

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.



A claim for losses caused by the Foot & Mouth disease (FMD) outbreak at Pirbright in 2007 has been struck out by the court.

The claimants were grouped into two categories. In the first category were farmers whose livestock were culled due to infection or suspected infection. Those responsible for the leak at Pirbright have settled with these claimants out of court. The second group consisted of farmers whose livestock were not physically affected by FMD. Their claims were for other losses caused by the disease control measures put in place.

Back in 2007 we said on our website that "it is basic English law that compensation for financial loss cannot be obtained unless there has also been damaged property... there would appear to be no more than a faint possibility of general claims for financial losses." The courts have traditionally been very reluctant to award compensation in respect of any financial losses which cannot be directly attributed to physical damage - so called "economic loss".

The second group accordingly argued that the effect of the livestock movement restrictions amounted to physical damage and was not economic loss.

The court decided that all the damage claimed was economic loss except for one head of claim. This was where produce had passed the stage of its natural development at which it can be marketed. An example given was pigs that were due for slaughter but then became overweight for their intended market. The Judge

held that there was a real prospect of a court accepting that as being physical damage. However, such losses were not caused by FMD but by the measures brought in to control it. There was no duty to compensate for such indirect physical losses and certainly not for the wider claims of economic loss.

This was always going to be a very difficult case for the second category of farmers. A decision in their favour would have opened up the category of claimants to all British livestock farmers who were equally affected by livestock control movements. Indeed the net would be cast even wider because other associated industries would also be affected.

The court has had to consider similar issues when the last FMD leak from Pirbright occurred. The case of *Weller v. Foot and Mouth Disease Research Institute* [1966] 1QB 569 was brought by livestock auctioneers claiming for losses caused by the closure of cattle markets. The claim failed as the markets could not be physically damaged by FMD. Since the *Weller* case, the courts have sought to restrict the categories in which economic loss can be claimed. Although the agricultural industry has changed significantly since *Weller*, with disease outbreaks having a greater and wider impact, the floodgates remain firmly closed against claims for losses not incurred as a consequence of physical damage.

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Farming



TB valuation - no discrimination

It will come as a surprise to many that the legal basis for the valuation of TB affected animals is not their healthy value but the salvage value of their carcass. This was the decision of The Court of Appeal in the latest round of the challenge to table valuations by Devon farmer, David Partridge.

Under the old regime of individual valuations, cattle were valued on the assumption that the animal was unaffected by disease. Values under the table valuation system are calculated as an average of actual sales with no reference to assumptions concerning the health of the animal. This results in payments to farmers in excess of salvage value.

Mr Partridge's argument was that the table valuations were discriminatory as they did not provide for adequate compensation for slaughter of high value pedigree cattle. These arguments were initially successful. The High Court found that table valuations breached the fundamental EU law principle of equality and that the basis of compensation was the market value of the animal in question on the assumption that it did not have TB.

DEFRA successfully argued in the Court of Appeal that their obligation to pay compensation in respect of a TB animal is the salvage value of its carcass. Applying that principle, the market value of a pedigree cow with TB is no different from that of a commercial beast similarly affected. This left the path clear to a finding of no discrimination. All owners of pedigree cattle were being treated equally as they all received sums in excess of the salvage value of their cattle. Although farmers of pedigree

cattle suffered greater losses from TB than those with lower value livestock that was not a result of discrimination against them.

The Court of Appeal agreed that the principle of equality was fundamental. However the fact that one particular group might be affected to a greater extent than another by a legislative measure does not necessarily mean that the measure is disproportionate or discriminatory if it seeks a solution to a problem as important as TB.

Even if it was discrimination, the Court of Appeal said that table valuations would be capable of justification. The previous system of individual valuations was unacceptable because of the risk of over compensation to farmers and the delays caused by individual valuations which hampered disease control measures. The savings to tax payers and the expectation that farmers would pay greater attention to bio security measures outweighed any disadvantage under the table valuations system. It was also considered possible for farmers with high value animals to insure them privately if necessary.

Therefore table valuations in England are here to stay. Some 20 other "piggybacked" cases will now be discontinued unless an appeal is lodged. As regards insurance, it will be almost impossible to obtain in TB hotspots and the implication that farmers are more likely to treat bio security seriously, if there is less compensation available, is unlikely to be well received.

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"It was also considered possible for farmers with high value animals to insure them privately if necessary."



Farming

Partnership

The idea of drawing up a written partnership deed is commonly perceived in the same way as drawing up a Will; Can I do without one? Won't matters sort themselves out in the way I would like and expect them to anyway?

The reality, in both cases, is usually no. And that is quite apart from the considerable cost and time it often takes to resolve the situation when it is too late.

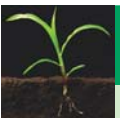
The Partnership Act 1890 legislates, in many areas, where partners (whether in a commercial or a family partnership) have not agreed terms between themselves. Some of the, perhaps surprising, effects of the Act (if there is no clear agreement between the parties to the contrary) are:

- The partnership will be dissolved on the death of one of three or more partners (even if the surviving partners consider they would like to continue the business)
- All partners are entitled to take an equal part in the management of the business
- All partners are entitled to share equally in the capital and profits of the business, and must contribute equally to losses. (Note: this can have devastating consequences in the context of land and property and its increased value!)
- No partner is entitled to remuneration for his partnership work

- The consent of all partners is needed to change the nature of the partnership business
- A partner introducing money into the partnership (beyond capital he has specifically agreed to introduce) is entitled to 5% interest on it per annum from the date of the payment in
- Any partner may serve notice on the others to dissolve the partnership at any time (unless there is a specific agreement between the partners that the partnership will last for a specific time). All partnership assets would then normally be sold at auction
- On a dissolution of the partnership none of the partners would generally have a right to buy out the others and continue the business

Even if partners consider that they have a good working relationship, or good family bond, it is very worthwhile facing the possibility of a disagreement at some stage in the future and working out what they would like to happen in these circumstances in advance, rather than allowing the 1890 Act to dictate what will happen. A written partnership deed can provide clear and unambiguous evidence of the intentions of the parties and avoid trusting to chance.

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Environment

Carbon Reduction Commitment

Over the next year all business with half hourly electricity meters will be asked to confirm their 2008 electricity usage. Those who consumed over 6,000 MWh (approximately a £500,000 electricity bill) will have to comply with the Carbon Reduction Commitment ("CRC") which is a mandatory emissions trading scheme due to begin in April 2010.

Under CRC energy consumers will be required to purchase allowances corresponding to their emissions and to surrender those allowances at the end of the scheme year. CRC attempts to place the obligation on the parent company in corporate group structures and care will be needed where there are joint ventures to decide who the right consumer is.

A league table approach is being adopted, with a ranking based on the consumer's emissions and certain performance measurements. Those businesses which perform well could receive more in the revenue recycling process than they had paid for



their allowances. Other impacts include costs from administration in collating information and potential reputational impact, since the performance tables will be publicly available.

Burges Salmon has been advising the Department of Energy and Climate Change, and a wide range of public and private sector organisations on CRC.

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"Those who consumed over 6,000 MWh (approximately a £500,000 electricity bill) will have to comply with the Carbon Reduction Commitment..."



Landlord and Tenant

VAT on rent reviews

We reported in the last edition of ALQ on *Mason v Boscawen*, the effect of which was that where the Landlord opted to charge VAT on rent, reducing the VAT rate to 15% on 1 December 2008 meant that the next date on which either party could obtain a rent review would be 1 December 2011. The promised return to 17.5% VAT in 2010 would similarly have been an alteration to the rent payable and put the next review date back by a further three years.

Happily in this case, the Government seems to have listened to the farming industry. When the Finance Bill is given royal assent (which we expect to be on 21 July 2009), changes to the rent level effected by

VAT rates being changed will not be events which re-start the three year cycle. The section is expressly stated to work retrospectively, so that the VAT rate decrease last December can also be disregarded and parties can proceed with, for instance, Lady Day 2009 reviews.

The main decision in *Mason v Boscawen*, that VAT forms part of rent and therefore should be included in the amounts claimed in notices to pay rent, remains unaffected.

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Real Property

"One day this will all be yours..."

Is it possible to enforce a promise to transfer land even though that promise is not written down and properly signed? The House of Lords in *Thorner v Majors*, decided in March 2009, confirmed that Peter Thorner, a farmer who had worked for 29 years on a farm owned by David, his father's cousin, was able to enforce a promise that he would inherit the farm, although David died without a will, and the farm would otherwise have passed to David's other relatives.

Peter relied on "proprietary estoppel". He therefore had to prove that he had received a promise from David and that he had relied on that promise to his detriment.

It was obvious that Peter, in working unpaid for David for nearly 3 decades, had acted to his detriment, but had he done so in reliance on a promise by David? The evidence was unclear, due in part to the fact that David was a taciturn and private man of few words. Nevertheless, it was found that there were enough indirect actions and comments to mean that David had made a sufficiently clear promise to Peter and that it was reasonable for Peter to rely upon that promise.

The absence of any written contract will always raise difficulties in enforcing promises to transfer land. Such promises normally require a proper written exchange of contracts. The contrast is with the case of *Cobbe v Yeomans Row* in 2008, when the House of Lords held that Mr Cobbe, who spent money obtaining planning permission for land which he had no contractual right to buy, could not force the land to be sold to him when planning permission was



obtained, despite an "understanding" to that effect. A significant difference from the *Thorner* case is that Mr Cobbe was a businessman and could be expected to protect his position properly, whereas the relationship between Peter and David was not commercial.

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Increased Land Registry Fees

From 6 July 2009 Land Registry fees will increase. Registration of a property transfer valued at over £1 million for example will cost £920 as opposed to £700 currently. If that property is being registered for the first time, the fee will be £690 (£525 currently). At the same time, the Land Registry is offering additional assistance with first registration such that the increase in the fee is likely to be more than offset by a reduction in the time that lawyers have to spend in preparing title deeds for first registration.

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