Written submission from Neil King

Land Reform Bill, Part 10

Stage 2 evidence on Scottish Government's proposed amendments to clause 79 (conversion of 1991 Act tenancies)

I write to comment on the Scottish Government's letter of 4 December 2015 to the RACCE Committee clerk.

1. Paragraph 413 of the Policy Memorandum says:-

The AHLRG [Agricultural Holdings Law Review Group] considered a wide range of options to try and meet these aims [i.e. enabling elderly 1991 Act tenants to be able to retire from their tenancies with confidence, dignity, and a fair return on their investment], from open assignation of 1991 Act tenancies, through to conversion to shorter term MLDTs, both with and without a pre-emptive right for the landlord to buy out the tenant's interests and take the holdings back "in hand". These options were discussed at length with the industry, before the AHLRG recommended the approach intended to be taken forward by the regulation making power in this Bill on conversion and assignation [...]. [Emphasis added.]

The Scottish Government should be invited to explain what has happened since the bill was introduced into parliament to cause it to depart from the AHLRG recommendations. For example, has a new and different consensus emerged amongst the industry stakeholders?

2. Para. 414 of the Policy Memo, under the heading of Human Rights, says:-

Scottish Ministers consider the proposal to allow for the conversion of 1991 Act tenancies into a minimum duration MLDT to be the most practical, proportionate and least intrusive option of achieving the aim sought.

Standing the RACCE Committee's anxiety that the bill be ECHR watertight (see for e.g., paras. 521 & 524 of the Stage 1 Report) to avoid repeating the mistakes made in the 2003 Act and the Salvesen v Riddell fallout which is still going on nearly 13 years later, the ScotGov should be asked to justify now putting forward a proposal which must by definition NOT be "the most practical, proportionate and least intrusive option of achieving the aim sought".

3. The passage in the first bullet point of paragraph 18 of the note attached to the letter:-

Under the terms of such leases [i.e. 1991 Act tenancies] the landlord is not currently guaranteed to regain control of the land at a fixed point in time: even in instances where a landlord might expect to regain control shortly (for example, because the tenant is nearing retirement age, single and without successors), the tenant's circumstances could change: he could (re)marry; have children later in life; or an eligible successor who has not previously shown an interest in taking on the tenancy could change his or her mind. By allowing the incoming tenant to take on the lease as a 1991 Act tenancy, the new policy therefore preserves the position the landlord was already in.

is naive at best and disingenuous at worst.

It's a short step from that sort of logic to arguing that a proposal to legislate for suspected drug dealers to be shot on sight does not breach Article 2 of ECHR (right to life) because the suspects could be killed in a road accident at any time! I don't pretend any expertise in Human Rights law but I'd hazard the guess that it exists to protect people's reasonable expectations as well as certainties (are there any certainties in life?) Perhaps the Committee should take evidence from an expert HR lawyer on this.

4. The following passage, in the third bullet of para. 18 of the note:-

In circumstances where landlords may feel they are most disadvantaged – in other words, where they may have expected to regain control of the land in the near future – the cost to the landlord of recovering possession will be relatively low. This is because the independent valuation of the land will take into account when the landlord would otherwise have been likely to recover vacant possession of the land from the tenant. If the tenant is nearing retirement and has no successor, the value of the land with the sitting tenant and the value of the land if vacant will be closer to each other, and the cost the landlord pays (50% of the difference) in addition to waygo compensation will be lower. Conversely, in circumstances where the landlord would not have been likely to recover possession of the land in any event, the impact on him of this new process is more limited. The difference in value between the land with the sitting tenant and the land if vacant would be higher, and therefore the 50% of the difference paid by the landlord would be a larger sum. [emphasis added]

gives the lie to the claim in the first bullet quoted previously that a landlord's position is not affected by the situation of the tenant - the ScotGov may believe that but the market apparently doesn't! And note how the third bullet accepts that the new process does have an impact on the landlord whereas the first point says it preserves the landlord's existing position - the note contradicts itself!

That aside, this aspect will only be of any comfort to landlords and a mitigation of ECHR risks if the subject to tenancy value is directed to be made assuming the possibility of allowing assignation to new entrants and "progressing farmers" did not exist. I would suggest the Committee takes evidence from the RICS on that point.

5. The claim in para. 22:-

However, there would nonetheless be drawbacks to enabling all tenants to unilaterally convert their 1991 Act tenancies to MLDTs, potentially imposing new lease terms on their landlords against their will. We are therefore of the view that continuing the tenancy as a 1991 Act tenancy is a better approach, as it retains the terms of the lease the landlord is already subject to.

is a total non-point and clutching at straws as a justification for retaining the tenancy as a 1991 Act after the assignation rather than an MLDT as the AHLRG recommended.

The only difference of any substance between an MLDT and a 1991 is that the former does not involve security of tenure. As such, there is not a landlord in

Scotland who would not welcome a 1991 being converted to an MLDT, unilaterally or otherwise. However, if imposing new terms on the landlord is still thought to be a concern, it can be got round by providing that, after the assignation, the tenancy will continue as a 1991 Act except with no security of tenure after 35 years (in other words the assignee would be vulnerable to an incontestable notice to quit after 35 years rather as a non-near relative successor is under the present law).