Newsletter

Food, Farming and Land Quarterly

BURGES SALMON

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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 our team or visit our website at www.burges-salmon.com

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Increased regulation of water quality and chemicals

The EU Water Framework Directive, enacted in 2000 under a UK Presidency, sets as a key objective the achievement by all Member States of "good status" in all controlled waters of the Union, with few exceptions by December 2015. This has been the basis for other implementing Directives and national regulations aiming to protect surface waters and groundwater. For surface waters, "good status" consists of "good ecological status" and "good chemical status", and is defined by reference to a number of detailed factors for each category.

Over the last 15 years, regulations have addressed and controlled many of the most obvious forms of water pollution, and as the December 2015 deadline nears and 47% of European Union waters are not in compliance, regulators' attention is coming to focus increasingly on the issue of "diffuse pollution from agriculture". Our water practice at Burges Salmon is seeing an increase in challenges and court cases which seek to enforce these obligations of water law. At the EU level, the United Kingdom is facing infringement proceedings brought by the European Commission aimed at forcing it to do more to implement and enforce the main Directive's provisions. In the national courts, we are seeing an increase in judicial review challenges to try to force regulators to take stronger action against diffuse pollution, for example from nitrates and phosphates where this may affect European protected sites. Taken together, these pressures are likely to result in more regulation for farming, more strictly applied.

At the same time, our chemicals regulation practice is seeing the impact of major regulations on the control of chemicals, not just in farming, but across the whole of industrial and consumer uses. Key European legislation requires closer control, registration and evaluation of chemical substances and biocidal products, with particular emphasis on stricter regulation or demands for the substitution of chemical substances of very high concern – for example, carcinogens, mutagens, reprotoxins and endocrine disruptors.

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> *"Our water practice at Burges Salmon is seeing an increase on challenges and court cases which seek to enforce these obligations of water law."*

Farming uses a significant number of chemical substances and inputs that are coming under this enhanced regulatory scrutiny and coming to the attention of a concerned public and highly active NGOs. Farmers will be familiar with the arguments about the potential health impacts of organophosphates, the potential effects on bees and pollinating insects of neo-nicotinoids, and the highly toxic effects on the water environment of even tiny amounts of synthetic pyrethroids. Now glyphosate has been found by the cancer agency of the World Health Organisation to be a "probable human carcinogen".

Farming is reliant for the basic and greening payments upon "cross compliance" with a range of environmental legislation, which is easy to say but harder to deliver. Chemical substances which have been routinely available to farmers may themselves be restricted by tougher regulations. At the same time, penalties for environmental offences such as water pollution have become much stricter. It is a good time to plan ahead, and to be better informed about regulatory impacts and alternative strategies that may be required to keep on the right side of increasingly strict and complex laws.

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A shock to the system for Landlords?

The overall burden on a landlord of an agricultural holding to repair an electrical supply system could be significantly increased from 1 October 2015. A review of the precise terms of the repair and maintenance obligations in individual agricultural tenancies is therefore advisable.

Model Clauses 2015

Agricultural tenancies governed by the Agricultural Holdings Act 1986 (the "1986 Act") usually rely on a set of statutory criteria known as the 'Model Clauses' to determine the division of responsibility for repair and maintenance between landlord and tenant.

From 1 October 2015 the old Model Clauses 1973 have been updated. The Model Clauses 2015 will now apply to:

- any existing 1986 Act tenancy which is expressed to incorporate the Model Clauses currently in force;
- any 1986 Act tenancy agreement which doesn't specifically deal with the issue of repair and maintenance responsibilities; and
- any farm business tenancy expressed to incorporate the Model Clauses where the wording does not expressly refer to the Model Clauses 1973.

New Obligations on Landlords

Under the Model Clauses 1973 a landlord's responsibility is limited to checking (from time to time) that tenants are carrying out checks and repairs. Under the Model Clauses 2015, however, the landlord is required to repair or replace "the electrical supply system including the consumer board but excluding sockets, switches, light fittings and similar electrical furniture". In particular, the landlord must:

- have the electrical supply system regularly inspected, maintained and serviced;
- keep full records of any work carried out; and
- make the records of work available to the tenant if the tenant asks to see them.

A tenant's responsibilities for repair and replacement under the Model Clauses 2015 only extend to electrical sockets and light fittings.

Landlord's wide duties of care

In addition to these new contractual requirements, landlords also have existing duties of care under health and safety legislation if the tenancy:

- imposes an obligation on the landlord to maintain or repair the premises; and
- gives the landlord the right (express or implied) to enter the premises to carry out maintenance or repair of the premises.

These existing obligations mean that a landlord who is now bound by the provisions of the Model Clauses 2015 will also have increased duties to take care under the existing health and safety regime.

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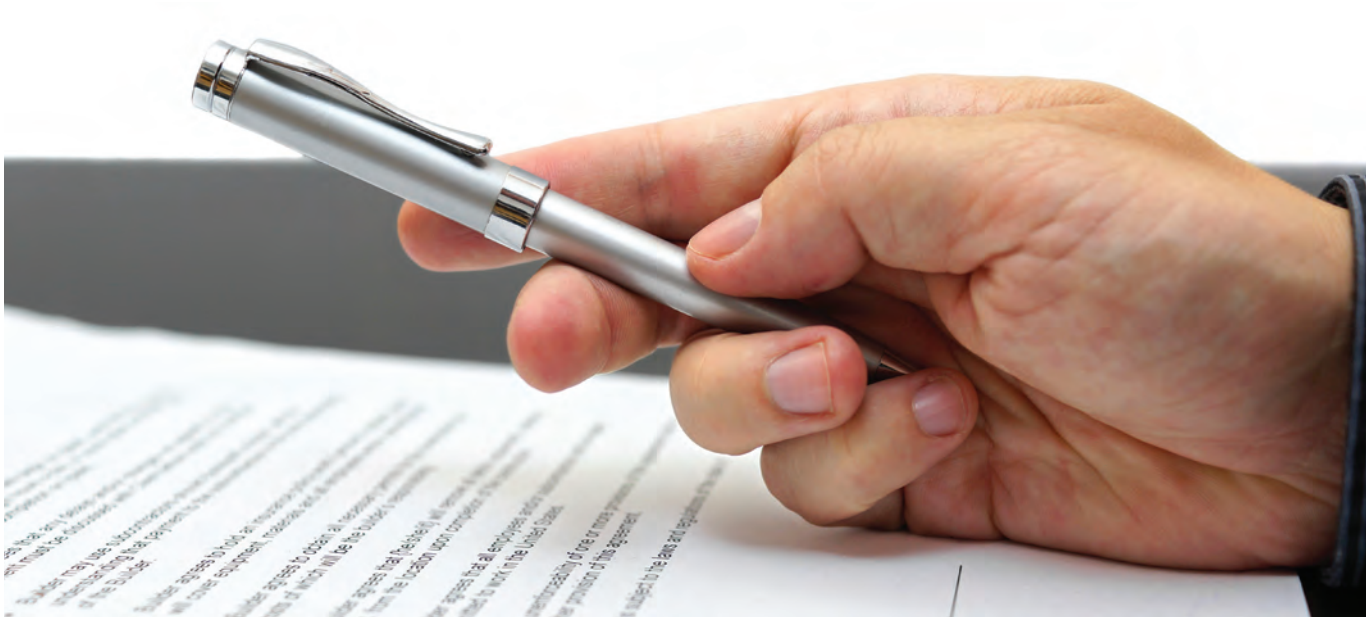
The importance of contracts of employment



"...contacts of employment can be a very powerful tool for employers and for employees working on estates and farms..."

Employees, whose employment is to continue for more than one month, are entitled to be given a written statement of certain terms and conditions of employment under section 1 of the Employment Rights Act 1996. The so called section 1 statement covers many of the issues which you would expect to see documented between an employer and an employee including job title, place of work, salary and remuneration, holidays, termination and pensions and benefits. While many employers do no more than provide their employees with a basic section 1 statement, contracts of employment can be a very powerful tool for employers and for employees working on estates and farms. There are additional provisions that an employer can include to ensure greater protection and flexibility such as:

- ***Holiday*** – you may want to stipulate times when holiday can and cannot be taken (e.g. during the shooting season, at harvest etc);
- ***Hours of work*** – flexibility in terms of hours of work is critical for many roles (e.g. housekeepers and agricultural workers) and specifically stating this flexibility in the contract is important;
- ***Duties and responsibilities*** – consider attaching a job description or set of duties for the role. While this can identify the core duties, the contract can still provide that an individual is required to provide such other duties as are reasonably required;
- ***Accommodation*** – the provision of accommodation is common and specific wording should be included in contracts to ensure that any service occupancies do not run the risk of being tenancies or being treated as a benefit in kind by HMRC;
- ***Health and safety*** – estate or agricultural workers are often involved in manual and/or potentially dangerous activities and specific provisions should be included. This is particularly the case in respect of firearms licensing for gamekeepers or any employees handling hazardous chemicals;
- ***Security and insurance*** – it is sensible to include obligations on employees to ensure the security of the estate and premises at all times as well as not doing anything that would breach any insurance policies;
- ***Confidentiality*** – confidentiality provisions can be widened to cover not just confidential information belonging to the employer, but also visitors and guests at the estate, information that is overheard by employees and information relating to the employer's family;
- ***Immigration*** – it is not uncommon for domestic staff to be overseas nationals and an obligation in the contract requiring them to notify the employer of any changes to their immigration permission is essential to ensure that the employer does not inadvertently employ an illegal worker.

Contracts of employment are often infrequently reviewed, but frequently reused without consideration. Employers would be well advised to undertake an audit of their contracts of employment to ensure that they are both legally compliant and fit for purpose.

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TVG update following enactment of Planning (Wales) Act

The Planning (Wales) Act 2015 came into force on 6 July 2015 and has further enhanced the legislative divide between England and Wales for planning matters in a number of ways. Here we focus on the town and village greens (TVG) provisions. These changes are not yet in force, but need to be borne in mind now.

TVG law sounds quaint but applications by objectors to register development land as a new TVG are common and continue to be the most catastrophic risk facing landowners and developers as development is made unlawful, and there is no compensation for the loss of development value.

Landowner statements

The Act has amended the Commons Act 2006 which regulates TVG in two main ways. The first enables landowner statements to be lodged with the commons registration authority and brings the law in line with the position in England. A landowner statement will bring to an end the period during which people have used the land for sports and pastimes 'as of right' – without force, secrecy or permission. However, use of land owner statements should continue to be treated with caution if land has been subject to public access for a lengthy period of time. A statement triggers the grace period for a TVG application to be made which may bring forward the very thing a landowner is trying to avoid. In particular, the Open Spaces Society is monitoring all landowner statements and notifying its local members when they are lodged to warn them they only have a year to make a TVG application.

"A landowner statement will bring to an end the period during which people have used the land for sports and pastimes 'as of right' – without force, secrecy or permission."

Trigger events

Secondly provision has been made for the occurrence of events which preclude the registration of a TVG. This means that if certain 'trigger events' have occurred an application for registration of land as a town or village green cannot be determined unless and until a corresponding 'terminating event' has occurred. The trigger events are the grant of planning permission, the making of a local development order and the granting of a development consent order. The terminating events are the expiry, revocation, quashing or modification of the planning permission, local development order or development consent order.

While these provisions are welcome they do not go far enough to protect developable land. There are no trigger events (unlike in England) for land which is in the local planning authority process to secure planning permission nor for land allocated for development in a local development plan. It may be that this latter protection is introduced later, once the new local plan regime, which is also brought in by the Act has been implemented.

Conclusion

The net result is that TVG risk will continue to be more serious in Wales compared to England, and the position in England continues to be serious in a significant number of situations. The key lesson continues to be: do not go public with a planning application or a development proposal without having considered TVG risk first.

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Working from home: Security of Tenure changes

If a residential tenant uses part of the house for business purposes, does that mean that the tenant has the protection of the Landlord and Tenant Act 1954 and can claim a new tenancy when the term ends?

Until recently the answer to that question has depended upon an assessment of whether the business use formed a "significant purpose" of the occupation of the house or whether it was merely incidental. Just because a tenancy called itself an "assured shorthold tenancy" (AST) did not mean that it avoided the application of the 1954 Act. Even if the tenancy prohibited business use, the 1954 Act could still apply if the landlord had consented to or acquiesced in the significant business use.

As from 1 October 2015, the law has been made simpler in both England and Wales. "Home businesses" will be outside the scope of the 1954 Act and, provided that all other requirements are met, the likely conclusion is that a tenancy of a house which permits "home business" use will be within the scope of the normal residential security of tenure regime.

> *"Even if the tenancy prohibited business use, the 1954 Act could still apply if the landlord had consented to or acquiesced in the significant business use."*

It will be important, however, that certain requirements are met. These are, broadly speaking:

- the tenancy must be of a dwelling house let as a separate dwelling;
- all tenants must be individuals;
- the tenancy must require the tenant to occupy the dwelling house as a home;
- the tenancy must permit a "home business" to be carried on and not permit a business other than a "home business" to be carried on;
- "home business" is a business of a kind which might reasonably be carried on at home (and expressly excludes pubs). There may well be borderline cases (workshops/light industrial units) which might fail to qualify as a "home business" and where the lease may therefore need to be contracted out of the 1954 Act.

It should now be possible for assured shorthold tenancies, subject to a little redrafting of existing standard forms, to be granted over "live/work" properties and to remain as ASTs even if the "home business" is significant. Landlords can be reassured that, if the proper procedures have been followed at the outset, they should be able to recover vacant possession of a house let on an AST through the usual two months' notice.

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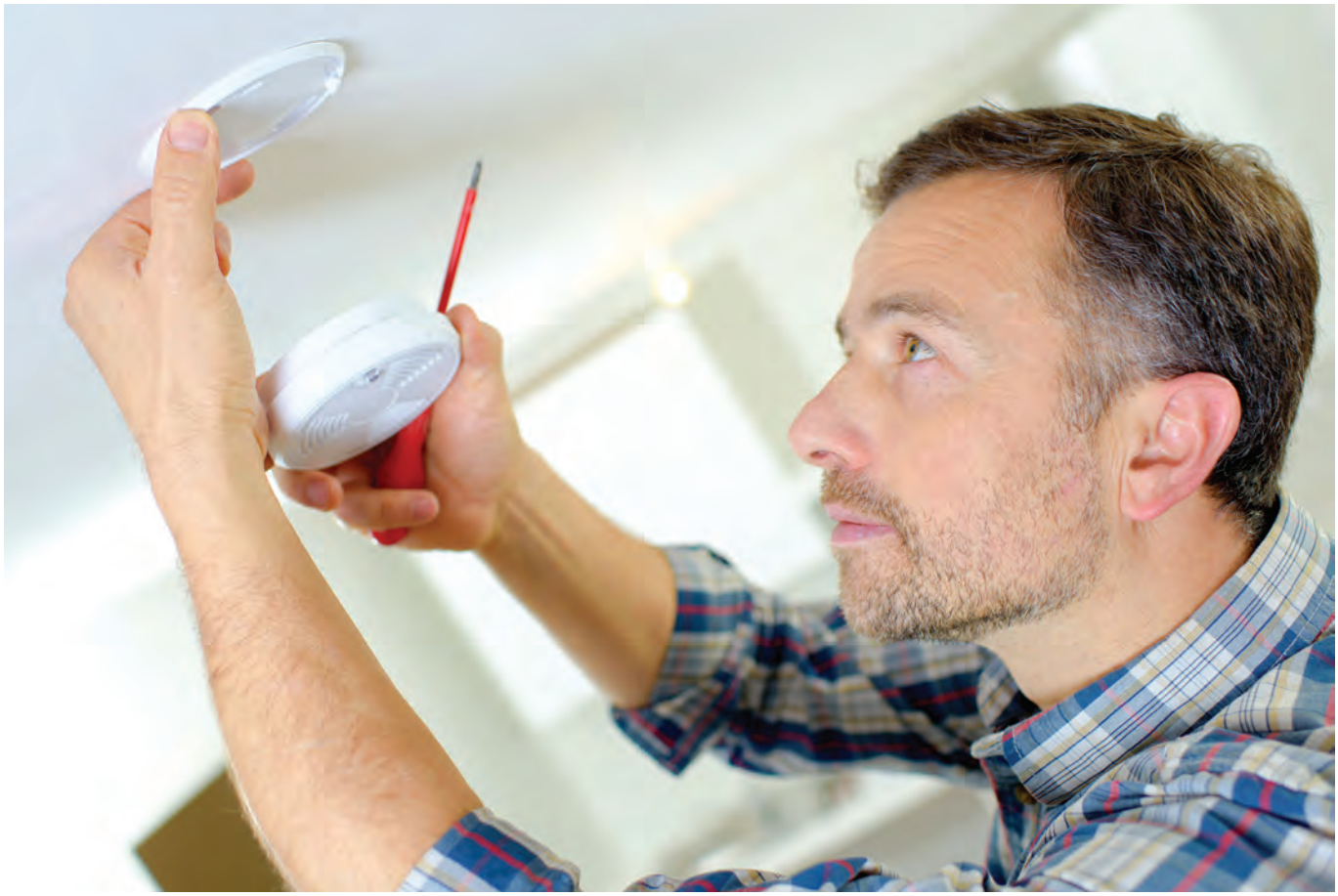
Residential Tenancy update



Termination

A new form of section 21 notice must be used to end assured shorthold tenancies created after 1 October 2015 and may (but need not) be used to end ASTs created before 1 October 2015 (including ASTs created before 1 October 2015 which become periodic tenancies after that date). From 1 October 2018, the new form of notice must be used in relation to all ASTs.

The notice cannot be used where the landlord has not:

- provided the tenant with an energy performance certificate free of charge;
- provided the tenant with a copy of a gas safety certificate; and
- provided the tenant with a copy of the Department for Communities and Local Government's booklet *'How to rent: The checklist for renting in England'*. The Regulations do not state that the new requirements must be complied with before the start of the tenancy but do state that a section 21 notice cannot be served if they have not been complied with.

Smoke alarms

New Regulations require landlords of ASTs (along with landlords of most other types of tenancies of residential properties) to ensure that after 1 October 2015 a smoke alarm is fitted on each storey of the property and that a carbon monoxide alarm is fitted in any room that is used, even partly, as living accommodation (including halls, landings, bathrooms and lavatories) and contains a solid fuel burning combustion appliance. Landlords must also test the smoke and carbon monoxide alarms to ensure that they are in good working order before granting any tenancy after 1 October 2015. Landlords who do not comply may receive a remedial notice from a local housing authority requiring them to comply with the Regulations; landlords who do not comply with a remedial notice can be required by the local housing authority to pay a penalty charge of up to £5,000.00.

"Landlords must also test the smoke and carbon monoxide alarms to ensure that they are in good working order before granting any tenancy after 1 October 2015."

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Terminating FBTs:
The case for reform

A landlord seeking unilaterally to terminate a fixed term FBT before the expiry date for "tenant default" (including insolvency) relies on the law of forfeiture. The operation of a forfeiture right is complicated by rules that have accumulated over time and render forfeiture an unreliable ally for the landlord.

As part of its campaign to encourage longer FBTs, the TFA has proposed that the rules on terminating FBTs of over 10 years be amended to allow landlords to terminate more easily than under the current regime in cases of default by the tenant. Cases where the landlord wishes to redevelop the property (which the TFA have included within this reform proposal) are usually dealt with by means of a break right rather than forfeiture.

The case for reforming the law of forfeiture was put forward in 1985 by the Law Commission, whose draft bill in 1994 was considered further and redrafted in 2006 in the expectation that the law would be changed. The bill has never been promoted through Parliament but the current discussion about agricultural tenancies may revive interest in it, which would, as proposed nearly 10 years ago:

- remove the landlord's option of "peaceable re-entry", so requiring forfeiture to be achieved only as a result of a court order, albeit with a number of new procedures;
- remove the rules on "waiver" so that, for instance, landlords could still accept rent even while trying to terminate the tenancy – not always possible under the existing forfeiture rules;
- strengthen the protection for sub-tenants and mortgagees who currently rely on the "relief against forfeiture" rules;
- require landlords to serve prior notices on tenants in all cases, to facilitate negotiation and compromise.

There is a widespread agreement that forfeiture rules need to be amended but it is also clear that balancing the interests of landlord and tenant is not as easy to achieve as it might seem. Terminating a tenancy before its expiry date for tenant default or insolvency is a very serious remedy, and the law of forfeiture has accumulated a number of protections for landlord and tenant which reflect the complexity of the task.

How does this impact on the TFA proposals? If the Law Commission proposals are implemented they are intended to change the law as a whole, and seem unlikely to incorporate a distinction between short and long term FBTs. A separate system would therefore need to be created especially for longer term FBTs, either in addition to or instead of forfeiture rights. Such a system could be based, for instance, on the 1986 Act rules under case D or case E, on the procedures based on "statutory grounds" used for terminating assured residential tenancies or on the 1954 Act system for commercial leases. Considerable thought would need to be given to the details of any such system, and the political will to implement such a new alternative would be tested.

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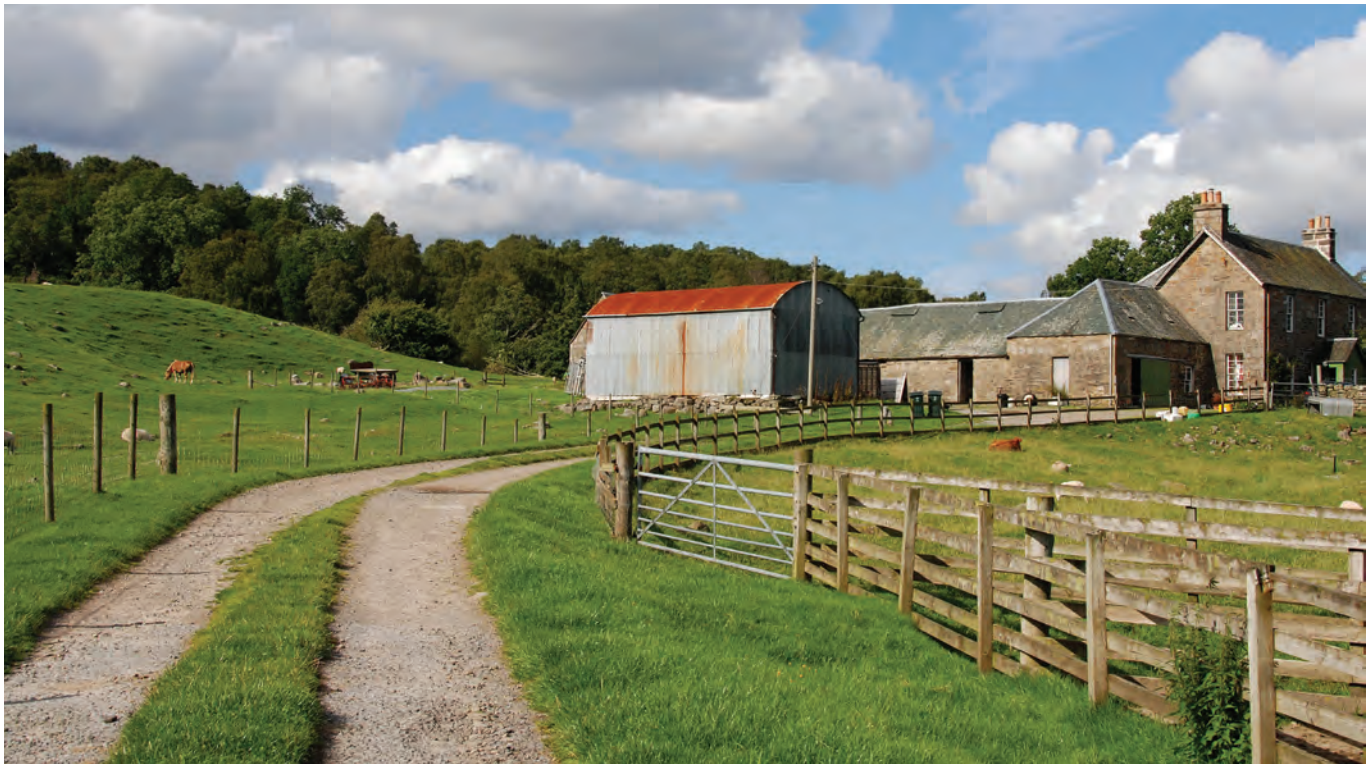

The 'Pink Book' land law bible goes digital

The 'Pink Book', Burges Salmon's famous legal 'bible' for landowners and farmers, is now available online for wide industry access.

The detailed reference guide covers topics as diverse as buying, selling and developing farmland, estate planning, trusts and partnerships, planning and employment law.

"When we first launched the Pink Book in 2011, it was in response to a real need for a reference book of this type. The complexity of issues such as family partnerships and tax planning can be daunting and the Pink Book aims to provide a comprehensive reference guide," explains Partner, Tom Hewitt, head of the Burges Salmon Food, Farming and Land sector group.

"We've intentionally written the content without legalese or jargon, the book aims to give businesses a thorough understanding of current law as applied to farming, land management and related issues," Tom Hewitt adds. *"Our clients and the wider industry say that the content is a really practical reference source and valuable for clarification on specific points of law."*

Amongst the topics there is guidance on contracts, brand protection, tenancies and food law.

"By giving landowners access to this information they will have a better appreciation of the risks and how to avoid them. The book is not intended to replace legal advice, but to give an indication of when legal expertise or representation would be prudent or necessary."

Each chapter contains a series of articles with worked examples, case studies and tabulated data to illustrate the topics under discussion. This includes what procedures have to be followed in dealing with issues such as planning, employment and risk management.

The 'Pink Book' was substantially updated in 2014 and the online migration is the next stage in its development.

The digital Pink Book is now available to download from the Burges Salmon website. Go to **www.burges-salmon.com/pink book 2** and follow the Pink Book links.

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