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Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 18 December 2013

Session 4

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
38th Meeting 2013, 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)
*Richard Lyle (Central Scotland) (SNP)
*Angus MacDonald (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Richard Blake (Scottish Land & Estates)
Mike Gascoigne (Law Society of Scotland)
Martin Hall (Scottish Agricultural Arbiters and Valuers Association)
Angus McCall (Scottish Tenant Farmers Association)
Stuart McMillan (West Scotland) (SNP)
Malcolm Taylor (Royal Institution of Chartered Surveyors)
Scott Walker (National Farmers Union Scotland)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 1

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 18 December 2013

[The Convener *opened the meeting at 10:04*]

Decision on Taking Business in Private

The Convener (Rob Gibson): Good morning and welcome to the 38th and last meeting of the Rural Affairs, Climate Change and Environment Committee in 2013. Committee members and members of the public should turn their mobile phones off, as they can affect the sound system. Please remember to do that. [*Interruption*.] We are all coughing and spluttering here, so we are looking forward to the recess. Short answers to short questions would be appreciated.

Agenda item 1 is a decision on taking business in private. I am sorry—I have a number of points to make before we get to that. We have received apologies from Cara Hilton, and we welcome Stuart McMillan to the committee. Angus MacDonald will be coming in later.

Do members agree to take in private at our next meeting and future meetings consideration of a draft letter to the Scottish Government on deer management issues?

Members *indicated agreement.*

Proposed Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014

10:05

The Convener: Under agenda item 2, the committee will take evidence from two sets of stakeholders on the proposed draft order. I welcome the first panel. Angus McCall is executive director of the Scottish Tenant Farmers Association, Richard Blake is legal adviser to Scottish Land & Estates and Scott Walker is chief executive of the National Farmers Union Scotland. Good morning.

I refer members to the paper that is before us. We will not have opening statements, so I will kick off with the first question. Are you satisfied that the Scottish Government has made sufficient effort to become aware of all those who are affected by the legal defect?

Angus McCall (Scottish Tenant Farmers Association): This will be a short statement from me, as my voice is on the way out. One of my organisation's concerns is that quite a number of tenant farmers will not be aware of exactly what is going on. The numbers from the Scottish Government that have been quoted are relatively low, and I suspect that a lot more people do not realise what is happening. Quite a number of people in groups that are not being considered will have something to say about the matter at a future stage. The Cabinet Secretary for Rural Affairs and the Environment was going to write to every tenant, but he never did that, which I think was a mistake.

The Convener: We will explore that with him.

Scott Walker (National Farmers Union Scotland): I echo Angus McCall's comments. There has been a lot of press coverage of the subject and individuals are aware that the situation is going to change. However, individual tenants are not clear as to exactly what the implications will be and what steps they should take from now on.

Richard Blake (Scottish Land & Estates): I generally agree. In so far as it has been able to do so in a short time, the Government has taken reasonable steps. However, I share the concerns of Scott Walker and Angus McCall that, because of the mystique of limited partnership leases and what they consist of, some tenants will not be aware of the Salvesen implications for them, particularly if they have entered bipartite agreements.

The Convener: It is our understanding—we have seen the letter—that the Government has written to every tenant in the country.

Angus McCall: I do not think that it was sent to every tenant in the country, although I will stand corrected if it was. We circulated it to all our members, but I am not sure if every tenant will have received it.

Graeme Dey (Angus South) (SNP): From a layman's perspective, it strikes me as inconceivable that a tenant farmer with the slightest concern that they might be caught up by the issue would not take proactive steps to ascertain their position.

Angus McCall: Unfortunately, a number of tenants are so focused on their businesses that they may well not have realised the implications for them. One of the difficulties that we have as a tenant farmers organisation is in getting down to the grass roots. Farmers are farmers, and their main interest is in producing food and looking after the environment; it is not necessarily the background stuff of their agricultural holding.

Scott Walker: We are dealing with a hugely complicated subject. Individual tenants who now have a secure tenancy will think that their situation has been resolved and that nothing is going to impact on them. Individuals who are sisted at the Scottish Land Court will be following the case very closely. A lot of our members—I suspect it is the same for Angus McCall's members—rely on their representative bodies to work in their best interests. Those people are working hard on their farms and are not really following what is a highly technical subject and an area in which, even at this stage, it is unclear what actions individuals should take.

Richard Blake: Professional advisers have made me aware that, when the Government invited parties who considered that they had an issue to get on to the internet and fill in the website form, there was some advice that they should not do that because it might prejudice their position. There are people out there who know about the situation but have not yet come forward.

The Convener: Angus McCall said that he has been in touch with his members. Scott, what have you done to encourage your members to respond to the Government?

Scott Walker: We have done a number of things. We have had articles in our magazine, the subject has been spoken about at our committees and in our regional structure and we have had news releases on the subject in the press.

I suspect that a lot of individuals are waiting to see the outcome of the proposed draft remedial order, so that they have a clear pathway to follow. At the end of the process, we would like to be able to contact our members and say, "If you are in this situation, these are the actions that you should take."

The Convener: Richard, do you have anything to add?

Richard Blake: Scottish Land & Estates publicised the proposed draft remedial order. After our discussions with Government officials, we told members about the website. I gave the necessary direct link to the members of our organisation who had been in constant touch with me, and I believe that they both completed the form.

Graeme Dey: Given the evidence that you have given so far, is more time needed to investigate the defective legislation's direct or indirect effects, or is it more important to end the current uncertainty in a reasonable time?

Richard Blake: It is important from both sides' points of view to get this resolved as soon as possible. The Supreme Court was clear that 12 months is a reasonable time to get the fix in place.

There have been two issues. The first is the legal fix that the Supreme Court requires. That needs to be put in place and the issue needs to be resolved sooner rather than later, both for the good of the industry and so that the affected parties can move forward.

The second issue is that, where there has been perceived loss, individuals have to look at the situation and take advice. The sooner that both sides of any particular case can see what their positions are and plan ahead, the better. We are back in the uncertain phase again.

Angus McCall: By and large, I agree with Richard Blake. We need to get certainty and clarity as soon as possible. We are not particularly happy with the legal fix, although we understand that it is probably the only route that is open to the Scottish Government. It is important that, after it is in place, sufficient time is spent to make sure that the outstanding issues get resolved. That is more important than trying to tinker with the fix. However, as part of the fix, we would like to see a commitment from the Scottish Government that it will have a look at compensation issues regarding people to whom harm has been done.

Scott Walker: There is consensus all round at this end of the table. Angus McCall mentioned the compensation issue. How that will be followed through by individuals and what form of help, assistance and guidance can be given in that process will be critical.

Graeme Dey: I presume that the quicker we get the issue resolved, the quicker people who have not yet come forward will do so. I see the witnesses nodding.

10:15

Nigel Don (Angus North and Mearns) (SNP): Good morning, gentlemen. The STFA's submission questions

"why the government has not sought to devise a remedy which would be more in keeping with its policy"

intention of opening up land to tenancies. If I can reduce things to a single line, it looks as though the remedy is essentially to give landlords access to their land again and routes to do that. A fair point has been made.

My question is for the whole panel, but Angus McCall may want to start. Does the draft order provide an appropriate balance between landlords and tenants?

Angus McCall: I think that it puts tenants in a particularly difficult position. The focus of the Supreme Court's judgment seems to be that the landlord's rights were violated, but my and most of our organisation's way of thinking is that significant damage is being done to tenants' rights. We have not as yet taken legal advice on the implications of that, but we intend to do so.

There will be people who will lose their farms. In the normal course of events, those tenants would have expected a limited partnership tenancy to have carried on. Many limited partnership tenancies went on from lease to lease and from year to year even though they were conceived as short-term fixes; in fact, most of the existing ones will probably be on a yearly basis. Obviously, that is not a very comfortable situation for the tenants, but it indicates that tenants who are in danger of losing their tenancies would have expected them to have carried on in the normal course of events. I think that there is a significant deprivation of tenants' rights in the order.

Scott Walker: Unfortunately, there is an unsatisfactory situation for everyone concerned, to a degree. Large groups of people will be unhappy at the end of the process.

In recognising the Supreme Court's judgment, I can see little that the Scottish Parliament can do compared with what is in front of us. The situation will be painful for some tenants who are sitting with what they believe have been secure tenancies, as they will now find that they will be removed from them. That will be painful given the decisions that they have taken with regard to investment over time and the situation going forward. There will be huge unhappiness out there, but we have looked at the situation and we find it difficult to see what else could be done compared with what is in front of us.

Richard Blake: My answer has to be predicated on the fact that it was a landowner who took the case about a breach of human rights; it was not a tenant. The Supreme Court found in favour of the landlord—it found that the landlord's rights had been breached. The remedial fix—I will call it that if I may, as it is easier for me to say—must reflect what the Supreme Court decided, and it tries to do that. I suppose that that begs the question whether the fix is correct to be as at 2014, when it will be enacted, or whether it should go back to 2003, when the bad law was enacted. We have discussed with Scottish Government officials whether it is correct for the enactment to fix the defect next year or whether it should be fixed as at 2003. It seems to me that the former is going through in the order.

Nigel Don: I want to pick up on the differences between the groups without worrying about those groups on the record, as that would be unintelligible to anybody else. I would like to pick up on group 3, or perhaps I should refer to the sisted cases. The draft order seems to say that the Scottish Land Court has the option to do whatever it thinks is reasonable. Is that correct? It uses the words

"in such manner as it considers reasonable."

It seems to me that, at least conceptually, that might leave the tenant in possession. The words are not in there, but is it possible that it might be reasonable for the Scottish Land Court to decide in a sisted case that the balance would be with the tenant?

Richard Blake: That is not my reading of the—

Nigel Don: Okay, but that is my question.

Richard Blake: That is not my reading of the order. My understanding of group 3 is that there are two possibilities. Either the case is removed from the Land Court and it pops into section 73, or it remains in the Land Court, which has discretion to take account of the whole circumstances and can decide when it would be reasonable for the landlord to recover vacant possession. The court might postpone that or might bring it forward.

One option is for the case to go straight to section 73, or if the circumstances are such that the case remains in the court, it has that discretion. It is questionable whether the second option complies with the judgment.

Nigel Don: I want to press you on that, as you have obviously thought about it. I am talking about article 3(3)(c). Subparagraphs (a) and (b) of article 3(3) refer to timing.

Richard Blake: Sorry, but could you say that again?

Nigel Don: I am talking about article 3, which is on page 3, under the heading "Ongoing cases". Paragraph (3) sets out what a court order under paragraph (2) "may" do. Subparagraphs (a) and

(b) relate to timing, which is what you have referred to. Subparagraph (c) states that such an order may

"deal with such other matters relating to the tenancy or its termination as the Court considers appropriate."

To me, that wording implies that the matters relating to the tenancy might not be its termination, because it says

"or its termination as the Court considers appropriate."

Am I looking through a keyhole but actually there is a key on the other side and I cannot see a thing? Is there no option that the tenant might stay in possession?

Richard Blake: That interpretation had not occurred to me, but I imagine that there might be other matters that the Land Court has to consider, such as compensation for improvements.

Nigel Don: Do you see the Supreme Court's judgment as meaning that the tenant does not have that option and that the only way that the Government can comply with the Supreme Court's judgment is to give the landlord the option to regain possession?

Richard Blake: That is a strong argument. There must be doubt as to whether the fact that the Land Court is given discretion complies fully with the Supreme Court judgment, to put matters back to where they should have been in 2003.

Scott Walker: I have certainly heard it suggested, in the way that Mr Don describes, that we could end up with a situation in which the Land Court once again finds itself at odds with the Supreme Court judgment. If that were to happen, we would be in a situation of much greater uncertainty than we are in at present. I am sure that the legal minds that will give evidence to the committee later will have a view on that.

The difficulty for any landlord and tenant who have a sisted case is to determine whether they wish to spend more money on something that has a huge degree of uncertainty or whether it is better to reach some sort of amicable settlement and then look again to the Government with regard to recourse or compensation for the situation in which they find themselves.

Angus McCall: Each sisted case is different and will be looked at on its individual merits. The concern is more that the Land Court might shorten the period and give a landlord possession earlier, which would be difficult for the tenants concerned. It would be nice to think that the court would have the discretion to confirm tenants in their tenancies, but I think that that is unlikely. There is a time element. From the tenant's point of view, it is important to allow as much time as possible to allow on-going negotiations and to give the tenant the chance to work out his future and to try to stay in the tenancy if at all possible.

Nigel Don: That brings me nicely to my next point, which is that, whatever that means, the order deals with those in group 2 and those in group 3 differently. I am sorry, but I need to get this on the record so that we know what we are talking about. Group 3 are the sisted cases and group 2 are the ones where a notice has been served under the now defunct section 72(6) of the 2003 act but it has not been challenged by the landlord, so the tenant appears to be in an agreement under the Agricultural Holdings (Scotland) Act 1991 or has moved on from it. No, sorry—if he has moved on from it, he is in group 4; if he has not moved on from the 1991 act tenancy, he is in group 2. That group is treated differently because it does not have the points that we have just talked about in article 3. Is that fair or should those in group 2 be in the same position as those in group 3?

Angus McCall: I think that the people in group 2 are those in possession of secure tenancies. They are in a completely different position in that they will probably have had their secure tenancies for a number of years and invested in them and done forward planning. We know of at least two cases where the sons abandoned their careers and came back to the farm, so a whole family operation is in danger of falling apart. It is crucial that sufficient time is devoted to see whether there can be some sort of reconciliation between landlord and tenant so that such people can stay on their farms. If that cannot happen, they will have to be compensated appropriately.

Government policy is to grow the tenanted sector and make use of tenants to deliver the Government targets for growing food, looking after the environment et cetera. It should therefore be a Government priority to maintain people on farms wherever possible.

Richard Blake: If I understood your question correctly, Mr Don, it was about whether those in group 2 should be put in the same situation as those in group 3—or was it the other way round?

Nigel Don: My question was whether it is fair that they should be treated differently.

Richard Blake: My answer is that it could potentially be discriminatory—that is probably what you are looking for.

Nigel Don: You have read my question as, "Can it be discriminatory?", and you have given the answer, "Yes", which is fair enough.

Richard Blake: Potentially. For group 2, there is another issue about opting in to section 73 by landlords. I do not think that they should have to opt in—I put that in my written evidence.

Nigel Don: You would rather that they were automatically put in a position of having opted in.

Richard Blake: Yes, and they could opt out if they wanted to do so. I do not see why the landlord should be put under another onerous condition to have to opt in to section 73 or why the legislation should not just put them straight in.

Nigel Don: Thank you. That is an interesting thought.

Graeme Dey: I take Angus McCall back to his answer to Nigel Don's original question about the appropriateness and fairness of the remedy. Mr McCall, I fully understand and indeed sympathise with your members' concerns, which you have articulated. Do you accept the more pragmatic view that Scott Walker has taken about the remedy—that it ain't perfect but the Government was in a difficult position and this is what it has to do—or do you have an alternative remedy in mind?

Angus McCall: I agree that the Government is in a difficult position and that it has little option. The Supreme Court has said that to remain in 1991 tenancies is unlawful. The Government has recognised the difficult position that those tenants are in, and that is why it has introduced the cooling-off period. That is absolutely essential, and the Government should be part of the mediation process rather than mediate between landlord and tenant. Mediation should take place with the Government in the room as well, as it were. We need Government support to try to move tenants on.

Graeme Dey: That is useful. I think that we will move on to the issue of the cooling-off period in a moment.

The Convener: Before that, we will discuss compatibility with the European convention on human rights.

10:30

Claudia Beamish (South Scotland) (Lab): We have already explored the issue of ECHR compatibility to a degree, but I want to push it a bit further. During the committee meeting on 4 December, I stated:

"A small number of the tenant farmers whom I represent have highlighted their concerns about what they see as their own human rights."—[*Official Report, Rural Affairs, Climate Change and Environment Committee,* 4 December 2013; c 3105.]

In a news release from 27 November 2013, the Scottish Tenant Farmers Association states that many tenants

"find it ironic that they now face losing their homes and businesses as a result of European court legislation designed to protect basic human rights."

We are all aware of the reasons for the decision, and we have to respect them. In written evidence that is annexed to the STFA submission, Hendersons Chartered Surveyors states:

"In offering redress by way of remedial orders Parliament must be very clear that it should not interfere with the Human Rights of Tenants."

Do you have any specific concerns that the proposed remedy impacts on the human rights of your members, further to what has been discussed already? The question is specifically for Angus McCall, but anyone may answer.

Angus McCall: Tenants are the victims in this situation, because they have acted in good faith according to rights that were conferred on them in 2003, but they now find themselves in an invidious position. We have not yet taken advice on the human rights aspect, but I suspect that there may well be a case to make that tenants' rights are being interfered with by the fix. I think that, in its judgment, the Supreme Court recognised that harm would be done to tenants as well as landlords. The retrospective nature of the fixes is causing that.

Scott Walker: I repeat that the situation is unsatisfactory for everyone concerned. The Supreme Court has given a ruling, and we now have to deal with that ruling in a practical way. When people look at the scenarios that individuals are in, they will have tremendous sympathy with various groups. I think that the situation is particularly unsatisfactory for tenants who exercised the rights that were given to them by the Scottish Parliament and have claimed a full tenancy. Angus McCall gave examples of situations in which a whole family has made changes because of those arrangements but those arrangements are now going to be unpicked. To a degree, no amount of compensation will sort that out for those individuals. They had a way of life and a situation that they believed would evolve into the future.

I recognise, of course, that there is another side to the argument—the landlord's side—and that the landlords will say that the law was wrong in the first place and that all that is happening is that a situation that should not have occurred is being corrected. Again, I have a degree of sympathy for the landlords because, however they unpick the situation on the ground, it will not be satisfactory. There is a danger that the actions that will take place could further tarnish the image of the landlord and tenant sector. As Richard Blake and Angus McCall have said, we want individuals to seek mediation—to sit down, wherever possible, and work out whether a set of circumstances can be brought about whereby parties can work together and continue to farm the land in a way that is similar to that which exists at the moment.

Richard Lyle (Central Scotland) (SNP): I want to pick up on the comments that Scott Walker and Angus McCall have just made, but I should first say that I am not a farmer. What I see, however, is that we have got into a mess and are trying to sort it out but there are different groups of people—lawyers, tenants and landlords—involved. Why can everyone not just sit down and try to resolve the issue? Given that people have worked on the land for 30, 40 or 50 years, I think that there needs to be a cooling-off period. After all, people who might have spoken to each other every day are now sitting in their own silos. Mr McCall made the point that Governments should try to ensure that tenants stay on the land, but my concern is that, given the situation, landlords might simply say, "Let's get everyone off the land and start again."

How are we going to solve the problem? Will the order do that? Should we have a good cooling-off period? I know that one of the witnesses said that the agricultural holdings review will have a bearing on the matter—the other panellists might want to comment on that—but, speaking as someone who is not a farmer but who has been a politician for 30-odd years, I believe that if we sit down with people, mediate and get some reasonable common sense, we can solve the problem. I should say that the problem was created not by the Scottish Government but by the Scottish Executive in 2003.

I mean no disrespect to Mr Blake but, instead of going to lawyers and spending thousands of pounds, I wonder whether there is a way in which the Government, tenants and landlords can sit down together and talk this out. For example, how much is compensation going to be?

The Convener: I had asked for short questions, Richard. We will come on to compensation in a moment.

Richard Lyle: I apologise, convener. I am getting very passionate about the issue.

Angus McCall: Ironically, the issue might well bring individual landlords and tenants together. With all due respect, I think that the committee deals with issues in the abstract, while we very much deal with people on the ground, their relationships and their lives and livelihoods. There is a possibility that, given sufficient time, landlords and tenants will be able to sit down, discuss the issue and get a win-win situation.

The Convener: But as you pointed out in your evidence, the agricultural tenancies review is being carried out at the moment. What would be the effect of delaying the order's implementation until after the review is completed?

Angus McCall: The review is not very far off being completed; in fact, it is due to be completed by the end of 2014. If the cooling-off period is due to end at the same time, I would like it to be extended into 2015 to give plenty of time for negotiations and attempts at mediation between the different bodies. Once we know what the review will recommend, that might make it easier for landlords, tenants and the Government to negotiate.

The Convener: In fact, the cooling-off period might last until 27 November 2015, because both parties have that length of time to make their claim. In other words, the period that you are talking about will go beyond the duration of the agricultural tenancies review.

Angus McCall: Yes.

The Convener: So there is actually quite a lot of time.

Angus McCall: I think that at the moment the cooling-off period will run to November 2014.

The Convener: But, in effect, the fact that

"'the intimation period' means the period of 12 months beginning on 28th November 2014"

allows for the cooling-off and agreement processes to continue.

Angus McCall: That would depend on whether the cooling-off period was to end on 28 or 29 November. Were it to end within the 2014 term date, tenants would have two rather than three years.

The Convener: I am talking about around four years by that point. The cooling-off period has been written in the order to allow the time to be extended. It is a minimum of six months, but landlords can serve a notice at any time within the following year, at which point the matter becomes time barred.

Richard Blake: From the landlord's point of view, if we legislate to put in place what the Supreme Court is looking for, it is important that the affected landlords are returned to the position that they would otherwise have been in as soon as possible. If the cooling-off period is extended for any length of time, that potentially discriminates against them, as they will not get the repossession as quickly as the double notice provision in section 73 permits.

The Convener: The double notice provision could be made at any point during those 18 months.

Richard Blake: Correct. There is an argument that the first notice could be deemed to have been served on enactment. That would be the fairest way to deal with the matter—

The Convener: It might well be but, in the circumstances, we are trying to dig our way out of the situation. Proposed new section 72A(4) in the

2003 act—the bit that I just read out—seems to allow for that period to extend up to a year from 28 November 2014, so there is plenty of time for those processes to take place. Are we happy with that? Are there any comments?

Angus McCall: As I mentioned, we would like to see as long a cooling-off period as possible, because it is important to give people time to sort out their lives.

The Convener: Is going up to 18 months from the period of the order unreasonable?

Richard Blake: Do you mean unreasonable with regard to the Supreme Court judgment or—

The Convener: Unreasonable, obviously, with regard to the Supreme Court judgment. It is always difficult for people to sort out their lives—I understand that.

Richard Blake: Absolutely—I understand it, too, but I go back to the point that was touched on that everybody needs certainty sooner rather than later.

The Convener: Okay, fine. Those are useful points.

Graeme Dey: Who, realistically, would be trusted by both sides to carry out the mediation work, and how should the process be funded?

Scott Walker: It will be far simpler if I deal first with the funding issue. The Scottish Government should provide the funding. As has been explained, the whole situation is unsatisfactory. No one wants to be in such a situation, and it is in everyone's best interests to encourage the parties to come together as soon as possible to look at the options and to find a compromise that satisfies them all. In addition, in relation to the on-going agricultural holdings debate, the Scottish Government has shown a strong interest in trying to improve the situation in the landlord-tenant sector. If it funded the mediation work, that would help to create better relationships there.

On who should carry out the mediation, I will let Richard Blake and Angus McCall speak first.

Richard Blake: I agree with Scott Walker on the funding issue.

Mediation will be difficult, because it will not just be between two parties as happens in a straightforward agricultural holdings dispute in which the landlord's case is on one side and the tenant's is on the other. In this matter, legislation is forcing a situation on both parties to see whether a deal can be brokered. However, at the end of the day, both those parties will have an issue with the Scottish Government, too, so, to return to Angus McCall's point, a third party is involved.

From a purely legal viewpoint, both sides will go into mediation with a certain amount of caution, because they might have to identify their potential claims against the third party—the Government—before entering into the mediation process between the two of them. That further complicates the matter.

On who should do the mediation, the situation is complex, because we have the agricultural holdings legislation, which as we all know is difficult, and we also have potential compensation claims, which will be built into agricultural land values as well as quantifying the loss to the individuals. There will have to be an experienced, and probably accredited, mediator. There are accredited mediators in the Faculty of Advocates and the Law Society of Scotland, and then there are the Scottish Agricultural Arbiters and Valuers Association and the Royal Institution of Chartered Surveyors of this world, whose members have experience of land values, although possibly not experience of quantifying claims.

10:45

Angus McCall: I broadly agree. To take the questions in reverse order, mediation would have to be funded by the Scottish Government. The Scottish Government has got to be part of the process rather than doing the mediation; that point has been made before. There are people who do mediation, and we could easily find someone who is capable of doing it. At the mediation stage, although there are a lot of technical issues in the background, we are really looking for agreement in principle on the sort of solutions that we could try to broker, rather than getting down to the nitty-gritty of exactly who does what and who pays what.

Graeme Dey: Having heard the other two answers, what is your view, Mr Walker?

Scott Walker: I genuinely do not know. I look at mediation as a way of bringing individuals—three parties, in this case—together to explore the various options and to try to build a consensus viewpoint. I do not believe that the mediator necessarily has to have all knowledge of agricultural tenancies, but they may need some fallback where they can seek information from an outside party to give them clear direction on what the law would be in different situations.

The Convener: Moving on to the elephant in the room, we turn to compensation, and Alex Fergusson.

Alex Fergusson (Galloway and West Dumfries) (Con): I thought that you were referring to me there for a moment, convener.

Good morning, gentlemen. Compensation has already been mentioned several times during the evidence that we have heard so far. When we took evidence from Scottish Government officials, the subject was raised again, and I know that it was also part of discussions with stakeholders in the early days of the process.

The Scottish Government has stated that

"there is a great difficulty in generically accepting liability."—[*Official Report, Rural Affairs, Climate Change and Environment Committee*, 4 December 2013, c 3106.]

I am interested in your views on that. Is that a reasonable position to take, on the ground that the small number of cases are, as we would all agree, extremely complex and therefore almost demand case-by-case inspection, or is a more generic option available?

Richard Blake: I understand where the Scottish Government is coming from in taking that view. As a lawyer, the advice that I would probably give a client would be to deny all responsibility until you see the scope and variety of the claims. Scottish Land & Estates has looked at the issue broadly, rather than specifically and it seems to me—looking at it not only from the landlords' side but from the tenants' side—that there are, as Mr Fergusson said, complex claims going back to 2003 that could involve uplifts in values of agricultural land, tax implications, loss of agricultural property relief and lots of other difficult issues that must be grasped. There will be issues that may not have been seen before in quantifying claims, which is where the Government is, quite understandably, being cautious.

There will probably be a number of smaller claims, particularly with the bipartite agreements that have been entered into, in which everybody is reasonably happy with the way things have been going.

There might also be small claims that are to do with legal and professional costs that were incurred at the beginning, which might provide the potential to encourage a class action. A group of tenants and a group of landlords could get together and talk to the Scottish Government to try to agree one case in principle, which would set the framework. That might be a workable way forward. However, I understand that the Government cannot say immediately that it accepts liability for potential class actions. I do not know whether that answer helps.

Angus McCall: The Government needs to accept that compensation and liability will be an issue. It will be difficult for individuals to feel that they can bankroll compensation claims against the Government. Most of the people whom I am concerned about—tenants—do not have deep pockets to bankroll big compensation claims. We would like an assurance from the word go that the issue is recognised and that the Government will take it on board.

On the other hand, we do not want to create a gravy train; the danger is that anyone who has been anywhere near a limited partnership tenancy will make a claim. There will be genuine cases—some people will be about to suffer extreme hardship—but others will not be hugely disadvantaged, on the whole.

Scott Walker: The key point is that the Government must be open to negotiating with individuals; it must send out the clear message that it accepts that there will be compensation and that liability will land at its door. The Government's attitude to progressing such cases will matter. As Richard Blake and Angus McCall said, we are not looking for the Government just to accept everything at face value—it must look at claims individually. The concept that Richard Blake described of grouping claims as a class action suit is interesting and should be looked at.

The Government should not take a legal attitude of whittling every claim down to the lowest possible amount. Individuals do not want to fight for a long time, so the presumption must be to settle at a fair and reasonable price for all who are concerned.

Alex Fergusson: Do you all agree that the order should not include a set compensation scheme? Do you think that we are in the right place on that?

Angus McCall: The order should not contain a set compensation scheme, but should recognise that claims will be made and dealt with on their individual merits. It would be difficult to establish a generic scheme because it would need to be quantified. However, there must be statutory recognition that compensation will be an issue.

Richard Blake: I made it clear in my submission that the background papers to the order are possibly misleading, because the only mention of numbers is a reference to 20-ish cases in groups 1 to 3. I understand where the Scottish Government got that figure from—it is based on the best available data at the time—but it pigeonholes other potential claimants; it says, "We're not really interested in you; you might not have a claim."

The papers say that people

"may or may not be content."

That is all that is said. I share Angus McCall's view that a statement from the Government is needed to provide clarity.

Alex Fergusson: That was helpful.

The Convener: Richard Blake talked about when compensation is due from and implied that it goes back to 2003, when the decision was made. Am I correct in understanding that your position is that the compensation includes the past 10 years?

Richard Blake: Yes. I made the point that there are two possibilities for the remedial fix: to put it in place from 2014, as is intended through the order, or to put it in place from 2003, which would mean unpicking all the settled bipartite agreements, which would not be workable. The compensation will have to go back to the date of the loss. That is basically what I meant. I do not know whether anybody is going to discuss the concept of a time bar; I know that that was mentioned two weeks ago.

The Convener: If people could go to court about something that was clearly inequitable, there clearly would not be a time bar.

Richard Blake: My understanding about the time bar is that the time normally commences when the aggrieved party becomes aware of the loss.

The Convener: Is there any kind of time bar under any acts of Parliament?

Richard Blake: We talked about that in the SLE technical legal group just last week. There were differing opinions, as there normally are when lawyers get together in a room. One opinion was that, for the people in groups 4 and 5, the time bar could start at the date of the Supreme Court judgment, because they do not come under the order. Another view was that the time bar would start at the date of enactment of the legislation, because the people in groups 4 and 5 might still come under the order before it is enacted. The legislation is not clear.

Nigel Don: Let us say that I buy your point that the time bar might come in for the people in groups 4 and 5 at the time of the judgment. You say that it is not part of the order and that those people are apparently not in a position that is affected by the Supreme Court judgment, except for the fact that they would not have a claim without the Supreme Court judgment. That is the point when they become aware that they might have a claim.

Richard Blake: Yes. It is about their awareness.

Nigel Don: Am I right in thinking that, in some circumstances, that might be a year?

Richard Blake: Do you mean a year's—

Nigel Don: That is all that they would have under the—

Richard Blake: No. Under the prescription and limitation they would have five years in which to bring a claim for their loss. The periods are three years for personal injury and five years for a normal commercial loss. At worst, five years would be triggered from the date of the Supreme Court judgment; at best, it would be from the date of enactment of the order.

Nigel Don: It would not be the one year for an ECHR claim, then.

Richard Blake: Would it be an ECHR claim?

Nigel Don: The matter arises from an ECHR judgment. I will leave you with that thought. It might mean that your time bar—or somebody's time bar—runs out before we can have the fix.

Richard Blake: Thank you for giving me that interesting thought to worry about.

Nigel Don: I am terribly sorry if that has spoiled your morning.

Richard Lyle: Who knows how much a claim will be for? There could be 20, 100 or even several hundred cases. Payment protection insurance claims have cost banks billions of pounds. How much would a reasonable case cost in this case? Pick a case. For people and their living, would it come to £100,000, £200,000 or what? Who knows?

Richard Blake: It is not easy to come up with an answer, but I know that considerable sums were paid by landlords back in 2003 to buy out secure tenants after defective legislation. There would be big seven-figure sums.

Richard Lyle: Do Scott Walker or Angus McCall have any figures in mind?

Angus McCall: No. Until we start to quantify loss of earnings and all the rest of it, we cannot know. The sums could be very significant. I know of a large sum that was paid out to a tenant, and I do not know whether it was the same one that Richard Blake has referred to, but that was part of another legal argument. Claims would have to be considered case by case.

Richard Lyle: How much was the significant sum?

Angus McCall: I do not know exactly, but it was a seven-figure sum. The claim that I am referring to, however, was very much bound up with a legal case on a completely different issue, which the landlord lost. If it is the same claim that we are talking about, there is a different implication. My concern, purely from a selfish tenant point of view, is that such claims should not present a windfall for any party.

11:00

The Convener: Finally, in its submission, Scottish Land & Estates baldly states:

"A Limited Partnership lease is a secure 1991 Act lease."

Does either of the other parties that are represented on the panel agree with that view?

Angus McCall: There are many technical terms floating around. Technically, a limited partnership tenancy is a 1991 act lease. However, although it has all the other benefits of a 1991 tenancy, it does not have the security of a full tenancy because it runs for only a set time. In other words, it is secure only for as long as the period of tenure.

Scott Walker: Whenever we start talking about leases, all the language becomes confusing. I—and, I think, the vast majority of tenant farmers out there—like to keep things simple. When people refer to secure tenancies, they are talking about something that is inheritable and which can be passed on from generation to generation, and everyone understands that a limited partnership is for a fixed period of time. Given that, as Angus McCall has pointed out, limited partnership tenancies are covered in the 1991 act, the statement that you read out is technically correct, convener, but people see the two agreements as being very different and as conferring very different opportunities to both parties that have signed up to them.

The Convener: In other words, it is a matter of interpretation.

Richard Blake: I can say that it is not a limited duration or short limited duration tenancy. By definition, it is—and has to be—a 1991 act tenancy.

The Convener: One might well argue about the question of security.

Scott Walker: The situation that you highlight again brings us back to the issue of the guidance that needs to be issued once the remedial order has been passed by Parliament. It must come in a very simple format that individuals can understand.

I always try to learn something in the course of a year. In 2013 the strongest message that I have taken home, which came in a meeting with Scottish Government officials, is that the average reading-ability age in Scotland is that of a 10-year-old. As a result, any guidance should be pitched at that level to ensure that people understand it. I have certainly encouraged all my staff to write for me as if I were a 10-year-old so that I can read and understand what they have written. As soon as individuals start getting into the strict legalese of what is a very complicated subject, they have to seek professional advice in order to understand it. We need to keep things simple; we need very simple flow diagrams and charts that show the actions that individuals need to take. I know that Angus McCall and Richard Blake will do that for their members and we will certainly do it for our members. The simpler the information that the Scottish Government issues, the more helpful it will be to individuals who are going down the mediation route, and the more helpful it will be in terms of building consensus and finding solutions.

Angus McCall: As we debate the remedial order, we need to remember that between 400 and 500 tenants and landlords are still in limited partnership tenancies that are, as far as the tenants are concerned, anything but secure. Some of them have still to finish their contractual period, but most of the tenancies will run on a year-to-year basis, which gives the tenant no more than three years of security. That puts people who are trying to operate businesses in a very difficult position, so we need, when we have these discussions, to think about the people who are still in such situations and what their future might be.

The Convener: I look forward to the review being issued in language that children can understand.

I thank the panel for their evidence. We will have a five-minute suspension to allow a changeover of witnesses and a comfort break.

11:05

Meeting suspended.

11:14

On resuming—

The Convener: I welcome our second panel of witnesses. Malcolm Taylor is head of land management at Bell Ingram and the factor for Airlie Estates and he represents the Royal Institution of Chartered Surveyors; Martin Hall is president of the Scottish Agricultural Arbiters and Valuers Association; and Mike Gascoigne is convener of the Law Society of Scotland's rural affairs sub-committee.

We move straight to questions. Are you satisfied that the Scottish Government has made sufficient effort to become aware of all those who are affected by the legal defect and that it is being corrected in as constructive and fair a manner as possible?

Martin Hall (Scottish Agricultural Arbiters and Valuers Association): As far as I am aware, a good effort has been made to contact as many people as possible. Information has been widely distributed through the member organisations that we heard from earlier and through the press. From that point of view, the answer is yes.

Malcolm Taylor (Royal Institution of Chartered Surveyors): Similarly, I think that a good effort has been made to contact those who

have been involved in the past and those who are still involved. One group that might slip through the net comprises people who have sold farms in the interim and have moved on, as they might not be aware of the ramifications of what is happening.

Mike Gascoigne (Law Society of Scotland): The Law Society of Scotland made an effort to have those who specialise in agricultural law made aware of first the Supreme Court judgment and then the draft order. They are probably key data providers as they have leases in their safes and so forth.

The Convener: Has the legal defect been corrected in as constructive and fair a manner as possible?

Mike Gascoigne: Yes, I would say so.

The Convener: Okay. We are all agreed about that. Thank you.

Graeme Dey: Good morning, gentlemen. Might more time be needed to investigate the direct or indirect effects of the defective legislation, or is it more important to end the current uncertainty in a reasonable time?

Mike Gascoigne: The Law Society takes the view that the draft order hits the nail on head. It does the right things for the right reasons. We are satisfied on that front.

Martin Hall: I think that it is more important to bring certainty to the situation, rather than having a longer period of uncertainty.

Malcolm Taylor: I think that that is right. I act for both parties. Running farms and owning land is a business, and anything that causes uncertainty is detrimental. That is the case for any business organisation. What we have in front of us is a good way of bringing the issue to a head.

Graeme Dey: That is fine. Thank you.

Richard Lyle: Good morning, gentlemen. In evidence to the committee, a panellist commented:

"Nobody is challenging the need for a legal solution—nobody is challenging the method."—[*Official Report*, *Rural Affairs, Climate Change and Environment Committee*, 4 December 2013; c 3099.]

Does the draft order provide the most appropriate legal solution to the defect? Is there any alternative path that you would like to be considered?

Mike Gascoigne: I will respond from a lawyer's point of view. The committee that I chair takes the view that the draft order is spot on. It does what it has to do, and it does it well.

Martin Hall: The Scottish agricultural arbiters take the view that the right steps are being taken. We would not wish to pursue another route.

Malcolm Taylor: That is echoed by the RICS. We feel that the route is equitable to the parties and should be pursued.

Richard Lyle: It is interesting that the three people here are all going down the same road. Thank you.

Claudia Beamish: The Supreme Court judgment on 24 April 2013 considered whether the legislation strikes a fair balance between different interests. The court said in paragraph 34:

"An interference must achieve a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".

Does the draft order strike a fair balance between the interests of the landlord and those of the tenant?

Mike Gascoigne: Let us take a step back. In the 2003 act there was a provision that has, some 10 years later, been proved to be inappropriate. If there is to be a restitution, there is a need to address where restitution must happen, as the draft order properly does, because tenancies inevitably involve two parties, the interests of which do not always coincide.

How the two parties to the tenancy—rather than just the landlord, who is the hurt party in the judgment—then square up and find a way forward is another, allied matter. There is a mix of the two elements.

The Convener: Does anyone else want to comment?

Martin Hall: It is a difficult question. There will always be one party that suffers and one that is put back in the position that they should have been in. I do not think that there is any other route.

As Mike Gascoigne said, it is important that there is a link with the third element, which is redress for the party who suffers. It is also important that the parties are not caught up in a further legal process to pursue a compensation scheme—or whatever it might be. There must be a clear path, with a short and aided process, so that parties are not forced into conflict yet again.

Malcolm Taylor: The phrase "fair balance" represents an attempt to put both parties back to where they were on the date when notices were served or when the wrong was done. The RICS thinks that that is fair, in that both parties will start afresh. The approach must be fair to landlord, tenant and the wider public interest.

Claudia Beamish: Thank you all for your responses. Does anyone think it appropriate to comment on concerns about the order's implications for tenants' human rights? We must

bear in mind that the Supreme Court has taken a position.

Mike Gascoigne: Again, the answer to your question lies in the nature of the problem. The problem is that landlords' positions were being prejudiced by a parliamentary provision. However, landlords are not the only people who are involved; the tenant is inevitably involved, because there is a contract between tenant and landlord.

Let us put the clock back: before the change happened, a lease was granted by a landlord to a limited partnership, which was his or her tenant. The starting point for putting things right is whether the limited partnership is allowed to remain for a period beyond what the landlord will have as a means of getting rid of the tenant.

The concern of parties who represent tenants' interests is whether tenants will get a raw deal. The Law Society's judgment is that the deal is about right. It gives people an opportunity to negotiate for some kind of new operation, which might be as little as three years but could be a lot longer—it is a matter for discussion.

Claudia Beamish: Do panellists have any other comments on this issue?

Martin Hall: We have not taken legal advice on the issue from a practical valuer point of view, as it were. It is perceivable that rights that have been granted to tenants since the 2003 act will be taken away, and there may be human rights issues, as was touched on in the previous evidence session. I have nothing to add to that.

Malcolm Taylor: There may well be a human rights issue. As Mike Gascoigne said, if we go back to where the parties were at the start of the issue, there should not necessarily be a detrimental impact on tenants' human rights.

Nigel Don: Good morning gentlemen. I want to pursue that point. There is a risk that we see the issue purely in legal terms—I am as guilty of that as anybody—when, I guess, it is one of fairness. Human rights reflect what every kid knows when they say, "It's not fair."

As observers of the rural community and the people who are affected by the issue, can you find examples of where it would not be fair for the tenant not to be able to continue to farm the property into which I presume that they have invested a great deal of their life and money? Is it automatically fair that the tenant loses his tenancy if the landlord chooses to take it back?

Mike Gascoigne: What might be fair for the tenant is for him to be put back to where he was, with the expectation that he had in 2003 as to how long the arrangement was likely to continue, given the nature of the beast, which is that the trigger for pulling the tenancy out of the ground was with the landlord and not the tenant. That might be the starting point.

In the mix is the fact that the tenant has had 10 years of a much superior type of tenancy: one in which, if he died, it was conveyed to his heir. That could not have happened with a limited partnership tenancy because a limited partnership cannot have an heir.

Nigel Don: Forgive me for interrupting—I do not want to prevent your colleagues from coming in on my original question—but I understand that.

Surely, that tenant—who, as you say, might have died and passed on the tenancy; indeed some may have done that—had, by dint of having a full 1991 act tenancy, the expectation of holding on to it as long as he had progeny and therefore might well have invested not just money but effort in a way that he would not have done had he been in the original position. In other words, putting him back to the original position of the limited partnership tenancy might not be fair to him.

Mike Gascoigne: The issue of improvements made by tenants are fairly dealt with in the 2003 act and the 1991 act. Provided that the tenant co-operates in getting the notices right, he has a right to compensation at the end of his tenancy for the betterment of the farm throughout his time there, provided that the improvements were made by him.

If the tenant made the improvements in the right way and as the acts require—if he gave notice to the landlord of what he intended to do—there is no question of him not being compensated for what he did during the past 10 years. He has a claim at the end of his tenancy. The improvements are not lost to him; he gets value for what he has left behind.

Nigel Don: So you believe that it would be fair.

Mike Gascoigne: Yes. The landlord will recognise that, at the end of a tenancy, a claim for compensation on a variety of fronts will always come in from the tenant. The landlord is ready to receive that.

Malcolm Taylor: At the time when the parties entered the agreement, the limited partnership would have been set up for a specific purpose and would have been arranged for a period of 10, 12 or 15 years.

At that time, the tenant taking the limited partnership had the expectation that they would be farming for 10 or 15 years. In fairness, that tenant should not be in a better position because of the defect in the legislation. They knew that they were signing up for five, 10 or however many years for a limited partnership tenancy and that at the end of the period the landlord could serve the correct notices; provided that they were served in the right

form at the right time, the limited partnership would dissolve and the farmer tenant would have no tenancy.

If we consider the limited partnership agreement that the parties entered into, therefore, what is happening now is fair.

11:30

Nigel Don: But I am looking at it now with hindsight. Those in group 2 have a 1991 tenancy. Is it fair on them in particular?

Malcolm Taylor: Possibly not, but on the other hand they have acquired a right that they would never have expected to have.

Nigel Don: Which is going to be taken away and which they might have acted on the basis of.

Malcolm Taylor: That is true but, as Mike Gascoigne said, the compensation provisions in the acts will put them back into the same position. However, if we are taking farming as a sort of personal activity—

Nigel Don: I am.

Malcolm Taylor: Then, yes, they might lose the right to be a farmer.

Nigel Don: I am conscious that there are sons who will have come back to the land to take over when dad, predictably, proposes to give up. There will also be daughters who will have come back for mums—I am certainly not trying to be gender specific here. I am sure that there will be some of those instances.

I am just questioning. As observers, you are not intimately involved in those cases—I would not expect you to comment if you were—but is it actually fair to take away the 1991 opportunity and expectation?

Martin Hall: Perhaps I can come in here. I think that none of this is fair, but unfortunately we are in the position we are in. People have been given expectations and rights that they would not have had if things had been done differently, so we are in the unfortunate position that none of this is fair.

We are also caught up in other factors that are all influencing people's decisions in the background. For example, we have the tenants review going on and the absolute right to buy still in the mix. That is why I think that the role of mediation and finding a solution is much more important in order to try to keep people in farms rather than put them out.

The Convener: This question is for Malcolm Taylor first. Written evidence from RICS stated that

"the Order should specify that Right to Buy does not apply to any of these cases,"

—group 2 cases—

"and that there must be some protection against any threat of Right to Buy during the process."

Why is it unjust for the right to buy potentially to apply to cases in group 2?

Malcolm Taylor: When this whole problem started, there was no right to buy and it had not been thought about. Under the current thinking, we feel that there should be some protection for landlords and that there should not be a right to buy while those in group 2 are moving through the process.

The Convener: Indeed. Is that it on that question for the panel? It seems so.

That is useful to know, given that we understand that the process should be complete by around the end of November 2015. It seems unlikely that laws or whatever is made would be effective before that, so perhaps there is no threat after all.

Malcolm Taylor: With the greatest respect, convener, the word "should" was in the RICS quotation. We must try to look after both parties. The RICS charter says that we must look fairly on both parties. What we said in our written evidence was an attempt to ensure that both sides are covered.

The Convener: Okay. Thank you. The next question is from Nigel Don.

Nigel Don: I would like to pick up on a particular piece of evidence from the Scottish Agricultural Arbiters and Valuers Association. Its submission questions whether the proposed draft remedial order deals fairly with those who are in group 5—in other words, those who have already made some bilateral agreement. My question is for everyone on the panel. Does the fact that groups 4 and 5 have in effect been excluded because, in principle, the judgment does not apply to them mean that it is right that they should be left out of the order and that nothing should be done to help them?

Mike Gascoigne: When it was considering the draft order, the Law Society's rural affairs committee took groups 4 and 5 as a matter of discussion. I do not think that I am telling tales out of school when I say that the first draft of the Law Society's response to this committee suggested that more emphasis should be placed on the fact that there might be wrongs and claims in relation to which a route other than the order might have to be taken in order to find solutions. In the end, we decided that it was up to the member organisations that look after tenant farmers in particular to take that up, as our main aim in considering draft legislation that comes from the

Parliament is to ensure that it is equitable and good law. We did not think that the issue should be raised by us.

Martin Hall: The thinking behind the comments and submissions that were made was that those groups should not be excluded from taking the compensation route. A practical and workable solution might have been reached, but losses have been suffered as a result of decisions that have been made based on the framework of legislation. If that is changed, compensation might be payable to one or other of those parties.

Nigel Don: Am I right in thinking that you are not suggesting that there should be any change to their legal status in the order?

Martin Hall: That is correct.

Malcolm Taylor: Similarly, the RICS feels that there are individuals in those groups who might be affected by the compensation claim, but the order should not necessarily affect them, because it would be extremely difficult to try to unpick some of those cases.

Nigel Don: I think that we are bound to come on to the issue of compensation. I have reached the point of recognising that anyone who is concerned with the issue might have a claim for compensation. That is understood, but the order does not specifically deal with that, perhaps for the reasons that we have articulated.

Earlier, we discussed the fact that those in group 3—in other words, those with sisted cases—seem, under article 3 of the order, to be in a slightly different position from those in group 2, who did not take their case to the court. Article 3 gives the Land Court the opportunity to deal with the cases

"in such manner as it considers reasonable",

which does not apply to any other cases. Is it fair that they should be treated differently? Do you have any thoughts on whether that might open up the possibility that, on the basis of the order, the tenant might retain possession?

Mike Gascoigne: If the order is passed and the Land Court is faced with this situation as a reality, I think that it will find it difficult to reach the conclusion that you suggest it could reach. However, the current wording gives it that opportunity. I find it difficult to see on what basis the court would judge that the landlord should never get his land back unless there was a failure of the tenant at some point. That seems to me to be a step that the Land Court would take only in extremis.

Nigel Don: Is it nonetheless reasonable—or is it perhaps unreasonable—for the options under article 3 to be different from the ones that are available for group 2?

Mike Gascoigne: On a particular level, it could be argued that that option for the court should not be there. That would take away the need for your question, and on that basis, you should possibly question why that option is there.

Nigel Don: Yes. Thank you. I am not in a position to tell you why the option is there; I am just asking whether it should be. You may have got to the nub of the point.

The Convener: As nobody else wants to comment on that, I call Richard Lyle, who has a question on mediation.

Richard Lyle: New section 72A(2) introduces what the Government describes as a "cooling off period". In written evidence to the committee, Scottish Land & Estates states that the cooling-off period is

"Possibly not compliant with ECHR".

What is the panel's understanding of the wording of the cooling-off period? Do you have any concerns about it, especially any that relate to ECHR?

Martin Hall: Are you referring to the 12-month cooling-off period that has been suggested?

Richard Lyle: Yes.

Martin Hall: I do not have any views in relation to ECHR, but 12 months seems a reasonable period to us as a body, as we have already discussed.

The Convener: The period can be anything between six months and 18 months, depending on whether the landlord serves notice, I guess. You said that you do not have any views on that in relation to ECHR. Does anyone else?

Malcolm Taylor: The RICS is quite happy with the idea of having as long a time as possible to try to reach agreement. Again, I will not tell tales, but one of our members said that it might actually be a heating-up period. However, we hope that relationships will not take that direction. We are trying to find a resolution to what is a fairly thorny issue, so a longer period for the parties to discuss things openly with each other is to be welcomed.

Richard Lyle: Do the panellists agree with the STFA that the Government's agricultural holdings review, which I believe will not finish until 2015, will have a bearing on the cooling-off period? Also, what would be the effect of delaying the operation of the order until after that review is completed?

Mike Gascoigne: As I understand it, the review report will be out at the end of 2014.

Richard Lyle: I think that there is a slight mix-up. Two reviews are going on at the moment, as I believe that there is a land review as well. The agricultural holdings review is due to finish in 2015.

Mike Gascoigne: I think that the agricultural holdings review is due to report by the end of next year—2014. I genuinely do not see it as a problem.

Malcolm Taylor: Similarly, we do not see that as a real issue, but I reiterate my point that the ultimate right to buy would in some instances be a concern to some owners or landowners.

Martin Hall: SAAVA is obviously aware that the reviews are going on, but we are unclear about whether they will be followed through. We understand that that may be reliant on whether there is a yes vote next September. There is therefore some uncertainty out there about whether the reviews will be followed through into enactments within a reasonable timeframe. We would not want the order to be held up because of that.

The Convener: Whatever the timeframe, the Government—if it holds together and continues in the way that it is going—will be here until May 2016, or March 2016. Therefore, there is time to both sort out the questions that relate to the 2003 act and make any other laws that the Government chooses up to that point.

Martin Hall: That is good if that is the case, but in the outside world there is some uncertainty about that.

The Convener: About the Government being here until 2016?

Martin Hall: No, no. I mean about the fact that a great deal of other business could gain priority over the issue that we are discussing.

The Convener: Thank you for your comments on that. Alex Fergusson has a question about compensation.

11:45

Alex Fergusson: Good morning, gentlemen. I think that you all heard the discussion that we had with the previous panel on the issue of compensation. In its written evidence, the RICS states that the Government might wish to

"consider the provision of formal mechanics or procedure for compensation".

You will have heard that that possibility did not receive a particularly positive response from the previous panel. I want to continue that conversation. The Scottish Government has said that it has "great difficulty" in accepting a generic liability, yet everybody agrees that compensation will almost inevitably be part of the resolution that arises. I ask the witnesses to expand on their thoughts on that general issue, starting with Mr Taylor.

Malcolm Taylor: We would agree that there is no model that can be lifted from case to case and used to work out the compensation for the parties. The point that we tried to put across in our written submission is that agricultural valuations are in some instances complicated and lengthy affairs, and we suggest that there should be an agreed format—although not necessarily heads of terms—for carrying out the valuation work when it eventually comes.

We should not lose sight of the fact that all cases are completely different. We cannot use a model valuation for a farm in Caithness, take it down to Dumfries and then bring it back to Angus. That just does not work. It might be possible for certain elements of the compensation calculations or layout to be followed from property to property, but there cannot be a generic approach that sets out how properties are valued. That is the end of the story.

Martin Hall: I understood the question slightly differently—I thought that Mr Fergusson was asking whether the Scottish Government should have a generic liability, and I think that it should. All the witnesses who have been at the committee this morning seem to believe that. It is the only way in which we will put parties back in the position that they would have been in in 2003, in so far as money can do that. In that respect, the compulsory purchase code is a framework that could be used.

I echo Malcolm Taylor's point that it would be useful to have a broad framework to work to, but that every case will be different. It is difficult to comment on that at this stage.

Mike Gascoigne: The Law Society recognises the Government's position. There is an underlying theme about not wanting to accept a liability in the process of getting the order sorted. However, the Law Society believes that the Government will in due course find arrangements that will allow for a compensation discussion to happen between the relevant affected parties.

Alex Fergusson: Thank you for those comments. It seemed to me that the previous panel all agreed that there should be some recognition of liability—I think that that is the appropriate word—in the order. Do you agree?

Martin Hall: Yes.

Malcolm Taylor: Yes.

Mike Gascoigne: I am not altogether certain that I agree.

Alex Fergusson: That is interesting. Why is that?

Mike Gascoigne: Having seen the proceedings of the committee's previous meeting and David Balharry's answers, I think that the Government appears to have some reluctance about opening its chest and saying, "Come on, hit us," while accepting that there probably is liability lying there and that other means of dealing with that might come forth in due course, possibly as the order comes into effect. That is my reading.

Alex Fergusson: I take it that you were not referring to a treasure chest, although maybe you were—I will leave that open.

The previous panel said that we need to resolve the situation as rapidly as we can for the sake of everybody who is involved so that they know where they are, and I think that everybody would agree with that. Certainty has been mentioned on several occasions, and I will not argue with the need for that. What is the best way to deal with the issue of compensation?

Mike Gascoigne: The Government should be represented in the process in which the parties try to find a way forward following the passage of the order. It should step up to the plate and have a representative in that process.

Martin Hall: I was going to answer along the same lines. It is important that there is a good case management system through the mediation process. That would involve the quantification of a claim if somebody considered that they had one, and Government involvement in the three-way mediation, because it is part of the same discussion.

Malcolm Taylor: We would echo Martin Hall's comments. Provided that the costs are all kept within reason for all parties—the Scottish Government, the tenant and the owner or landlord—there must be a model to ensure that the process is equitable to all and the costs do not run away for them.

Nigel Don: I go back to the issue that I left the previous panel with—the time bar within which a person must bring an action, otherwise they will be at the Government's mercy. It was reasonably suggested that that could be five years, but I threw in the hand grenade and said that it could be one year. Does Mike Gascoigne have any thoughts on whether the time bar could be one year, given that we are talking about ECHR claims?

Mike Gascoigne: It could very well be one year. I was listening and thinking at the same time, and it seems to me that there is an opportunity to knock the matter on the head by adding to the draft order a provision for time barring that is specific to the problem. Perhaps that could be four years from next November. That is a suggestion.

Stuart McMillan (West Scotland) (SNP): My question follows on from Nigel Don's question. In your opening comments, you each said that you thought that the order is fine and good as it stands; I think that one of the phrases that was used was along the lines of "It hits the nail on the head." However, in response to Nigel Don's question, Mr Gascoigne suggested that an addition regarding the time bar could potentially go into the order.

Mike Gascoigne: It is for the Government to decide whether it will buy into my suggestion. If there is an issue, it seems to me that it is in the Government's hands to sort it. We should not fiddle around with the existing law of time bar, which does not fit this rather unique occasion.

Graeme Dey: For clarity, will Malcolm Taylor expand a little on an aspect of the RICS's written submission? It states:

> "given the expertise of chartered surveyors, the Scottish Government may wish to consider the offer that RICS can provide in valuation services or advice in the way the compensation can, and should, be calculated."

Was that offer made in the spirit of Christmas and therefore on a laudable free or gratis basis, or is the RICS touting for business, as it is, of course, perfectly entitled to do?

Malcolm Taylor: I suspect both. [*Laughter*.] In all seriousness, to try to pick our way through things, I note that there will be a difficult set of calculations to look at at some point. That offer is open, and I suspect that our SAAVA colleagues also have views on how the valuation methodology could be adapted and used. I think that we just wanted to say that the Government should not sit and think, "How do we do it?" There are people out and about who would be perfectly happy to assist.

The Convener: Angus McCall said that he hoped that there would not be a gravy train. It strikes me that, in an age of austerity, a gravy train of compensation is not exactly the kind of thing that we would want to come out of this.

Thank you for your evidence, gentlemen. I hope that we will build on it when we meet the cabinet secretary.

As I mentioned earlier, this is the committee's last meeting in 2013. At the next meeting, which will be on 15 January, we will take evidence on the proposed draft order from the cabinet secretary and consider our draft letter to the Scottish Government on deer management.

That leaves me to thank our clerks, Scottish Parliament information centre researchers, official reporters, the media, broadcasters and security staff for all their hard work this year, and all the witnesses at our many meetings for their time and efforts.

I also, of course, thank all the stakeholders, the cabinet secretary, the ministers and the Scottish Government officials who have participated in our meetings this year and enabled the committee to do its job of scrutinising legislation.

Meeting closed at 11:55.

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