Newsletter

# Food, Farming and Land Quarterly

BURGES SALMON

Autumn 2014

## Welcome

Welcome to the latest edition of Food, Farming and Land Quarterly, discussing current issues in the food, farming and land sector.

If you would like further details on any of the areas covered in this newsletter then please contact one of the contributors or visit our website at www.burges-salmon.com

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## Comment

### Basic Payment Scheme: a cause for concern?

On 21 October the gates came down and the RPA drew a line under transferring Single Payment Entitlements. The gates will lift in early 2015 and Basic Payment Scheme entitlements will be ushered in. The feeling that something different is coming has set in. How different will it be?

The fact that in England SPS entitlements are being rolled over directly into BPS entitlements gives some comfort. But anything involving a change of system has the potential to crack under the pressure of a launch, although surely there is less chance of that this time? That seems to be a major worry and given past experiences of the implementation of new IT systems (and this is not a problem confined to the RPA) this may in practice be where the greatest problems emerge.

Greening is something that we're seeing causing a lot of work at farm level. There are still uncertainties there, but as it feels like there's been a focus on it over the past few months it may be that the greening requirements can be completed without wrecking proper farming. There are some particular concerns, such as on small farms, but perhaps the new regulations can be made to work. There are still unknown issues, and the Active Farmer test fits that description perfectly - at the time of writing we are still waiting for further guidance on its application

If land and entitlements are being transferred over the next few months, advisers will be trying to work out ways of minimising the risk of a bump in the road causing an entitlement problem. The fact that transfers of entitlements can be registered as late as 15th May could easily be more of a curse than a blessing without proper thought and a fully operative RPA computer system.


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# What does 'dependant' mean in an agricultural occupational condition?

In the recent case of *Shortt v Secretary of State for* Communities and Local Government and another [2014] EWHC 2480, the High Court considered the meaning of 'dependants' in the context of an agricultural occupancy condition ("AOC"). Mr and Mrs Shortt occupied a farmhouse with 22 hectares of land. It was subject to an AOC restricting the occupation of the dwelling to persons employed or last employed in agriculture **and their dependants**. Mrs Shortt kept 20 sheep on the farm followed by a pedigree breeding herd of 15 cattle. The total labour contributed to the farm was less than 20% of a full time worker and the farm made a loss. Mr Shortt was a businessman and did not work on the farm.

Mr and Mrs S Shortt applied for a certificate of lawful use on the basis of ten years' breach of the AOC. They claimed that even though Mrs Shortt may have been considered an agricultural worker, she did not financially contribute to Mr Shortt and their two children and they could not be described as her dependants. They placed reliance on the case of *Fawcett Properties Ltd v Buckingham County Council [1961] AC 636*, where Lord Keith of Avonholm clarified the term 'dependant' as meaning: *"persons living in family with the person defined and dependent on him in whole or part of for their subsistence and support"*.

*Continued overleaf*

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The local planning authority failed to determine the application and Mr and Mrs Shortt appealed. The Inspector determining the appeal held that the definition of 'dependant' was not limited to financial dependency. Mr and Mrs Shortt challenged this decision. Mr Justice Hickinbottom held that Lord Keith's definition of "subsistence and support" does not just refer to financial support and that the definition of the term 'dependant' is largely context-specific. His view was that it would include a spouse and minor children who are provided with the usual family services and care and would not necessarily require financial dependency. Therefore the Shortt and their two children were dependants and the ACO had been offered, so no certificate could be issued.

An important point to remember is that the interpretation of dependants may vary from case to case and depend on the factual circumstances and the particular wording of the AOC.

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# Unfair trading in the food sector

The European Commission adopted a Communication in July encouraging Member States to look for ways to improve protection for small producers and retailers against unfair trading practices (UTPs) in the food supply chain. The food supply chain is not only crucial for the daily life and well-being of consumers but is also important for the economy as a whole, employing more than 47 million people in the EU, many in SMEs, and representing about 7% of the EU gross value added. The total market size of EU retail trade in food-related products is estimated at €1.05 trillion. UTPs can be defined as practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on the other and include:

- avoiding or refusing to put essential commercial terms in writing
- retroactive unilateral changes in the cost or price of products or services
- transfer of unjustified or disproportionate risk to a contracting party
- deliberately disrupting a delivery or reception schedule to obtain unjustified advantages or
- unilaterally terminating a commercial relationship without notice, or subject to an unreasonably short notice period and without an objectively justified reason.

The Commission in its Communication does not propose legislation at EU level but suggests a "mixed approach" to dealing with UTPs. The Commission's approach has three parts:

1. It encourages participation in the Supply Chain Initiative which was launched in September 2013;
2. It suggests that there should be EU wide standards for principles of good practice; and
3. It stresses the importance of ensuring the effectiveness of enforcement mechanisms at national level through the adoption of minimum standards applicable throughout the EU.

The Commission will monitor and assess progress and intends to present a report to the Council and the European Parliament at the end of 2015 which may lead to further action at EU level.

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# Dealing with a knotty problem

The mere mention of Japanese knotweed can send shivers down the spines of many property developers. However, recent publicity on the new powers to be given to environment regulators as a result of the Infrastructure Bill, currently in parliament, will have opened their eyes to other species, such as the zebra mussel, the "killer shrimp", the Chinese mitten crab, Asian hornets or Brazilian rhubarb.

It is easy to trivialise the establishment of the species but we should not. To tackle this increasingly large and costly problem - both in financial terms (invasive species cost the EU about €12 billion a year in crop losses and damage to infrastructure, says the European commission) and the loss of important biodiversity and habitats - the EU reached a deal earlier this year on a new invasive species regulation.

## Controlling measures

The EU's regulation comes into force from January 2015 and will ban "intentionally or negligently importing, keeping, breeding, transporting, selling, growing or releasing species of EU concern". Under the provisions, member states will have to analyse the pathways of introduction of potential and listed invasive species and take action to eradicate, control or contain them. The polluter will be forced to pay for this action. Member states are also required to impose dissuasive, effective and proportionate sanctions for breaches of the regulation.

Through the Wildlife and Countryside Act 1981 the UK has certain controls on species, such as Japanese knotweed. However, much of this regulation has revolved around controlling the spread of species as opposed to eradication. The Law Commission review of wildlife law iin England and Wales, which was published in February, concluded that the existing legislation is not sufficient to control and eradicate invasive non-native species. The commission recommended the introduction of enhanced control procedures to allow environmental authorities and bodies to make species control orders.

The commission explained that the Environment Agency, for example, should first offer a species control agreement to the owner or occupier of the land or premises in question. Only when an agreement proves impractical or is not being properly performed should an order be imposed. In most cases, the law does not allow those charged with the management and control of wildlife to enter privately owned land or premises to carry out operations to manage or eradicate invasive non-native species without consent. However, the proposed change provides powers of entry to enable regulators to investigate or monitor a site, or to allow an order to be carried out.

The Infrastructure Bill puts the recommendations of the commission in place by amending the existing Wildlife and Countryside Act. A new schedule 9A will be inserted into the Act to empower environment authorities to enter into "species control agreements" (SCA) with owners of premises where the authority considers that an invasive non-native species is present. An agreement will detail what needs to be done to control or eradicate the species, who is going to do it and the time by which the actions need to be carried out. Further powers will be given to the environment authorities to make species control orders (SCO). So if the owner of a premises has failed to comply with or agree to an SCA, the authority can make an SCO. This can require the owner to carry out species control operations or can allow the authority itself to do so.

It is not entirely clear from the new provisions in the Wildlife and Countryside Act who will pay for this work. In some cases, it may be the environment In practice.  Clearly, there will be a much stronger legal requirement for authorities to deal with non-native species. How often SCAs and SCOs will be used will depend on how many species are listed as invasive and also on the resources the regulators can allocate to the problem.

However, owners, leaseholders and purchasers of land need to take this issue seriously. As many a developer will testify, the costs associated with the eradication and disposal of even a familiar invasive species, such as Japanese knotweed, can be significant. Equally importantly is the delay it can cause to redevelopment.

The proposed legal changes must also surely mean that further environmental studies will need to be carried out at the outset of the land acquisition process to assess the risk and it may in time lead to contractual indemnities and provisions being sought from purchasers or occupiers.

## EU Regulation

The European commission set out its proposals last year for new legislation to prevent and manage invasive alien species (IAS), noting that there are more than 12,000 non-native species in Europe. Of these, about 15% are invasive and they are rapidly growing in number. In April 2014, the European parliament backed the proposals.

The legislation would require EU member states to ascertain the routes of introduction and spread of IAS and set up surveillance systems and action plans. Official checks at EU borders would also be stepped up. For widespread IAS, member states would have to draw up management plans. They would also be responsible for determining penalties for breaches of the legislation. The proposals now need approval by the European council.

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# Abstraction Management System Reform - Government summary of consultation responses

In July 2014 Defra and the Welsh Government published a Summary of consultation responses to their proposals for water abstraction reform. This is an area of key importance to many sectors – farmers and landowners, water and sewerage companies, industry abstractors, food and drink businesses, energy companies, hydropower companies, horticulture businesses and many others.

The two governments say that the purpose of proposed reform is to maximise the amount of water available to abstraction; to facilitate trading; to provide certainty for abstractors; to protect water eco systems; to promote efficient use of water through charging for actual use; and to ensure that the new system is able to respond to longer term changes in water availability.

However, the clue may be in the title of the consultation 'Making the most of every drop'. This is a legislative response to perceived water scarcity. The two main options under review are "Current System Plus" and "Water Shares". Current System Plus would link water availability to annual and daily volume constraints – more accurately measured and defined, reducing abstractions in times of very low flows and relaxing restrictions at times of plenty. The Water Shares option, which seemed less popular with respondents, would be based on giving abstractors a share in the water available in a whole catchment, and therefore a shared incentive to save water.

Under both options, it is proposed to make water trading quicker and easier, remove time limits on licences, make improvements to the measurement of catchment availability of water, reform the system of abstraction charges, pilot implementation in "enhanced catchments" and manage the impact of discharges.

There are major changes of very considerable importance to a very wide range of businesses, abstractors and users. The consultation document from July 2014 talks about legislation 'early in the next Parliament' with important policy arrangements in 2015. In Wales this will take the form of completion of the final Water Strategy for Wales.

The UK is now on the run up to the next election, with a new Secretary of State for the Environment, Food and Rural Affairs, so there may be many changes and adjustments to the policies indicated in July 2014, but it does seem clear that "business as usual" is most unlikely in the area of water abstraction, and those affected should instead anticipate fundamental reform.

## Water Act 2014

The Water Act 2014, as amending legislation, is not an easy read, but does contain more important provisions than first appear.

It aims to promote competition within the water industry; to increase the resilience of water supplies to floods and droughts; and to promote the availability of flood risk insurance for households.

It allows most business customers to switch their water and sewerage supplier, with cross border arrangements with Scotland and easier systems for sales of water between companies. Long-term resilience becomes an new over-arching duty of OFWAT.

Many detailed provisions on areas such as environmental permitting for abstraction and impounding, and promotion of sustainable drainage or 'SuDS' schemes will have important localised impacts. The Act provides a system of Retail Exit for (in particular) smaller companies to contract out of their licence obligations in favour of licensed suppliers in all or part of their areas. In many areas, the Act takes powers for Ministers to make Regulations, issue Guidance and codes: the way in which it is applied will be of high practical importance to this legislation.

The Act has provisions on new water and sewerage licensing (as an alternative to water and sewerage undertakers); many detailed revisions to the competition within the water retail market; the resilience duty for OFWAT; some revisions to environmental regulation; a significant system for Flood Reinsurance to be available to households based on a levy; and other detailed provisions.

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# Agricultural state aid

Government aid can be vital to the success of businesses in the food and farming industry. However, recipients of aid should always check that such aid is compatible with State aid law. The consequences of receiving illegal State aid can have serious financial consequences, and under State aid law it is the recipient – rather than the government – which ultimately picks up the tab.

The principle underlying the State aid rules is that government assistance should not be used to distort competitive markets by favouring a particular business to the detriment of its competitors. The most recognisable forms of aid are direct grants and subsidies, but many other less obvious measures can constitute State aid: tax exemptions, guarantees, levies, favourable land deals, "soft" loans, etc;. For example, the Agriculture and Horticulture Development Board's advertising and promotion and technical support schemes have both been the subjects of clearance decisions in the last five years.

A common misconception is that a government-run aid scheme is necessarily compatible with State aid law. Unfortunately this is not always the case, and aid recipients need to be aware that the main commercial risk lies with them: if an aid is found to be incompatible with State aid law, the recipient must repay the aid it has received to the government, together with interest. The seriousness of an illegal State aid investigation is compounded by the fact that such investigations can occur several years after aid has been paid, during which time significant interest is likely to have accrued.

Small amounts of aid might not be considered to constitute illegal State aid. However, in the agriculture sector the ceiling for this exemption is set at just €7,500 (approx. £6,000) for all aid received in any three-year period[1]. If that ceiling is exceeded, aid recipients are at risk of an adverse State aid finding unless a relevant exemption applies. New rules and guidelines on exemptions were introduced in June 2014 but it is fair to say that this is a complex and evolving area of law[2].

It is recommended that specialist legal advice should be sought if you have concerns that aid you have received or intend to receive might not be compatible with State aid law.

[1] NB: This measure is only available for SMEs which are defined by the Commission as enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding €50m and/or an annual balance sheet not exceeding €43m.

[2] On 25 June, the Commission announced that it had adopted a new Agricultural Block Exemption Regulation ("ABER") and State aid guidelines in relation to agriculture, forestry and rural development. The new measures entered into force on 1 July 2014. The changes introduced by the new ABER include a widening of the categories of exempt aid.

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# British Legal Awards nominations

LegalWeek
THE BRITISH LEGAL AWARDS 2014
Property Team of the Year
FINALIST

The Burges Salmon team led by Alastair Morrison (Rural Property) and Nick Graves (Corporate: Real Estate Group) has been nominated for the Property Team of the Year for the work done on the Co-operative Group's disposal of its 40,000 acre farm holdings in England and Scotland, including residential and commercial property, for £249 million to the Wellcome Trust. Requiring a highly specialised combination of legal expertise, transferring all of the freehold property from a co-operative into a single limited company and then selling the shares in that company, the deal reflects our strength in the real estate and food, farming and land sectors. During the 9 months that we worked on the deal 7 partners and 40 lawyers from the rural and commercial property, corporate, employment, pensions, tax, environment and commercial contracts areas of the firm contributed as part of the team.

**Burges Salmon team leaders**
Alastair Morrison and Nick Graves

# Intestacy, or what you Will?


October 2014 will see the introduction of the Inheritance and Trustee Powers Act 2014 which make significant changes to the intestacy rules.

A common misconception is that if you don't leave a Will everything goes to your spouse – not so. Where there is no Will, or part of the Will fails, the intestacy rules step in to distribute the estate: rather than getting everything, spouses receive only part of the estate with the remainder being divided differently depending on which other family members survive.

Currently, if the deceased leaves a spouse and children, the spouse receives all personal effects, a lump sum of £250,000, and a right to receive income from half of any remaining assets for life. The other half of the remaining assets is divided between the children (even though they may be grown up and not need anything), and they will also receive the other half after the death of the surviving spouse. If there are no children but instead surviving parents or siblings, they will receive the children's share.

So, unless the whole value of the estate is fairly modest, spouses would only inherit the entire estate where there are no descendants or immediate family who survive.

Under the new rules, the spouse takes their interests outright, but where there are children they will still receive the same share. The crucial change is that where there are no children or grandchildren, the surviving spouse will inherit everything: the rest of the family is left out, even where parents or siblings survive. Though this is some improvement, it is still unlikely to give people what they want.

The intestacy rules are inflexible in other ways too. They do not allow any choice of executors or guardians, leave gifts (either of cash or particular items) to particular people or charities, give any option to establish trusts or take advantage of opportunities for tax efficiency. Nor do they allow for anyone who is not a family member to benefit: other dependents may have to rely on a claim against the estate to get anything.

A properly drafted Will remains the best way to make sure that chosen people benefit and how they do so, and that an estate can be administered in the way you would wish.

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# Do you have the right to rent?

From as early as 1 December 2014, residential landlords who fail to check if their tenants have the right to live in the UK will face the prospect of fines of up to £3,000 per person.

The legislation is far reaching as it will cover most residential lettings (both leases and licenses), although there are a number of exemptions that may apply such as accommodation provided by an employer to an employee in connection with their contract of employment.

Landlords who rent out residential property that doesn't qualify as an exemption will need to carry out "right to rent" checks for all new tenancy agreements to determine whether their tenants (and all adults who the landlord knows will be living at the property) have the right to live in the UK legally. In most cases landlords will simply need to check their tenant's passport or biometric card as evidence of the tenant's identity and citizenship but, in a limited number of cases, landlords can ask the Home Office to conduct a right to rent check using an online form.

The Government has produced a draft code of practice which includes helpful guidance for landlords affected by the introduction of the right to rent checks. The code of practice can be accessed at **https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/350211/Landlords_scheme_-_draft_Code_of_Practice.pdf**

Landlords must remember to check all tenants and occupiers to avoid claims of race discrimination. Furthermore, if the landlord rents a property to a person who only has a temporary right to live in the UK (such as a student), the landlord will need to recheck their immigration status when that temporary right exists. On a more positive note, if a landlord lets properties through a letting agency, the obligations will apply to the agency, not the landlord subject to anything in the contract with the agency.

The Government has announced that the scheme is being implemented on a phased geographical basis, and will only apply to residential tenancy agreements entered on or after the date of implementation in a particular area. From 1 December 2014, landlords in Birmingham, Walsall, Sandwell, Dudley and Wolverhampton should carry out "right to rent checks" for new tenancy agreements to determine whether tenants have the right to live in the UK legally. It is not yet known when other areas will be subject to the "right to rent" checks.

For further information, please see our briefing *'Checks or cheques? – Residential Landlords take note'* - **http://www.burges-salmon.com/practices/real_estate/publications/checks_or_cheques_residential_landlords_duty_to_check_tenants_immigration.pdf**

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# Neonicotinoids and bees

Neonicotinoids[1] have been widely used as pesticides since their development in the 1990s. Initially welcomed by scientists (as they appeared to provide an improved method of tackling some crop pests while being safer for humans, large mammals and the environment) recent studies have suggested that neonicotinoid exposure may cause harm to bees.

As neonicotinoids are generally applied to seeds before planting the pesticide remains in every part of the plant. While this stops insects in the soil attacking the seed, neonoicotinoids can then enter the nectar and pollen on which bees feed.

Scientific evidence in inconclusive, however there is concern that the agricultural use of neonicotinoids has caused an increase in pesticide toxicity to bee populations, causing negative effects on honey bee performance and behaviour potentially leading to bee colony collapse disorder.

## Control of neonicotinoids

EC Regulation (EU) No 485/2013, adopted in May 2013, restricts the use of three neonicotinoid pesticides (Clothianidin, Imidacloprid and Thiametoxam) for a period of two years (from 1 December 2013). Once new information is available, and at the latest within the two years, the Commission will review the conditions of approval of the three neonicotinoids to take into account relevant scientific and technical developments.

## The UK government's position

The UK did not support the EU restrictions, as it argues that the science behind the restriction is inconclusive, and that removing these pesticides could have a detrimental impact on crop yields. However, despite its opposition, the UK has implemented the measures.

In March 2013, Defra released the findings of its assessment on neonicotinoids and bees which includes data from large-scale field studies done in 2012 ("An assessment of key evidence about Neonicotinoids and bees").

The assessment concludes that whilst it cannot exclude rare effects of neonicotinoids on bees in the field, it suggested that effects on bees do not occur under normal circumstances. This assessment also suggests that laboratory based studies demonstrating sub-lethal effects on bees from neonicotinoids did not replicate realistic conditions, but extreme scenarios. Consequently, it supports the view that the risk to bee populations from neonicotinoids, as they are currently used, is low.

## What if neonicotinoids are banned?

Although not something the UK government is likely to suggest or support, further EU restrictions are possible. If neonicotinoids are banned as opposed to restricted, there is an argument farmers would be compelled to use products that are much more harmful to the environment and to a wider range of animals and that production of crops may be compromised.

The effects of a ban on the use of neonicotinoids would be most felt by the UK's sugar-beet industry. According to the NFU, approximately 92% of sugar beet seed sown by UK growers was treated with neonicotinoid insecticides in 2012 which helped prevent the spread of viruses by aphids. The NFU is of the opinion that the ban of neonicotinoids would render the sugar-beet industry in the UK uneconomical as sugar-beet growers would have no real alternative pesticide, especially since aphids have developed resistance to previously used pesticides.

The NFU and other industry groups are actively involved in promoting integrated pest management strategies (IPMs) in production systems. It remains uncertain however, whether improved IPMs would be a suitable alternative for the use of neonicotinoids.

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[1] For example Acetamiprid, Thiacloprid, Clothianidin, Imidacloprid, and Thiamethoxam

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