

Briefing
Summer 2010
Clarke Willmott
Agricultural Law



* SPS penalties: Heads RPA wins - tails farmers lose

Over the past few months we have seen a complete fiasco over the mapping exercise carried out by the Rural Payments Agency (RPA).

Farmers were required to use the new maps for the 2010 Single Payment Scheme (SPS) application, but by 23rd April the RPA still had 1200 maps outstanding. Many maps were sent out either in "interim form", with obvious and manifest errors, or so late that farmers were left with just a few days to complete their SPS applications.

There are some serious consequences from all of this: first, many maps issued by the RPA are defective, which raises the risk of errors by farmers completing their applications. Secondly, completing complex SPS applications at speed raises the likelihood of mistakes.

The RPA has not only taken a very strict line with any errors, but we have seen a 50% increase in England and 175% increase in Wales of penalties imposed for breaches of the SPS.

According to press reports one 70 year old farmer in Kent, Mr David Robinson, had £25,000 deducted from his SPS payments (a 10% penalty) because he made a "simple honest mistake" over a date; he put 02/02/06 rather than 02/03/06 on his form. On review, the Ombudsman said he would not help because a similar case in Northern Ireland was unsuccessful last year. Quite why this error could not be classified as an "obvious mistake" and thus avoid penalties being levied is a mystery.

So farmers are forced to work under time pressure, with inaccurate maps and data and when simple mistakes are made, they are penalised as criminals and denied natural justice.

A similar situation arises with SPS compliance, especially over animal welfare. Numerous clients have suffered SPS penalties for animal husbandry breaches. Animal Health itself, in many cases, has decided not to prosecute for lack of evidence for a criminal prosecution. Had it done so, farmers would be able to challenge veterinary evidence, to test whether a crime had been committed. Under the SPS, however, a penalty of many thousands of pounds can simply be imposed, without clients being able to mount a cost effective challenge.

Granted there is a 1st and 2nd tier appeals process against penalties, however this does not inspire confidence: first, a win at first review is almost unheard of; and secondly the Minister does not have to accept the decision of the 2nd tier review tribunal and we have seen cases, where this has happened in practice. The only further challenge for the farmer is by judicial review, where he has to show irrationality or disproportionality: both are difficult legally.

With the arrival of a new DEFRA team, there is perhaps hope for a new approach on SPS compliance and penalties – one which assists and supports farmers, leaving criminal penalties for the truly culpable.



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Welcome

to the Summer edition of our Agricultural Law Briefing

Over the last few months the country has experienced a rollercoaster of change: months of indecision through the election campaign, the formation of a coalition government, the combination of which few would have ever predicted and then, more recently, the start of policy changes, combining the priorities of the Tories and the LibDems.



So what has all this meant for farming? In many ways it seems business as usual for the agriculture industry, particularly in light of the budget last week. Although much change across the country was anticipated from George Osborne, there were few fiscal changes for farming businesses.

The badger/bovine TB question is simmering away, with Jim Paice no doubt researching every angle which could be raised by the badger lobby on any appeal against a cull.

The promise of a cut in red tape will be most welcome and there will no doubt be many within agriculture looking forward to a government focused on helping and supporting the industry. Too often in the past, farmers have felt the heavy hand of rules and penalties, rather than assistance from the very team, to which they looked for support.

In this edition of Fieldtalk we have focused on some of the new policies announced by the coalition. As ever, please do contact us for a no-obligation discussion if you need further advice.

Tim Russ

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*Renewed energy for renewable energy?

The new coalition Government's published "Programme for Government" includes a number of ideas around the (primarily LibDem) ambition to increase the target for energy from renewable sources.

These include measures to promote a "...huge increase in energy from waste through anaerobic digestion". Many in the renewables arena have reservations about the wisdom of the government (rather than the market) selecting the technology for the industry. Thoughts prompted by the Programme include:

- **Planning** – Planning permission is often a stumbling block for waste processing facilities and looks like a significant road block in the way of the "huge increase" in AD driven power generation which the Programme seeks. The proposal to "...encourage community-owned renewable energy schemes where local people benefit from the power produced..." may help, in combination with the proposals just announced by the Chancellor for incentives designed to give councils a direct financial payment from new developments. We await the details with interest.
- **Finance** – The Programme includes a proposal for the establishment of a "green investment bank" and this is clearly being discussed actively within the coalition and its advisers. But this seems unlikely to provide any direct assistance to the (generally smaller) projects, which a farmer might usually consider building as an adjunct to his farming activities. Anaerobic digestion is generally sensitive to inconsistent feedstocks. Securing (contractually) consistent feedstock is extremely difficult, particularly over a term



which is anything like the life of the plant. This makes it difficult to secure meaningful operating warranties from the supplier/builder of the plant which, in turn, will make it very difficult to secure finance to fund its construction.

- **Financial Model:** The Programme also promises to establish a "...full system of feed-in tariffs.." and to maintain the banded Renewables Obligation Certificates: the choices (a) between the two regimes; and (b) between different methods of dealing with any ROCs; and (c) whether to opt for market pricing rather than the export tariff should be challenging! Add to that the considerable uncertainty as to future gate fees for the feedstock (in the continental market these have more or less disappeared) and we have a recipe for interesting times in a truly Chinese sense!

In conclusion, the Programme looks encouraging but the fundamental technology and market issues will need to be very carefully considered by farmers or other landowners exploring AD projects at this time.

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*Clarke Willmott supports the meat industry

Clarke Willmott is delighted to announce that Jamie Foster from the agriculture team has been appointed to a national panel to assist clients of the Association of Independent Meat Suppliers (AIMS) who are involved in regulatory investigations and prosecutions.

AIMS represents 80% of all abattoirs across the UK and has appointed 4 firms of solicitors across the UK.



*Badgers and Bovine TB

Animal Welfare Law through the looking glass

Despite recent scientific evidence confirming the connection between badgers and the spread of Bovine TB and despite reassuring noises from the new government, English farmers still await a cull of badgers in affected areas.

The outcome of the (currently suspended) Welsh cull is critical to future policy in England. Caroline Spellman, the new DEFRA Secretary of State, is considering a limited cull in parts of England depending on how successfully the Welsh cull controls the spread of the disease. Meanwhile opponents of a cull are determined to prevent one at all costs.

There are two particularly intriguing issues that arise out of the cull. First, opponents reject this option on the grounds of animal welfare, despite the welfare implications for badgers themselves. Bovine TB kills some badgers affected and causes debilitating illness in others. Those affected can die of suffocation, underground, with long extended claws caused by being too weak to dig. No doubt those opponents would be keen to euthanise any other animal in this condition on grounds of its own welfare – but seemingly not badgers.

Secondly, the Welsh cull permits the trapping and shooting of badgers for a few months of the year. No gassing of affected setts will be allowed. As such, the cull will not eradicate badgers, and will in fact, leave alive some infected badgers that are so ill, they cannot leave their setts. As badgers spread the disease by breathing the air exhaled by another, clearly a cull that misses out very ill badgers breathing underground is not likely to eradicate the disease.



Some people point to the fact that the Bern convention makes gassing illegal as a reason for the current stance on gassing. In fact, the convention allows for methods such as gassing to be used, where it would not affect the population as a whole. It would appear, so long as culls are arranged in such a way that leave diseased badgers alive and able to infect others, such culls are likely to provide confusion rather than clarity to the whole issue.



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*Case Notes

Town or Village Greens (TVG)

Two more cases on TVGs raise further issues for landowners to note, following the Redcar decision highlighted in the Spring edition of Field Talk:

Leeds Group Plc v Leeds City Council considered the question of which locality had to be named in support of an application to register land as a TVG. In this case the registration was challenged on the basis that (1) the named locality had ceased to be a legally recognised administrative district decades ago, (2) the area identified was not sufficiently cohesive as to constitute a neighbourhood and (3) the land was used by inhabitants of 2 or more separate neighbourhoods or localities which did not meet the requirements of the legislation.

The court dismissed these arguments finding that it was not appropriate to attempt to define the word “neighbourhood”. Furthermore the existence of two or more qualifying neighbourhoods within a locality or localities was not fatal to an application. Although the legislation has changed since this case started, the definitions are sufficiently similar for this judgement to remain useful.

In **R v Oxfordshire County Council**, “no public right of way” notices had been erected by a landowner on land used by members of the public, not only as a right of way, but also for recreational purposes. When development of the land was planned the land was registered as a TVG on the grounds that the inhabitants had enjoyed 20 years use “as of right”.

At the judicial review of the decision to register the land, the owners argued that the notices rendered the use of the meadow contentious, thus interrupting the 20 years continuous use as of right. This argument was rejected. The Court found that the notices were clearly directed to the paths nearby and there was no reason why they should be taken objectively to refer to recreational use of the meadow as a whole. If the defendants had wanted to render contentious the user of the entire meadow, they could and should have done so by using an appropriately worded notice.

*Rural planning: The brave new coalition world

The new coalition government plans a number of reforms to the planning system which will affect rural land owners.

The majority of the changes are being driven by the new government's "localism" agenda – devolving power back to local authorities to decide what development is needed in the area. This will include the scrapping of the Regional Spatial Strategies (RSS) (which imposed nationally set housing targets) - of particular relevance for landowners whose land previously fell within an "area of search" identified by the RSS to accommodate housing. The development potential of many areas will be significantly reduced.

The coalition programme states that the new government will maintain the Green Belt, SSSIs and other environmental protections. A new designation will be created – similar to SSSIs – to protect green areas of particular importance to local communities. This may make it more difficult for landowners to construct buildings on their land, where it falls within such a designation.

The new Government will introduce a presumption in favour of sustainable development. Quite how the term "sustainable" will be interpreted remains to be seen. Depending on the definition chosen, the presumption could make it more difficult to develop in rural areas, where options to travel by modes other than the private car are limited, if not non-existent.

There is a proposal to create new local housing trusts. The trusts will make it simpler for communities to provide homes for local people. It is envisaged that such trusts would allow communities to grant planning permission for new housing within villages and towns.

A further key proposal, which has yet to be fleshed out, is the government's support for a scheme called 'Home on the Farm'.

The "Home on the Farm" scheme is likely to follow the model which has been operated in South Lakeland District which is designed to create affordable housing from disused or underused farm barns to



help young families remain in their communities. However, at present, there is no indication as to how or when the scheme will be implemented.

This represents a significant policy shift in terms of the locations that will be considered suitable for affordable housing. For the time being, it is certainly worth retaining and maintaining any redundant farm buildings so as to preserve their physical integrity. This should help to ensure that works will fall within the definition of a "conversion" rather than "rebuild".

As always, the devil will be in the detail so watch this space!



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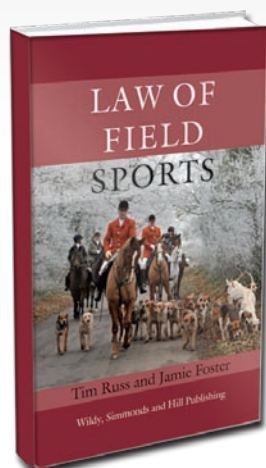
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Fieldsports book launched

Tim Russ and Jamie Foster, both members of Clarke Willmott's agricultural team, have published *The Law of Fieldsports*. This is the first book on the Game Act 1831 for almost 100 years, during which time there has been considerable reform of the law. The book contains a detailed analysis of the civil and criminal law relating to shooting and hunting and offers a practical evaluation of the Hunting Act 2004. It is available online at Amazon, WHSmith and Wildys.



Also included are:

- the law of poaching
- control of shooting and hunting - closed seasons
- up-to-date precedents on the Ground Game Act 1880
- an overview of pertinent firearms law
- rural land ownership, so far as it relates to shooting and hunting
- the treatment of field sports rights under the law of real property
- the law appertaining to badgers, deer and other species.

Tim and Jamie will be signing copies of the book at its launch at the Game Fair, Ragley Hall, Alcester, Warwickshire on Friday 23rd July 2010 at 10.30am in the Countryside Alliance tent. They would be delighted if you would like to join them, please contact jenny.edwards@clarkewillmott.com for an invitation.

*Recovery of debt: Part 2 – Bankruptcy/winding up

If a person or a company owes someone £750 or more and they have not paid the debt then the creditor can apply for a bankruptcy order (if the debtor is an individual) or a winding up order (if the debtor is a company).

The effect of either order is to make the debtor insolvent and put the control of his financial affairs in the hands of a trustee in bankruptcy or liquidator, who will realise what assets there are and distribute those to the creditors, in an attempt to pay out all outstanding debts. This is a fairly dramatic event, but for a creditor it is often very effective in that it focuses on whether the debtor is able to pay the debt and, if not, puts in place a process where all assets are liquidated. It also often results in a prompt payment, if a debtor is solvent, but otherwise does not want to pay his debts.

The critical issue we see in practice is whether the debt is seriously disputed or not. Insolvency can only apply where there is an undisputed debt. If the debt is disputed on genuine grounds (a Judge would ultimately decide if those grounds are genuine) then a Court claim should be made (see next edition of Field Talk). If the debt is undisputed, then it is usually better for the creditor to get straight into the bankruptcy process, to enforce the debt, rather than carry out a Court claim only to get a judgment that still then has to be enforced through the insolvency procedure.

As insolvency proceedings are technical proceedings by the Court, governed by a set of rules, compliance with specific rules is fairly rigidly enforced, to enable a Judge to have the jurisdiction to declare an

insolvency. For this reason, if this approach is taken, the creditor needs to tick the correct procedural boxes to ensure the debtor will either be made insolvent or, faced with this, will pay the debt in full.

As always, the devil will be in the detail so watch this space!



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This article is the second in a series on Recovery of Debt. The other topics are:

- **Distress – See Spring 2010 Edition**
- **Court claims generally**
- **Charging orders**
- **Third Party Debt Orders**
- **Warrants of Execution**

*Making local food relevant

When you think back 20 years, the farming and food industries were hard at it - still pushing and, to some degree, following a cheap food policy in this country, whilst in Europe, they had already moved away from mass food production towards an 'artisan' model.



Hence, on the continent there are literally hundreds of Protected Food Products reflecting a traditional and authentic approach to production. In this country we have less than 50 products protected under the Protected Food Name scheme.

However, that hasn't dampened our industry here in the West Country, where over the last 20 years, there has been a huge development in

local food production to the point that wherever you go now, there are farm shops, farmers markets, delis, pubs and restaurants, as well as, yes – supermarkets, all selling top quality, local and regional food. There is however, still a perception that local food is elitist and certainly expensive and therefore not the preserve of anybody but the rich. This is a perception that we as an industry have to tackle and is something that we, at Taste of the West take seriously. By simplifying the supply chain for example, via the development of our hub with J&R Foodservice at Exeter, we are able to pool resources and therefore cut costs, reducing the price to the customer at the end of the chain. We are also trialling a brand new way of marketing local food - via a vending machine where the price point is critical to success, in what is a very competitive market.

I have very recently been advising a local district council on its policy for the development of farm shops - at present they will only allow such a development if 75% of the products sold come from the farm itself, not a realistic expectation for any producer or consumer for that matter. My advice is for a 30-30-30-10 split, 30% home grown on the farm, 30% from the locality, 30% from the west country region and 10% other. This principle should also be backed up by a simple audit to ensure that any new policy is adhered to. This should not be expensive. All of this proves one thing - that local food is now becoming very relevant and is now a major contributor to true sustainability on all three fronts; socially, environmentally and economically.

Once again we are delighted that John Sheaves, CEO of Taste of the West, the regional food and drink trade organisation for the South West of England, has contributed to this summer edition of Field Talk. Clarke Willmott continues to provide a free legal helpline for members of Taste of the West.

*The Budget: Your farm and Capital Gains Tax

The increase in the rate of Capital Gains Tax (CGT) in the Government's emergency budget was foreshadowed by a Treasury announcement in the Spring, however the new rate and the timing of the change were both unexpected

Issues of particular significance to farmers include:

- From 23 June 2010 the rate of CGT on 'non-business' assets (e.g. shares, let land and buildings and cottages on long term lets) will be determined by aggregating a taxpayer's gains with their taxable income. Where the combined total of gains and income is less than the higher rate income tax threshold of £37,400 the gains will continue to be taxed at the 'old' rate of 18%. However where the combined total of gains and income is more than £37,400 the gains will be taxable at a new rate of 28%.
- From 23 June 2010 the lifetime limit on entrepreneur's relief will be increased from £2M to £5M. Very broadly, the relief is available on the sale of 'business assets' (including in hand farms) provided that certain qualifying criteria have been satisfied. Where the relief applies the rate of CGT on gains is 10%.
- These new rules will only apply to gains that are realised on or after 23 June. Taxpayers who made disposals before 23 June will be assessed to CGT under the 'old' rates and thresholds. However HMRC has indicated that taxpayers will be free to allocate their annual

CGT exemption (£10,100) and losses in the manner that gives the lowest overall tax liability for the year. In other words losses can be offset against post 23 June gains in preference to pre 23 June gains.

- The Treasury has confirmed that the benign taxation treatment of furnished holiday lettings will remain in force until at least April 2011. The previous Government had proposed to withdraw this treatment. This is good news for farmers who let cottages or converted farm buildings to holiday makers.

Precisely because the Treasury gave advance warning of the headline changes to CGT many farmers and landowners were able to take steps to bank the 18% rate of tax. Going forwards, the key to successful CGT planning will turn on structuring a disposal to ensure that entrepreneur's relief is available as well as on the more traditional roll over and hold over reliefs.



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Clarke Willmott was delighted to sponsor the annual Race for Repeal at Ascot's Countryside Day in April. Some of the country's top huntsmen took part in the flat race which was held to raise money for the Countryside Alliance's repeal fund.

If you would like to receive future editions of **Field Talk** by email please email martha.harley@clarkewillmott.com

The articles in this briefing are not intended to be definitive statements of the law but instead provide general guidance.

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