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Official Report

FINANCE COMMITTEE

Wednesday 6 February 2013

Session 4

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CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	2195
LAND AND BUILDINGS TRANSACTION TAX (SCOTLAND) BILL: STAGE 1	2196

FINANCE COMMITTEE
5th Meeting 2013, Session 4

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Gavin Brown (Lothian) (Con)
*Malcolm Chisholm (Edinburgh Northern and Leith) (Lab)
*Jamie Hepburn (Cumbernauld and Kilsyth) (SNP)
*Michael McMahon (Uddingston and Bellshill) (Lab)
*Jean Urquhart (Highlands and Islands) (Ind)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Richard Blake (Scottish Land & Estates)
Kennedy Foster (Council of Mortgage Lenders)
David Marshall (Edinburgh Solicitors Property Centre)
Gavin McEwan (Charity Law Association)
David Robb (Office of the Scottish Charity Regulator)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Committee Room 6

Scottish Parliament

Finance Committee

Wednesday 6 February 2013

[The Convener *opened the meeting at 09:30*]

Decision on Taking Business in Private

The Convener (Kenneth Gibson): Welcome to the fifth meeting in 2013 of the Finance Committee. I remind everyone present to turn off mobile phones, BlackBerrys or other electronic devices, please.

Under agenda item 1, the committee must decide whether to take in private item 3 and whether to take in private further consideration of the draft demographic change and ageing population report at future meetings. Do members agree?

Members *indicated agreement.*

Land and Buildings Transaction Tax (Scotland) Bill: Stage 1

09:31

The Convener: Item 2 is oral evidence as part of our scrutiny of the Land and Buildings Transaction Tax (Scotland) Bill at stage 1. I welcome to the meeting David Marshall, from the Edinburgh Solicitors Property Centre; Kennedy Foster, from the Council of Mortgage Lenders; and Richard Blake, from Scottish Land & Estates.

There are no opening statements, so we will go straight to questions. I will ask the first couple of questions before opening it out to committee members.

Paragraph 6 of the submission from the Council of Mortgage Lenders states:

"An issue which might be worth considering is that the lower number of high value transactions in Scotland compared with elsewhere in the UK may result in a greater number of winners and losers from the introduction of a progressive system if its aim was revenue neutrality".

Will you expand on that?

Kennedy Foster (Council of Mortgage Lenders): We did a lot of research, which is now 10 years old. In the United Kingdom, 75 per cent of stamp duty land tax was raised in London and the south not only because of the number of transactions, but because of the number of high-value transactions.

I spoke to David Marshall before the meeting. I am aware that the ESPC has done some research looking at the Scottish land register, and there is not the same number of high-value transactions in Scotland. If, as I understand it, the proposal is that the settlement from Westminster will be reduced by the corresponding amount of stamp duty land tax collected in Scotland, and if the Scottish Government wants to maintain revenue neutrality, it will have less flexibility in setting tax rates than it might have had were there a lot of high-value transactions.

The Convener: Should the Scottish Government pursue revenue neutrality?

Kennedy Foster: I have no view on that at all.

The Convener: That is fine.

Mr Marshall, the ESPC has given figures suggesting that most people would pay less tax or that the proposal would be revenue neutral. However, you express concern that people in your area of Edinburgh, Lothians, and Fife

"will pay more under the new regime as house prices in this region are higher than the Scottish average."

You go on to say that there is not much scope for localised taxation levels because that

"would run counter to the objective of having a simple and easily understood system".

Is that not the case at present?

David Marshall (Edinburgh Solicitors Property Centre): Yes. We accept the fact that the proposals would lead to people in any area in which average house prices are above the national average paying a higher rate of tax.

Our main concern, I suppose, is the rate at which the tax increases with selling price. If that gradient is too steep, that may make it more difficult for people to move up and down the property ladder. We are certainly fully supportive of land and buildings transaction tax being a progressive tax, but the rate at which it increases with the selling price is our main area of concern.

The Convener: Obviously, you have concerns that particular areas of Scotland should not be disproportionately affected by the new tax.

David Marshall: As I said, it would not be practical to have regional variations in LBTT. That would lead to greater complexity and require constant revisions so, although it might be a nice idea in theory, it would be terribly difficult to put into place in practice. However, there certainly needs to be awareness of the make-up of regional markets when setting the new rates to ensure that there are no unforeseen consequences on regional markets.

The Convener: Of course, the Edinburgh region is more prosperous than the Scottish average, so that is one reason why that situation might arise.

David Marshall: Absolutely. As I said, we are fully supportive of LBTT being a progressive tax. There is a disparity in house prices between Edinburgh and Lothians and the national average, but that needs to be seen in the context of the disparity in incomes—whether mean or median—given that the differential in house prices is usually greater than the differential in incomes. Those higher house prices are not always matched by people being more cash rich or having higher incomes. We need some awareness of that to ensure that there are no blockages in the market. As I said, anything that prevents people from moving up and down the ladder will have a negative impact on the market as a whole.

The Convener: However, the progressive nature of LBTT should ease that, particularly for the cliff edge around £250,000.

David Marshall: Yes, we fully support the move away from the slab structure of stamp duty land tax. As I was saying to Kennedy Foster before the meeting began, I fail to see any rational argument for the situation in which a change in £1 in selling price instigates an increase of £5,000 of tax. There is no rational argument for that whatsoever. We are very much in favour of the move away from that, but we need to be careful about the rate of increase to ensure that, for example, the tax paid by someone on a property at £250,000 is not massively less than the tax paid on a property at £350,000 or suchlike. Where large disparities exist, they can create inequalities in the market. That is our only real concern.

The Convener: The Scottish Land & Estates submission expresses some concerns about the taxation of sub-sales, in particular the potential for double taxation. Mr Blake, will you perhaps expand on that for the committee?

Richard Blake (Scottish Land & Estates): To understand where we are coming from, it is worth just rehearsing what might happen in a fairly major purchase. Where a buyer sees attractions in a farm or estate or chunk of land—or any other business in the countryside—that is on the market, the buyer will submit an offer on the closing date and then use the period between the offer being accepted and completion of the sale to sort out how to finance it. Some finance might already be in place, but there may be a need to look at sub-sales to produce more of the finance. Our concern is that the Parliament should look very closely at whether the Government's policy objective should be to do away with all sub-sale relief, as seems to be the case in the bill.

We are fully aware that there is scope for abuse of sub-sale relief, in that blocks of land that have been purchased and for which the missives have not been completed may be sold on, possibly for profit. As far as I understand it, that scope for abuse is one of the concerns of the bill team, but I do not think that a broad-brush approach to stamping out a potential abuse of sub-sale relief should necessarily block consideration of whether a properly targeted sub-sale relief should be provided for properly constructed transactions in which there is no attempt at tax avoidance.

The Convener: You are worried about the baby being thrown out with the bath water, so to speak. How might the Scottish Government amend the bill if necessary to ensure that we reach the objective of eliminating avoidance while not having that effect?

Richard Blake: I have not looked at the technical detail of this, but I suppose that the Government could look at making provision that, where no profit is made on a sub-sale, some sort of sub-sale relief is available. That would ensure that there was no double taxation.

I am not sure whether your question was also referring to the point that we made about

nominees. Would you like me to comment on that issue, which to a certain extent comes from the same angle?

The Convener: Yes, indeed.

Richard Blake: When someone wants to invest in a major business opportunity—in rural Scotland, or in the centre of Glasgow or wherever—the ownership of the property may need to be structured among various different companies or different parts of the business. For a title that is being sold by person A, part of the title may be taken by B Ltd and part of the title may be taken by C Ltd, both of which might be part of the same organisation. There is a real concern that, if the Government's policy wish is that sub-sale relief should not be available and that it should also catch nominees, that might take away a lot of the flexibility for potential purchasers in deciding how to finance a potential project or which pocket of their business to put it in. I reiterate that I am talking about an effect not only on rural purchases but on corporate or commercial purchases.

The Convener: Colleagues round the table will no doubt want to ask further questions on that, so I shall move to questions from committee members.

Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): Mr Foster has already referred to the research that was undertaken for the Council of Mortgage Lenders Scotland about 10 years ago. The CML briefing paper helpfully sets out some of its findings. What was the impetus and methodology for that research?

Kennedy Foster: The research was carried out by University of Reading academics on behalf of the CML in 2003, when the marketplace was probably quite different. However, they looked at the impact of stamp duty on the first-time buyer market, the distribution of stamp duty and its impact throughout the UK. They proposed a number of alternatives to stamp duty land tax as it existed at that time. I shared that research with the Scottish Government officials when they were looking at bringing forward the bill.

Jamie Hepburn: Given that you shared the research with the Government, presumably you think that it still has relevance, even though you concede that the market is different now from what it was 10 years ago.

Kennedy Foster: The research certainly still has relevance and we have referred to it in our submissions on the UK Government's budget over the past 10 years. We have constantly called for the UK Government to move away from the slab system to a more progressive system.

Jamie Hepburn: Did I pick you up correctly as saying that the research was UK wide?

Kennedy Foster: Yes. I should make it absolutely clear that the research was UK wide, so it is not just about Scotland.

Jamie Hepburn: I am not sure that we have that research. It might be useful for the committee to have a copy of it.

Kennedy Foster: I can certainly send it on to the clerk.

Jamie Hepburn: Your submission expresses concerns about the collection of the tax. You say that online collection is a good idea in principle,

"but given the issues which there have been with the Automated Registration to Title to Land system in Scotland (ARTL) it is important that lessons are learnt from that project."

I freely concede that I am not aware of the details of that project. What lessons need to be learned from it?

Kennedy Foster: Registers of Scotland moved to a system called automated registration of title to land, which was one of a number of Government information technology projects that came in for criticism in an Audit Scotland review. I do not personally use the system day in and day out, but we in the lending industry place quite a lot of store on that system, which involved a move to deeds being held electronically with electronic signatures. At the end of the day, lenders would not have to store title deeds and so on, and the system had various security advantages. However, solicitors have found the system slow and difficult to use. They say that registering deeds the old paper-based way is still their preferred method.

My understanding is that it is proposed that that system be replaced. Registers of Scotland has changed its IT methodology; it used to have a contract with British Telecom, but I believe that IT has been taken in house. The committee will take evidence from the keeper at some stage, so it may be worth asking her about that.

The intention, over a period, is to replace the automated registration of title to land system with a new system. However, that system will also deal with the new tax when it comes into play. The concern is that IT projects are delivered. From personal experience in the banking industry, I know that they are notoriously difficult to deliver.

09:45

Jamie Hepburn: Indeed. We have seen that in the public sector, too. Thank you. That is helpful.

I turn to Mr Blake. The convener raised the issue of your concerns about possible double taxation on a land transaction. If I followed you correctly, I think that you were explaining that to finance a purchase, a purchaser may sometimes

sub-sell, or sell parts of the property. I can understand B purchasing land from A and sub-selling part of it to C, but what I cannot understand is B selling the whole property to C. What is the rationale for that type of transaction? Presumably it does not finance the purchase for B, because C will own the whole job lot.

Richard Blake: I cannot tell you the rationale for that, but it happens. It could be a change of mind or circumstances, or the unavailability of finance from banks.

Jamie Hepburn: It is useful to know that we do not have a compelling rationale for that. We need to explore that further.

Richard Blake: I return to a point that Kennedy Foster made. The issue is not in our submission, and I hope that I am introducing it at the right time. We are concerned that where VAT is charged on rent on a taxable transaction, stamp duty, or son of stamp duty—land and buildings transaction tax—would be charged on the VAT element as well as the rent, which is another example of double taxation that might need to be watched. That happens at the moment with stamp duty land tax, and it is a concern to us as an organisation and to professionals when they are dealing not just with a rural lease but with any sort of purchase or rent in which there is a VAT element.

Jamie Hepburn: Are you saying that if that is followed through for LBTTT—I might have used one too many Ts there—it would be consistent with the current form of taxation? It would not be a change, but your point is that it would be a long-standing concern.

Richard Blake: It would not be a change but the Parliament might like to consider that sort of double taxation, or tax on tax. It is rather like tax on fuel duty at the pumps.

Jamie Hepburn: I am sure that we can explore that further.

Mr Marshall's submission helpfully gives us two sample scenarios for the introduction of a progressive taxation system. In the first, just under 40 per cent of buyers would pay less tax and in the second just over 50 per cent would pay less. I think you said that although few people would pay more, those who pay more would be more "negatively impacted"—I presume by that you mean that they would pay more—than those in the first scenario. Which is your preferred scenario?

David Marshall: I reiterate what I said previously. Our main concern is simply that the rate of increase in taxation should not be too steep. The two illustrative examples that were provided were not entirely unreasonable. There was a slight concern for us about the level of taxation that would be paid at around the £350,000 to £400,000 mark, because there would be a significant increase in taxation at that level, which could have an impact on a significant number of transactions for family homes in and around Edinburgh.

If members look at the first illustrative example, instead of introducing stamp duty at £180,000, possibly our preference would be to introduce it at a low level—it could still be for properties that sell for more than £125,000—which could allow a slightly lower level of taxation on family homes that sell at around the £350,000 to £400,000 mark.

Jamie Hepburn: To be fair, you discounted the prospect of localised taxation—

David Marshall: Absolutely—yes.

Jamie Hepburn: However, you posited the possibility, so I will ask my question anyway. You said that there should be awareness of local markets in the system. However, we have received evidence that there is concern about market distortion. Could it be argued that local taxation would lead to market distortion?

David Marshall: As I said, we would in no way advocate regional taxation, which raises three issues. One relates to the complexity of the system and the difficulties in communicating that to potential buyers. The second issue is precisely what you said—the system could lead to distortions between neighbouring markets. The third concern is that constant revision would be required. For example, if house prices in Glasgow rose relative to those in another area of the country, revision would be required. Localised taxation would not be practical.

Jamie Hepburn: What are the other two witnesses' perspectives on the idea of localising the tax?

Kennedy Foster: Defining a region would be difficult. The housing market is regionally based—the likes of Aberdeen and Edinburgh are prosperous areas, but other areas, such as parts of Ayrshire, are not as strong. Some areas of a region have isolated pockets that are different. I stay in Kilmacolm, which is in Inverclyde. Kilmacolm is quite a prosperous village, whereas other bits of Greenock and so on are not as prosperous. Defining a regional market would be extremely difficult.

Richard Blake: Such a system would be difficult to define and administer, and it would cause all sorts of problems for professionals who were trying to get their heads round it daily. The switch from stamp duty land tax to LBTT will be difficult enough for professionals to understand. We need to keep the system as simple and straightforward as possible, to make revenue collection work, as well as anything else.

Jamie Hepburn: My final question is for Mr Marshall, whose submission makes the interesting point that,

"whilst acknowledging that one of the aims of a progressive system of taxation is to place a greater burden upon those who have the broadest shoulders, it is worth pointing out that households buying a home worth £400,000 aren't necessarily 'rich'."

What do you mean?

David Marshall: As I said, almost one in five transactions for three-bedroom and four-bedroom properties in the capital is at such a level. I made the point that higher house prices in an area are not necessarily reflected in higher incomes—the value of someone's property might have increased and they might be looking to move up the ladder.

Our greater concern is that anything that has an impact on one area of the market will have a knock-on effect elsewhere. If the increase in tax was a little too steep, it could have a negative impact on other areas.

Jamie Hepburn: I did not ask about that; I asked what your definition of "rich" is. Do you have any form of statistical analysis that shows the average income of a family who buy a home that is worth £400,000 or more?

David Marshall: As I said, one in five three-bedroom and four-bedroom properties in the capital is sold at such a level. That is not simply at the very upper end of the market; it covers 18 per cent of transactions for three-bedroom and four-bedroom properties. We are not simply talking about the very wealthy—a number of families would be affected.

Jamie Hepburn: The statistic that you refer to—one in five three-bedroom and four-bedroom properties—is specific. What is the figure among transactions overall?

David Marshall: The percentage among overall transactions is much lower but, in most cases, we could not expect a family to live in a one-bedroom flat.

Jamie Hepburn: I am on the Welfare Reform Committee, so I think that the UK Government might disagree. That point might not be for now, convener; I think that I have explored the point as far as I can.

Richard Blake: I have a point to make on the values that have just been discussed. I understand that the questions that have been asked so far are about residential purchases, but one of the planks of the Scottish Government's rural policy is to encourage new entrants into farming, and everyone is aware that the cost of agricultural land in Scotland is an additional burden on new entrants who are not necessarily "rich". They are trying to get their foot on the ladder when they borrow to fund the purchase of a small farm. With agricultural values at between £3,000 and £8,000 an acre, those people who do not have an awful lot of surplus cash will soon be into the higher rates of LBTT. Looking at the rural side as well as the residential might help to inform the committee.

Michael McMahon (Uddingston and Bellshill) (Lab): I will direct my question initially to Mr Foster, but I welcome answers from the other witnesses. Mr Foster raised the issue of the proposed exemptions within the bill. At previous committee meetings, witnesses have said that we have a clean slate and a unique opportunity to devise a new piece of taxation legislation. Accepting the current exemptions might therefore mean that we miss a trick. Are you aware of any other exemptions that you might want to be discussed with the Government? As your submission says, further exemptions would have to be considered in regulations or subordinate legislation. We are talking about a fresh bill, so could we consider any such exemptions at the appropriate time?

Kennedy Foster: I cannot think of any other exemptions. I know that there has been some discussion around energy efficiency, which is quite an interesting concept, but I cannot think of anything else.

David Marshall: I echo what Richard Blake said previously, which was that the transition from stamp duty to LBTT should be kept as simple as possible. Unless there is a particularly compelling reason for exemptions to be removed or added, as much as possible they should stay in line with the current exemptions.

Richard Blake: There are two points that I could usefully make. They are not included in our submission on the bill, but they were in our response back in August to the Government consultation on the proposals.

I echo Kennedy Foster's point. We would support any intention to continue the relief for zero-carbon homes. We would welcome that, and many of our members are encouraging and trying to develop that in the countryside.

In our consultation response, we suggested that, to follow the Scottish Government's stated priority of a vibrant agricultural tenancy sector, consideration should be given to exempting agricultural leases from LBTT to encourage new entrants.

Michael McMahon: We might pursue that at a later date.

Mr Foster mentioned energy efficiency. It might have surprised a number of us to hear evidence from previous witnesses that energy efficiency is not necessarily an important factor when it comes

to the purchase of homes. Location, number of rooms, and facilities are much higher priorities. Energy efficiency does not feature very highly in the priorities of people who are looking to purchase a home. Would we be encouraging, or raising awareness of, energy efficiency if we were to pursue something along those lines?

Kennedy Foster: The Scottish Government consulted last year on its energy efficiency strategy and, as I understand it, it will make proposals sometime this year about energy efficiency.

The housing market faces a huge challenge if the carbon reduction targets are to be achieved. Most of that will lie with existing housing as opposed to new build. Obviously, there are building regulations that require more energy efficient homes to be built. The issue is how the Government will achieve its targets through improvement in what is basically the second-hand market. There is a proposal for a new energy efficiency standard for social housing. However, the question is how to achieve energy efficiency in the owner-occupied and private rented sectors.

10:00

I said in my response to the Government that there might be areas in which compulsion could be required, and areas in which a carrot could be offered to either the private rented sector or the owner-occupied sector to improve energy efficiency. LBTT is one way of doing that, and council tax reduction is another. People always use the analogy of vehicle excise duty, whereby the lower the emissions from a car, the lower the duty that is paid. However, that is a policy issue that needs to be considered in the light of what the Government proposes on energy efficiency later this year.

Michael McMahon: That is fine. Thanks.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): Some of the figures from the ESPC on winners and losers were very interesting for options 1 and 2. I think that you said that you prefer option 2—to be more correct, it is option B. Do the other witnesses have a view on that? In addition, do we have any figures for the whole of Scotland, since you all keep telling us that Edinburgh is different? I should remind the committee, though, that Edinburgh has the fifth-lowest rate of owner occupation in the 32 local authorities in Scotland, which I think most people in Scotland forget.

David Marshall: Our figures cover Edinburgh, the Lothians and all of Fife, so the figures provided in the paper are not simply focused on the Edinburgh market. Unfortunately, I do not have figures for the whole of Scotland, but it would certainly not be a difficult analysis to look at sales in the Registers of Scotland over the past one or two years and identify what the impact would be across the board. Intuitively, given that the average selling price across east central Scotland is higher than that across Scotland as a whole, I anticipate that there would be more winners, as it were, because more people would pay less in Scotland as a whole, than in the area that our paper covers.

Malcolm Chisholm: Do others have a view on the options, or any information?

Kennedy Foster: No. It is not something that I have studied in detail.

Malcolm Chisholm: I was going to ask about sub-sales, but I think that that was substantially dealt with by the convener. However, I repeat that the uppermost question is how we prevent abuse while protecting Scotland's competitive market.

I have a more specific question for Scottish Land & Estates. You suggest in your submission that in a transaction

"conveyances to nominees of a purchaser are treated as conveyances to the purchaser and ... not ... sub-sales."

I think that such conveyances are treated as sub-sales under the current system. Given that transparency in the process to avoid tax avoidance is such an issue, what suggestions do you have with regard to the role of revenue Scotland in accounting for all parties in a transaction?

Richard Blake: Nominee purchases are fine at the moment and are not excluded from stamp duty land tax, so there would just be a continuation of the existing system. I have no particular proposals. All we wanted to do was to ensure that sense and practice dictate that the nominee should be treated as the purchaser, as long as there is no abuse.

Malcolm Chisholm: Okay. I have a question for the Council of Mortgage Lenders that relates to the current system. You state in section 10 of your submission that you

"believe that the principle of payment of SDLT before registration of the deed ... is a well-established one".

I was not aware of that and a lot of people have been saying that there might be problems with requiring payment at the same time as registration. You go on to suggest that there could be a problem. You suggest that

"the system of advance notices to be introduced through the provisions of the Land Registration, etc. (Scotland) Act 2012 ... be enacted before LBTT comes into force."

Will you give us a bit more detail on and explain those issues?

Kennedy Foster: I am not an expert in commercial property, but it is my understanding

that there is a difference in the payment of stamp duty land tax in the commercial sector. In the residential sector, it is a well-established principle that, usually, when the solicitor is doing the conveyancing and collecting the purchase price ready for settlement, they also collect the stamp duty and send it off to the keeper at the same time as they send off the deeds for registration. In fact, I am old enough to remember, from when I did conveyancing, that at one stage you used to have to take the deeds round to the stamp office and have them physically stamped before you could pass them to the keeper for registration. That is a well-established principle.

My slight concern, and the reason why I mentioned the system of advance notices that is provided for in the Land Registration etc (Scotland) Act 2012, is that, if there are any delays in registration around the payment of the stamp duty land tax, the position of lenders would be protected by an advance notice, which gives a period—I think that the legislation proposes two months—in which the purchaser has priority. There is a race to the register and the deed that gets there first is the one that is registered first. The system of advance notices is really to protect the position of lenders during an interim period. It is important that that provision is enacted, and I think that the intention is that it will be enacted before the LBTT comes into place.

John Mason (Glasgow Shettleston) (SNP): I will start with Mr Foster's submission. We have touched on exemptions. You were asked whether you want more exemptions, but I want to ask whether we should keep those that we have in the bill. For example, there is to be an exemption when no money changes hands or when somebody dies. There is also an exemption for the Crown, which would mean that the UK Government could buy and sell property in Scotland and we would lose out on the tax. Are those three exemptions justified or could we remove them?

Kennedy Foster: I would not like to comment on the last one. Of the others, one was in the case of death, and what was the other one?

John Mason: It is when the property is a gift, in effect.

Kennedy Foster: Those are well-established principles. As we said earlier, we should not change them unless there are good policy reasons for wanting to change them. The move to the new taxation system will certainly be a lot more straightforward if we continue with existing exemptions. Those are well-established exemptions. Obviously, other taxes are payable on the likes of death and so on.

John Mason: The exemptions are well established and the result is that rich families stay rich and poorer families stay poor. If we were interested in the redistribution of wealth, would there not be logic in removing those exemptions?

Kennedy Foster: That is a policy matter for politicians. I do not want to comment on it.

John Mason: We have talked about the possibility of relief for zero-carbon homes, but I understand that there have been very few instances of that. However, if the standard of homes keeps increasing, as we hope will happen, is there a risk that the tax take will fall and fall because there will be a lot of exemptions?

Kennedy Foster: Obviously, we need to get to a certain place to achieve the targets, and the tax can be used as an incentive to help us get there. Would we want to use it for all time coming? I suspect that the answer is no.

John Mason: So we would have to keep revising it, which could be complex.

Kennedy Foster: Yes, it could be.

John Mason: If no one else wants to comment on that, I will move on to Mr Blake's paper. I have been trying to get my head round the comments in appendix 1 about persons B, A and C and all the rest of it. The example starts off with:

"B purchases land from A".

Then B sub-sells part or all of the land to C. Right down toward the end, the second last bullet point says:

"This results in double taxation on that part of the land not purchased by B".

I cannot quite understand that, because I thought that B had purchased all the land.

Richard Blake: B purchases all the land, then sub-sells on to C. The concern there is that there might be two lots of tax payable on the land that was originally bought by B.

John Mason: Right, so B buys the land and then sells part of it to C. In other words, the land is purchased by B, but it is not kept by B.

Richard Blake: Correct.

John Mason: Okay. I am with you.

Richard Blake: The title would go from A to C, missing out B. There would not be a conveyance from A to B for that bit of the land that had been sub-sold. There would be a conveyance from A to B of anything that B kept and a conveyance from A to C of anything that B sold on. The question is whether there should be a double tax hit on any of that land.

John Mason: Okay.

I think that it was Mr Hepburn who asked you about selling on the whole amount, for which there might be various reasons. Is it your contention that if the two transactions are distinct, it is okay to tax them both but, if they are in effect one transaction, they should not both be taxed?

Richard Blake: If only one amount of money passes between the parties, there must be an argument that only that should be taxed. If A sells to B or C for a cumulo price of £1 million and gets no more than £1 million, and B does not make a profit in the middle, is there a valid argument for there to be a second bite of tax on any part of that sale?

I will give a worked example that I was involved in in Perthshire. I was instructed to offer for a small farm that an estate was selling. I think that my client was a tenant of a farm that was fairly adjacent to part of the farm that was on the market. He did not have the wherewithal to pay the whole price for all the land, so he did a deal with two neighbours who were also farmers and whose land adjoined parts of the farm that was being sold. After he had concluded missives with the estate, he agreed with the other two parties that he would keep the first section, the second farmer would get the middle section and the third farmer would get the other section, so that they lay into the respective farms.

The estate got only the price that was agreed in the missives to start with, whatever that might have been. My client put his percentage of the cumulo price into the pot, as did the other two farmers. No one made a profit; it was just a sensible way to break up a farming unit to make the other units more manageable and affordable.

The Convener: Jamie Hepburn has a supplementary; I will let John Mason continue afterwards.

Jamie Hepburn: In the circumstances that you have just described, how could it be argued that there were two sales? Surely there was just one sale; it just so happened that multiple parties were involved in the purchase.

Richard Blake: No, I think that, in law—I hope that I am not wrong, given that I have been in practice for long enough—the conclusion of the missives, which was when A concluded a contract to buy from the estate, was the date of sale. There were subsequent missives between A, who bought from the estate, and B and C, but it was only one bit of land that changed hands. It can be argued that there was a main sale and sub-sales underneath it.

Jamie Hepburn: But, in that case, there was no additional selling. Is there a misunderstanding of what we mean by "sub-sell"? Would it be accurate to describe the process that you have set out as sub-selling, even though there was no sale?

Richard Blake: Correct. That is what we are concerned that the bill is targeting, possibly through policy or possibly not through policy. We feel that there is an issue there that needs to be looked at.

Jamie Hepburn: It might be the terminology that is at issue.

Richard Blake: Possibly, but I think that the Government needs to be asked whether its policy is to do away with every sub-sale relief, or whether it is simply trying to target sub-sale relief where there are potential abuses and profits to be made.

Jamie Hepburn: So we should ask the Government whether it is looking to target sales when there is a cash transaction and people make money, as opposed to the circumstances that you have just described.

Kennedy Foster: I suspect that, in the example that Richard Blake gave, three sets of missives were concluded for the sale and three separate dispositions of the property took place.

10:15

Richard Blake: In that case, there was one set of missives between the estate and A and there were two other sets of missives. Kennedy Foster is right—there were three separate conveyances of the three separate bits of land, so each person would have had to pay stamp duty under the present system.

Jamie Hepburn: This is the first time that I have been simultaneously more confused and more clear about a matter.

Richard Blake: I do not blame you—it is not an easy question.

The Convener: The deputy convener and I were just saying that the issue would have been easier to understand if Richard Blake's submission had contained such an example, instead of saying that A goes to B, which goes to C and whatever.

John Mason: I appreciate Richard Blake's explanation—I think that the convener is trying to say that what you said was clearer, so that was helpful.

You have mentioned moving title between groups of companies, but that would be covered by the separate group relief, would it not?

Richard Blake: That would be the case if a company was buying but not if an individual was doing so.

John Mason: I see what you mean—there would be no group.

Richard Blake: I am no expert in company law but if somebody from any part of Scotland or outwith Scotland wants as an individual to buy a chunk of land, a building project or whatever it might be, he concludes missives for himself, so he does not have a company with which other companies can be part of a group. If he then sets up different structures in an organisation to hold parts of the title in different ownerships—whether that is for tax reasons or whatever—I do not think that group relief will cover that.

John Mason: That is a wee bit at the edge of my knowledge as well—

Richard Blake: Just marginally.

John Mason: We will leave that one.

Another question is whether the tax should be levied on the gross amount, including VAT, or on the net amount, net of VAT. Does that make a difference? If the amount is £1 million plus VAT—that is £1.2 million—and 5 per cent is added to that, or if 6 per cent is added to the net amount of £1 million, we end up with the same answer. The public purse needs to get the money. If the amount included VAT, the rate would be lower, and if it excluded VAT, the rate would be higher. Is that not the case?

Richard Blake: I have no comment to make on that. Whether a tax is taxed is a policy point.

John Mason: Would you prefer 6 per cent on the net amount to 5 per cent on the gross amount, or would you just prefer 5 per cent on everything?

Richard Blake: We must bear it in mind that not every transaction at £1 million will have VAT on top. If somebody buys a property that does not have VAT on it—because no election into the VAT regime has taken place, for example—that person will pay less in land and buildings transaction tax than a person who buys a property that has VAT on it. I suspect that that is a slight anomaly.

John Mason: That would be a wee bit of unfairness.

Richard Blake: I appreciate that that would be marginal. However, in 20 years' time, the 5 or 6 per cent could be 15 or 16 per cent—who knows?

John Mason: The argument has been made that, if people from outside the country who are looking to invest see one rate in the UK and another rate in Scotland, they might not look below the surface—they might look just at the rates. If we had to have a higher rate because it was based on the net amount, would that put people off or would they understand that?

Richard Blake: I do not think that people would necessarily understand the LBTT—it would be difficult for anybody to understand. I hear where you are coming from, but whether just following the existing stamp duty land tax arrangements is correct is a policy decision for the Government.

John Mason: We have two papers from Mr Marshall and I am not entirely sure of the differences between them. Am I correct in thinking that some figures have been changed?

David Marshall: Amendments were made to lower some figures in option B in the appendix. I apologise to the committee for that error, which I identified yesterday.

John Mason: That is okay—I asked just because I have not had time to go through the submissions line by line.

David Marshall: I sincerely apologise for the error.

John Mason: I see a difference in paragraph 12. Do you know whether that is the only different paragraph?

David Marshall: The difference is just in the final section, in the numbers on the different amounts that would be paid at various levels. Under option B now, more people would benefit, fewer people would lose out and the taxation differential would be lower. I apologise again for that.

John Mason: That is okay—just as long as we are clear about it.

Mr Hepburn asked about the definition of "rich", so I will not return to that. You talked in your submission about setting the rate, and in paragraph 17 you commented that the banding will be introduced in April 2015. It has been suggested to us that it would be good to know that as far ahead as possible. Do the witnesses share that view?

David Marshall: Our view is that expediency will be most important between the point at which a decision is made and communicated to the public and implementation. As much time as necessary should be taken to set the right levels of taxation, but once the decision has been communicated to the public we will want to move as swiftly as possible to implementation. If that does not happen, there is the potential for scenarios in which some people realise that they can benefit by bringing a transaction forward and others realise that they can save money by delaying a transaction until after implementation, so there could be short-term disruption. That is the main area in which timeliness is an issue.

John Mason: Thank you. If I picked you up correctly, you said that you would like some of the higher rates to be reduced and some of the lower rates to be increased or introduced at a lower level. Is that your view? The effect would be to

make people who are less well off pay more tax and to make better-off people pay less tax.

David Marshall: I should clarify that. Option A considers the suggestion that we raise the lower threshold for stamp duty from the current £125,000 to £180,000. In our experience, the stamp duty holiday, which was in place until last year, did not have a significant impact on the number of transactions in the market. A very low rate of taxation at the lower end of the market might allow for a slightly lower rate of taxation at the upper end, but we would certainly still want a higher rate at the higher end of the market—that goes without saying.

John Mason: You said in your submission that the proposed approach would place

"a significant financial burden on families in the Edinburgh area."

However, I presume that an effect might be that some of the prices at the top would come down a little. That would be a good thing for buyers.

David Marshall: Yes, potentially, if we take the view that people simply have a pot of money to spend on a house, to cover house price, tax and so on. However, in the short term the proposed approach might mean that people needed to raise additional finance to move up the ladder, so there might be short-term disruption in that regard.

Gavin Brown (Lothian) (Con): Sub-sale relief has been considered in detail, and the Scottish Government has made it clear that it does not want to mirror the provisions in SDLT, for reasons that I think are understandable. The question is whether there can be targeted sub-sale relief, which exempts genuine commercial transactions while not applying to transactions that are merely tax-avoidance measures. How easy would it be for the Government to define the types of transactions that could be exempted and the types that should not be exempted? Do you have a view on that? If not, can you reflect on the issue, to assist the committee?

Richard Blake: I am happy to take the question back to my little specialist group—two tax lawyers and a tax accountant—for consideration, if that would be of use to the committee. It would be difficult, first, to get the terminology right, and secondly, to police the system—I suspect that that would be the other problem. I guess that one of the arguments for closing down the relief altogether is that doing so makes it easier to police the system.

If you would like us to look at that, I will see whether I can get the group to come up with anything. They hold that work close to their heart because it is a useful professional planning tool for them.

Gavin Brown: That would be helpful. As it stands, there would be no sub-sale relief—that is the position.

Richard Blake: That is my understanding.

Gavin Brown: The Government will almost certainly not just bring in sub-sale relief as a whole, but the door is slightly ajar for some targeted relief, if the case can be made. It has said that it will listen to the conclusions of the committee and stakeholders.

If your members believe that sub-sale relief is a genuinely important economic tool and, if they can convince the committee and the Government that there are certain cases in which it should be allowed, who knows what the Government may do. If your members cannot do that, my suspicion is that sub-sale relief would just be excluded. There would definitely be value in your making the case, if you can. I do not know whether other panellists have views on that.

Kennedy Foster: Sub-sale relief affects more the commercial side as opposed to the residential side.

Richard Blake: That is right. The Law Society of Scotland or the Institute of Chartered Accountants of Scotland would probably be a good place to start to get something that is specifically targeted to their practitioners.

Gavin Brown: The other issue that I wanted to ask about that has not been covered is non-residential leases. Clearly, that is a complex area. Consultation is on-going and amendments at stage 2 are likely. Most organisations that have given evidence, written or verbal, have basically said that the topic is complex and that they are glad that it will be returned to. Is there anything that the committee ought to be aware of, looking out for or asking about in relation to non-residential leases?

Richard Blake: I will give one or two thoughts on the rural sector. I am not coming from the commercial sector side at all, except when the proposals would impact on rural estate owners.

I brought up an example during the passage of the Long Leases (Scotland) Act 2012 that is possibly worth looking at. There was a major east coast golf course development, with a huge amount of money put in by commercial partners to enable a development under a long lease—which is why we raised the matter under the long leases legislation—that would have been caught by the bill if we had not drawn the matter to the attention of the parliamentary committee at the time.

My understanding from what I recollect about the lease was that no rent was payable for the first X years. Obviously, the golf course has to mature, and time is needed for publicity to get the

Americans and Japanese over to pay £200 a round or whatever it is. The decent rent to the estate did not kick in for a number of years, which is a turnover rent situation. I suspect that the specialist sub-group is looking at how to tackle turnover rent situations in which there is no specific up-front sum at the beginning of the transaction.

Usually, in residential or rural purchases—farms or whatever—there is an amount in the conveyance and the lease that can be targeted with whatever the rates are. However, with such golf course cases, there may be some agricultural and renewables leases. It is critical at the moment to get renewables leases right. Turnover rents will be paid later on, once the energy comes on stream, but how do you get a formula that will be sensible, fair, understandable, workable and policeable?

I know that the sub-group has been working hard on that, and we have been copied into all its paperwork. Although I have not seen the results of the last meeting, I know that it is working on a matrix to pass to the cabinet secretary to give him various options and their consequences. I hope that that will be a clear way for the cabinet secretary and the committee to look at that. Turnover rents will be the key issue.

Gavin Brown: That is helpful—thank you.

10:30

Jean Urquhart (Highlands and Islands) (Ind): It has been interesting listening to the answers, and some of the questions that I had have been answered. However, I want to go back to Mr Blake's example about persons A, B and C. I am sorry, but I have to get the issue right in my head. All the evidence that we have taken has said that the stamp duty land tax is complex and liable to abuse. The sort of scenario that Mr Blake painted is probably an area in which we will be vulnerable to tax evasion, because the more parties that are involved, the more complicated the land deal or sale is. In the normal way of things, when somebody buys a bit of land, the conveyancing is done and there is the return of the new title and so on. Is it not that work that kicks in the stamp duty?

Richard Blake: Yes. That happens in a straightforward purchase and sale, whether it be residential, commercial or rural. The offer is put in and accepted and the missives are concluded, which means that it is absolutely a done deal as far as the purchaser and seller are concerned. Then there is a time in which the due diligence is sorted out and the paperwork signed. Then, at completion, the purchase price is paid, the stamp duty is paid and the deed goes off to Register House for registration and absolute title. There is no difficulty with that at all. However, in the example that I gave earlier, a farm was sold, but it was not of interest to one particular person, because it suited three farmers to expand their businesses, and these days people need bigger farms to get profitability.

Jean Urquhart: That all sounded very practical, but I guess what I am getting at is that it is unlikely that one agent would be working for the farmer and for the successor owners of the land that he bought. I presume that everybody would have their own representation.

Richard Blake: They would have separate lawyers.

Jean Urquhart: I want to know about the practical business of doing that. Who would register, who would hold title and how would it be divvied up? I am obviously missing something, because I cannot quite understand the reason why that would not be seen as a sale on.

Richard Blake: That is absolutely a sub-sale that would be caught. In practical terms, four sets of solicitors would be involved: one acting for the seller, one for the original purchaser who concluded the purchase and other solicitors acting for parties C and D. That is just the way that it works, otherwise there could be conflicts of interest all over the place. The missives would state that the original purchaser, B, was entitled to have the title in his name or in the name of whomever he wanted, which would give him the option to sell on.

I fully understand that if he was selling on for a profit, there would be potential abuse and additional tax would have to be paid. However, in this particular situation, the three dispositions and three conveyances would be prepared and stamp duty would be paid on the individual transactions by the individual solicitors. The seller is not interested in who pays the tax—he just wants his £1 million or whatever it is, and then he is out of the equation. So it would be down to the three other sets of solicitors to ensure that the paperwork is in place. In that situation, the original purchaser B is potentially exposed if he cannot sell on bits to C and D because they cannot get funding, so he is in a potentially vulnerable situation.

To take the issue further, a foreign, or Scottish, purchaser might purchase an estate in Scotland that is made up of farms, houses, cottages and businesses. After they conclude missives to buy at whatever the price is, they might see an opportunity to sell off bits. I can understand that the Scottish Government might have the policy objective of dealing with such asset stripping. There have been lots of cases in Scotland in the past 10 or 15 years in which landed estates have

been bought up by property speculators and then cottages, farms and houses have been sold. That is a sub-sale for profit, which I think is where the difference is between that and my first example.

I do not know whether I have explained the issue sufficiently clearly, but those are two very different examples of what can happen in the countryside.

The Convener: That brings our questions to an end. I thank committee members for their questions and, more important, the witnesses for coming along and giving the answers.

10:35

Meeting suspended.

10:42

On resuming—

The Convener: The committee will continue its oral evidence taking on the bill. I welcome to the meeting David Robb, from the Office of the Scottish Charity Regulator, and Gavin McEwan, from the Charity Law Association. I understand that you have no prepared statements, so we will go straight to questions.

This will be a difficult session for me as convener. Your submissions are two pages and just over two pages long respectively, and it will be difficult for me to hold back and not ask the juicy questions, depriving all six members of the committee of their opportunity. I will try not to do that, and I know that Malcolm Chisholm is keen to ask a question, so he will be first after me. I will just ask a couple of openers so that the committee has a chance to explore the issue in the necessary depth.

Mr McEwan, paragraph 8 of your submission says:

"there is a cost to charities that need to amend their constitutions to satisfy the Scottish registration requirements. There are also ongoing compliance costs, including annual reporting costs."

How much might a one-off cost be to an average charity, and what would be the costs of on-going compliance?

Gavin McEwan (Charity Law Association): It will vary from charity to charity. Typically, the initial costs of compliance with the Scottish charity test and getting on to the Scottish charity register involve a constitutional change. It is usually a simple change to the articles of association of a charitable company, or a change to a trust deed. Those changes might cost a few hundred pounds if the organisation needs legal support and, by themselves, they are quite straightforward. If a charitable company is quite sizeable and has a large number of members, it might be quite difficult logistically to get people together for a general meeting. That can add to the cost of the process of putting through a constitutional change.

If, however, a charity is created as a royal charter body or under an act of Parliament, the process is much more involved. Typically, the charity will either need to obtain consent from the Scottish Parliament, from the Westminster Parliament if the charity is England-based, or from the Privy Council if the charity has been created as a royal charter body. That is a more expensive process and it can typically cost £5,000 or more to make even a simple change to a constitution. It can therefore be quite costly for that type of charity to make what looks like a minor change.

The financial cost of meeting on-going requirements is not great, but there is a commitment to comply with Scottish charity law generally, so there is a bit of a dual burden of regulation to be satisfied, and that requires a bit of extra work and effort on the part of the charity. However, the cost is not substantial. It tends to be front-loaded and in some cases it might be quite small, although it could be higher in other cases.

10:45

The Convener: How many charities are we talking about? You have said in your submissions that the number is small, so how many per year will be affected by the bill?

Gavin McEwan: It is difficult to estimate that. At the moment, I would say that we are talking about dozens, up to about 100 in total, and not many more than that. They would all be within the UK. We are talking about quite a small-scale issue.

A tiny number of charities that were created outside the UK might be affected, but it would be just a handful. We are talking about dozens of charities, possibly up to three figures, but not thousands.

The Convener: Mr Robb, do you concur with those figures?

David Robb (Office of the Scottish Charity Regulator): Yes. We do not have detailed numbers but we are engaging with Her Majesty's Revenue and Customs to get a better estimate. However, that is our sense of the scale. The number might just touch on the hundreds inside the UK and there might be a tiny handful outside the UK. Gavin McEwan's estimate of the scale is absolutely right.

The Convener: Mr Robb, OSCR's submission says:

"The intention of section 14 was to ensure that only charities with 'significant operations' in Scotland are required to register with OSCR."

What do you define as "significant operations"?

David Robb: The Charities and Trustee Investment (Scotland) Act 2005 seeks to create a comprehensive register that will give the public confidence that charities that are active on the ground and delivering services in Scotland are registered. However, lots of UK-based charities might seek to raise funds through a television campaign, so people might send money to a charity that is based south of the border. It is quite proper for those charities to refer to themselves as charities even if they do not have significant operations in Scotland. The 2005 act tried to strike a reasonable balance between giving people in Scotland confidence that charities that are active in Scotland are properly entered in the register and recognising that charities from beyond Scotland should still be able to legitimately raise money or make grants in Scotland without having to go through the full registration process.

The Convener: Finally, before I open questioning out to the rest of the committee, Mr Robb, your submission says:

"There is a question as to whether bringing such organisations permanently under the full scope of the Scottish charity regulatory regime is a proportionate way of providing assurance that they qualify for what may only be a one-off relief on one transaction."

Is it?

David Robb: In my view, no. I think that there is a simpler fix that is more consistent with the general thrust of the 2005 act. As we have been exploring the issue, this tiny problem has emerged for investment decisions from beyond the UK and, as the bill stands, from elsewhere in the UK. There is probably a better solution to be found than the one that is in the bill.

The Convener: I will not continue to explore that because I will be stealing my colleagues' thunder. Malcolm Chisholm will go first, to be followed by Jamie Hepburn.

Malcolm Chisholm: I am interested in the section 14 exception. Has anyone registered voluntarily under section 14?

David Robb: To my knowledge, no one has completed the process. We have had occasional inquiries, but it is difficult to know who would seek to register in Scotland if they were not planning to be active in Scotland.

Malcolm Chisholm: I was slightly surprised by what you said about that. That process appears to deal with some of the problems that other bodies such as the Wellcome Trust and the Charity Law Association have raised. Where in section 14 of the 2005 act does it say that someone can register on that basis? The heading of section 14 is "Exception for certain bodies not in Register".

David Robb: I am sorry—I will tread carefully in this area, as I am not a legal expert, and I know that these are complex matters. We need to consider the interaction of sections 13 and 14 of the 2005 act. Section 13 is the one that requires charities that are active in Scotland to register. Section 14 permits charities to refer to themselves as charities without being on the register. That deals with the situation that I was describing earlier, where a charity that is based in England is raising funds in Scotland but is not active on the ground here. It is perfectly proper for it to refer to itself as a charity, but it is not required to register.

There has been a bit of confusion in some of the evidence that you have received about whether charities can choose to register. They can if they think that they will meet the Scottish charity test, but it is not clear to me why they would choose to do that. The matter before the committee is that, as the bill stands, in order to qualify for charity relief, a charity would have to register with us. We are not sure that that is the appropriate mechanism. At the moment, there is no stream of charities—not even a trickle—seeking voluntarily to register with us, other than those that plan to be active in Scotland.

Malcolm Chisholm: So, in order to get the relief, a charity would have to register voluntarily. There are two questions that arise from that. The matter of cost has been touched on—although your comments on what the cost might be could be interesting. On a more substantive point, in order to register under section 14 of the 2005 act, would a charity still have to meet the Scottish charity test? That could presumably be a problem for some bodies in England or elsewhere.

David Robb: It would register under section 13. Section 14 is about a body referring to itself as a charity but not being registered. If a charity voluntary sought to register under section 13, it would still be required to meet the Scottish charity test. The test says that it must have exclusively charitable purposes and must be providing public benefit in Scotland or elsewhere. There are charities that are properly registered in Scotland although their activities are overseas. The public benefit may be provided overseas.

The 2005 act creates the possibility that a charity in Venezuela could apply for registration in Scotland. If it could demonstrate to us that it was providing public benefit in Venezuela and that its constitution was exclusively charitable and met the tests, we could accept it on to the register. Having been accepted, it would then have to follow the rest of the regulation procedure, so it would be required to submit annual returns to us. If it ever came off the register, we would have a continuing interest in its assets. It is for that reason that we do not have a lot of interest from charities beyond

our shores seeking registration, unless they want to be active in Scotland, in which case registration is the proper route. In our view, to go through the full registration process simply to benefit from the charity tax relief on an investment decision seems a little disproportionate.

Malcolm Chisholm: Are you implying that that bit of the bill needs to be reformulated? You presumably still want relief for charities, but you think that the need to register with you perhaps goes too far?

David Robb: Yes. As some of the written submissions that you have received point out, there are easier ways for charities, particularly those south of the border, which account for the large majority of those involved from outwith Scotland, to be identified as bona fide without their entering themselves on to the register for what might be a single transaction.

Malcolm Chisholm: The Wellcome Trust, which was one of the main bodies that raised these concerns, also expressed concern about cases in which a property is purchased jointly by a charity and a non-charity. I believe that such a move does not get relief under the current SDLT system, but the trust argues that, as funding for charitable organisations becomes more competitive and scarce, joint purchasing of resources with non-charitable groups might become increasingly necessary, and it has suggested that, instead of a complete prohibition on relief in such circumstances, a purpose test on properties purchased by charities and private companies be introduced. Is there any merit in that suggestion?

David Robb: I hope that Gavin McEwan has a better grasp of this matter. I have to admit that when I studied that part of the trust's evidence, I found ma heid birlin. I am no expert on some of the formulations in the submission about the extent to which such a purchase is a joint one and how the different interests would be apportioned—I have to say that that left me a bit bamboozled—but I think that, in operational terms, determining where the benefit and entitlement lay would be largely a matter for HMRC. It is not really something that OSCR is directly involved with. We decide whether a charity should be on our register; if it is, we will regulate it. As reliefs are administered through HMRC, it would have a better operational understanding of the matter.

Gavin McEwan might, with his expertise, be better placed to disentangle the issue.

Gavin McEwan: Obviously I cannot speak for the Wellcome Trust, but I should point out that our submission contains a paragraph or two on the same point. On behalf of the Charity Law Association, I would say that, in relation to the Pollen Estate Trustee Company court case that we highlight and which the Wellcome Trust also refers to in its submission, the judge said that it was not clear whether under the SDLT regime there was a deliberate policy either in favour of or against reliefs to charities where there was a range of co-investors but, under the black letter of the law, relief had to be denied.

The association invites the Parliament to consider whether a specific policy on this issue should be introduced just to make things clear. Although I can see why charities that co-invest to purchase a property would like to gain relief on their element of it, I can also see that that does not match the current practice under SDLT. It has to be a policy decision and, as I have said, the association simply invites the Parliament to explore whether a policy decision needs to be made on this matter.

Jamie Hepburn: Paragraph 10 of Mr McEwan's submission says that the Charity Law Association considers

"that registration as a charity with HMRC in accordance with the provisions of Schedule 6 Finance Act 2010"—

with which I must confess I am not intimate—

"should be a sufficient requirement for exemption from LBTT."

Given that HMRC will not be responsible for collecting the tax and that the Parliament has no legislative authority and the Government no executive authority over it, might such a move not lead to problems?

Gavin McEwan: I take the point. The suggestion in paragraph 10 was intended to broadly reflect the structure of the current tax relief but, having been fortunate to have read OSCR's submission, I think that its alternative proposal might present a solution to any difficulty around the charity relief test that might well satisfy the association. We would in principle be willing to go along with something along the lines of OSCR's proposal instead of our suggestion in paragraph 10.

Jamie Hepburn: I will indeed explore OSCR's proposal in a moment, but you do recognise that your own suggestion has its limitations.

Gavin McEwan: I can see that.

Jamie Hepburn: The next paragraph says:

"We are also concerned that charities may be unable to benefit from the charity exemption when they co-invest in property in Scotland jointly with other investors."

What is your solution to that?

Gavin McEwan: That relates to what I was talking about a few moments ago. Again, I do not really have a solution. We are not really arguing that there should be such a relief; we are inviting

the Parliament to consider whether there is a definite policy to be made on that point.

11:00

Jamie Hepburn: Would you suggest that there should be relief on the entire transaction?

Gavin McEwan: No, I do not think that that would be fair. If there were to be relief under those circumstances, the policy would have to be that only the elements that related to a charitable purchaser should be relievable, not the entire transaction.

Jamie Hepburn: Otherwise, presumably, it would act as an incentive for every investor to hook a charity.

Gavin McEwan: Absolutely. I completely agree.

Jamie Hepburn: Will the situation not be rather complicated? We have heard a lot of evidence that suggests that the process should be kept as simple as possible. Trying to disaggregate parts of an investment for taxation purposes sounds pretty tricky to me.

Gavin McEwan: I can completely see that. That is why we are stopping short of presenting some kind of solution or even arguing against the idea of refusing relief on those transactions. We are inviting Parliament to make a policy decision.

Jamie Hepburn: What you are saying is that we should be aware of the issue but that there might not be a solution to it.

Gavin McEwan: Precisely.

Jamie Hepburn: What is the purpose of section 14 of the 2005 act? What does it allow a foreign charity to do in Scotland?

David Robb: It allows it to say that it is a charity and it allows that not to be a problem.

Jamie Hepburn: Okay. I kind of got that. Am I right in thinking that it is not allowed to do anything, such as raise funds, have a presence and so on?

David Robb: No, it might collect funds.

Jamie Hepburn: On that basis, I presume that OSCR has a degree of oversight and some responsibility for regulation. You must have to ensure that those charities have a genuine charitable purpose.

David Robb: Concerns are occasionally raised by members of the public about whether a body that is presenting itself as a charity has a legitimate reason to do so. Sometimes, that body will be one that is not on our register but which meets the criteria in section 14. If we find a body representing itself as a charity that does not meet those criteria or which should be on the Scottish register, we have powers to take action.

Section 14 is trying to strike a balance between a comprehensive register that captures all the significant on-the-ground activity in Scotland and a situation in which Scotland will be open to messages from overseas charities.

Jamie Hepburn: So you have the ability to investigate whether those bodies have a genuine charitable purpose and take action if you find that it does not.

David Robb: Yes, but it does not arise very much.

Jamie Hepburn: I appreciate that. We are spending a lot of time on this when we are all aware that the circumstances that we are discussing around LBTT are not going to arise very much. Nonetheless, that is what we are discussing.

Given that what you have said is the case, it does not seem that it would be an overwhelming burden for OSCR to maintain a register of the sort that is proposed in the bill.

David Robb: I do not think that the burden would be large for OSCR. There would be work involved in investigating the circumstances of people applying to join the register—

Jamie Hepburn: But that is the case anyway.

David Robb: Yes, but if the charity is overseas, it can be harder for us to establish the facts of the situation.

Given that the vast majority of applicants for this relief are going to be in the UK, as Gavin McEwan outlined—there will be possibly 100 or so from the UK and a handful from outside the UK—we are not so concerned about the burden on OSCR. The burden will fall on the charities applying to the register.

We believe that there is a risk of the integrity of the register being eroded. At the moment, people are confident that we have a comprehensive register in Scotland. That is not the case in other parts of the UK. Everything on our register meets the charity test and is clearly a recognisable charity in Scotland. If we start accepting non-Scottish charities whose sole reason for application is an investment decision, that starts to dilute the integrity of the register.

Jamie Hepburn: Could you explain that a bit more? Why would it dilute the integrity of the register?

David Robb: We would be including charities on the register that do not otherwise have a profile in Scotland and whose only intention in applying to the register would be to benefit from tax relief. Our

register should be there to capture significant charitable activity, so people might see that as an unusual use of it—certainly one that it was not designed for.

Jamie Hepburn: Are we talking about people in the third sector? None of my constituents has ever raised with me concerns about the integrity of OSCR's register.

David Robb: Our purpose and the regulation's purpose is to reassure the public. Ultimately, if an overseas charity applied for registration and sought to make significant investment in property, that would introduce a risk that we are not particularly well placed to police.

Jamie Hepburn: I will pose this to both witnesses. There is acceptance that charities furth of Scotland should be able to benefit from the exemption. I have not heard anyone say that that should not be the case. The argument is then that, in essence, the Scottish taxpayer would be subsidising a charitable purpose outwith Scotland, so the least that that charity could do is register with the Scottish charity regulator. Does that argument have any merit?

Gavin McEwan: You need to consider whether it is proportionate to grant charity relief dependent on registration. A charity will have to amend its constitution and become subject to the body of Scots charity law simply to gain a tax relief that Parliament wishes it to receive, which we think is disproportionate.

Jamie Hepburn: Would it make sense if there was some form of supplementary register—a separate register that was still held by OSCR? Even in OSCR's recommendations, someone will have to have responsibility. A burden will fall on someone. You have accepted that that already exists to an extent for OSCR in section 14 of the 2005 act. Someone has to check that a charity is bona fide.

David Robb: There is a lot of merit in the suggestion of some form of supplementary list. I know that the committee has taken evidence to that effect. There is a role for OSCR to be involved in that.

Operationally, OSCR does not administer tax relief. As revenue Scotland gets into its stride, we would expect to have dialogue with it about eligibility, as we now have dialogue with HMRC about some of the issues. At the moment, the question does not arise for the vast majority of transactions, because the charity is based in Scotland and is properly on our register and HMRC can rely on that eligibility. That will continue to be the case.

At the margins, where a charity is not on our register and in our view it is not desirable for it to go through the registration process just to demonstrate eligibility, we get into territory where some sort of supplementary list should be held. Who holds it and who makes the decisions about it is the area that we need to explore.

Jamie Hepburn: That is helpful.

John Mason: As I understand it, a key line in section 14 of the 2005 act concerns whether a charity is occupying property. If it is occupying property—presumably for its office—it is required to register with OSCR, and if it is not occupying property, it does not have to register. Is that correct?

David Robb: Yes.

John Mason: I presume that the reason for having the register and OSCR is that people were calling themselves charities who might not have been. I assume that the Scottish standard to be a charity is higher than it is in other countries.

David Robb: That is very much the case. In many parts of the world there is nothing that we would recognise as a charity regulation system.

John Mason: Although we have also been told that we must treat all EU countries, at least, equally, so we cannot be too discriminatory.

I presume that the risk is that organisations somewhere outside Scotland that, according to our understanding, would not really be charities, might come to Scotland, call themselves charities and get relief. That is why the proposed provision is there. Is that correct?

David Robb: Yes.

John Mason: So, in addition to the costs, which we have had explained to us, there is a risk.

As I understand it, one of OSCR's guidelines is that charities should not sit on assets but should use them. If a charity just sits on piles of money, which do not go down, questions are asked about that. Should questions not also be asked about a charity—whether Scottish or from overseas—that buys property and just sits on it?

Gavin McEwan: Charities are entitled to invest their assets. Under charity law, charities have a duty to invest assets that they do not immediately need for the purposes of their charitable activities. That means that if a charity has, for example, a large amount of cash that it does not immediately need for its charitable activities, it should invest those funds, which may mean investing them partly in stocks and shares; it may also mean investing them partly in property to have a diversified range of assets. There is a legal duty to invest assets that are not immediately required. From that point of view—I am speaking for OSCR here—OSCR is content for charities to sit on funds

that are legitimate investments and which are not immediately required for charitable activities.

David Robb: I agree entirely with that, but if we saw evidence that that was all that a charity was doing, we would have concerns. The charity test requires the active provision of public benefit. One of the early issues that OSCR had to deal with was that there were many dormant, frozen charities that were providing no active benefit, even though they might have been established for charitable purposes. The Scottish charity test requires charities to actively provide public benefit; an organisation that simply sat on funds, whether invested or not, would not meet the test. A lot of our regulatory activity is focused on charities in relation to which we have a concern that the active provision of public benefit is not demonstrated.

Gavin McEwan is absolutely right, but if investing in property were a charity's exclusive activity, we would have a concern, because that would not seem to us to meet the test.

John Mason: That will be trickier for you to establish with an overseas or foreign charity. You might not know what activities it is doing.

David Robb: As I said, it is a situation that does not arise very often and one that the 2005 act was not designed to capture. We are worried about being drawn into such activity. I do not foresee us sending teams to Venezuela to check on their activities, but that situation could arise in a tiny number of cases.

John Mason: That deals with charities outside Scotland.

As far as charities within Scotland are concerned, it seems to me that there are two kinds of charities: there are real charities that help people and there are what I would call pretend charities, which used to be part of organisations such as councils but which now provide leisure services, for example. As they have managed to get through the hoops, they are called charities and get relief, but they are not charities in the traditional sense of the word. In fact, some of them have been set up with the sole purpose of avoiding tax, particularly business rates.

Where are we going with what is proposed? Should we just accept that any body that is called a charity should get all the relief because it has satisfied the OSCR test? Is that right?

David Robb: We would describe the situation slightly differently. It is undoubtedly true that there is a great spectrum of activity that correctly passes the charity test. We do not distinguish between charities that are very charitable and those that are only a wee bit charitable. If a charity is on our register, it is there because it meets the charity test, which is the test that the Parliament agreed that we should apply. We do that consistently.

I recognise the situation that you describe. There are lots of organisations about which a man or woman, when stopped in the street and asked, "Does that look like a charity to you?", would say, "Absolutely," because it fits with the traditional mould, but among the assets of the third sector are its flexibility and its capacity to innovate. The label "charity" is evolving quite rapidly to respond to different situations. I think that that is a good thing and something that we should value in the third sector. However, it means that we continually need to modernise our understanding of what the "charity" label or brand means. Currently it encompasses a lot of things that surprise people.

The challenge is to ensure that our understanding keeps up with the times. There are tensions in that regard and it is possible that, over time, we will need to have different categories of charity. Currently we have one test, so we do not have a very sophisticated system to address a tremendously diverse sector, which comprises 23,500 charities. In general, diversity is a strength and should be encouraged, but I recognise the situation that you described.

11:15

John Mason: For the purposes of the bill, we need to continue to treat all charities in the same way, but the issue might need to be looked at at another time.

Gavin McEwan: It is important to stress that, as well as existing for a charitable purpose, a charity must provide public benefit. That is part of the charity test, and it is a big part of OSCR's assessment of charities at the point of creation as well as its on-going regulation of charities. If a charity existed only to secure relief from non-domestic rates, there would be a good argument that it was not providing public benefit. For the charity test to be satisfied, there must be a deliberate attempt to provide public benefit. OSCR actively polices and regulates the issue.

Jean Urquhart: Is setting up charities a big business? For example, could someone in Scotland establish a charity offshore and register and operate a company elsewhere globally—or at least across the United Kingdom and Europe—in which you would not take an interest? Are you aware of loopholes or movements, given the growing number of charitable organisations? Where is the line in the sand beyond which you would be nervous about the future?

Gavin McEwan: I am a full-time charity lawyer, so a lot of charities come across my desk, day in, day out. I see the problems that charities bring to me and I see the concerns that people have about

the sector. I do not see widespread abuse along the lines that you described. I do not see people creating charities offshore to get round tax rules or other regulatory requirements. That is a very rare occurrence indeed—I cannot think of an example of that happening that I have come across.

The issue tends to be that charities are not spending their money properly, domestically. Such cases come up from time to time and OSCR rightly investigates them. There is not an issue with offshore entities trying to grab our domestic tax reliefs—that does not happen very much.

Jean Urquhart: If we are proudly saying that our standards are high in deciding whether a company meets the charity test—in examining its purpose and so on—how do we compare with countries in the rest of the United Kingdom and the rest of Europe? Are there issues to do with our standards?

David Robb: It is difficult for me to say categorically. The positions across the UK are slightly different. The charity regulator in Northern Ireland has been able to get up and running only in the past few months, because there have been difficulties with establishing the basis of the charity test there. The Charity Commission has been established for a long period, whereas the regulatory body in Scotland is still quite new. I do not have encyclopaedic knowledge of how things work across Europe, but my impression is that the systems are very different.

I underline what Gavin McEwan said about the rarity of the incidents that you asked about. Our view in OSCR is that wilful misconduct on the part of charity trustees is extremely rare and the great bulk of activity should not be a matter of concern for anyone. However, problems can arise and there are instances in which people actively seek to abuse the system. I suppose that my message is that there might be easier systems to abuse than the Scottish system. Scrutiny is something that OSCR does quite well. Given our comprehensive register, and given the scrutiny that we exercise before we accept a charity on to the register and on an on-going basis, I suspect that there would be easier systems to exploit, if someone was minded to exploit the system.

The Convener: That concludes questions from the committee. I thank the witnesses for your contributions, which have helped our deliberations.

At the start of the meeting, we agreed to take the next part of the meeting in private.

11:21

Meeting continued in private until 12:02.

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