24 April 2013

PRESS SUMMARY

Salvesen (Appellant) v Riddell and another (Respondents), Lord Advocate intervening (Scotland) [2013] UKSC 22
On appeal from [2012] CSIH 26

JUSTICES: Lord Hope (Deputy President), Lord Kerr, Lord Wilson, Lord Reed and Lord Toulson.

BACKGROUND TO THE APPEAL

The issue in this appeal is whether, in terms of the Scotland Act 1998 (the "Scotland Act"), section 72 of the Agricultural Holdings (Scotland) Act 2003 (the "2003 Act") is outside the legislative competence of the Scottish Parliament. The argument for Mr Salvesen is that it is incompatible with his rights under article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") relating to the protection of his property **[1, 26]**.

For much of the post-war period, agricultural tenants enjoyed effectively indefinite security of tenure under statute. 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. When such a limited partnership is dissolved, the remaining partners cannot carry on the business of the firm, and there ceases to be anyone who can claim to be the tenant. Therefore by dissolving the limited partnership, the limited partner effectively had a way of terminating the tenancy. Landlords were reluctant to let agricultural land on any other basis and the practice of letting to limited partnerships became widespread. But it came to be recognised that a new system was needed **[8, 9]**.

Section 72(6) of the 2003 Act provides that if the limited partner serves a dissolution notice after 16 September 2002, the tenancy continues to have effect and the general partner becomes the tenant under the tenancy in his own right if he gives notice to the landlord as required under the subsection. Section 72 also provides that if the dissolution notice is served between 16 September 2002 and 30 June 2003, the landlord can apply to the Land Court for an order that section 72(6) does not apply. The Land Court can make such an order only if it is satisfied that (a) the dissolution notice had been served otherwise than for the purposes of depriving any general partner of any right derived from the section and (b) that it is reasonable to make the order.

Section 72(10) provides that where a tenancy continues to have effect by virtue of section 72(6) and the dissolution notice was served on or after 1 July 2003, section 73 applies. Section 73 allows the landlord to terminate the tenancy at the end of its term 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), that gives rise to the devolution issue in this case **[13 – 16, 21]**.

The Agricultural Holdings (Scotland) Bill had been introduced into the Scottish Parliament on 16 September 2002. Amendments were published on 3 February 2003, which included the precursor to section 72. At that stage, the start date of the period on or after which a notice of dissolution would trigger the application of the provision was 4 February 2003. On or about 10 March 2003, an amendment to that provision was published which moved the start date back to 16 September 2002. The aim was apparently to address urgently the mass service of dissolution notices and to prevent any further steps by way of avoidance by landlords. The March 2003 amendment was retrospective. It caught dissolution notices that had been served in the period since the Bill was introduced. They included the notice served by Mr Salvesen **[18 – 21]**.

Peaston Farm, near Ormiston, East Lothian was subject to a tenancy held by a limited partnership in which the general partners were the Riddells. When Mr Salvesen purchased the farm in 1998 and became the landlord, the limited partner's rights were assigned to his nominee. The lease was to run until 28 November 2008 and would continue from year to year thereafter unless the limited partnership was dissolved. On 3 February 2003 the

limited partner gave notice to the general partners that the limited partnership – which was to run until 28 November 2008 and from year to year thereafter unless dissolved – would be dissolved on 28 November 2008. On 12 December 2008 the general partners gave notice to the landlord that they intended to become the joint tenants of the farm in their own right.

Mr Salvesen then applied to the Land Court for an order that section 72(6) did not apply. He said that his intention when he bought the farm was, when the tenancy came to an end, to amalgamate it with other farms he had in hand, and farm everything as one unit. The Land Court was not satisfied that the test for such an order had been made out. Mr Salvesen then appealed to the Court of Session and obtained leave to raise the devolution issue which is now before the Supreme Court. Although the underlying dispute between the parties to the lease was settled during the summer of 2012, the question whether section 72 is incompatible with the landlord's A1P1 rights is a matter of general public importance **[4 – 7]**.

JUDGMENT

The Supreme Court unanimously allows the appeal. It finds that Mr Salvesen's A1P1 rights were violated by section 72(10) of the 2003 Act and that this provision is outside the legislative competence of the Scottish Parliament. It makes an order under the Scotland Act suspending the effect of this finding effectively until the defect is corrected **[58]**. The judgment is given by Lord Hope with whom all the other justices agree.

REASONS FOR THE JUDGMENT

A1P1 is, as was conceded by the Lord Advocate, engaged in this case **[33]**. A measure designed to deal with the large number of dissolution notices served on 3 February 2003 in an attempt to avoid the effects of the Bill can be said to have had a legitimate aim **[40]**. The effect of section 72(10) 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). The landlords who served dissolution notices during that period are in a worse position than those who served notices from 1 July 2003. The provision is discriminatory in a respect that affects the landlords' right to the enjoyment of their property. It is hard not to see it as having been designed to penalise landlords in this group retrospectively **[42]**.

The Court is not persuaded that there was a justified difference in treatment between this group and landlords of continuing tenancies who served notices from 1 July 2003. The benefit of section 73 was regarded in their case as an appropriate counterweight to the benefit that was conferred on the general partner by section 72(6). The difference in treatment of those whose notices were served before that date 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. 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 still been applied to him **[44]**.

The relevant provisions are expressed in clear and unequivocal language. Section 72 can be read only in a way that is incompatible with the A1P1 right. It is plain that the whole section needs to be looked at again, as does its relationship with section 73. 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. The incompatibility arises from the fact that section 72(10) excludes landlords of continuing tenancies from the benefit of section 73 if their notices were served between 16 September 2002 and 30 June 2003. So the Court limits the decision about the lack of legislative competence to that subsection only **[47 – 51]**.

The Court declines to make an order removing or limiting the retrospective effect of its decision on incompatibility. A long period has elapsed since the legislation came into operation, and there are competing rights and interests which will need to be considered, as well as a number of different possible scenarios. 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 following research, consultation with both sides of the industry, and the formulation of proposals for dealing with the situation that respects the parties' Convention rights **[54 – 57]**. An order will be made under the Scotland Act suspending the effect of this finding for a period that will enable this process to be carried out **[58]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html