The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 15 January 2014

Session 4

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CONTENTS

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
1st Meeting 2014, 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:

Paul Cackette (Scottish Government)
Richard Lochhead (Cabinet Secretary for Rural Affairs and the Environment)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 2

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 15 January 2014

[The Convener *opened the meeting at 10:02*]

Subordinate Legislation

Feed (Hygiene and Enforcement) and Animal Feed (Scotland) Amendment Regulations 2013 (SSI 2013/340)

The Convener (Rob Gibson): Good morning and a happy old new year to everyone. This is the first meeting in 2014 of the Rural Affairs, Climate Change and Environment Committee. I know that we are already a few weeks into January, but I hope that everyone had a good break over the festive period. On behalf of the committee, I welcome everyone back. I ask members and the public to turn off their phones because they can affect the sound system.

The first item on the agenda is consideration of subordinate legislation. The committee should note that no motion to annul has been lodged. I refer members to the accompanying paper.

Does the committee agree that it does not wish to make any recommendations on the regulations?

Members *indicated agreement.*

Angus MacDonald (Falkirk East) (SNP): I am encouraged to note that no businesses require further approval under the legislation and am pleased to see that all four small to medium-sized Scottish firms that produce fish oils for animal feeds currently meet the requirements.

The Convener: That point about the realities of the regulations is well worth putting on the record.

Proposed Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014

10:03

The Convener: For item 2, which is consideration of the proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014, the committee will take evidence from the Cabinet Secretary for Rural Affairs and the Environment. I therefore welcome to the meeting the cabinet secretary and his Scottish Government officials: David Balharry, who is project team leader on the European convention on human rights compliance order, and Paul Cackette, who is deputy solicitor and head of group 2. The cabinet secretary wishes to make an opening statement.

The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead): Thank you, convener. I wish members a belated happy new year on my first appearance before the committee in 2014. I also give a special welcome and bid happy new year to the committee's new member, Cara Hilton, on my first appearance at committee with her as a member. Given the very important topic that we have to discuss this morning, I very much welcome the opportunity to say a few words and perhaps to clarify a number of important points before we get under way with the question and answer session.

By way of background, the committee will be aware that a decade ago it was recognised in the Agricultural Holdings (Scotland) Act 2003 that a new system was needed to offer tenants security of tenure and landlords the prospect of recovering vacant possession. The 2003 act sought to address that by creating short limited duration tenancies and limited duration tenancies.

However, before the act's arrival, the market had devised for the industry limited partnerships as a means of giving landlords the confidence that they could recover vacant possession. Although limited partnerships were attractive to landlords, they were seen by many as being disadvantageous to existing tenants because of reduced security of tenure and absence of the legal cover that would be associated with the normal checks and balances of a secure tenancy.

In the light of events that happened during the passage of the Agricultural Holdings (Scotland) Bill, the 2003 act provided a mechanism in legislation for limited partnerships to be brought to an end in a way that respected tenants' needs. Those solutions are detailed in sections 72 and 73. Section 72 describes the legal process for moving from a limited partnership into the process that is described in section 73 for bringing a limited

partnership to an end at the end of its contractual period. The process that is outlined in section 73 provides tenants with a minimum of two years' notice and requires the landlord to terminate the tenancy by giving intimation of their intention to do so and then serving notice to quit.

During the passage of the bill, a number of landlords served advance notices on tenants to quit their farms when the limited partnership contracts expired. As members will be well aware, many commentators believe that notices might have been served in an attempt to circumvent the possibility that the bill might be amended to bring with it an absolute right to buy.

When the legislation came into force in June 2003, it included for any landlord who had served a notice to quit between September 2002 and June 2003 the anti-avoidance provision that tenants would gain a secure tenancy under the Agricultural Holdings (Scotland) Act 1991. On 24 April 2013, the Supreme Court concluded that, although it was not wrong in principle, that anti-avoidance measure was contrary to landlords' human rights because it was arbitrary and disproportionate. In its judgment, the Supreme Court provided guidance on the way forward and recognised that, since the legislation had been in effect since 2003, a number of people over that time who were not parties to the court case in question would nevertheless have been affected by the ruling. Consequently, the Supreme Court provided the Scottish Parliament, guided by ministers, with the opportunity to consider with the industry until April this year solutions that respect the landlords' rights under the European convention on human rights and to bring them into effect.

In drafting the order, we have had to walk a very difficult line in balancing the ECHR requirements of both the tenant and landlord. I believe that the route that we have taken seeks to provide a remedy that will alter only non-compliant ECHR outcomes and that, in providing for those arrangements to be altered, we have recognised the practicalities of farming and farm businesses and the need for an orderly transition.

I also want to take this opportunity to record my appreciation to all stakeholders for their positive engagement in working with officials to find a solution to what are—as I am sure the committee has discovered—very difficult and complex issues. When the committee took evidence from stakeholders in December, two issues in particular—compensation and the absolute right to buy—were highlighted. It might help if I make my position clear on both, in advance of members' questions.

First, on compensation, the order's sole purpose is to remedy the "unlawful" legislative outcomes in section 72 that have resulted from the defect that was identified in the Supreme Court judgment. I was heartened by stakeholders' recognition that, given the complexity of and differences between the cases in question, it is simply not possible or advisable to provide a generic compensation scheme. For that reason, we are not making provision for such a scheme.

However, stakeholders have made it clear in their statements and submissions to the committee and us that they would like the Scottish Government to provide the assurance that we fully understand the harm that the defect has caused, and that compensation claims may arise as a result. I fully accept that, in some circumstances, correcting the legislative implications through the order might be only part of the route to giving satisfaction to those who have been affected.

For those who are affected by the order, we are providing £40,000 of funding for mediation with independent accredited mediators. That is an opportunity for reconciliation and for all of us to move forward. I encourage all parties to take the opportunity to work together, and with the Scottish Government, to establish the facts and circumstances and to explore all the options for finding a solution, rather than to put more money into lawyers' pockets than is necessary.

Stakeholders have highlighted the importance of the Scottish Government's being part of the mediation process. When that approach is acceptable to the tenant and the landlord, I will strongly support it. We have to look at each case on its merits, but given the circumstances, I reassure those who believe that they have legitimate claims for compensation that I am not, at this stage, ruling out going down the road of compensation. Of course, I am sympathetic to people who have been harmed by the defect.

There has been confusion and anxiety about how the absolute right to buy might affect some of the cases that have been caught by the defect. The key to that confusion is the distinction between secure 1991 act tenancies and 1991 act tenancies that are under limited partnerships. Although limited partnerships are 1991 act tenancies, the key is that limited partnership 1991 act tenancies do not carry the security of being heritable tenancies.

The committee might recall that I said—on the record—in September 2013 that

"consideration of the absolute right to buy will be restricted to secure agricultural tenancies under the Agricultural Holdings (Scotland) Act 1991."—[*Official Report*, *Rural Affairs, Climate Change and Environment Committee*, 18 September 2013; c 2557.]

In November 2013, I said that

"consideration will be limited to traditional secure 1991 agricultural tenancies".

I make it clear that those who have extended limited partnerships as part of a voluntary agreement, and those who remain in limited partnership 1991 act tenancies, are not to be included in the scope of the review of the absolute right to buy and secure agricultural tenancies under the 1991 act.

I accept that, in group 2, some tenants have ended up with a secure 1991 act tenancy, but that outcome has been judged to be unlawful and is being addressed by the remedy. I also provide assurance that, if the landlord does not convert a secure 1991 act tenancy into a non-secure tenancy, we will exempt the farm from the absolute right to buy, if that measure is introduced as a result of the on-going review of agricultural holdings legislation.

This has been an extremely complex legal case, so I have no doubt that I will lean on my colleagues to my left and right to help me through the question and answer session. I hope that, following questions, the committee will be able to agree with the Law Society of Scotland's comment that the draft order

"does the right things for the right reasons."—[*Official Report*, *Rural Affairs, Climate Change and Environment Committee*, 18 December 2013; c 3149.]

The Convener: We welcome your statement, which has helped with some of the questions that we wish to ask. We will kick off with ballpark situations. Several people, including Richard Blake of Scottish Land & Estates, still suggest that some people might be aware of the situation but might not have identified themselves because of fear that their doing so might prejudice their position. In evidence to the committee, stakeholders have suggested that some people who are affected by the legislative defect have not identified themselves, or might have sold their farms or whatever. Has the Scottish Government done anything more—can it do anything more—to identify all those who are affected?

Richard Lochhead: When we received the court judgment, we realised that we had to deal with a difficult situation that would affect the livelihoods and lives of a number of tenant farmers and which would affect landlords. When the 2003 bill went through Parliament, there was a lot of anecdotal evidence that perhaps 300 notices to quit had been served to tenants with limited partnerships. However, we do not know how many notices were served.

In 2013 and 2014 we have relied on intelligence from the industry and all stakeholders in trying to calculate to the best of our ability how many tenancies might have been affected. We spoke to stakeholders and, using all the usual channels, publicised the fact that we wanted anyone who felt that they had been affected to get in touch with the Scottish Government. At present, about 60 farmers who feel that they have been affected have registered with the Scottish Government. As the committee knows from a previous meeting, we have whittled that down to 20 or so farms or tenancies that face being directly affected in the current situation.

10:15

On the positive side, we can take comfort from the fact that we are relatively confident that the number of farmers who are affected is not in the hundreds. From speaking to stakeholders, we know that that is their view, too. Although we do not have an exact figure for how many tenancies are affected, we feel that the number is in double rather than treble figures. We are therefore thankful that, despite the angst and the slight panic that we had when we received the court judgment, what was feared has not come to fruition and we now have a better feel for how many people are affected, although I cannot give the committee any guarantees on the numbers.

On publicity, I hope that this meeting and the on-going media coverage for the past year or so will have got the word out there that anyone who feels that they are affected should get in touch with their association—which will, in turn, get in touch with us—or directly with the Scottish Government. I am relatively confident that most people who are seriously affected will be aware of what is happening.

The Convener: On treatment of groups 1 to 3 and ECHR compatibility, why does the order provide different outcomes for the different identified groups, in terms of legal outcome and legal process?

Richard Lochhead: I might ask colleagues to respond in a second, but first I will give a broad-brush answer. We have painstakingly analysed the individual circumstances of the landlords and tenants who have contacted the Government. Although, on the one hand, the Government wants to give certainty to tenants and landlords so that we can move on, on the other hand, we want to protect the interests of those who are involved. We do not want to upset people's businesses needlessly. In particular, we do not want tenants who perhaps believed that they were in a secure tenancy and who suddenly found out that they are not, with all the turmoil that comes with that, to go through needless change.

We have looked strictly at the legal position of each of the different circumstances that we are aware of and have put them into the groups that the committee has discussed. Some people are much more affected than others. Some have moved on and circumstances have changed. For instance, a secure tenancy that has come to an

end because there was no one in place to inherit it is now basically outwith the scope of the remedy. A number of other people, particularly group 2 farmers, have been getting on with life based on the understanding that they have been in a secure tenancy, but have suddenly had the bombshell of the court judgment. Those in group 2 are clearly affected; the other groups are affected in different ways.

That has been the general approach. I can give you the best estimate of the numbers in each group. In group 1, which is cases that have yet to reach a termination date, we reckon that there are a dozen farmers. In group 3, which is the sisted cases, we reckon that there are five tenancies. Also, in group 2, we reckon that there are five or so cases—as I said, they are clearly affected. Overall, perhaps 20 tenancies are directly affected in one way or another.

I do not know whether Paul Cackette wants to add anything.

Paul Cackette (Scottish Government): I will add one or two comments. Our approach has been to try to secure a consistent outcome for everybody who is affected, and we think that we have done so. We felt that it was appropriate to ensure that the tenancies are converted to section 73 tenancies. We have endeavoured to do that in a consistent way, not least because one of the court's criticisms was about the inconsistency that had occurred before.

The three groups that are mainly affected by the remedial order will all end up with section 73 tenancies, although they will get there by different routes—that is where the different approaches appear—because their circumstances vary. Group 3 is the most obviously different group. Those cases are already in the courts system and are on-going cases; we felt that it was appropriate for on-going cases to be resolved by the Land Court. They are in the Land Court already, so the Land Court is the place where we can get the section 73 solution, not an order. For those who are affected because their cases did not get into court—group 2—there is a different solution to get to the same point. Equally, for group 1, for which the solution date has not yet come, their differing circumstances will lead to different avenues being taken to get to the same outcome.

We were comforted by the judgment of the Supreme Court in drawing out the inconsistent outcomes that were provided for in 2003. It said that one of the problems for Mr Salvesen as an affected landlord was that he did not get "the benefit"—that is the phrase that the court used—of section 73. That comforts us in our view that section 73 is an ECHR compliant solution. The idea is to draw everybody consistently to the same end point. Because of the way in which the section has operated, some leases will already be covered by section 73 because of a notice served after 1 July 2003 leading to that situation having already arisen. So, the consistency applies to all circumstances.

The Convener: Thank you for that helpful answer.

Alex Fergusson (Galloway and West Dumfries) (Con): In both written and oral evidence that the committee has received, concern has been expressed on all sides of the debate that ECHR compliance will be extremely difficult to achieve in the round. Are you confident that you will be able to achieve that compliance?

Richard Lochhead: Yes, we are confident that we will achieve ECHR compliance.

Alex Fergusson: The basis of the whole problem was a Supreme Court judgment that—if I have got this right—said that the human rights of a landlord had not been upheld and had therefore been infringed. In the light of that original judgment, which is the cause of the whole issue, can you give an assurance that the outcome will be that affected landlords will be put back in the position that they were in before the 2003 act was enacted?

Richard Lochhead: The Government proposes this remedy to address those cases that are unlawful according to Supreme Court judgments, which will have to be made lawful. That is our approach, and our policy intention is to balance the interests of the tenants and landlords as we take the matter forward. Because so many different circumstances have arisen between 2003 and now, however, we cannot put forward a proposal to reverse everything to pre-2003, so we are addressing what is unlawful and making it lawful.

Alex Fergusson: I absolutely understand that position and have a lot of sympathy with it. However, given the original finding of the Supreme Court, can you do that without being open to further challenge from a landlord or landlords?

Richard Lochhead: I am not a lawyer, so I ask my colleagues to correct me if I say anything that is inaccurate from a legal perspective. As I indicated in my opening comments, the Supreme Court judgment was helpful in that it recognised, among a number of issues, the predicament that the Government would be in in trying to address the matter. We are reflecting what we see as the court judgment and must address what is unlawful. As I said before—I am sorry to repeat the point—it is complex and we cannot turn the clock back to 2003 and create the circumstances that existed before then, so we must address what is unlawful and make it lawful.

Alex Fergusson: I appreciate the complexity of it all. Thank you.

Nigel Don (Angus North and Mearns) (SNP): Good morning, gentlemen. I think that I am beginning to understand that, as all the parties who are involved started from a limited partnership, they understood at the beginning that the landlord would get his land back. It therefore sounds perfectly reasonable to take people through a section 73 process that will eventually give the landlord his land back. However, there can surely be an exception—this has been pointed out to us, and these people would now be in group 2—where, regardless of a misunderstanding of the law, the tenant may have been given in good faith and possibly for value a 1991 heritable tenancy that, as far I can see, the order is going to take away from them.

If I understood you correctly, you said at the beginning that you think that that is "unlawful"—I quote from your opening statement. However, it has been suggested that it is not, because it might be that the balance of the ECHR is with the tenant at that point, and that might be entirely consistent with the Supreme Court's intention. Can I first get your response to that, at least as an assertion of a possibility, and then inquire what you feel the order might do about it?

Richard Lochhead: Notwithstanding the court judgments, which we have to address because of the unlawful aspects of the 2003 act that have been highlighted, I have bent over backwards and we have worked painstakingly to exhaust all avenues to avoid being in a position where a tenant in a secure tenancy would suddenly be in a much more uncertain position.

As a policy intention, working within the law, and to ensure that we address those elements that are unlawful, I have wanted to protect the interests of tenants, for obvious reasons. We have an unfortunate situation where a tenant may have been living with the understanding that they are in a secure tenancy and suddenly there is turmoil, potentially. Likewise, we have to balance the interests of the landlord and the tenant. That is a difficult balancing act, as I said at the beginning.

That is why we are taking the approach that we are taking with the remedy, where there is a window of opportunity for the landlord to convert from a section 72 tenancy to a section 73 tenancy. The reason for that is that there are so many different circumstances out there. I do not know the situations that exist between the tenants and the landlords in all the cases that are affected. However, the court judgment exists, and it gives a judgment on the ECHR aspects. It is difficult for us to speculate or comment on anything else, because we have the court judgment that gives us the view.

Nigel Don: Do you accept that, at least in principle, what I proposed might be the case? I am not a lawyer either, and the last thing that I want to do is to second guess what a court would say. I do not have an inside track on this, by the way; I do not have the information. However, it is just possible that, in one or more of the five cases, folk acquired a heritable 1991 tenancy in good faith and it was the landlord's view that he should have given that, but the landlord is now in a position where the order will allow him to renege on that.

Richard Lochhead: This case refers only to those circumstances where the anti-avoidance measures were put in place, so we are talking about specific circumstances. We are not talking about other circumstances where the normal course of events may lead to the creation of a secure tenancy. We are talking about specific circumstances, which are where the anti-avoidance measures were put in place.

Nigel Don: I do not dispute that. It is clear that we are referring only to a case where notice was served in the time period. However, I am still picking up—I accept that this is potentially purely theoretical, but it might not be—that the subsequent outcome might have been intended to be a heritable 1991 tenancy, potentially for value and at least agreed on in good faith by both parties. It seems to me that, with the order, we run the risk of taking that away unnecessarily when the balance of the ECHR might say that the tenant should have it.

I guess that the solution would be somehow to allow the prospect of cases—we are talking about only five cases—finishing up in the Land Court, where they could be sorted out. I come back to the basic point that the Land Court is bound to come up with ECHR-compliant solutions, so it would give the right answer.

10:30

Richard Lochhead: I have a couple of comments to make before I hand over to Paul Cackette. The first is about certainty, a plea for which we have had from tenants and landlords. They would like us to provide a fix that gives certainty. If we were to go down the route of allowing cases to go back to the Land Court—I guess that, ultimately, this is up to the tenants and the landlords—the uncertainty on the subject would continue, and we would not meet their plea for certainty. That is the plea that we have had from the industry.

You spoke about both parties acting in good faith. If such a relationship already exists, it can continue—there is nothing in the proposed remedy that says that it must change. The landlord will have the opportunity to continue with a secure tenancy by not converting it. With the remedy, we

are providing a means by which the unlawfulness—if that is a word—of the legislation can be fixed. However, if the tenant and the landlord want to continue with a secure tenancy, there is nothing to prevent that from happening if, as you said, both parties were happy with that and acted in good faith.

Paul Cackette: I add that the possibility that you are talking about is a theoretical one. We know that there are only five cases, but we do not know whether that situation arises. That is the main reason why there is an opt-in conversion that makes the landlord choose to take the active and positive step—it is not an onerous step, as has been suggested—to convert the tenancy. In that hypothetical example, if the landlord were acting in bad faith, because they came to a deal to allow the tenancy to arise, and they still converted the tenancy, they would be vulnerable to the tenant saying, "We came to a deal, which you have gone back on." As a result, the tenant might well be entitled to legal compensation at the end of the tenancy and could well make a claim of unjust enrichment—or, perhaps, breach of contract—against the landlord.

Therefore, the landlord must think extremely carefully about what to do. As the cabinet secretary said, your question is predicated on the parties acting in good faith, but you are suggesting that the landlord is not acting in good faith. I think that the landlord would have to take advice about whether they wanted to take the step of converting the tenancy if to do so would go back on a deal that they had previously come to with the tenant and would leave them vulnerable. I hope that landlords would not do that, because we want to move towards mediation and having a cooling-off period, which will involve positive and forward-looking relationships that can help to restore confidence in the sector. The mediation process would certainly not be helped if there was a risk of further litigation as a result of the landlord behaving in such a way. We hope that such a situation would be inconsistent with the general intention to make things work in a positive way for the future and with the landlord's legal liabilities.

The Convener: Excuse me for a second, Mr Don, but Claudia Beamish has a question, which she can ask if it is on that point.

Claudia Beamish (South Scotland) (Lab): It relates to a broader issue, but it falls within the context of the same point.

The Convener: All right. We will come back to Nigel Don after you have asked it.

Claudia Beamish: Good morning, cabinet secretary.

In your opening remarks and in response to questions, you have highlighted the need to protect the interests of tenants and to find a balance of interests in the remedial order. I have a broad question about the ECHR and the public interest. I would like you to put the Government's position on the record at this late stage, if you do not mind. In relation to the public interest argument, could the Government have opted to leave tenants in possession and to pay compensation to landlords? Why has the argument for the secure tenancy of the limited partnership tenants never been made? Could you clarify that?

Richard Lochhead: I hope that I have conveyed to the committee the fact that we have bent over backwards and have left no stone unturned in a bid to ensure that we support a vibrant tenancy sector in Scotland. Therefore, it is not in our interest to see tenant farmers being turfed off their farms because of a provision that was introduced back in 2003 but which has been found to be unlawful.

However, we have a legal framework in place. The issue has been exhausted; it has gone right through the legal process to the Supreme Court and the issue that you mentioned was, as I understand it, considered as part of the court's deliberations. Now we have the judgment and therefore an unlawful situation that must be made lawful.

Unfortunately, that is just where we are. However, we hope that the route that we have chosen to go down will minimise the disruption that might otherwise have been. The starting point was that we felt that hundreds of tenancies could be affected. With the route that we are taking and mediation as part of that, the number of those who are directly affected will, we hope, be as high as double figures, but—who knows?—we may get into single figures.

That has been our approach to the matter.

Nigel Don: I will go back and explore the previous point. I accept that it might be theoretical, because I genuinely do not know whether any tenant is actually in that position, but it seems to be perfectly possible that there is a tenant whose interest in retaining the heritable 1991 tenancy that they currently have might be substantial and might lead to the next Salvesen v Riddell, because we can do nothing in the order that prevents us from being taken back to court. The argument would relate to the ECHR and would be that the order did not adequately balance that tenant's rights with those of the landlord.

I ask you to reflect on whether it might be sensible to put something in the order that at least opened up the possibility of such folk being able to finish up in the Land Court rather more swiftly and more cheaply for all involved if that looked like the best answer. I am conscious that we are talking

about a handful of potential cases. It is probably no more than one or two, in reality, if there are any at all. I leave that thought with you, because I would not want to be the author of the next Salvesen v Riddell when we could see it coming.

I also wonder whether anything more needs to be said on the question of opting in rather than opting out, which we were going to get to later but which Paul Cackette has just commented on. Is there anything else that we ought to be aware of? Is there an ECHR argument about that, as well as the idea that it forces the landlord to think?

Richard Lochhead: We have chosen what we think is an appropriate route to fix the unlawfulness of the 2003 act. I have explained our policy intentions to you, so we feel that the order is the most proportionate way forward and, we hope, helps to minimise disruption for both parties by giving a cooling-off period for mediation, after which there is a window of opportunity for landlords to convert. That is a reasonable way forward and we will reflect on your other comment.

The Convener: In the light of what Nigel Don said and just to make it clear for the rest of us, what is your view of the Scottish Tenant Farmers Association's suggestion that proposals for dealing with groups 1 and 2 should be revisited?

Richard Lochhead: I guess that that comes back to the fact that we have identified various groups, some of which are in an unlawful position at the moment and some of which are in different circumstances. I am not sure what else I can say to answer that question. Perhaps Paul Cackette wants to comment on that point.

Paul Cackette: I would not really add anything. The only thing that I will say is that one of the suggestions of looking at the way that the sisted cases are allowed to continue to the Land Court should be applied across the board. In one sense, it would have been an easy option for us to say that it was all too difficult and that we could pass everything over to the Land Court for it to sort out, but I do not think that that would have been an acceptable approach for the Government to take to address the issue. It is certainly not desirable to encourage more litigation, as the cabinet secretary said.

The solution that we have tended to adopt is that, where cases are already in court, they must be dealt with in court, but we do not want cases to end up in court if they do not have to, and that is why we have taken a different approach. That leads to the differential avenues to what will we hope will be the same outcome.

The Convener: Thank you for that clarification. Jim Hume has a question about the sisted cases.

Jim Hume (South Scotland) (LD): Good morning, cabinet secretary. Looking at article 3 of the proposed draft order, we see that the cases in group 3, the sisted cases, are to be treated differently from those in group 2, where the landlord has to opt into section 73 of the 2003 act. In group 3, the sisted cases, it is automatic that section 73 of the act will apply. What is the rationale for the differences between those two groups?

Paul Cackette: There is no practical difference in the outcome that section 73 will apply. On article 3, the cases are in the court and, as was suggested by one of the witnesses, the Government wants parties to get out of the court process. Our view is the other way round: we would far rather that people completed the court processes under the Land Court—the court has to resolve the cases before it. Article 3 intends to achieve the section 73 outcome, but it gives the court maximum flexibility in determining the cases that are with it already. If, for example, a landlord wishes to shorten their notice periods under section 73, that can be done by combining those in one court action, rather than two, which is obviously beneficial.

We have also given a power to make changes to the determination date. However, that is only to give the Land Court the flexibility to ensure that any disposal of the case is ECHR compliant. The Land Court is itself a body that requires to make decisions that are consistent and compatible with ECHR, and the power ensures that the court has that option.

Jim Hume: I will go on to another difference regarding groups 2 and 3. On group 2, it is said that, in the interim, the tenant will have a secure 1991 act tenancy in his own right, including the pre-emptive right to buy, whereas that is not the case for group 3. Some of the evidence that we heard suggested the opposite: we heard that that could be at odds with the UK Supreme Court ruling, and that it could allow the court to grant the tenant a secure 1991 act tenancy for sisted cases. There is a bit of confusion there. I would like clarification on that. Could consideration be given to amending the proposed draft order so as to reduce some of the confusion and any ambiguity?

Paul Cackette: Clearly, our view is that it is not open to the Land Court, in deciding cases before it, to give the outcome that was outlawed by the Supreme Court. The Land Court has to have regard to the jurisprudence of the ECHR, which includes the Salvesen v Riddell judgment. One of the options that is not open to the Land Court would be to do something inconsistent with the decision on Salvesen v Riddell.

Angus MacDonald: Good morning, cabinet secretary. As we know, the proposed draft order proposes a legal remedy for groups 1 to 3, but not for groups 4 and 5. We also know that, in the

Government's view, groups 4 and 5 have gone beyond the scope of the 2003 act and the proposed draft order. However, we have heard a range of views from stakeholders as to whether groups 4 and 5 should be included or excluded. In particular, Scottish Land & Estates has expressed concern that those in groups 4 and 5 have not been fully or adequately treated in the proposed draft order. It questions whether excluding group 4 from the legal remedy in the order is fully compliant with ECHR obligations. How do you respond to those concerns from Scottish Land & Estates and other stakeholders about the exclusion of groups 4 and 5 from the proposed draft order, and how do you propose to work with people in groups 4 and 5 who wish to seek redress?

10:45

Richard Lochhead: We will work with anyone who approaches us. As I said, we are looking at individual circumstances across the board. However, when the case in question arose initially, I considered the different options that I had to handle it, one of which would have been simply to put through an order to identify all the people affected and convert the tenancy from a section 72 to a section 73, and that would have been it done and dusted. However, I did not take that attitude, because I realised that we wanted to help people and did not want to have more disruption than necessary for the tenancy sector, particularly because of the circumstances that I outlined previously.

Of course, I had to strike a balance between the landlord and the tenant in terms of legality. That is why we broke down the cases that we were aware of into individual circumstances and took the view that we would look at them and try to address each individual circumstance. Where we feel that the circumstances have moved beyond the scope of any remedy, those people would be in a separate group. If a farm has been sold and if there was a mutual agreement in some circumstances between the tenant and the landlord over the next stage of the tenancy because there were, for example, no heirs in place or because the tenant passed away, those cases are simply moved on, and we did not want to intervene needlessly in them.

That is the approach that we took, which I think has been the right and most helpful one for those who are directly affected by the judgment. I do not know whether Paul Cackette has any legal points to make.

Paul Cackette: I have two observations, one of which is just to echo what the cabinet secretary said. Groups 4 and 5 are different because they are effectively beyond the scope of the order in two ways. As has been said, tenancies in group 4 have circumstances that make them beyond the scope of the order because it seeks to convert, in one form or another, existing tenancies into section 73 tenancies. However, if intervening events between 2003 and now have meant that there is no tenancy to convert, the order cannot convert them. For that reason, they fall outwith the scope and the remedy in the order does not address them. That is not to say that there are not remedies, but the order is designed to ensure that the legislation that affects tenancies is brought into ECHR compatibility. That is why that group is not addressed specifically in the order.

Tenancies in group 5 are sometimes described as bilateral agreements because the landlord and tenant came to an agreement in some form or another, no doubt in the shadow of and influenced and impacted by section 72. However, the outcomes that they came to are not a direct consequence of the operation of law; they are a direct consequence of the bilateral agreement that the tenant and landlord entered into with each other. In that sense, therefore, changing what section 72 provides is a different issue from the bilateral agreements that fall outwith that.

Angus MacDonald: Okay. Should an issue arise with those in either group 4 or group 5, presumably their course of action would be through the Land Court.

Paul Cackette: It would certainly be through a court, but not necessarily the Land Court. They probably would not get to the Land Court. If a bilateral agreement has been entered into but one side then wishes that they had not entered into it and perhaps did so because of a mistaken understanding of the law, which Mr Salvesen's case has clarified, those parties must get their own advice on what their options are. However, the remedies that the parties who entered into an agreement with each other would look to take would depend on the advice that they got at the time and the advice that they get now on what to do about that. The order is not the place to deal with that set of circumstances.

Claudia Beamish: Cabinet secretary, I have listened carefully to the answers that you and your colleagues have given on group 5. However, there is still concern about group 5, although it is outwith the order's scope. I seek clarification on the position from a legal perspective of the Riddell family in particular. As we all know, although Andrew Riddell is, sadly, now deceased, he is regarded as having settled his dispute with Salvesen out of court by not pursuing it further and his case falls into group 5.

Do you agree that, morally, if anyone deserves compensation, it is possibly the Riddell family? I

appreciate that it is difficult to comment on a case, but I wanted to put that on the record.

Richard Lochhead: We are all aware of the difficult circumstances of that case. I cannot comment on the legal issues with individual cases, but any family or individual who is affected is free to take legal advice or to speak to their own associations for advice.

We will engage with anyone who wants to speak to the Government about any particular case or the wider issues, but we cannot give legal advice to individual tenants or families.

The Convener: We move on to mediation and cooling off.

Graeme Dey (Angus South) (SNP): Good morning, cabinet secretary. Your opening remarks on mediation were helpful in clarifying the Government's position, but I have one or two small questions. Will the offer of mediation, which you have said will be available when the landowner and tenant both want the Government to be involved, be open only to those in group 2 or to those in other affected groups?

What informed the setting of a £40,000 ceiling on funding for mediation? Given that you refer to independent mediators, can you expand on the definition of independent? Do you envisage the mediators being people with an industry or legal background, or would they offer more general mediation services?

Richard Lochhead: First, I hope that landlords and tenants who are affected will go down the mediation route if they are unable to reach an agreement among themselves immediately. Indeed I would urge them to do so, as that would be a much more helpful way forward for all parties and for tenant farming in Scotland.

In conjunction with stakeholders, we have identified accredited professional mediators, who will be employed at the Government's expense. I am willing to make resources available for that; the £40,000 figure that I gave to the committee is simply an estimate of what may be required. I do not have a ceiling per se on the amount—obviously we have to pay attention to resources and there is not a limitless pot available, but if the cost goes above £40,000 we will cover it. The amount is not a fixed ceiling, but simply an estimate of how much we think we may have to allocate for mediation. The cost will depend on demand. As Mr Dey says, we need both the tenant and the landlord to come to the table in order for mediation to work.

Graeme Dey: To be clear, would the mediation route be available to everybody who has been affected by the defect or just to those in group 2?

Richard Lochhead: Apologies—I did not answer that point. Yes, that is the case: we will make mediation available to any one of the key cases that are affected, irrespective of which group those people are in.

Jim Hume: You announced the figure of £40,000 almost as if it was a grant, but you have just clarified that it is simply an estimate of what the cost would be. It is tricky to clarify that figure because it seems somewhat odd. Is it an estimate of the amount per case or per individual organisation, landlord or tenant?

Richard Lochhead: The £40,000 is simply the resource that we are allocating for mediation at this stage. If it appears that there is greater demand for mediation, and even more landlords and tenants than we expect agree to come forward to participate, we will make additional resource available at that point.

Jim Hume: For clarification, does the £40,000 that has been allocated from Government funds apply per case, or—

Richard Lochhead: No, it is the budget. We will engage mediation services—

Jim Hume: The budget for all mediation?

Richard Lochhead: Yes.

Jim Hume: Right—okay.

Claudia Beamish: Cabinet secretary, you commented on compensation in your opening remarks so I hope that you will bear with me while I highlight some of the evidence that the committee has heard, given that compensation is a key aspect of resolving the settlement in the fairest possible way for everyone concerned. I will then ask a couple of questions, and other members may want to follow up on the issue.

The proposed order and supporting documents do not include reference to compensation, but given that farm sales and bilateral agreements have been made, compensation could be significant in many cases.

In evidence to the committee, David Balharry said:

"We have been absolutely clear to everybody all along that, if they feel that harm has been caused to them, they can make claims against the Scottish Government. Those claims will be looked at in the context of the merits of each claim.

There is an awareness of the issue, but there is a great difficulty in generically accepting liability."—[*Official Report, Rural Affairs, Climate Change and Environment Committee*, 4 December 2013; c 3106.]

Scott Walker, from NFU Scotland said:

"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. ... The Government should not take a legal attitude of whittling every claim down to the lowest possible amount."

I am not necessarily associating myself with those remarks, but we need to get out in the open the fact that there is a concern that that might happen.

Richard Blake stated during the same oral evidence session:

"I share Angus McCall's view that a statement from the Government is needed to provide clarity."—[*Official Report, Rural Affairs, Climate Change and Environment Committee*, 18 December 2013; c 3144.]

You have acknowledged today that there will be compensation cases, and that is quite clear to people who have been financially or personally disadvantaged by the legal defect and the proposed remedy. Although stakeholders who gave evidence to us generally accepted that the generic compensation scheme should not be included in the order, might the Scottish Government be in a position to state its position on compensation in relation to all affected parties, and would you be able to put your position on that in the order? Could there be mention of such a scheme, although no detail, in the order itself, to reassure people?

Richard Lochhead: As I said previously, the Government's approach will be both sympathetic and responsible. I am not ruling out compensation and there may well be some circumstances in which compensation is justified, but we are clearly at a stage where we are looking at the circumstances in many different cases. We wish the parties to consider mediation as the best route to reach a settlement, and I hope that circumstances will arise in which there is no need for any further intervention from Government, if parties can reach their own agreements. That is by far the best way forward for most cases. However, there may well be cases in which compensation is a valid option, and we shall leave that on the table.

I do not think that there is any need for that to be in the order. The order is about correcting an unlawful aspect of the legislation, and that is its purpose. In terms of Government policy, I make it clear to the committee today that there may be circumstances in which compensation is an option, that we will leave that on the table and that we are certainly not ruling it out.

Claudia Beamish: I would like to push you a little bit on that. Would not it be reassuring for people if there were something in the order about compensation possibly being the route that some people might have to go down?

Richard Lochhead: I am trying to give the committee reassurance that I recognise that circumstances could arise in which compensation is justified and that, for that reason, we see that as a valid option. However, without understanding all the circumstances or knowing what the outcome of mediation might be, we are unable to put any more meat on the bones. The fact that both the stakeholders and the Government—and, I hope, the committee—agree that there should not be a generic compensation scheme is a good thing, because we all recognise the circumstances.

Graeme Dey: Continuing on the compensation theme, I recognise that this may be a difficult question to answer, but apart from offering to fund and facilitate mediation, how can we avoid a situation in which resolving those issues becomes a drawn-out affair that provides rich pickings for the lawyers?

Richard Lochhead: That is why I am approaching the subject cautiously, but recognising that there could be circumstances in which compensation would be a perfectly valid outcome.

There are many different circumstances out there. There will be many circumstances in which there is no case for compensation, but, as I have just said, there may well be cases in which compensation is a valid option. That is why we are not going down the route of a generic compensation scheme. We have to leave our options open until we understand the circumstances of all the different, complex cases out there.

11:00

Richard Lyle (Central Scotland) (SNP): Good morning, cabinet secretary. I welcome the £40,000 for mediation and your statement that you want mediation, which I certainly agree with—I made comments about that a couple of weeks ago.

When people made claims with regard to payment protection insurance, they did not need to go to court; they basically went to the bank and said, "You've overcharged me. Can I have my money back please?" If people come to the Government and say, "You've cost me money. Can I have my money back please?", will they need to take you to court?

Richard Lochhead: As I have said, I think that we have taken a sensible approach to these cases. We have indicated that we are willing to discuss individual circumstances with all the parties affected. The last thing we want to encourage is putting more cash into the pockets of lawyers—I have already commented on that—which is what we would do if we were to go down the route that you suggest. We want to avoid that. We want all parties to be sensible about this. No one wants to be where we are at the moment, but we have to deal with the judgment in the most sensible and responsible way possible.

Jim Hume: My question follows on from Graeme Dey's point about mediation. You estimate a cost of £40,000 for helping with mediation, which of course would be fantastic. Do you see yourselves fully funding the mediation or would you fund only a certain percentage of it?

Richard Lochhead: At this point, we are happy to fund the mediation. We have said to the sectors that we have been speaking to that we are keen on the mediation route and are therefore willing to fund it.

Jim Hume: Are you willing to fund it fully?

Richard Lochhead: Yes. Clearly, if for some reason the cost ran to millions of pounds in the future, we would have to reconsider that, but we do not anticipate that. We have said that we will fully fund the mediation as part of trying to find solutions.

Jim Hume: That is useful. Thanks.

We have heard various opinions on the issue of time barring. We heard that:

"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 ... Another view was that the time bar would start at the date of enactment of the legislation".

We also heard that, given the confusion, it might be useful to add to the draft order

"a provision for time barring that is specific"—[*Official Report, Rural Affairs, Climate Change and Environment Committee*, 18 December 2013; c 3145, 3159-60.]

to various situations. It would be interesting to hear your understanding of the position regarding time barring.

Richard Lochhead: Our view is that there is no need for any special arrangements in relation to time bars. I am happy to ask my colleagues to address the legal dimension of that.

Paul Cackette: One of the things that we are conscious of is that, outwith the specific provisions, there are common-law and statutory structures and frameworks within which remedies can be secured. One of those relates to the law in relation to time bars. Within the Prescription and Limitation (Scotland) Act 1973, there is a power for a court, in dealing with a time bar case, where it is equitable—that is the phrase used in the act—to disapply the time bar depending on the facts and circumstances that apply in that case. Our view is that that is the appropriate place for a court to decide whether a case is time barred, if a time bar issue arose. A specific provision in this case could be only of general application and would not really assist in individual circumstances. Our view is that suspension of time bar, as a general proposition, is not necessarily appropriate in relation to this particular remedy.

Jim Hume: Do you therefore think that nobody in groups 4 or 5, or indeed any of the groups, will have to face a time bar at all?

Paul Cackette: If they can show the court that there are good reasons why they have not raised the case in time, they will be in that position.

Jim Hume: So it is their responsibility.

Paul Cackette: They have to take advice as to the way forward and act accordingly.

Jim Hume: Have you considered, as the Law Society suggested, adding a provision to the draft order to give that reassurance, so that people in the groups do not have to make the case?

Paul Cackette: We did not think that it was sensible to have a general application, because there could be circumstances in which it would not be appropriate to extend the period of the time bar.

Alex Fergusson: I seek absolute clarity on this issue, because I think that there was a bit of confusion at the previous meeting about whether, if a time bar came into play—if that is the right expression—it would be a traditional five-year time bar for legal challenges or a one-year time bar, as was perhaps suggested at our previous meeting.

Paul Cackette: I do not know the individual basis on which it might be suggested that a one-year time bar would apply, so obviously I cannot give the committee advice on that aspect. I would certainly have thought that the five-year time bar would be the period that would apply. I have not looked specifically at what the period would be. I am not sure that I am in a position to advise the committee on it definitively.

Alex Fergusson: With great respect, I wonder whether you could look at that and provide an answer, because I think that it is quite important.

Richard Lochhead: We will take that issue away and write to the committee with our views on it.

Alex Fergusson: I would be grateful for that. Thank you.

The Convener: We will be very happy to receive an answer on that.

I thank the cabinet secretary and his officials for taking forward this complicated matter.

At our next meeting on 29 January, we will hold an evidence session with stakeholders on national planning framework 3 and consider our report on the draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014.

11:06

Meeting continued in private until 12:11.

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e-format first available
ISBN 978-1-78392-497-4

Revised e-format available
ISBN 978-1-78392-514-8

Printed in Scotland by APS Group Scotland