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Removing Barriers to Tree Planting by Tenants

The Scottish Government would like all landowners and occupiers to be able to contribute to the woodland creation programme, and to benefit from the opportunities provided. Concern has been expressed, however, about the ability of tenant farmers, under current legislation, to engage in woodland creation.

This publication discusses the steps that would need to be taken to make it easier for current tenants to plant trees.

1. Current Circumstances in which Tenants Can Plant Trees

1.1. Planting trees as an agricultural activity

Agriculture, as defined in the 1991 Agricultural Holdings (Scotland) Act, includes “*the use of land for woodlands where that use is ancillary to the farming of the land for other agricultural purposes*”. There is no indication of what scale of planting would be outwith the definition of agriculture, and therefore trigger the need for a tenant to treat the project as a diversification, but the general assumption seems to be that anything beyond a few small woodlands for shelter purposes would require to be treated as a diversification and would therefore require the consent of the landlord. The special circumstances of agroforestry need clarification, since the intent is to create tree cover of one sort or another while enabling the land to be also available for cropping or livestock grazing. As the land continues in agricultural production, the extent to which agroforestry, at any scale, does not require to be treated as a diversification remains untested.

1.2. Planting trees as a non-agricultural activity (diversification)

The 2003 Agricultural Holdings (Scotland) Act gave the tenant a qualified right to use the land for non-agricultural purposes, notwithstanding the terms of the lease. The tenancy remains valid even though the land is taken out of agricultural use. That right extends to devoting the whole holding to non-agricultural use and in that situation the tenant continues to enjoy the protection of the 1991 Act.

Diversification into tree planting requires the express consent of the landlord (failure to object cannot be taken as consent), who has the right to request further information and to object in circumstances where the landlord considers that the diversification would be detrimental to his/her interests.

If the tenant resists the landlord’s objections, the landlord may apply to the Land Court for a determination that the objection is reasonable. The landlord may also attach reasonable conditions to the granting of consent.

The tenant has the right to cut timber from trees planted by him and the timber belongs to the tenant. The parties can contract out of this provision provided that the lease or agreement also entitles the tenant to a reduction in rent or to payment of compensation for the loss of income as a result of him or her contracting out.

A claim for compensation at waygo is open to both landlord and tenant, depending on the extent to which the effects of the tree planting have been detrimental or beneficial to the landlord’s interest. The compensation is based on two valuations. Valuation (a) assesses the present worth of the trees to a willing purchaser for future cropping, and valuation (b) assesses the loss of rent to the landlord by retaining the trees until the likely date of cropping plus the cost of returning the land to agricultural use after cropping. If (a) is greater than (b), the tenant is entitled to the difference between the values as compensation, but if (b) is greater than (a), the landlord is entitled to the difference between the values as compensation.

A tenant applying for a woodland creation grant under the Forestry Grant Scheme must be able to show that the lease will be in place for the duration of the scheme or that the landlord has agreed to accept responsibility for completing the scheme if the lease duration is shorter than the scheme duration (normally 20 years). A similar requirement exists if the tenant should apply for registration under the Woodland Carbon Code, but the duration of the scheme will be much longer (50 to 100 years).

1.3. Planting trees through a commercial arrangement between landlord and tenant

Where the above diversification route is taken, it is assumed that, at the outset, landlord and tenant will construct an agreement that covers the rights and responsibilities of each party and the division of future costs and benefits. That agreement will have to be constructed within the framework of the diversification legislation and any limited ability that exists to contract out of the statutory provisions. It is open to both parties, however, to agree to remove the land in question from the lease and to construct a commercial agreement that covers all the relevant issues but with freedom to agree on terms acceptable to both parties with respect to issues such as compensation and the division of rights, responsibilities, costs and benefits. In such circumstances both landlord and tenant must accept that they will be deprived of the protections of the agricultural holdings legislation. For the tenant with a 1991 Act tenancy this means that, unless agreed to the contrary, the land in question will not be covered by the right to buy legislation and will not be part of a secure tenancy with the associated rights such as assignation and succession and compensation at waygo.

2. Barriers and Disincentives

Tree planting by tenants is not a common occurrence. In common with all farmers, there are cultural, practical, and financial barriers. These are issues common to all farmers and, if an increase in farm woodlands is desired as part of the Government's woodland expansion plans, attention will have to be given to how to overcome these obstacles. There are, however, additional disincentives for tenant farmers arising from the provisions within the diversification legislation and the unwillingness to risk taking the land in question out of a secure tenancy. The current potential to earn tradeable carbon credits from new woodlands, coupled with increasing pressure for farm businesses to demonstrate carbon neutrality, is providing additional incentives for farm woodland creation, but if tenants are to be take advantage of these opportunities, it will be necessary to consider how to make it easier for tenants to engage in woodland creation while providing appropriate protection for the interests of landlords. Key barriers and disincentives are discussed below.

2.1 Barriers specific to tenants

2.1.1 Lack of clarity over what scale of woodland creation counts as agricultural activity

For many farmers, the height of their ambition will be the planting of one or more relatively small woodlands, which may be intended to deliver a range of objectives. Uncertainty over what type and scale of woodlands are covered by the definition of agriculture, and the inability to claim these as tenant's improvements, is a disincentive to tenants who may wish to create some small woodlands but are wary of entering into a diversification scheme.

2.1.2 Lack of clarity over the status of agroforestry

Combining woodland and agricultural production on the same area of land has many attractions, but tenants need certainty over the relationship between agroforestry and diversification.

2.1.3 Inconsistency between grant scheme rules and the diversification provisions

Few farmers wishing to plant trees on any scale will do so without taking advantage of the financial support available in the form of the Scottish Forestry Grant Scheme and the Woodland Carbon Code. Both of these schemes require the applicant to accept that the land use change to woodland will, other than in exceptional circumstances, be permanent. The diversification

legislation, however, allows for the possibility that the land will be returned to agriculture by the landlord at the tenant's cost. It is questionable whether a tenant can sign up to a grant scheme that requires a commitment to a permanent land use change while also signing up to a diversification scheme that includes provision for the land to be returned to agriculture.

2.1.4 Compensation arrangements

The compensation arrangements included in the diversification legislation were set out at a time when the assumption was that woodlands created on farms were primarily intended to produce timber. The reality now, and increasingly so in the future, is that a tenant may wish to plant trees for a variety of reasons including timber production, shelter, biodiversity, and carbon sequestration. Should a tenant create woodlands intended to deliver biodiversity and carbon sequestration only, then, as there will be no timber income in the future, the landlord will automatically be entitled to claim, at waygo, the loss of rent until time of cropping (but there will be no cropping) and the cost of returning the land to agriculture. No tenant is likely to plant non-productive woodlands in those circumstances and therefore may be effectively barred from accessing the ability to earn the tradeable carbon credits that can be attached to such woodland.

2.1.5 Lack of guidance on the creation of commercial agreements

While the principle of proceeding by means of a separate commercial arrangement may be accepted by some landlords and tenants, there is little guidance or experience to date to help in the formulation of such an agreement, given the significant number of issues where the allocation of responsibilities and costs and benefits between landlord and tenant have to be negotiated over the course of a long-term project which may have commercial and non-commercial objectives.

3. Resumptions

The ability of a landlord to resume land for planting from a 1991 Act tenancy is relatively well understood, as is the concept of 'fraud on the lease' as a factor limiting the extent of a resumption, but the situation is less certain in the case of fixed duration tenancies. Whether resumption can be a contractual matter or is restricted to the statutory resumption provisions set out in section 17 of the 2003 Agricultural Holdings (Scotland) Act remains contested and creates uncertainty for both tenant and landlord.

4. Where to next?

All of the relevant stakeholder organisations are engaged with Scottish Government, through the Tenant Farming Advisory Forum (TFAF), in formulating proposed changes to the current legislation, which, if enacted by means of the forthcoming Agriculture Bill, should deal with most of the uncertainties and potential barriers identified in the early part of this paper. Particular attention is being given to the boundary between 'ancillary to agriculture' and diversification, the place of agroforestry, and the compensation arrangements.

In the meantime, it is clear that neither tenant nor landlord can progress very far without the consent of the other. That provides an incentive for the parties to sit around the table and construct a bespoke contract that builds on the aspirations of both parties and deals with their respective rights and obligations. Work is in hand to provide guidance on the formulation of such agreements and will be resumed once the legislative changes are clear.

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