



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Land and Human Rights Advisory Forum

Note of Meeting – Tuesday 13th December 2022

Discussion

Legal News Update and Reflections on Previous Meeting

The Cost of Living (Tenant Protection) (Scotland) Act 2022 was passed in late October 2022. The forum discussed the possibility of legal challenges to the Act, which might be on the basis of Article 1, Protocol 1 of the European Convention on Human Rights (ECHR), which concerns private property rights. Forum members noted however that the Scottish Government's policy memorandum that accompanies the bill addresses A1P1 directly, asserting that the legislation falls within the margin of appreciation of A1P1 and strikes an 'appropriate balance' between the private property rights of landlords and protection of tenants from rent increases and evictions during the ongoing cost crisis.

The forum discussed whether the timing of the legislation was potentially problematic, as its effect was backdated to the date of the First Minister's programme for government announcement, rather than the date the legislation was passed.

In the context of the new Tenant Protection Act, the forum discussed international examples of residential tenancy legislation's interaction with human rights. The example of residential tenancy reform in Austria being challenged at the European Court of Human Rights, which ultimately did not uphold the challenge. Rent controls in cities in the United States and rent pressure zones and the eviction moratorium in Ireland, were also raised as examples. Forum members provided links to opinion and legal articles for further reading.

Also discussed was the publication of the Trust and Succession Bill, which most members agreed appears to be a technical law reform project rather than signalling any kind of major reform. However, the forum noted that this could change as the bill progresses through parliament and flagged it as a topic for future discussion.

The publication of the Fourth National Planning Framework was also raised. Forum members noted that it has developed significantly from its previous draft and there was agreement of its obvious implications for the forum's discussion of options agreements.

Some members of the forum raised the UK Government's Levelling Up and Regeneration Bill and Retained EU Law Bill, and in particular concerns expressed by civil society groups and non-governmental organisations on the potential risk to environmental and biodiversity protections posed by each bill. However, this was not discussed in detail.

Forum members also noted that the Scottish Government has moved to abolish the 'local connection' requirement in homelessness legislation, which changes the responsibility that local authorities have to homeless people living within their bounds.

Members noted that the consultation on the forthcoming Human Rights Bill is expected in the spring.

Options Agreements and Transparency

Discussion around the use and operation of options agreements, particularly in the development context, and how measures to improve transparency could be supported by a human rights approach.

The forum discussed options agreements, which in simple terms are agreements between a landowner and buyer, typically a housing developer, to buy the owner's land at a point in the future. Developers often use this for risk management and business planning.

Previous work from the Land Commission has found a lack of information on raw land and a lack of cadastral data. One of the Commission's other findings is that when it comes to development, early community engagement meant better overall outcomes, including better placemaking and more support from communities for housing development, indicating the need for transparency.

The Land Commission is now undertaking further research to better understand options agreements, and, in particular, how the potential for further transparency interacts with issues of commercial confidentiality.

Forum members discussed options agreements in the contexts of both transparency and human rights, to help inform the Land Commission's thinking on its research. This included a discussion of the practicalities of options agreements, noting that options agreements are generally backed up by a standard security, which creates publicly available information and provides competing developers with knowledge that a security is in place and the site is likely unavailable to them. However, the presence of a standard security does not necessarily indicate the presence of an options agreement, and the terms of any options agreement are not available to competitors or the wider public. Forum members agreed that if there was greater transparency of options agreements across the board, this would not threaten competition within the development sector as it would create a level playing field – every market actor would be obliged to disclose the same information. However, forum members said that such an approach should take into account other aspects of commercial confidentiality, as well as the risk of legal loopholes to avoid transparency, such as using personal options agreements for business reasons.

The forum discussed the impact of the fourth National Planning Framework, and its plan-led approach that includes a two-year review of development plans to ensure delivery is working well. Members observed that the framework contrasts with previous market trends in development in Scotland, which has seen development led by market availability and promotion of plots of land rather than an overarching plan that meaningfully includes considerations like land-reuse (development of brownfield sites) or community engagement. However, members also noted that land promoters have indicated openness to previous attempts at planning-led development approaches.

While noting that options agreements would usually be registered as standard securities already, the forum also discussed the role of Registers of Scotland in recording options agreements, and its Register of Controlled Interests in Land. Members noted that greater transparency, for instance, through the creation of a register of options agreements isn't an end goal in and of itself – public interest goals should be clear. The theoretical example was given that transparency of options could help local authorities deliver affordable housing where it needs to be.

The forum noted that when the creation of the Register of Controlled Interests was being debated in the Scottish Parliament in 2015, the issues of protection against harassment and the right to privacy were raised. There was a sense from the forum that, though these issues

were ultimately addressed when the Register was created, a move to greater transparency of options agreements might see similar challenges and issues raised, and these should be taken into account.

Links between this topic and the proposal in the recent Land Reform Bill consultation to give statutory weight to the principles of the Land Rights and Responsibilities Statement (LRRS) were identified by members. The LRRS contains expectations of transparency of ownership and tenure, which, if given appropriate statutory weight, may raise further questions on the transparency, or lack thereof, of options agreements.

The forum also made links between transparency of options agreements and the wider relationship between development and the human right to housing. Forum members were generally in agreement that the human right to housing pertains mainly to emergency situations like substandard housing, evictions, or homelessness, which all entail an obligation to provide suitable housing to those in need. The right to housing, forum members argued, does not necessarily extend rights to people to develop specific plots of land, so it would be difficult to suggest that private developers have a human rights obligation to provide housing. However, members discussed the nuances of this – for instance, the human right to housing places obligations on governments and local authorities, and their housing delivery mechanisms are at least in part reliant on the private sector, so in that sense the activity of private developers isn't totally divorced from right to housing obligations. The forum did not draw any firm conclusions on this part of the discussion.

Options Agreements and Land Reform

Discussion around the effect of options agreements on Community Rights to Buy, and any implications for the developing Land Reform Bill.

Previous Land Commission research identified options agreements as a barrier to the Land Reform (Scotland) Act 2003 Part 2 Community Right to Buy. The forum considered that options agreements continue to provide an effective mechanism to block community right to buy applications, and undermine legislation and policy intent.

Members expressed concern about the impact on progressing community right to buy applications that options agreements are having, however noted that legislative solutions to this issue are very complex

The forum discussed the level of compensation required for those in options agreements in circumstances where the agreement might be affected by a community right to buy process or public interest test. There was no overall agreement as to whether compensation should be tied to the development value of the land set by the market, or how compensation is split between buyer and owner – forum members agreed that this would depend on the specifics of each options agreement. Members discussed whether there might be circumstances when no compensation would be provided at all, given that there is always the risk of non-development in an options agreement. This raised further discussion as to what extent contractual rights might be infringed if an options agreement is undermined, whether the value of the land is attached solely to the owner (though the buyer would likely argue that they are entitled to some of that value given they held an option on the land) or whether the land is valued differently. How options are valued is one question, and whether options constitute property is another. The forum discussed these nuances in some detail.

Members identified that options agreements potentially a layer of complexity to the Public Interest Test (PIT) proposal set out in the Land Reform Bill consultation. If the PIT applies to

all transfers of control over land, its application to options agreements – existing or proposed – needs to be clarified, as the landowner does surrender some control under an options agreement. Theoretically, applying a PIT to an options agreement might also constitute interference in pre-existing contractual agreements and obligations, which also raises difficulties, for instance, if the two parties have concluded missives but ministers intervene in a transfer from an options agreement, it could interfere with the contractual right to dispose land. These questions were not definitively answered or resolved and may be looked at in more depth by the forum in future meetings.

Forum members also discussed the merits and problems of a lack of a time limit on options agreements in Scots Law. By way of an international comparison, it was noted that article 2628 of the Louisiana Civil Code contains requirement for a time limit on options agreements.

Links

Members provided links for further reading related to the discussion:

Policy Memorandum from the Scottish Government accompanying The Cost of Living (Tenant Protection) (Scotland) Act 2022: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/cost-of-living-tenant-protection-scotland-bill/introduced/policy-memorandum-accessible.pdf>

Opinion article from the Irish Times on Eviction Ban: <https://www.irishtimes.com/opinion/2022/10/19/eviction-ban-is-likely-to-survive-court-challenge/>

Article from Northwestern University Law Review 'American Courts' Image of a Tenant': <https://scholarlycommons.law.northwestern.edu/nulr/vol117/iss1/9>

Louisiana Civil Code 2628: <https://law.justia.com/codes/louisiana/2011/cc/cc2628>

Pre-emption rights provision of the Land Reform Act (Scotland) 2003: <https://www.legislation.gov.uk/asp/2003/2/section/65>