Easter Term
[2013] UKSC 22
On appeal from: [2012] CSIH 26

JUDGMENT

Salvesen *v* Riddell and another, Lord Advocate intervening (Scotland)

before

Lord Hope, Deputy President
Lord Kerr
Lord Wilson
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

24 April 2013

Heard on 12 and 13 March 2013

Appellant
James Mure QC
Kenny McBrearty
(Instructed by Scottish Government Legal Directorate Litigation Division)

Advocates to the Court
W James Wolffe QC
Alasdair Burnet
(Instructed by the Solicitor to the Faculty of Advocates)

LORD HOPE (with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Toulson agree)

1. This is an appeal from an interlocutor of the Second Division of the Court of Session (Lord Justice Clerk Gill, Lord Osborne and Lord Nimmo Smith) of 15 March 2012 allowing an appeal under section 88(1) of the Agricultural Holdings (Scotland) Act 2003 from a decision of the Scottish Land Court: [2012] CSIH 26, 2012 SLT 633. Section 88(3) of the 2003 Act provides that the decision of the Court of Session in any appeal made to it under section 88(1) is final. But, as the Lord Justice Clerk explained in para 1 of his opinion, the issues in the appeal to that court included the question whether section 72 of the 2003 Act was compatible with the European Convention on Human Rights.

2. Section 29(1) of the Scotland Act 1998 provides that an Act of the Scottish Parliament is not law in so far as any provision of the Act is outside the legislative competence of the Parliament. Section 29(2)(d) provides that a provision is outside competence if it is incompatible with any of the Convention rights. The question whether a provision of an Act of the Scottish Parliament is within the competence of the Parliament is a devolution issue: Schedule 6, para 1(a). Paragraph 13 of Schedule 6 provides for an appeal to this court, with leave, against the determination by the Court of Session of the question whether a provision of an Act of the Scottish Parliament was within the Parliament's legislative competence. The Second Division gave leave to appeal on 29 March 2012.

3. The Lord Advocate appeared as an intervener in the proceedings in the Court of Session on behalf of the Scottish Government. The interlocutor of 15 March 2012 included a finding that the appellant's Convention rights had been violated by section 72 of the 2003 Act. The court ordered intimation to the Advocate General for Scotland, and the appeal was continued to a later date on the question of remedy. The Advocate General has not thought it necessary to intervene in these proceedings.

The facts

4. Alastair Salvesen, who was the appellant in the Court of Session, owns Peaston Farm, near Ormiston, East Lothian. He purchased the farm in 1998. At that time it was subject to a tenancy held by a limited partnership. The limited partnership had been constituted by a contract of partnership dated 22 August and 2 September 1991. The general partners were John and Andrew Riddell. The limited partner was the nominee of the previous owner of the farm. When Mr

Salvesen purchased the farm and became the landlord the limited partner's rights were assigned to his nominee. The lease to the limited partnership was dated 17 March, 9 April, 22 April and 27 April 1992. It was to endure until 28 November 2008 and would continue thereafter from year to year by tacit relocation until the limited partnership was dissolved or an effective notice to quit was served under the Agricultural Holdings (Scotland) Act 1991. These provisions were mirrored by the terms of the contract of partnership. The limited partnership was to run until 28 November 2008 and from year to year thereafter, unless notice of dissolution was given in terms of the partnership agreement.

5. On 3 February 2003 the limited partner gave notice to the general partners that the limited partnership would be dissolved on 28 November 2008: for the significance of serving the notice of dissolution on that date, see para 19, below. On 12 December 2008 the general partners gave notice to the landlord under section 72(6) of the 2003 Act that they intended to become the joint tenants of the farm in their own right. Mr Salvesen then applied to the Land Court under section 72(7) for an order under section 72(8) that section 72(6) did not apply. He averred that his intention when he bought Peaston Farm was, when the tenancy came to an end, to amalgamate it with the adjacent farm of Whitburgh and part of the nearby farm of Windymains and Keeper Glen, both of which he had in hand, and farm them as one unit. He had expected that he would obtain vacant possession of Peaston Farm on 28 November 2008, when the lease to the limited partnership was due to end.

6. On 29 July 2010 the Land Court refused his application on the ground that his averments failed to satisfy the requirements of section 72(9)(a)(i) of the 2003 Act. It did not have to determine the devolution issue, as it had not been raised there. The issues in the appeal to the Court of Session included an issue as to the construction of section 72 of the 2003 Act. They also included the devolution issue which is now before this court.

7. The underlying dispute between the parties to the lease was settled during the summer of 2012. Mr Salvesen has chosen not to play any further part in these proceedings, and he seeks no further order of substance from this court or the courts below. But the question whether section 72 is incompatible with the landlord's Convention right is a matter of general public importance. It affects many other cases, several of which are already the subject of proceedings before the Land Court. So the appeal to this court against the interlocutor of 15 March 2012 is being maintained by the Lord Advocate. Mr Wolffe QC and Mr Burnet were appointed as advocates to the court, and the court is grateful to them for their helpful submissions both orally and in writing.

The 2003 Act

8. For much of the post-war period, since the enactment of the Agricultural Holdings (Scotland) Act 1948 which was later consolidated in the Agricultural Holdings (Scotland) Act 1991, agricultural tenants enjoyed indefinite security of tenure under the statute. In most cases, a notice to quit served by the landlord would, if the tenant served a counter-notice, be effective only if the Land Court consented, and the Land Court could consent only in defined circumstances. Relatives of the tenant could succeed to the tenancy. But the practice had grown up of granting new agricultural tenancies to limited partnerships constituted under the Limited Partnerships Act 1907 in which the landlord or his nominee was the limited partner and the tenants of the farm were the general partners. Dissolution of a limited partnership by one of the partners giving notice to the others determines the partnership at the date when the notice takes effect. The remaining partners cannot carry on the business of the firm, as it has been dissolved: J Bennett Miller, *The Law of Partnership in Scotland* (2nd ed), p 460. So when the partnership was dissolved there ceased to be anyone who could claim to be the tenant under the tenancy: see *Inland Revenue v Graham's Trustees* 1971 SC (HL) 1, 20, per Lord Reid; Gill, *The Law of Agricultural Holdings in Scotland* (3rdth ed), para 1.13. As the legislation gave tenants what in practice amounted to indefinite security of tenure, landlords were reluctant to let agricultural land on any other basis. The practice of letting to limited partnerships became widespread.

9. In *MacFarlane v Falfield Investments Ltd* 1998 SC 14 it was submitted that the use of limited partnerships was against the public interest. Greater importance, it was said, should be given to the protection of security of tenure for agricultural tenants over artificial transactions of that kind. The court did not accept that argument. Lord President Rodger said at p 34 that it was not for the court to second guess those who were charged with policy on that matter and to strike down schemes simply on the basis of its uninstructed view of what might be contrary to the public interest in good husbandry. But it had come to be recognised more generally that there was a need for a new statutory pattern for the letting of agricultural land. A system was needed which could offer security of tenure to the tenant, and to the landlord the prospect of recovering vacant possession at the end of a fixed term agreed by the parties before the tenancy began. In May 2000 the Scottish Executive published a white paper entitled *Agricultural Holdings – Proposals for Legislation* (SE/2000/51) which proposed that a new limited duration tenancy should be created and that, with the creation of limited duration tenancies, it should no longer be possible to create new limited partnership tenancies. The 2003 Act was enacted against that background.

10. Section 1(4) of the 2003 Act provides that where, in respect of a tenancy of an agricultural holding, a lease is entered into before the coming into force of that subsection and the 1991 Act applies in relation to the tenancy, the tenancy under

the lease is referred to in the Act as a "1991 Act tenancy". That expression also includes a tenancy under a lease which was entered into on or after the coming into force of the subsection, provided the lease was entered into in writing prior to the commencement of the tenancy and it expressly states that the 1991 Act is to apply to it: section 1(2), read with section 1(4).

11. Part 6 of the 2003 Act is entitled "Rights of certain persons where tenant is a partnership". They include provision in section 74 for the application by the Scottish Ministers of the right to buy provisions in Part 2 of the Act to partnerships who are tenants. The issues which arise in this case relate, however, to the provisions of section 72, which is headed "Rights of certain persons where tenant is a limited partnership". To put those provisions into their context reference must also be made to sections 70 and 73 of the 2003 Act, which are also included in Part 6.

12. Section 70 applies to tenancies where the tenant is a partnership. The partnership to which it refers need not be a limited partnership. It applies to a 1991 Act tenancy if the lease constituting the tenancy is entered into on or after the coming into force of that section where the tenant is a partnership: section 70(1). It is designed to deal with cases where any partner is the landlord or an associate of the landlord, or a partnership of a company in which the landlord has an interest of the kind referred to in section 70(7), and there is any other partner: section 70(2). In such cases, a purported termination of the tenancy as a consequence of, among other things, the dissolution of the partnership in accordance with the partnership agreement attracts the provisions of sections 70(5) and (6), which state:

> "(5) Where this subsection applies, notwithstanding the purported termination of the tenancy –
>
> (a) the tenancy continues to have effect; and
>
> (b) any partner not mentioned in subsection (2)(a) [the landlord or the partnership or company in which he has an interest] becomes the tenant (or a joint tenant) under the tenancy in the partner's own right, if the partner gives notice to the landlord in accordance with subsection (6).
>
> (6) Notice is given in accordance with this subsection if –
>
> (a) it is in writing;

(b) it is given within 28 days of the purported termination of the tenancy; and

(c) it states that the partner intends to become the tenant (or a joint tenant) under the tenancy in the partner's own right."

The effect of these provisions is that, if the landlord seeks to bring the tenancy to an end and the non-landlord partner gives notice in accordance with section 70(6), the tenancy will continue in existence but with the non-landlord partner as tenant in his own right.

13. Section 72 is designed to deal with cases where the tenant is a limited partnership, and any limited partner is the landlord or an associate of the landlord or is a partnership or a company in which the landlord has an interest of the kind referred to in section 70(7). In such cases any general partner may exercise or enforce the right to buy provisions in Part 2 of the Act unless the conditions in section 72(5) are met. But the section also provides that a purported termination of the tenancy as a consequence of, among other things, the dissolution of the partnership by notice served on or after 16 September 2002 by a limited partner of the kind referred to above attracts the provisions of sections 72(3) to (10). These are the provisions to which the issue of incompatibility with the landlord's Convention right is directed.

14. Section 72(3) provides that, in the event of such a termination, "subsection (6) applies subject to subsection (4)." Subsections (4) to (10) are in these terms:

"(4) Subsection (6) does not apply if –

(a) the conditions mentioned in subsection (5) are met; or

(b) the Land Court makes an order under subsection (8).

(5) For the purposes of subsections (2) and (4)(a), the conditions are –

(a) that –

(i) a (or the) notice of dissolution of the partnership has been (or was) served before 4th February 2003 by a limited partner mentioned in subsection (1)(b); and

(ii) the partnership has been dissolved in accordance with the notice; and

(b) that the land comprised in the lease –

(i) has been transferred or let;

(ii) under missives concluded before 7th March 2003, is to be transferred; or

(iii) under a lease entered into before that date, is to be let,

to any person.

(6) Where this subsection applies, notwithstanding the purported termination of the tenancy –

(a) the tenancy continues to have effect; and

(b) any general partner becomes the tenant (or a joint tenant) under the tenancy in the partner's own right,

if the general partner gives notice to the landlord within 28 days of the purported termination of the tenancy or within 28 days of the coming into force of this section (whichever is the later) stating that the partner intends to become the tenant (or a joint tenant) under the tenancy in the partner's own right.

(7) Where –

(a) a tenancy continues to have effect by virtue of subsection (6); and

(b) the –

(i) notice mentioned in paragraph (a) of subsection (3) was served before the relevant date; or

(ii) thing mentioned in paragraph (b) or (c) of that subsection occurred before that date,

the landlord may, within the relevant period, apply to the

Land Court for an order under subsection (8).

(8) An order under this subsection –

(a) is an order that subsection (6) does not apply; and

(b) has effect as if that subsection never applied.

(9) The Land Court is to make such an order if (but only if) it is satisfied that –

(a) the –

(i) notice mentioned in paragraph (a) of subsection (3) was served otherwise than for the purposes of depriving any general partner of any right deriving from this section; or

(ii) thing mentioned in paragraph (b) or (c) of that subsection occurred otherwise than for that purpose; and

(b) it is reasonable to make the order.

(10) Where-

(a) a tenancy continues to have effect by virtue of subsection (6); and

(b) the-

(i) notice mentioned in paragraph (a) of subsection (3) was served on or after the relevant date; or

(ii) thing mentioned in paragraph (b) or (c) of that subsection occurred on or after that date,

section 73 applies."

15. Section 72(11) provides that, for the purposes of subsections (7) and (10), the relevant date is such date as the Scottish Ministers may by order specify and that, for the purposes of subsection (7), the relevant period is the period from the relevant date to such date as they may so specify. Section 72(12) provides that in that section the expressions "limited partnership", "limited partner" and "general partner" are to be construed in accordance with the Limited Partnerships Act 1907. The relevant date is 1 July 2003. The relevant period ended on 29 July 2003 or on the date 28 days after the general partner gave notice under section 72(6), whichever was the later: Agricultural Holdings (Relevant Date and Relevant Period) (Scotland) Order 2003 (SSI 2003/294).

16. Section 73 is headed "Termination of tenancy continued under section 72". Where it applies, the provisions of section 21 of the 1991 Act about notice to quit and notice of intention to quit do not apply: section 73(1). Section 73(3) provides that the tenancy may be brought to an end by the landlord if the landlord gives notice to the tenant under that subsection. Section 73(4) provides that, subject to subsection (7) (which provides for the making by the Land Court, on an application by the landlord under subsection (6), of an order that, instead of the periods of time mentioned in subsections (4) and (5), such shorter periods as the Land Court may specify are to apply), a notice under subsection (3) must:

"(a) be in writing and state that the tenant shall quit the land on the expiry of the stipulated endurance of the lease constituting the tenancy (or, where the lease has continued in force by tacit relocation, on the expiry of a period of continuation); and

(b) be given not less than one year nor more than two years before the expiry of the stipulated endurance of the lease (or expiry of the

> period of continuation), provided that not less than 90 days have elapsed from the date on which the intimation mentioned in subsection (5) is given."

Section 73(5) provides that, subject to subsection (7), a notice under subsection (3) is of no effect unless the landlord has given written intimation of the landlord's intention to terminate the tenancy to the tenant not less than two years nor more than three years before the expiry of the stipulated endurance of the lease (or expiry of the period of continuation).

The history of the legislation

17. The background to the introduction of the Agricultural Holdings (Scotland) Bill to the Parliament on 16 September 2002 and the history of its passage through its various stages to its passing on 12 March 2003 and the Royal Assent on 22 April 2003 were described very fully and helpfully by the Lord Justice Clerk in paras 7 to 33 of his opinion. Much of it has no direct bearing on the devolution issue which is before this court, so I do not think it necessary to go over these matters in detail. The following points are however worth noting.

18. The use of limited partnerships with a fixed duration was devised by the market to deal with the greatly reduced value of the landlord's interest that was the result of the security of tenure that had been conferred on the agricultural tenant as part of the post-war reorganisation of British agriculture. Although this was not objectionable in principle, the flexibility that the system gave to the landlord as to the duration of the tenancy was not attractive to tenants. This was not only because of the reduction in their security of tenure. There was also an upward pressure on open market rents due to the competition for limited partnership lets. An attempt was made in 1983 to proscribe such lets by way of a proposed amendment to the Agricultural Holdings (Amendment) (Scotland) Bill, but it was unsuccessful. It was to this issue that the Scottish Government directed attention when its white paper *Agricultural Holdings – Proposals for Legislation* was published in May 2000. But in the last sentence of para 2.9 of the white paper it was stated that existing leases where the tenant was a limited partnership would not be affected by its proposals. That remained the position when the Bill was introduced on 16 September 2002.

19. An indication that existing tenancies where the tenant was a limited partnership might after all be affected was given by the Minister for the Environment and Rural Development, Ross Finnie MSP, in a letter to the convener of the Parliament's Rural Development Committee of 19 November 2002. He said that he had not yet closed his mind to the option of providing a right to buy for

existing general partners in 1991 Act tenancies where the tenant was a limited partnership, adding that while the consultation on the draft Bill had not revealed much support for this, a number of tenants had separately urged him to extend the right to buy in this way. On 3 February 2003 a marshalled list of amendments for stage 2 was published by the Parliament. It included a proposed new section 58A that was to apply to existing limited partnerships. It would enable the general partner, in the event of the service by the limited partner of a notice of dissolution of the partnership during the period from 4 February 2003 to a date to be specified later by the Scottish Ministers, to apply to the Land Court for an order that the tenancy was to continue with the general partner as tenant in his own right. This was, albeit in substantially different terms, the precursor of what is now section 72 of the 2003 Act. The limited partner in this case served his notice of dissolution on 3 February 2003. So it was not affected by the proposed amendment, which was agreed to by the committee.

20. A further list of marshalled amendments for stage 3 was published on or about 10 March 2003. Among them was an amendment to section 58A which moved the start date of the period on or after which a notice of dissolution would trigger its application back to 16 September 2002. It also provided that the landlord could apply to the Land Court for an order that the provision that the general partner was to continue as tenant in his own right was not to apply, but that the Land Court could make such an order only if it was satisfied that the dissolution notice had been served otherwise than for the purposes of depriving any general partner of any right derived from the section and that it was reasonable to make the order. As the Lord Justice Clerk observed in para 28 of his opinion, this greatly weakened the position of the landlord in comparison with the position he would have been in under section 58A in its original form. Under the previous amendment the general partner could become tenant only if he applied to the Land Court and established specific grounds for his application. The March 2003 amendment was also retrospective. It caught notices of dissolution that had been served in the period since 16 September 2002 when the Bill was introduced. They included the notice of dissolution that was served in this case.

21. This marshalled list of amendments also included an amendment which inserted a further section into the Bill, to follow section 58A. This was the precursor of what is now section 73 of the 2003 Act. It was to apply where the tenancy continued to have effect by virtue of what are now sections 72(6) and 72(10). It allowed the landlord to terminate the tenancy at the end of its contractual period by giving intimation of his intention to do so and then serving a notice to quit. It is this section, and the conditions for its application in section 72(10)(b)(i) and (ii), that gives rise to the devolution issue in this case.

The issues in the appeal

(a) prematurity

22. The appeal to the Court of Session related solely to an issue about the construction of section 72(9) of the 2003 Act. The Land Court held that, despite Mr Salvesen's explanation for it, the main purpose of the limited partner's notice had been to avoid the risk that a provision in the proposed new Act would prevent him from terminating the tenancy on 28 November 2008. The question for the Court of Session was whether the Land Court had construed section 72(9)(a) too narrowly, having regard to the purpose of that provision.

23. The Second Division held that the test that should have been applied by the Land Court was whether the notice was served with an underlying purpose that was "not simply" to prevent the general partner from acquiring rights under the legislation. The words "not simply" were to be read into section 72(9)(a)(i) to give content to the subsection. A purpose other than that to which it referred would exist where the landlord served the notice in implementation of a pre-existing plan, for the fulfilment of which dissolution of the partnership in accordance with the partnership agreement was a necessary step. The Land Court had therefore erred in dismissing the application, and the landlord was entitled to a proof of his averments as to the reason why the notice was served: paras 65-67.

24. The Second Division recognised, however, that the landlord might fail to prove his case under section 72(9)(a)(i) or, having proved it, might fail to satisfy the Land Court on the reasonableness test set out in section 72(9)(b). In either of these events the Convention arguments that had been submitted to it on the landlord's behalf would become decisive. The Lord Justice Clerk said that the Convention based questions remained live and that, as a decision on those questions could make further procedure in the Land Court unnecessary and they were of such general importance, they were better considered now rather than later: para 69. So he proceeded, on behalf of the court, to give his opinion on these issues.

25. Mr Mure QC for the Lord Advocate submitted that the Second Division's finding that the landlord's rights were violated by section 72 was premature and unnecessary, as the effect of its decision on the construction issue was that the question whether Mr Salvesen was entitled to an order under section 72(8) was still pending before the Land Court. I would reject that argument for the reasons given by the Lord Justice Clerk in para 69. Events have, of course, moved on since he delivered his opinion. The parties have settled their differences and there is no longer any need for the case to be remitted to the Land Court. The

Convention issues remain, however. They are of general public importance, and the sooner any uncertainty as to how they should be answered is resolved the better. The best course in these circumstances is for them to be resolved in this appeal.

(b) the Convention issues

26. As the Second Division's interlocutor of 15 March 2012 makes clear, the argument that section 72 is incompatible with the landlord's Convention rights relies on article 1 of the First Protocol to the European Convention on Human Rights, read together with article 14 of the Convention. There are three questions that need to be addressed under this heading:

(i) is section 72 incompatible with that Convention right?

(ii) if not, can it be construed in such a way as to make it Convention compliant?

(iii) if it cannot be so construed, what is the appropriate remedy?

The Second Division's opinion on these questions

27. The Second Division proceeded initially on the basis that section 72 was enacted as an anti-avoidance measure. But it held on that basis that it was inappropriate because of its excessive effect and its arbitrary scope: paras 80-85. The Lord Justice Clerk said that it was excessive because, if the landlord should fail to obtain an order of the Land Court under section 72(9), the general partner is given a 1991 Act tenancy of the holding, with all the adverse consequences to the landlord that this involves, and the landlord is also exposed to the tenant's contingent right to buy. It was unreasonably discriminatory against the landlord on whose land a 1991 Act tenancy is imposed because of his failure to obtain an order under section 72(9), as a landlord who serves notice of dissolution on or after 1 July 2003 (see para 15, above) has the opportunity under section 72(10)(b)(i) to bring the tenancy of the former general partner to an end by an incontestable notice to quit under section 73. It was arbitrary because its prejudicial consequences affect all notices of dissolution served in the period from 16 September 2002 to 30 June 2003, no matter how long the period of notice is. It was also arbitrary because it continues to apply for what appears to be a random period of one month and eight days from the coming into force of section 72 on 22 May 2003 to the coming into force on 1 July 2003 of section 73: Agricultural Holdings (Scotland)

Act 2003 (Commencement No 1) Order 2003 (SSI 2003/248); Agricultural Holdings (Scotland) Act 2003 (Commencement No 2) Order 2003 (SSI 2003/305).

28. Asking himself whether any alternative justification of section 72 could be found, the Lord Justice Clerk examined the justification that had been offered for this provision to the Parliament. He referred in paras 87-92 to passages in the speeches of the deputy minister in the debates at stages 2 and 3 of the Bill which indicated that the provisions of section 72 were essentially punitive. Its inclusion at stage 3 was a retaliatory act based on the ministerial view that dissolutions effected in anticipation of the legislation were immoral. In para 95 he said that he could see no reason why the service of notices of dissolution during the period before the amendment of March 2003 was published was deserving of any form of penalty. This was lawful under the existing law, and would have been unaffected by the proposals for law reform that were current at the time.

29. For these reasons the Lord Justice Clerk said that he was unable to find any convincing justification for the differential treatment of landlords in sections 72 and 73, or that section 72 pursued an aim that was reasonably related to the overall aims of the legislation: para 97. He was also unable to see how section 72(9) could be read in such a way as to avoid the harsh consequences to landlords that were prescribed by that section for notices served before 1 July 2003 in comparison with the consequences for notices served after that date. As section 72 could only be read in a way that was incompatible with the Convention right it was, to some extent, outwith legislative competence: para 103.

30. Two questions then arose, namely (i) the means of severance of the offending parts of the legislation, if severance was possible; and (ii) the orders, if any, that the court should make to deal with the consequences under section 102 of the Scotland Act 1998. The Second Division was not fully addressed on these issues and, as it was of the opinion that the case could be appropriate for the making of an order under that section, it ordered intimation of the proceedings to the Advocate General as required by section 102(4)(b). It appointed 29 March 2012 for a hearing on the question of remedy and the possible application of section 102: paras 105-106. That hearing did not take place, however, as on 29 March 2012 the Second Division granted leave under para 13 of Schedule 6 to the 1998 Act for an appeal to this court against the Court of Session's determination of the devolution issue.

Article 1 of the First Protocol

31. Article 1 of the First Protocol ("A1P1") is about the protection of property. It is in these terms:

> "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."

32. Article 14 of the Convention prohibits discrimination in the enjoyment of the right to the protection of property under A1P1. It 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."

33. The Lord Advocate contended in the Court of Session that A1P1 was not engaged: see 2012 SLT 633, para 71. But that was no longer his position in this court. He accepts that the article is engaged, due to the potential control of use that may result in the event that the landlord's application under section 72(9) fails and there is no order in his favour under section 72(8). I think that his acceptance that A1P1 is engaged was unavoidable. The consistent jurisprudence of the Strasbourg court shows that a restriction on a landlord's right to terminate a tenant's lease constitutes control of the use of property within the meaning of the second paragraph of the article: *Barreto v Portugal* (Application No 18072/91) (unreported) 21 November 1995, para 35; *Spadea v Italy* (1995) 21 EHRR 482, para 28; *Gauci v Malta* (2009) 52 EHRR 818, para 52.

34. The question which then arises is as to the proportionality of the interference. The tests to be applied are now firmly established. The second paragraph of A1P1 must be construed in the light of the principle laid down in the first sentence of the article: *James v United Kingdom* (1986) 8 EHRR 123, para 37. An interference must achieve a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: *Sporrong v Sweden* (1982) 5 EHRR 35, para 69. The search for this balance is reflected in the structure of the article as a whole and therefore also in the second paragraph: *Mellacher v Austria* (1989) 12 EHRR 391, para 48. There must be a reasonable relationship of proportionality between the

means employed and the aim pursued: *James v United Kingdom*, para 50; *Mellacher v Austria*, para 48.

35. In *Lindheim and others v Norway*, (applications nos 13221/08 and 2139/10) (unreported), given 12 June 2012, para 119, the court began its assessment by setting out the principles about achieving a fair balance that were restated by the Grand Chamber in *Hutten-Czapska v Poland* (2006) 45 EHRR 52, paras 167-168:

> "167. Not only must an interference with the right of property pursue, on the facts as well as in principle, a 'legitimate aim' in the 'general interest', but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.
>
> The concern to achieve this balance is reflected in the structure of article 1 of Protocol No 1 as a whole. In each case involving an alleged violation of that article the court must therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden.
>
> 168. In assessing compliance with article 1 of Protocol No 1, the court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are 'practical and effective'. It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions for reducing the rent received by individual landlords and the extent of the State's interference with freedom of contract and contractual relations in the lease market but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner."

The provisions of section 72, and the legislative steps that led to its enactment, must be examined against this background.

36. There is no doubt that, as regards the question whether it is pursuing a legitimate aim in the general interest, the Parliament has a broad area of discretion in the exercise of its judgment as to social and economic policy: *Hutten-Czapska v Poland*, paras 164-166; *Gauci v Malta*, para 54. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the court to say whether the legislation represents the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way: *James v United Kingdom*, para 51; *Mellacher v Austria*, para 53. But there must be a fair balance if the requirement of proportionality is to be satisfied. The balance that must be struck is between the demands of the general interest of the community and the requirements of the protection of the fundamental rights of the individual. The question is whether the general interest demands in this case were sufficiently strong to justify the extent of the prejudice that the legislation gives rise to: *Lindheim and others v Norway*, para 129.

37. Some of the remarks by the deputy minister to which the Lord Justice Clerk referred in paras 87-92 of his opinion might be taken to indicate that the intention was to punish landlords who served notices between 16 September 2002 and 4 February 2003 for conduct that the deputy minister described in col 16317 during the debate at stage 3 on 12 March 2003 as "immoral". But in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, para 66, Lord Nicholls of Birkenhead issued an important warning. He said that one must be careful not to treat a ministerial or other statement as indicative of the objective intention of Parliament. It should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions.

38. A reader of what the deputy minister said during that debate might be forgiven for thinking that it displayed a marked bias against landlords. If there was, this was a regrettable attitude for a minister to adopt in a system where both the legislature and the executive are required to act compatibly with the Convention rights. As a minority group landlords, however unpopular, are as much entitled to the protection of the Convention rights as anyone else: see *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, para 210, where attention was drawn to the use throughout the Convention of the word "everyone". In the present context this means that the rights and freedoms that it guarantees are not just for tenants, although their interests are important. They are for landlords too.

39. But this is a case about the legislative competence of the Parliament, not about acts of the Scottish Government. The question whether section 72 is

incompatible with the Convention right must be judged primarily by what the section provides, not by what was said by the deputy minister. That is not to say that what he said in support of the amendment which he introduced at stage 3 is irrelevant. It is important information as to the purpose for which the legislation was being proposed. He drew attention to the large number of dissolution notices that had been served due to the desire of landlords to avoid being adversely affected by any of the amendments that were under discussion, including the possible introduction of a right to buy. Mr Mure said that the mass service of these notices was a deliberate step of avoidance at a stage when the Bill, which had been designed to implement key social and economic policies, was still being debated. It was to deal with this situation that the amendment that was brought forward at stage 3 was introduced.

40. A measure designed to deal with this situation can, in my opinion, be said to have had a legitimate aim. As the court said in *Bäck v Finland* (2004) 40 EHRR 1184, para 68, it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy that was being adopted. Legislation which is retroactive is not necessarily incompatible with A1P1: *MA v Finland* (2003) 37 EHRR CD 210, 217. As the court pointed out in that case, retrospective legislation is not as such prohibited by that provision. The question is whether the retrospective application of section 72 imposed an unreasonable burden on landlords who had served notices before 1 July 2003, and thereby failed to strike a fair balance between their interests on the one hand and preserving the integrity of the legislation on the other.

41. The provision in section 72 which lies at the heart of the argument is subsection (10). Its function is to enable a landlord, in cases where the tenancy continues to have effect by virtue of section 72(6) notwithstanding the purported termination of the tenancy in the circumstances referred to in section 72(3), to obtain the benefit of section 73. It confers a significant benefit as a counterpart to the benefit that the general partner obtains under section 72(6), as it provides that the tenancy may be brought to an end by the landlord by the service of a notice to quit at a time of his own choosing. Where it applies the general partner does not enjoy security of tenure under the tenancy in his own right for an indefinite period. But subsection (10)(b)(i) and (ii) adds a further qualification that must be satisfied if section 73 is to apply. The notice of dissolution or thing mentioned in section 72(3) must have been served or occurred on or after the relevant date which, as specified by order by the Scottish Ministers, is 1 July 2003.

42. The effect of this qualification is to deny the benefit of section 73 to all cases where the tenancy was purportedly terminated between 16 September 2002 and 30 June 2003 but which continue to have effect by virtue of section 72(6). Landlords who served dissolution notices on 3 February 2003 are therefore denied that benefit. They are in a worse position than those who served notices on or after

1 July 2003. So too are landlords who served them at any time after the date when the Bill was introduced, despite the fact that existing leases where the tenant was a limited partnership were not at that stage affected by its proposals and those who served notices before 4 February 2003 were not affected when the new section 58A was introduced on that date at stage 2. The provision is therefore discriminatory in a respect that affects the landlords' right to the enjoyment of their property. It is hard not to see this provision as having been designed to penalise landlords in this group retrospectively. The benefit of section 73 is also denied to landlords of continuing tenancies who served dissolution notices during the period of one month and eight days between the coming into force of section 72 and the coming into force of section 73. The penalisation of this group appears to be entirely arbitrary.

43. Mr Mure said that section 72 had to be seen in the context of the situation as it was at stage 3 when the amendment was introduced. The aim was to address what he referred to as the mass service of dissolution notices urgently and to prevent any further steps by way of avoidance. Where there was an urgent need to address that situation it could not be excessive to place all of those who had been serving notices during the passage of the bill into the same category. He did not agree with the description of the effect of section 72(10)(b)(i) and (ii) by the Inner House as punitive. He said that there had been a policy choice to make which was within the margin of discretion that ought to be accorded to the Parliament. It was a legitimate choice which was made in the public interest. It was a question of balance, and the Second Division had erred by placing undue weight on the difference between sections 72 and 73.

44. I am not persuaded that the difference in treatment between landlords of continuing tenancies who served notices after 30 June 2003, for whom the benefit of section 73 was regarded as an appropriate counterweight to the benefit that was conferred on the general partner by section 72(6), and landlords of continuing tenancies who are denied that benefit because they cannot satisfy the tests in section 72(10)(b)(i) or (ii) was justified. The difference in treatment has no logical justification. It is unfair and disproportionate. It is no answer to this criticism to say that there was an urgent need to meet the problem that had been identified. The legislation was intended to have an effect which was permanent and irrevocable. I agree with the Lord Justice Clerk's conclusion that section 72 does not pursue an aim that is reasonably related to the aim of the legislation as a whole. On this reading of it, Mr Salvesen's rights under A1P1 would have been violated if it had been applied to him.

45. I do not think that any separate issue arises under article 14. All that needs to be said is that the declaration that it contains, which is that the enjoyment of the rights and freedoms set forth in the Convention are to be secured without discrimination on any ground, informs the approach that is to be taken to the

question whether there is an incompatibility with A1P1. But it is not just because section 72 is discriminatory that it is incompatible with the landlord's rights under that article. The substance of the incompatibility lies within A1P1 itself, in view of the punitive effects of section 72(10)(a) read together with section 72(10)(b)(i) and (ii).

Can section 72 be read and given effect compatibly?

46. Section 101(2) of the Scotland Act 1998 provides that a provision of an Act of the Scottish Parliament is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and to be given effect accordingly. But as we are concerned in this case with an issue about compatibility with a Convention right, the proper starting point is to construe the legislation as required by section 3(1) of the Human Rights Act 1998: *DS v HM Advocate* [2007] UKPC 36, 2007 SC (PC) 1, para 24. The obligation to construe a provision in an Act of the Scottish Parliament so far as it is possible to do so is a strong one, and the court must prefer compatibility to incompatibility. But any section 3 interpretation must, as Lord Rodger of Earlsferry said in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 121, go with the grain of the legislation; see also Lord Nicholls of Birkenhead, para 33. It is not for the court to go against the underlying thrust of what it provides for, as to do this would be to trespass on the province of the legislature.

47. As the Lord Justice Clerk pointed out in para 102, the problem that any attempt to construe section 72 compatibly with the landlord's A1P1 right has to face is the harshness of the consequence that is prescribed for landlords of tenancies which continue to have effect by virtue of section 72(6) who served notices or in relation to whom the specified things occurred before 1 July 2003, in comparison with the consequences for those whose notices were served or in relation to whom the specified things occurred on or after that date. This is the effect of section 72(10)(a) read together with section 72(10)(b)(i) and (ii), which is expressed in clear and unequivocal language. The underlying message is plain. Only those whose dissolution notices were served or in relation to whom the specified things occurred on or after 1 July 2003 can take advantage of section 73. I do not think that this provision is capable of being read and given effect in any other way.

48. Section 72(9), which sets out the tests that the Land Court must apply when it is considering whether to make an order under subsection (8) that subsection (6) does not apply, is also expressed in clear and unequivocal language. Its purpose, of course, is to ensure that landlords whose only purpose in serving the dissolution notice was to avoid the consequences of legislation that might turn out to be to their disadvantage would be caught by the provision in favour of general partners

in subsection (6). The words "but only" which appear in parenthesis in subsection (9) serve to emphasise the strictness of the test that is to be applied in order to achieve that result. The Second Division held that the words "not simply" should be read in to the subsection to give content to it. To this extent the test may be more precisely targeted. But it is a test that by no means every landlord will be able to satisfy. It provides no protection for those who cannot do so against the incompatibility with their A1P1 Convention right.

49. For these reasons I agree with the Lord Justice Clerk that section 72 can be read only in a way that is incompatible with the A1P1 Convention right. The question which must then be addressed is whether it is possible to identify and sever the provision within section 72 which is incompatible with the Convention right. That would allow the remainder of the section to remain in force, and so limit the effects of the decision that the section is not within the legislative competence of the Parliament. The Second Division made a finding that Mr Salvesen's rights under A1P1 were violated by section 72, but it was not fully addressed on this issue. Having heard fuller argument on the point, this court is in a position to examine it more closely.

50. It has not been suggested that the incompatibility extends to the rights conferred by section 72(2), or to cases of the kind referred to in subsection (5) or to cases where the Land Court has made an order under subsection (8) that subsection (6) does not apply: see also sections 72(3) and (4). There is no reason to think that those provisions are outside legislative competence. Mr Wolffe pointed out that the relationship between section 72 and section 73 should not be overlooked either. Section 73 applies in the circumstances described in section 72(10), and there are no doubt now many leases governed by section 73 in existence. So it would be desirable, if this is possible, to leave section 73 standing. A declaration that section 72 as a whole is outside the legislative competence of the Parliament would deprive section 73 of its effect too. As Mr Wolffe put it, if section 72(10) is not law, that proposition will take section 73 with it. But it is not possible to solve every problem at this stage.

51. It is plain that the whole section needs to be looked at again, as does its relationship with section 73. This is not just a matter of redrafting in order to ensure that all its provisions are compatible with the Convention rights. There are important issues of policy too which the court must leave to the democratic process. But the finding of incompatibility ought not to extend any further than is necessary to deal with the facts of this case, and it is important that accrued rights which are not affected by the incompatibility should not be interfered with. As the incompatibility arises from the fact that sections 72(10)(a) and 72(10)(b) are so worded as to exclude landlords of continuing tenancies from the benefit of section 73 if their notices were served or the specified thing occurred before the relevant date, I would limit the decision about the lack of legislative competence to that

subsection only. I would recall that part of the interlocutor of 15 March 2012 in which the Second Division found that Mr Salvesen's rights under A1P1 were violated by section 72, and substitute a finding that Mr Salvesen's rights under A1P1 were violated by section 72(10). This then raises questions as to the appropriate remedy.

Remedy

52. Section 102(1) of the Scotland Act 1998 provides that the section applies where any court or tribunal decides that an Act of the Scottish Parliament or any provision of such an Act is not within the legislative competence of the Parliament. Section 102(2) is in these terms:

> "The court or tribunal may make an order –
>
> (a) removing or limiting any retrospective effect of the decision, or
>
> (b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected."

53. These two sub-paragraphs can work hand in hand, but the powers need not be exercised together. In *Martin v Most* 2010 SC (UKSC) 40, para 43 I said that, had I been in favour of allowing the appeals in that case, I would have made an order under section 102(2)(a) removing the retrospective effect of the decision and an order under section 102(2)(b) suspending its effect for two months to enable the defect in the legislation to be corrected. But each case must be dealt with on its own facts, and in this case the question whether it would be right for the court to remove the retrospective effect of the decision is much more difficult.

54. Section 102(3) provides some guidance as to how the powers under section 102 are to be exercised. It says that the court must have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected. In *Martin*, where the issue was about the sheriff's sentencing powers, that was unlikely to be a difficult exercise. But in this case a long period has elapsed since the legislation came into operation, and there are competing rights and interests which will need to be considered. Tenants who have benefited from the legislation may be adversely affected if the decision is to operate retrospectively. Landlords against whom steps have been taken in reliance on the legislation may be adversely affected if the decision cannot operate retrospectively. An order which only had prospective effect might well be

incompatible with their Convention rights. The court would be in breach of section 6 of the Human Rights Act 1998 if it were to make such an order. On the other hand there will be other landlords of tenancies which continued to have effect by virtue of section 72(6) but who now have the benefit of section 73 because they have been able to satisfy the conditions in section 72(10)(b)(i) or (ii) as their notices were served or the specified things occurred on or after 1 July 2003.

55. Mr Mure drew attention to the prospect that, in the absence of an order removing or limiting the retrospective effect of the decision, tenants who had invested in their agricultural holdings during the past ten years on the basis that they had security of tenure under a 1991 Act tenancy would find that their tenancy was null and void. Other parties might have acquiesced in the operation of the legislation and reached commercial settlements on the basis of mutual agreement. Settled transactions of that kind ought not to be disturbed. On the other hand some landlords who might wish to resume possession of their lands if section 72 were not law would be prevented from doing so if the decision did not have retrospective effect. Mr Wolffe referred to various other examples of cases which might be affected by an order removing or limiting the retrospective effect of the decision. Most of these problems will have been addressed by limiting the extent of the incompatibility to section 72(10), but cases directly affected by that provision will need to be provided for.

56. In *Marckx v Belgium* (1979) 2 EHRR 330, para 58, the Strasbourg court declared that the principle of legal certainty was necessarily inherent in the law of the Convention as in Community law, and it dispensed the Belgian state from re-opening legal acts or situations that antedated the delivery of its judgment. It followed the same approach in *Walden v Liechtenstein* (application no 33916/96) (unreported) 16 March 2000. The court said that it had also been accepted that, in view of the principle of legal certainty, a constitutional court may set a time-limit for the legislator to enact new legislation with the effect that an unconstitutional provision remains applicable for a transitional period. As was noted in *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13, para 58, section 102 of the Scotland Act gives effect to that principle. This suggests that closed cases of whatever kind should be allowed to stand. But if the principle were to be applied generally, it would exclude claims by landlords whose position had been prejudiced by the operation of section 72(10)(b). As already mentioned, that would be incompatible with their Convention rights.

57. I would therefore decline to make an order under section 102(2)(a) removing or limiting the retrospective effect of the finding that section 72(10) is outside the legislative competence of the Scottish Parliament. Any adverse effect on rights arising from tenancies to which section 73 has been applied because the conditions set out in section 72(10) were satisfied will need to be provided for.

But I would leave that matter to the Scottish Parliament. Decisions as to how the incompatibility is to be corrected, for the past as well as for the future, must be left to the Parliament guided by the Scottish Ministers. Both sides of the industry will need to be consulted, after the necessary research has been carried out and proposals for dealing with the situation that respects the parties' Convention rights have been formulated. That process will take time, and the court should do what it can to enable it to be conducted in as fair and constructive a manner as possible. So I would suspend the effect of the decision that section 72(10) is not law for a period that will be sufficient to enable the defect to be corrected. Mr Mure suggested that a period of twelve months or such shorter period as might be necessary for this purpose would be appropriate, and I would be content to adopt that suggestion. It is, however, possible that more time will be needed. So I would also give permission to the Lord Advocate to return to the court for any further orders under section 102(2)(b) that may be required in the meantime. The court best placed to deal with that matter would be the Court of Session.

Conclusion

58. I would allow the appeal. I would, as indicated in para 47, above, recall the Second Division's interlocutor finding that Mr Salvesen's rights under article 1 of the First Protocol to the European Convention on Human Rights were violated by section 72 of the 2003 Act and substitute for it a finding that Mr Salvesen's rights under article 1 of the First Protocol were violated by section 72(10) of the 2003 Act and that this provision is outside the legislative competence of the Scottish Parliament. I would make an order under section 102(2)(b) of the 1998 Act suspending the effect of the finding that section 72(10) is outside the legislative competence of the Parliament for 12 months or such shorter period as may be required for the defect to be corrected and for that correction to take effect. I would give permission to the Lord Advocate to apply to the Court of Session for any further orders under section 102(2)(b) that may be needed in the meantime to enable the Scottish Ministers to achieve the correction before the suspension comes to an end.