Rùnaire a' Chaibineit airson Cùisean Dùthchail agus na h- Àrainneachd
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The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND

Rob Gibson MSP
Convenor
Rural Affairs, Climate Change and the Environment Committee
Scottish Parliament
EH99 1SP

27 January 2014

Dear Rob,

During the Rural Affairs and Climate Change meeting on the 15 Jan 2014 I promised to reflect on two issues raised by members. I have now had that opportunity, and would comment as follows.

The first issue was whether it would be fair if a landlord (in group 2) who had provided a secure '91 tenancy, irrespective of any defect in the legislation is, through the Order, given the opportunity to renege on that deal?

As I mentioned, we know of five cases where the tenant has ended up with a secure tenancy which resulted from the landlord either 'acquiescing' or 'capitulating'. In so far as I am aware, none of these five tenancies would have been granted had it not been for the defect.

The legal basis for these five secure '91 tenancies arising results from the landlord not challenging within 28 days the claim notice served by the tenant under section 72(6). As a result of the landlord either not challenging or withdrawing their challenge, the tenancy continues to have effect in the partner's own right.

Continuing tenancies of this nature, being to a person rather than the partnership, are secure tenancies. If the tenancy is continuing because of section 72(6), it can be converted to a tenancy, to which section 73 applies under the remedial order if the Landlord so wishes. If the outcome agreed to by a landlord was to provide the tenant with a secure tenancy, by a means other than section 72(6), then section 73 is not applicable. *There are specific requirements /appropriate methods needed for that creation (as opposed to a continuation) of 1991 Act tenancies.*

/If…

If a landlord decided to take advantage of the opportunity in the current proposed draft Order to convert the secure ’91 tenancy, which was given irrespective of the defect, into a section 73 tenancy, they would be exposing themselves to a breach of contract. Under breach of contract, the courts would be able to examine whether there was reasonable evidence that the landlord willingly provided a secure ’91 tenancy, irrespective of the defect in the legislation.

In summary, we believe that the hypothetical situation does not arise. A secure ’91 tenancy, given in good faith and without duress, will be supported by written agreement and these written agreements can be appropriately examined by the courts without special provision being made in the Order.

Tenants and landlords are being provided with every opportunity to identify themselves, and we will continue to make every effort to establish the factual positions of those affected and ensure that the Order makes provision as appropriate.

Secondly, I undertook to write in connection with the issue of time bar.

For the reasons given to the Committee, I remain firmly of the view that it would be wrong in principle to make a specific amendment to the Prescription and Limitation (Scotland) Act 1973 for current circumstances.

I say that for three reasons:-

1) As indicated to the Committee, the 1973 Act itself (at section 19A) gives a court the power to allow a case to be brought out of time, if it is equitable to do so. We remain of the view that, if litigation proves necessary and this issue is a relevant one, the court using that existing power is best placed to assess the merits of such a request on the facts presented.

2) Not only are the facts and circumstances different in each case, but the weight to be given in balancing the equity of the situation is best carried out by the court and, indeed (as below), the fact of, or the length of, any time bar period may vary according to the sort of action brought.

3) As I made clear to the Committee, a key objective underpinning the Order is the avoiding of litigation, not its encouragement, nor the prolonging of cases.

The Government cannot provide legal advice to the Committee, nor say anything that comprises legal advice to others, but I hope I can though provide some re-assurance on the issue of time bar.

A point was made in Committee about time bar. The issue of time bar is not universal and greatly depends on the sort of action brought and, as indicated to Committee, there may be claims and proceedings such as the possibility mentioned, if circumstances would support it, of a claim for unjust enrichment between the parties. For such claims, we do not see why normal time bar rules relevant to such claims would not apply.

The uncertainty would only appear to arise, therefore, in respect of claims against the Scottish Government.

/Whether…

Whether the Government would have any time bar point, and whether they seek to rely upon it would depend on the circumstances, including the nature of the claim and the extent to which a claimant contributed towards the delay.

However, consistent with our desire to encourage mediation and the amicable resolution of any disputes without recourse to litigation, we accept that it would be unhelpful during ongoing mediation for a person with a potential claim against the Scottish Government to start proceedings, simply in order to protect, or perceive to protect, their legal position.

I can, therefore, undertake to the Committee that, where any party enters into the mediation offered as part of the solution in good faith, the Scottish Government (for its part) will not treat any clock to start ticking for the purposes of time bar, if it arises, until the end of the mediation or 28 November 2015 (whichever date is earlier), for the purposes of a claim against the Government.

This undertaking can, of course, only apply to the circumstances provided for in the Order itself, namely Groups 1, 2 and 3. For Group 1 cases, this undertaking would apply at the end of the mediation, or 2 years after the LP dissolution date (whichever date is earlier).

I hope that this re-assurance is helpful to the Committee, but I must stress again that all circumstances are different, and that affected parties must take their own legal advice as to what options are open to them and how best to protect their legal rights.

Richard Lochhead

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