POLICY NOTE

THE AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003 REMEDIAL ORDER 2014

SSI 2014/DRAFT

Background

1. On 24 April 2013 the Supreme Court issued its judgment in the case of Salvesen v Riddell [2013] UKSC 22, which involved a dispute between a land owner and a tenant over the dissolution of a Limited Liability Partnership (LLP). The judgement identified a defect in section 72 of the Agricultural Holdings (Scotland) Act 2003 ("the 2003 Act"), holding that the effect of the operation of section 72(10) contravened landlords' rights in certain circumstances under Article 1 of the First Protocol of the European Convention on Human Rights. The Court held that those rights had been breached (a) since the consequence of certain actings of landlords in dissolving an LLP (ie the establishing of a full tenancy under the Agricultural Holdings (Scotland) Act 1991) before 1 July 2003 was disproportionate and (b) because an arbitrary and unfair outcome arose compared to the dissolving of an LLP after that date.

2. The Supreme Court suspended their judgement until 23 April 2014 to allow the Scottish Government time to consult with the industry and address how best to provide "just satisfaction" to persons whose rights have been breached.

3. The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 is made under section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 and makes provision which is necessary or expedient for the purposes of that section by amending the 2003 Act to remove the incompatibility arising from the operation of section 72(10) by repealing provisions of section 72 and inserting a new section (section 72A). Section 72A provides for the application of section 73 of the 2003 Act to affected groups, being a consistent and proportionate outcome, by way of response to the circumstances that gave rise to the enacting of section 72. The Order makes provision in respect of ongoing cases and makes transitional and savings provision.

4. The Order, in particular, provides 3 avenues into section 73 of the 2003 Act, in the existing circumstances set out below (other than where the Land Court makes an order relating to termination date under article 3(2)(b)). The Order provides for the same outcome if a dissolution notice is served under section 72(3) of the 2003 Act in future. This ensures consistency both for circumstances in which the outcome was in the past and will in the future be a tenancy under section 73 of the 2003 Act.

5. The Court, in its judgement, recognised the right of the Parliament in principle to make measures such as that at section 73(8), to reduce notice periods ahead of a given expiry date, provided that the consequences, where the landlord does not meet the test, are proportionate. In such a case, the terms of the Order respect the other existing contractual terms agreed between the parties, while providing for termination by the landlord under section 73(3) and (4).

6. Moreover, the Scottish Government recognises - as the Court did in its judgement, at paragraph 57 – that the transition to a fair solution, balancing competing interests in a constructive way, will take time. This remains important even after the Order takes effect and accordingly, after that date, the Scottish Government will offer mediation services to facilitate that smooth transition as far as possible. The Order provides for a limited "cooling off" period designed to support that transition. This 'cooling off' period is designed to respect the long term nature and complexity of farming businesses and to provide time for both landlords and tenants to discuss options and prepare for the change in their personal circumstances.

Groups affected by section 72

7. The Order makes amendments to the 2003 Act which are needed or expedient in order to remove the incompatible effects arising in consequence of the necessary operation of section 72, as concluded by the Court. It does not seek to address outcomes which may have arisen by virtue of agreements between parties which have avoided the consequence of the potential operation of section 72 (which are entirely dependent on the individual facts and circumstances of each case) and as a result of which agreements there is no incompatibility in consequence of the necessary operation of that section.

8. The Scottish Government has identified three groups of persons and circumstances in respect of whom amendments to the 2003 Act are needed or expedient to that end.

9. These are-

9.1 Where an LLP notice was served between 16 September 2002 and 1 July 2003; the tenant served a notice under section 72(6) of the 2003 Act; but the landlord did not apply to or continue with an application to the Land Court under section 72(7) (referred to in the Consultation Paper as Group 2). The effect of section 72 on such circumstances is that a full tenancy under the Agricultural Holdings (Scotland) Act 1991 ("a full 1991 Act tenancy"), which is a consequence disapproved of by virtue of the judgement of the Court will have arisen. This includes cases (if any) where an application was made but not pursued to a substantive decision (where giving rise to that same outcome).

Although it might be considered that a landlord in those circumstances has – by virtue of not applying or pursuing an application under section 72(7) – acquiesced in the giving rise to a full 1991 Act tenancy, the legal effect of these circumstances (by operation of the Act) is an outcome considered by the Court to be disproportionate.

The Order provides for a landlord, if desired, to bring the tenancy to an end so that rather than the tenant continuing to have a full 1991 Act tenancy, the landlord can use section 73 of the 2003 Act after a "cooling" off period which runs from the date that the order comes into force until the 28 November 2014. Scottish Government will provide mediation during this period.

9.2 Where an LLP notice was served between 16 September 2002 and 1 July 2003; the tenant served a notice under section 72(6) of the 2003 Act; the landlord applied to the Land Court under section 72(7); but the Land Court has not yet determined the application (referred to in the Consultation Paper as Group 3). The main persons so affected are in proceedings where the landlords raised court cases and the cases were and remain sisted pending the outcome of the Supreme Court judgement and this Order. That situation could still arise where there is an ongoing application under section 72(7) made before the intended coming into force date of the Order.

In this case, it is no longer open to the Land Court to make a finding under section 72(9) that it is not satisfied thereunder (since such a finding would cause section 72(6) to apply).

In consequence, Article 3(3) of the Remedial Order applies and allows the Scottish Land Court to make any such order it considers reasonable, with express provision (since these are proceedings which are ongoing before the Court) to make clear that an order of the Court can cover any matter related to the tenancy. Alternatively, if the landlord wishes he or she could abandon his or her application and section 73 would apply.

Accordingly, whether or not a landlord seeks to satisfy the Land Court as to the tests at section 73(8) and whether or not they are successful, the outcome is a section 73 tenancy with the right of termination under section 73(4) & (5), which is a proportionate outcome for that circumstance.

This places the landlord into a consistent position with all other landlords where the notice of dissolution was served after 1 July 2003 and ensures that landlords will have an outcome which is proportionate. In addition, the Court is able (by virtue of article 3), in a more transparent way than under section 72(9) to balance the potentially competing ECHR rights where for example the occupancy by the tenant of the holding is the family home of the tenant and so where immediate vacant possession may run the risk of contravening the ECHR rights of that tenant.

9.3 Where an LLP notice was served between 16 September 2002 and 1 July 2003, but with a termination date falling after the intended coming into force date of the Order; the tenant serves a notice under section 72(6) of the 2003 Act within 28 days of the purported termination; and accordingly the right of the landlord to apply to the Land Court under section 72(7) has not yet arisen (referred to in the Consultation Paper as Group 1).

In this circumstance too, it is no longer possible to allow a case to go to the Land Court in a way that allows it to make a finding under section 72(9) that it is not satisfied thereunder (since such a finding would cause section 72(6) to apply).

The Order therefore provides (for the same reasons of consistency and proportionality) for section 73 to apply. A landlord may terminate the tenancy based on periods of notice as provided for under section 73(4) & (5) without

needing to go to the Land Court but may make an application under section 73(6) to reduce the notice period if able to satisfy the Land Court as to the tests at section 73(8) (being the same test as at section 72(9)).

The Remedial Order

10. In order to give effect to the outcomes set out above, the Remedial Order provides as follows.

11. Article 2(2) repeals section 72(4) and (5) which are spent provisions in consequence of it no longer being possible (after the date of the coming into force of the Order) to meet the conditions at section 72(5), with consequential repeals of wording in section 72(2) & (3).

12. Section 72(7) to (11) are repealed in consequence of the application of section 73 by virtue of new section 72A, subject to provision for ongoing cases and transitional and savings provisions.

13. Article 2(3) inserts a new section in the 2003 Act (section 72A).

14. Provided that there is still a tenancy in existence at the relevant time for these provisions to apply to, section 72A(1) applies section 73 in the second and third sets of circumstances above and section 72A(2) applies section 73 in the first set of circumstances above (by virtue of the definition of "relevant tenancy"), other than-

    14.1 where there has been a sale of the landlord's interest since 2003 but there remains a tenancy in existence (comprising the circumstances as set out at section 72A(3)) or
    14.2 where the landlord elects not to seek a conversion to a section 73 tenancy.

15. The right of the landlord to convert is unlimited provided that an intimation notice is given within the set time period, but exists as a landlord may decide at his or her own hand not to seek a conversion and so conversion is not imposed if not desired.

16. To allow landlords and tenants to move through a transition that is as orderly as possible (once the Order has become law), the Order specifies an intimation period tied in with the Martinmas term date, a traditional starting point for agricultural tenancies, giving landlords 12 months from 28 November 2014 to intimate an intention to convert the tenancy into a section 73 tenancy. In the period between the Order coming into force and the start of the intimation period (and throughout the intimation period) the Scottish Government will offer mediation services to facilitate as far as possible that smooth transition, in balancing respective interests, in accordance with best industry practice.

17. That period does not prejudice the right of Landlords after conversion to seek an order from the Land Court under section 73(6) for shorter periods of notice, if the tests at section 73(8) are met.

18. Article 3 deals with the effect of the repeals on ongoing cases (ie in set 2 above) by requiring the Land Court to continue to determination of such cases, but makes provision for disposal by the application of the section 72(9) test repeated at section 73(8).

19. Article 4 preserves the right of a landlord to apply to the Land Court where part of the 28 day period allowed by section 72(7) falls after the coming into force date of the Order, to ensure that he or she has the full 28 day period provided by the current law to seek a remedy. The 28 day period is the "relevant period" as prescribed for the purposes of section 72(7) by the Agricultural Holdings (Relevant Date and Relevant Period) (Scotland) Order 2003 (SSI 2003/294).

20. Article 5 preserves rights of landlords and tenants who are already in circumstances where section 73 applies to their tenancy (where the acts referred to in section 72(3) occurred after 1 July 2003), notwithstanding the repeal of section 72(10) by article 2(2)(c).

Consultation

21. The proposed draft Order was prepared in close consultation with key stakeholder bodies Scottish Tenant Farmers Association (STFA), Scottish Land and Estates (SLE), Scottish Agricultural Arbiters and Valuers Association (SAAVA), Royal Institute of Chartered Surveyors (RICS) and National Farmers Union for Scotland (NFUS).

22. A public consultation was carried out on the proposed draft Order between 22 November 2013 and 7 February 2014.

23. The results of the public consultation have been captured in a "Statement of Observations and Reasons" which will be laid. This document provides a response to those observations on which the Scottish Government had regard and details the changes that have been made to proposed draft Order prior to the draft Order being laid.

24. During the consultation the Cabinet Secretary gave the following commitments regard mediation/time bar and absolute Right To Buy (aRTB).

25. Mediation is being offered to all those in groups 1-3 and key cases in groups 4 and 5 as appropriate to the circumstances of these cases. Where parties enter into mediation, the Cabinet Secretary has given an assurance that:-

"Notwithstanding that, consistent with the benefits of seeking mediated solutions, I have given a clear undertaking that where any party enters into the mediation offered as part of the solution in good faith, the Scottish Government (for its part) will not treat any clock to start for the purposes of time bar, if it arises, until the end of the mediation or 28 November 2015 (whichever date is earlier), for the purposes of a claim against the Government for groups 1, 2 and 3.

That undertaking cannot apply to groups 4 or 5. However, as I indicated to the Committee, I do not want to limit mediated solutions".

26. As regards absolute right to buy, the commitment given is that*:- aRTB if introduced in the future will neither apply to limited partnerships, continuing or extended, or to '91 tenancies resulting from group 2 cases.*

Impact Assessment

27. A Business Regulatory Impact Assessment (BRIA) was undertaken and will be lodged.

Agriculture and Rural Communities
Scottish Government

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