

Our Ref: ECH/AB  
By email

26 October 2015

Mr R Gibson MSP  
Convener  
Rural Affairs, Climate Change and Environmental Committee  
Room T3.40  
The Scottish Parliament  
Edinburgh  
EH99 1SP

Dear Mr Gibson

**Agricultural Remedial Order**

On behalf of the affected eight agricultural Tenants and their families it was felt appropriate an update from their perspective be provided:-

**1. Mr A Stoddart (Group 3)**

Mr Stoddart and his family face removal on 28<sup>th</sup> November 2015. Mr Stoddart's Constituency MSP, Iain Gray, along with Claudia Beamish as Andrew's Regional MSP facilitated a meeting between Scottish Government Officials, Counsel for Andrew and myself as at 7<sup>th</sup> October 2015. The following points arose from the meeting:-

- (a) Scottish Government Officials contend despite a Scottish Land Court Order of 25<sup>th</sup> March 2015 referencing to art 3(2) of the Remedial Order that Mr Stoddart does not fall within the Remedial Order process.
- (b) **Scottish Government Officials advised they saw no circumstance in which Scottish Government had a liability to the Tenants.**
- (c) As a function of Point (b) a meeting of Counsel for Scottish Ministers and Tenants was agreed upon which may or may not advance to a Mediation on the same.

Counsel have now met. Tenant's Counsel explained the Tenants' position and reaffirmed their willingness to mediate as originally offered by Scottish Government. Counsel for Scottish Government listened and stated he would take this back to the instructing Scottish Government Solicitors.

Scottish Government have at least now come out into the open and confirmed that they see no liability whatsoever to affected Tenants. They did advise they thought there may be a liability owed to Landlords.

2.

However:-

1. All through the stakeholder engagement process this was never disclosed.
2. All through the evidential and RACCE Committee process this was never disclosed.
3. All through the discussions on the framing of tri-party mediation process this was never disclosed.

The review of submissions and oral evidence by RACCE informed to its subsequent Report. The Executive Summary addresses the central role of mediation and per Point 7 on the question of compensation. For accuracy I note:-

*"7. The Committee also believes that payment of compensation may be required for some of those with a valid case if they have suffered financial or personal loss as a consequence of the defect or the proposed draft order coming into force. Whilst acknowledging that it is difficult for the Scottish Government to accept general liability for all those disadvantaged by this situation, the Committee believes that the Government must accept liability for anyone disadvantaged by the remedy put in place, and for any stress suffered by those involved. The Committee therefore welcomes the Cabinet Secretary's helpful confirmation that compensation may be a valid outcome for some of those affected."*

In terms of the Order the Minister per his letter to the Committee of 27<sup>th</sup> January 2014 reiterated:-

*"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"*

My simplistic understanding is that this position can only be resolved by one of two ways:-

1. The eight Tenant families have to contemplate a long expensive series of litigations against the Government to prove their liability to them. This may take years.
2. Parliament presumably via the Rural Affairs Committee can bring forward an addition to the Remedial Order simply clarifying the position with regard to liability in Groups 2 and 3.

The latter of those options I think reflects what stakeholders understood through the engagement process. I would like to think it reflects what was captured via the evidential stage and reflected in the RACCE Committee Report. I even am of the opinion that it actually reflects the genuine intention of the Minister.

These eight Tenants have no choice and are being drawn further and further into litigation. Scottish Government Solicitors will then be able to shut down the whole constructive dialogue which the Rural Affairs Committee have to their immense credit revisited and given clarity and focus to.

Mediation was seen as a means of trying to resolve issues with Landlords but also to give a platform and a means of the relatively quick resolution of claims between those principal parties. Namely Landlord, Tenant and Government. The latter being the party held liable by the Supreme Court for the defect. Unfortunately not in the eyes of the Scottish Government Solicitors.



3.

If there is an issue of quantification of liability and a need for the public purse to reconcile its extent of liability then that still can be done by way of reference to the Lands Tribunal being an Expert Court but it must and can only go there similar to what you have in a Compulsory Purchase process where there is an acknowledgement and an acceptance that the Government accepts liability in those cases.

All these Tenants have done since the outset is work within the letter of the law. Be that the 2003 Act or now as they have reluctantly accepted the consequences of the Remedial Order correcting that legislative incompetence in the original drafting. They do not, as I appreciate the Rural Affairs Committee recognise, deserve to be exposed to these further emotional but also serious financial strains. Their preference would have been to remain to farm.

Sadly because of Government delays we are rapidly running of time and options. The Stoddart family are the first of those to face removal as a consequence of the Order with effect from 28th November 2015. Five weeks. I think there is sufficient desire of Scottish Government to be able to find and indeed fund constructive solutions but even they will find themselves constrained because of this refusal to accept liability by legal colleagues for the harm that has been caused directly to these Tenants.

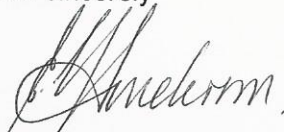
There should not be the need for Tenants directly affected in Groups 1, 2 or 3 to legally argue the liability of Scottish Government.

It is recognised in any such comparable 'statutory' claim against Government as with Compulsory Purchase that quantum of any claim still needs to be supported. These can be referenced to the Lands Tribunal for Scotland as an expert Court. As importantly points of agreed quantum can be paid out to claimants thereby avoiding undue hardship.

Time is of the essence. May I ask, if feasible, for the RACCE Committee to bring forward the following:-

1. Clarity on the question of liability against Scottish Government for those falling with Group 2 and Group 3 of the Remedial Order if possible via an addendum to the Order.
2. In the event of dispute as to the level of such claims against Scottish Government this can be referred by the claimant to the Lands Tribunal for Scotland for determination.
3. The Government backed mediation process be left in place as a means for parties to advance the early resolution of outstanding matters and issues of compensation (as envisaged).

Yours sincerely



**E C HENDERSON**