SALVESEN V RIDDELL (LORD ADVOCATE AND ADVOCATES TO THE COURT INTERVENING)

ON APPEAL TO THE UNITED KINGDOM SUPREME COURT FROM THE INNER HOUSE OF THE COURT OF SESSION, SECOND DIVISION

23 APRIL 2013

LADY MCHARG (WITH WHOM LORD NICOLSON AGREES) (DISSENTING)

The Issue before the Court

The question before this court is a devolution issue arising under the Scotland Act 1998 concerning whether section 72 of the Agricultural Holdings (Scotland) Act 2003 (the 2003 Act) is outwith the legislative competence of the Scottish Parliament. Section 72 is alleged to breach Article 1 of the First Protocol (A1P1), read together with Article 14, of the European Convention on Human Rights (ECHR) because it retrospectively interferes with the property rights of certain agricultural landlords. By virtue of section 29(2)(d) of the Scotland Act 1998, an Act of the Scottish Parliament is "not law" if it is incompatible with Convention rights.

At the heart of this issue, however, there is in fact a conflict of property right claims. The dispute from which the devolution issue arose involved, on one side, a claim by Mr Alastair Salvesen, the owner of Peaston Farm, Near Ormiston, East Lothian, for vacant possession of the farm, following the issuing of a notice of dissolution of the limited partnership which holds the lease to the farm. The limited partnership consists of Mr Salvesen's nominee as limited partner and Mr John Riddell and Mr Andrew Riddell (a father and son) as general partners. On the other side, the Riddells sought confirmation that they are entitled to be regarded as tenants of Peaston Farm in their own right in terms of section 72 of the 2003 Act, and to the security of tenure and other entitlements which such tenancy would bring with it.

The Riddell family has farmed Peaston Farm since 1902. The lease was originally held by Mr John Riddell's father. It was a secure tenancy in terms of the Agriculture (Scotland) Act 1948 and its statutory successors (now the Agricultural Holdings (Scotland) Act 1991 (the 1991 Act)), and as such it was bequeathed to Mr Riddell's brother on his father's death. However, the brother died with no successors and the tenancy came to an end. The then owner of the farm, Hopetoun Estate, was willing to re-let the farm to Mr Riddell and his son, but only on a limited partnership basis. The limited partnership came into effect 1992 and was due to run until 28 November 2008, and on a year-to-year basis thereafter unless terminated by notice. Mr Salvesen, a billionaire businessman and heir to the Christian Salvesen shipping fortune, bought the farm from Hopetoun Estate in 1998, and his nominee became the limited partner in succession to the previous landlord's nominee.

A limited partnership tenancy is a device used to avoid the security of tenure conferred on agricultural tenants by Part 3 of the 1991 Act. Agricultural policy since 1939 has promoted security of tenure as a way of fostering a long-term approach to agricultural husbandry in order to encourage investment in farms so as to increase food production and, in more recent times, to promote environmental sustainability. However, the inflexibility of 1991 Act tenancies makes them unattractive to landlords, and reduces the capital value of their land. As it is not possible to contract out of the security of tenure provisions in the 1991 Act (*Johnson v Moreton* [1980] AC 37; *Featherstone v Staples* [1986] 1 WLR 861), the device of granting the lease to a limited partnership was employed as an alternative mechanism to allow landlords to regain possession of their land at the end of a fixed or minimum term of let. Although the lease enjoyed by the limited partnership was a 1991 Act tenancy with full security

of tenure, by dissolving the limited partnership, the landlord could effectively bring the lease to an end because the tenant ceased to exist.

While advantageous to landlords, limited partnership tenancies were obviously considerably less advantageous to farmers than 1991 Act tenancies held in their own right. Indeed, in *MacFarlane v Falfield Investments Ltd* 1998 SC 14, an attempt was made to challenge the validity of the use of limited partnership tenanciesas effectively amounting to a sham, although the argument was rejected by the Inner House which did not regard the arrangements as either deceitful or contrary to public policy. Thus, although the Riddells clearly agreed to the limited partnership arrangement, this was most likely something of a Hobson's choice if they wished to continue the family business and remain in the family home. In fact, by the time they entered into the arrangement, limited partnership tenancies had become the dominant form of tenure for new agricultural lets across Scotland.

The dispute between the parties was originally heard before the Land Court, which found for the Riddells in July 2010, and then on appeal to the Inner House, which found for Mr Salvesen in March 2012. Following the Inner House decision, Mr Salvesen served notice to quit on the Riddells, and the parties reached a settlement in summer 2012. Tragically, however, in October 2012, after gathering in his last harvest, and obviously distressed at the prospect of losing his home and livelihood, Mr Andrew Riddell took his own life. Sadly, such suicides are all too common amongst farmers and in our rural communities, a phenomenon frequently linked to economic insecurity.

Given these tragic events, Mr John Riddell understandably no longer wishes to participate in further proceedings before this court. Having recovered vacant possession of Peaston Farm, neither does Mr Salvesen. Nevertheless, the appeal against the Inner House's decision was maintained by the Lord Advocate as intervener. The devolution issue raises a point of general public importance which it is desirable to resolve at this time. The validity of section 72 of the 2003 Act affects numerous other limited partnership tenancies, and the facts of this case remain illustrative of the nature of the issues at stake.

The Agricultural Holdings (Scotland) Act 2003

The 2003 Act is part of a broader programme of land reform pursued by the Scottish Parliament since its inception. Even before devolution, land reform was identified by the Scottish Office as a priority area for the new institutions, given both the highly unequal pattern of landownership in Scotland, and the perception that significant reform had effectively been blocked at Westminster due to a combination of lack of legislative time and the influence of powerful land-holding interests in the House of Lords. Thus, in 1997, the Scottish Office established the Land Reform Policy Group (LRPG) to make recommendations for reform (see *Land Reform Policy Group Recommendations for Action*, Scottish Office, January 1999).

As regards agricultural holdings, the LRPG recognised the need to strike a better balance between the interests of landlords and tenant farmers, allowing landlords the ability to grant fixed term tenancies without the inflexibility and loss of control entailed by 1991 Act tenancies, but giving tenant farmers greater rights and security than afforded by limited partnership tenancies. It therefore recommended the discontinuation of limited partnership tenancies, and the introduction of new forms of fixed duration tenancies, although existing 1991 Act tenancies would be unaffected and it would remain possible to create new 1991 Act tenancies.

As initially introduced, the Agricultural Holdings (Scotland) Bill provided for two new forms of agricultural tenure – Limited Duration Tenancies and Short Limited Duration Tenancies (see 2003 Act, Part 1). It also provided that, if a *new* limited partnership tenancy was entered into after the coming

into force of the Act (whether a 1991 Act tenancy or a limited duration tenancy), the general partner would become tenant in their own right on the same terms as the limited partnership tenancy in the event that the limited partner sought to dissolve the partnership (see 2003 Act, section 7). In effect, while the Scottish Parliament could not prevent tenancies being granted to limited partnerships (partnership law being a matter reserved to the UK Parliament), it sought to deter the creation of new limited partnership tenancies. In its initial form, however, the Bill did not affect *existing* limited partnership tenancies.

Nevertheless, as commonly occurs, the Scottish Ministers' policy evolved during the passage of the Bill through the Parliament. Law-making in the Scottish Parliament is expected to be a collaborative and participatory process, between the Scottish Ministers, the Parliament and the interested public, particularly via the role of the relevant subject committee. In its report on Stage 1, the Rural Development Committee invited the minister in charge of the Bill (Ross Finnie MSP) to re-examine the extent to which the provisions of the Bill (in particular the pre-emptive right to buy introduced for 1991 Act tenants) should apply to existing limited partnership tenancies.

Accordingly, on 3 February 2003, the minister tabled amendments for consideration at Stage 2. These did two things. First, they extended the provisions of the Act to existing limited partnership tenancies. By virtue of what became section 72 of the 2003 Act, if a landlord sought to terminate a pre-existing limited partnership tenancy after the Act came into force, the general partner would, on giving a counter-notice, be able to assume a 1991 Act tenancy in their own right. But, under section 73, this would be subject to the landlord's absolute right to gain vacant possession by giving notice to quit of between two and three years. Second, the amendments proposed an anti-avoidance measure: if a dissolution notice were served between 4 February and 1 July 2003 (the date on which the provision was expected to come into force), the general partner would be entitled to continue the tenancy under section 72, on application to the Land Court.

The response from landlords, including Mr Salvesen, was a flood of dissolution notices issued on 3 February, obviously timed to avoid being caught by the amendments. In response, further amendments were tabled at Stage 3. These moved the start date for the anti-avoidance provisions back to 16 September 2002 (the date on which the Bill was first published), such that the dissolution notices issued on 3 February would now be caught retrospectively by the Act. They also provided that section 72 would automatically apply on the issuing of a notice by the general partner under section 72(6), subject to the right of the *landlord* to apply to the Land Court for an order that the general partner should *not* assume the tenancy (section 72(8) and (9)). The Land Court could only issue such an order if it were satisfied that the dissolution notice had been issued for a purpose other than to defeat the rights of the general partner under section 72, *and* if it considered it reasonable to do so. Further, unlike limited partnerships dissolved *after* the Act came into force, landlords who had engaged in anti-avoidance tactics would *not* be able to invoke the right to give an extended notice to quit under section 73. Their general partners would, in other words, be entitled to a full 1991 Act tenancy.

Proceedings before the Land Court

On 3 February 2003, Mr Salvesen gave notice that the limited partnership in respect of Peaston Farm would be dissolved on 28 November 2008. On 12 December 2008, the Riddells gave notice under section 72(6) of their intention to assume the tenancy in their own right. Mr Salvesen applied to the Land Court under section 72(8), arguing that it had always been his intention to dissolve the limited partnership when the agreement came to an end, and to amalgamate Peaston Farm with adjoining farms that he also owned. The Land Court refused the order, without allowing a proof, holding that

the timing was such that the purpose of issuing the notice of dissolution could only be regarded as having been to defeat the general partners' rights under the 2003 Act.

Proceedings before the Inner House

Mr Salvesen appealed to the Inner House on two grounds: first, that the Land Court had applied the wrong test in determining the purpose of the dissolution notice; and, second, that section 72 of the 2003 Act violated his rights under A1P1 and Article 14 ECHR.

The Lord Justice Clerk held that, in order for section 72(8) and (9) to be meaningful, they must be taken as referring to the landlord's underlying purpose in seeking to regain possession of the land, and not simply to his motivation for the timing of the dissolution notice. Accordingly, he held that the Land Court had erred in refusing Mr Salvesen proof before answer. The Lord Advocate has not sought to dispute this ruling, and it must surely be correct.

The Lord Justice Clerk also held that the retrospective variation of the effect of the dissolution notice breached the landlord's property rights under A1P1, since it was unjustifiably discriminatory, as compared with the treatment of landlords who dissolved limited partnership tenancies after the Act came into effect, and arbitrary in its scope. In his Lordship's view, the amendments to the Bill were motivated by the desire to punish landlords who had sought to avoid the consequences of the legislation. Moreover, he considered that there was nothing immoral or deserving of punishment in exercising rights under a contract which had been freely entered into. No separate question of discrimination arose under Art 14 ECHR, since no protected status was involved.

The majority of judges in this court agree with the Inner House that there has been a breach of A1P1, although their finding of incompatibility is limited to section 72(10) (which deprives landlords in Mr Salvesen's position of the benefits of section 73) rather than the whole of section 72.

Property Rights in Context

The courts in Scotland, as elsewhere in the United Kingdom, are rightly concerned to ensure that property rights are respected, that contractual bargains freely entered into are upheld, and that rights and expectations are not interfered with retrospectively. All three are vital elements of the Rule of Law as it is understood in a liberal democracy, serving to protect individuals' autonomy and their ability to plan their affairs. Property rights in particular provide the foundation for personal security, economic well-being, and individual freedom.

Nevertheless, it is important not to lose sight of the wider context in which property rights are enjoyed. In the first place, property rights are rarely absolute, and different property rights may also conflict. In the current situation, the effect of maintaining the rights of landlords is to deny valuable property rights to their tenants - rights on which they have legitimately relied for more than 10 years and on the strength of which they may have invested considerable sums in their homes and businesses. Lord Hope, in giving judgment for the majority, acknowledges this problem (at [54] – [55]). His solution is to suspend the effect of the finding of incompatibility, pending the development and enactment of a solution by the Scottish Ministers and the Scottish Parliament. However, if the majority's finding of a breach of A1P1 is to be respected, it unclear what options are open to ministers and legislators other than to deny the tenants the security of a full 1991 Act tenancy. Indeed, the prospect may arise of further claims being made under A1P1 by disappointed farmers thereby deprived of their legitimate expectations.

Secondly, property comes in different forms. On the one hand, there is property in those things that are necessary to human flourishing: rights in one's home and to the secure protection of oneself and

one's family, or to the necessities of life, or to the means of earning a livelihood, as well as ownership of the possessions that facilitate self-expression. Property rights in this sense are at the core of the autonomy-promoting function of property identified above. On the other hand, property may simply represent an economic asset – a means to enhance one's material wealth. In this sense, property can be a significant source of power – not merely self-mastery, but potentially also power over other people who may need or want access to those resources. Where property rights are unequally distributed – and Scotland has one of the world's most concentrated patterns of land-ownership – social and economic power is also unequal. Property rights might therefore be regarded as carrying with them the responsibility to ensure that power is not abused.

Finally, property may be understood not merely as a set of individual rights, but also as a social institution. Contrary to the traditional view of ownership as a means of achieving autonomy, the exclusion of others, and dominion over nature, more critical approaches found in the work of feminist, communitarian and environmentalist scholars advance an understanding of property as a means of expressing oneself through connection with others and with nature (see eg CM Rose, "Property as Storytelling: Perspectives from Game Theory, Narrative Theory" (1990) 2 *Yale Journal of Law and the Humanities* 37;; LS Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford, Oxford University Press, 2003); S Coyle and K Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Oxford, Hart Publishing, 2004). On this view, the role of property rights is not simply, as in more traditional legal conceptions, to mark out a sphere of private autonomy free from public intrusion; nor is the allocation and configuration of property rights derived from some natural state of affairs. Rather property rights are the product of positive law, intended to achieve social purposes which include, but are not limited to, the promotion of individual autonomy. In this sense, property can be understood as consisting not primarily of a set of rights, but rather a set of relationships – between individuals, between individuals and things, and between individuals and the community as a whole. It "mediates people's connections with each other instead of serving to map the boundaries of their separation" (M Stone, "Equity, Property, and the Ethical Subject" (2017) 11 *Pólemos* 73, 73). Since the definition and enforcement of property rights are dependent upon collective choices and collective action, law-makers may therefore legitimately regard certain interests in or relationships with or forms of property as more or less worthy of promotion or protection.

This "social" or "relational" view of property as an embedded element of social relations is particularly pertinent in the context of agricultural holdings, where landowners and tenants manage the land not only in their own interests, but also in the interest of the wider community, though the maximisation of food production, and in the interests of future generations, through the sustainable stewardship of land. As Lord Hailsham of St Marylebone put it in *Johnson v Moreton* [1980] AC 37, referring to English statutory provisions on security of agricultural tenure, "These are not simply matters of private contracts from which the landlord can stipulate that the tenant can deprive himself as if it were a *jus pro se introductum*. It is a public interest introduced for the sake of the soil and husbandry of England, of which both landlord and tenant are in a moral, though not of course a legal, sense *the trustees for posterity*" (at p 59G—H (emphasis added)).

It is not the function of this court to adjudicate between different conceptions of property rights, nor to decide whose interests should be preferred. Rather, the question is whether *the Scottish Parliament*, in the exercise of its legislative functions in the public interest, is entitled to confer a secure 1991 Act tenancy on farmers in the position of the Riddells, albeit that this amounts to a retrospective interference with the exercise of contractual rights and a frustration of the expectation of landowners in the position of Mr Salvesen of regaining vacant possession of their land. The key

issue is whether this legislative choice is compatible with the constraints imposed on the Parliament by the provisions of the ECHR. It is therefore to the Convention that I must now turn.

The Convention Rights

A1P1 of the ECHR provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Both the Lord Justice Clerk in the Inner House and Lord Hope for the majority in this court conclude that no issue of discrimination within the meaning of Article 14 arises in this case, since the difference in treatment between particular groups of agricultural landlords is not one based on "status" within the meaning of Article 14. I agree, and will not consider this issue further.

It is, on the other hand, common ground before this court that A1P1 is engaged. Like most Convention rights, however, the rights conferred by A1P1 are not unqualified. Property rights may be limited in the general interest, provided that the restrictions are authorised by law (as that is understood in the jurisprudence of the European Court of Human Rights) and they are not disproportionate. The courts in Strasbourg and in the United Kingdom have recognised that even retrospective interferences with property rights may sometimes be permissible, although as a *prima facie* departure from the Rule of Law, retrospective interference requires special justification (*Bäck v Finland* (2004) 40 EHRR 1184; *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; *R (Huitson) v Revenue and Customs Commissioners* [2011 EWCA Civ 893).

Analysis of the text of A1P1 reveals that property rights may also be interfered with in different ways. In *Sporrong & Lönnroth v Sweden* (1983) 5 EHRR 35, the European Court of Human Rights identified three rules contained within A1P1: (1) a general prohibition on interference with "peaceful enjoyment of possessions"; (2) a specific prohibition on "deprivation" of property; and (3) restrictions on the "control of use" of property. In the current case, the conferring of a right to security of tenure amounts to a control of use of property (*Barreto v Portugal* App no 18072/91, ECtHR, 21 November 1995, unreported, at para 35; *Spadea v* Italy (1995) 21 EHRR 482, at para 28; *Gauci v Malta*, (2009) 52 EHRR 25, at para 52). The landlord retains his ownership of the land and the right to receive rents, but his ability to regain possession of the land is restricted, and this reduces its capital value. It is, in other words, his economic interests that are prejudiced. The pre-emptive right to buy conferred by the 2003 Act upon holders of 1991 Act tenancies constitutes a further restriction on the landlord's right to freely dispose of his property (although the Inner House has recently held that even an absolute right to buy does not, by itself, constitute a breach of A1P1: *Pairc Crofters Ltd v Scottish Ministers* 2013 SLT 308).

In accordance with the general structure of the Convention, the less severe the interference with property rights, the less is required by way of justification. For instance, a deprivation of property will almost certainly not be justified without payment of compensation (*James v United Kingdom* (1986) 8 EHRR 123; *Lithgow v United Kingdom* (1986) 8 EHRR 329), whereas this is not necessarily required in relation to a control of use or other forms of interference with the peaceful enjoyment of possessions.

In addition, under A1P1, the state is entitled to a particularly wide margin of appreciation in making assessments of what the general interest requires by way of restrictions on property rights, particularly in areas of social or economic policy (*J&A Pye (Oxford) Ltd v United Kingdom* (2007) 46EHRR 1093, at para 75). In the domestic context, the margin of appreciation translates as a duty on the courts to respect the legislature's discretionary area of judgment, and not to substitute its view of the general interest for that of the legislature (*AXA General Insurance Ltd v Lord Advocate*).

It is also worth noting that a range of other rights, as well as considerations of the general interest, may be engaged in decisions to restrict property rights. Particularly relevant in the present context are the right to respect for one's home under Article 8 ECHR – which may impose positive obligations on contracting states (*Chapman v United Kingdom* (2001) 33 EHRR 399) – and rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, to which the United Kingdom is also a party, such as the right to work (Article 6) and the right to an adequate standard of living (Article 11). Although these rights have not been relied upon directly in this case, they may be relevant to the question whether the interference with rights under A1P1 is justified.

Proportionality

Since A1P1 is engaged, the question on which this case turns is the proportionality of the interference with the landlord's property rights via section 72 of the 2003 Act. By now, the stages of a proportionality analysis are well understood (see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn); *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45). The court must ask itself:

1. Does the impugned measure serve a *legitimate aim*?
2. Is the measure *suitable* to achieve the legitimate aim?
3. Is it no more than *necessary* to achieve the legitimate aim?
4. Does it strike a *fair balance* between the interests of the right-holder and the general interest?

In view of the contested questions of social and economic policy and as to the appropriate balance between private property and state regulation which arise in the context of A1P1, the test to be applied at the first three stages is one of "manifest unreasonableness" (*AXA General Insurance Ltd v Lord Advocate*). In other words, the court must not ask itself whether it agrees with the legislative judgment, nor whether some alternative measure might have been adopted instead (*James v United Kingdom*), but rather whether there is some reasonable foundation for the legislative choice. In relation to the final stage, the question is whether the individual has been made to bear "an individual and excessive burden" (*Sporrong and Lönnroth v Sweden*, at para 73*; James v United Kingdom*, at para 50).

The Aim of Section 72

The Lord Justice Clerk in the Inner House and Lord Hope for the majority in this court agree that the 2003 Act as a whole pursued a legitimate aim. It was certainly legitimate for the Scottish Parliament

to seek a more equitable balance between the interests of agricultural landlords and their tenants, and to seek to end the practice of limited partnership tenancies. Notwithstanding the decision in *MacFarlane*, such tenancies were clearly an artificial device – or as the Conservative party spokesman (Alex Fergusson MSP) put it during the Stage 3 debate on the Bill, a "dodge" (Official Report, 12 March 2003, col 16324) – intended solely to avoid the provisions of the 1991 Act, and which disproportionately benefitted landlords at the expense of their tenants. There is also no dispute that it was legitimate to include *existing* limited partnership tenancies within the scope of the legislation, notwithstanding that this meant rewriting settled contractual bargains (*Bäck v Finland* at para 68; *Mellacher v Austria* (1990) 12 EHRR 391, at para 51). Moreover, although the Lord Justice Clerk's opinion might be read as suggesting otherwise, in our view there was no unfairness in the fact that the provisions affecting existing limited partnerships were added as the Bill progressed through the Parliament, particularly given that representatives of landholding interests, as well as of tenant farmers, were fully consulted and involved throughout the legislative process.

If existing limited partnership tenancies were to be caught by the Bill, it is further accepted that it was legitimate to take anti-avoidance measures, even though these operated retrospectively to alter the effect of notices of dissolution issued before the legislation came into effect (*R (Huitson) v Revenue and Customs Commissioners*). There was some debate in the Parliament about the date from which these anti-avoidance measures should apply. Some members wished to extend what became section 72 further back to catch notices of dissolution issued from 16 April 2002 (the date on which the draft Bill was published). However, it was recognised that whatever date was chosen would necessarily be somewhat arbitrary. Such arbitrariness is inherent in the nature of a rule, and not in itself a reason for condemnation under the Convention (*R (T) v Greater Manchester CC* [2013] EWCA Civ 25).

What the Lord Justice Clerk and Lord Hope object to primarily, though, is the suitability and necessity of the anti-avoidance measures that were taken, particularly the fact that landlords who gave notice of dissolution before the legislation came into effect could end up being treated more harshly than landlords who waited until after it came into force before doing so. According to the Lord Justice Clerk, this was not a legitimate anti-avoidance measure because it went further than necessary:

> "[80] I proceed initially on the basis that sec 72 of the 2003 Act was enacted purely as an anti-avoidance measure. On that basis, sec 72 is inappropriate, in my view, because of its excessive effect and its arbitrary scope. A classic anti-avoidance measure simply nullifies the benefit gained by the avoiding action. Section 72 operates altogether differently."

In his view, "the inclusion of sec 72 was essentially a retaliatory act based on the Ministerial view that dissolutions effected in anticipation of the legislation were 'immoral'. The conclusion is irresistible … that the provisions of sec 72 were essentially punitive" [90]. He went on to say that "I can find no intellectual justification in any of the Deputy Minister's words for the proposition that it was immoral for a landlord to bring about a result that the general partner had contracted for" [91]. Nor did he consider it accurate for the Minister to have claimed that the "attempt by landlords to protect their position put the general partners in a situation of great uncertainty and faced them with the threat of imminent eviction" (Official Report, 12 March 2003, col 16315).

According to Lord Hope, "[a] reader of what the deputy minister said during [the Stage 3] debate might be forgiven for thinking that it displayed a marked bias against landlords" [38]. Although he recognises that ministerial statements should not necessarily be taken as indicative of the objective intention of the Parliament in enacting section 72 [37], he makes no attempt to ascertain a possible alternative Parliamentary motive. Consequently, he agrees with the Lord Justice Clerk that the treatment of landlords in the position of Mr Salvesen appears to amount to arbitrary penalisation [42], with no

objective justification for the difference in treatment between those giving notice of dissolution before and after 1 July 2003 [44]. He therefore agrees that section 72 does not pursue an aim reasonably related to the aim of the legislation as a whole [44].

It is important to bear in mind that the test to be applied in assessing the suitability and necessity of measures is one of manifest unreasonableness. A measure is not disproportionate simply because an alternative approach might have been taken which the court considers would have been preferable. The question is whether the measure which *was* adopted had any rational basis.

In my view, it is not appropriate to characterise section 72 as having no rational basis. The sudden rush to issue notices of dissolution on 3 February 2003 clearly did leave general partners in an uncertain situation. While some landlords indicated that the notices were simply a legal device and that they intended to enter into new limited duration tenancies after the legislation came into effect, others did not. In the latter situation, general partners did therefore face genuine uncertainty about whether they would be able to continue their businesses, and in many cases to remain in their homes, once their limited partnership came to an end. Further, even for those in the former situation, while the Bill was still going through the legislative process, there would have been uncertainty about the precise form that any new tenancy arrangements might take. This contrasts with the position of landlords seeking to dissolve limited partnership tenancies *after* the Bill came into effect, where general partners would have much greater clarity about their legal position, and a reasonable time in which to make adjustments should their landlord wish to regain possession of the land or to transfer to a limited duration tenancy.

In this context, I do not consider that it is manifestly unreasonable to take the relational view of property, discussed above, which regards the economic power enjoyed by landlords as carrying with it responsibilities not to abuse that power, and to take into account the interests of others. From this perspective, taking action to disturb settled and productive tenancy arrangements purely to avoid being caught by the 2003 Act could reasonably be regarded as irresponsible, and certainly showed little concern for the human impact that such action would have on the material and emotional well-being of tenants. It might well be thought that the issuing of dissolution notices in these circumstances was precisely the type of abuse of the limited partnership device that the legislation was aimed at eradicating.

This conclusion is reinforced if one takes the view that agricultural landlords and tenants are in a position of collective stewardship over land as a common good -. Again, it is not manifestly unreasonable to consider that landlords who are prepared to prioritise their own short-term interests over the maintenance of settled and productive tenancy arrangements are not to be trusted with unfettered control of something so valuable to society as agricultural land (see MM Combe "Human Rights, Limited Competence and Limited Partnerships: *Salvesen v Riddell*" (2012) *Scots Law Times* 193, at 199). The productive use of agricultural law is, moreover, essential to the fulfilment of other rights, such as the right to adequate food contained in Article 11 ICESCR. Indeed, it might be argued that a rejection of the notion of land as a commodity and of tenancies as purely business arrangements is at the heart of the wider programme of land reform of which the 2003 Act forms part.

It is also worth noting that the discussion of the amendments at Stage 3 divided along party lines: Conservative members were opposed, while all the other parties supported them. This underlines the deeply political nature of the legislative choices being made. Lord Hope accuses the Deputy Minister of anti-landlord bias, but a reader of the majority judgment might equally conclude that it exhibits a *pro*-landlord bias. Certainly, it fails to acknowledge the insight of feminist and other critics that formal equality conceals and legitimates underlying imbalances of social power. It is precisely to avoid such

allegations of political bias that unelected judges ought to be extremely wary of trespassing upon the judgments of elected politicians.

Fair Balance

The issue remains whether section 72 strikes a fair balance between the interests of landlords and the legitimate aim it pursues. The question is whether it imposes an excessive burden on landlords, but it is important to bear in mind the potential impact on other rights and interests, particularly those of tenants, were the provision held to be invalid.

What, then, is the impact of section 72 on landlords who sought to dissolve their limited partnerships between 16 September 2002 and 30 June 2003? As already noted, the interests that are at stake for the landlords are primarily economic ones: the imposition of a secure 1991 Act tenancy means that they have greatly reduced flexibility to regain vacant possession of their land, and the capital value of the land is thereby significantly reduced. Under the 2003 Act, they are also under a variety of other obligations, for instance, to compensate tenants for any improvements they have made. In the current case, Mr Salvesen claimed that he sought to dissolve the limited partnership not solely to defeat the Riddell's statutory rights, but because it had always been his intention to resume possession of Peaston Farm at the expiry of the limited partnership and to farm the land himself. Nevertheless, it seems clear that Mr Salvesen bought the farm as an investment, not because he intended to occupy it as his home or his primary means of making a living.

In any case, if a particular landlord does have some good underlying reason for having given notice of dissolution within the relevant period, they may apply to the Land Court under section 72(8) and (9) for an order preventing the general partner assuming the tenancy in their own right. Although the Land Court in this case erred in its interpretation of these provisions, if they are applied in the manner correctly held by the Inner House, this constitutes a significant protection for landlords which should ensure that the regime does not operate excessively harshly. It should also be pointed out that, far from being discriminated *against*, a landlord who is successful in obtaining an order under section 72(8) and (9) is in a *better* position than a landlord who seeks to end a limited partnership tenancy on or after 1 July 2003, who does not have the option of applying to the Land Court.

Finally, it is worth noting that, although the Lord Justice Clerk and Lord Hope characterise the different treatment of landlords who give notice of dissolution before and after enactment of the 2003 Act as discriminatory, they accept, as discussed above, that this is not a distinction based on status. Nor is it in any sense discrimination associated with any form of systematic disadvantage, as in the classic instances of unlawful discrimination based on gender, race, or other protected characteristics. On the contrary, it would be absurd to characterise agricultural landlords in Scotland as a class as anything other than highly privileged – a minority perhaps but not a disadvantaged minority.

On the other hand, as the plight of the Riddells in these proceedings makes clear, the impact on tenants of striking down section 72 is potentially very severe. For many tenants, this is not simply a question of an investment which turns out to be less profitable than they anticipated. Rather, they may face the loss of their homes and livelihoods; of being evicted from land with which they have a lived relationship, and which may have deep personal meaning reaching back for generations. Here we may be talking about property rights not simply as an entry on a balance sheet, but in relational terms as something intimately connected with a person's sense of self and their connection with others with whom they have built a family. Although frequently in tension with the dominant conception of property as a means to autonomy and wealth creation, the law has always recognised

a more primordial association of property with "hearth and home", nurturing and husbandry as something worthy of protection – more recently, of course, via Article 8 ECHR.

The adverse effect on tenants of a finding that section 72 is invalid is increased by the fact that they have for 10 years been led to believe that they were entitled to a secure 1991 Act tenancy. The disappointment of finding themselves back in the same precarious situation they were before the enactment of the 2003 Act, dependent upon the goodwill of their landlord, may be profound. Moreover, they may, as already noted, have invested and planned on the strength of this expectation – investments for which, in the absence of a 1991 Act tenancy, they will have no right to compensation, notwithstanding any enhancement of the value of land or buildings which may accrue to their landlord.

Set against any burden on landlords, therefore, there is a significant risk of harm and injustice to tenants, compounding the historic injustices and systematic disadvantage that the 2003 Act sought to address.

Conclusion

A fair balance must be one that takes account of the potential impact of the decision on all relevant interests, and which considers who is best placed to bear any unavoidable harms. In this case, I conclude that any adverse impact on landlords is not excessive when compared to the effect on their tenants of removing their rights to secure 1991 Act tenancies under section 72 of the 2003 Act. Accordingly, I find that there has been no disproportionate interference with the rights of landlords under A1P1 and that section 72 of the 2003 Act is within the legislative competence of the Scottish Parliament.

SALVESEN V RIDDELL – REFLECTIVE STATEMENT

Our challenge in writing a feminist judgment for *Salvesen v Riddell* was the fact that the case has no gender angle. Nevertheless, we chose it because it seemed to lend itself to a feminist re-reading employing an ethic of care as opposed to the arguably more masculinist ethic of justice[1] that appeared to us to imbue the original judgments in both the Inner House and the Supreme Court. As is well known, whereas the ethic of justice is founded on the idea that everyone should be treated equally in formal terms and according to their rights irrespective of the consequences, the ethic of care requires that as far as possible no one should be hurt, and that relationships and loved ones be protected. Whereas the ethic of justice assumes that one can resolve moral dilemmas by abstract and universalistic moral reasoning, the ethic of care requires due attention to context and the specific circumstances of each situation. And in

[1] See C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Ma., Harvard University Press, 1993); N Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Chicago, Chicago University Press, 1984); JC Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (London, Routledge, 1993); C Menkel-Meadow,'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39 and 'Portia *Redux*: Another Look at Gender, Feminism and Legal Ethics, in S Parker and C Sampford (eds), *Legal Ethics and Legal Practice* (Oxford, Clarendon Press, 1995) . See also the related idea of the role of love and compassion in law and judging: MC Nussbaum, 'Compassion: the Basic Social Emotion' (1996) 13 *Social Philosophy and Policy* 27, 'Emotion in the Language of Judging' (1996) 70 *St John's Law Review* 23; *Political Emotions: Why Love Matters for Justice (*Cambridge, MA: Belknap Press, 2013); see also special issue on Law and Compassion, (2017) 13 (2) *International Journal of Law in Context*.

resolving disputes, applying an ethic of justice involves the ranking of principles and rights, whereas an ethic of care requires the concrete needs of all to be addressed and that if anyone is going to be harmed it should be those who can best bear the harm.

In both the Inner House and the Supreme Court in *Salvesen v Riddell*, the issues were presented in very formalistic and rights-based terms: the landlord (Salvesen) had exercised a contractual right freely entered into by the tenants (the Riddells) and had been (unfairly) retrospectively penalised by the Scottish Parliament, leading to a breach of their right to property under A1P1 ECHR. The interests – and indeed the rights – of the tenants, as well as the tragic human story that lay behind the legal case, were almost entirely missing.

Our primary rhetorical strategy in developing a feminist rewriting of the case was therefore to reinsert the Riddells, and the human impact of the decision to invalidate s72 of the 2003 Act, into the judgment. We also sought to construct the case not simply as involving an interference with the landlord's A1P1 rights, but as involving *a range of* (actually or potentially conflicting) rights, needs and interests. This was not a case in which the legislature was interfering with the landlord's rights in pursuit of some abstract, disembodied public interest. Rather, it was intervening in support of other *concrete* rights and interests – most obviously those of agricultural tenants, but more generally in support of the (social and economic) rights of the general citizenry who benefit from the productive and sustainable use of agricultural land. In this respect, we had the benefit of hindsight. A group of tenants in the same position as the Riddells subsequently successfully sued the Scottish Government for breach of their own A1P1 rights as a consequence of the Remedial Order enacted to give effect to the decision in *Salvesen v Riddell*.[2] In addition, the Scottish Government has in recent years sought to justify its ongoing land reform programme by reference to a range of social and economic rights in order to counter-balance the property rights claims of existing owners.[3] Reinserting these broader rights and interests into the judgment was important because, as we understand the ethic of care, this requires attention to the *full* range of rights, needs and interests implicated in a dispute, rather than the abstraction of a narrow set of legal issues from their broader social and legal context. Finally, we sought to emphasise the imbalance of power between agricultural landlords and their tenants, the comparative vulnerability of the tenants, and hence the greater ability of landlords to bear the harms resulting from the resolution of their conflicting rights.

In order to get to the point of applying an ethic of care, however, we had to progress further in a proportionality analysis under A1P1 than the Inner House or the Supreme Court; we had to reach the final stage, which requires a balancing of property rights against the legitimate aims being pursued by the legislature. By contrast, both Lord Gill in the Inner House and Lord Hope in the Supreme Court concluded their proportionality analysis at an earlier stage, holding that the retrospective effect on the landlords went further than was necessary to achieve the aims of the legislation, and was therefore punitive and discriminatory.

[2] *McMaster v Scottish Ministers* [2018] CSIH 40.

[3] See Scottish Government, *Scottish Land Rights and Responsibilities Statement* (2017), published under Part 1 of the Land Reform (Scotland) Act 2016, available at: http://www.gov.scot/Publications/2017/09/7869.

Here we employed two further feminist strategies. First, we drew upon feminist understandings of property as a social and relational institution[4] to challenge the highly formalistic analyses employed by Lord Gill and Lord Hope. Such an understanding sees property in terms of connecting, relating to and uniting people rather than in terms of autonomy, exclusion and wealth creation. This allowed us to emphasise the responsibilities, as well as the rights, that come with ownership, and the social objectives that are a legitimate part of a democratic decision to allocate and reallocate property rights. We recognise that the alternative property theories we draw upon here are not exclusively feminist.[5] However, our aim was not so much to defend a feminist understanding of property, but rather to use feminist and other critical theories to problematise and politicise the idea of property, thus justifying judicial deference to the political choices made by the legislature – deference which was conspicuously absent from the original judgments.

Second, we sought to challenge the idea that the differential (and less favourable) treatment of landlords caught retrospectively by section 72 should thereby be regarded as discriminatory. Instead, we drew upon feminist and other similar critical understandings of discrimination as involving systemic disadvantage – or social domination[6] – to challenge what we regarded as the absurd construction of wealthy agricultural landlords as a persecuted minority. Instead, it is agricultural *tenants* who have suffered systemic disadvantage, and this reinforced the legitimacy of the Scottish Parliament's attempt to redress the balance of power in their favour.

Our biggest challenge in rewriting *Salvesen v Riddell* through a feminist lens was to construct what we regarded as a *plausible* judgment – both as a matter of law, but also as a matter of style. As regards the latter, we did not think it plausible that Supreme Court judges would refer explicitly to feminist theory. Accordingly, we tried to echo the language of feminist scholarship rather than to pin our colours overtly to a feminist mast. As regards legal plausibility, we were also mindful of the institutional constraints on the feminist judge *qua* judge, and in particular of the potential Rule of Law objections to an approach to judging which abandons the ethic of justice in favour of an ethic of care.[7] We hope we have managed to strike the balance appropriately, and provided a legally persuasive (or at least plausible)

[4] See eg CM Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory', (1990) 2 *Yale Journal of Law and the Humanities* 37; FW Rudmin, 'Gender Differences in the Semantics of Ownership: a Quantitative Phenomenological Survey Study' (1994) 15 *Journal of Economic Psychology* 487; J Nedelsky, "Law, Boundaries, and the Bounded Self" (1990) 30 *Representations* 1620.

[5] Of the vast literature, see eg K Gray and SF Gray, 'The Idea of Property in Land' in S Bright and J Dewar (eds) *Land Law: Themes and Perspectives* (Oxford, Oxford University Press, 1988); LS Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford, Oxford University Press, 2003); S Coyle and K Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Oxford, Hart Publishing, 2004); M Stone, "Equity, Property, and the Ethical Subject" (2017) 11 ***Pólemos*** 73.

[6] See eg CA MacKinnon, 'Difference and Dominance: On Sex Discrimination' in *Feminist Legal Theory: Foundations* (Philadelphia, Temple University, 1993).

[7] See eg RA Epstein, 'Compassion and Compulsion' (1990) 22 *Arizona State Law Journal* 25; N Boger, 'Liberal Democracy and a Theory of Care' (1999) *UCL Jurisprudence Review* 20; D Markel, 'Against Mercy' (2004) 88 *Minnesota Law Review* 88; SA Bandes, 'Compassion and the Rule of Law' (2017) 13 *International Journal of Law in Context* 184.

judgment, which demonstrates the relevance of feminist legal sensibilities beyond the gender context.