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Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 6 August 2014

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
21st Meeting 2014, Session 4

CONVENER

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

DEPUTY CONVENER

*Graeme Dey (Angus South) (SNP)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Nigel Don (Angus North and Mearns) (SNP)
Alex Fergusson (Galloway and West Dumfries) (Con)
*Cara Hilton (Dunfermline) (Lab)
*Jim Hume (South Scotland) (LD)
*Angus MacDonald (Falkirk East) (SNP)
*Dave Thompson (Skye, Lochaber and Badenoch) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Mike Gascoigne (Law Society of Scotland)
Martin Hall (Scottish Agricultural Arbiters and Valuers Association)
David Johnstone (Scottish Land & Estates)
Jamie McGrigor (Highlands and Islands) (Con) (Committee Substitute)
Nigel Miller (NFU Scotland)
Christopher Nicholson (Scottish Tenant Farmers Association)
Andrew Wood (Royal Institution of Chartered Surveyors)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 6 August 2014

[The Convener *opened the meeting at 10:01*]

Decision on Taking Business in Private

The Convener (Rob Gibson): Good morning, everyone. Welcome to the 21st meeting this year of the Rural Affairs, Climate Change and Environment Committee. I hope that you have all enjoyed a good summer break.

I remind everyone to switch off their mobile phones, because they might affect the broadcasting system. People might notice some committee members consulting tablets during the meeting, because we provide meeting papers in digital format. I guess that some witnesses are wired for sound, too.

I have received apologies from Alex Fergusson and I welcome to the meeting his committee substitute, Jamie McGrigor.

Agenda item 1 is a decision on whether to take in private agenda item 4, which is consideration of the committee's letter to the Scottish Government on petition PE1490, on control of wild goose numbers. Do members agree to take the item in private?

Members *indicated agreement.*

The Convener: Thank you.

Subordinate Legislation

Seed (Fees) (Scotland) Regulations 2014 (SSI 2014/167)

10:02

The Convener: Agenda item 2 is consideration of a Scottish statutory instrument that is subject to the negative procedure. I refer members to committee paper RACCE/S4/14/21/1 and note that no motion to annul has been received in relation to the regulations. Do members have comments?

Jim Hume (South Scotland) (LD): This is just a small point on consultation, which is mentioned at the bottom of page 3 of the paper. I note that the Government consulted more than 150 interested parties but received only one response, which I think came from NFU Scotland. It is concerning if stakeholders are not engaging fully on issues that can affect them quite dramatically.

The Convener: We note that. If there are no further comments, does the committee agree that it does not want to make any recommendation in relation to the instrument?

Members *indicated agreement.*

Agricultural Holdings Legislation Review Group

10:03

The Convener: Agenda item 3 is evidence from stakeholders on the interim report that the Scottish Government's agricultural holdings legislation review group has produced, before we hear from the Cabinet Secretary for Rural Affairs and the Environment and review group members on 20 August.

I very much welcome our witnesses: Mike Gascoigne is convener of the rural affairs sub-committee of the Law Society of Scotland; Nigel Miller is president of NFU Scotland; David Johnstone is chair of Scottish Land & Estates; Christopher Nicholson is chair of the Scottish Tenant Farmers Association; Martin Hall is from the Scottish Agricultural Arbiters and Valuers Association—he is a former SAAVA president—and the tenant farming forum; and Andrew Wood, FRICS, is from the Royal Institution of Chartered Surveyors. Good morning to you all.

We have no opening statements, so we will move straight to questions and answers. When questions have been exhausted, I will ask witnesses whether they want to make further points on issues that we have not covered.

We are looking at the agricultural holdings review with a view to having a vision for the tenant farming sector, and we probably need to discuss how that vision can be delivered. The Government says that its vision is

"for a Scottish tenant farming sector that is dynamic getting the best from the land and the people farming it, and provides opportunities for new entrants, forming part of a sustainable future for Scottish farming"

as a whole. What approach will be necessary to achieve such a vision? Without considering any of the details that are bound to come up in questions that will follow, will you say what, generally, your vision is? Who would like to kick off?

Martin Hall (Scottish Agricultural Arbiters and Valuers Association): If things are going to work, we need to find a system that operates on a business footing. This is really about farming businesses—that is primary—and about people and mutual respect. If we can get those three elements into the system, we will be a long way there.

The Convener: We clearly need an alternative paradigm to the one we currently have, and we will look at that in some detail. Would anyone else like to comment on the vision?

Christopher Nicholson (Scottish Tenant Farmers Association): The STFA is very supportive of the review group's vision of what the future tenanted sector should look like. We support its approach and its evidence gathering and all the solutions that it appears to be considering.

We notice that the group's remit is to look purely at tenancies from the perspective of the tenanted sector and at the business model of tenancies. To our mind, tenants' role is much greater than purely operating their businesses.

The land reform review group has made recommendations on the public interest argument for preserving the viability of tenanted farming families. We feel that, to have a proper and effective review of agricultural holdings, some of the land reform considerations have to be taken on board.

Our country has a history of addressing tenancy problems by addressing tenancy legislation—by going in at the bottom and addressing problems from the bottom up—whereas other countries have addressed problems by looking at the open market for land and at the controls and regulations that relate to the ownership of and the buying and selling of land. They have put balance into the system by having controls on land reform issues rather than looking at tenancy legislation. Where there is a balance of land ownership, the tenancy sectors appear to work without as much regulation as we have. The evidence suggests that, to come to a successful answer on the operation of tenancies, both the tenanted sector and land ownership and regulation in the land market need to be looked at.

The Convener: Are you saying that the business, working and respect issues are all very well, but what the land reform review group is talking about would perhaps deal with aspects of the buying and selling of land as a whole, and so that should not be ignored in the outcomes of the group's deliberations?

Christopher Nicholson: Now that we have land reform and tenancy reform as two parallel workstreams, there is a unique opportunity for the two to link up. There are areas of overlap.

I do not disagree with anything that the review group has come up with. It is very important that business models work for tenancies, but other considerations come into play. If we are looking at the viability of tenancies in the long term, the future of tenant farming families and their wider role in fragile rural communities, what appears to be a narrow definition of the remit of the agricultural holdings review group may be a limiting factor. However, I think that the group is taking on board some of the issues that the land reform review group came up with.

The Convener: We might explore that issue a little later. Does anyone else wish to comment on the vision?

Nigel Miller (NFU Scotland): Very briefly, we are supportive of what the review group has done. I have been hugely encouraged by the way in which it has gone about its work and the care that it has taken in consulting, and its overall vision is pretty much where we would like it to be. Seeing that happening is quite exciting, and we genuinely believe that we will get something good out of the process.

Chris Nicholson is, in some respects, in the same place as us. Regulating the sector is not the only answer. The tax and subsidy environments in which we work are pretty important, and the higher level infrastructure that we use, whether it be the Scottish Land Court, arbitration or some other body, will be critical in balancing the issues that will inevitably arise in a minority of cases.

The other real danger is that we focus too much on the 1991 tenancies and forget about or do not put enough effort into the future. The review group is very much alive to that, but the flexibility that already exists in vehicles such as share farming or various forms of long-term limited duration tenancy such as LDT to retirement or whatever, which allow a tenant to renovate a rundown property and get back some value for all their work, needs to be defined in a model that people have some confidence in to ensure that the landowner and tenant can have a lifetime, or at least a significant period, in which to make that sort of investment. That must be to the benefit of everyone in the rural community. In any case, some of this is about working with the current structures and creating models that people find attractive.

David Johnstone (Scottish Land & Estates): I broadly endorse Nigel Miller's comments. We very much welcome the review, which we think has been carried out in a very inclusive and progressive way and is genuinely looking for solutions to the problems that have been identified.

To us, the tenancy sector is vital in not just maintaining but growing what is already there. The changes to the common agricultural policy that will come through over the next five years and the diminution of the subsidy after that mean that we need ever-increasing flexibility in farming to ensure that farming businesses are able to diversify, restructure, grow and adapt. That sort of thing is difficult to quantify, but we have a unique opportunity not only to provide that flexibility but to reinstil confidence among tenants and landowners that what we have is fit for the 21st century and will drive us forward for the next five, 10, 15 or 20-plus years.

It is important that we strike a balance to ensure that the pendulum favours neither side. We have been heartened by how the review group has taken on board and addressed that matter, and we look forward to working with it in the future.

Andrew Wood (Royal Institution of Chartered Surveyors): I want briefly to reinforce some of the points that have already been made. Like all the other groups represented today, the RICS has been working closely with the review group, and I think that a number of extremely valuable things have emerged during the process.

Over a number of years, we and the tenant farming forum have been looking at all sorts of issues, but a key thing that we have lacked is data to back up what we have been discussing. A number of concerns have been raised, but we have never really had the facts to look at in any detail. One important thing that will come out of the review group's data collection is facts that will allow us to examine these matters in more detail.

There is clearly some conflict between where the review group and the land reform agenda are going. Everyone wants a vibrant tenanted sector, but that requires people to be confident about investing in and buying land to let, and we need to look very carefully at what I think is an issue of conflict.

The Convener: Okay. We will now discuss some of the detail of the review group's aspirations. Jim Hume will kick off on that subject.

10:15

Jim Hume: Thank you, convener. The review group has come up with eight aspirations. It would be interesting to hear from the stakeholders whether they agree with those aspirations and how achievable they think they are. I will have to go over them, obviously, just to remind you, although you might have memorised them already.

The aspirations are for a range of flexible tenancy options to suit different circumstances; the ability for people to move into, through and out of the tenanted sector as their businesses develop; business investment in the tenanted sector to be equivalent to that in the owner-occupied sector; addressing barriers to entry for new entrants, so that they can farm successfully; rent levels to reflect commercial returns from a well-managed farm business; the supply of tenanted land to be broadly compatible with demand, given rent levels; risk to be shared more between tenants and owners to encourage innovation, et cetera; and the underlying culture to look forward and be based on shared endeavour and mutual respect—I think that, as Martin Hall already said, trust would also be a factor. So, those are the eight aspirations.

The Convener: Do you want to ask about a specific one at the moment?

Jim Hume: The issue of rent levels is perhaps the most topical, so we could start with that. However, the stakeholders can feel free to pick any of the aspirations.

David Johnstone: From SLE's point of view, they are all spot on and achievable. They are exactly what is required to generate the confidence to bring more people into the market for letting and renting land. You referred to the rent measures, and rents must be fair and sustainable for both sides. We cannot have a rent that is going to be too much to have a productive holding or the capacity to produce, otherwise it is unsustainable. At the same time, landlords must be able to receive a realistic and fair rent to encourage them to let. Part of the review process will be to look at how section 13 of the Agricultural Holdings (Scotland) Act 1991 can be amended by new ideas to maintain the level of negotiation between the parties.

As you are all probably aware, the STFA, the NFUS and SLE sat down and came up with an interim measure to look at rent levels, with the consumer prices index as a guideline, and give a sense check as to where we are. We found that progressive and we hope that it will be helpful for the industry and will allow some calmness to return to where we are now, and give a chance for the review group to have a good look at the mechanism involved in assessing rents going forward.

Christopher Nicholson: Obviously, we have made progress in the past few weeks, with the help of Andrew Thin, to come up with an interim measure before any legislation recommended by the review process can be implemented. So that is quite a leap forward. We see the real problem with the rent test being the primacy given to the open market test, which adds complexity and uncertainty. There is no clear, transparent way of making the adjustments and disregards that are required. We feel that any rent test that incorporates the open market test as a formal part of the test will be lengthy and confrontational, and it is recognised that it may not result in viable long-term rents. So our preference is in accordance with the vision of the review group, which is that rents should reflect the agricultural earnings capacity of the holding. That would ensure that rents remain viable.

The other area of conflict with rents is in ascertaining what improvements have been provided by the tenant and what improvements have been provided by the landlord. There is a huge difference in the provision for that between different tenancies. The underlying principle of agricultural rents is that the landlord receives rent only for what he has provided. That is a core principle that we must not lose sight of.

Nigel Miller: The list of aspirations is quite comprehensive, and I think that we would all aspire to meet all of them. Many of them are deliverable, but I suspect that the one on supply and demand will be particularly difficult to meet. We are not going to suddenly change to a world in which there are many opportunities for tenanted land—that simply will not happen fast. Given the expansionary nature of farm businesses and the economic pressures on them, that will be a difficult aspiration to drive. I suspect that if we are really serious about that one, we will have to give more consideration to share farming, which I have talked about, and use that as a way into the sector.

In addition, there are larger farm businesses that might focus totally on the arable sector, but which have, within their portfolio, assets that could be spun off as a subsidiary or a tenanted business, whether a livestock business, such as one involving pigs, or a dairy, which could use some of the steading infrastructure of the larger business and some of its by-products. We must be a lot smarter. Rather than doing what we did before, we have to create new opportunities. We must consider ways of encouraging more diverse use of the rural economy.

We must also be a bit more imaginative. Government has a role to play in that with regard to how we use pillar 2. The reality is that we are all hooked into new entrants. The new entrants package looks pretty good—or rather, it has very good potential—but it will be restricted to a very small number of individuals. Many of those individuals will not be able to take up the opportunities because they do not have the matching funding to do so. We must think about second-stage developers—people who are moving from a temporary holding on to their next holding, which might be something such as an LDT. We need to support them at that stage, and nothing has been introduced in pillar 2 that will do that. If we are serious about enabling people to get established in the industry and getting a flow through, there needs to be intervention at various stages to open things up, as well as vehicles that people can use.

On rent determination, I am greatly heartened by what has been achieved in the past few days and I appreciate the effort that everyone has put in, but the reality is that it is a quick fix for a particular gap that we face before the review moves rent determination on to a different stage. The principle is quite attractive. The CPI appears to be a reasonable baseline, but I suspect that there might be more sophisticated ways of examining the profitability of our industry. I am not

sure that the CPI is the right index to use, but the principle is quite a clever one. We are talking about a viability test to ensure that we do not stray from a reasonable approach to rent determination. However, the key issue of how to determine rents is still problematic, and I think that we will probably come back to it.

The Convener: Yes, we certainly will.

Jim Hume has another question.

Jim Hume: I thought that someone else wanted to come in.

The Convener: Two other members of the committee have questions.

Jim Hume: In that case, I will continue—thank you.

Risk sharing and investment sharing are similar things. In the past, there have been different partnership agreements that have involved such sharing. Have they been successful? What sort of instruments could be used in the future to increase risk sharing and therefore bring about better investment in tenancies?

Andrew Wood: The key mechanism that is used for risk sharing outwith traditional tenancies is contract or partnership farming, which can be structured in different ways.

In effect, such farming involves a commercial deal between two individuals, whereby the rent and the terms of that deal reflect the investment. In most cases, the rent is not a fixed amount of money and both sides share in the end result from year to year. That means that the farmer, who is doing the bulk of the work, gets paid for his day-to-day operations, with the profit of the farm being divided at the end of the year according to a formula that is agreed at the outset. Those types of processes exist.

What the review group is considering is really investment in fixed equipment. There are some specific issues around that. As with all agricultural holdings issues, there is some history, in that some of the arrangements in relation to fixed equipment were perhaps not equitable or appropriate. However, the key thing for people in the tenant sector is that they get a return on their investment. Generally, they would not build a new grain store or cattle court if there was not going to be a return. Equally, when they come to the end of the tenancy, there must be some reflection of and compensation for the investment, because there is still value in it that will be passed on to somebody else.

From the landlord's point of view, in terms of encouraging investment, if you are going to put up a cattle court that costs, say, £100,000, you have to ensure that the rent will reflect that investment and that you will get some return for yourself. That is where the investment and the rent review process gets intertwined because, in order to encourage the investment, the rent review process has to take into account fairly the capital funds going into the holding.

Dave Thompson (Skye, Lochaber and Badenoch) (SNP): I want to focus on the rent reviews and the rent situation. It is my understanding that, in England, the market test was done away with in 1984. I see that Andrew Wood is shaking his head, but that is what I have in my notes. Perhaps he can correct me on that. If that is not the case, we cannot say what the effect of that will have been over time.

I want to know why the market test is seen as a better method of fixing rent than the earnings capacity of the holding. Obviously, this is a complex area and we will probably pick up on areas such as assignation and so on later. All the issues link together. The point that Andrew Wood just made about a landlord who has invested £100,000 wanting to get a return on the rent is relevant.

I might be about to stray into a point that I want to make later but if, for example, 1991 tenancies were assignable, that would deal with the problem, because the tenant themselves would be able to raise the cash to build a barn or whatever, which they cannot do at the moment, and the value and productivity of the farm would increase. If there was a method of assessing rent based on what was being produced—the earnings capacity—that would take care of all of that. Could the members of the panel explain why they feel that the current market test is the best way to review rent and why a test based on earnings capacity is not, if that is their view?

David Johnstone: I am not a legal expert on this matter in any shape or form. However, as far as I am aware, the English model has an open-market element within it, but it also has a link to the productive capacity of the holding, and it gives equal weight to both measures as a way of providing a check and balance when the rent is assessed. There is a strong argument for bringing that measure into legislation in Scotland, along with the open market, to allow different ways of agreeing the rent and to provide a sense check, as it were.

In reality, when the rent reviews are done, they take into account the productive capability of the holdings anyway—that is an unofficial way of doing the sense check. However, my understanding is that, at the moment, the legislation does not allow for that—if a case ends up in the Land Court, that is not deemed to be relevant.

We think that it would be perfectly sensible to start to bring that approach into legislation in Scotland. However, we would be reluctant to see the open market done away with, because it provides another measure with which we can ensure that rents are fair and reasonable.

10:30

Nigel Miller: Our tenant members are determined that, as far as an economic test goes, we must prioritise the actual capability of the holding to get a better balance in rent determination. How that is balanced with open market evidence is the crucial factor.

The attraction of the English model is that it is tried and tested: it has been through the courts. All organisations, including the STFA, SLE and ourselves, have looked at that model as something that might break us out of the threat of court action and give us something to work on.

I do not think that the English model is perfect: that is the reality. Rental in some parts of England is actually quite high, and it is driven by quite volatile markets. There are issues about how we use budgets or a holding's earnings capacity to drive a rental process. Certainly, there would have to be a defined budgetary process and there would have to be an averaging of costs and outputs to ensure that the spikes are taken out. The principle is right, but I do not think that it is the whole answer; I suspect that after such a process there would have to be some sort of sense test as well.

The other issue, certainly in some parts of Scotland, is that we have rents that are probably out of kilter with other regions. Maybe they should be out of kilter, as there will be regional differences. However, some rents have been neglected in the review process. If we try to move them in line with the market, we create an unacceptable pressure on the businesses involved. Therefore, if we are going to adjust to a new rental review system, we must have a phased process over six, seven or eight years, to allow people to adapt to it. If we want to have confidence in the system, let us have a phased process. I hope that, after that, it will be more like an index, in which we will be rolling on every three years.

It is a tall order to deliver all those components. We need confidence in the system, and to get that we need a budgetary system that is robust and takes out the spikes. It probably needs some sort of balance with the market. It should go to a sense test, and if there are big deviations from the norm we need to have a phased changeover to the new system.

Martin Hall: When we are out in the real world, negotiating rents for landlords or tenants, most practitioners undertake both methods: we look at the market and we look at the viability. The courts have moved away from that in the past two decisions and have directed us towards using markets as the primary factor. However, most landlords and tenants want a sustainable rent and it is quite important to bring that balance back. I agree that south of the border the practice is to look at the market and the budget in equal measure and to give them equal weighting.

I was involved in the publication of the practitioners' guide last year, and I put in a slight word of caution: depending on what time is taken, budgets can introduce a large degree of variance, which is down to the volatility of commodities. We looked at the Moonzie case when we wrote the guide. Over a six-year period, the variance on that rent could be anything from £8,000 up to £84,000, depending on what time was looked at. I agree with Nigel Miller that we need a balanced approach, but you need to be aware that there are big variances out there.

Christopher Nicholson: The English have almost 30 years' experience of their rent test. I accept Martin Hall's point that, if we look purely at budgets, there can be some volatility, but the formal part of the rent test, which is the comparison with agreed sitting tenants' rents, irons some of that out. One of the overall benefits of the English test is that, in a period of agricultural downturn such as that post-1997, rents go down; the same did not happen in Scotland. As a result, it has been shown that the English test follows farming fortunes better.

With regard to volatility, although historical statistics such as farm business income are volatile, rents are set looking forward, and there is not as much volatility in forward prices. In recent years, for example, the forward price of wheat two or three years in advance has always been around the £140 or £150 a tonne mark; volatility only emerges the closer you get to harvest. As I have said, we can iron out volatility if we look forward and use sitting tenant comparables, but an issue with using agreed sitting tenants' rents as comparables is that everyone needs equal access to that information, and it would be hugely helpful if Scotland had a database of rents and details of holdings to allow that process to happen at rent review time.

The Convener: Unless Mike Gascoigne wants to come in on this point, I will take Andrew Wood next.

Mike Gascoigne (Law Society of Scotland): I am happy to pass on that question, convener, but I should say that the policy of the stakeholder whom I represent is not to make known its feelings about

Government proposals or policy. That is a matter for Government. We are in the business of—I hope—organising and engendering good law, which means that until there is a bill in front of us we are rather on the sidelines. That said, I am happy to try to add to the debate as we go on.

The Convener: That is okay. I just thought that I would ask.

Andrew Wood: The current process is already very complex. People throughout the industry look informally at budgets and productivity, and because of certain issues that have already been highlighted one would have to be very careful about structuring that in a formal way. After all, various people buy their fertiliser or sell their crop at different times of the year. There is huge volatility, and any agreement about the process will have to take that into account.

I should also say that the English system is not without its faults. My firm works throughout England, and we have first-hand experience of people's difficulties in agreeing the budgetary side of things. We need to take a careful look at that system, because it is not a panacea.

The second thing that we need to be slightly careful about is the fact that people who relet a farm are going to be in the market's hands. They will tender it on an open market basis, and people will put their rents in on the same basis. If we introduce a system that brings in a completely different test for judging rents at the first rent review, we might create a further barrier to the letting of land.

We need to be slightly careful about what happens after a farm is let for the first time. There will be an open market test, because the farm will be tendered in the market, and the very nature of such an approach means that people will compete for that land. The question is: what happens when the first review comes along and you have moved away from the market test?

The Convener: I call Nigel Don.

Nigel Don (Angus North and Mearns) (SNP): Can I come in later, convener?

The Convener: Certainly. I call Jamie McGrigor.

Jamie McGrigor (Highlands and Islands) (Con): Do you want me to ask my main question, convener, or just my supplementary?

The Convener: Your supplementary.

Jamie McGrigor: On David Johnstone's comment about using earning capacity as a measure, I would suggest with the greatest respect that such a move would be very difficult. After all, the earning capacity of any unit would depend on how efficiently it was run, the individuals running it and how much they were putting into the land. How on earth would you measure earning capacity between farms?

Christopher Nicholson: All farmers farm to different standards and abilities, but in the context of a rent test you are considering not the individual farmer but the hypothetical farmer, who is in essence your Mr Average from the Scottish Agricultural College farm business handbook. There are plenty of statistics, whether from John Nix, the Government or the SAC handbook, that can tell you what the hypothetical farmer should be making from a particular type of farm, in a particular area on particular land. You are not considering when the individual farmer bought his fertiliser; you are considering what the hypothetical farmer would do in that situation. Given the statistical information that we have from research and from Government, that is easily achievable.

David Johnstone: I have broad sympathy with what Chris Nicholson said, but by using that method you are in effect assessing and producing a critique of how that person is farming that farm. That could run the risk of creating a degree of tension between landlord and tenant, particularly if the landlord says, "I think that should be done differently" and the tenant says, "No, this is fine." It is not a panacea—there are problems in there—but I think the method needs to be looked at.

The Convener: Okay. We are trying to keep this session tight. I call Nigel Miller, after which Dave Thompson will come back with a supplementary on this issue. I will come in after that.

Nigel Miller: Time is very short, so I will just agree with Chris Nicholson that by using stats from the SAC and Nix you can do budgets, although you have to average them as well. That approach is not perfect—there will be issues about it—but it is certainly something that we should be thinking about and looking at.

Dave Thompson: I want to pick up briefly on something that Andrew Wood said. He talked about the first rent review and the comparison with the rent that was dealt with when the purchase was made. Is there evidence from England that that is a problem? The English have had 30 years of the sort of system that we are talking about, so it should be pretty clear whether the first rent review creates a different figure.

Andrew Wood: It can do, but we must remember that in England they still take account of the market as part of the test. It is not purely a budgetary system. The budget and the market are looked at in balance, so it evens out peaks and troughs. If a very high rent was tendered and there was then a period of catastrophic prices, there would be potential for quite a large downward rent

review at the first review. However, that would be an unusual set of circumstances.

Dave Thompson: So the mixed aspect of the English system is what gives a wee bit more balance.

Andrew Wood: Yes.

Christopher Nicholson: Just to clarify, in the English system, the earnings capacity part of the test applies only to secure tenancies—the tenancies under the Agricultural Holdings Act 1986. With the new types of tenancies, the rent test is essentially about freedom of contract and open market. It seems that, north of the border, we are looking at a similar system—freeing up the new-style tenancies but making adjustments to improve the resilience of the old-style tenancies.

The Convener: I want to come at this in a slightly different way. The supply of tenanted land will be broadly compatible with the demand at particular rent levels. I relate that to the 223 per cent increase in the cost of buying farmland in the past 10 years, as reported by Knight Frank, quoted in *The Press and Journal*, on 30 June—that figure confirms the on-going situation. Does that saleable value of land on the market have a huge impact on the ability of landlords and tenants to reach mutually agreed approaches to rent levels and so on? Is the saleable land price, which seems to me to be completely separate from the economic value of that land, dogging the process of setting rents at a level that will meet the economic circumstances?

Martin Hall: I feel quite strongly on that, because I have seen it reported in the press that there is some relationship between rents and capital values, but that is certainly not the case. In the land market, arable land might be £7,000 an acre, and you are absolutely correct that that bears no resemblance to the earning capacity of the land. There are many other factors at play in determining what the market will pay for land. There is no relationship whatsoever between the capital value and the rental value of agricultural land.

10:45

Nigel Miller: I guess that I agree with that, but I have some sympathy with your view of the world, convener, because we seem to have become detached from reality in many ways, which is not helpful for the industry. We are almost caught in a vice, because a lot of farmers' borrowings are based on the value of their land so, if we interfere with that, many farmers might get into trouble. There is probably a tax issue. If major investment is coming into farmland because of the favourable tax environment, the tax measures should be hooked into how the land is used. If investors buy land at a high level and then let it out, that is pretty good. If they do not let it and it is all in-hand farming or contract farming—to be honest, contract farming agreements are sometimes not as balanced as we would like them to be—that is maybe not so good. If people are getting a tax shelter, there must be a linkage to how the land is used. I hope that that would mean that outside investment would open up opportunities rather than close them down.

The Convener: Indeed. People talk about landlords wishing to invest and then looking for a return. It seems to me that, if people buy land at a high price, that will drive the whole market in renting. The statistics show the loss of land for renting over the piece and they clearly show that it has not all gone into shorter tenancies. Land has actually been removed from farming in Scotland at a time when we want the outcome of more local production. There is something far wrong with a system that allows the selling and buying of land on the open market in a way that leads to less land being available for people to use for the fundamental purpose that the Government and the European Union support.

Martin Hall: Part of the challenge for the committee and the review group is to create the right environment that is attractive for those who invest in land so that they want to let it. That is about creating sufficient flexibility so that those who buy land feel confident and want to enter into letting arrangements.

The Convener: Do you think that the mutual respect and partnership between owners and tenants is seriously affected by outside factors relating to the saleable value of land and the way in which investment is seen by some people as a means to get a return, probably through selling on the land?

Martin Hall: Personally, I do not think that that affects the relationships and mutual respect in the real world. Mutual respect has been developed over time between two parties or it exists because parties enter into new arrangements and come at them at the same time with their eyes open rather than carrying baggage from previous times.

Graeme Dey (Angus South) (SNP): I do not want to go off at a tangent, but I want to raise an issue in the context of mutual respect and partnership between owners and tenants. If that aspiration is to be achieved, are not the spirit and nature of the conduct of rent reviews as important as the system itself? If we accept that, we need to consider who actually pursues the negotiations on behalf of landowners. Is it not better all round to have locally based factors conducting negotiations rather than bringing in hard hitters from outside?

People have to rub along with each other after the dust has settled on a rent review. Will negotiations be conducted in a more cordial and commonsense way if the person is part of the fabric of the estate or works with the tenants regularly, rather than someone who has been brought in from outside? You have far more experience of the issue than I have, but when I have heard of instances in which a rent review has generated a lot of resentment they have tended to involve an outsider coming in to conduct the review, rather than a person who is operating on the ground.

Christopher Nicholson: That is certainly true, and it is becoming more and more common for outside agents from further away to conduct rent reviews. Even on estates that have resident factors, reviews are left to a third party from outside.

I agree completely that if everyone has to rub along afterwards, we need to develop respect and have a smoother process. The process is important, and the TFF has developed guidance to help in that regard. It is difficult to persuade everyone to follow the guidelines; if they were enshrined in a code that had a bit more teeth, the process might work.

There is an appetite, certainly among tenants, to have the setting of rents taken out of the hands of landlords and tenants, so that we have a system that is more like the French one, whereby a local panel or part of the department of agriculture or a rents adjudicator—or some such body—has the power to set rents and recommend rent changes in a certain area, according to the circumstances.

Nigel Miller: I do not think that anyone can disagree with what Graeme Dey said, but that is the reality of the world that we are in. I guess that the guidance for practitioners on rent determination is key, so it might be a good thing if it were mandatory—I am probably in the same place as Chris Nicholson on that. However, the key point is that there should be an on-going relationship, with both parties meeting up regularly, so that even if there is no change of rent there should be some sort of process. Within the process, there should be an inventory of improvements or changes to the holding, to ensure that such issues do not slip away, because there can be points of contention when there is no such inventory.

If an outside agent is to be used, there should be a designated point of contact. Even in a trust, there should be a contact—a face—who deals with the tenant year in and year out. That does not happen in some trusts. It sounds a bit frilly, but Graeme Dey has got to the heart of the matter, in that the reality is that relationships can fracture and go badly wrong.

David Johnstone: I support Nigel Miller on a lot of this. The key is that rent reviews must follow the guide and all parties must be mutually respectful. Rent reviews are complicated to do, given how the legislation is framed, and outside parties are brought in to bring knowledge to the review. Without doubt, that has caused friction, which is why the TFF created a guide to follow. There has been uptake of the guide, but it should be taken up more and followed more. However, it would be difficult to limit the conduct of reviews to local people.

We lose sight of the fact that there are big estates and small estates. The big estates have a resident factor and can bring in outside people to help, but there are an awful lot of small landowners who might have one or two tenanted farms and no resident factor. Such landowners are the points of contact with whom tenants deal directly, but they simply do not have the knowledge to do rent reviews, so they bring in outside people.

I agree with Nigel Miller that there should be a clear point of contact for a tenant, so that they know to whom they must go, whether it is the trust or someone else. That applies to land that is held by the Scottish Government, the Forestry Commission and all the rest of it. The factoring team for such land revolves from time to time, so we end up losing the relationship that has been built up. The system is not perfect and can definitely be improved.

The Convener: The NFUS, SLE and the STFA have agreed on a reasonableness test. It would be interesting to hear the RICS response to that.

Andrew Wood: We have no issue with the reasonableness test at all. I can see that there might be a difficulty in applying it but only in a small number of cases.

We are highlighting quite a few issues, but we have no feel for the quantum of a lot of them. As Graeme Dey highlighted, there have been one or two unpalatable issues. The RICS is not defending those cases. Indeed, how business was done in that small number of cases was unsatisfactory.

We have a worldwide code of conduct. We have continually encouraged people to come forward if they feel that that has been breached. The code has teeth: it puts people in very difficult circumstances and could potentially end their careers. I have brought some copies with me, should people want to see it later on.

The process is complex. It was highlighted that the vast majority of people do not have full-time agents. The range of people who own tenanted farms is vast, from small charities to individuals who may have their grandfather's farm right through to the large estates.

As I say, we have no issue with the reasonableness test. However, a difficulty relates to how the test is applied. For example, some rent reviews happen only infrequently. That takes us back to the relationship issue. Sometimes, six or nine years will elapse between rent reviews, so it is not something that some people on either side of the table do regularly, and that can cause difficulties.

The TFF's code is very new—it has been in place for only a year. Rent reviews may not be conducted in line with that code for some years. Therefore, we must allow time for take up. There is a lot of pressure in the industry to make that work and to see how it improves relations.

The Convener: We move on to the right to buy.

Graeme Dey: We are getting down to the nitty-gritty. Does the panel accept that there should be a right to buy for tenancies under the Agricultural Holdings (Scotland) Act 1991? The review talks of

"undertaking further assessment ... and ... an analysis of the wider potential implications for the Scottish economy beyond the agricultural sector."

What factors ought to be taken into account when determining the public interest in the issue?

Nigel Miller: We have consulted members right round the country on that issue. There is quite a regional variation between tenants, which perhaps reflects the environment in which they work. We work with our land-owning members, too, so we have probably seen both sides of the picture.

Some people see right to buy as an imperative; others feel that the system under which they work is totally dysfunctional, with no investment and no opportunity in the region, which they have found dispiriting not only for themselves but for the whole community. I am sure that committee members will have experienced that. There is an issue that must be addressed.

The position now is as set out in our submission. Where we have a dysfunctional system that obviously does not deliver, an intervention is required. We have suggested that an adjudicator could move in with a power of compulsory purchase and then dispose of farms or let them accordingly afterwards to break the cycle. To be honest, that would also, in the view of our tenants and landowners, flip over in instances where tenants did not fulfil their basic obligations. Therefore, the intervention is very much targeted.

Our view is that that will, we hope, be a driver of improvement. If it does not improve things, a significant intervention will be necessary to sort out the situation. Our proposal will mean that those who have good relationships with their tenants and who do a good job of letting land will not be compromised and that we will work in a positive atmosphere in the future.

We have struck a balance. I know that we have members who are pretty critical of the current position, which they think is too interventionist. We also have members who believe that a general absolute right to buy is the solution. It is by no means the case that the view that we have put forward is unanimous, but we have struck a balance that the majority of our membership believe is probably about right.

11:00

Christopher Nicholson: The STFA is supportive of the approach that the review group has taken to a right to buy in looking at its role in land diversification and allowing further investment in farms in cases in which that is clearly in the public interest.

There are circumstances in which it will not be a right to buy a whole farm that is under consideration, but a right to buy a certain section of a farm or a site of diversification or development on a farm that would allow a tenant to make better use of bank finance to develop a farm shop, a wind turbine or whatever.

I know that the review group is looking at other measures that might promote investment in the tenanted sector by tenants, such as freedom of assignation of leases. The ability of a tenant to invest is a key driver of the desire among tenants to have a right to buy. There is evidence that, in cases in which tenants have bought their farms in the past 10 to 20 years, the purchase has been followed by a leap forward in investment and in the quality of investment on the holding. In purchasing the farm, the tenant does not have to pay for his past improvements, so he purchases it at a discount in comparison with the open-market value. Once he has purchased the farm, the value of the past improvements enables him to increase his borrowing power to make further improvements.

A flaw in the business model of the tenanted system at the moment is that a tenant cannot use their past improvements as collateral to fund future improvements. Many people regard a right to buy as the only solution to that problem, but I know that the review group is doing work on terms of assignation, too.

Martin Hall: As an overriding principle, SAAVA believes that nothing will kill off the let-land sector more quickly than the introduction of a right to buy. There are two reasons for that. First, a right to buy would take a whole chunk of land out of the let-land sector. Secondly, it would deter those who own land from ever wanting to let land again. The introduction of a right to buy would certainly be a

step change, but in our view it would kill off the let sector as we currently know it.

I want to pick up on one of Christopher Nicholson's points, because it is very valid. It is about borrowing capacity and the ability to invest. From the research that we did in developing our paper, we discovered that what happens in Scotland is quite different from what happens south of the border, where tenants can borrow against improvements that they have made and their waygo. In general in Scotland, banks do not take that view, and I think that that needs to be looked into.

The Convener: Especially given that it is the same banks that we are talking about.

David Johnstone: It will come as no surprise to hear that we are not in favour of a right to buy. The fact that issues have been developing over a very long period that have not been addressed satisfactorily has created a groundswell of frustration that needs to be dealt with. For us, the purpose of the review is to iron out all the points that people are having difficulty with and to find solutions to them so that we can drive the industry forward in the knowledge that people have the confidence to make more land available for let on the market.

Martin Hall is absolutely right that waygoing is a problematic area at the moment. There are tenants who have not served the correct notice and who are therefore not technically eligible to receive waygo compensation when they leave their tenancy. We, as an organisation, think that that is wrong, and we propose in our evidence that there should be an amnesty. If a tenant has made a valued improvement to their holding, they should receive fair compensation for that improvement. The ability to borrow against that would have a great deal of attraction and would start to free up some of the security that is needed to fund improvements.

Andrew Wood: You earlier raised a point about people investing in land to let. I have probably sold more farms to tenants than most, and the introduction of the right to buy has been a real barrier to investment. There is a perceived confidence issue among investors because of the right to buy, which needs to be considered.

On the borrowing issue, in many instances, whether someone is an owner-occupier or a tenant, the banks are moving much more towards looking at the person's business finances—their cash flow and ability to repay—instead of looking purely at the collateral that is set against that. Most of the banks are moving in that direction. We are finding that, throughout the agricultural sector, it does not really matter how much collateral someone has, although the banks would like to know that there is some. The banks have been heavily criticised—quite rightly—in some sectors for not looking at people's ability to repay and at the liquidity in their businesses, and there is an opportunity for further dialogue on that.

My last point is on compensation at waygo. Everybody recognises that some inappropriate deals were done in the past—I stress that those deals were done in the past. I think that the amnesty is a good idea but, from a wider perspective, in the light of recent issues with legislation that has been used retrospectively, we need to be careful how we treat that.

The Convener: We are going to have to pin something down. On page 27 of the full interim report, we are told that there are 1,006 fewer holdings than there were in 2007, which amounts to 254,291 fewer hectares in agricultural tenancies. My question is for Martin Hall. Are you telling me that the right to buy has taken that land out of use?

Martin Hall: No, I am not. I do not have the statistics in front of me, but I imagine that a large number of those holdings have been sold through voluntary negotiation with the tenants.

The Convener: If that is the case, it would be helpful for us to know how much land is still in agriculture but has been sold on. Knowing the amount of land that has been sold on and is still in agriculture, but is in ownership and no longer in tenancy, would be central to our understanding of the problem.

Andrew Wood: Mr Chairman, I made a point earlier about the statistics and data. I think that most of that land is still in agricultural production. However, I know of a large number of farms that have been sold to tenants, so the land has come out of the tenanted sector.

The Convener: Nigel Miller wants to comment on the issue, after which Dave Thompson will ask another question.

Nigel Miller: I just want to fill a gap in what I said. We did not touch on the pre-emptive right to buy, and I want to make it clear on the record that we support the use of the pre-emptive right to buy. I think that there is consensus about it, and we believe that it should probably be automatic. The fact that only just over 20 per cent of tenants register seems to be strange to us, and there are tensions in the registration process that we believe are not helpful. It would be fairly uncontroversial to make it automatic.

As far as investment goes, Chris Nicholson's point is valid. We are increasingly seeing tenants with multiple landholdings putting on a tenanted unit a grain store or dairy that is far beyond the capacity of that one holding. That is a real

nightmare for the landowner and the tenant, because the present waygo arrangements would exclude compensation for it. In the case of diversification and in that case, there may well be some sense in that being taken out of the agricultural tenancy and put into some sort of business let that would then have value and could be sold to another party if necessary. That might be helpful in respect of some units.

Dave Thompson: I would like to move on to assignation, which may deal with quite a number of the problems and issues that we have discussed, and will continue to discuss.

Does the panel think that giving '91 tenants the right to assign their tenancy, lease or whatever would allow them to develop their holdings? Obviously, if they could assign, the value that they add to the holding would be taken into account in what they would get from the person who took over the lease. That would deal with issues to do with waygo, because that would be built into the price. Any improvements that the tenant made would be handed back to them once they assigned their lease to a third party, because they would be built into the value of the lease.

I imagine that that would also better allow them to approach the banks—there would be collateral. On visits to farms, we have heard evidence that tenants are having real problems in raising finance. Very go-ahead farmers cannot raise finance unless they have some other property that they can use as security. What they have done on their farm and their vision for the future are simply not enough for some banks to lend to them.

I would like to get views on assignation as a possible answer to a number of the issues that we have discussed.

The Convener: We have strayed into the area of establishing a stable and effective framework, which is fine. That is possibly what a lot of people want.

Christopher Nicholson: Assignation is potentially a real game changer for the viability of secure tenants in ensuring that investment continues in the future. Without investment, all holdings will eventually become unviable; investment is the key. Many holdings that have in recent years fallen out of the tenanted sector have possibly become unviable through a lack of investment, and are now used as an addition to other holdings.

In principle, assignation can solve many problems. It can solve the investment problem, because it allows a lease to have value. When a tenant invests, that will increase the value of the lease, and the lease could be held as a security by a finance provider. I accept that there are details that have to be ironed out, but the principle exists, and I think that the review group is working on that.

On waygo for secure tenancies, assignation can cut out the uncertain and difficult waygo process, because instead of going through waygo compensation for tenants' improvements, a retiring tenant without successors will simply sell his lease and receive value that way. That would be a clearer, fairer and more certain way for the tenant of receiving value. It also allows the landlord not to have to worry about future cash-flow requirements for paying tenants compensation.

In the very long term, given that open assignation allows a tenant better ability to invest, some requirements of a landlord to provide fixed equipment could probably be removed, as a trade-off. Therefore, there would be benefits for both parties.

In respect of fluidity in the sector and breathing life back into it, one of the key benefits of assignation is that it allows a retiring tenant to pass on his tenancy to an incoming new entrant if he does not have successors.

11:15

Tenancies come in all shapes and sizes; some of them are suitable for a new entrant who is looking to farm part-time. If he builds up his business and looks for a larger holding, he could assign his existing holding to another new entrant and match himself up with a retiring tenant who has no successors coming out of a bigger holding. At the moment, there are between 100 and 200 tenancies falling out of the system through lack of succession. Even if just a small portion of those were assigned to new entrants, we would solve the new entrant problem. We would not only solve the starter unit problem, but would give entrants a ladder on which to progress beyond the starter units.

Comparing our situation with that in England, the English have almost 3,000 starter units on county council holdings, which we do not have, but there is no progression for them beyond that. However, freedom of assignation would allow progression beyond the starter unit stage into a secure tenancy, which is the best vehicle that we have to generate investment and ensure the viability of holdings.

Dave Thompson: Can I just follow that up quickly before others speak? In your view, would freedom of assignation also reduce the pressure in terms of the desire to have a right to buy? Would assignation do a good part of what ownership would do?

Christopher Nicholson: In many circumstances, it would do that. That would be the

case if we look at tenancies from a purely business perspective. There are always stakeholders who are interested in further land reform outside the tenanted sectors, and the right to buy would always come into that debate. However, from the perspective of a tenant looking to invest, assignation could go a long way to taking that pressure away. At the moment, though, we are just looking at the principle; the details need to be ironed out.

Jamie McGrigor: Page 75 of the report states:

"A range of economic, social and cultural issues underpin the current dissatisfaction."

The report goes on to outline a number of important issues for consideration, including "Improvements, Compensation and Waygo". We have already heard some talk of that by the panel, so it is obviously an important point. I understand that the dissatisfaction comes from the fact that tenant farmers are not getting sufficient compensation, but tenant farmers have often not properly notified. I note that SLE mentioned the issue in its written evidence, so I would really like to know from SLE about the amnesty for people giving notification and what it means exactly, and how SLE would cope with the reported dissatisfaction.

David Johnstone: I have touched on that area already. It comes down to what we talked about regarding the notices that have to be served to notify the landlord of an improvement that has been made. In the past, those notices have often not been served correctly or have not been done at all. As a result, when a tenant wishes to leave the holding with no notice, there is no legal framework to ask for compensation.

We think that that is fundamentally wrong. We think that if an improvement is valid for the holding, it should have a value irrespective of whether the notice is served or not. We think that that should also apply to cases in which the tenant did serve the notice, but it has been time-expired because there were write-down agreements for five, 10 or 15 years, because what is there is still relevant and pertinent to the holding and as such should have a value and should attract reasonable compensation. We see that as a method to encourage investment, because the tenant will know that they will at the end of the day get the compensation that is due.

Jamie McGrigor: Is the one year an arbitrary time?

David Johnstone: Do you mean for the amnesty?

Jamie McGrigor: Yes.

David Johnstone: Nigel Miller suggested in the NFUS submission that we could use a three-year cycle that would tie in with all the rent reviews and would therefore be part of a natural process. There is a lot of sense in Nigel's suggestion of using the same period as the rent review period.

Jamie McGrigor: Yes, quite. Does anyone else want to comment on that?

Mike Gascoigne: Perhaps I can put this in context and suggest where it all comes from. When after the last war the then Labour Government was considering how to stop Britain running out of food again, the answer in Scotland was the Agriculture (Scotland) Act 1948, which introduced security of tenure for the first time. The concept in that legislation, which after being enacted was consolidated in 1949, was to give all the chips to the tenant. However, the cost to the tenant was compliance with what everyone now agrees are footering and annoying requirements to make notice in certain ways at certain times and for certain purposes. That legislation is completely out of date and should be top of the bill for reorganisation.

Christopher Nicholson: Although assignation could bypass the waygo problem for secure tenants, waygo will still be a fundamental issue for limited duration and limited partnership tenants. That legislation needs to be sorted out and, as representative tenants, we are very pleased by the progress that SLE and other stakeholders have made in recognising that there should be an amnesty or moratorium, and that tenants should be allowed to catch up on registration of their improvements.

As for the serving of notices, we must remember that the legislation contains a list of improvements that require no notice—in particular, improvements to land, including rock and stone removal. There is no paper record of such improvements, so a register or record of tenants' improvements that is updated regularly at, say, rent reviews, in order to avoid disputes later, might be fundamental to relationships in the sector. That is important, especially given the age of some tenancies. The average tenancy is more than 50 years old—they will only get longer. We need good records, because we are now getting to the stage where people's memories of improvements are beginning to fade.

Nigel Miller: Just to underline the importance of waygo, there is now a focus on assignation, and there is a real drive among our membership, as well as the review group, to look at the issue. I am not sure that assignation is necessarily the political fix that we all think it is; the reality is that if we go to assignation for value, it will not be people on the second rung of the ladder or new entrants who get the holdings. It will be fat cats like me who get them, because we already have the money, the farms, the marriage value and the capital behind

us—well, I might not, but a lot of us have—and new entrants or people who have just got on to the ladder are going to get squeezed out.

If you really think that assignation is going to be useful, you will have to limit the class of people who are able to bid for assigned farms, which will mean that the tenant will not get the same value that he would have got on the open market. That is the reality, and some Government intervention and perhaps pillar 2 support will be required to oil the wheels and make it all work. If you want agriculture to consolidate into larger and larger businesses, assignation for value makes perfect sense, but if you want more diversity, you will have to be more interventionist.

If the proposal is to assign to a full tenancy, how many landowners are going to stand by and let that happen without intervening and offering the tenant a big chunk of money to assign it back to the estate or to drop the tenancy? It is probably a lot more equitable and makes more sense to flip it over to an LDT for a lifetime or 25-year tenancy. Those are the nasty compromises in what seems to be a fantastic solution that would solve all the problems.

The Convener: I see that a number of people want to come in on this.

Christopher Nicholson: I support Nigel Miller's point that there will need to be restrictions on assignation if the public policy is to ensure that holdings do not get too large, and in that regard we see a future role for a commission or tenancy adjudicator.

David Johnstone: The complex thing about assignation is the psychological message that it sends out to affected landowners. We understand how it is affected by security of tenure, and we also know about the pattern of tenancies that start off on a limited term and are then altered to become the long-term secure tenancies that we have now. If part of the reason for the review is to encourage new letting in the industry and more people to come forward, I am worried that such a major retrospective alteration of the letting arrangement between tenant and landlord will send out the message that their present arrangements or the new arrangements that they are going to go into might be altered again at a later date. That will start to affect confidence dramatically at a time when we need more confidence and stability in the system.

The option that was mentioned by Nigel Miller of converting a 1991 act tenancy to an LDT, which as we know has a fixed term, instead of assigning it to another 1991 act tenancy, is interesting and is something that we would like to explore. We would, of course, be talking about a fairly lengthy LDT of probably 20 or 25 years. It would also help to re-establish that area of the tenanted sector and create vibrancy and a trade in LDTs.

I should point out that LDTs are assignable for value at the moment, which means that they can be put on the market. As far as I am aware, however, no one with an LDT has ever secured borrowing from a bank against its value. I do not know how the banks view them, and I wonder whether anyone else has any experience of that methodology.

I think that we just need to be a bit careful about assignation being the panacea that it might appear to be. Some complex issues need to be ironed out within it.

Nigel Don: Now that we have got to the sharp end of some of the issues that you are grappling with, the conversation suddenly seems to have got much more lively. However, given that we are the legislators in all this, I wonder whether I can drag everyone back a little bit.

There is a tenancies review, which is what we are discussing, and there is also a land reform review, which is on-going and which you all know about. In 1925, the United Kingdom Parliament legislated right across the area of land and equities and trusts to try and clear the ground—dreadful pun—of the law on this. To some extent I am looking at Mike Gascoigne as I say this, but I am just wondering whether there are other areas—maybe to do with taxation, registration or trust law itself—that we should be looking at at the same time as we try to get these very practical solutions to land use and land tenancies.

Mike Gascoigne: I should say that the act of 1925 that you refer to did not affect Scotland.

Nigel Don: That is correct.

Mike Gascoigne: I am not very sure in what context you raised it, in that case.

Nigel Don: Forgive me. The context in which I am raising it is that it did an awful lot for English landlords; it settled the whole issue in a oner. Is there something appropriate that should be done in Scotland at the same time as all of this work?

Mike Gascoigne: My colleagues will tell you whether I am right or wrong but, as I understand it, the position in Scotland is that any entity may own land, particularly agricultural land, and may choose to let it or not. I do not see any interest in looking at the machinery for trusts, limited companies, limited liability partnerships or any other entities; they do not have a bearing on what we are trying to do, which is to sort out some of the ills of the tenanted sector.

Nigel Don: Am I right in thinking that it is not obvious to any of you that there is anything else that we should be doing at the same time or that

there are any other legal barriers to the aspirations that we are discussing?

Mike Gascoigne: There is a tiny issue that might be worth mentioning in this context. Because, under the present common law in Scotland, the landlord has the right to choose his tenant, an automatic right of assignation by the tenant will require Scots law to be altered. However, that is a matter for Parliament.

11:30

Nigel Don: In general, do stakeholders think that there are other issues lurking out there that we need to address at the same time, or does the panel think that what we are trying to do on land reform and tenancy reform can be done in the context of the two reviews that we are talking about?

Martin Hall: A factor that we highlighted in our paper is access to not land but finance, which is a barrier. It is a separate issue, which we are not here to discuss today, but it is a factor for tenants that is at play in the whole discussion.

Nigel Miller: I am not a legal person or a tax expert, and of course tax is currently reserved, although maybe after September it will not be—it might be the Parliament's job to sort out. The reality is that agricultural and business property relief and inheritance law have a big impact on people's decision making about what makes sense.

The system should be designed so that it incentivises best practice and encourages a vibrant rural community. Reliefs should be available for people who deliver and not available for those who do not deliver. We are talking about pretty solid tools; the Parliament should be looking at them. The land reform review group highlighted various examples, of course. The system should be used to create incentives that drive the behaviour that we all want.

Christopher Nicholson: I echo Nigel Miller. Taxation and CAP are cross-cutting issues that affect the tenanted sector. For example, many contract farming agreements, which were mentioned earlier, are really sham rental agreements, which are designed to allow the landowner a fixed rental, without risk for his land, and to enable him to have trading status for tax purposes. We currently have a fiscal system that acts as a disincentive to let land.

We also have very generous tax breaks on land ownership, such as 100 per cent inheritance tax relief. Is there a public interest argument that supports 100 per cent tax relief on land that is simply let out on very short-term leases? There are many questions to be asked about taxation. I know that taxation is not devolved at the moment, but it might well be in future.

Andrew Wood: On an administrative point, Mr Chairman—

The Convener: We are conveners in this Parliament.

Andrew Wood: My apologies, convener.

The RICS submission to the review group does not seem to have been included in the committee's pack—it certainly was not in the papers that I got; I do not know whether other people have it. We made a point about legislation creep and the number of changes that have been made in agricultural holdings legislation over a very short period. We need to be aware of that—it is a confidence issue.

The Convener: The paper was probably not sent to our clerks, which would be why we do not have it. We would be happy to accept it, to assist us in our reflections before we hear from the next panel.

Andrew Wood: Thank you.

The Convener: Not at all.

We have been talking about creating new and flexible frameworks to stimulate diverse arrangements. Angus MacDonald will continue on that theme.

Angus MacDonald (Falkirk East) (SNP): Let us look briefly at other tenure arrangements and then go on to consider small landholders. The panel will be aware of the Cook report of 2009, which considered routes into farming and suggested staged entry for new entrants as they accumulate experience and skills, with tenancy being the final stage.

Various arrangements are used in Scotland, including incentivised employment contracts, share farming, equity and partnership arrangements, and contract farming and growing, which has just been mentioned. What other tenancy arrangements would help to meet the Scottish Government's vision for the agricultural tenant sector? What regulation, if any, is needed for the other arrangements that farmers use to share control of land?

Andrew Wood: The RICS has taken the view for some time that the ability to have a freedom of contract-type tenancy would be a good thing for the availability of land. Short limited duration tenancies and limited duration tenancies are doing a pretty good job, but there are still quite a few constraints attached to them, and certain contract farming and partnership arrangements, which are quite complex and quite expensive to operate, would potentially change into open market-type tenancies.

Nigel Miller: We have looked at that a bit and have always looked for a silver bullet, but we have never really found one, which is unfortunate.

There are real disincentives for landowners to let out part-time units. We have to break through that, because the reality is that most people who are getting on to the farming ladder will be part time for various reasons, such as capital reasons; they may well have to have another job. If we are going to encourage that letting, there must an incentive for the landowner to do it.

Flexibility is probably needed around the housing side. In many units, the house is of more value in letting terms than the farm unit. A proactive intervention in planning guidance may be helpful to allow another house to be built. Perhaps the farmhouse could be let out as a separate private dwelling. There could be a reasonable house that is appropriate for a young family that has a small farm with it. I hope that that would be positive for both sides. Such flexibility might open up new units.

The other area in which we think that there is scope is consideration of some sort of LDT for renovation. That would mean people getting a peppercorn rent. There would be some sort of security for the medium or long term, and, I hope, a decent waygo package that was well defined at the beginning. There are real incentives for some of the larger estates or some estates in the west in which farming has dropped off their priorities and which have land that was previously for agricultural holdings but is now used extensively for grazing. There should be some sort of incentive or pressure in land use to give young people a chance to get hold of land and get a foot on the ladder.

Things such as temporary grazings, which are a very easy option for landowners and farmers, are the other issue that is worth looking at. They are a very important part of the market for many farmers, but the reality is that they involve high rents and often low investment. The investment is good in some places, but in some cases it is not good. If people—especially new entrants—pay high rents, there must be some investment from the landowner to ensure that the fencing, lime status and basic fertility are maintained. Such standards should be built into the short-let market.

David Johnstone: Temporary grazings are not ideal. They have a place in the market for helping out various farmers, but they are currently being used as a stopgap while the review is going on until we see where we end up.

We have SLDTs and LDTs, which, broadly speaking, we think are quite suitable vehicles, but there is room for improvements. To be able to have the full repairing leases that Nigel Miller talked about, offsetting low rents against the commitment to improve and the waygoing at the end offers greater flexibility.

Having the SLDTs and the LDTs is complicated. In an ideal world, we should be able to have one vehicle that would be able to cover both timeframes and build in the flexibility that allows the creativity that is out there to be drawn out of people to find arrangements that suit them. However, for me, that is not straight freedom of contract. Freedom of contract almost implies that people sit down with a blank piece of paper and come up with whatever agreement suits them. There need to be safeguards within that for tenants and landlords that give a structured framework that people will work to, but which allows flexibility. That would free up the market and send out a very clear message to landowners, potential landowners and small farmers who may be thinking about retiring and getting out that there is an attractive option to find another way for the farm to be used productively.

Mike Gascoigne: People often say that they hesitate to say something, but I am not going to hesitate to say that the sector of the law that we are considering is hugely overmanaged. There are enormous complications in the existing legislation to do with crofting, smallholdings and agricultural holdings. If, through the current process, the law could be made smaller, better and less complicated for everyone concerned, the Law Society would wish that to happen.

The Convener: Indeed. Philosophy is fine, but it would be interesting to have reality kick in and see how we would simplify things. It has been suggested in relation to crofting that the word “simplify” is easy to say, but the process of doing it is very time consuming.

Mike Gascoigne: There is the option of the Scottish Law Commission, which could start again.

The Convener: I suppose that there is. I would like work to be done on other parts of the law.

Before Christopher Nicholson comes in, Graeme Dey wants to make a wee point.

Graeme Dey: I want to go back to a point that Nigel Miller made. As part of a different workstream, the committee has been looking at rural housing. Nigel Miller talked about creating small units. Would it be useful if there was a presumed consent to build on the sites of derelict properties, of which there are many in our farmland around the country? Planning consent would not be guaranteed, but would it be useful to have a consent in principle to allow houses to be constructed on such sites?

Nigel Miller: I think that it would be useful. The issue comes up time and again as a barrier.

Different local authorities have different philosophies on that. In some regions, the issue is less of a barrier, but it is a genuine barrier. One reason why people are reluctant to retire or to hand on is because they do not have a home to go to and they want to stay in their local community—I suppose that they want to live near their spiritual home, where they have lived all their lives. Flexibility is required, and Mr Dey's suggestion would be a smart solution and a good fit.

The Convener: Angus MacDonald wants to come back in.

Angus MacDonald: I just want to check whether anyone else has views on freedom of contract.

Christopher Nicholson: We recognise that landlords are reluctant to let some land because of obligations to provide fixed equipment, and we feel that there is room to lessen some of those obligations, which might allow longer-term letting. However, as Nigel Miller mentioned, the balance is that, in those situations, the incoming tenant will have to provide the fixed equipment. We might need to ensure that his investments are protected at the other end of the tenancy, at waygo.

We have lessons from England, where there have been farm business tenancies—FBTs—for nearly 20 years, which are approaching freedom of contract. The average length of term for FBTs in England is only about four years. That is probably not the way forward for Scotland. It is difficult to legislate for long-term tenancies and get people to use them, so the only other tools that are available are fiscal measures to encourage long-term letting. However, in the interests of Scottish agriculture, a fair proportion of the new tenancies that are coming on the market need to be long term to allow the necessary investment and security for tenants.

Angus MacDonald: Convener, can I move on to small landholdings?

The Convener: Certainly.

Angus MacDonald: The review group is considering the position of small landholders and the small landholders acts. The land reform review group recommended that small landholders should have the right to buy. However, currently, small landowners can exercise the right to buy only if they are in one of the areas to which crofting tenure was extended in 2010 and they then convert their landholding into a croft. The LRRG found that no small landholders have successfully done that to date. Do the panel members consider that statutory small landholdings have a part to play in future land tenure arrangements?

11:45

Christopher Nicholson: I think that there are lessons and ideas in the small landholders legislation that might enable new starter units to be set up. Whether you use the legislation or take ideas from it remains to be seen.

You mention the difficulties that some small landholders are experiencing under the Crofting Reform (Scotland) Act 2010, which allows them to convert to crofting status, in order to access the crofting right to buy. The difficulty concerns doing the conversion. We support the land reform review group's recommendation that, instead of going through the conversion process, they simply have a right to buy if they qualify for it.

The Convener: I think that it was the Crofting Reform etc Act 2007 that led to that. I had an unfortunate part to play in that in relation to an attempt to solve a particular problem—as I said, it is less than simple when you get down to the bit. However, the general tone of what you say is correct.

Martin Hall: I have no experience of small landholding but, with regard to freedom of contract, SAAVA's view is that there should be as little legal intervention as possible, so we support Mike Gascoigne's point.

With regard to what Christopher Nicholson said about FBT south of the border, I want to clarify that, for whole farms, the average term is 10 years, which is probably more reflective of what we are trying to achieve.

Claudia Beamish (South Scotland) (Lab): I have listened with care to the information and evidence that you have given us about the different types of tenancies and arrangements for the sharing of land in Scotland, which my colleague Angus MacDonald has led on.

Mike Gascoigne highlights his belief in the need for the simplification of crofting law. As a lay person, I strongly concur with that. However, David Johnstone—I hope that I do not misquote him—says that, in terms of LDT, there should be safeguards and, possibly, a structured framework. With regard to the different arrangements for the sharing of land, what sorts of regulations or protections for both sides do people on the panel think that the tenancy review group should be considering that it perhaps is not considering already?

David Johnstone: As Chris Nicholson has suggested, LDTs are a good vehicle. However, if you are going to bring in freedom of contract, there have to be safeguards within that. Chris Nicholson touched on one element of that when he said that, if tenants bring about improvements, there must

be a mechanism to compensate them for the work that they have done.

An element that we have not touched on yet is arbitration. There must be some form of simple dispute resolution that all parties can use without incurring the huge costs that we see when parties end up in the Land Court, which can result in people being afraid to go to the Land Court, leading to both sides being under pressure to arrive at an outcome that has not been handled fairly or equitably.

SAAVA put forward a model for simple arbitration, which could handle rent reviews, diversification and so on. You would still need the Land Court to decide on points of law but, if we could find a simple way of handling binding arbitration, it would go a long way towards sorting out a lot of the problems that we are seeing. That has to be in the new vehicle.

Martin Hall: SAAVA is also developing an independent-expert approach, which is an extension of our arbitration procedures.

Nigel Miller: We are very supportive of both approaches and expert determination might well be the preferred choice of many tenants. The flaw is that, in many cases, the fallback is to go to the Land Court. That is always in the background. We need some sort of barrier that keeps people out of the Land Court. If the court is always overhanging the arbitration process, it will not be taken up or have the power that it should have. That is probably a legal issue.

The other thing that came back from SAAVA is that arbitration is at the moment very much confined to summation of rent. In reality, we see arbitration being useful on points of waygo and possibly on sorting out different views of diversification and things like that. We need arbitration to be opened up wider.

Andrew Wood: I have been in practice long enough to remember when arbitration was the preferred route before the Land Court. The difficulty with arbitrations then was that they often dealt with wider and more complex issues rather than a single issue. The result was that people tended to turn up armed with a battery of lawyers—I am not sure that that is the right word. They came heavily represented and the costs of the exercise tended to spiral.

The panacea for that was to move to the simplified system of the Land Court. That clearly has not worked because disputes tend not to be about a single issue. Myriad issues get dragged in and the length of the dispute and the costs that go with it can get out of hand, as we have seen recently.

SAAVA should be commended for the concept of going back to the grass roots of dispute resolution with the ability to have simplified, single-issue arbitration to avoid it getting out of control. When a dispute arises between a landlord and tenant, the rent is often not the big issue; it could be a historical issue about something else. We must be able to prise those issues apart and treat them individually. It is hoped that that would prevent the dispute and the costs that go with it getting out of control.

Mike Gascoigne: I think that everyone who is here would probably agree that the move to the Land Court in 2003 has not proved to be the right move. In most people's summation, the Land Court should be the final port of call when all that is at stake is the law and what the law says. Everything else should be kept as far away from the Land Court as possible. A system that allows for local, low-cost operations to sort out disagreements should be the target.

The Convener: But as final courts of appeal now reach in the direction of the supreme court in Europe, how would the human rights element of an arbitration and appeal work? Would what you propose not just leave things as they are? If an appeal is taken to the Land Court, it can be taken further.

Mike Gascoigne: The Arbitration (Scotland) Act 2010 will give you the answer.

The Convener: Yes, if it was extended to cover agricultural matters.

Christopher Nicholson: Dispute resolution needs to be sorted out by practical valuers or farmer arbiters with practical valuation experience. Most of today's disputes should be resolved by practical arbiter valuers rather than allowing a dispute to become an arms race in legal gamesmanship, which often happens, reflecting the fact that our legislation is based on drafting from 1949, when agriculture and tenancies were in a very different place. If the law was made clearer, more applicable and fit for modern purposes, we would not have the legal gamesmanship.

The Convener: Okay. That is pretty clear.

Claudia Beamish: Many interesting suggestions have been made this morning. On behalf of the committee, I want to broaden things out by asking for comments on how to ensure a wider, cross-cutting context for the sharing of land in Scotland.

Page 52 of the report says that a running theme is the often poor relationship between landlords and tenants, which is

"mired in expectations and behaviours derived from centuries of cultural history."

What we have heard this morning does not indicate that kind of atmosphere at all, which is certainly positive. However, beyond the suggestions that have already been made today, can the panel put forward anything for consideration by the committee and the review group that would help to ensure what Martin Hall called mutual respect, which of course in many circumstances exists between tenants and landlords? We have heard about mediation or arbitration and the legal aspects. Are there further issues relating to CAP reform beyond the Scotland rural development programme? Nigel Miller mentioned the possible second stage and new entrants finding that they might be blocked. We heard about both the positive side and the dangers of assignation. Are there other areas that we should be considering in seeking a vibrant tenanted sector in Scotland?

Nigel Miller: On the relationship side, things have been dropped in in all sorts of discussions. Knowing who owns the land—who your landowner is—and having some sort of designated point of contact and some continuity are absolutely vital. What came out of the land reform debate is that, at times, that is not totally apparent. That would mean that, if outside professional expertise was brought in, there would be a point of contact, who should be there during the negotiations. If there was an office for tenancy or an adjudicator, support and advice should be available through that office. If someone felt that they needed support, they could go there. That would mean that there was some balance in the available expertise and support. There should be a long-term point of contact.

It makes sense to make the best practice mandatory. It makes sense to have some sort of assurance scheme for professional behaviours, given that we have that in other sectors. This sector is crucial, so why do we not have it here as well? That would address some of the land-use issues and the short-termism that exist.

Other important aspects relate to what we have just touched on. Having immediate access to dispute resolution that is fast and low cost—or at least where you know the cost before you go into it—is important. Having that sort of package would start to give us a sector that looks a bit more sensible than what we have now.

I just want to underline where we are with the SRDP. Nothing is solid until it comes back from Europe, but there is a really good package there, which might go to €70,000 for a new entrant. If you have a good business plan and you can fuel it, you might even be able to buy stock—you could develop a business, which is fantastic. However, the money might well be limited to the first year or two, while you are a new entrant. Once that is gone, it is lost. That is probably too short, for a start, because for the first year or two many new entrants do not have the capital or the confidence to have a business plan, so they might need more time. The second and third stages certainly need looked at, should a similar package be available, because that is when a new entrant will have to jack up from being a part-timer with a job to a full-timer, and possibly with a family.

12:00

Christopher Nicholson: Key to improving relationships and taking the heat out of some of the disputes is a role in future for a tenancy commissioner or adjudicator who, before a dispute escalates to the level of employing Queen's counsel, can sit around the table with the parties and mediate, seeing what everyone's position is, getting the facts and trying to narrow the differences. At the moment, there is no forum or place to go for that and, if you cannot resolve a dispute, you immediately end up in a situation involving legal fees.

Claudia Beamish: How would you envisage those people being appointed? What form might that forum take?

Christopher Nicholson: Many stakeholders have recommended some form of tenancy commissioner or adjudicator. In addition, one outcome from the land reform review group recommendations was about a lands commission. It is important to find people who are impartial. It might be a role for a mixture of individuals, or for retired professionals who have no commercial allegiance to one particular side.

When the three stakeholder organisations here were setting up the joint initiative on rent determination to cover the interim period, we were very aware that we had to create a panel that people would feel able to come to. We said that, rather than being staffed by professionals, there should be an office-bearer from each of the organisations, to make it look more approachable. We said that there should be a simple form for submitting a claim and simple parameters that would allow people to submit a claim.

David Johnstone: When the review is completed and we are settling down, an ombudsman or adjudicator will be vital to ensuring that communication stays pertinent to what is going on and that we continue to air any problems quickly rather than letting them develop to the point where they require more action. For us, it will be a form of self-regulation and self-policing to ensure that we never get back to the distrust that exists at present and that we can build better relationships going forward. It is about the tone and how we conduct ourselves, with mutual

respect for all parties, to try to understand what their desires are and to address their concerns.

Mike Gascoigne: In our debate on this point, arising out of the interim report, we looked quite carefully at the possibility of a model not dissimilar to the Private Rented Housing Panel if, depending on which way the debate goes, a model is needed. That model works very well. It is cheap, successful and respected.

Nigel Miller: We looked at the panel a bit in the past few days, when we were looking at the review group. It is a model that is definitely worth considering.

I guess that there should probably be two tiers in any system. You probably need a tier that relates directly to the tenant or the landowner, which hopefully holds useful information in a databank. It might even hold a databank of potential young entrants, to allow them support and access to landowners. Hopefully, it will also hold codes of practice that cover all points of operation. That tier would interface with people, conciliate and so on. You perhaps need a professional adjudicator when things go wrong. That needs to be backed up by an expert panel. The reality is that we are in a dynamic world. New issues arise, and that face of the panel—or the adjudicator—has to be detached from legal systems and should probably support the industry and have quite a connection to it.

However, there will need to be some sort of legal expertise behind that, as well as RICS expertise, so that if there are particular issues to address, advice can be given on the updating of codes or submissions can be made to the Government. That will be a tool for the adjudicator group—the support group—to use when new problems arise. The system needs those two tiers. I would hope that it would be low cost and something that the Government would be keen to put money into. If it is not, we would be keen to put money into it, as it is something that we need.

The Convener: It would be even better if we had subsidy convergence earlier to help all the new entrant farmers and so on, but that is an argument for another day that we have already had.

Cara Hilton (Dunfermline) (Lab): By way of rounding things up, I would be interested to hear the panel's views on how the process has gone to date and how it will go in the future. Does any further evidence need to be considered before the final report is published, or could any improvements be made generally?

Christopher Nicholson: Not really. We are very supportive of how the review group has carried out the process. It has been very thorough in taking evidence. I understand that it will now draft recommendations and go around the countryside again, having meetings and trying to draw criticism or approval of those recommendations. I cannot think of a better way of doing it.

Nigel Miller: Claudia Beamish raised the issue of the need for an adjudicator and office of support. We all have a vision of that wonderful body, but we have not drilled down enough to the mechanics of how it would be structured and financed. I am sure that the review group will have views on that. It would be helpful if we could be a bit more specific about what the body should do and how it should be structured. That is a challenge for us, and we need to go back to the review group on that.

The question of assignation has come up several times. We see the real positives that could come out of it, but there are some compromises as well and we need to get a balance.

Those are the two most difficult issues. We have also not really touched on diversification today. It is important to have a route through disputes when a landowner is not keen on diversification, limiting the process when there are disputes so that it does not totally stall. We need some sort of dispute resolution, otherwise many farmers will be denied the opportunity to have a viable business.

David Johnstone: We have been very supportive of the process so far, which has been conducted in an exemplary fashion. We have found it to be engaging and inclusive, and we see that continuing in the future. The review group is drilling down into the key issues that it wants to highlight and will come back to us in on-going dialogue to explore the ideas, see where they go and help to shape the process over the next four to five months. The group has almost led us in our thoughts and has brought those in the industry closer together. It has been a step on from the TFF and has performed the role that the TFF never quite managed to perform.

We are very supportive and are quite optimistic that the outcome will be productive and will result in a more vibrant tenanted sector in Scotland.

The Convener: Thank you. That is a good place to end the evidence session. The atmosphere is one of helpful and engaged activity, which makes a change from some of our past discussions, which have seemed like trench warfare. That is a very good omen.

I thank the panel for all their contributions. I have no doubt that we will see you at some point when we have received not just all the evidence but the final report, which we are told we will have by Christmas. Let us hope that the present that we get at Christmas is welcomed because, as they say, it will be not just for Christmas but for life. If

we can make a long-term breakthrough, that will be very good for the whole agricultural sector in Scotland.

As we agreed earlier, we will take agenda item 4 in private. At next week's meeting, the committee will take evidence from stakeholders on the Government's designation of marine protected areas.

12:10

Meeting continued in private until 12:38.

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