

# Field Talk

Agricultural Law Briefing • Spring 2021

## Striving for fairness the new dairy Code of Practice

**The UK is the eleventh largest milk producing country in the world and yet it is in decline both in terms of the size of the dairy herd (the total number of UK dairy cows fell from 2.6 million in 1996 to 1.9 million in 2018) and the number of producers.**

Indeed, it is this second set of statistics which is perhaps the most shocking; the number of registered dairy producers in the UK fell from 35,741 in 1995 to 12,209 in 2019, a whopping 66% reduction. This begs the question – what is driving farmers to quit the industry?

No doubt there are several factors at play – the financial and emotional stress of bovine TB for example. However, the pressure placed on farmers locked into unfair supply contracts has been cited as another significant factor. Evidence gathered during the 2016 Groceries Code Adjudicator Review, revealed a pattern of unfair or unclear terms and conditions in contracts between milk producers and the dairy processors. The Summary of Responses recorded that several respondents highlighted the challenges posed by variations to specifications or contract terms, especially if imposed at short notice. Other respondents raised the difficulties that producers face in trying to terminate their contracts within a reasonable period if significant changes to pricing or contractual terms are proposed.

After intensive lobbying from farmers and their unions, this Review progressed to a 12 week government consultation in 2020 on contractual relationships in the dairy industry. Following that consultation, Defra announced on 3 February 2021 that a statutory Code of Conduct between milk suppliers and processors will be introduced later in the year with full implementation expected

in about 24 months. This news has been welcomed by farmers, the NFU and the UK's three other farming unions who have campaigned hard for many years for a fairer dairy supply chain.

### Imbalances of Power

In its recent announcement, Defra noted that the 2020 government consultation had confirmed that *"imbalances of power within the dairy supply chain were believed to be causing instability for dairy farmers, such as where milk buyers have the ability to set and modify the terms of a contract at short notice"*.

The 2020 case of *Watson's Dairies Limited v AG Lambert & Partners & Ors* is an example of such an imbalance of power. Our agricultural disputes team defended the 16 dairy farmers in this case, all of whom had served the processor – Watson's Dairies – with notices to terminate their milk supply contracts. Watson's Dairies initiated court proceedings disputing the validity of the notices which were due to expire on 30 September 2020 and subsequently sought and obtained a short interim injunction restraining the farmers from selling their milk elsewhere. This caused significant difficulties for the farmers who had already signed contracts with their new processors to supply milk from 1 October. When the matter returned to court on 6 October 2020, the judge refused to allow the injunction to

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## Welcome to the Spring 2021 edition of Field Talk



It is astonishing to think that when we published the last edition of Field Talk in October 2020, a second and more challenging wave of COVID-19 was imminent with no sign of any vaccine on the horizon. Brexit was looming with many sceptical that a trade deal could be brokered in time.

Now, some seven months on, more than half of the UK's population is vaccinated, infection levels are at an all-time low, we have transitioned out of Brexit with a trade deal and the Agricultural Transition Plan (ATP) is well underway. Suffice to say that we are emerging from the third national lockdown into a true spring season of new life, new beginnings, and hope.

Despite the challenges posed by the pandemic, we have continued to serve our clients from our home offices and have seen some real benefits of this new way of working. Thanks to the relative ease and availability of video conferencing platforms, we have witnessed our client base widen and reach into all four corners of the UK. We are continuing to engage with our referrer network through webinars and virtual networking; again geography is no longer a barrier and we are able to record the content so people can watch after the event – a real positive according to those who signed up for this year's Budget Briefing.

Whilst our agricultural lawyers are busier than ever with a range of contentious and non-contentious matters, we are conscious that we need to look at how our traditional practice can evolve and develop so that we are able to serve our agricultural clients as the sector transitions through the ATP. Needless to say, we are confident that the strength and depth of our practice – as illustrated by the range of content in this edition of Field Talk – stands up in good stead for this exciting new phase.

**Esther Woolford, April 2021**

## Striving for fairness *continued*

continue to trial and dismissed the application leaving the farmers free to supply their milk to their new processors. The main court proceedings continued for several months before the parties were able to reach a settlement on favourable terms to our clients.

The farmers in this case were all NFU members and as such they received significant financial assistance from the NFU and its Legal Assistance Scheme in defending their position.

The case also resonated with the NFU which had campaigned for reform for years, having just documented its formal response to the government consultation in a 30 page document.

### Restoring Power

The objective of the statutory Code of Conduct announced by Defra is to provide a guiding framework which will seek to balance minimum standards with giving businesses the flexibility to adapt contracts to their individual circumstances. Now that the UK has left the European Union, it is more critical than ever to ensure that the dairy industry survives and thrives.

Following the announcement of the new Code, the Defra Minister, Victoria Prentis said:

*"It is only right that any contracts drawn up between farmers and processors deliver fair conditions across the board, for an industry that works hard year-round to provide the dairy products for which we are world-renowned."*

*This new Code of Conduct will crack down on unfair practices within the supply chain, supporting the dairy sector and ensuring that our dairy farmers remain competitive as they look to the future".*

The announcement is obviously a step in the right direction but there is still much work to be done in terms of fleshing out the bones of the Code to ensure that it delivers fairness and transparency across the supply chain. This relies on constructive and meaningful engagement between the government and the key stakeholders in the industry – both processors and producers – which will require careful management and we await the outcome of the next phase with some anticipation.

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## Helping you make a Will

### Which Will suits you?

**Arguably the most important document the average person will sign during their lifetime is a Will; after all, which other document deals with all your assets and decides who will receive them after your death?**

Many people delay making a Will, perhaps because dying seems too remote an event, or even from worries that it might hasten the end of their life. However, one thing the pandemic has taught all of us is that life can change very quickly, and things shouldn't be put off.

The process of making a Will can seem too difficult to do, although like most tasks the more it is delayed the harder it can be to face. We can help you make the process easier enabling you to focus on the most important questions, to better protect your loved ones and possibly to save tax. Our expert advice is more expensive than making your own Will, or receiving help from a non-specialist, but a Will is not something that can be skimped on. It is vitally important for your family's future security, and we are always transparent in our pricing.

### Our online Which Will? tool

Given the importance of having a well thought out Will, we have developed an online tool that helps in deciding which is the best form of Will for you. Everyone has different circumstances, particularly in this ever more complex world, where blended families are commonplace. Your own personal situation, and the nature and amount of your assets, are vitally important in deciding which Will is best for you. Our Which Will? tool is easy to use



and asks you a series of questions to determine your situation before recommending which Will is likely to be most suitable. If you request a consultation, our specialist team will know important information about you in advance, making the process easier and helping you to get more out of the meeting.

### Complex Wills

Complex situations sometimes require complex solutions, but our specialist team can explain their recommendations in clear, jargon free language. As a national firm we make significant numbers of Wills every year and so we have dealt with numerous people with many different circumstances enabling us to get to the heart of any problems quickly and efficiently.

### Caring for your family

A Will enables you to put in place asset protection where necessary, provide clear directions for what is to happen to your estate and, in some cases, maximise your family's inheritance by reducing tax. Drawing up a well thought out Will can help reduce the stress that your family will be under at a very difficult time, could reduce the likelihood of expensive disputes, and is one of the most powerful ways you can care for your family and demonstrate your love for them.

Access our easy to use Which Will? tool at [www.clarkewillmott.com/which-will/](http://www.clarkewillmott.com/which-will/) to find out which Will is best for you.



# Farming Divorces: A balancing act

**Resolving financial issues on divorce is rarely straightforward. Both parties must give full financial disclosure and there must then be negotiations to establish a fair settlement both in relation to capital and income.**

It is vital that there is a clear understanding of what the relevant resources are, whether they should be included as part of the “marital pot” and if so, what they are worth.

When the assets for division include a family farm, there are several additional considerations that make these types of cases more complex. A divorce can potentially have a devastating effect on businesses such as farms, with the Courts having little regard for the fact that they have been in the family for generations. It is therefore important that farmers and their families clearly distinguish between partnership owned assets and those which are individually owned; that they agree this position between them and crucially, that this is accurately reflected in the relevant paperwork. The same is true in relation to liabilities.

It is often the case that land previously in one or more of the names of the partners comes to be included on the balance sheet in the annual partnership accounts. Sometimes the partners cannot recall why this would have been the case or have different recollections of the position. Alternatively, the information set out in the accounts does not reflect what might be recorded elsewhere, for example, on the deeds or title register of land or property, or in a partnership deed. Understandably this can cause significant confusion when there is an examination of the assets upon divorce, and can, on occasion, lead to assets being included when they should not and vice versa.

Where there is a lack of clear evidence as to the position, it would be easy for a Court to assume that land should be included in the “marital pot” for division, which could, for example, result in the non-farming spouse being entitled to a greater pay out than might otherwise be accurate. This could cause additional difficulties for the farm when looking at liquidity issues, including what level of borrowing could be raised to buy out the spouse without damaging the ongoing business, or even whether the farm, or parts of it, would still be viable if land has to be sold. It is important to note here that after a medium length or long marriage, the Court’s starting point is to divide all marital assets equally. However, this does not necessarily mean that a farm which has been in a family for generations, together with its assets, would be distributed equally as in this case there would be strong arguments for the farm to be considered ‘non-marital’ as it was not acquired during the marriage, and different legal principles apply.

Clearly farming families and partnerships can avoid the above by having open and honest discussions between themselves as to the ownership of assets (both in terms of assets themselves and a partner’s share in the partnership itself), and to take time to ensure that the partnership deed, Land Registry title deeds and the annual partnership accounts record these wishes, and that they are consistent. If changes are made to the position over time, it is important that the various records are updated. The partnership accountant will play a crucial role in this process.

Family lawyers can also assist with this situation by advising in relation to pre or post nuptial agreements. These are agreements entered into between spouses before or after marriage recording what they agree will happen financially upon divorce. Such an agreement can make it clear which land can be taken into account in a financial settlement on divorce and how the assets are to be divided. Such agreements therefore offer protection to both the individuals directly involved and the wider farming business. Whilst pre and post nuptial agreements are not fully binding in the Courts of England and Wales, if they are entered into correctly (including where both parties take legal advice, there is full disclosure, and there is no duress), they are persuasive to the Courts and are likely to be upheld if a Judge agrees that it’s terms are fair. As a result, many farmers are taking advantages of these agreements to help protect their positions.

The family team at Clarke Willmott are experts in all areas of private family law. They have significant experience in advising in farming cases and those with agricultural connections, including in relation to financial settlements on divorce and in relation to nuptial agreements.

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# Landowning Issues in Lockdown

**Despite the inclement weather at the start of 2021, people have continued to flock to the countryside for exercise and fresh air during the recent third lockdown. This is continuing to cause some landowners concern particularly in relation to footpaths, livestock worrying and littering/flytipping.**

In this article, I am going to explore the knotty problem of footpaths and consider the practical and legal measures that can be taken by landowners to protect their land.

## Managing established rights of way

We know that COVID-19 has led to an intensified use of green spaces. Whilst public rights of way were largely able to cope with the increased footfall in the first lockdown, the winter weather has caused many to deteriorate.

Rather than persevering along the muddy routes, some users have chosen to stray from established paths leading to many footpaths becoming far wider than the legal line of the routes as drawn and with productive arable and pastoral land becoming damaged in the process.

Whilst this situation is concerning, it does not give landowners any excuse to block or obstruct public rights of way which run over their land. In fact, it is an offence to do so without lawful authority or excuse under the Highways Act 1980 and can result in a hefty fine. However, there are simple steps that can be followed to mitigate the problem:

- Signage – many member organisations such as the NFU and the CLA have downloadable signage which can be used to encourage users not to stray away from the paths. Effective signage does more than say “Keep Out” – it can politely educate visitors about why it is important to stick to the paths e.g. “This land is home to ground nesting birds. Please do not stray from the right of way and keep dogs on a lead or under very close control to avoid disturbing the birds”;
- Good management of the paths – clearing away fallen branches, keeping stiles in good working order and not locking gates will all help to minimise wandering;
- Offering permissive footpaths – this could take the pressure off existing routes and give the ground time to repair. Existing routes do have to stay open, however, and signage will be needed to direct walkers to the alternative

## The claiming and recording of new rights of way

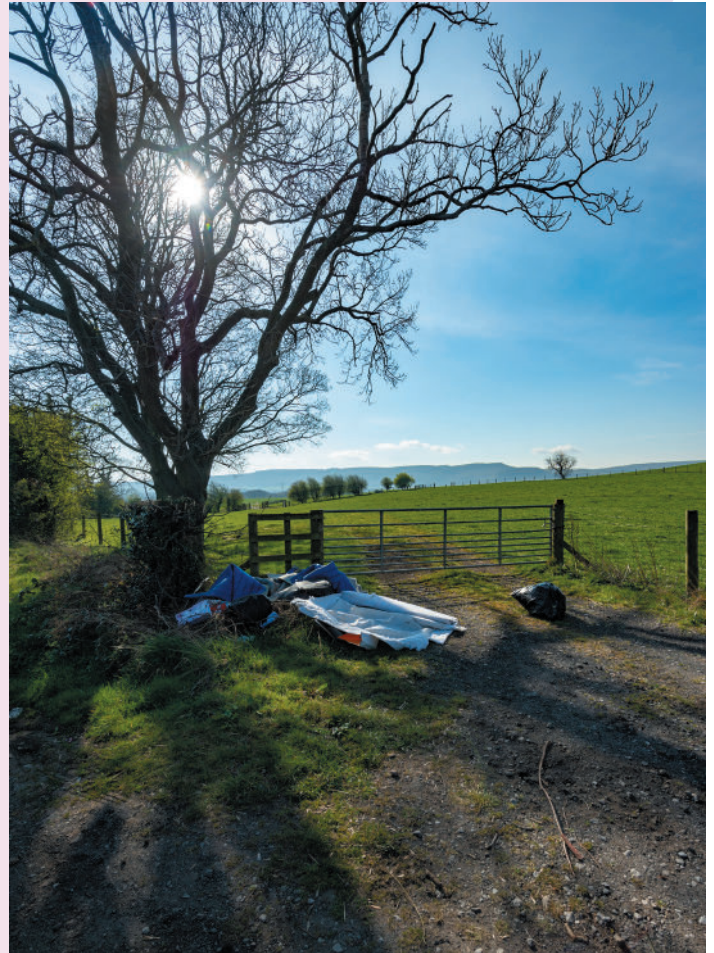
Landowners should also be aware that the public can apply for rights of way to be recorded on the definitive map by applying for what is called a Definitive Map Modification Order (DMMO).

Any right of way can be claimed via user or documentary/historic evidence or a combination of both.

### 1. User evidence

Section 31 of the Highways Act 1980 provides that any person can apply to have a route recorded as a public right of way if it can be shown that there has been at least 20 years’ uninterrupted use by the public “as of right” (without force, secrecy or permission).

If such use is proven, this creates a rebuttable presumption that a route has been dedicated for use by the landowner. The burden then shifts to the landowner to prove that a route has not been dedicated. Evidence which is often put forward by landowners to prove this includes:



- The erection of carefully worded and strategically placed notices;
- The regular locking of any gates and the recording of the same;
- Polite challenges to users who stray from established rights of way, and again keeping a record of the same;
- The depositing of a statement and map, followed by a subsequent declaration, under section 31(6) of the Highways Act 1980 acknowledging any existing public rights of way and declaring no intention to dedicate any further routes to the public

### 2. Documentary/historic evidence

A well-known saying in public rights of way law is “Once a highway, always a highway”. This saying comes from the ability of the public to lodge applications for the adding of public rights of way based on historic documents which show that a particular route was once a public right of way (highway), even if the public use of such a route has long since stopped.

Applications based on both types of evidence have become more prevalent in light of the requirement to register lost or historic paths by the statutory deadline of 2026 and organisations such as the Ramblers have launched projects to support volunteers with collecting the necessary evidence required to support applications.

We regularly advise landowners and others in connection with all types of public rights of way matters and for further information please contact:



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# Spotlight on... our Employment Team



## Introduction

Our agricultural and farming employment law specialist solicitor, Paula Squire, is on hand to help you with all your employment law needs. Whether this is nipping small employee issues in the bud, advising on seasonal variations, disciplinarys and grievances, drafting a contract or assisting with live-in employees, please do get in touch. For smaller employers, Juliette Staunton, our resident Senior HR Consultant, is not afraid to put on her wellies and attend your place of business to assist with employee meetings, as if she was your very own HR person.

In this issue, Paula and Juliette will walk you through some topical issues facing the farming community. Do also let them know if you want to be invited to their quarterly online employment law webinars or be sent their free monthly Employment Matters newsletter, which brings employers up to speed with new developments.

### 1. Post Brexit: What do the new immigration rules mean for agricultural jobs?

Given the number of EU nationals employed in agricultural jobs on British farms, businesses need to consider the effect of Brexit on their recruitment practices.

Under the new immigration system, any EU national who wants to come into the UK (an important distinction is made from those who already live in the UK) needs to qualify for a visa. If you have workers arriving in the UK to undertake seasonal work, you must follow government guidance to ensure they are able to work in your business.

#### Skilled Worker or Seasonal Worker Visas?

The Skilled Worker visa has replaced the Tier 2 visa (commonly known as a work permit).

The Home Office defines a Skilled Worker job as one that requires an A Level or Higher exam level of skill. Unfortunately, this means that a significant number of agricultural jobs are excluded from the Skilled Worker category. Even where a role is considered to be sufficiently skilled by the Home Office, a business will need a Sponsor Licence to support the application and will also need to pay that worker a salary of at least £25,600 per year, which is likely to be out of reach in many cases in the agriculture sector.

There is some positive news; there is now a new scheme for temporary agricultural workers called a "seasonal worker visa". This means both EU and non-EU nationals can be hired by farm owners. The new system applies to jobs involving vegetables grown in glasshouse systems; field vegetables; soft fruit; orchard fruit; vines and vines and mushrooms. There are costs associated in obtaining the Sponsor Licence and all employers still need to carry out certain Right to Work checks and keep required records.

### 2. Contracts of employment and the complexities of agricultural tenancies

It is often the case that farm workers live in accommodation provided by their employer, for example in a cottage or mobile home.

In the agriculture sector, it is possible for a worker to benefit from a protected tenancy, which can make it very difficult for an employer to reclaim the property even where employment has been terminated. Therefore, it is extremely important for employers to ensure that the written statement of employment particulars and any other contractual documentation is drafted very carefully at the start of employment and before they move into the accommodation. It is also advisable to think about these issues before a dismissal is affected.

We offer a free contract and handbook review for employers to look over their existing terms of employment. This includes advice on how to bring existing contracts up to date in accordance with legal requirements which changed the face of contracts as of 6 April 2020.

### 3. The Kickstart Scheme

You may have heard that the government has launched a new scheme to help get young people into long-term employment. The Kickstart Scheme



provides funding to employers to create job placements for young adults aged 16-24 who are at risk of long-term unemployment.

Under the scheme, the government is funding new 6-month work placements with the aim of creating hundreds and thousands of new and fully funded jobs across England, Scotland and Wales.

The all-important funding covers, for each job placement: (i) 100% of the relevant National Minimum Wage for 25 hours a week; (ii) associated employer National Insurance contributions and (iii) employer minimum automatic enrolment contributions. In return, employers provide training and support to participants of the scheme helping the young people to develop teamwork, organisational and communication skills.

The scheme is running until December 2021 and covers the whole of the UK. It is available to employers of all sizes in all sectors including agriculture and will be very beneficial to those farmers needing support during busier periods such as silaging or harvest.

#### Get in touch

If you require legal advice on any of the above or any other employment and HR related matters, please contact:



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# The OTS's capital gains tax review: More tax on disposal of the family farm?

**The Government's spend on the furlough scheme and help for the self-employed during the pandemic has prompted the question – how does the Chancellor of the Exchequer intend to recoup that money?**

Inevitably his request to the Office for Tax Simplification (OTS) for a review of possible measures to simplify capital gains tax (CGT) has been met with some scepticism as to whether the intention is just to reform and simplify CGT or whether it is also to increase the tax take.

## The OTS's recommendations

The OTS made several recommendations with regards to rate alignments (aligning CGT rates with income tax rates), the annual exemption (reducing this from the current rate of £12,300 per person to somewhere between £2,000 - £4,000) and further tightening of Business Asset Disposal Relief (BADR) (formerly Entrepreneurs' Relief). Perhaps the most significant proposal for farmers, however, is the recommendation in relation to CGT and business and agricultural assets.

The OTS recommends that assets subject to business property relief (BPR) and agricultural property relief (APR), which can reduce the amount of inheritance tax payable on death to nil, should not benefit from a CGT uplift on death. This uplift enables beneficiaries to receive assets with the 'base cost' for the purposes of calculating any 'gain' for CGT uplifted to the value at the date of death. This allows them to dispose of those assets with lower or no CGT bills than would otherwise be payable. This arrangement is based on the presumption that an asset should not be subject to both IHT and CGT. However, the OTS have argued that if an asset has been exempted from IHT due to APR or BPR then it should not also be exempt from CGT.

This potential change could substantially increase the potential tax bill of someone inheriting a family farm. For example, George leaves his dairy farm to his son John. The farm is valued at £1.5 million but no IHT is payable as APR applies. Two years later John sells the farm. At present he is only liable to pay CGT on the difference between the value at George's death and the sale proceeds.

If the changes mentioned in this report go ahead, John would be liable to CGT on the difference between the value of the farm when George acquired it (or possibly its value in 2000 as outlined below) and its sale proceeds. In addition, BADR might not be available to John and the gain may be taxed at his marginal income tax rates rather than the currently lower CGT rates significantly increasing his tax bill.

The OTS suggests this increase in tax could be offset by rebasing the acquisition date of assets to the year 2000 and reintroducing a wider form of CGT holdover relief for gifts.

## Implementation

Several recommendations have been made by the OTS in recent years (including simplification of IHT and the taxation of trusts) but as yet, none have been translated into policy or legislation. In view of the huge bill arising from the pandemic, many expected the Chancellor to unveil his plan to reform CGT in the Budget, but no such announcement was made. There was some anticipation that potential reforms could be included as part of the government's announcement of their tax policies and consultations on 23 March ("Tax Day") but no significant CGT announcements were made.

We therefore retain the current CGT regime for the time being but speculation as to what reforms may be implemented in the future will continue.



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