



# Land Tenure – Freedom of Contract

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# Challenge perceptions

- What is freedom of contract
- Regulation in agricultural tenancies
- Freedom of contract in agricultural tenancies
- What are we scared of?

## Freedom of Contract

*A person's freedom to enter a binding agreement on terms of his or her choice, without regulation by the state.*

OED

# Freedom of contract

## Cornerstone of the free market

- The idea the market will regulate itself
  - supply and demand
  - terms and conditions
- Regulation by the state is perceived as a distortion to the operation of the market.

# Some regulation is required

## Examples of limitations on freedom of contract

- Market failure - failure to deliver economic goals – (RBS/banking crisis)
- Failure to deliver social goals – health and safety/employee protection
- Abuse of power by the strong against the weak (unfair contract terms)
- National emergencies – wartime rationing of limited supplies

# Current agricultural tenancy regime

## A brief summary

- Different types of agriculture leases currently in Scotland:
  - Full tenancies (1991 Act)
  - Limited partnerships leases (1991 Act)
  - Short Limited Duration Tenancies (SLDTs) (2003 Act)
  - Limited Duration Tenancies (LDTs) (2003 Act)
  - Grazing Leases (2003 Act)

# And there are more...

## Leases that have *morphed*

- Grass let that has become a 1991 Act tenancy
- Grass let that becomes an SLDT
- Limited partnership lease that becomes a 1991 Act tenancy (subject to s73 etc)
- SLDT < 5 years defaulting to 5 years
- SLDT becoming an LDT – 15 years
- SLDT becoming an LDT - 10 years

# Examples of current restrictions

## Applying to leases of agricultural land

- Duration
- Use/Diversification
- Rent
- Fixed Equipment/Improvements
- Alienation by tenant – assignation etc
- Sale by landlord
- Dispute resolution



**The current legislation is a heavily regulated  
restriction on freedom of contract**

*Does it serve the industry well?*

*Would greater freedom of contract assist?*

# Some of the problem areas

## Fixed Equipment

- Regulated in terms of:
  - Initial provision of fixed equipment
  - Allocation of repair, maintenance and renewal
  - Improvements
- The problems:
  - Agricultural margins are thin – rents are low relative to cost of fixed equipment
  - Landlords are wary of heavy fixed equipment costs with low ROI
  - Tenants are wary of statutory provisions and landlord dispute
  - Landlords and tenants frustrated at restrictions to “striking a deal”

# Some of the problem areas

## Fixed Equipment

- The effect:
  - Stifles entrepreneurism and innovation
  - Can lead to a stalemate – and a gradual deterioration of fixed equipment
  - Reduced productivity
  - Holds land back from the market
- Contrast with commercial leases:
  - Freedom of contract
  - FRI – full repairing and insuring lease common – subject to duration and the market
  - Insurance and collateral warranties plays a key role
  - Investors more active in the market

# Potential benefits of greater freedom

## Fixed Equipment

- Potential benefits of greater freedom of contract:
  - Flexibility to reach agreement on provision of fixed equipment
  - Innovative solutions
  - Reduced risk to both parties
  - Can open the door for new entrants
  - Removes a major hurdle to bringing more land to the market

# Some of the problem areas

## Duration

- The restrictions:
  - Do not necessarily meet the needs of the enterprise
  - Inflexible and locks parties into a particular lease type
  - Frustration at arbitrary thresholds - lowest common denominator
- Contrast with commercial leases:
  - No minimum duration.
  - Maximum duration by statute is 175 years.
  - Otherwise, complete freedom of contract for landlord and tenant to agree duration, including break/extension clauses.
  - Longer leases have more onerous obligations on tenant – shorter leases the converse

# Potential benefits of greater freedom

## Duration

- Potential benefits of greater freedom of contract:
  - Flexibility for different circumstances – to suit the parties
  - Can open the door for new entrants
  - May bring more land to the market
  - Landlords want a guarantee they can get their land back easily at the end

# Some of the problem areas

## Others issues

- Use/Diversification
  - Modern farm businesses are multifaceted.
  - Current restrictions limit freedom to agree a mix of uses which may not sit easily with the agricultural holdings legislation
  - Freedom of cropping – as a concept outmoded - may not meet needs of either party
- Dispute Resolution
  - Current arrangements are prescriptive
  - Excludes alternatives unless parties agree once dispute has arisen
  - Potentially leads to cost and unfairness
  - Greater flexibility would give more options to tailor to the circumstances

# Traditional tenancies

## Could greater freedom of contract bring benefits?

- Existing secured tenancies
  - Consider permitting a voluntary “opt-in” to a more flexible regime on e.g. fixed equipment, rent etc – with or without indeterminate security of tenure
- Right to buy
  - RTB has undoubtedly done considerable damage to the supply side
  - Consider freedom to contract out of RTB by agreement – on a temporary or permanent basis



# What are we scared of?

## Some examples of where greater freedom of contract exists

- Short Assured tenancies of residential property
  - Heavily regulated, but;
  - Flexibility on duration and rent - has freed up the market
- Wind farm leases
  - Long term leases – in the rural sector
  - Significant investment in fixed equipment by the tenant
  - Wide freedom of contract – on rent, duration and fixed equipment

# Closing observations

## The case for considering greater freedom of contract

- Leasing as a way of holding or occupying land is still a preferred option for many
- Greater flexibility may bring more land to the market
- The cost of land is high – flexible leases may give more options for new entrants and for expanding existing farm businesses
- Rent will respond to supply and demand
- Greater freedom may lead to more productive use of land and better fixed equipment
- Points to a more commercially focused approach – fit for purpose for a modern agricultural industry



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