



## 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.

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## New guidance on rent reviews

In an admirable briefing to members of the CAAV, Jeremy Moody describes *Morrison-Low v Paterson* (a decision of the Scottish Land Court made on 2 June 2010) as “the first major case on agricultural rent review law perhaps since *Childers v Anker*”. That is not an understatement.

Scottish legislation is different to that in England & Wales. Nevertheless the rent review mechanism governed by section 13 of the Agricultural Holdings (Scotland) Act 1991 (as amended by the Agricultural Holdings (Scotland) Act 2003) does address issues common to rent reviews under the Agricultural Holdings Act 1986. As a consequence, the conclusions of the Court bear careful scrutiny for those advising in relation to rent reviews under the AHA 1986. In summary:

### Comparables

The Court allowed comparables in relation to limited duration tenancies to be used as evidence. This would equate to rents in relation to farm business tenancies being used as comparables in respect of lettings under the AHA 1986.

### Scarcity

The Court interpreted the Scottish legislation in respect of the disregard of scarcity as a principle not giving rise to an assumption of equality of available farms and prospective tenants, but simply excluding more extreme bids.

### Marriage Value

The Court determined that (applying the same approach as the Court of Appeal in *Childers v Anker*) while marriage value is to be excluded when considering comparables, the issue as to whether there is any marriage value in respect of the subject holding did fall to be considered.

### Single Payment Scheme (SPS)

It was recognised that neither SPS entitlements nor the payments themselves in effect attach to the holding. Nevertheless, the Court allowed a modest rental element to reflect the opportunity offered by the land to claim the single payment, relying on the relatively low payment figures for naked acres readily available in the Scottish market. The logic of this is that it is the eligibility of the land that enables the payment to be claimed. That low figure led in turn to a relatively high fraction of the pre-rent surplus also allocated



to the rent, partly to reflect the farmhouse. The different circumstances of the English markets for entitlements might lead to different arithmetic.

### Dwellings

The old chestnut of how to assess residential units within an agricultural holding on rent review was considered. The analysis is of limited worth because of concessions made. Nevertheless, in relation to two sub let cottages, on the facts of this particular case, the Court allowed one half of the rental income to be paid to the landlord of the holding. In relation to a cottage which was occupied by the farmer's son, the Court considered that if, under the terms of the tenancy, the farming might be by contract and it was possible to let the cottage, then it should be let and a rental equivalent should be taken into account when assessing the rent for the entire holding.

As will be appreciated, this case provides a valuable analysis in relation to these issues which should assist in advising under the AHA 1986.

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# Environment

## Flooding v Food

The new Flood and Water Management Act 2010 is likely to have a significant impact on farming operations, especially on low lying land or where there is a farm reservoir or man made lake. One of the Act's central objectives is to shift the emphasis away from flood defence to "flood and coastal erosion risk management", a concept which allows rural land to flood to protect urban centres.

The NFU has pointed out that 57% of Grade 1 agricultural land is low lying land (below the 5 metre contour) and it highlights the potential conflict between flood risk management and food security. The Act also modifies the regulation of reservoirs and will bring many more into the regulatory regime, including many farm reservoirs. Farmers and private landowners will be required to produce detailed information on their reservoirs (which could be costly) even if they pose minimal risk to human life.

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## Planning

### Removing an agricultural occupancy condition

*"It is also important to remember that the principle set out in the first case carries on after you have gained your Certificate."*

A breach in a planning condition achieves immunity from enforcement action after the end of the period of 10 years beginning with the date of the breach. The 10 years drops to 4 years if the change of use is to use as a single dwelling house. Thereafter the ongoing lawfulness of the breach can be proven through an application for a Certificate of Lawfulness. However the grant of a Certificate is not as certain as this deceptively simple concept might seem; as two recent cases confirmed.

The first considered a breach of an agricultural occupancy condition and held that even though there had been a continuous 10 year period of breach in the past a period of subsequent compliance meant that the immunity was lost. Even a period of non-breach, where the property is merely unoccupied, could be enough to lose the immunity.

That being said the second case confirmed that naturally occurring short breaks between lettings to a series of non-agricultural tenants or even periods when refurbishment works are being carried out with the aim of re-letting to non-agricultural tenants may not constitute a break in the breach timeline.

To remove a troubling agricultural occupancy condition you must be able to tick all of the following boxes:

- there must have been a continuous breach of the condition for a period of 10 years;

- that breach must be subsisting at the time of the application;
- there must be no gaps in that non-compliance period; and
- you must have sufficient evidence to prove the above on the balance of probabilities.

It is also important to remember that the principle set out in the first case carries on after you have gained your Certificate. If you were to allow future compliance with the condition then, despite the existence of a Certificate of Lawfulness, the immunity clock restarts effectively expunging the Certificate. To avoid this the additional step of applying to remove the condition should be taken once you have your Certificate.

*Ellis v Secretary of State for Communities and Local Government and Chiltern DC*

*Basingstoke & Deane BC v Sec of State for Communities and Local Government*

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# Real Property

## Buying and selling - When can you and when should you insure?

The High Court has considered a case between NFU Mutual Insurance Society Limited ("NFU") and HSBC Insurance (UK) Limited ("HSBC") who respectively provided insurance for the buyer and seller of a property.

After exchange of contracts both policies were in place and there was an extensive fire. The buyer claimed against his NFU policy; was paid out in full and then proceeded to purchase the property with a view to using the insurance proceeds to carry out the necessary repair works. The seller did not claim against HSBC as he had not suffered loss, the property having been sold. NFU claimed a contribution from HSBC on the basis that there was "double insurance". This claim was denied by the Court as the HSBC policy contained a provision that they would not pay out if the building was insured under other insurance. There was, in this case, no double insurance.

Double insurance may arise if *both* parties insure before exchange and completion and if *either* policy also covers the other party to the sale contract. For example, a seller's policy may well cover an uninsured buyer so as to allow the buyer to complete their purchase, thereby protecting the position of the seller.

Such a scenario is viewed as undesirable as one or either policy may be invalidated or the payment under it restricted.

Where double insurance occurs, the insurer who pays out is entitled to require a contribution from the other. Specific policy wording may vary this rule.

Can and should both parties insure? To insure a party must have an insurable interest. In the context of an exchange of

contracts, the legal interest in the property remains with the seller, not passing until completion, and the beneficial interest passes to the buyer. Both are insurable interests so both parties can insure.

Having an insurable interest in a property is a different concept to holding the risk in it.

The frequently used Standard Conditions of Sale (4th Ed.) state that the risk in the property remains with the seller but that the seller is under no obligation to insure. The buyer may rescind if severe damage occurs. These standard conditions are often amended to pass the risk to the buyer who then insures against this risk but, even un-amended and with no passing of risk, the buyer is well advised to insure if the seller is not obliged/inclined to do so and limited damage to the property may not allow a buyer to rescind.

The Standard Commercial Property Conditions (2nd Ed.) are more complicated in their approach and must be considered carefully. In the absence of specific wording in the contract, the seller may be under no obligation to insure. The buyer should then insure from exchange.

Although the standard conditions may not oblige a seller to insure, they may be required to do so under the terms of their mortgage, which will not be redeemed until completion; in fulfilment of their obligations as landlord; or if the sale contract is conditional as the beneficial interest will not pass to the buyer who, with no interest in the property, cannot insure.

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*"Double insurance may arise if both parties insure before exchange and completion and if either policy also covers the other party to the sale contract."*



# Employment

## Employment Law update



Employment law is constantly changing. The employment team have put together a list of some of the recent changes that may affect farming businesses.

### **Time off for study or training**

From 6 April 2010, employees with six months' service have the right to request unpaid time off for study or training. Employers are required to seriously consider a request and can only refuse for specified business reasons. The right will initially only apply to businesses with 250 or more employees, but will be extended to all businesses in April 2011.

### **Equality Act**

This is expected to come into force in October 2010. It contains a number of key provisions for employers in the agricultural sector including the following:

- Employers will only be able to ask health questions of a job applicant in certain limited circumstances;
- Discrimination by association (e.g. harassing someone because they have a disabled son) and by perception (e.g. refusing someone a pay rise because you think they are gay even if they are not) will be explicitly prohibited; and
- Employers will be liable in certain circumstances for harassment of their employees by contractors, customers and visitors in the workplace.

### **Sharing the burden**

Additional paternity leave, which will apply to parents of children due on or after 3 April 2011, allows a mother to transfer some of the last 6 months of her additional maternity leave or additional adoption leave to the father of her child so that she can return to work.

### **Going up**

An increase in the national minimum wage from 1 October 2010 has also been announced. The new rates will be £5.93 per hour for workers aged 21 and over; £4.92 per hour for 18-20 year olds; and £3.64 per hour for 16-17 year olds. For agricultural workers, the provisions of the current Agricultural Wages Order will of course apply.

### **Full refund available**

As a result of recent case law, employers will find it difficult to refuse to allow employees who are sick whilst on holiday to take their holiday after they have recovered and to carry over their holiday entitlement into the next holiday year, if the employee requests this. Employers should review their absence management procedures to ensure they are dealing with sickness absence effectively.

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*“Employers should review their absence management procedures to ensure they are dealing with sickness absence effectively.”*

# Tax

## Large CGT rise fails to materialise

*“The relief could be worth up to £900,000 per family member and so is now as important as Business Asset Taper Relief used to be.”*



The Coalition's emergency Budget was delivered on 22 June. The focus was primarily on significant cuts to public spending rather than tax increases, although inevitably tax rates did not escape unscathed. There were no announcements about inheritance tax or the status of non-domiciliaries but of course the Chancellor needs to keep something up his sleeve for next time!

The Government opted for the new 28% rate of CGT to be a flat rate with no form of indexation or taper relief which many thought might make a reappearance. There is little to incentivise long term investors and it would not be surprising if this is revisited in time.

The good news came in the form of an extension of Entrepreneurs' Relief to the first £5 million of lifetime gains (up from £2 million). Entrepreneurs' Relief is a lifetime relief that can be claimed by individuals on the disposal of a business or certain shares or securities of a trading company. This will be a welcome boost to entrepreneurial activity as the first £5 million of gains will be taxed at a rate of 10% and therefore more focus will be needed on trading structures and arrangements to ensure that the maximum amount of relief is secured. The relief could be worth up to £900,000 per family member and so is now as important as Business Asset Taper Relief used to be.

Essentially Entrepreneurs' Relief is available on an interest of 5% plus in a trading company in which an individual is employed and it is also available on an interest in a sole trade or a partnership. There are, however, times when it may be difficult to secure the relief on the sale of an asset held outside but used in a partnership where, had the asset been owned by the partnership, relief would have been available. Therefore there is a compelling case for restructuring partnerships to introduce land into them as real property capital in order to maximise both Entrepreneurs' Relief and Business Property Relief for inheritance tax purposes which can be achieved without a charge to either CGT or Stamp Duty Land Tax.

The other attractive headline of the Budget was the announcement that the full rate of corporation tax will be reduced from 1 April 2011 by 1% a year for five years until it is 24%. In addition, the small companies' rate of 21% will be cut to 20% from 1 April 2011 which may lead many to consider incorporation when compared with the top rate of income tax of 50%, although this is only an avenue to pursue if it is appropriate for profits to be rolled up.

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## Burges Salmon Roadshow 2010

This year we will be speaking at six venues across the country in November. Further details of the topics being discussed will appear in the Autumn edition of ALQ. In the meantime please keep the following afternoons free:

<b>1 November 2010</b>	York Racecourse
<b>2 November 2010</b>	Orton House Hotel, Peterborough
<b>3 November 2010</b>	The Royal Agricultural College, Cirencester
<b>9 November 2010</b>	Albrighton Hall Hotel, Shrewsbury
<b>10 November 2010</b>	Frimley Hall Hotel, Camberley, Surrey
<b>11 November 2010</b>	Exeter Racecourse, Exeter

**If there is anything that you would be interested to hear us speak about please email the editor, [vivienne.williams@burges-salmon.com](mailto:vivienne.williams@burges-salmon.com)**

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