

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.



Rent & VAT: One step forward, two steps back?

In December 2008 the High Court delivered Judgment in the case of *Mason v. Boscawen*. It is a decision of Mr. Justice Lewison who, before being promoted to the High Court Bench, was the Joint Head of Falcon Chambers and as such extremely experienced in landlord and tenant disputes, including in the agricultural sector.

The case is important for its headline decision, but it has further relevance to those practising in this area for a second reason emerging from the decision.

Practitioners will be aware that notices to pay provide the landlord with the most draconian weapon in relation to the recovery of rent payable under the Agricultural Holdings Act 1986. If a tenant fails to comply with a notice to pay within two months of service of the notice on him, then the landlord can serve what is often described as an "incontestable" notice to quit.

The headline of *Mason v. Boscawen* is that the Judge decided that it is not fatal to a notice to pay rent given under the AHA 1986 to include VAT. A previous decision of an Arbitrator had gone the other way and, as a result, the safe course for a landlord had been not to include the VAT payable in relation to rent in a notice to pay.

A further reason for this case being of significance is that the AHA 1986 controls rent review, including the frequency of reviews. If VAT is payable by the tenant, and it is to be treated as part of the rent so that it can be included in a notice to pay rent, then the statutory machinery for rent review is liable to disruption by the intervention of the Value Added Tax Act 1994. It was argued by Mr. Martin Rodger QC for the Tenant that rent, for the purposes of the AHA 1986, cannot include an element which is capable of being varied by the

unilateral act of one of the parties or by the intervention of a third party. It was submitted for the Tenant that this conclusion is supported by public policy considerations. Counsel submitted that it was not possible to contract out of the AHA 1986 rent review provisions.

The Judge disagreed. The Judge referred to the section in the 9th edition of Scammell and Densham's Law of Agricultural Holdings where a number of cases are cited in support of the proposition that it is possible to contract out of the rent review provisions of the AHA 1986. In his Judgment, Mr. Justice Lewison considered this in detail and concluded that the submission contained in Scammell and Densham is correct and that the Tenant's public policy argument failed.

A further very important consequence of this decision is that the Judge accepted that the effect of any change in the rate of VAT (as a result of it being included in the "rent") is to postpone any increase or reduction in the rent for 3 years in accordance with the statutory rent review mechanism. Mr. Justice Lewison said that this "unintended consequence" was something which made "it urgent for legislation to be passed rapidly if recent political events are not to have the effect of causing an inadvertent and possibly prolonged agricultural rent freeze". Clearly this is a decision with enormous consequences for landlords and tenants alike.

The decision is not being appealed, so any change to the law is likely to require new legislation.

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Landlord and Tenant

Case B notices to quit

Arbitrations are private and Awards delivered by Arbitrators are not binding upon Arbitrators in other disputes. Nevertheless, reflecting its objective to be a practitioners' book, Scammell and Densham continues to refer to Arbitrators' decisions to assist practitioners in advising in relation to the interpretation of provisions in Agricultural Holdings legislation particularly where there has been no decision of the Court on an issue.

Arbitrators can of course get it wrong. The decision in the High Court recently in the case of *Mason v. Boscawen* illustrates this as it reverses an Arbitrator's decision in a much earlier case in relation to the effect of the inclusion of VAT in a Notice to Pay Rent (see separate article). However, we consider that in another Arbitration relating to a Case B Notice to Quit the Arbitrator is correct in his Award delivered in December 2008.

Case B of Schedule 2 of the Agricultural Holdings Act 1986 allows a Landlord to serve a Notice to Quit and recover possession where he requires the land for a non-agricultural use for which planning permission has been granted. Where Case B applies, it is unnecessary for the Landlord to have to apply to the Agricultural Land Tribunal for consent to the operation of the Notice to Quit.

In a case where the Landlord served a Case B Notice to Quit, having got planning permission to convert redundant agricultural barns to a dwellinghouse, the Notice to Quit was found to be ineffective because the area for which possession was sought was beyond that for which the Planning Authority would allow development.

The Arbitrator quoted paragraph 32.15 of the 9th edition of Scammell and Densham which starts: "The better view is that all of the land which is the subject of the Notice to Quit must be required for the purpose specified in Case B. It is not sufficient if merely a substantial part of the land has the benefit of planning". The Arbitrator added: "I agree with this view".

Although this decision is not binding upon Arbitrators in other cases or upon the Higher Courts, wise counsel to any Landlord in this situation must be that the Landlord should give a Notice to Quit under Case B in relation to exactly the same land for which planning permission has been given.

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Real Property

A step closer to compulsory land registration?

One of the Land Registry's objectives is that in time all unregistered land becomes registered. It does this through voluntary first registrations of unregistered land and by stipulating transactions which trigger compulsory first registration. Over the last few years the triggers for first registration have become more extensive and from 6 April 2009 the appointment of a new trustee of unregistered land will require registration of title at the same time (as will the partition of unregistered land between the beneficiaries of a trust and the appointment of new charity trustees by deed)

The "new trustee trigger" for registration will mean that on the next change of trustees on or after 6 April 2009 any unregistered land held in trust will have to be registered at the Land Registry. Failure to register will mean that title remains with the old trustee or his personal representatives – which could delay a transaction and result in additional costs.

First registration is not necessarily an expensive process. A good deal will depend upon the size of land holding and the complexities of title. But once registered the title will be much easier to deal with in the future and reduce the risk of successful adverse possession (or squatter) claims.

Trustees owning unregistered land should consider voluntary first registration now rather than await the trigger of the next change of trustees. The Land Registry may be prepared to do much of the work on a voluntary registration and it can be done at a time which suits the trustees.

For further information about first registration contact Alastair Morrison on 0117 939 2258 or email alastair.morrison@burges-salmon.com alternatively, please contact Joel Woolf 0117 902 6617 or email joel.woolf@burges-salmon.com



The VAT status of Shooting Clubs



Shooting syndicates and shooting clubs, if properly constituted, can enjoy VAT exemption. While this means that the syndicate/club cannot reclaim VAT it has paid, not having to charge VAT on supplies made to participants/members generally outweighs this disadvantage.

That HMRC has been looking closely at the VAT exempt status of bodies in the game shooting industry for some years is clear from its Annual Report 2005/6. The report makes reference to its 'campaign' within the game shooting industry and the fact that, at that stage, it had identified potential VAT arrears in the region of £60 million in this area. This campaign shows no signs of abating, and in this context reference should be made to the Court of Appeal's decision in *Messenger Leisure Developments Ltd v Revenue and Customs Commissioners* [2005].

In *Messenger Leisure*, a case concerning the VAT status of a golf club run through a company in an otherwise commercial group of companies, the Court of Appeal ruled that the company was not a non-profit making body. This was in spite of the restriction on the distribution of profits to its members contained in the company's constitutional documents. Following the Court of Appeal's ruling, HMRC publicised in Business Brief 22/05 its view that *'any company which is precluded from distributing profit, but whose function is nevertheless to create VAT exemption [sic] in the context of a wider commercial undertaking, is not a non-profit making body for VAT purposes.'*

No doubt encouraged by their success in *Messenger Leisure*, HMRC set up a specialist unit to investigate the game shooting industry. This has been operating for the last three years and now appears to be starting seriously to challenge syndicate and club arrangements.

We believe there are good arguments for saying that HMRC's interpretation of the *Messenger Leisure* decision is mistaken as a matter of law. If you have concerns or are already having difficulties with HMRC in this regard, then please get in touch with us and we would be happy to assist you.

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The Herd Basis - The Upside

Many livestock farmers with production herds will have elected for the herd basis when they first started the herd. The herd basis election means the herd is treated as a capital asset. As a result, the initial purchase of the herd and any subsequent purchases that increase the numbers attract no tax relief although relief is available on replacements. Very significantly however, if the whole or a substantial part of the herd is sold and not replaced within 5 years the proceeds are free of tax.

In times of rising livestock prices this may be an important consideration for farmers who are considering selling their herd as they may have a significant tax free lump sum in prospect. See *example below*.

Example

Mr Black wishes to retire. He sells his 300 head pedigree herd for £600,000 (£2,000 per head). They originally cost £195,000 (£650 per head). Because he is disposing of the whole or a substantial part of his herd and not replacing it, the entire £600,000 is received tax free.

Part reductions in the herd may be tax free if the proportion sold is large enough.

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Capital Gains Tax - Entrepreneurs' Relief

The taxation of gains for farmers was turned upside down on 5 April last year. Up until then, gains could be reduced (or even wiped out entirely) by an allowance for indexation and then business asset taper relief applied to any remaining gains to give a 10% rate of tax.

Since 5 April, indexation and business asset taper relief have gone and a fixed rate of 18% now applies. To soften this blow for the business and agricultural community, the Revenue have given us the new entrepreneurs' relief.

Entrepreneurs' relief works like taper relief to reduce gains before the 18% rate is applied, so that the effective rate of tax paid on them is 10%. However it is much less generous – firstly because it is limited to a maximum of £1m of gains during the lifetime of any taxpayer (so is therefore worth a maximum tax saving of £80,000 per individual) and secondly because the rules are based on the old retirement relief and very different criteria apply.

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The relief is available in 3 situations:

- 1 On disposals by individuals of the whole or part of a business or shares in a trading company owned for one year prior to the disposal. A key issue here is whether the disposal of an asset (e.g. a field) is the disposal of part of a business, and therefore relievable, or just the disposal of an asset, and therefore not. The retirement relief cases will apply here, which suggest that a field may well not qualify.
- 2 On disposals of assets used by the business, but not part of it, and only where the taxpayer is withdrawing from the business.
- 3 On disposals by trustees of business assets or shares, but only if there is a beneficiary who has a right to the income from those assets. The

beneficiary must also carry on the business in question personally, which may deny relief where it is the trustees who are in business.

The 18% rate and entrepreneurs' relief represent a complete overhaul of the taxation of gains and, although the spirit of the legislation is to preserve the 10% rate for the most deserving cases, farmers should certainly not assume that it will be available. The relief is technically drawn and careful thought needs to be given as to how farm assets are structured to take full advantage of the tax savings on offer.

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Environment

New powers for regulators

Agricultural and other land use activities that result in minor regulatory offences may now attract immediate civil sanctions where previously no action was taken.

The Regulatory Enforcement and Sanctions Act 2008 (RESA) will provide regulators such as the Environment Agency and Natural England with a number of additional sanctions for breaches of regulatory law.

RESA follows a review by Professor Macrory into regulatory justice, in which he concluded that regulators often took no action following regulatory breaches because they were limited to bringing a prosecution or doing nothing: he called it the "compliance deficit". RESA attempts to fill the compliance deficit by providing regulators with powers that are easy to administer.

Landowners and agribusinesses should be aware that these new sanctions have teeth. The regulator will have the power to issue fines, and the level of those fines could be unlimited. Notices can require the recipient to do something in a specified time or face criminal prosecution. A stop notice, as the name suggests, prohibits the recipient from carrying on any activity specified in the notice, and as such could bring businesses to a halt.

The regulators are given the right to exact summary punishment before the "offender" has been heard. His only course of action is to appeal, but

- the time for an appeal is likely to be short
- the regulator is required to publish the sanctions it administers, so that the damage to a farmer's reputation may have been done before the farmer has been able to defend himself.

One of the more novel new sanctions is the enforcement undertaking. These undertakings are designed to allow the individual or company that has committed an offence to negotiate a solution with the regulator. This provides a welcome degree of flexibility for those who have committed an offence and want to avoid prosecution. However, a breach of any of the terms within an enforcement undertaking can result in a criminal prosecution, and therefore the undertaking must be drafted very carefully, preferably with legal assistance.

Landowners and agricultural businesses can expect an increase in activity from the Environment Agency and other regulators as they seek to minimise the "compliance deficit" by ensuring that every breach is enforced.

For further information on the implications of RESA or on environmental regulation in general please contact Michael Barlow on 0117 902 7708 or michael.barlow@burges-salmon.com or Simon Tilling on 0117 902 7794 or simon.tilling@burges-salmon.com. Michael is a partner (from 1 May 2009) and Simon is a solicitor in our Environment and Energy Team.

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