Business and Regulatory Impact Assessment

Title of Proposal

Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014.

Introduction

The Business and Regulatory Impact Assessment ("BRIA") is:-

- a tool used by the Scottish Government ("SG") to assess and present the likely costs and benefits and the associated risks of a proposal that might have an impact on the public, private or third sector
- a continuous process to help Government understand the issues associated with a proposal and avoid unintended consequences, fully think through the reasons for intervention, to weigh up various options for achieving an objective and to understand the consequences of proposed intervention.

The consultation here is now complete so this is a final BRIA.

Purpose and intended effect

Background

The Supreme Court judgement in *Salvesen v Riddell* [2013] UKSC 22 held that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 was incompatible with a right under the European Convention on Human Rights and suspended the effect of their judgment for 12 months to allow the Scottish Government to consult with the industry and address how best to rectify the problem. Their decision is scheduled to take effect on 23 April 2014.

Salvesen v Riddell was a legal dispute between a landlord and tenant over dissolution of a limited partnership. It turned on the differential treatment given to landlords on the basis of the date of service of dissolution notices, that is, those served between 16 September 2002 and 30 June 2003 and those served on or after 1 July 2003. The Court considered this distinction both arbitrary and unduly harsh to those landlords in the first category. In particular the Court disapproved of outcomes which resulted in landlords in the first category being subjected to a full 1991 Act tenancy if they failed in an appeal to the Scottish Land Court against the tenant's notice under section 72(6). By contrast landlords in the second category (ie those who served dissolution notices after 1 July 2003) are subjected to the less onerous outcome set out in section 73 of the 2003 Act.

Objective

The objective of this Remedial Order is to remedy the defect in the Agricultural Holdings (Scotland) Act 2003 to ensure compliance with the European

Convention on Human Rights. This will be by a super affirmative process. On 22 November 2013, the proposed draft Order was put out for public consultation. Public consultation ended on 7 February 2014 and analysis of results is now complete. The final draft order is due to be laid on 24 February 2014.

Rationale for Government intervention
SG are making this proposal as a direct result of the decision of the Supreme Court in the above case. It is a requirement to remedy the defect in the legislation.

Consultation

Scottish Government
The proposed draft Order is the SG response to the judgment of the Supreme Court detailed above.

The following Government Agencies and Departments have been consulted in the preparation of this Business and Regulatory Impact Assessment:-

- Better Regulation and Industry Engagement Branch has provided advice on preparation of this BRIA;
- Legal Aid Team has provided advice on the implications for the legal aid fund

Public Consultation
Public consultation on the proposals started on 22 November 2013 and ended on 7 February 2014. This was by way of a formal public consultation on the SG website (http://www.scotland.gov.uk/Publications/2013/11/4471). This public consultation was circulated to all stakeholder groups, all interested parties that the SG was aware of, local authorities, all MSPs and all MEPS, as well as court and justice agencies.

We received a total of 14 responses to the consultation. The Rural Affairs Climate Change and Environment Committee (RACCE) and the Delegated Powers and Law Reform Committee (DPLRC) responded to SG along with the following groups and individuals:- Scottish Courts Service, Faculty of Advocates, Scottish Tenant Farmers Association (STFA), Scottish Land and Estates (SLE), Scottish Agricultural Arbiters and Valuers Association (SAAVA), Royal Institute of Chartered Surveyors (RICS) and South Lanarkshire Council.

In addition to those mentioned above RACCE also took evidence from Scottish Government officials, STFA, SLE, National Farmers Union of Scotland, RICS, SAAVA, the Law Society of Scotland and the Cabinet Secretary for Rural Affairs and the Environment.

SG also sought views from the Scottish Land Court on the draft order, in light of the impact on their functions.

We have taken full account of those in preparing the draft Order. Where respondents gave permission for their responses to be made public these will be published on the SG website.

Business (Tenant farmers and landlords)
We issued a letter to tenant farmers and landowners who may be in limited partnerships on 24 September 2013 by sending it to approximately 200 tenants in limited partnerships whose details were provided to us by a stakeholder organisation. The letter was also circulated widely to tenant farmers and landowners via stakeholder representative bodies. It was also provided to Committee members of the Rural Affairs and Climate Change Committee (RACCE) so that it could be provided to constituents if so required.

The letter with guidance was also published on the SG website - http://www.scotland.gov.uk/Topics/farmingrural/Rural/rural-land/agricultural-holdings/limitedpartnerships and it was published in Scottish Farmer by the Scottish Tenant Farmers Association (STFA).

It was circulated to key stakeholder groups in the field, namely STFA, the National Farming Union for Scotland (NFUS), the Scottish Agricultural and Valuers Association (SAAVA), the Royal Institute of Chartered Surveyors (RICs) and Scottish Land and Estates (SLE) for onward circulation and discussion with their members and also received press coverage.

As noted above, SG webpages on limited partnership tenancies were created to provide those not in stakeholder groups with information on the letter and steps to take.

As part of the letter, we also created an online questionnaire which we invited limited partners (landlords) and general partners (tenants) of agricultural tenancies to complete in order to provide us with an indication of whether they may be affected by the policy proposals and also their legal position.

Responses were received to the online questionnaire from both limited partners and general partners which allowed us to identify around 50 business units. Although the level of return was moderate, the range and type of respondents provided broad coverage of business interests within the tenant farming sector from both landlord and tenant side.

The responses were considered by the policy team and results were then used to help inform the development of the proposed draft Order.

A series of meetings (through stakeholder groups) took place in August 2013. These were in the format of stakeholder meetings with each of the representative bodies outlined above.

The results of the meetings helped inform the preparation of the proposed draft Order. In particular, the meetings considered the options which may be available, the consequences on members of the stakeholder organisations of

these options and also raised the issue that compensation may be sought by some of those affected by the judgment.

Through the super affirmative process, SG has undertaken a 60 day public consultation.

A further round of stakeholder meetings took place with the key stakeholders in November 2013 to explain the proposed draft Order.

Options

Option 1 – Do nothing

The option of doing nothing is not appropriate here. In terms of the judgment of the Supreme Court, action must be taken by SG.

Option 2 – Introduce remedial legislation.

Sectors and groups affected

The draft proposed Order proposes different options depending on the circumstances of those affected. Those affected are all within the group of tenant farming within Scotland as further specified below.

To provide context, the Agricultural Holdings (Scotland) Act 2003 section 72(10) came into force on 1 July 2003. Its function was to enable a landlord in a limited partnership tenancy, in cases where the tenancy continues to have effect by virtue of section 72(6) notwithstanding the purported termination of the tenancy in the circumstances referred to in section 72(3) to obtain the benefit of section 73. This allows the tenancy to be brought to an end by the landlord by the service of a notice to quit at a time of his or her choosing. Subsection 10(b)(i) and (ii) adds a further qualification that must be satisfied if section 73 is to apply. The notice of dissolution or thing mentioned in section 72(3) must have been served or occurred on or after the relevant date which is 1 July 2003. The effect of this qualification is to deny the benefit of section 73 to all cases where the tenancy was purportedly terminated between 16 September 2002 and 30 June 2003. There are different effects on different groups of persons depending on the action taken following the service of the dissolution notice.

A closed group of people are affected by the Supreme Court judgment for which a legal remedy is proposed. The numbers involved have been partially identified by analysing the results of the above online questionnaire. However, there is no guarantee that all those affected replied to the questionnaire. The closed group is defined by virtue of the date of service of the dissolution notice.

The proposed draft Order is to correct the defect in the law and to bring the legal relationship between the landlords and tenants into an ECHR compliant position by providing a route to allow landlords to recover vacant possession to their land.

Initial analysis has identified 3 distinct groups of tenants and landlords for which solutions are required to bring them into an ECHR compliant position. Attached is

a diagram showing the groups.

1. Those where the landlord served on the tenant a dissolution notice under section 72(3) for a date in the future. The tenant has the option, within 28 days, of the purported termination, to serve a notice claiming the tenancy in their own right under section 72(6). The date at which the tenant can serve the claim notice is still to arrive (group 1).
2. Those where the tenant is in receipt of a full 1991 tenancy as a result of the landlord either electing not to apply to the Land Court for an order under section 72(8) or withdrawing from the Land Court process (group 2).
3. Those where the tenant's claim to a full tenancy was challenged by the landlord under section 72(7) and the cases were sisted pending the outcome of the above Case (group 3).

The proposals are as follows:-
Landlords in Groups 1,2 and 3 are provided with different routes for getting into section 73 as the means for recovering vacant possession. The only exception is for group 3 cases where there is an option of allowing the Scottish Land Court to make a decision on a time period that they would regard as reasonable.

- For group 1 the order provides for the section 73 process.
- For group 2 the order provides that the landlord has an option (though not an obligation) of converting these tenancies into the section 73 process. The opportunity for conversion is provided during a 12 month period which starts on the 28 Nov 2014. The delay for the start of the conversion period allows for a "cooling off" period during which the Scottish Government is offering to assist with mediation if required.
- For group 3 the order provides that if the case is removed from the Land Court, it is processed through section 73. If it remains at the Court the order provides more discretion to take account of the circumstances ie potentially long delays where the landlord has been seeking to recover vacant possession, and for the Court to make a decision as to when it would be reasonable for landlords to recover possession.

It is important to note that it may well be the case that one or other of the parties have taken action which moves them beyond the defect by, for example, selling their property or entering into a bilateral agreement other than a 1991 Act tenancy. These persons may or may not be content and this will depend on the individual facts and circumstances of each case and it is possible, even likely, that these will vary widely. A group response for these persons is thus not possible.

Consequently the effect of the proposed draft Order is constrained to groups 1,2 and 3 and does not apply to groups 4 and 5.

Groups 4 and 5 are deemed to have moved beyond the defect by either the sale of the farm or bilateral agreement between the parties.

The tenant farming sector of the agricultural industry and their landlords are those who will be primarily affected. Secondary groups affected are those involved in the land market. Supporting industries and broader rural communities would not benefit from any reduction in an active tenant farming sector as this supports

local supplier firms and population retention in local rural communities.

Benefits

Option 1 – do nothing

This is not an option given the terms of the judgment by the Supreme Court.

Option 2 – introduce remedial legislation

Give effect to the Supreme Court judgment in Salvesen v Riddell.

The following are likely to be affected by the Convention Compliance Order:- a closed group of landlords and tenants of agricultural tenancies.

Landlords

Route to recover vacant possession.

Ability to re-let / amalgamate / deal with farm.

Adjust the legal relationship between landlords and their tenant farmers to an ECHR compliant position.

Tenants

Adjust the legal relationship between landlords and their tenant farmers to an ECHR compliant position.

Costs

Views expressed on impact on private businesses are taken from discussions and have not been evidenced.

Option 1 – doing nothing

Failure to act would place SG in contravention of the ruling of the Supreme Court of the UK, accordingly, landlords may make compensation claims regarding the failure to act.

Option 2 – introduce remedial legislation

Costs to the Scottish Government

The draft proposed order does **not** make provision for a compensation scheme. We are aware from consultation, in general terms only, that some individuals may seek to advance compensation claims. Any case would require to be considered on its own facts and circumstances. No judgment could be made in the abstract as to whether any claims have merit.

The proposed draft Order provides for a cooling off period during this time SG is offering to pay for mediations.

Costs on landlords

There may be legal expenses incurred in taking advice on the proposed draft order, its implications and how best to proceed. There may be costs incurred should landlord recover vacant possession and require to pay for tenants'

improvements. There may be tax implications. At present, these costs cannot be quantified as they depend on the facts and circumstances of each individual case.

Costs on tenant farmers
There may be legal expenses incurred in taking advice on proposed draft order, its implications and how best to proceed. There may be improvements made to farm by tenant though these may be claimed through normal waygo arrangements.

Tenant may have made succession planning arrangements which would not be realised should tenant lose the farm. Tenant farmer may require to re-train to find employment.

At present, these costs cannot be quantified as they depend on the facts and circumstances of each individual case which are highly diverse.

Costs on Scottish Land Court
At present, it is unclear whether the draft proposed Order will impose additional workload and thus additional costs on the Scottish Land Court. Accordingly this will be kept under review.

Scottish Firms Impact Test
There has been consultation with stakeholder organisations from both the landlord and tenant representative organisations throughout development of the draft proposed Order. There has also been engagement direct with those directly affected through the online questionnaire. There has been a 60 day public consultation.

The number of farms affected by the terms of the proposed draft Order is sitting below 20 and is a closed group of persons, as outlined above. **Definitive figures are not available**. The impact on them is diverse as it depends on the facts and circumstances of each particular case. It also varies depending on the group involved.

To give context to these figures, in Scotland there are a total of 52,625 agricultural holdings. Of this, 436 holdings are 1991 Act tenancies held by limited partnerships. Against this backdrop the number of farms affected by the terms of the proposed draft Order is small when compared to the overall number of agricultural tenancies in Scotland.

The possible impact on businesses in both monetary and other terms has been informed by engagement with both stakeholders and also with individual tenant farmers and landlords.

For individual farmers, the impact as indicated to us is that they have invested significant energies and financing (sometimes by way of bank loans) in improving their farms on the basis that they would obtain or have already obtained a secure 1991 tenancy (which tenancy was found to be an illegal outcome by the Supreme Court). Some farmers indicated that they had conducted their affairs on the basis

of a family member taking over the farm which will not be possible if they lose the farm. Some farmers indicated that they have felt uncertain as to their future as a result of the ongoing case. Some farmers said they had spent considerable sums in legal fees at the Scottish Land Court or generally to take advice on their position. Some farmers who had entered a limited duration tenancy felt that they were unable to do future planning as a result of the duration of it as opposed to the “security” of a 1991 Act tenancy.

For landlords, the impact as indicated to us is that they may have accepted the granting of a secure tenancy which has incurred loss of capital value, risks of being exposed to a right to buy and substantial legal expenses. It was indicated to us that a landlord had lost the opportunity to enable a family member to farm the holding in the future, having entered a fixed term lease with this in mind. It was indicated to us that tenancies had been bought out for value to avoid the risk of a tenant claiming a secure tenancy. It was indicated to us that a notice of dissolution had been withdrawn in exchange for the grant of a limited duration tenancy which the landlord felt they had no option other than to grant.

Consultation

We refer to the statement on observations which outlines the reasons for proposing to make the order for a summary of relevant consultation responses.

Respondents to the consultation had the opportunity to make observations on the partial BRIA which was published on the SG website and also circulated widely by email to all interested parties.

Recurring themes were that those affected (from both tenant and landlord side) may seek compensation which may be substantial (for loss, expenses, impact on them) with views expressed for a mechanism for compensation to be provided so that parties do not have to take on the expense, inconvenience and uncertainty of court action. It was submitted that those affected will pay a financial and emotional price given that both their businesses and families will be affected (unemployment, upheaval, loss of chance to profit from improvements and loss of improvements, loss of investment). It was submitted that a compensation scheme be devised with provision for statutory waygo. There was acceptance by some respondents that cases will turn upon their own facts and circumstances.

Having fully considered the consultation responses and the submissions and evidence sessions of the RACCE and DPLR Parliamentary Committees, it is considered inappropriate to include a compensation scheme within the order.

As the Cabinet Secretary indicated to the RACCE Committee on 15 January 2014, the order’s sole purpose is to remedy the unlawful legislative outcomes in section 72 that have resulted from the defect that was identified in the Supreme Court judgment. The Cabinet Secretary said he had been heartened by the stakeholders’ recognition that, given the complexity and differences between the cases in question, it is simply not possible or advisable to provide a generic compensation scheme. He indicated that, for that reason, we are not making provision for such a scheme. However, he stated further that, for those affected

by the order, we are providing £40,000 funding for mediation with independent accredited mediators. That is to establish the facts and circumstances and to explore all the options for finding a solution.

We have already appointed an independent mediator to design a process for the mediation in full consultation with stakeholders. It is hoped that the report on this will be available on 24 March 2014.

Competition Assessment

Tenant farming is regarded by many as offering the first rung on the farming ladder and SG wants to encourage more new entrants into farming. The proposed draft order will not place any restrictions on the tenant farming letting market, instead it will rectify the defect in the legislation and alter the legal relationship between a limited group of landlords and tenant farmers as outlined above. There will be no direct restrictions on the number of tenant farmers, indirect restrictions on entry to tenant farming or negative impact on the ability of tenant farmers to compete within the agricultural letting market. The proposed draft order impacts on those within the closed group above and does not intervene or interfere with commercial decisions made by landlords and tenant farmers who are not within the closed group. Formal farm tenancy arrangements between landlords and their tenant farmers operate within a commercial business environment.

Test run of business forms

No new business forms are proposed.

Legal Aid Impact Test

Contact has been made with the Legal Aid Impact Team to consider the impact that the proposals may have on individuals' right of access to justice through availability of legal aid and possible expenditure from the Legal Aid Fund. Details were provided of the potential number who may be affected by the draft proposed Order. Obviously, at the present time, it is unknown whether (and if so, to what extent) compensation claims will be submitted. That being so, the exact amount of claims on the legal aid fund are unknown.

Replies from the Legal Aid Impact Team are in the following terms:-

Availability of civil legal aid

The Scottish Legal Aid Board has confirmed that Schedule 2 of the Legal Aid (Scotland) Act 1986 provides that civil legal aid is available in proceedings before the Scottish Land Court. So civil legal aid could be made available for cases proceeding there provided that the other statutory tests were met.

It is unclear at present whether claims would be made in the name of individuals or as partners in partnership. This may affect the availability of legal aid. Those making a claim, be they tenant farmers or landlords would require to meet the statutory definition of a person per section 41 of the 1986 Act with civil legal aid being available to a person under section 15 of the 1986 Act. Where the application is made by a body corporate or unincorporated the Board has a locus

to reject an application without consideration of the other statutory tests (which are finance and merits). Those who did wish to make a claim for legal aid could apply for and be granted civil legal aid provided that the statutory tests were met and any assessed contribution be met.

Practical impact of the ruling

Estimate figures of farms affected by the ruling were provided.

The response from the Board was that, whilst the case is of importance from a constitutional perspective in that the Scottish Parliament has been found to have acted outwith legislation competence in enacting a provision contrary to Convention rights and whilst this is a matter of the utmost importance to those affected by it, in terms of the practical effect of the ruling and for the purposes of the fund, the numbers affected are relatively small as indicated above in the **Scottish Firms Impact Test** section.

Conclusion

The Board confirmed that the above assessed likely impact can be reported to the Minister, subject to the proviso that, at this stage, they do not know what claims may be made, whether they would have merit, and nor whether such claims would find their way into the courts or, if they did, whether they would proceed through the courts or be settled on an extrajudicial basis, and on the basis that the Board would be willing to engage further on this issue if so required.

Enforcement, sanctions and monitoring

This Order is concerned with leasing arrangements entered into between tenant farmers and landlords for agricultural land. It does not introduce enforcement measures. Such arrangements are enforceable contractually between the parties with potential recourse to the Scottish Land Court. The Order does not impose sanctions or monitoring.

The Scottish Government is offering to fund a mediation process during the cooling off period outlined above.

Implementation and delivery plan

The Supreme Court suspended its judgment for 12 months to allow the Scottish Government to correct the defect and for that correction to take effect. Their decision takes effect on 23 April 2014. As outlined above, there is a suggestion of the provision of a cooling off period to allow mediation to take place between the parties. Effectively this cooling off period would be provided to landlords within groups 2 who have the option but not an obligation to convert during a 12 month period which starts on 28 November 2014.

Post-implementation review

SG will review the effectiveness of the legislation.

When the order is approved by the Scottish Parliament, SG will communicate this to all stakeholders groups and other interested parties to ensure that all those who may be affected know of the provisions which may impact on them and know the appropriate timescales should further action be required by them.

Summary and recommendation

Option 1, doing nothing, is not appropriate here. Section 72(10) has been found to have breached the human rights of landlords. The Supreme Court suspended their judgment to enable the defect in the legislation to be fixed and for that fix to take effect. It is simply not appropriate for no action to be taken here.

Option 2, the proposed draft Order, attached, is considered appropriate. In this instance, making legislative changes is the only option which is available to SG to remedy the legal defect identified by the Court.

Summary costs and benefits table

Option	**Total benefit per annum** **Economic, environmental, social**	**Total cost per annum** **Economic, environmental, social** **Policy and administrative**
1 – do nothing	Not applicable	This is not an option given the judgment of the Supreme Court. Failure to act would place SG in contravention of the ruling of the Supreme Court of the UK and, accordingly, landlords may make compensation claims regarding the failure to act.
2 – legislative change	Landlord is provided with a clear route to recover vacant possession. Each case will turn on its own facts and circumstances. Will result in lawful relationships between landlords and tenants.	While the consultation process has made it clear that compensation claims may be made there is not quantification of these at present standing that claims have not yet been made and each case will turn upon its own facts and

	Tenant may lose farm and require to retrain, find other employment, leave farming – again this depends very much on the facts and circumstances of each case. May impact on succession arrangements to the farm – again this depends very much on the facts and circumstances of each case.	circumstances. The mediation process may provide some detail of the facts and circumstances of particular cases.

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

RICHARD LOCHHEAD, CABINET SECRETARY FOR RURAL AFFAIRS AND THE ENVIRONMENT

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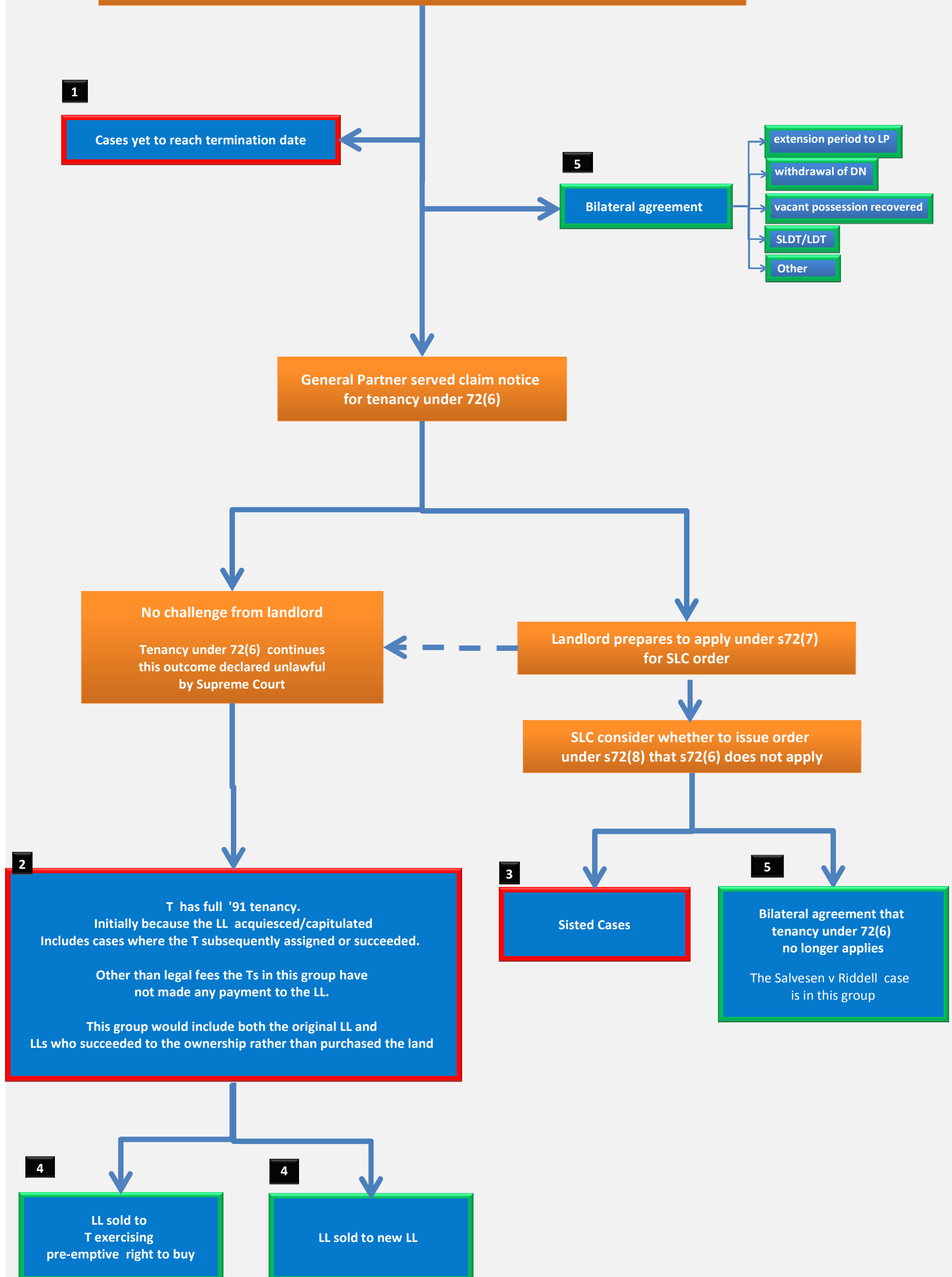
Dissolution Notices Served by Limited Partnerships
16 Sept 2002 - 30 June 2003
1
Cases yet to reach termination date
5
Bilateral agreement
extension period to LP
withdrawal of DN
vacant possession recovered
SLDT/LDT
Other
General Partner served claim notice for tenancy under 72(6)
No challenge from landlord
Tenancy under 72(6) continues this outcome declared unlawful by Supreme Court
Landlord prepares to apply under s72(7) for SLC order
SLC consider whether to issue order under s72(8) that s72(6) does not apply
2
T has full '91 tenancy.
Initially because the LL acquiesced/capitulated
Includes cases where the T subsequently assigned or succeeded.
Other than legal fees the Ts in this group have not made any payment to the LL.
This group would include both the original LL and LLs who succeeded to the ownership rather than purchased the land
3
Sisted Cases
5
Bilateral agreement that tenancy under 72(6) no longer applies
The Salvesen v Riddell case is in this group
4
LL sold to T exercising pre-emptive right to buy
4
LL sold to new LL