tenant buys and he will not have any clawback on that. If the sitting tenant has a secure tenancy, which may have been handed down over years, he will be entitled to make the best business deal that he can. With a sale within a month or two of buying, a 100 per cent mark-up seems unusual.

John Farquhar Munro (Ross, Skye and Inverness West) (LD): There seems to be confusion about the benefits or otherwise of the pre-emptive right to buy. I posed this question to witnesses at the committee's meeting last week. I am still unclear whether the pre-emptive right to buy is an attractive option for tenant farmers. It simply indicates that the tenant farmer must have an option in the negotiations or in the purchase of the farm. It does not imply that they will ultimately be successful in buying the property, as the pre-emptive right to buy means that they have to exceed the best offer that the landlord can get for that property.

John McDiarmid: I see nothing wrong with the pre-emptive right to buy for secure tenants. The great majority of tenants must be ambitious to own their own property and it must be in their long-term interests to do so.

John Farquhar Munro: Yes, I think that I would agree. I am sure that every farmer would aspire to own their property. However, do you think that the pre-emptive right to buy would give them the absolute security that they would acquire the property when it came on to the market at whatever valuation? As I said, to acquire the property, they would have to exceed the best offer that is made to the landlord.

14:45

John McDiarmid: No, that is not my understanding. If one registers an interest as a tenant to buy, one has the opportunity under the bill to do so.

John Farquhar Munro: In a bidding round, however, the tenant farmer would have to exceed the best offer that the landlord could secure on the property.

John McDiarmid: No, I do not think so.

The Convener: We had this misunderstanding last week. I point John Farquhar Munro to section 27 on the right to buy, which says that

"the tenant has the right to buy the land".

A mechanism is set up by which a valuation will be agreed if the two parties cannot agree. My understanding, and that of the majority of the committee, is that a tenant will have the right to buy under the pre-emptive right-to-buy agreement.

Malcolm Strang-Steel: Section 31 provides the basis of valuation and it says nothing about matching the price offered by any other party.

John McDiarmid: It would be a shame if the sitting tenant did not have the right to buy when the land came on to the market. I may stand corrected, but I think that the bill will give the sitting secure tenant the opportunity to buy his farm.

John Farquhar Munro: Would you not agree that the word "buy" should be substituted by the word "bid"? The tenant is given the opportunity to bid as opposed to buy.

John McDiarmid: If that were the wording, it would mean that the sitting tenant would not have the right to buy. If he had to bid, he might fail because the bid was too low.

John Farquhar Munro: That is precisely the point that I am making.

The Convener: I am sorry to intervene, but we have to move on because we are tight for time. I do not think that the majority of the committee is in any doubt that we are debating a pre-emptive right to buy for a tenant farmer.

Mr Rumbles: Section 31(2) states:

"The valuer is to assess the value of the land … having regard to the value that would be likely to be agreed between a reasonable seller and buyer of such land … assuming that the seller and buyer are, as respects the transaction, willing, knowledgeable and prudent; and … where the buyer is a sitting tenant".

In other words, if the land were sold above the head of the sitting tenant, it would achieve only 50 per cent of its value. However, if it were sold to the sitting tenant, there cannot be another sitting tenant and the price must be higher than the 50 per cent. Is that not the case?

John McDiarmid: If you put it that way, Mr Rumbles, the answer is yes. However, it is horses for courses: every unit is different. I agree that the sitting tenant is the best-placed guy to buy. There is no doubt about that.

Mr Rumbles: Purely financially, it is in the landowner's interests to sell to the sitting tenant. That is what I wanted to confirm. The landowner should welcome the measure on financial terms.

John McDiarmid: In the majority of cases, you could well be right, but I would not say that that applied in every case.

Mr Rumbles: If we consider only the value of the farm, it would be right. I am not talking about other issues.

John McDiarmid: If you are blinkered—

Mr Rumbles: Let us be blinkered.

John McDiarmid: If you are blinkered and consider only the value of the individual farm, you would probably be right.

Mr Rumbles: Thank you.

The Convener: I want to ask two quick questions. You said that, over the past 10 years, rents on stock farms had risen to quite a high level. Do you agree with the notion that rents have become fixed not so much on the profitability of the farming enterprise, but on the subsidy-attracting capability of the individual farm? Is that a possibility, as subsidy attraction and profitability do not necessarily go hand in hand?

John McDiarmid: That is a possibility. We must look to our lords and masters in Europe to understand what will happen in the agricultural world with regard to subsidies and environmental issues, which are becoming more important. Anybody who offers for rent should bear in mind how the long-term future looks for the section of agriculture involved. At present, things are very much in flux.

The Convener: Do you have figures from the past five or 10 years to show what percentage of annual rental agreements go to arbitration?

John McDiarmid: No, but I would say that few agreements go to arbitration.

The Convener: Are the figures available through your association?

John McDiarmid: No, but because arbitration was carried out by appointment through the Secretary of State for Scotland—it is now done through the First Minister—the committee should have easy access to the figures. Given the costs involved, I would think that few cases go to full arbitration.

Malcolm Strang-Steel: The matter is a little more complicated than that. Most rents are fixed by agreement, but negotiations often run up against the time limit of the date by which the rent is to take effect. Whichever party thinks that it has the upper hand will often apply for an arbiter to be appointed to preserve the situation. Frequently, agreement is reached and the arbiter does not have to go through the full arbitration process to determine the rent. Figures will be available from the Scottish Executive environment and rural affairs department on the number of arbiters that it has appointed. I am sure that arbiters report on the outcome, so the figures ought to be available. However, one cannot find out about rents that are

fixed by agreement without an arbiter being appointed.

The Convener: That brings us to the end of that part of the session. I thank the witnesses for answering our questions to the best of their ability and for giving up their time. They are welcome to stay for the rest of the afternoon.

I now welcome Judith Morrison and Beth Elliot of the Scottish Law Commission and Lord McGhie of the Scottish Land Court. Both parties have supplied us with papers. Thank you for coming along to give evidence this afternoon.

I remind members that, due to the particular status of the Land Court, it is inappropriate to ask our witnesses to comment on issues of policy behind the bill, but it is appropriate to ask them questions relating to procedure, background research and so on. As the Law Commission was involved in the drafting of the bill, it does not feel able to give an independent view on the dispute-resolution procedures in the bill, but it will happily answer any questions on its report and the work leading up to that. I hope that the witnesses will feel free to say whether they think that it would be inappropriate to respond to a particular question. I ask Judith Morrison to begin with a brief statement.

Judith Morrison (Scottish Law Commission): I am a project manager at the Scottish Law Commission and I am here to provide information on our May 2000 report on jurisdictions under the Agricultural Holdings (Scotland) Bill. The recommendations that we made in the report were adopted by the Executive in its white paper on proposals for reform and are the foundations of the dispute-resolution provisions in the bill.

I have provided the committee with a paper on the main issues arising from our report, which I will summarise briefly. We carried out a comprehensive review of the jurisdictions and dispute-resolution procedures that operate under the 1991 act and found that the present system is complex and in need of wholesale reform. In making our recommendations, we applied three guiding principles: that the dispute should be determined by the forum that is best qualified to answer the question at issue; that it should be determined as efficiently as possible; and that it should be determined as economically as possible.

As a result, our principal recommendation was that the compulsory nature of arbitration should be abolished. In most cases, there would be a role for arbitration and other alternative methods of dispute resolution if the parties agreed that that was appropriate. However, we believe that the new focus of the system of jurisdiction should be the Land Court, which would have legal skills and judicial authority as well as considerable agricultural expertise.

The Convener: Thank you for the brevity of that statement. I ask Lord McGhie to make a statement.

Lord McGhie (Scottish Land Court): I am here as the chairman of the Scottish Land Court. As you will see from the written material that I have supplied, I am also the president of the Lands Tribunal for Scotland. The two bodies work from the same building—one upstairs and one downstairs—and I float between them. That might have some relevance to what we have to consider today. Both bodies are courts and, as the convener pointed out, it would be inappropriate for me to comment on matters other than court procedure.

I will not repeat what I said in my written submission, but I will say that the work that it is proposed that the Land Court should do would be well within its general competency, with the possible exception of appeals. Staffing issues are always a concern, but we are unable to say what our requirements would be. Demand would increase, but it is difficult to say what that would amount to. As members will be aware, four bills and three sets of regulations that will increase our jurisdiction are on the go at the moment. That makes it difficult to know what the situation will be at the end of the day.

I do not want to go into the ins and outs of appeals on valuations, but we have suggested in our written submission that the committee should consider whether the Land Court or the Lands Tribunal for Scotland, which is the valuation expert body, would be the most appropriate place to deal with appeals. Whichever body is given the nominal responsibility, it is likely that I would chair the body. If the Lands Tribunal were to be given that responsibility, we omitted to set out in our submission the option that, at present, Queen's counsel and senior lawyer John Wright would be available to chair it. As the Land Court stands at present, only one person is able to deal with those matters. I urge the committee to give attention to our submission on that subject. It is a matter of some importance to ensure that the task is undertaken by the right body.

15:00

The time limit for giving decisions is the other matter that is of concern to us. In view of all the other material that the committee has to consider, I know that this may sound trivial, but we think that section 33(6) is based on a misunderstanding. We think that the draftsmen may have taken the Land Reform (Scotland) Bill as their guide. We knew that the positive policy desire for that bill was to

have a short, speedy time limit. Although we did not like that, we went along with it.

However, I understand that the lead committee on the Land Reform (Scotland) Bill has agreed to delete that provision, or rather to change the time scale involved. I stress that all courts cannot prioritise all cases. If we had to produce a decision "within 2 weeks", we would need to allocate two weeks to write the decision on every case. The implications of that for our work load would be considerable. Most cases settle, but if we had to create a timetable that allowed three-week slots for every case, only to find that most of them collapsed, the net result would be a lot of wasted time and everything would be delayed. I do not want to press that point any further.

The existing system works because it can be flexible. We decide which are the important cases as best we can. We think that section 33(6) would throw a spanner in the works and that it would not achieve its end—whatever that was supposed to be. I invite the committee to express the view that it rejects that provision. I also encourage the committee to amend Scottish Land Court Act 1993 by amending the bill.

We have made various proposals for speeding matters up. Today, I want to mention only one, on the extension of the retirement age limit from 65 to 70, which might need the weight of a committee recommendation. Lands Tribunal members retire at 70 and, if I am spared, I will retire at 72. We recently had to bring in a part-time member of the Land Court. Without any disrespect to the good man we got, we would have had a wider field of people if we had had that wider age bracket to select from. People who would be prepared to sit as part-time members at 65 might not be prepared to do so at 55. I urge the committee to give consideration to those matters, which are set out in our submission.

The Convener: Thank you. We move straight to questions, the first of which is from Stewart Stevenson, who is a member of the Justice 2 Committee, which has been dealing with the Land Reform (Scotland) Bill.

Stewart Stevenson: At the beginning of June, I was only 55; now I am 110. That is due to the Land Reform (Scotland) Bill, which has required considerable effort. As my question is about timetabling and so on, I am glad that Lord McGhie introduced the subject.

During the stage 2 debates on the Land Reform (Scotland) Bill, the Deputy Minister for Environment and Rural Development told the Justice 2 Committee that he was not prepared to introduce penalties for anyone as a result of the failures of the Land Court and others. Quite properly, the minister said that he could not control those bodies in order to ensure that they met some of the timetables that are set out in that bill.

I would find it useful, as I am sure the committee would, if you could indicate the normal timetable for decision making. What is par for the course in the Land Court? What upper and lower bounds do you expect? What are your expectations of the work that would result from the Agricultural Holdings (Scotland) Bill?

The Convener: I believe that the Justice 2 Committee amended the Land Reform (Scotland) Bill in order to increase the time limit for decisions from two weeks to four weeks. Is that correct?

Stewart Stevenson: Yes, but there are other timetables that affect the Land Court to a degree. For example, there is a 63-day timetable in relation to something else—what it is temporarily escapes me—in that bill.

Lord McGhie: One must bear in mind the fact that I am representing the Land Court and the Lands Tribunal on this occasion because I will need to deal with all those matters.

The target time for all decisions is two months. I deal with some tribunal cases in a day. If a legal issue pops up in the morning, I will deal with it and the decision will be issued the next day. The type of material that is involved—valuation—tends to take up all our time. There are many reasons for that; for example, we do not pluck a value from the air. Valuation involves a grinding process of looking at the various elements in the assessments of different valuers. We do not know how the proposed procedure would work for a single farm; it might be easier. In a typical case, we are not concerned with looking at comparative figures for the value of another farm; we look at the hoped-for value for the individual farm. The farmer will say, "Yes, this is a farm at the moment, but we expect housing development or we expect this and that." If the case is at all argumentative, we are likely to be dealing with evidence of that nature.

When I say that two months is the target time, I mean that we will have issued all decisions, more or less, in that two-month period. Sometimes a decision may take longer because we do not allocate writing time. If a case takes a week to hear, we would expect to need a solid four weeks to resolve it. However, we do not allocate five weeks; we allocate one week and hope that we will manage to fit it in, which sometimes involves weekend working. We try to be as flexible as possible. I am satisfied that a time limit would not make us work any harder, and I do not think that it would make us work any faster, either. We see a time limit as a positive downside in every respect. As I say, on average, we expect all decisions to come out inside two months.

Stewart Stevenson: I put it to you that having a time limit could be of value to you in one respect. If the timetable were externally imposed on you, it would give you an objective, rather than subjective, standard against which you could plead, quite properly, for the resources to meet that timetable. You made the point in your opening remarks that additional burdens were being placed on the court. In the absence of a timetable being laid on you, I have concerns that you would be expected to do the additional work within existing resources, but you would not have an adequate argument for the resources to deliver on a reasonable timetable. Is that a fair point for me to put to you?

Lord McGhie: So far we have managed to deal with resources on the straightforward basis of explaining our position to the powers that be. We have always been under contracts and have had to tell the powers that be that we do not have the work for a full-time member. Staffing has been cut down quite dramatically in the past three years for both the tribunal—

Stewart Stevenson: Are you sure that you want to put that in the *Official Report*?

Lord McGhie: We have decided to play it straight. I appreciate that there may be other ways of approaching such arguments, but I am a little out of my depth with them. I am doubtful whether an argument for extra resources to deal with the odd case that fell outside the time limit would be persuasive. If four cases came in today, we would put them all down for the same month. If we had a time limit of two weeks for each, it would be likely that we would put each one down for three weeks, so they would all be staggered. The next case that came in would be booked not for the next month but for four months down the line. Having a time limit at the end of the decision-making process tells us nothing about speed unless we take into account the constraints of fixing diets. As Stewart Stevenson will know from the Land Reform (Scotland) Bill, that has been taken on board: the diet has to be fixed within a certain time. We think that setting a time limit for a decision would push everything back and would not achieve anything—except in cases under the Land Reform (Scotland) Bill, which, we are told, is a priority policy.

Mr Rumbles: I am interested in the valuation process. The bill states:

"The seller or the tenant may appeal to the Land Court against any decision of the valuer made under section 31."

I asked the previous witnesses about their interpretation of what the bill says about the value of a farm. I was eventually satisfied that the valuer would rule that, under the pre-emptive right to buy and looking purely at finance—although I know that there would be many other considerations—the farm would be worth 50 per cent more if it was sold to the sitting tenant than what it would be worth without a sitting tenant. The impression that I got from the previous witnesses was that they were not terribly clear but that they were thinking through the process. If the matter is not clearly thought through, either the landowner or the sitting tenant could appeal to you for your interpretation of the bill. That is what I am asking for. How do you interpret the bill?

Lord McGhie: I should really have interrupted you because I am reluctant to answer that question today. Someone will come along some day and address the Land Court on that point, and therefore we are reluctant to express a view. My reluctance, which has been consistent, gained force following a report last weekend, when, in a three-judge case in the Court of Session, the entire appeal process was thrown out because one of the judges had expressed a view in Parliament many years previously about what a piece of legislation meant. The decision was that he could not be seen as impartial. However, I do not express any view about whether that was a sensible decision.

The Convener: I quite understand your reticence.

Mr Rumbles: As a parliamentary committee, we have to understand what we are talking about when we discuss the bill. We asked you and other witnesses who will be affected by the bill to give evidence partly for the reassurance that the way in which we interpret the bill is the same as the way in which you interpret it. If you do not interpret it in the same way, we might need to amend it so that you can do your job more effectively.

Lord McGhie: That is a good idea. However, as I understand it, constitutionally, it is not the role of the courts to advise the lawmakers before they make the law. We have tried to be as helpful as possible by asking you to clarify things, but we have never expressed a view on what any section actually means, as we will have to interpret the bill later.

Mr Rumbles: Would you have any difficulty in interpreting the law that is proposed in the bill?

The Convener: Feel free not to answer that question.

Lord McGhie: None of us in the Land Court has attempted to study the bill to that degree. We have commented on provisions that obviously needed to be clarified or tidied up, but we have not gone through the bill line by line. As you will know, in a court, when someone is interpreting the law for real, a lot more attention is given to every word than can possibly be given at this stage. I would love to help, as I am anxious that the bill should work. Nonetheless, I feel unable to comment further.

Mr Rumbles: I am finding it difficult to think of a useful question to ask you.

The Convener: In that case, Rhoda Grant can ask her questions.

Rhoda Grant: I have a few questions, which dot about a bit. If everyone will bear with me, I will jump from subject to subject.

Let us return to your concern about the two-week deadline. I understand that that period was specified to speed up the process. If a valuation took too long, it could hold up a sale. Do you have any idea how we could make the process quicker without pinning you down to a two-week period? Have you given any thought to ways in which the process could be streamlined and speeded up?

Lord McGhie: We wondered whether we could be directed to inform the parties concerned of the reasons for our decisions under the Land Reform (Scotland) Bill. I should explain that, like most courts and tribunals, the Lands Tribunal for Scotland was set up to give judgments in such a way that everyone in the country could read and understand the decisions that were taken. That means that we need to set out decisions at great length, explaining all the facts, all the arguments and the result. The parties know what the land looks like and they know what the arguments were, because they argued them. They are concerned only to know which way we have jumped on the critical issues.

We invited consideration of whether we could be positively directed by Parliament to find a shorter style of judgment. We stressed that that would not necessarily speed matters up, because we tend to reach our decisions following a fairly detailed analysis of all the material that we are given. We will still take time—it is not a matter of just jumping in and guessing a figure—but the new approach might speed things up a bit.

15:15

Rhoda Grant: So it is a matter of cutting down on the amount of detail in your judgments.

Lord McGhie: Yes. In short, we would be informing the parties, not the public. That is different from our usual role, under which we issue guidance to the public about the court's approach.

Rhoda Grant: It would not affect anybody's legal rights if you were to shorten your judgments.

Lord McGhie: No, it would not. It would make sense to do that in matters that purely concern evaluation. I have not pushed that reform, because I am not sure that it would make much difference to the amount of time involved. It might make a difference but it would certainly not make matters last longer.

Rhoda Grant: You spoke about the Lands Tribunal dealing with valuations. Is there anything in the bill that would prevent you from referring appeals on valuations to the Lands Tribunal for it to deal with?

Lord McGhie: Essentially, that relates to our structure as a court and not as a body that deals solely with value. Perhaps I sound a little condescending, but when we first started dealing with the proposals under the Land Reform (Scotland) Bill, and were discussing them with the officials who were instructed in them, those officials clearly had an idea that the Lands Tribunal just dealt with value. They thought that, if a valuer gets a figure wrong, they go along to the Lands Tribunal, which says what the right figure is.

We had to unscramble that perception and explain that we were a court, which hears evidence from witnesses on both sides, and that witnesses need time to set up their case and prepare their arguments about why the value should be X or Y. If we, as a court, are entrusted with that job, then we, as a court, cannot say, "Hang on a minute, we'll go and get the Lands Tribunal to do this for us." We would, however, bring in an expert from the Lands Tribunal to sit with the court. The decision would remain with the court.

Rhoda Grant: So your argument is that the Lands Tribunal is better placed to deal with appeals on valuations than the Land Court is.

Lord McGhie: That is my personal perception. The Land Court does a lot of land valuation work in crofting. In that context, we reached a decision that, on balance, it was better to have the Land Court do the valuation for crofting counties under the Land Reform (Scotland) Bill. On balance, I think that it goes the other way when normal agricultural communities are concerned, in which case the Lands Tribunal has that jurisdiction. It is a matter of keeping things consistent with the Land Reform (Scotland) Bill.

Rhoda Grant: I have some questions for the witness from the Scottish Law Commission. You said that you had reviewed the present situation. Have you any idea how many cases are going to arbitration at the moment?

Judith Morrison: There are some figures on that in our report, which are based on information that the Executive provided. I am not sure whether members have copies of that report handy, but table 3 shows the number of arbitrations by type of appointment. We have information only on statutory arbitrations; we do not have any statistics on private arbitrations. Over the past 10 years, the average has been about 50 arbitrations per year.

Rhoda Grant: Do you know what percentage of those cases go through the process, and how many are agreed outwith arbitration?

Judith Morrison: The number that reached a decision averaged between eight and 15. Some might have taken longer than a year; some might have dropped out because the cases were settled. I cannot give you that information. On average, however, between eight and 15 cases would be determined each year.

Rhoda Grant: It is clear that arbitration is slow and that few people reach the end of the process. I presume that the bill's proposed system will improve that situation. However, will that new system create more costs for people than the current system does? Or will the speed of arbitration mitigate the costs?

Judith Morrison: The bill's proposed arbitration system will be elective. The parties involved will choose whether to go to arbitration; they can also choose the arbiter. The intention is for arbiters to compete in the open market on cost-effectiveness and expertise. I would not say that there would be any change in the kinds of costs that are incurred by a party going to arbitration. I do not think that the bill will make any difference to that.

Fergus Ewing: I, too, am concerned about costs. This might be an extreme case, but at last week's committee meeting we heard from Alistair Mann, a farmer from the Black Isle, who said that his landlord had demanded that his rent be increased from £13,500 to £30,000. Mr Mann spent £22,000 on arbitration. The combined arbitration and Land Court costs were £80,000, which is unsustainable.

I hope that my question is within the permissible range. What can be done to cut such costs, which are plainly out of reach for most farmers and must deter tenant farmers from invoking any legal process?

Lord McGhie: That case was before my time, but it seems to rumble on unendingly because it is in the minds of all farmers. The case set a bad example because it went to appeal and involved questions of law of which the arbiter had not thought. I might stand corrected on this, but I believe that the result of the appeal was similar to the arbiter's original decision. However, the case set a bad example of matters running right through to an appeal.

The Land Court's costs are low. They are set by politicians and run at modest levels, involving hundreds rather than thousands of pounds. We cannot do much about that side of things. The problem is the costs that arise from the use of experts and lawyers. The Land Court tries to be as helpful as possible to avoid the need for more lawyers than is necessary. However, the use of lawyers is a matter for the parties in a case.

We have considered various measures to cut costs in the Land Court, such as capping them. That would involve telling people at the beginning of a case to decide on a figure for expenses, whether they win or lose the case. For example, someone could decide that their case was worth only £5,000 of expenses, so that person would agree with the other party that the winning party would get only £5,000 in expenses from the other. However, we cannot implement that as Land Court policy, because it would have to be decided politically. We simply throw it out as an idea.

Fergus Ewing: Does Judith Morrison have any suggestions about how we can cut costs?

Judith Morrison: The bill's proposed system is designed to prevent a legal matter from going to arbitration and then having to be referred to a court to be sorted out. Widening the jurisdiction of the Land Court to allow either party to go there straight away will prevent the parties from having to go to arbitration first and then raising matters of law that are sent on a stated case. We regard that as an area in which savings can be made. The stated case procedure can be removed for legal issues because a person can go straight to a court that is best qualified to give a decision on those issues.

In addition, authoritative decisions by the Land Court can inform subsequent disputes in which the same matters are raised. There will be no need to re-litigate on those issues, which is not the case in arbitration.

Fergus Ewing: Thank you. I did not appreciate that the bill would remove the need for the stated case procedure. I presume that that will cut costs.

I want to ask Lord McGhie a specific question about section 33. I ask the question because I think that the section might add unnecessarily to the cost of pursuing the procedure of making an application to the Land Court—or the Lands Tribunal if your advice is taken and the tribunal is given responsibility for section 33 appeals, mainly against the valuation of the farm. Section 33(3) states:

"In an appeal under this section, the Land Court may—

(a) reassess any value of the land … and

(b) for the purposes of section 29(2)(c), determine the price."

On the Land Court and the Lands Tribunal, your written submission states:

"it is important to remember that both are judicial bodies which use their expert knowledge to reach a sound decision **on the evidence presented**."

However, you do not act as valuers per se. Does that mean that, in order to meet the option under section 33, you would in effect engage people who would probably be arbiters? How would you go about dealing with the procedure?

Lord McGhie: I quibble with the "reassess" point, which came out of the original proposals for the Land Reform (Scotland) Bill. The draftsmen's original concept was that we would just say what the figure was. We told them that we would have to hear evidence and make decisions on that basis. We would expect parties to go to their solicitor to say that the figure was wrong before the matter got to either the court or the tribunal. The solicitor would go to the valuer for each side, decide what the value should be and why, and instruct counsel as they saw fit. There would be a hearing and we would decide the matter on evidence.

Although the word "reassess" is used in the bill, we certainly, as a court or tribunal—it does not really make any difference which one—would require to deal with cases on evidence. That is a well-established procedure for valuation for compulsory purchase. There might be better ways of doing it, but from the point of view of the court, that is the only way that we could do it.

Fergus Ewing: The other point that I wanted to raise also relates to your submission. You make a criticism of section 13 of the 1991 act, which I believe is about variations of rent. You state:

"The provisions of sec 13 of the 1991 Act are hard to follow."

Broadly speaking, for the limited duration tenancy, the same formula and wording are applied to the new format as are applied to the existing secure tenancies. On the provisions of section 13 of the 1991 act, you go on to say:

"We did suggest that they should be radically overhauled".

Can you say in what way they should be overhauled and what the objectives are, or am I transgressing the breadth of your remit once again?

Lord McGhie: That is a problem and it would need policy input, which is the difficulty that I face. We have set out for the officials in many pages of analysis why we think that the provisions are not transparent at the moment and what some of the possible options are. The options are largely to follow the idea of trying to have comparative renting by looking at what is paid in other farms. The drawback is that there are premium elements in all such examples for various reasons. Rent could be based on profitability, but that also has its drawbacks. We are certainly not in a position to say which option should be preferred. Our perspective is simply that the text of section 13 is contorted and far from the way that the procedure works in practice. It could be sorted, but it would be a big exercise.

Fergus Ewing: If we were to ask the Executive for the submissions that you cannot talk about today, perhaps the Executive might want to share them with us.

Lord McGhie: I do not think that the Executive reached a view on what the outcomes should be, but there was an analysis and, I hope, a great deal of detail given about what was wrong with the way that section 13 read.

Fergus Ewing: We heard from Mr McDiarmid that part of the problem for some tenants lies in simply understanding the legislation, because it is complicated. If they do not do the right thing at the right time they can lose out substantially. Is that a general observation in your experience?

Lord McGhie: There has been a general problem with arbitration. There are many time limits in the agricultural holdings legislation. To date, the policy of courts throughout the country has been to interpret those limits strictly. It is fair to say that, in the House of Lords, there is a move away from that position. There is a realisation that one must be more realistic about time limits. Attempts to do that cause a great deal of difficulty. It is not an easy matter.

Fergus Ewing: Have you made submissions on that?

Lord McGhie: We have not made submissions on time limits. We see that as a matter of policy.

Fergus Ewing: Perhaps you might give such submissions privately to the Executive. We are not expert lawyers; although I am a lawyer, I have no expertise in the field. We are all concerned that we have a golden opportunity to improve the law, to simplify it and to make it more effective. We appreciate all the expert advice that we have received from many quarters.

Lord McGhie: That is encouraging. It is my impression that the Executive would be happy to take on board the proposed technical changes, if it were encouraged to do so. Your encouragement is helpful.

The Convener: Would you like to respond to those points or are you happy?

Judith Morrison: No. I am happy to leave that matter to Lord McGhie.

15:30

Mr Rumbles: I have found a constitutionally appropriate way of asking my question. In your written evidence, you discuss the appeal process on the value of the land and pendulum arbitration. You say:

"One possibility is that instead of the Court having to fix a precise figure it would leave the parties to propose appropriate figures and limit its own task to that of choosing the more appropriate."

In normal circumstances, the pendulum arbitration

process is effective in getting both parties to narrow their submissions to you to obtain the best result.

There is a difficulty with the bill, which was raised in previous evidence to the committee. The landowner and the tenant farmer might have a fundamentally different interpretation of the valuation. One of the parties might feel aggrieved and might appeal to you. One of the parties might feel that they were putting in an appropriate offer of 50 per cent to buy the farm, while the other party might say, "No, the law says that this is the level." Before you have to deal with such cases, I want to know how you interpret the bill in that regard. Do you see what I am getting at?

Lord McGhie: Perhaps the problem with the valuation is that we are considering the figure of 50 per cent and saying that a tenant farmer would want to pay a little more. I think that a professional valuer would say that a free-market purchaser would buy the farm in the knowledge that there was a tenant on it who would be prepared to pay a premium to release the tenancy. That value is locked in. The tenant who wanted to purchase the farm would not pay just 50 per cent—he would be prepared to pay a premium.

In theory, the tenant will pay just a fraction more than 50 per cent to get his farm. However, the idea that one cannot get more on the open market because there is a sitting tenant and the value is therefore much lower ignores the fact that purchasers buy in the knowledge that the tenant farmer is an interested purchaser. I am not sure that my explanation was clear. Although I can express a personal opinion that it is probably right that the proposed statutory scheme will result in the landowner getting a little more, the situation is not quite as black and white as it seems.

Mr Rumbles: In relation to your written evidence on pendulum arbitration, the figures that the two parties submit should be close, rather than being wide of the mark.

Lord McGhie: Our considerations related to renting. The problem is that there are always different perceptions. If we looked at the value of a farm simply on the basis of agricultural acreage value, there would not be much difference in the figures that were submitted. The difference will almost certainly arise because someone will have an idea that the farm in question could be used for a golf course, for example. I do not know what is better than farming nowadays.

The last case of this kind that we handled related to a farm on the outskirts of Edinburgh. The city bypass marks the green belt. The land was immediately to the west of the bypass, at Gogar. One party argued that planning permission would be obtained some day; the other side disagreed. The whole issue, which took a long time to resolve, was what that element was in the farm value. Pendulum arbitration works fine if it seeks only to agree a comparative figure, but if one party has a completely different idea of an element, the pendulum process is not so effective.

The Convener: On that thought, we draw the session to a close. I thank ladies and gentlemen for joining us and for answering the questions so capably.

15:35

Meeting suspended.

15:43

On resuming—

The Convener: Our final panel is comprised of Lamont Hair and Robert Cumming, who are from the National Farmers Union of Scotland's tenants working group. They have studied the form, so I hand over to one of them to make an introductory statement.

Robert Cumming (National Farmers Union of Scotland Tenants Working Group): As I am first alphabetically, I will begin. I am a tenant farmer on a fairly large traditional estate in Banffshire—that is a wee county beside Aberdeenshire. My father was a farm worker who started off in a smaller farm in the mid-1930s and moved when I was a young chap to the larger farm that I am now in. Through hard work, the business flourished and prospered. Because the farm is situated on the edge of the estate, my father bought the odd small farm alongside it, which means that, in addition to being tenants, we own a bit of land. I took over the tenancy when my father died in 1982 and I have farmed there with my wife ever since. We also have the tenancy of a smaller farm on the same estate.

I have been on the NFUS tenants working group for a number of years and—I hope—I have influenced some of the joint proposals of the Scottish Landowners Federation and the NFUS that are before the committee. I have been a member of the panel of arbiters for two or three years, but I have not carried out an arbitration because the two cases with which I have been involved were settled before the final arbitration day.

15:45

Lamont Hair (National Farmers Union of Scotland Tenants Working Group): I am a partnership tenant—or, if you prefer, an insecure tenant—on Ardwell estate, which is a small family estate in the extreme south-west of Scotland. The estate is first class and there is a good

atmosphere between landlord and tenant. Like all tenants who have given evidence to the committee, I thought long and hard about whether to do so. Ardwell estate was involved early on in the process, when Ross Finnie visited the estate to gauge the views of a group of partnership tenants and secure tenants on what progress was required. Fortunately, I know that my landlord is perfectly happy for me to give my views in this forum.

Because I am an insecure tenant, my interest in the bill lies in where we go from here. We should ensure that the bill creates a framework within which tenants can continue to look after the land to the best of their ability and are allowed to make a living that equates with the work and time that they put in. The bill should also ensure that, at the end of the tenancy—which might not always be at retirement—there is a mechanism to allow tenants to realise the investment that they have made during their tenancy. Those are my main interests in the bill.

Fergus Ewing: Much in the bill is not controversial and, as a result, we tend not to focus on it. I am sure that we all welcome the new opportunities for leasing that the bill creates, to which Mr Hair alluded.

In earlier evidence, John Kinnaird said on behalf of the NFUS that the union is totally against an absolute right to buy. I have a couple of questions about the NFUS consultation, although I am not sure whether you will be able to answer them. From the NFUS written submission, I understand that 57 per cent of the sitting 1991 tenants who responded supported an absolute right to buy. Is that factually accurate?

Lamont Hair: From the figures that we have here, I believe that the figure to which you refer is the number of secure tenants who wish an absolute right to buy.

Fergus Ewing: Yes.

Lamont Hair: That was only 540 of the total of 2,500 who responded. So if you want to play with the figures to that extent, yes, 57 per cent of the secure tenants who responded wanted an absolute right to buy. However, as we must represent all our members' views, we must take an approach that somehow strikes a balance. I have a long-term connection with our tenants panel—it goes back 12 years. The position that we have reached did not just arrive as a result of the survey. It already existed, and we had been working on it several years prior to the survey taking place. The survey only re-emphasised the broad view that we took—which we felt was most satisfactory to all members—that a pre-emptive right was the proper course. It was the one that most mirrors what actually happens.

I do not want to be too long-winded but, in our area, we have seen the dispersal of a small estate in the past three months. All five tenants, including the partnership tenant, were given the opportunity to buy. Even without a bill, it appears to me that the opportunity that we are trying to create exists at the moment.

The Convener: Do you want to add to that, Mr Cumming.

Robert Cumming: No, it has been covered adequately.

Fergus Ewing: I will pursue a further question about the consultation exercise that was carried out and in which a majority of sitting tenants supported an absolute right to buy. Can you give us a breakdown of whether the sitting tenants who did not support an absolute right to buy—43 per cent—were sitting tenants alone or sitting tenants and farm owners?

Robert Cumming: I cannot. All I can do is reflect the views of the area from which I come and my own views. As a sitting tenant, I would obviously stand to make a lot of windfall gain if I had the opportunity to demand to buy the farm that I rent, which is my home, at any time. Surely, it must be wrong in principle for any government body to take away the freedom of an individual through an act and give me the right to take somebody else's property from them against their will.

As my colleague has said, on the estate in his area, tenant farms have been sold. Throughout the years, tenant farms have been sold to sitting tenants. To look further down the line, I hope that a next generation of farmers exists. We must ensure through the bill that tenanted land is available for them to start as my father did—he started as ploughman and worked his way up—and be able to create a business and bring up a family. Tenant farmers contribute to the areas in which they live by being represented on various committees, by participating in local events and by sending their kids to local schools. That is important and it will all be destroyed if the bill attempts to create an absolute right to buy. That will dry up the supply of farms that are available to let.

I will put myself in a landowner's position—which I am not, because we own only a small area that I farm in hand. If something happened to me and I wished to let my land out, there is no way that I could consider that if I felt that the person to whom I let it—who might be a neighbour's son—could knock on my door a year after he went in and tell me that he was buying the place.

Fergus Ewing: Many of us might have some sympathy with your views if that were what was proposed, but it is not, because the proponents of

the straightforward right to buy are not suggesting that it apply to all tenants. In fact, they are specifically saying that it should not apply to tenants of grazing leases or, for that matter, the new vehicles of short limited duration tenancies and limited duration tenancies. I think that I am correct in saying that they are arguing—we have established this from the evidence—that the right should apply only to 1991 tenancies. By definition, those tenancies will tend to be held by farmers who have farmed the same farm all their lives and whose families have perhaps farmed it for generations before that. It is important to clarify that, as far as I am aware, nobody is suggesting that, if you lease the farm that you own to somebody, that person should acquire a right to buy.

Robert Cumming: I stand corrected on that point.

Fergus Ewing: Will you go back and find out whether the information that I have requested is available? Is there a breakdown of whether the 43 per cent of tenant farmers in the consultation exercise who opposed an absolute right to buy were landowners as well as tenants? Can you tell us that as a matter of fact? It may be that that information is not available, or that the NFUS may not wish to share it with us. However it would add to the debate if it was available—[*Interruption.*] I apologise, convener, for transgressing the first rule of the day, as my mobile phone has gone off.

The Convener: There is always somebody.

Lamont Hair: One of my fears with an absolute right to buy is that although I live and work on an estate where 75 per cent of the tenants would not be in a position to exercise that right, the 25 per cent who could might interfere with the total viability of the estate if they took farms out of it. The pre-emptive right to buy finds favour with me, because at least there is a willing seller who is probably looking to sell the whole estate. Even as partnership tenants, although we will not have any right to buy by law, we will at least know that the farm is coming up for sale and we will become a bidder like anybody else. My fear is that if estates are fragmented, we will lose many more tenancies than we are trying to create and we will not get the framework that we need. That is what frightens me slightly with an absolute right to buy.

Rhoda Grant: You said that an absolute right to buy would interfere with the viability of the whole estate. I cannot see how that would differ from a pre-emptive right to buy. Given that the estate is being sold, the secure tenant could exercise their right to buy. Surely that would have the same effect. I cannot see any difference between those two situations for the viability argument.

Lamont Hair: It is obviously my misunderstanding. I was led to believe that if there was an absolute right to buy, the tenant would, at any time, be able to attempt to buy his farm. That could well happen where the landlord does not wish to sell his estate. If a number of farms are taken out, the estate will be scaled down, and a lot of the work that we presently see going on in forestry, shooting and all the rest of it may well become—

Rhoda Grant: But surely there could be the same effect on an estate that was being sold because the landowner wanted to retire or slow down, for instance, or because of a death or for some other reason. Not everyone just decides, "Oh, I'm away." Surely the same argument could be used against the pre-emptive right to buy: if an estate is being sold as a viable, going concern and one farm is pulled out, that could affect the viability of the whole unit. I do not see how that argument works.

Lamont Hair: I think that we are both agreed that there are difficulties.

Robert Cumming: The difference is that with a pre-emptive right to buy it is the landowner who, in effect, decides and triggers the option for the tenant to buy. He decides which farm, which part of the estate, and how much of his land he wishes to dispose of. He is in control. If the situation is turned the other way round so that there is an absolute right to buy, the landowner does not have that power; the power moves to the tenant, who can fragment the estate, as was highlighted earlier.

Rhoda Grant: I would argue about that. The landowner would have no control over which farm to sell, because the secure tenant would be exercising the right to buy the farm for which they have the tenancy. The landowner would not have the choice of which farm to sell to the tenant. The tenant would have the pre-emptive right to buy only the farm for which they have the tenancy, so there is no choice about which piece of land is bought. The point is the mechanism that is used.

Robert Cumming: I beg to differ. Maybe I do not understand it properly, but if there is an absolute right to buy, as far as I can see it, the tenant is in the driving seat; he decides when to buy and which tenanted unit he wishes to buy. With the pre-emptive right, which means that the tenant has to be notified and offered the farm, the landlord decides which farm he is going to sell. He triggers the whole mechanism of negotiation and purchase, not the tenant. Maybe I do not understand. I am a practical farmer, not a lawyer, but to me it is quite simple: the driving seat is different.

Rhoda Grant: The landowner has control over when the pre-emptive right to buy is exercised by their control over whether they sell their estate, but

that is the only difference. The landowner has no control over which farm is sold or where that is. That relates to the viability argument. If one farm is strategically important to the estate and an absolute right to buy could affect the estate's viability, the situation would be no different from the situation under a pre-emptive right to buy. The only difference is that the effect on the landowner would not be the same, because they would pass all the land to somebody else, including a tenant farmer who exercised their right to buy.

Robert Cumming: I ask the convener to clarify an issue for me, and, I hope, for everybody else. With a pre-emptive right, I, the tenant, do not approach a landlord and say that I want to buy the farm. The landlord approaches me for whatever reason—whether financial, managerial, or to move his money from land investment to the City—and says that he would be interested in selling the farm that he rents to me as a sitting tenant. He triggers the mechanism. If I am wrong, say so. If I am correct, please inform Rhoda Grant of the facts.

16:00

The Convener: That is correct as far as the pre-emptive right to buy is concerned.

Rhoda Grant: We are coming from different directions. That is correct if the landowner sells one chunk of a farm, but if he sells the whole estate, the farmer can exercise their pre-emptive right to buy on the part of which they are the tenant. We are talking at cross-purposes.

Robert Cumming: However, the landlord triggers the selling procedure.

The Convener: That was a supplementary question and it has had a fair crack of the whip. It was Mike Rumbles's turn, so I ask him to speak. I will return to Rhoda Grant if required.

Mr Rumbles: I will return to the questions that my colleague Fergus Ewing asked. In response to Fergus Ewing, Lamont Hair said that the NFUS's consultation showed that 57 per cent of secure tenants wanted the absolute right to buy. I do not know whether there was a misunderstanding, but I understood Fergus Ewing to be referring clearly to 57 per cent as the majority of sitting tenants. Did 57 per cent of secure tenants or 57 per cent of all tenants express that view?

Lamont Hair: I believe that the figures say that it was 57 per cent of secure tenants.

Mr Rumbles: Are most tenants not in favour of the compulsory right to buy?

Lamont Hair: Many tenants are not included in that group. Such tenants could be involved in other arrangements, such as partnership agreements.

Mr Rumbles: That is why the policy of the NFUS's tenants working group and of the NFUS is in favour of the pre-emptive right to buy and against the compulsory right to buy. Is that right?

Lamont Hair: Yes.

Robert Cumming: That is correct.

Mr Rumbles: I wanted that to be in the *Official Report*, because I thought that there was some confusion and that perhaps Fergus Ewing had misinterpreted your response, which he seems to have done.

The matter that Rhoda Grant raised is causing some confusion. Am I right to say that Robert Cumming's response to Rhoda Grant is that the compulsory right to buy takes the ownership decision away from the current set-up to the individual tenant farmer, which could threaten the way in which the arrangement works?

Robert Cumming: That is what I feel.

The Convener: As an ex-farmer, I still cannot get through the weekend without reading *The Scottish Farmer* and other agricultural journals. Much has been made of the resignation in the past week of three members of the tenant farmers action group who are also members of the NFUS's tenants working group. How many members does the tenants working group have? Is that a set or free-flowing number? What is the structure?

Lamont Hair: When those people resigned, the group had 11 members, who were taken from all areas of Scotland.

Robert Cumming: That is correct.

The Convener: I understand that those people resigned because they felt that the NFUS had not sufficiently represented the views of the 57 per cent of secure tenants who replied to the survey.

Robert Cumming: That was the reason that those people gave.

The Convener: We must accept that as the reason why they resigned.

Lamont Hair: Yes.

The Convener: I presume that all members of the tenants working group are tenant farmers.

Robert Cumming: They are, but some, like me, might own an adjoining farm, too.

The Convener: Are the majority of members owners?

Robert Cumming: No.

The Convener: Some are owners.

Robert Cumming: One or two are in the same position as me. We are on the edge of the estate, so when a neighbouring farmer sold what was not a big farm, we bought it.

The Convener: Many owners rent some ground, too.

Robert Cumming: I still count myself as a tenant farmer, mainly.

The Convener: Is it fair to say that the eight of the 11 who did not resign are satisfied that the NFUS has represented Scottish tenant farmers' views?

Lamont Hair: I believe that they are.

The Convener: Do you know what percentage of tenant farmers are members of the NFUS?

Lamont Hair: I cannot tell you that offhand. At least 80 to 90 per cent of the tenant farmers in my area are members of the Wigtownshire branch of the NFUS, of which I am a member. If that were replicated throughout Scotland, the figure would be fairly similar.

Robert Cumming: Tenant farmer membership of the farmers union is similar in my area.

The Convener: As members have no more questions, I thank the gentlemen for their time and for answering the questions.

That is the end of today's evidence on the Agricultural Holdings (Scotland) Bill. I thank all the witnesses and remind them that the committee will take further evidence next week, after which we will consider all the evidence that we have taken. That will be compiled in a report to the Parliament on the bill's general principles, which might include recommendations, which will be based on the evidence that we have heard.

16:06

Meeting continued in private until 16:16.

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