

Briefing  
Winter 2011  
Clarke Willmott  
Agricultural Law



## \* Agency farm workers given new rights

Many farm businesses currently use agency workers. This is a very effective way of taking on a temporary or even long-term worker without having to be responsible for their employment, thus avoiding any potential claims for unfair dismissal or redundancy.

The worker is an employee of the agency. It is the agency, therefore, which is responsible for him/her, rather than the farmer who is actually providing the work.

This arrangement has been of great benefit to many employers over recent years, but that time is now running out.

### New Regulations

As from October this year the new Agency Workers Regulations 2010 will come into force. The purpose of these Regulations is to provide the majority of agency workers with very similar rights to those of employees.

That means that any worker, who may have an employment contract with an agency, but is actually working for a farm business, will be entitled to be treated in the same way and have comparable terms and conditions as all other actual employees of that business. In particular, they should be entitled to the same pay and rights in relation to rest periods, rest breaks, annual leave, sick pay, pension allowances, bonuses, maternity/paternity or adoption leave, redundancy and expenses.

Similar to discrimination laws, it will become unlawful to treat an agency worker any differently from other employees by reason of the fact that he is an agency worker.

### Which workers are affected?

There is a qualifying period for an agency worker to acquire these rights: the agency worker must work in the same role with the same hirer, i.e. the farm business, for 12 continuous calendar weeks, during one or more assignments.

However, the Regulations then go on to stipulate when 12 weeks will not be 12 weeks and in particular to state that it will be acceptable in certain circumstances for a worker to have as much as a six calendar week break, during a three to four month period without affecting the required continuity period. Generally that six week break should be related to sickness, injury, maternity/paternity or other time off for leave. Therefore it will not always be clear at the outset which agency workers will qualify for these enhanced rights.

### Action for employers

With these new rules, our advice to farm businesses employing agency workers is to roll out the same terms and conditions for all workers, be they agency workers or other contracted employees. Obviously this is the spirit behind the regulations.

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Welcome  
to the Winter edition of our  
Agricultural Law Briefing

A Happy New Year to you.  
When I first qualified as a  
solicitor, the work I did was  
almost always for clients in a  
very close geographic area.



That has changed greatly over the past 20 years and even from just looking at the distribution list of Fieldtalk it's clear that our highly specialised Agriculture team is helping clients all over the country. Technology helps us with this, and I know that this year will see our lawyers travelling further than ever to meet you. If you haven't seen us in a while, please let us know and we can arrange a visit.

We have had many client requests to have agricultural lawyers permanently situated in our Bristol office. I am delighted to confirm we have now done this, and partner Kevin Kennedy and assistant solicitor Scott Silbereis relocated there in December. Our offices are at 1 Georges Square, Bath Street, Bristol BS1 6BA and please do feel free to see us there. Kevin and Scott always extend a warm welcome to visitors.

**Tim Russ**

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## \*Agency farm workers *Continued*

This could however prove to be expensive and the assessment of which workers may qualify for those rights could be a time-consuming and difficult exercise.

Furthermore, agency workers currently only have redress against their contractual employer, the agency, for breach of any employment legislation with regard to issues such as receiving information and not being subjected to unfair dismissal. Under the new Regulations, agency workers will have potential to bring claims against the hirer, i.e. the business for which they are actually carrying out the work. Farm businesses may therefore need to review their contracts of employment to ensure that the terms and conditions are appropriate for a potentially far larger workforce.

The new regulations are clearly a minefield for many employers in the Agriculture sector. Farm business must prepare now for the operation of the new rules from October 2011.

Kate Gardner, Agricultural Employment Specialist at Clarke Willmott is running a number of seminars and providing information to employers.

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## Agency workers and gangmaster's licences

For those interested in Kate Gardner's article on agency workers, it is worth bearing in mind that the first cases of farmers prosecuted for entering into agency agreements with Marden Management Limited are now coming to court. Marden is alleged to have operated as a gangmaster without a gangmaster's licence. We will provide a full analysis of the cases when they have been dealt with. In the meantime it is essential that any farm business taking on agency workers obtains a copy of the supplier's gangmaster's licence in advance.



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## Covert surveillance update

In the last issue of Fieldtalk we were able to publish news that the Crown Prosecution Service had changed their guidance on the use of covert surveillance in hunting cases following legal arguments made by Jamie Foster, in a case involving the prosecution of a countryman with the South Dorset Hunt.

We can now announce that the Association of Chief Police Officers has also updated its guidance and is now advising police forces not to enter into informal partnerships with organisations which collect evidence using undercover filming. In future it looks more likely that anti-hunt organisations will need to obtain proper authorisation before engaging in undercover filming on land belonging to other people.

## \*Case Notes: Extent of an agricultural right of way

### Dewan v Lewis

This case concerned a right of way over a private road, used by Mr Lewis and others to gain access to his agricultural land. Mr Dewan and his fellow appellants lived in properties which used the same driveway.

Initial proceedings confirmed the existence of the right of way, with or without vehicles and animals, established by 20 years' continuous use. The appellants then argued that the right did not include a right to drive stock along the driveway, as this right had not been exercised during the 20 years' use. Mr Lewis argued that the right to drive stock was "a normal incident of the use of agricultural land" and should therefore be included.

The Court of Appeal found that the right of way to access the grazing land did not include a right to drive stock. The judge held that since the use of the private road over the relevant 20 year period had not included use for driving cattle, the appellants were entitled to exclude that use from the right of way. This was so even though driving stock could be said to be "fairly related" to the use of grazing land.

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# \*Telecom Masts: Beware operators exploiting site sharing opportunities

The main telecom operators are continuing to consolidate their operations. An increase in site sharing is resulting in attempts to assign or break leases and carry out alterations to the equipment. Landowners need to be alert to the opportunities these changes present.

## Assignment

In most cases the first step to this process is when the operator contacts the landowner for permission to assign the Lease from the single operator company to a joint venture site sharing company. The landlord should check the lease and notice carefully to ensure that the notice has been validly served on the correct party. He should ask quickly for any further information he needs. He should also make a decision promptly or the operator may have a claim for damages for unreasonable delay. Landlords may well need specialist advice to determine whether there are grounds to refuse consent.

## Alterations and additions

Where the site is to be shared, there may also be a need to alter or add to the equipment. Alterations are usually restricted in the lease, so the operator is likely to seek the landlord's consent to these works. Once again the lease and the request must be checked carefully to see if there are any grounds for refusal.

## Breaking the lease

Where two operators who are working together have two separate leases on the same site, they will often seek to site share under the more favourable lease and will endeavour to break the other one. The terms of any break clauses in the lease and the terms of any notice served should be checked carefully.

In our experience break clauses are frequently drafted on the basis that the lease can only be broken if the operator loses its code powers or if it loses the beneficial use of the equipment, not because the operator wishes to site share with a joint venture partner.

Whenever a landlord receives a notice or request for consent from an operator, they should consider it very carefully as it is highly likely to offer an opportunity to increase the rent, change the terms of the lease or procure some other advantage for the landowner.

For further information please contact:



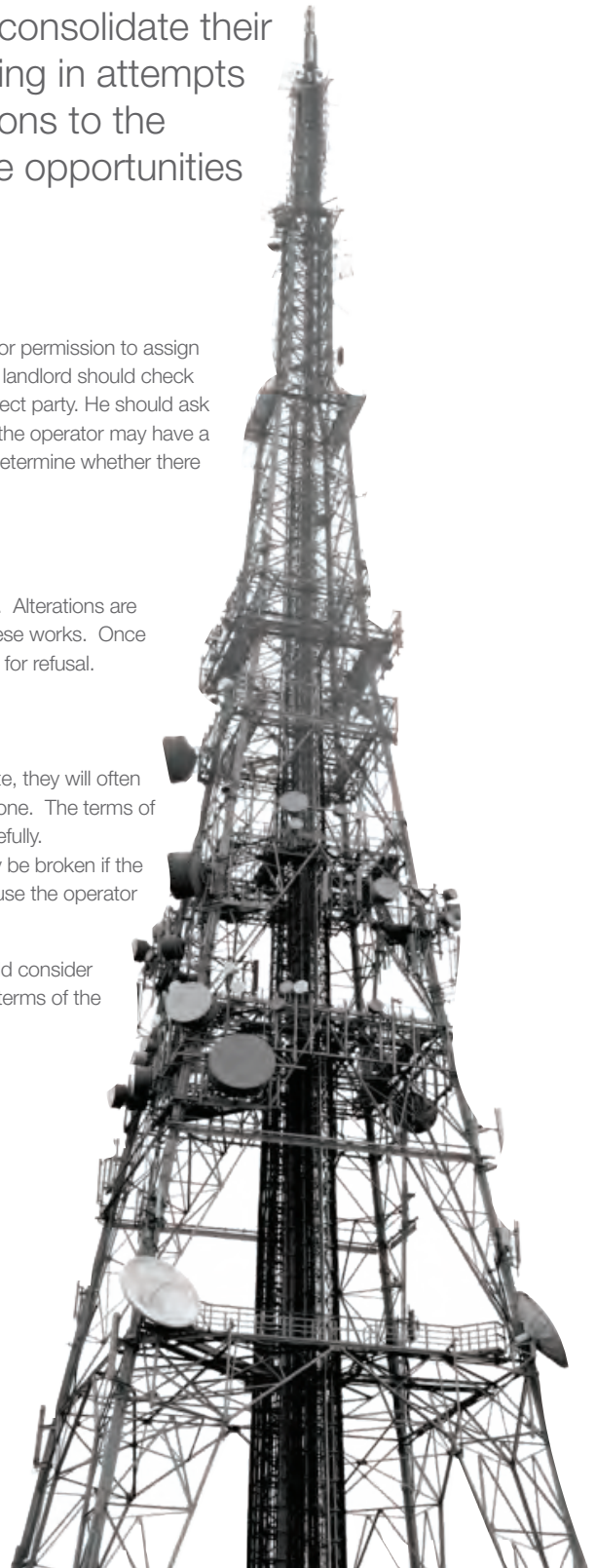
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# \*Community Infrastructure Levy: Here to stay

Last November, the government announced that Labour's Community Infrastructure Levy (CIL) will not be abolished - minor reforms are proposed instead.

Local authorities in England and Wales can charge CIL on new developments in their areas. Many intend to introduce CIL by 2014. This revenue must be used to fund infrastructure such as transport, educational, medical and recreational facilities.

CIL is charged on new development which increases floor space, if a charging schedule is in place when planning permission is granted. It is not charged on structures or buildings that people only enter to inspect or maintain fixed plant or machinery, e.g. electricity substations. Getting permission and starting development before the charging schedule is adopted will save CIL.

Most developments under 100 square metres (m<sup>2</sup>) will not pay CIL. New houses or flats will pay CIL, even if less than 100 m<sup>2</sup> in area. CIL has no exceptions intended to benefit the rural community or agri-business specifically.

Three reliefs are available: charitable relief (if the development will be used wholly or mainly for charitable purposes); social housing relief and "exceptional circumstances" relief, which charging authorities may offer when CIL would have an unacceptable impact upon a development's economic viability.



Charities owning investment property may get relief, if the charging schedule allows this.

Currently (February 2011) no authorities have adopted charging schedules. The Mayor of London has just published a draft CIL schedule, designed to raise £300m towards Crossrail, proposing standard CIL rates for all development types at £50 per m<sup>2</sup> for central London boroughs, down to £20 per m<sup>2</sup> in the outer boroughs. The government's January 2011 impact assessment estimates that CIL will raise between £5.3 and £6.7 billion in the first 10 years.

Section 106 agreements will continue to fund affordable housing and will be scaled back.

Landlords and trustees owning land should be aware that CIL is recoverable from "innocent" landowners, if tenants or beneficiaries default in paying CIL. Vulnerable landlords etc. should consider amending their documentation now.

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# \*Notes from the local food sector

Brand new year, and the nights are drawing out... but is this cause for optimism in the local food sector?



Well, news regarding the general economy is very mixed, some reporters are being quite positive, and others negative regarding the economic fortunes of business in general. If you add into that, the increased costs now being passed on in the food supply chain, then we may have a problem.

2011 will see price hikes in raw commodities such as wheat, sugar and of course energy – all of which will have to be passed on to the consumer via the retailer, not least because price hikes last year were largely covered by producers – this year is different.

To offset this rather gloomy picture, there appears to be no let up in the appetite for local and regionally sourced food and drink, as consumer forecasts are still strong for this sector.

One thing that is changing is that consumers do appear to be seeking out quality and not just relying on the fact that it is locally produced. Therefore the need to authenticate that fact has never been stronger.

That is why we believe that the Taste of the West awards programme, being the biggest and most comprehensive regional awards programme of its kind supported by Clarke Willmott, is fundamental to helping local and regional products reach the market place with independent clout in terms of quality.

For more information go to [www.tasteofthewest.co.uk](http://www.tasteofthewest.co.uk)

**We are delighted, once again, 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 Winter edition of Fieldtalk.**

## \*Recovery of Debt: Part 4 - Charging Orders

Assuming a creditor has successfully sued his debtor and obtained a judgment from the court, what are his options for securing that debt until it is paid?

A charging order over property owned by the debtor gives security for the judgment debt. It is similar to a mortgage and means that ultimately if the debt is not paid, the property can be sold. Note however that a charging order will not take priority above existing mortgages. If the property is sold then existing mortgagees are paid first, with any remaining funds then passing to the holder of the charging order. This puts the holder of the charging order in a much better position than other unsecured creditors, as he can then be paid out for the amount of the charge (assuming there is enough money in the property) and it is only after this stage that the balance will pass to any unsecured creditors, or to a trustee in bankruptcy.

Given this, if a creditor obtains a judgment and there looks to be an asset which is capable of supporting a charge, it is often sensible to apply then for a charging order. This can also be a process that helps resolve the dispute between the parties: the charging order gives the creditor confidence that he will ultimately be paid and provides a structure to allow the debtor to pay over a longer period of time.

The process for obtaining a charging order requires an interim order, a hearing and final order. Although this seems convoluted, it is relatively straightforward in practice and the benefit to a creditor in the right circumstances should not be underestimated.

In the next edition Kevin will consider Third Party Debt Orders.

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This article is the fourth in a series on Recovery of Debt. The topics already covered are:

- **Distress: A useful tool for recovery of rent** - Spring 2010
- **Bankruptcy/winding up** - Summer 2010
- **Court claims explained** - Autumn 2010

Upcoming topics:

- **Third Party Debt Orders**
- **Warrants of Execution**

## \*Oxford Farming Conferences

The beginning of my year always starts with the Oxford Farming Conference. This year we heard a more upbeat tone from both speakers and delegates and met a team of Ministers, who were patently far more "plugged in" to the industry's requirements. Once again the overriding issue for discussion focused on ways to farm in a more environmentally efficient and carbon friendly way.

Across the road, the "real Oxford Farming Conference" was also being held. I was interested to note that one of the items for discussion there was the long standing swill feeding ban, which prevents the feeding of cooked waste food to pigs. It was argued that at a time when recycling is very high on the agenda, avoiding or preventing the reprocessing of waste in this highly efficient way is indefensible and must be reversed in future.

Over many years I have advised farmers who used to use a swill feeding system. The ban was imposed after the 2001 foot and mouth outbreak, following an extremely short consultation, which concluded that the outbreak had resulted from swill feeding.

No proper compensation was ever provided to farmers for equipment that was rendered useless. This is despite the fact that a swill feeders group subsequently persuaded the Parliamentary Ombudsman that compensation should be paid.

In reality the problem in 2001 was not swill feeding itself, but inappropriate and improperly managed and regulated swill feeding. In my view swill feeding remains a highly efficient way of re-processing human food waste, it gives considerable environmental benefits and also saves food producers and restaurants the considerable collection fees for removing wet waste. According to the real farming conference, we throw away approximately 20 million tonnes of edible material, the majority of which now goes to landfill instead of being reprocessed.

Talk at the Oxford Farming Conference was very much about low till and min till systems of farming, of preserving carbon sinks and reducing the costs of farming: all intended to bridge the gap between the world's current food production and that needed to sustain a projected middle-of-the-century population of 9 billion.

Swill feeding is unlikely to provide a complete answer to this collection of very difficult problems. It seems to me, however, that government ought to re-think the compensation issue. It should also consider devising a system to allow swill feeding in a manner that does not pose a risk to human health by transmitting animal diseases, thus reducing the food being sent to landfill.

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## \*SPS Entitlements: The impact of bankruptcy

If a farmer is made bankrupt, it is well known that his assets, including his Single Payment Scheme (SPS) entitlements, will vest in a trustee in bankruptcy. But what should happen to those entitlements when the bankrupt is discharged from the bankruptcy?

At the beginning of a bankruptcy the Rural Payments Agency (RPA) will transfer the entitlements to the trustee. For the period the farmer remains bankrupt, the trustee effectively steps into his shoes and can claim the SPS payments on behalf of the creditors. At this stage the trustee fulfils the definition of a "farmer" who is entitled to claim under the SPS, because the farmer and the trustee are treated in law as one.

Once the bankrupt is discharged, however, the position changes. The trustee is unlikely still to fulfil the definition of a "farmer". Any SPS payments made to the trustee will probably be in breach of the rules and any payments received could be reclaimed. Furthermore, if the entitlements are held by the trustee for two years without being used (three years prior to 2010), or are deemed to have been unused (by a breach of the rules), then they will be confiscated to the National Reserve without payment.

Under the Insolvency Act 1986 the trustee is not under any time pressure to sell the entitlements, but he is under a duty to maximise the return from them. Whilst the farmer is bankrupt the best option

is often for the trustee to claim the SPS payments. After discharge however, the trustee should sell the entitlements either on the open market or back to the farmer or risk making fraudulent claims and confiscation.

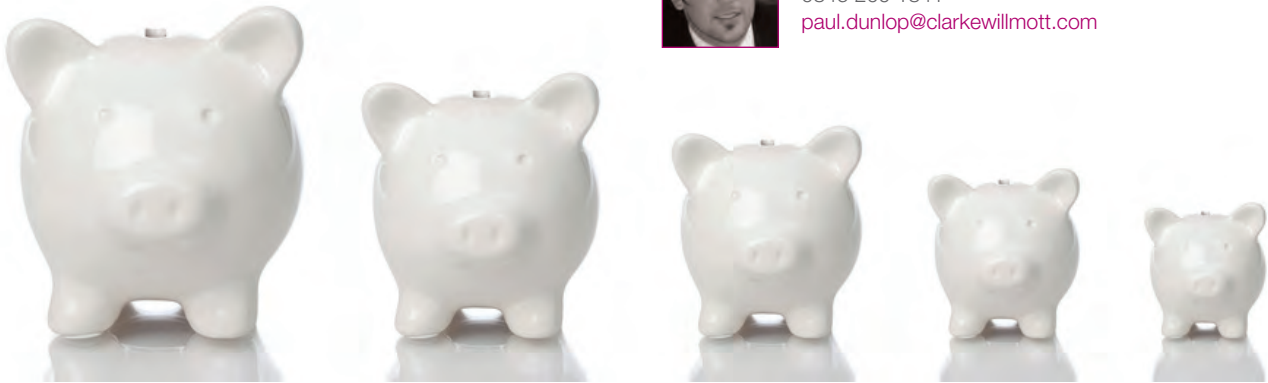
Many trustees are unaware of the SPS rules. The RPA provides very limited guidance to trustees and unless the risks are pointed out, they often continue to hold the entitlements and submit claims after the bankrupt is discharged.

Farmers facing bankruptcy have a real opportunity to negotiate a helpful resolution of these issues. If at the outset the farmer explains the potential problems and risks, he may well be able to agree terms with the trustee to allow the farmer to purchase the entitlements back after discharge, perhaps at a slightly higher than market price, but spread over a period of years as he receives the SPS payments.

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## Stop Press: Tax exemptions being reviewed

The Treasury is actively reviewing over a thousand tax exemptions, with a view to "simplification" of the tax system, potentially removing some loopholes and reducing tax avoidance (despite the fact that avoidance is legal, as opposed to evasion, which is an offence).

Although Agricultural and Business Property reliefs from Inheritance Tax are two of the exemptions on the list, we are not expecting major changes in those areas. Having said that, it is worth bearing in mind that the current regime for passing over businesses and agricultural property to the next generation is as benign now as it ever has been.

Those considering handing property over in the foreseeable future would be well advised not to delay.

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