

## Welcome

Welcome to our latest issue of **Agricultural Law Quarterly**. We hope you will find these articles on recent developments in agriculture to be of interest.

### Contents

• Landlord and Tenant	p2
• Real Property	p3
• Tax	p3
• Food	p4
• Agriculture	p4

## bTB - It is hurting, but is it working?

The dramatic rise in cases of bTB across all regions of GB means that it is now becoming the major business risk facing the industry which has an annual output of £4billion.

### Herds under movement restriction

Year	Number
2004	3,745
2005	5,748
2006	6,856

### Costs

Year	£ million
2003/4	88
2004/5	90
2005/6	99

It is costing farmers even more than tax payers since uncompensated and consequential losses are often many times greater than the compensation paid. It is based on scientific testing that is increasingly called into question. It needs to be emphasised that bTB is just that. It is not human TB. The risk of people contracting TB from cattle is very low. As a result, serious animal welfare and ethical issues arise.

The legal issues that arise are intriguing. The issue of the proportionality of Government measures is well and truly engaged. What is the objective that is trying to be achieved and is this objective being achieved in the way that imposes

the minimum cost on producers? Is it time to ask the big questions again? What are we trying to achieve, what is it costing, what is the evidence that the policy is working and what is the evidence that continuing and extending the policy will achieve the desired result? The need to answer these questions arises as increasing numbers of vets, farmers and independent observers begin to ask themselves whether the huge present scale and cost of activity is fully objectively justifiable.

In the context of rising expenditure accompanied by vastly increased measures to prevent spread (eg. pre-movement testing) producing the undesired result of increased spread, legal issues on the reliability of test results and how the cost of all the measures is shared between Government and industry arise. The recent revelations about the test results for Ecstasy Journalist Roxy (which just happened to be worth £100,000) are replicated on lesser scales across the country. The often abysmal valuations in England resulting from the Cattle Compensation (England) Order 2006 are now subject to challenge in the courts as is the absence of any category for organic cattle in the Order. It rubs salt into the wounds of producers in England to receive these values when their neighbours in Wales continue to be paid market value for their animals under the 1978 Order. This is despite the Welsh Minister having signed up to the same ten year Government strategy of Margaret Beckett.

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## Trading Standards rush to slaughter

Many livestock markets and livestock farmers will be encouraged by this recent blow against the growing trend of Trading Standards shooting animals first and then prosecuting when the livestock owner and his vet have had no chance to inspect the animals or to discuss the situation. The conviction made by the magistrates in this case was quashed by the High Court because Trading Standards had acted precipitously and unilaterally without involving the owners of the sheep and so as to deprive the owners of the chance of mounting a successful defence. Burges Salmon has seen

numerous other cases where Trading Standards (often with limited experience of livestock) have rushed to slaughter without any discussion or the involvement of the owner's vet and then refused to countenance the possibility that their judgement might have been at fault.

*Kevin Leathland and Robert Pritchard v Powys County Council February 2007*

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# Landlord and Tenant

“...for landlords... the bar has traditionally been set reasonably high...”

## Bad Bad Husbandry

On balance it would probably be true to say that for landlords seeking to recover possession in the Agricultural Land Tribunal, the bar has traditionally been set reasonably high, so a case of a tenant losing on a certificate of bad husbandry is noteworthy. The facts in this case were extreme. The Tribunal found that fields had been abandoned, fields had been used for dumping rubbish, scrap metal, tyres and plastic and that long term poor management was going to adversely affect production for several years.

*Phillips v Davies 2007 ALT Wales*

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## Notice to Remedy and Notice to Pay

Notices to quit had been served on behalf of the National Trust following the tenant's failure to comply with two notices to remedy and a notice to pay. The tenant argued that by reason of the landlord's failure to undertake certain repairs there was a defence to the arrears of rent claimed and therefore the Arbitrator should not uphold the notices to quit. The argument was that of equitable set-off. The case law in relation to equitable set-off establishes that there must be a close nexus between rent due and the set-off. In this case, the discussions between landlord and tenant about repairs to be undertaken by the landlord had occurred six years prior to the service of the notice to pay and notices to remedy and so there was not a sufficiently close nexus between rent due and the set-off. The notices to quit were held to be valid.

*National Trust v Rose*

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## Succession

The Agricultural Land Tribunal was right to refuse a succession tenancy when the requirements of the Agricultural Holdings Act 1986 Section 36 (3)(a), that the tenant's livelihood was derived from agricultural work on the holding for a continuous period, had not been satisfied to a "material extent" pursuant to Section 41 (1)(b) of the Act.

Pamela Thomson failed to establish that in the seven years preceding her brother's death, her principal source of livelihood had derived from agricultural work on the holding. While Pamela Thomson's

hard work on the farm was acknowledged, her livelihood had in part come from other sources as well. In the seven years, the percentage of livelihood derived from the holding ranged between 36% and 39% and she had reached an average of 75% in terms of her time. However this was insufficient.

*Thomson v Church Commissioners for England 2006 ALT (Northern Area)*

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## Time of Rent Review

The tenant under an assured tenancy fell into arrears. The landlord housing association sought possession and judgement for the arrears. The tenant defended on the basis that the tenancy agreement provided for the rent to be increased annually with effect from the first Monday in June each year. In fact the landlord had given notice of rent increases from the beginning of April – a change in respect of which there had been no agreement between the parties and no consultation process.

The landlord argued that the specified time was not of the "essence" and so not to be strictly construed, or alternatively that the tenant had accepted the change by failing to object to increases in April in the past.

The Court of Appeal found in favour of the tenant, holding that it was not open to the landlord unilaterally to change the review date and the tenant could not be taken to have accepted a change of the date.

The House of Lords took a different view. On their interpretation of the tenancy agreement the landlord could serve a notice increasing the rent from a later date and the notices were valid. To avoid a dispute, if parties agree a rent review formula they should stick to it, unless there is a clear agreement to the contrary. Remember also the need to properly implement the statutory mechanisms under the 1976, 1977 and 1988 Acts if you wish to impose a new rent on an existing tenant.

*White and another v Riverside Housing Association Ltd: [2007] UKHL 20*

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“...there must be a close nexus between rent due and the set-off.”



## Real Property

### Undue Influence

A transfer of land by way of gift from an elderly, frail great-uncle to his great-nephew and the great-nephew's subsequent transfer for a small consideration to a property developer, would be set-aside as the donor had not transferred the land with full, free and informed consideration, but had been acting under undue influence. The transaction was one that no-one would enter into without careful and informed thought as to the effect. That gave rise to a presumption that, when making the gift, the great-uncle was responding to some great pressure or influence.

*Leslie Goodchild v Shane Bradbury [2006] All ER (D) 247 (Dec)*

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### National Park Designation

An inspector had erred in upholding the inclusion of an estate within a National Park by watering down the statutory test as to whether it had afforded opportunities for open air recreation by applying a test of potential opportunities. It was inherent in the term "opportunities" that one could look to the future and that consideration was not limited to the present facilities for open air recreation, for example the existing network of footpaths and bridleways. However the inspector had watered down the statutory requirement by applying a test of potential opportunities that went too far.

*Meyrick Estate Management Limited v Secretary of State for the Environment, Food and Rural Affairs 2007*

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### Development Agreements

The High Court recently considered the effect of a planning obligation to build a bypass (contained in a

section 106 agreement and necessary to allow residential development to be carried out) where the relationship between the landowner and the developer who were jointly bound by the obligation had subsequently broken down.

The facts are complex, but the outcome may be helpful to landowners in similar circumstances where a relationship with a developer has soured.

The landowner wanted to proceed with construction of the bypass, but to do so needed access across other land occupied by the developer. On paper, no such right of access had been granted to him, either in the section 106 agreement, or in any of the landowner's other agreements with the developer.

The judge decided that the landowner was in fact entitled both to construct the bypass and to have access to the developer's land in order to do so. He did this by implying a term into the section 106 agreement or into one of the other agreements. Although a section 106 agreement is designed to create obligations which are enforceable by the local authority, it can also create rights and obligations between the other parties. The implied term giving the landowner access over the developer's land could be registered as a caution at the Land Registry.

Some useful lessons emerge from this case. First, it emphasises how important it is for landowners to be properly advised when entering into agreements with developers. However amicably negotiations may be proceeding, it is vital to understand that people and even companies change (in this case Beazer was taken over by Persimmon) and unless agreements are properly documented, they will be impossible to enforce. Second, development agreements need to be comprehensive and to make allowance for possible changes in circumstances.

*Stroude v Beazer Homes Limited*

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*"The transaction was one that no-one would enter into without careful and informed thought..."*



## Tax

### VAT and Poly Tunnels

The VAT Tribunal has held that rentals paid under a lease of poly tunnels are compulsorily subject to VAT at the standard rate. According to the Tribunal, the lease was a lease or letting of land for VAT purposes, but was excluded from VAT exemption because the poly tunnels amounted to "permanently installed equipment and machinery".

*Argents Nurseries Limited v HMRC VAT Tribunal March 2007*

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## Food

### Egg on their face

In April this year, the Competition Commission ordered the effective unravelling of the completed merger between Stonegate Farmers and Deans Food Group. Both companies are major suppliers of shell eggs to UK based retailers, accounting for over 60% of sales. Despite such high market shares and the fact that Deans and Stonegate were number one and number two respectively in the market for the supply of shell eggs and processed eggs in the UK, the decision was taken to complete the deal without obtaining a merger clearance from the OFT. Such a strategy is always high risk unless the merging parties are absolutely certain that the transaction is unlikely to raise concerns amongst their customers

and supplier base. In this case the parties clearly did not know their customer or supplier base sufficiently well and the gamble of completing the deal in the hope that divestment would not be ordered, has not paid off. Stonegate Farmers must now be sold to a suitable purchaser, the vendors much be hoping that the sale price they achieve is not materially lower than the price paid for the business back in 2006.

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## Agriculture

### The Humble Drill and Harrow

A case about a combination seed drill and harrow has made new law in the House of Lords. It concerns the common question of when the right to reject faulty machinery is lost. In this case the buyers notified the sellers of the problem and the seller agreed to take the machinery back. They repaired it to "factory gate standard" and then tried to return it. The buyers asked the sellers what the problem was, but they were not told. In fact it was a major defect that would have entitled the buyers to reject the goods. Having not been told what the defect was, the buyers rejected the goods on the ground that they should have been told what the problem was with the machinery. They asked for the price back. The House of Lords held that the buyers were able to reject the goods because of the sellers' refusal to tell them what the problem had been. The seller's conduct was unreasonable and the seller had been under an implied obligation to provide the information asked for.

*J & H Ritchie Limited v Lloyd Limited [2007] UKHL 9*

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### Artificiality

Agriculture continues to be the pace setting topic of law when it comes to developing European law about artificiality. Yet another decision has come from the European court confirming that in cases of artificiality the State has to prove the two stage test consisting of:

- First, a confirmation of objective circumstances from which it is apparent that, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules had not been achieved, and
- Second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.

*Vonk Dairy Products BV v Productschap Zuivel Case C-279/05 January 2007*

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