FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 40
P321/15

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the petition of

R A McMASTER AND OTHERS

Petitioners and Reclaimers

against

THE SCOTTISH MINISTERS

Respondents

for judicial review of (one) the actings of the Scottish Ministers in making The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014; and (two) the decision of the Scottish Ministers not to pay compensation to the petitioners in respect of the loss, injury and damage sustained by them as a consequence of the making of the said 2014 Order

Petitioners and Reclaimers: Sir Crispin Agnew of Lochnaw QC, Blair; Davidson Chalmers LLP
Respondents: Mure QC, Ross QC; Scottish Government Legal Directorate

12 June 2018

[1] The petitioners are six limited partnerships that carry on the business of farming on tenanted land, together with the general partners of those partnerships. They have raised proceedings for judicial review against Scottish Ministers, in which they claim that they have suffered loss in consequence of the making by Scottish Ministers of the Agricultural

Holdings (Scotland) Act 2003 Remedial Order 2014 (the "Remedial Order"). It is alleged that the making of the Remedial Order without express provision for the assessment and payment of compensation to the petitioners was in breach of the petitioners' rights under article 1 of the First Protocol to the European Convention on Human Rights, and was accordingly outwith the powers of Scottish Ministers or the Scottish Parliament in terms of section 57(2) of the Scotland Act 1998.

History of the Remedial Order

[2] In general terms, the background to the petitioners' claims is as follows. The Agricultural Holdings (Scotland) Act 1948 conferred statutory security of tenure for an indefinite period on agricultural tenants, and the relevant legislation was re-enacted and consolidated in the Agricultural Holdings (Scotland) Act 1991. Far-reaching security of tenure was perceived as a problem by the owners of agricultural land, and it became common practice for landowners to circumvent security of tenure by granting leases of farms to limited partnerships in which one of the limited partners was an agent of the landlord, the general partner being the individual in charge of the farming operations. The limited partner was able to dissolve the partnership by giving the stipulated period of contractual notice. In this way the statutory security of tenure was rendered ineffective because, following the dissolution of the partnership, there was no tenant and the lease necessarily came to an end. The validity of such arrangements was upheld by the Court of Session in *MacFarlane* v *Falfield Investments Ltd*, 1998 SC 14. A detailed account of the history of the legislation and the use of limited partnerships to avoid the effects of security of tenure is found in the opinion of the Lord Justice Clerk in *Salvesen* v *Riddell*, 2013 SC 69, at paragraphs [7] *et seq.*

[3] In *MacFarlane* v *Falfield Investments Ltd*, *supra*, it had been submitted that the use of limited partnerships was contrary to the public interest, and that the statutory security of tenure for agricultural tenants should be protected. While that argument was rejected by the court, it came to be recognized that there was a need for a new statutory structure for leases of agricultural land; in particular it was recognized that what was required was a system that could offer security of tenure to the tenant but which gave the landlord the prospect of recovering vacant possession at the end of a fixed term agreed at the outset of the lease. Proposals to that effect were put forward in a White Paper published by the Scottish Executive in May 2000, *Agricultural Holdings – Proposals for Legislation*. It was proposed in particular that it should be possible to create a new form of limited duration tenancy, and that correspondingly it should no longer be possible to create new tenancies in favour of limited partnerships. The White Paper formed the background to the Agricultural Holdings (Scotland) Act 2003.

[4] Under that Act, the standard form of tenancy is the new limited duration tenancy, as provided for in section 1. It remained competent, however, to create a tenancy that was subject to the provisions of the 1991 Act (referred to as a "1991 Act tenancy": section 1(2) and (4)). The Act made express provision for leases in favour of partnerships. Section 72 dealt with the rights of the parties where a lease had been granted in favour of a limited partnership. That section operated in the context of section 70, which applied to leases where the tenant was a partnership and one of the partners was the landlord or the landlord's associate and there was another partner; in such cases if the landlord attempted to terminate the tenancy, by dissolving the partnership or otherwise, any partner not connected with the landlord might give notice under section 70(6), which had the effect that the party giving the notice became tenant in his own right. In this way the use of a limited

partnership to confer security of tenure was effectively nullified. The provisions of section 72 dealt with cases where the tenant was a limited partnership and any limited partner was the landlord or an associate of the landlord or certain other persons connected with the landlord. That section provided that a purported termination of the tenancy as a consequence of the dissolution of the partnership by notice served on or after 16 September 2002 by a limited partner connected with the landlord in the foregoing manner attracted the provisions of section 72(3)-(10). It is important that the latter provisions, and in particular subsection (6), only applied to leases where the landlord or the landlord's representative served notice dissolving the partnership, or performed certain other acts intended to bring the tenancy to an end, during the period running from 16 September 2002 (the date when the Bill was introduced in Parliament) to 1 July 2003, the date that was subsequently fixed by Scottish Ministers as the "relevant date" for the purposes of subsections (7) and (10) of section 72.

[5] For present purposes the critical points of section 72 are subsections (4)-(10). In their original form, these provided, as follows:

> "(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 the 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 party 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".

The "relevant date" (subsection (7)) was to be specified by Scottish Ministers (subsection (11)), and was in fact determined to be 1 July 2003.

[6] The result of these provisions was that if the landlord of a limited partnership served notice dissolving the partnership between 16 September 2002 and 30 June 2003 with the intention of terminating the lease, the general partner became entitled to serve a notice under subsection (6). In that event, the general partner was given a 1991 Act tenancy of the holding. That was so even though the general partner was not one of the parties to the lease, which of course was in favour of the limited partnership. The landlord was entitled to apply to the Land Court for an order under subsection (9), but the grounds on which such an order could be granted were very restricted. Thus section 72 made limited partnership arrangements ineffectual in most cases where notice dissolving the limited partnership was given during the period from 16 September 2002 to 30 June 2003. Furthermore, landlords who gave notice between those dates were denied the opportunity of converting the existing tenancy into the new form of limited duration tenancy of the subjects. This was the result of subsection (10), which provided that section 73 of the Act should apply if notice dissolving the limited partnership were given on or after the authorized date, 1 July 2003. Section 73 permitted a landlord to bring a tenancy to an end by giving notice under subsection (3) of that section; the latter provision permitted a landlord to bring an agricultural lease to an end by giving notice at least two years and not less than three years before the expiry of the stipulated endurance of the lease. That was the manner in which the new form of limited

duration tenancy introduced by the 2003 Act was available to landlords who had let agricultural land to limited partnerships, but subsection (10) of section 72 had the effect of excluding leases where a limited partner had taken steps to dissolve the limited partnership prior to 1 July 2003.

[7] The paradox created by section 72 was summarised by the Lord Justice Clerk in *Salvesen* v *Riddell*, 2013 SC 69, as follows (paragraph [82]):

> "In this way the Parliament conferred on the general partner a form of tenancy the creation of which section 1 of the 2003 Act was designed to restrict and a form of tenancy that had caused the problems that the 2003 Act sought to cure".

Thus section 72 had an adverse, and somewhat incongruous, effect on the rights of landlords who gave notice to dissolve a limited partnership tenancy within a relatively limited period, running from the introduction of the Bill to 30 June 2003. Other landowners who had let farms to limited partnerships but did not give notice during that period were not affected. In *Salvesen* v *Riddell*, 2013 SC 69; 2013 SC(UKSC) 236, it was argued on behalf of a landlord who had given notice to dissolve a limited partnership on 3 February 2003 that section 72 was incompatible with article 1 of the First Protocol to the European Convention on Human Rights; article 1 provides that every natural or legal person is entitled to peaceful enjoyment of his possessions and that no one is to be deprived of his possessions except in the public interest and subject to conditions provided for by law. The Second Division held that the landlord's rights under article 1 of the First Protocol were infringed by section 72 of the 2003 Act, with the result that that section was outwith the legislative competence of the Scottish Parliament.

[8] On appeal, the United Kingdom Supreme Court held that section 72 violated article 1 of the First Protocol, but restricted the order made by the Court of Session. They held that the finding of incompatibility with Convention rights and the consequent lack of legislative

competence should not extend further than was necessary to deal with the facts of the particular case. The finding of lack of legislative competence was accordingly restricted to section 72(10) of the 2003 Act. The effect of this finding was suspended for 12 months or such shorter a period as might be required for the defect to be corrected and for the correction to take effect: Lord Hope at paragraphs [57] and [58]. At paragraph [57] Lord Hope, delivering the opinion of the court, explicitly addressed the possible retrospective effect of the finding that subsection (10) was outside the legislative competence of the Scottish Parliament and the manner in which that defect might be corrected. He declined to make an order removing or limiting such retrospective effect, on the basis that that matter should be left to the Scottish Parliament. Furthermore, decisions as to how the incompatibility was to be corrected, for the past as well as the future, should be left to Parliament together with Scottish Ministers. That would enable proper consultation and research to be conducted.

[9] As the UK Supreme Court contemplated, its decision in *Salvesen* v *Riddell* was followed by further legislation in the form of the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014. Article 2 of the Remedial Order repealed subsections (4), (5) and (7) to (11) of section 72, with certain consequential amendments to other subsections; subsection (10) of that section had of course already been held incompatible with Convention rights. The Remedial Order further inserted a new section 72A into the 2003 Act. Section 73 of the Act enabled tenancies to be ended by the landlord by giving between two and three years' notice. The new section 72A(1) provided that section 73 should apply to a tenancy continuing to have effect by virtue of section 72(6) unless the tenancy were a relevant tenancy. "Relevant tenancy" was defined by subsection (4) to cover tenancies that continued to have effect by virtue of section 72(6) where a limited partner had taken steps to

terminate the tenancy prior to 1 July 2003 and there was no ongoing application to the Land Court for an order under subsection (8) of section 72. If the tenancy was a relevant tenancy, section 72A(2) provided that section 73 should apply to the tenancy from the date on which the landlord gave notice in writing intimating that he might bring the tenancy to an end in accordance with section 73; such notice required to be given within 12 months of 28 November 2014. In this way the landlord was able to convert the tenancy into the new form of limited duration tenancy, in the same way as landlords of holdings let to limited partnerships who had not given notice to terminate the partnership prior to 1 July 2003.

The petitioners' challenge to the Remedial Order

[10] There are at present six sets of petitioners. Each set comprises the general partner of a limited partnership that was dissolved by notice given on 3 February 2003 together with the limited partnership itself; we were informed that the general partner was acting on behalf of the dissolved partnership with a view to winding up its affairs. Prior to 2003 the limited partnerships were the tenants of agricultural land which they farmed. On 3 February 2003 representatives of the landlords of each of the holdings served notices under section 72(6) of the 2003 Act. In the case of the last three sets of petitioners, the notice dissolving the limited partnership was followed by proceedings brought by the landlord in the Land Court under subsection (7) of section 72; in the case of the first three sets no such application was made. The result is that the general partners in the first three sets of petitioners became tenants with secure 1991 Act tenancies, in accordance with section 72(6) of the 2003 Act. The proceedings in relation to the last three sets of petitioners have been sisted in the Land Court, and consequently the general partners are not yet secure tenants, although if the landlords' applications are unsuccessful they will become tenants with

secure 1991 Act tenancies. For present purposes, however, nothing appears to turn on the distinction between the two groups, as in both cases the landlords are entitled, on the face of the Remedial Order, to convert the tenancy into a limited duration tenancy by giving notice under section 73 of the 2003 Act as amended by the Remedial Order, as permitted by section 72A(2) of the Remedial Order.

[11] Following the making of the Remedial Order, the landlords of each of the holdings served application notices under section 72A(2) and (4) of the 2003 Act as amended by the Remedial Order with a view to bringing the tenancies within section 73 of the Act. The effect of those notices was that the general partners ceased to be entitled to secure 1991 Act tenancies. Instead, the tenancies became subject to section 73, so that the landlords could terminate them on giving not less than one nor more than two years' notice before the expiry of the stipulated endurance of the lease. We understand that following the coming into force of the Remedial Order all of the landlords have issued termination notices under section 73 in order to terminate the tenancies.

[12] The petitioners have brought proceedings for judicial review of the actions of Scottish Ministers in making the Remedial Order and deciding not to pay compensation to the petitioners for loss that they claim to have sustained in consequence of the making of the Remedial Order. The petition and answers proceeded to a hearing before the Lord Ordinary, who on 31 May 2017 pronounced an interlocutor which deleted substantial elements of the petition. In particular, the Lord Ordinary sustained the respondents' pleas-in-law challenging the relevancy of the claims made by the limited partnerships and the limited partners and the interest of limited partnerships and limited partners to bring the present proceedings. The result was that only the claims made by the general partners remained. The Lord Ordinary further deleted the petitioners' claims in so far as they were

based on an alleged legitimate expectation that following the passing of section 72 of the 2003 Act in its original form they would in due course acquire a secure 1991 Act tenancy.

[13] Consequently the general partners' claims for loss were limited by the Lord Ordinary to losses sustained as a consequence of reasonable reliance by the general partners upon having a secure 1991 Act tenancy. That would include elements of frustration and inconvenience, but any claims were subject to the counterbalancing effect of setting off the value of benefits obtained by the qualifying general partners arising from the extended period of tenancy that they had enjoyed (from 1 July 2003 until the Remedial Order came into force on 3 April 2014). In his opinion the Lord Ordinary set out the principles that he considered should apply to the valuation of those claims. The critical point was that the petitioners' claims did not extend to compensation for loss of the secure 1991 Act tenancies of the farms but were restricted to the consequences of any reliance by the general partners on the belief that they were entitled to such tenancies. That meant that the general partners could not recover the value of the secure tenancy that they claimed to have lost. Subject to that restriction, and the rejection of claims by petitioners other than the general partners, the Lord Ordinary made arrangements for the petitioners' claims to be pled in greater detail and amended to reflect the principles that he had set out in his opinion. Thereafter, following a proof if necessary, a decision could be reached on whether there had in fact been any infringement of the general partners' rights under article 1 of the First Protocol to the Convention as a result of their reasonable reliance on the apparent grant of a secure 1991 Act tenancy.

Grounds of appeal

[14] The petitioners have reclaimed against the Lord Ordinary's decision. Their grounds

of appeal in their original form were complex and somewhat difficult to follow. In the written submissions to the Court, however, the petitioners distilled their arguments into two sets of propositions. These were as follows:

1. The Lord Ordinary ought to have had regard to the reality of the situation, which is that the general partner obtained a "possession" for the purposes of article 1 of the First Protocol on the coming into force of section 72 on 27 November 2003. The general partner was the farmer who possessed the major part of the capital in the limited partnership. Initially the possession was a legitimate expectation linked to the general partner's right to obtain a secure 1991 Act tenancy. In due course this possession was converted into a secure 1991 Act tenancy. Thereafter the general partner had a possession, in the sense of the secure tenancy. The reality of the situation was that all along the general partner had the secure tenancy as a possession, and his actings in reliance on that possession from 27 November 2003 onwards had been compromised by the Remedial Order. In that way loss and damage was caused to him, for which he should be compensated.

2. The tenancy and the farming business conducted on the tenanted land were interrelated. The general partner was granted a secure 1991 Act tenancy which was taken away by the Remedial Order. That deprived the general partner of a valuable asset, namely the tenancy with the farming business associated therewith. The general partner was entitled to compensation for the loss of that asset, because the state is required to compensate for loss occasioned by its error. Consequently the value of the tenancy and the farming business should not have been disallowed at this stage, but should

have been considered along with other factors in determining the level of compensation that would provide just satisfaction.

Issues raised on appeal

[15] The various matters raised in the grounds of appeal can most conveniently be organized into five issues.

1. The nature of the "possession" obtained by the general partner in each of the limited partnerships on the coming into force of section 72 of the 2003 Act, and in particular, whether the general partners are entitled to compensation for the value of a secure 1991 Act tenancy as against the tenancy that the general partners now enjoy, which is a limited duration tenancy subject to section 73 of the Act.
2. The applicability of the concept of legitimate expectations, and in particular whether the general partner in each of the limited partnerships (or the limited partnerships themselves) obtained a legitimate expectation for the purposes of article 1.
3. Whether the petitioners' claims should include the value of the "family farming business"; and in particular whether the "family farming business" is a possession for the purposes of article 1 of the First Protocol.
4. The Lord Ordinary's general approach to compensation.
5. The relevancy of the claims made on behalf of the limited partnerships, together with the interest to sue of the limited partnerships or the general partners on their behalf. This includes the question of whether the limited partnerships had "victim" status for the purposes of the Convention.

[16] Before the specific matters raised in the grounds of appeal are considered, however, it is necessary to consider the general interpretation of article 1 of the First Protocol, and thereafter to analyze the rights enjoyed by the general partners and the limited partnerships throughout the period from February 2002 to the raising of the proceedings for judicial review. This involves consideration of the rights enjoyed at the outset of that period and the effect on those rights of the 2003 Act, the decision of the United Kingdom Supreme Court in *Salvesen* v *Riddell*, and the Remedial Order (together with the landlords' exercise of the rights under the Remedial Order).

Article 1 of the First Protocol

[17] Article 1 of the First Protocol is the major provision in the Convention that protects the right to property. It is in the following 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".

It is clear from its terms that article 1 applies to interference with the "possessions" of a person, whether natural or legal. Interference can take the form of outright deprivation, as contemplated in the second sentence of the article, or lesser forms of restriction or control, including the control of use of property. Such interference may be justified by the public interest, and in that event a further range of considerations become relevant: whether the

interference is in accordance with law, whether it is intended to achieve legitimate purposes, and whether the degree of interference is in all the circumstances proportionate.

[18] It is well established that the Convention should be applied in a manner that is practical and effective, so that the Convention rights of those affected are properly recognized and properly enforced; authority for that proposition is found in, for example, the opinion of the European Court of Human Rights in *Artico* v *Italy*, (1981) 3 EHRR 1, at paragraphs [32]-[33]. Counsel for the petitioners placed particular stress on this requirement, and submitted that the court should have regard to the reality of the situation rather than to legal niceties. We agree with such an approach, although we would observe that it is not fundamentally different from the manner in which the Scottish courts interpret domestic legislation. First, regard should always be had to the context in which legislation operates. Two types of context are relevant. The first of these may be described as the general context: the social and economic background to the legislation under consideration: in this case that is the context of tenanted agricultural land, the history of security of tenure and the former practice of using limited partnerships to avoid security of tenure. This is of particular importance in the present case in relation to the alleged concept of a family farming business, discussed below at paragraphs [47] *et seq*.

[19] The second form of context may be described as the internal context of the legislation; it is obvious that a statutory provision must invariably be construed in the context of the whole of the statute in which it occurs. The internal context may be wider than that, however. In particular, if one statute is designed to amend another, as occurred in the present case, the internal context plainly consists of both of those statutes. The context can go even further than that. In the present case the Remedial Order was designed to amend the 2003 Act and incorporated important references to the 1991 Act, but it was also

designed to deal with the effect of the decision in *Salvesen* v *Riddell* and the difficulties identified in that case that arose under the Convention. We consider that all of these elements, the 2003 Act, the 1991 Act and the decision in *Salvesen* v *Riddell*, must be considered as the internal legislative context in which the Remedial Order falls to be construed.

[20] Secondly, legislation should be interpreted in a purposive manner which gives effect to the substance of the legislation and does not become unduly concerned with niceties of wording or minor details. A purposive interpretation ensures that the fundamental objectives of legislation, or indeed any legal text, are achieved. In this way the rights created by the legislation are rendered "practical and effective", and not merely "theoretical and illusory", in the words of the European Court of Human Rights in *Artico* v *Italy*, *supra*, at paragraph [33]. To that extent the method of interpretation used in domestic law appears to us to be fully in line with the Convention. Thirdly, in interpreting legislation regard should be had to common sense, including where appropriate the commercial reality of the situation in which the legislation operates. This is of importance in relation to the nature of a family farming business, discussed below. Fourthly, it is obvious that legislation must be properly enforced, thus ensuring that it is effective at a practical level.

[21] Nevertheless, the fact that the Convention must be applied in a manner that is practical and effective does not mean that proper legal analysis at a domestic level can be abandoned. Before the Convention can operate, it is first necessary to ascertain what the parties' domestic rights and obligations are and, in a case such as the present, how those rights and obligations have been affected by domestic legislation. Counsel for the petitioners submitted that, in assessing the reality of the situation as to the possessions of the general partners, it was evident that Scottish Ministers when introducing the provisions which

became the 2003 Act did so on the basis that the *de facto* position was that the general partner was the tenant. It was further submitted that the court must have regard to the appearances of the situation, rather than the actual validity of the legal position in terms of domestic law. In our opinion those submissions must be rejected. Before article 1 can be applied to the 2003 Act and the Remedial Order, it is essential to determine precisely what those provisions did as a matter of domestic law; anything else would lead to total incoherence. As a matter of domestic law, the tenant was the limited partnership, not the general partner; that is the clear import of the decision in *MacFarlane* v *Falfield Investments Ltd*, *supra*, and any other assumption would seriously distort the problem that section 72 of the 2003 Act was designed to deal with. That in turn would distort the solution adopted in that section, of permitting the general partner to take over from the limited partnership as the tenant. Furthermore, it would distort the reasoning in *Salvesen* v *Riddell*, *supra*, which is of fundamental importance to the situation that the court must address in the present case.

Nature of the petitioners' claims under article 1: the Lord Ordinary's analysis

[22] Against the foregoing background, we propose now to consider the Lord Ordinary's analysis of the 2003 Act, the decision of the UK Supreme Court in *Salvesen* v *Riddell* and the Remedial Order.

[23] The Lord Ordinary held that the only persons among the petitioners who had a possession that was capable of being interfered with by the Remedial Order were the general partners who had served a notice in terms of section 72(6) (paragraphs [136]-[152]). He then gave detailed consideration to the nature of the petitioners' claims (paragraphs [153]-[195]). The first question was whether there had been interference with a possession of the general partners for the purposes of article 1 of the First Protocol, and the

nature of that interference. It was accepted by Scottish Ministers that the tenancy held by each general partner who had served a notice under section 72(6) was a possession of that general partner for the purposes of article 1. The Lord Ordinary held that, in order for a deprivation of property to occur for the purposes of article 1, it must be definitive and involve an irrevocable expropriation or transfer of property rights. That included deprivation of contractual rights. One of the rights that formed the general partner's new tenancy was the security of tenure given by a secure 1991 Act tenancy. Nevertheless, deprivation of a single right relating to property was not the same as deprivation of the property right, but was rather a control of use of the property. The Remedial Order had fundamentally altered the position of the general partners as tenants, as it was subject to the notice procedure under section 73 of the 2003 Act which could convert the tenancy into a limited duration tenancy, thus depriving the general partners of security of tenure. That in the Lord Ordinary's opinion amounted to a control of use of the tenancies, rather than outright deprivation.

[24] The next issue was whether there had been a violation of article 1. The Lord Ordinary noted that the requirements under article 1 of legal certainty and justification in the general public interest were both established; indeed they were not disputed by the petitioners. The issue under the Article accordingly became one of proportionality. The Lord Ordinary analyzed the background material to the Remedial Order, and concluded that Scottish Ministers accepted that there might be valid claims for compensation as a result of the passing of the Remedial Order, and that it would be left to them to deal with any such claims (paragraph [169]). Scottish Ministers had not considered it necessary, however, to provide a scheme to deal with such claims within the Remedial Order itself; instead, they had accepted that such claims would have to be dealt with as they arose. In this respect the

Lord Ordinary relied in particular on a letter from the Cabinet Secretary for Rural Affairs, Food and Environment to the Convener of the relevant Parliamentary committee dated 5 November 2014: paragraph [171]. The Lord Ordinary accordingly concluded that it was:

> "within the area of discretion afforded to the legislature [and, it would seem, the executive] to leave the question of compensation to be determined by the 'assessment processes' to be applied by the Scottish Ministers rather than to create a scheme for the assessment of compensation under the Remedial Order itself".

For this reason the Remedial Order itself did not violate the rights of any of the petitioners under article 1.

[25] The critical question was accordingly the validity of the decision of Scottish Ministers to refuse to meet the compensation claims advanced by the petitioners. That involved an assessment of the proportionality of Scottish Ministers' response. Proportionality required to be considered in context, and raised the issue of fair balance in relation to the decisions of Scottish Ministers. The Lord Ordinary considered that matter, referring to case law of the European Court of Human Rights and certain English courts, and then analyzed the effect of the 2003 Act and the Remedial Order.

[26] Prior to the 2003 Act the general partners were members of limited partnerships which were subject to termination; consequently there was no security of tenure beyond the contractually agreed duration. After the 2003 Act some of the general partners were able to obtain an enhanced security of tenure, although this resulted from an unlawful piece of legislation. The general partners had not given any consideration for their enhanced security of tenure. When the position was corrected by the Remedial Order, the general partners were placed in the same position as other general partner tenants, where notice to dissolve the limited partnership had not been given prior to 1 July 2003 (paragraph [180]). The general rule as to compensation for deprivation of property had much less force when

what was being done was to rectify an unlawful piece of legislation from which the qualified partners had benefited for no consideration. In the circumstances the Lord Ordinary concluded that, even if the effect of the Remedial Order were viewed as a deprivation of property, the striking of a fair balance did not warrant or require payment of compensation reasonably related to the value of the tenancy (paragraph [181]).

[27] Thereafter the Lord Ordinary considered the nature of the claims that the general partners might have, excluding the value of the secure 1991 Act tenancy, and set out the manner in which such claims might arise and the principles for their computation (paragraphs [190]-[195]). Scottish Ministers were required to strike a fair balance among the interested parties and to pay proper levels of compensation. That would involve having regard to a number of factors. These included the conceptual background, the various legislative changes, including the fact that the general partners acquired secure 1991 Act tenancies without giving value or consideration, and the enjoyment by them of several years of tenancy beyond what would otherwise have been the termination date. On the other side was the fact that general partners might, through no fault of their own, have made expenditure in reasonable reliance upon the apparent right to a secure tenancy that had been unlawfully conferred. That could have caused loss. In addition, the general partners might have suffered frustration and inconvenience. The European Court of Human Rights had recognized in certain cases, notably *Trgo* v *Croatia*, 11 June 2009, App No 35298/04, and *Klibavičienė* v *Lithuania*, 21 October 2014, App No 34911/06, that a person who relied on legislation enacted by mistake or subsequently abrogated as unconstitutional should not bear the consequences of the state's own mistake. That proposition was not challenged by either party, but we should record that we are in full agreement with it; it is amply vouched by those and other cases.

[28] It was on that basis that the Lord Ordinary held that Scottish Ministers should compensate individuals for loss directly arising from reasonable reliance upon defective legislation, in the form of the original section 72 of the 2003 Act. Specific losses incurred as a direct result of reasonable reliance would nevertheless require to be established. Reliance on the defective legislation would require to have occurred in the period after the service of the notice under section 72(6) but before it was known or ought to have been known that the landlords' Convention rights had been infringed by section 72. The act in question would require to be in reliance on having a secure 1991 Act tenancy, rather than being an act which would have occurred even if a tenancy subject to termination under section 73 had been held. Only those losses would fall within the principle of reasonable reliance.

[29] The petitioners' averments make no claim for specific losses suffered as a direct consequence of reasonable reliance on the holding of a secure 1991 Act tenancy. The Lord Ordinary held, however, that such claims could not be excluded if a closer analysis were carried out. In addition, the general partners might have suffered frustration and inconvenience, for which a relatively modest sum might be awarded; claims of £5,000 per general partner were made in this respect. The Lord Ordinary held that because prior to the 2003 Act the limited partnership tenancies were due to come to an end in any event as a result of contractual provisions that had been freely entered into, the striking of a fair balance did not require compensation to be paid for any other consequences of termination of the tenancy. Furthermore, the tenancies had been excluded from the limited duration tenancy regime in section 73 as a result of an unlawful act; consequently the striking of a fair balance did not require compensation to be paid in respect of the value of the tenancy.

[30] Against the foregoing factors, certain matters required to be counterbalanced, namely the value of the benefits obtained by the general partners as a result of the extended

period of tenancy that they had enjoyed. Without more detailed pleadings and in due course argument and possibly evidence, the Lord Ordinary could not reach a definitive view on the possible claims that might arise. He decided to put the case out by order to discuss further procedure. When the case called by order, he ordained the remaining petitioners (the general partners) to lodge a minute of amendment in process. This should give specification of their status as "qualifying general partners", and also:

> "(ii) any specific losses directly caused to them as qualifying general partners as a consequence of their reasonable reliance (during the period after service of a relevant section 72(6) notice before it was known or ought to have been known that the landlords' rights had been, or are likely to have been, infringed by the Agricultural Holdings (Scotland) Act 2003) on having a secure 1991 Act tenancy; and (iii) the benefits obtained by such qualifying general partners arising from any extended period of tenancy enjoyed by them by virtue of their obtaining a secure 1991 Act tenancy, and the value of any such benefits".

[31] We now propose to consider the specific arguments advanced on behalf of the petitioners.

The general partners' possessions and their right to compensation for the loss of secure 1991 Act tenancies in consequence of the Remedial Order

[32] As the Lord Ordinary noted, Scottish Ministers do not contend that no compensation is payable to general partners in consequence of the making of the Remedial Order. This is important, because the primary question that arises in the present case is not whether compensation is payable but the circumstances in which such compensation is payable and how it should be calculated. In particular, a critical question is whether compensation should be payable in respect of the value of the secure 1991 Act tenancies that were enjoyed by the general partners as a result of section 72(6) of the 2003 Act, or whether compensation should be confined to losses sustained by the general partners in consequence of their

reliance on having been awarded such a tenancy. It is not in dispute that the 1991 Act tenancies created by section 72 were possessions of the general partners and as such protected by article 1. The Lord Ordinary nevertheless held that the purpose of the Remedial Order was to correct an unlawful feature of the 1991 Act tenancies, namely that they could not be converted into limited duration tenancies subject to section 73 of the Act. The general partners in question had not given any value for that benefit. Consequently the Lord Ordinary held that the striking of a fair balance did not require compensation to be paid in respect of the value of the 1991 Act tenancies conferred in consequence of section 72(6) (paragraph [193]). We agree with that conclusion.

[33] In answering this question, it is essential in our opinion to analyze the rights that the general partners had throughout the period from 3 February 2003 to the making of the Remedial Order. In conducting that analysis, it is important in particular to consider the legal position that existed prior to 3 February 2003 and the changes made as a result of the 2003 Act, the decision in *Salvesen* v *Riddell* and the Remedial Order; the internal context of the legislation includes all of those elements. The notion of a "possession" is relatively straightforward; it includes property rights, including such contractual and other rights as can be considered intangible property. Prior to 3 February 2003 the limited partnerships were the tenants under the leases and the general partners had rights against the limited partnerships under the limited partnership agreements. The rights under the leases were limited, however. The leases were for fixed terms, and more importantly they could be brought to an end through the dissolution of the limited partnership by a limited partner who acted as the landlord's representative. On 3 February 2003 the limited partnerships were dissolved, and that brought the tenancies to an end. Thus immediately after that date

the general partners had no continuing rights in the land that could properly be considered possessions for the purposes of article 1.

[34] Section 72 of the 2003 Act was then enacted. It took effect on 22 May 2003. Under section 72(6), the general partners were empowered to give notice to the landlord within 28 days of the coming into force of the section that they intended to become tenants under the tenancy in their own right. All of the general partner petitioners exercised that power. Consequently on the face of things the general partners had all acquired secure 1991 Act tenancies in their own right. Those tenancies conferred virtually unlimited security of tenure because the landlords were precluded from setting up the new form of limited duration tenancy that other landlords could create by virtue of section 73. This was different from cases where a lease had been granted to a limited partnership but the landlord did not attempt to dissolve the limited partnership tenant between 16 September 2002 and 1 July 2003; in those cases the landlord was permitted to convert the lease into the new form of limited duration tenancy. In *Salvesen* v *Riddell* both the Second Division and the United Kingdom Supreme Court held that the distinction between those two categories of landlord was not justified under article 1 of the First Protocol. The Second Division held that the result of this was that the whole of section 72 was vitiated. The United Kingdom Supreme Court, however, held that it was unnecessary to declare the whole of section 72 incompatible with the Convention and confined the declaration of incompatibility to subsection (10).

[35] Despite this restriction in the declaration of incompatibility we are of opinion that the clear import of the decision in *Salvesen* v *Riddell* was that the policy in section 72 of prohibiting a limited class of landlords from making use of the new power to grant a limited duration tenancy was incompatible with article 1. The enactment of provisions that gave effect to that prohibition was accordingly outwith the powers of the Scottish Parliament, and

to that extent section 72 was an unlawful piece of legislation. This was a matter of substance, not mere form, and it went to the practical effect of section 72. The result was that the alleged statutory right of the general partners to secure 1991 Act tenancies was a nullity; the existence of an indefeasible 1991 Act tenancy was inevitably based on the illegitimate hypothesis that a limited category of landlords should not be entitled to convert the existing tenancies into the new form of limited duration tenancy. The fundamental problem, in other words, was not the creation of 1991 Act tenancies but the inability of the landlords to convert those tenancies into the new form of limited duration tenancy. Thus the consequence of section 72 was to confer security of tenure on the general partners for years, possibly many years, beyond the period of the lease in favour of the limited partnership.

[36] It was against that background that the Remedial Order was enacted. The purpose of the Remedial Order was to remedy the incompatibility with article 1 that was identified in *Salvesen* v *Riddell*. It did so by amending section 72 of the 2003 Act and inserting a new section 72A; in our opinion these provisions are properly regarded as in the form that would have been enacted had the original provisions of the 2003 Act been compatible with the landlords' Convention rights, and hence within the powers of the Scottish Parliament. The Remedial Order accordingly did no more than correct a contravention of article 1. Furthermore, the general partners had given no value for the creation of the 1991 Act tenancies. Thus it cannot be said that the Remedial Order caused any loss to the general partners; to the extent that it restricted the value of their possession (the 1991 Act secure tenancy) it merely removed a right that should not have been granted and for which no consideration had been given.

[37] Moreover, the fundamental defect in section 72 of the 2003 Act did not involve an attempt by the state to deprive persons of their property; it rather consisted of a failure to balance the interests of two groups of people, landlords and general partners. A fundamental policy of the 2003 Act was to create a new form of limited duration tenancy, and landlords generally were permitted to convert leases into that form of tenancy. The exception to that was the limited group of landlords who had attempted to bring limited liability partnerships to an end during the period between 16 September 2002 and 1 July 2003. In *Salvesen* v *Riddell* it was decided that that involved an unfair and disproportionate interference with the rights of that category of landlords. That in turn meant that the general partners received rights as against those landlords that they should not have received. In our opinion there is nothing unfair in bringing matters back to the position that would have obtained had the 2003 Act conformed to article 1 of the First Protocol. For these reasons we agree with the Lord Ordinary that the alteration in the general partners' rights brought about by the Remedial Order did not require the payment of compensation in order to strike a fair balance between the landlords and the general partners *qua* tenants.

[38] It does not follow, however, that if the general partners acted in reliance on the secured 1991 Act tenancies that were apparently conferred by the 2003 Act they cannot recover losses sustained in consequence of such reliance. The state has passed legislation which on its face appears to confer rights on individuals or other legal persons but which is invalid owing to its incompatibility with article 1. If that occurs, it is evident that individuals who believe that they have acquired rights under the legislation may reasonably act in reliance on those rights. In doing so they may incur expenditure or obligations or perform other acts that turn out to have no legal foundation, and they may suffer loss in consequence. That in itself amounts to a deprivation of possessions. Consequently the

person affected is potentially entitled to recover such loss from the state that has caused it, provided that the reliance on the apparent rights has been reasonable in all the circumstances. Authority to that effect is found in *Trgo* v *Croatia*, App No 35298/04, 11 June 2009, where the European Court of Human Rights stated (at paragraph [67]):

> "[T]he Court considers that the applicant, who reasonably relied on legislation, later on abrogated as unconstitutional, should not – in the absence of any damage to the rights of other persons – bear the consequences of the State's own mistake committed by enacting such unconstitutional legislation.… In this connection, the Court reiterates that the risk of any mistake made by the State authority must be borne by the State and the errors must not be remedied at the expense of the individual concerned, especially where no other conflicting private interest is at stake".

[39] That formulation assumes that the state's error has caused loss to an individual. If all that corrective legislation does is to restore matters to conformity with article 1, it cannot be said that there is any true loss from the legislation by itself, since the individual concerned obtains what he ought to have had if the legislation had conformed to the Convention. In such a case, the only loss that can be said to arise from acts of the state other than those compelled by the Convention is loss that arises from reliance on the invalidly enacted legislation. That alone is a loss that would not have occurred but for the state's enactment of defective legislation. This is in our opinion the proper analysis of the claims that the Lord Ordinary has allowed to proceed. He describes these (paragraph [195]) as:

> "specific losses directly caused to the qualifying general partners as a consequence of reasonable reliance by them upon having a secure 1991 tenancy and for frustration and inconvenience, subject to the counterbalancing effect of setting off the value of the benefits obtained by the qualifying general partners arising from the extended period of tenancy which was enjoyed".

Such claims are in our opinion properly recoverable under article 1, and we do not understand this point to be disputed, at least as a matter of principle, by Scottish Ministers. The quantification of such claims must still, of course, be decided.

Legitimate expectation

[40] The petitioners' submissions relied in large measure upon the concept of legitimate expectation. It was argued in particular that from the coming into force of section 72 of the 2003 Act on 27 November 2003, the general partner had a possession in the form of a legitimate expectation that he would have a secure 1991 Act tenancy; once this was converted into a secure tenancy the general partner was entitled to continue to act upon the basis that he held a secure tenancy. Our initial observation on these arguments is that, if the legitimate expectation is converted into a possession in the full sense of that word, the question of whether or not there was a legitimate expectation is irrelevant; it is the possession itself that is then protected under article 1. Scottish Ministers concede, however, that the protected 1991 Act tenancy purportedly conferred by section 72(6) was a possession for the purposes of article 1. On that basis it is not obvious why it is necessary to consider the law on legitimate expectations in relation to the 1991 Act tenancies.

[41] The petitioners also appear to rely on the concept of legitimate expectation to broaden the scope of their entitlement to possessions to cover matters such as the farming businesses conducted on the farms. Such use of the concept is in our opinion misplaced. The meaning of the expression "legitimate expectation" has been considered by the European Court of Human Rights in a number of cases, and it is clear from these that a legitimate expectation is inevitably an adjunct to a possession, in the sense of a property right that is itself protected by article 1. This is apparent, for example, from the detailed discussion of the concept in *Kopecký* v *Slovakia*, (2005) 41 EHRR 944, in which reference is made to the previous case law on the subject. In that case the applicant sought redress for her inability to recover gold coins that had been confiscated from her father in 1959 by the

then Communist government of Czechoslovakia. The European Court of Human Rights noted that the claim that the applicant's father had against the state required the intervention of the courts; consequently it could not be characterized as an "existing possession" (paragraph 41).

[42] Against that background the Court went on to consider whether the applicant had a legitimate expectation for the purposes of article 1. Reference was made to *Pine Valley Developments Ltd* v *Ireland*, (1992) 14 EHRR 319, where it had been held that a legitimate expectation arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its development. The planning permission was described in that case as "a component part of the applicant companies' property". In a later case, *Stretch* v *United Kingdom*, (2004) 38 EHRR 12 the applicant had leased land for a period of 22 years with an option to renew at the expiry of the term, and had erected at his own expense a number of buildings for light industrial use which had been sublet. The Court found that the applicant had at least a "legitimate expectation" of exercising the option to renew. (We would note that the option would itself have been an item of intangible property, and the option can be exercised directly, without the intervention of the courts, as in *Kopecký* itself. On that basis it is difficult to understand why it was not treated as an existing possession).

[43] The Court in *Kopecký* then continued (paragraph 47):

> "In the above cases, the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment. In this class of case, the 'legitimate expectation' is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights."

Another aspect of the notion of "legitimate expectation" was then referred to, under reference to the Court's decision in *Pressos Compania Naviera SA* v *Belgium*, (1996) 21 EHRR

301, a case concerning claims for damages to shipping arising out of the alleged negligence of Belgian pilots. In that case the claims were classified as assets attracting the protection of article 1, and the applicants could be said to have a legitimate expectation that those claims would be determined in accordance with the general law of tort (delict). The significance of this case was that it was implicit in the decision that no legitimate expectation could come into play in the absence of an "asset" falling within the ambit of article 1 of the First Protocol, in that instance the claim in tort.

[44] It is accordingly clear from the Strasbourg case law that a legitimate expectation for the purposes of article 1 of the First Protocol is not an independent concept but must be related to a legal act which bears on property rights. Its function is to deal with possible restrictions on the property right, such as the need to assert a claim in litigation and to have it recognized by the court, as in *Pressos*, or the need to enforce the exercise of an option, as in *Stretch*. Alternatively, it may deal with what may be considered component parts of the applicant's property, as with the outline planning permission that had been granted in *Pine Valley*; in that case the planning permission was clearly essential to maintain the value of the applicant's property. In the present case, by contrast, it is clear that the tenancy held by a general partner who exercised the right available under section 72(6) was a possession of the general partner in question; that was expressly conceded by Scottish Ministers. There was no need for any adjunct to that right to ensure that it could be enforced or that its full value could be enjoyed. The right to the protected 1991 Act tenancy under section 72(6) failed because its unqualified nature, denying a limited class of landlords the ability to create a new limited duration tenancy, was held to have contravened article 1. The concept of a legitimate expectation does not have any bearing on that analysis.

[45] Furthermore, both the Scottish Parliament and Scottish Ministers accept that some compensation is likely to be payable in consequence of the Remedial Order's removal of a right to an unqualified protected 1991 Act tenancy. The Lord Ordinary expressly held that there was such a right to compensation, albeit that he limited it to losses caused by reasonable reliance upon the provisions of section 72 of the 2003 Act, and excluded the value of the tenancy itself from the right to compensation. We do not understand that the concept of a legitimate expectation can add to that analysis. An aspect of the general partners' possession, namely immunity from conversion into a limited duration tenancy, failed because it contravened article 1, and for this purpose it is immaterial whether the immunity is classified as an aspect of the right to possession or as a legitimate expectation. We are accordingly of opinion that the concept of a legitimate expectation does not assist the general partners' claims.

[46] It is likewise of no assistance to the limited partnerships. For reasons discussed subsequently, we are of opinion that the limited partnerships had no property right or legitimate expectation associated with a property right that they would ever enjoy secure 1991 Act tenancies. The right to those tenancies was conferred on the general partner by section 72(6), not on the limited partnerships, which had ceased to exist by the time that the right became available.

The "family farming business"

[47] For the petitioners it was submitted that the Lord Ordinary ought to have had regard to the interrelationship between the tenancy of each farm and the farming business conducted on the tenanted land; that relationship was said to be part of the reality of the situation. The result, it was argued, was that the Remedial Order deprived the general

partner of both the tenancy and the farming business associated with the tenancy, and the general partner was entitled to compensation for the loss of both the tenancy and the farming business. Thus the fundamental contention that is made in this regard is that the "family farming business" was itself an asset, associated with the lease, which formed part of the general partner's possessions for the purposes of article 1 and for the loss of which compensation should be payable.

[48] In our opinion this argument is without foundation, for two reasons. In the first place, it is not apparent from the petitioners' pleadings or from their note of argument what the "family farming business" is supposed to be. The expression "business" is in common use to signify the economic activity carried on by a person together with the assets used in carrying on that activity, but the expression covers a collection of concepts. This can best be illustrated by considering the sale of a "business". The sale will usually include the assets that are used to carry on the business. These will include premises or land, such as a shop or workshop or factory. In the case of a farming business, the farm and farm steading, together with any other structures built on the land, will fall into this category. Moveable assets will also be included, such as plant and machinery (in so far as it does not become a fixture attached to the premises), raw materials and stock in trade. In the case of a farming business, this would include elements such as seeds, fertilizers, harvested crops and livestock. A third category of assets comprises what is known in Scots law as incorporeal property and to economists and accountants as intangible property. In the case of a business, these will usually be a set of contractual rights of various natures, notably debts due to the person carrying on the business, and they might also include claims against third parties.

[49] Apart from the foregoing categories of asset, the sale of a "business" is likely to include the goodwill of the business, if it has marketable goodwill. For reasons that we will discuss shortly, the last qualification, the need for marketable goodwill, is a matter of importance. At a general level, goodwill represents the amount paid for a business in excess of the fair value of its assets at the date of acquisition. It may be looked upon as its ability to earn future profits above those of a similar newly formed enterprise, or it may be seen as the "goodwill" of customers and the established network of contacts, staff and management. It represents, in short, the component in the value of a business that exceeds the value of its tangible and intangible assets.

[50] The meaning and evaluation of goodwill has been considered in a number of cases on article 1 of the First Protocol. For present purposes it is sufficient to refer to the opinion of Richards LJ, in which the other members of the Court of Appeal concurred, in *The Queen (on the application of New London College Limited)* v *Home Secretary*, [2012] EWCA Civ 51, [2012] Imm AR 563, in which the earlier decision of the European Court of Human Rights in *Denimark Ltd* v *United Kingdom*, (2000) 30 EHRR CD 144, was followed. Richards LJ stated (paragraph [84]):

> "*Denimark Ltd v United Kingdom*… provides a useful statement by the Strasbourg court of the distinction that has been developed in the authorities between *loss of goodwill* and a mere *loss of future income*. In considering the extent to which the applicants' 'possessions' had been affected by a statutory prohibition on handguns, the court said this:
>
> > 'The Court recalls its case-law that goodwill may be an element in the valuation of a professional practice, but that future income itself is only a "possession" once it has been earned, or an enforceable claim to it exists... The Court considers that the same must apply in the case of a business engaged in commerce. In the present case, the applicants refer to the value of their businesses based upon the means of earning an income from those businesses as "goodwill". The Court considers that the applicants are complaining in substance of loss of future income in addition to loss of goodwill and a diminution in value of their assets. It concludes that the

> element of the complaint which is based upon the diminution in value of the business assessed by reference to future income, and which amounts in effect to a claim for loss of future income, falls outside the scope of Article 1 of Protocol No 1'".

[51] The nature of goodwill in the context of article 1 was also considered in *R (Nicholds)* v *Security Industry Authority*, [2007]1 WLR 2067, another case referred to in *New London College* (at paragraph [85]), where the judge followed the distinction between goodwill, which might constitute a possession, and an expectation of future income, which was not a possession. As to the meaning of "goodwill", the judge considered that the word was not used in the technical accounting sense of the difference between the cost of an acquired entity and the aggregate of the fair values of that entity's identifiable assets and liabilities. It was rather used in the economic sense of the capitalized value of a business or part of a business as a going concern which, according to modern theory of corporate finance, was best understood as the expected free future cash flows of the business discounted to a present value. It is not in our opinion necessary for present purposes to decide the precise meaning of "goodwill" as a matter of accounting or economic theory; it is sufficient to note that it represents an element in the value of a business that is additional to the tangible and intangible assets of the business. What is critical on the basis of the Strasbourg case law is that the goodwill should be an asset with a monetary value, and should represent more than an expected stream of future income which has not been capitalized; that is apparent from the passage quoted above from *Denimark Ltd* v *United Kingdom*.

[52] In the present case neither the petitioners' averments nor their written argument gives any indication of whether it is goodwill in the proper sense that is said to have been lost or merely an expected stream of future income. If it is the latter, it is clear on the basis of the case law in the European Court of Human Rights that no "possession" exists and that

the loss is therefore not recoverable. Consequently, if the petitioners are to recover for loss of goodwill, they must make the nature of that goodwill clear, in such a way that it represents an element in the value of the enterprise itself over and above the value of its assets and distinguishable from the mere loss of future income. This has not been done at present, and for that reason alone the petitioners' claim for the value of the "family farming business" is irrelevant and must be rejected.

[53] The second reason for rejecting the petitioners' argument about the value of the "family farming business", with reference in particular to the element of goodwill, relates to the nature of such a business and the extent to which it has any marketable goodwill. The nature of a farming business is obviously well known, but two particular features are important for present purposes. The first is that the business involves the exploitation of the land on which it is carried out, whether for growing crops or for grazing livestock. The business is entirely dependent on use of the land. The farmer's interest in the land, however, is one of the assets of the business. That is so whether the land is owned by the farmer or tenanted by him, although in the latter case it is the tenancy that is the asset of the business, and clearly its value may be small or non-existent (if it cannot be assigned). Thus the "goodwill" of the business, in so far as it is possible to use that expression, is indissolubly linked to an asset of the business.

[54] The second feature of a farming business that is important for present purposes is that it normally produces standard products, for example beef, lamb, milk, cereal crops or potatoes, for which a well-established market exists. There is no difficulty in selling farm produce, if it is of the requisite quality, if only because farms in the United Kingdom only produce about half of the country's demand for farm produce. The existence of well-established markets means that individual trading connections are not of great commercial

importance; any farmer can take his cattle or sheep to the local market and sell them there, or can sell his cereals and potatoes to wholesalers.

[55] The result of the foregoing features is that a farming business has little or no "goodwill" in the ordinary sense of that word. The ability to trade is indissolubly linked to the land, and the value of the business is the value of that land together with stock, raw materials, produce and fixed equipment. If the land is tenanted it obviously cannot be sold, although provisions exist under the Agricultural Holdings Acts for the payment of compensation for fixed equipment. The stock can be sold, and indeed when the tenancy of a sheep farm is transferred hefted stock are normally sold by the outgoing tenant to the incoming tenant. In the present case, however, the general partners will be able to obtain full payment for the value of their stock, plant and equipment and the like. All that remains is the value of the tenancy itself. For the reasons already discussed, we are of opinion that the Remedial Order, in so far as it deprived the general partners of protected 1991 Act tenancies, did not involve any contravention of Convention rights; see paragraphs [35]-[37] above.

The Lord Ordinary's general approach to compensation

[56] In the course of their submissions the petitioners challenged the Lord Ordinary's general approach to compensation. The major specific challenges related to the value of the protected 1991 Act tenancies and the notion of the family farming business; we have already dealt with both of those matters. In addition, the petitioners made certain general challenges to the method adopted by the Lord Ordinary, which we have summarized at paragraphs [27]-[30] above.

[57] The petitioners submitted that the state should bear the risk of errors made by it; the individuals concerned should not bear the risk of those errors. Reference was made to the

decisions of the European Court of Human Rights in *Trgo v Croatia*, *supra*, and *Klibavičienė* v *Lithuania*, *supra*, both of which were cases relied on by the Lord Ordinary. The proposition that the state should bear the risk of errors made by it has considerable force in cases where the error has resulted in a benefit to the state, as occurred in both of those cases. Where, however, the error involves the striking of a balance between groups of private individuals and the error consists of a contravention of the Convention rights of one of those groups of individuals in such a way that the other group is favoured, we do not agree that the state must bear the full cost of the error. The beneficiary of the error was not the state but one of the two affected groups of private individuals. Moreover, in the present case it is the benefited group that are now claiming for the loss of rights that they were given in contravention of Convention rights, and for which they did not pay any consideration. In those circumstances we are of opinion that as a matter of fairness the state should not require to pay the formerly benefited group for the loss of the benefit that they should not have received. On the other hand it is fair that the state should bear the cost of any losses that were incurred by persons who reasonably relied on the existence of the defective legislation. Those are the losses that can truly be said to be caused by the state's defective act. The effect of the Lord Ordinary's decision, and our own, is that losses within the latter category should be compensated but not losses within the former category. That in our opinion is fully in accordance with the case law of the European Court of Human Rights.

[58] For the petitioners it was further submitted that in setting compensation for breach of Convention rights the approach followed in domestic law should be avoided. The purpose of compensation for breach of Convention rights was to provide just satisfaction, which might involve both restoring the victim to the position that would have occurred but for the violation of Convention rights and compensating him for any consequential loss: *R*

(Greenfield) v *Home Secretary*, [2005] 1 WLR 673, at paragraph [19]; *Papamichalopoulos* v *Greece*, (1996) 21 EHRR 439. It is generally correct that the European Court of Human Rights, when awarding just satisfaction damages, adopts a relatively broad and equitable basis for determining the amount. Nevertheless, one of the reasons for adopting a broad and generally equitable approach in Strasbourg is that the Court does not have power to call and examine witnesses; consequently damages are awarded in respect of a factual situation that appears from the documents presented to the court. Before proceedings can be taken in the European Court of Human Rights it is normally essential to exhaust domestic remedies. Consequently it is appropriate that a Scottish court, which obviously has power to hear witnesses, should award just satisfaction damages on the basis of evidence led before it. That is what is proposed in the present case.

The position of the dissolved limited partnerships

[59] The Lord Ordinary allowed certain aspects of the claims made by the petitioners on behalf of the general partners to proceed to proof. In respect of the limited partnerships, however, he decided that the claims under article 1 were irrelevant. No link had been identified between the limited partnerships and the right to the tenancy conferred by section 72(6), and it could not be argued that the limited partnerships had some form of legitimate expectation in view of the meaning of that expression in the Strasbourg case law. Furthermore, the limited partnerships could not have any legitimate expectation of enjoying a property right on the basis of section 72(6) because they could never enjoy that right; that subsection conferred the right on the general partner, and thus it was only the general partner who could have a legitimate expectation for the purposes of article 1 (paragraph [144]).

[60] The limited partnerships have of course all been dissolved, and thus no longer exist as legal persons. It is nevertheless possible for the general partners to continue to assert the rights of the limited partnerships for the purpose of winding up their affairs; the petitioners' contention to that effect was not disputed by Scottish Ministers, and is in any event well vouched by authority, notably *Douglas Heron & Co* v *Gordon*, 1795, 3 Pat App 428. Nevertheless, if the dissolved limited partnerships are to have any claim under article 1, they must establish that they had a property right, or conceivably a legitimate expectation connected with a property right, that was affected by the Remedial Order. For the reasons given by the Lord Ordinary, we are of opinion that no such right or legitimate expectation has been identified. The right created by section 72(6) was not conferred on the limited partnerships but on the general partners. Consequently it is only the general partners that can conceivably have been deprived of such a right by the Remedial Order. For this reason we adhere to the decision of the Lord Ordinary on this issue.

Conclusion

[61] For the foregoing reasons we are of opinion that the Lord Ordinary reached the correct decision in the present case. This applies in particular to his refusal of the petitioners' claims for the value of the purported secure 1991 Act tenancies, his rejection of claims based on the concept of the "family farming business" and legitimate expectations, and his decision that the claims made by the limited partnerships were irrelevant. We are further of opinion that the Lord Ordinary's general approach to compensation was correct. We agree that it is necessary that the general partners should provide greater specification of their claims for compensation for losses incurred through reasonable reliance on the apparent secure 1991 Act tenancies conferred by the 2003 Act, as specified in the interlocutor

of 31 May 2017 quoted at paragraph [30] above. For these reasons the reclaiming motion must be refused. Thereafter we will remit the case to the Lord Ordinary to proceed in accordance with his interlocutor of 31 May 2017.