FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 64
P321/15

Lord President
Lord Menzies
Lord Drummond Young

STATEMENT OF REASONS

issued by LORD DRUMMOND YOUNG

in the application for permission to appeal to the United Kingdom Supreme Court by

RA McMASTER and OTHERS

Applicants

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

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

18 September 2018

[1] On 12 June 2018 the Inner House refused a reclaiming motion by the applicants against a decision of the Lord Ordinary which remitted certain parts of the applicants' claim to proof before answer. The applicants have now applied for permission to appeal to the

United Kingdom Supreme Court under section 40 of the Court of Session Act 1988. The application is presented on six grounds.

[2] Permission to appeal may be granted if the proposed appeal raises (i) an arguable point of law which is (ii) of general public importance and which (iii) ought to be considered by the United Kingdom Supreme Court at this time. After hearing argument on the matter, we concluded that this test was not satisfied. No arguable point of law was raised in the applicants' application, and no issue was raised of sufficient general public importance to be considered by the United Kingdom Supreme Court at the present time. In particular, it appeared to us that the issues raised by the applicants, in so far as they had any substance, were fully covered by existing case law, particularly in the European Court of Human Rights.

Whether there is an arguable point of law: grounds of appeal

Ground 1

[3] The applicants contend that the Inner House erred in law in failing to recognize that the limited partnerships that held the tenancies of each of the leases prior to the coming into force of the Agricultural Holdings (Scotland) Act 2003 were "simply a device", and that the reality of the situation, which is relevant for the purposes of article 1 of the First Protocol to the European Convention on Human Rights, was that the relevant general partner was the tenant throughout for the purposes of any claim.

[4] We consider this ground of appeal to be unfounded. We made it clear in our opinion that we had regard to the reality of the situation rather than to legal niceties (paragraph [18]), and we applied such an approach throughout. The contention to the contrary displays a fundamental failure to understand elementary aspects of our reasoning.

[5] Nevertheless, a proper legal analysis at a domestic level is essential to discover what was actually achieved by section 72 of the Agricultural Holdings (Scotland) Act 2003, the decision of the UK Supreme Court in *Salvesen* v *Riddell*, 2013 SC (UKSC) 236, and The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014. Thereafter the principles found in article 1 of the First Protocol must be applied on the basis of that analysis. The applicants' arguments, by contrast, appeared to proceed on the assumption that vague and indefinite statements of domestic law can be used as the basis for application of the Convention. We consider such an approach to be unarguable.

[6] The applicants refer to the decision of the European Court of Human Rights in *Beyeler* v *Italy (No. 1)*, (2001), 33 EHRR 52. The facts of that case were very different from those of the present case. It is primarily authority for the proposition that the expression "possessions" in article 1 of the First Protocol has an autonomous meaning, and covers intangible property and rights, regardless of how they are classified in domestic law: paragraphs [100]-[105]. It was not in dispute, however, that the 1991 Act leases conferred by section 72 were possessions for the purposes of article 1.

[7] The applicants suggest that the limited partnerships were "simply a device" intended to avoid security of tenure. This ignores, however, the important decision in *MacFarlane* v *Falfield Investments Ltd*, 1998 SC 14, where the effectiveness of the tenancy in favour of the limited partnership was recognized. No argument was advanced to us to suggest that that decision was wrong. Thus the legal "reality" of the situation, as a matter of Scots law, was that the limited partnerships existed as separate legal persons.

[8] This ground of appeal concludes with a statement that the Inner House was in error in holding that there was no claim for expenditure incurred on the faith of the 2003 Act prior to the service of the section 72(6) notices by the general partners. Such an argument was not

presented during the reclaiming motion. The Lord Ordinary held that the general partners might have suffered loss through reasonable reliance upon their apparent right to a secure tenancy, as conferred by the 2003 Act. They might in addition have suffered frustration and inconvenience. They were potentially entitled to compensation for such losses, but required to present their claims with greater specification. We agreed with that analysis. On the present pleadings it is not clear whether any of the petitioners has a claim for expenditure incurred during the period between the passing of the 2003 Act and the service of the relevant section 72(6) notice. We do not consider that any such claim can be considered until it is actually made in the pleadings.

Ground 2

[9] The applicants next contend that each general partner "had a legitimate expectation that he could act on the expectation of acquiring a secure 1991 Act tenancy before the section 72(6) notice was served which was linked both to the tenancy and the family farming business". This is said to have constituted a possession for the purposes of article 1 of the First Protocol, and would give rise to an entitlement to compensation.

[10] It is not easy to understand what is meant by this ground. In any event, we do not consider that it is arguable. At paragraphs [41]-[44] we rejected the applicants' arguments based on legitimate expectation on the basis that they were based on a fundamental misunderstanding of that concept. The Strasbourg case law makes it clear 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. That proposition appears to us to be quite clear. Indeed any other view would deprive the expression of any intelligible meaning.

[11] The applicants further contend that the court held that the whole of section 72 was unlawful when the United Kingdom Supreme Court had plainly held that only subsection (10) was unlawful. There is no foundation for this contention. The extent of the United Kingdom Supreme Court's decision on section 72 is set out at paragraph [34] of our opinion, and its implications are stated at paragraph [35], in terms that clearly recognize the extent of the decision in the earlier case. In holding that subsection (10) was incompatible with the Convention, the United Kingdom Supreme Court recognized that the alleged statutory right of the general partners to secure 1991 Act tenancies was ineffective, because the existence of any such tenancy was 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. That is fully recognized in our opinion.

[12] Finally, we would observe that the concept of legitimate expectation adds nothing to the claim of the general partners to a possession. Under the 2003 Act the general partners obtained a secure 1991 Act tenancy, and the fundamental claim is that that tenancy was a possession. We cannot understand what the concept of legitimate expectation adds to this: see paragraph [40].

Ground 3

[13] The applicants' next ground of appeal is that the court was in error in holding that no relevant claim for compensation under article 1 of the First Protocol arose from the loss of the secure 1991 Act tenancy when this was caused by the actings and error of the state and was not remedied for approximately 10 years, during which time the general partners had acted on the faith of having obtained a secure 1991 Act tenancy. We consider that this ground of appeal is not arguable.

[14] First, the effect of the Lord Ordinary's decision, which we have affirmed, is that the general partners are entitled in principle to recover for loss caused by their actings on the faith of having obtained a secure 1991 Act tenancy.

[15] Secondly, the applicants appear to suggest that the court held that payment of consideration for a possession was required before it was possible to make a claim for any loss arising from interference with that possession. We are unable to understand this contention. The fact that the general partners did not provide consideration was not the reason for holding that they had no claim for the loss of their 1991 Act tenancies. The fundamental reason was rather that the conferring of a 1991 Act tenancy in such a way that the landlord could not convert it into a limited duration tenancy was inconsistent with article 1 of the First Protocol. That necessarily meant that the general partners could have no Convention-compatible right to a 1991 Act tenancy. The relevance of consideration, as the court noted at paragraph [27], was in relation to benefit obtained at the expense of a third party rather than the state.

[16] Thirdly, the applicants refer to case law of the European Court of Human Rights. We consider that that Court's case law has been adequately dealt with in the opinion. In addition to the cases cited at the hearing in the Inner House, reference is made to the recent decision of the United Kingdom Supreme Court in *Mott* v *Environment Agency*, [2018] 1 WLR 1022. We consider that that case is of little relevance to the present case. The United Kingdom Supreme Court emphasized (at paragraph [37] of the opinion) that the case was exceptional in nature, and that the claimant had been treated differently from other persons with similar rights in a manner that was disproportionate. It has not been suggested that any issue of proportionality arises in the present case among the applicants or as between the applicants and any other claimants in respect of the 2014 Order.

[17] Fourthly, the applicants refer to the principle of "good governance" under the European Convention on Human Rights, whereby the state should bear the risk of errors made by it. The court was not addressed on any principle of good governance, and we cannot understand how it is relevant to the applicants' claims. The applicants obtained tenancies with a form of protection against their landlords to which they were not entitled under the Convention. To that extent the legislation was ineffective, and the relevant provision, section 72(10), was held incompatible with the Convention in *Salvesen* v *Riddell*, *supra*. We have held that a right which is not Convention compatible is not protected by article 1 of the First Protocol. We do not recognize in the case law any principle that the state must invariably bear the risk of defective legislation and provide compensation for it. In the present case we have of course held, agreeing with the Lord Ordinary, that the applicants are entitled to compensation for at least certain losses incurred by their reliance on the defective legislation. That is as much as the Convention requires.

[18] Fifthly, the applicants refer to a principle that the need to correct an old wrong should not disproportionately interfere with a new right acquired in good faith by an individual relying on the legitimacy of a public authority's actions. It is not easy to understand what is meant by this. To the extent that general partners have reasonably relied on the 2003 Act and have incurred loss in consequence, they may be entitled to compensation; that is a matter for proof.

[19] Sixthly, the applicants suggest that the approach of the court was inconsistent with the approach taken in the later case of *Mott*, *supra*, in that it focused on the purpose behind the interference rather than the impact on the individual claiming loss as a result of state action. We do not understand this criticism. Our opinion took account of the impact of the

2014 Order on the general partners, and held that they were entitled to compensation for losses caused by reasonable reliance on the rights purportedly conferred by the 2003 Act.

Ground 4

[20] The next ground of appeal is that the court allegedly failed to recognize that the lack of payment of any consideration for security of tenure was a factor that might only have a bearing on the quantum of compensation paid for the loss of the secure 1991 Act tenancies, but was not relevant to whether there was a loss to be compensated. A case is cited that was not referred to in submissions, *Pincova* v *Czech Republic*, Application No. 36548/97, 5 November 2002. That case arose out of circumstances very different from those of the present case, namely deprivation of property rights for which the applicants had made payment.

[21] The applicants further submit that when compensation is paid it should amount to full market value. At an abstract level that may be correct in cases where full compensation for the value of a possession is properly due. In the present case, however, the court has decided that compensation for loss of the security of a 1991 Act tenancy is not payable; only losses caused by a reasonable reliance on the 2003 Act are recoverable.

Ground 5

[22] The fifth ground of appeal for the applicants is that the Inner House held that the effect of *Salvesen* v *Riddell*, *supra*, was that the whole of section 72 was incompatible with article 1 of the First Protocol, and not merely subsection (10) of that section.

[23] There is no basis for this ground. The court, at paragraphs [34] and [35] of its opinion, made the limited effect of the decision in *Salvesen* clear: that the indefinite security of tenure that had purportedly been conferred on a limited number of tenants was

incompatible with the landlords' Convention rights. The logic of that conclusion is considered at paragraph [35]. The court did not find that any such secure 1991 Act tenancy was a nullity; its incompatibility was limited, but it affected the ability of landlords to make use of the new limited duration tenancy. That was critical in the present case. We cannot discover any arguable error of law in this connection.

Ground 6

[24] The sixth ground of appeal for the applicants is that the Inner House was in error in treating the deprivation of a secure 1991 Act tenancy as relating to a control on the use of possessions as opposed to a deprivation of possessions.

[25] We do not understand the relevance of this ground. The Lord Ordinary stated (at paragraph [195] of his opinion) that the same principles would have applied whether the case was characterized as control of use of possessions or as deprivation of possessions. We are in full agreement with that comment by the Lord Ordinary.

Criteria for permission to appeal

[26] For the foregoing reasons we are of opinion that there is no arguable ground of appeal disclosed in the present application. Furthermore, we do not think that any of the points raised can be properly considered of general public importance, or that they ought to be considered by the United Kingdom Supreme Court at this time. So far as the general law is concerned, the matters raised by the applicants have all been the subject of previous decisions. The effectiveness of using a limited partnership was considered in *MacFarlane* v *Falfield Investments Ltd*, *supra*, and the defects in the Agricultural Holdings (Scotland) Act 2003 were identified in *Salvesen* v *Riddell*, *supra*. The principles that govern the application of

article 1 of the First Protocol are discussed at length in a substantial number of cases in the European Court of Human Rights. In these circumstances it cannot be said that there is any question of general of general public importance that requires to be determined in the present case.

[27] In particular, the question of what amounts to a possession for the purposes of the Convention is clear from the Strasbourg cases, and it is not in dispute that the leases purportedly conferred by the 2003 Act were "possessions". The concept of legitimate expectation is also discussed at length in cases before the European Court of Human Rights, and we consider that once again the concept is well established. The present case is concerned with the application of the principles laid down in the Strasbourg case law to a particular set of facts.

[28] The applicants further submit that in the present case the scope of the ruling in *Salvesen* v *Riddell*, *supra*, should be considered. The scope of that ruling was not raised in argument either at first instance or in the Inner House. So far as the incompatibility of the 2003 Act with the Convention is concerned, the decision is quite clear, and we cannot see that there is any need for further reconsideration.

[29] The applicants submit that the compatibility of the court's decision in the present case with the English decision in *Mott* v *Environment Agency*, *supra*, is an issue of general public importance. The latter case was described as "exceptional…on the facts" (paragraph [37]). We cannot see that the compatibility of our decision with a case of that nature is in any way a matter of general public importance.

[30] Next, the applicants submit that the present case is suitable for clarifying the proper approach to how loss arising from defective legislation is to be approached, particularly where the correction of the legislation was done to secure compliance with the Convention.

We do not consider that this is a matter that requires consideration by the United Kingdom Supreme Court at this time. In this area, individual cases turn very much on their own facts. In the present case, legislation has already been held to be incompatible with the Convention, and the court's opinion merely draws logical conclusions from that finding. It does not prevent the award of compensation; to the extent that general partners relied on the invalid legislation they may be entitled to compensation.

[31] The next point taken by the applicants is that the case raises the principle of "good governance" for the purposes of the Convention. No such argument was presented in the Court of Session, and it is not clear what the principle is said to entail or how it is said to apply to the present case. In those circumstances we cannot see any point in permitting an appeal on a ground that has not been properly formulated.

[32] Finally, it is said on behalf of the applicants that there is general public importance in ascertaining the duties owed by the state in remedying losses arising from rights acquired under defective legislation. We have dealt with this matter already; the court's opinion merely draws conclusions from *Salvesen* v *Riddell*, *supra*, in a manner that seems logically inevitable.

[33] For the foregoing reasons we consider that the test for granting permission to appeal to the United Kingdom Supreme Court has not been satisfied in this case.