

PLAYING THE LONG GAME

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Introduction

The subject matter of this talk covers both the current Land Reform Bill and the recently enacted Community Empowerment (Scotland) Act 2015. In particular it focuses on three aspects of the land reform debate which are likely to provoke heated discussion over the months and years to come – (i) restrictions on who can own land, (ii) certain aspects of the community right to buy land, and (iii) football.

(I) - “Where did you say you’re from?”

Scotland is not the only country in the world concerned about landownership. Land reform campaigners in England have highlighted that 60% of land is owned by 0.6% of the population. Countries as disparate as Brazil and Australia have proposed restrictions on the foreign ownership of agricultural land in the interests of national food security. The Final Report of the Land Reform Review Group raised concerns about the lack of traceability and accountability of some legal bodies which owned land in Scotland and were based overseas¹. The Review Group recommended that the Scottish Government should make it incompetent for any legal entity not registered in a member state of the European Union to register title to land in the Land Register of Scotland. The Report did however note that this measure “*would not necessarily reveal the final beneficiary owner of the EU entity*”, although it would ensure that the entity was governed by EU law.

This recommendation was picked up by the Scottish Government in a Consultation on the Future of Land Reform issued in December 2014. Of the 827 respondents who addressed that particular question, 82% agreed. Strongest support came from private individuals, whilst the lowest levels of support came from private landowner organisations and private sector and professional bodies².

Despite the recommendation of the Review Group and apparent support from the general public, the proposal does not appear in the Scottish Government’s published Land Reform Bill. Instead the Bill contains a provision (Section 35) about access to information on persons in control of land, and a provision (Sections 36) which amend the Land Registration (Scotland) Act 2012. Scottish Ministers would be given the power to make regulations which allowed the Keeper of the Registers of Scotland to request additional information about existing and proposed registered proprietors of land. The information to be provided would relate to the category of person or body that owned the land, and the individuals having a controlling interest in the proprietors of land and

leases. The regulations would set out the circumstances in which information was to be published in the Land Register (or otherwise), and the circumstances in which information could be provided to others. Regulations under Section 35 would provide for the circumstances where "persons affected by land" could request information from a request authority, and powers of request authorities to require information to be provided to them (with further powers of those persons to require third parties to provide them with information). The Scottish Government's explanation for this approach is set out in the Policy Memorandum accompanying the Bill³. It was said that the proposal did not improve accountability and traceability as it does not deal with trusts, and could encourage more land to be held by trusts. Nor would it prevent the use of complex company structures or nominee directors to obscure the true position.

So far as companies are concerned it should be noted that Part 7 of the Small Business, Enterprise and Employment Act 2015 (c 26) makes reforms to UK company law which requires all company directors to be natural persons (Section 87) and requiring companies to keep a register of information about persons with or having significant control over a company. The legislation applies to UK companies only. It will apply to all private companies limited by share or guarantee. It is likely that the legislation will also be extended by regulation so as to cover limited liability partnerships. "Significant control" means those person having more than 25% of the company or controlling more than 25% of the voting rights of the company. Where a trust is involved the trustee will usually be considered to be the beneficial owner, but in certain circumstances the beneficiaries could also be considered to be beneficial owners. Similar measures are set out at EU level in the fourth Anti-Money Laundering Directive, which contains requirements to record the ultimate beneficial owners of companies and trusts (where the trust "generates tax consequences").

There have of course been examples of landowners who have caused problems for their neighbours and/or tenants due to poor land management practices, but these people have been very much a small minority, and have often been individual UK nationals or citizens of EU Member States. There is a political dislike of the use of overseas tax shelters, but there is no body of evidence I am aware of that indicates that where companies or trusts do own or rent land then these bodies are the source of any significant problem in terms of bad land management practices. Nor am I aware of any particular problems caused by other non-tax shelter, non-EU companies (such as from Norway or Switzerland) who might own land in Scotland who would also be caught by such legislation. The absence of any solid evidence of a problem would not prevent political support for such a measure. Standing the popular support for such a move, and the support which could be drawn from the UK and EU legislation noted above, I anticipate that the Scottish Government will come under strong pressure to reconsider its decision not to introduce a requirement that any non-natural person owning land in Scotland ought to be an EU registered body. Whether there is a real problem which justifies such a move is of course a different issue, but nevertheless I believe that is very likely that at least one MSP will seek to introduce an amendment to this effect. I suspect that such an amendment would have considerable support amongst MSP's. Even if the Scottish

Government successfully resisted the proposal this time, the subject has an emotive resonance which means that it will not go away.

(II) - “Don’t turn your back on me”

The second and third parts of this talk concern aspects of the Community Empowerment (Scotland) Act 2015. Part 4 of the Act modifies the right to buy provisions in Parts 2 (community right to buy) and 3 (crofting community right to buy) of the Land Reform (Scotland) Act 2003. Most significantly, the existing exclusion of areas with a population exceeding 10,000 from the community right to buy is removed, so that the community right to buy now covers the whole of Scotland (except for mineral rights to oil, coal, gas, gold or silver). Scottish charitable incorporated organisations and community benefit societies are added to the definition of “community bodies” and “crofting community bodies” entitled to exercise the right to buy. The requirement that the majority of members of the community body are to be members of the community has been altered, so that at least three quarters of members of the body will require to be members of the community. The time allowed for the community body to complete a purchase is increased from 6 months to 8 months.

Another significant aspect of the 2015 Act is the extension of the right to buy “abandoned, neglected or detrimental land”. The potential problems caused by abandoned and neglected land are not exclusive to Scotland. In 2011 an academic study in the United States proposed that individual states should create clear paths to public control of vacant and abandoned properties, and set out a number of suggestions (some based on existing projects) as to how this could be done⁴.

The existing community right to buy is a pre-emptive right to buy which can only be exercised if the land is to be put up for sale by its owner. The new Part 3A provisions which are inserted into the 2003 Act will allow community bodies to purchase land even where the owner has no wish to sell it (and provided that the owner is not otherwise prevented from selling the land or subject to any enforceable personal obligation to sell the land to someone else). These provisions apply to land which in the opinion of the Scottish Ministers is (a) wholly or mainly abandoned or neglected, or (b) where the use or management of the land is such that it results in or causes harm, directly or indirectly, to the environmental wellbeing of a relevant community. “Harm” includes environmental effects having an adverse effect on the lives of person comprising the relevant community.

Owner occupied homes, croft land, and land owned or occupied by the Crown as a result of it being vested in the Crown *bona vacantia* or falling to the Crown as *ultimus haeres* are excluded from these provisions. Applications to buy land under Part 3A of the 2003 Act are to be registered in the Register of Community Interests in Abandoned, Neglected or Detrimental Land which the Keeper of the Registers is required to set up. The criteria for consent include requirements that the Scottish Ministers are to be satisfied that the community body has tried and failed to buy the land, and that the exercise of the right to buy is in the public interest, and that the exercise of the right to buy is compatible with

furthering the achievement of sustainable development of the land. In the case of abandoned or neglected land the Scottish Ministers also require to be satisfied that the achievement of sustainable development would be unlikely to be furthered by the owner of the land continuing to be its owner. In the case of land whose use or management causes harm to the environmental wellbeing of a community, the community body has to have requested all relevant regulators to take action so as to remedy or mitigate the harm before making an application to buy the land. Scottish Ministers must also be satisfied that the exercise of the right to buy is compatible with removing or substantially removing the harm to the environmental wellbeing of a community, and that regardless of any action to be taken by a relevant regulator, the harm is unlikely to be removed or substantially removed by the owner of the land continuing to be its owner.

The Act does not define what is meant by abandoned or neglected land, or by "environmental wellbeing". A number of commentators have expressed concerns about this. I am not so sure that this is a significant problem as so much depends on individual circumstances. It was indicated during the Acts passage through the Scottish Parliament that "environmental wellbeing" was intended to have a broad meaning, which was not restricted to physical harm, but will cover harm to the amenity of a community. Examples given were boarded-up shops, unoccupied housing and algae-filled ponds. There may be difficulties in establishing what is abandoned or neglected land, particularly in rural areas. It wasn't that long ago that budget cuts forced local authorities to stop cutting the grass in many areas where this had been done on a regular basis. This is now promoted as a positive policy of encouraging wild life and promoting natural habitats. The "re-wilding" of areas of land could have long term environmental benefits in some cases. There may be issues for some land owners where, due to economic circumstances, they are required to cease operating from certain premises, and the state of the property market is such that there is no immediate prospect of them selling or using the property on a commercial basis. They might find themselves faced with a community body who are able to acquire that asset at a reduced market value rather than their preferred option of holding on to that asset until there is a significant upturn in the economy.

(III) - "Fitba' daft"

Another subject which has an emotive resonance is football. Scottish football results both on and off the field do not stand up well to comparison with some of our sporting rivals. Off-field problems can significantly effect on-field outcomes, and vice versa. Many people have their own views as to what is best for football in general, and in particular what is best for the success of any club they support. During the course of the Community Empowerment Bill's passage through the Scottish Parliament Alison Johnstone MSP, supported by Ken Macintosh MSP, tabled amendments to the Bill which would have allowed supporters to own Scottish professional football clubs. Hailed as "the fan's right to buy", the proposal was modelled on the pre-emptive right to buy for agricultural tenants in the Agricultural Holdings (Scotland) Act and the community right to buy in the Land Reform (Scotland) Act 2003. The

amendments would have required the Keeper of the Registers to establish a public register of supporters' trusts who could register an interest in a professional football club. More than one supporters trust could have registered an interest in a club, although that trust would not have been able to register such an interest in more than one club.

Where any supporters' trust's interest in a football club was on the Register, the owner or operator of the football club would have been prohibited from transferring ownership of that football club, or from taking any action with a view to the transfer of ownership of that football club, except in accordance with the Act. A proposed sale of a club, or a transfer of shares in a club by an owner or operator, would trigger a pre-emptive right to buy on the part of any registered supporters' trust. The insolvency of a football club would also have activated the right to buy. Only one supporters trust would have been able to buy a club. Where two or more supporters' trusts decided that they wished to exercise their rights to buy such a football club the Scottish Ministers would have had the unenviable task of deciding which one was to be allowed to proceed. However much the Scottish Government wants to support and promote the financial and sporting success of Scottish football, it was clearly not daft to the consequences of what was being proposed. The potential political fallout from that provision alone was probably sufficient to kill off the prospect of any support for those amendments from the Scottish Government!

What the Scottish Government did do was to make provision which allowed them to make future regulations to facilitate (a) the involvement of the supporters of a football club in decisions affecting the management, operation or governance of the club, and (b) supporter ownership of football clubs⁵. The Scottish Government has said that it intends to consult on the proposed regulations, a process which is envisaged to take two to three years. With framework legislation in place which allows football supporters to have a say in the running and control of a significant asset in many communities, it might be said that the passing of the legislation signals half time. Over the interval all the players involved will have plenty of time to think about what needs to happen in the second half and will get the chance to have their say. The game's not over yet.

¹ *The Land of Scotland and the Common Good*, Report of the Land Reform Review Group, May 2014, Part Two, Section 5, pp 34 – 36.

² *A Consultation on the Future of Land Reform in Scotland: Analysis of consultation responses*, Scottish Government Social Research 2015, Chapter 5, pp 34 – 35.

³ Land Reform Scotland Bill Policy Memorandum, paras 108 – 129.

⁴ *Recapturing Land for Economic and Fiscal Growth*, Brookings-Rockerfeller Project on State and Metropolitan Innovation, May 2011.

⁵ Community Empowerment (Scotland) Act 2015 (asp 6), ss 99 – 101.