Newsletter

Food, Farming and Land Quarterly

BURGES SALMON

Summer 2015

Welcome

Welcome to the latest edition of Food, Farming and Land Quarterly, discussing current issues in the food, farming and land sector.

If you would like further details on any of the areas covered in this newsletter then please contact one of our team or visit our website at www.burges-salmon.com

Contents

Ten year FBTs

The Tenant Farmers Associations ("**TFA**") is campaigning to encourage longer term Farm Business Tenancies. It argues that as farming is a long term endeavour, tenants should have a longer period of guaranteed occupation to develop their businesses. By investing in capital projects, enhancing the soil and building a business through the inevitable lean years, tenants will benefit themselves and their landlords.

The "ten year minimum term" tag is misleading. The TFA is not proposing to ban shorter term tenancies but to encourage longer terms by changes to the tax position of landowners. If landlords only receive 100% relief from Inheritance Tax on land they farm themselves or on land rented out on tenancies of more than 10 years, it is thought that landowners will be nudged into granting longer term tenancies. Under those longer term tenancies, it is implied that greater investment from both landlord and tenant is likely.

The argument is attractive but not conclusive. Institutional landlords are not affected by Inheritance Tax. Taxable landowners can still farm through a properly run contracting agreement (a structure which many farmers might find more attractive anyway). Good practice can be encouraged over the long term through a broader collaborative approach between landlord and tenant and/or through a more energetic enforcement of tighter "good husbandry" covenants.

Both landlords and tenants should in any case remember that 10 years can be a very long time to be contractually committed to each other if the relationship sours. The notice to quit procedures open to both sides under pre-1995 tenancies (and in the landlord's case always used in preference to the standard but complex forfeiture rights common in all tenancies) do not apply to fixed term FBTs, for which break rights have to be written in at the beginning. Before assuming that "longer is better" both sides need to be very clear about their exit strategies.

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Employment law round up

- A new system of **shared parental leave** is available to parents of children born or placed for adoption with them on or after 5 April 2015. Eligible employees will be entitled to a maximum of 52 weeks' leave and 39 weeks' statutory pay upon the birth or adoption of a child which can be shared between the parents.
- The ACAS Code of Practice on **disciplinary and grievance procedures** as well as the accompanying ACAS guide, both of which should be referred to by employees when dealing with disciplinary and grievance issues, have been recently updated. The Code and guide can be found at www.acas.org.uk.
- With effect from 10 March 2015, it is a criminal offence for an employer to require job applicants or existing employees to obtain a copy of their **criminal records** by means of a data protection subject access request and supply it to the employer in connection with their recruitment or continued employment (known as an enforced subject access). Details of an individual's criminal record should be obtained under the Disclosure and Barring Service.
- A recent case arising from a school **unilaterally imposing changes** to a part time teacher's working hours has highlighted the need for employers to tread carefully when making such changes. Employers who are considering changing an employee's terms and conditions of employment will want to ensure that there is a clear, specific and unambiguous contractual right to do so and follow a fair procedure.
- A number of cases in the UK and European Courts in relation to the **calculation of holiday pay** have confirmed that employees should receive their normal remuneration whilst on holiday and that this may include overtime, commission/bonus payments and other allowances. Employers are advised to look at how they calculate holiday pay and to assess whether payments above and beyond the employees' wages need to be taken into account.

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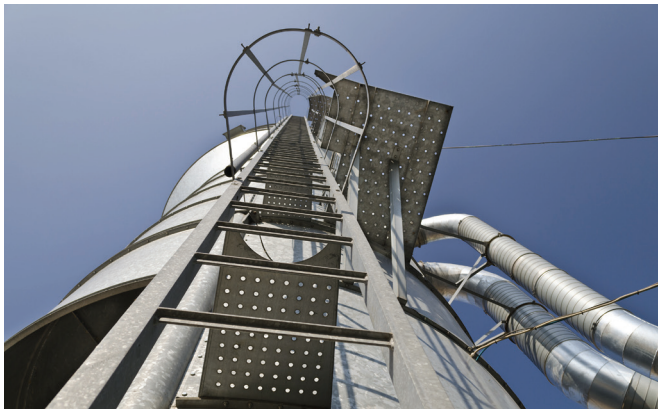
The rising cost of falls



Of all UK industries, the agriculture industry has the highest rate of fatal accidents with falls being the second highest cause of death. Each year at least eight people die and numerous major injuries are sustained as a result of falls from height.

Deaths and serious injuries have severe human and economic impacts for the family involved but workplace injuries and deaths can also impose substantial long term economic costs upon a business.

Due to the persistently high rates of fatal incidents within the agricultural sector, the Health and Safety Executive (HSE) takes a keen interest. In relation to falls from height, the HSE will bring prosecutions where there are serious injuries and deaths if the employer cannot demonstrate the work was properly planned, properly supervised and carried out in a manner which is, so far as reasonably practicable, safe. This includes an obligation to ensure that any work is carried out by people with the requisite skills to complete the job. In the last year, two particular prosecutions have demonstrated the Courts' increasing willingness to impose a hefty fine if the HSE's prosecution succeeds.

In June 2014, a partner of an Essex farm was prosecuted under the Work at Height Regulations 2005 as a result of an employee accident. The prosecution was brought because the employer failed to take steps to prevent an employee working on the fragile surface of a grain store roof or to provide suitable or sufficient platforms, coverings or guard rails. The roof gave way causing the employee to fall and sustain serious injuries. As a result of this criminal prosecution, a fine of £12,500 plus the HSE's costs of almost £4,000 was levied against the partner involved.

In February 2014, a partner of an East Sussex farm was prosecuted following a similar incident. Again, a fine of £12,000 plus costs was imposed.

Overall farmers maintain positive attitudes and behaviours towards safety. However, the positive can-do attitude applied across the sector (particularly in relation to working at height) can lead to workers being exposed to unnecessary risks in attempting jobs which they are not qualified to complete.

In light of the recent prosecutions and aside from the moral and human implications, it is increasingly cost effective for employers to ensure that work at height is properly planned and resourced.

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AHA Tenancy update

This year sees the arrival of some important changes to the regimes governing 'old-style' tenancies regulated by the Agricultural Holdings Act 1986. This follows government consultation which concluded that there was a need to modernise the law in a number of key areas.

Expert determination

From 27 May 2015, The Deregulation Act 2015 makes changes which will allow landlords and tenants to agree to a third party expert determination as an alternative dispute mechanism to arbitration (except for notices to quit).

This is intended to be a quicker and cheaper approach to resolving disputes as arbitration can be a very lengthy and time consuming process. Currently, however, there are very few 'experts' putting themselves forward to provide this service and there is little guidance about who would constitute an expert for these purposes and how they are to be monitored and regulated (if at all).

End of tenancy compensation

Less prescriptive rules on how end of tenancy compensation is calculated will be introduced from 1 October 2015. These aim to allow compensation which better reflects the value of the improvement or matters being compensated for at the time the tenancy is terminated.

The current prescribed approach under the Agriculture (Calculation of Value for Compensation) Regulations 1978 will therefore be revoked. Instead, amending regulations in England will enable tenants and landlords to settle compensation claims for improvements at values on the date the tenancy ends. The hope is that this will provide a more effective incentive for outgoing tenants to keep the land productive in the last years of their tenancy. It also gives landlords and tenants greater autonomy and flexibility to agree a method of calculating compensation which best suits the circumstances of their particular agricultural holding.

Model Clauses

The Model Clauses set out the default position for determining whether a landlord or tenant is responsible for repair and maintenance of specific types of fixed equipment on an agricultural holding. The existing rules date back to 1973, as amended in 1988.

From 1 October 2015 new Model Clauses will come into force (under the Agriculture (Model Clauses for Fixed Equipment) (England) Regulation 2015) which will include items now in common use and will provide a more detailed breakdown of certain liabilities to either better clarify what is covered or to change the liability between landlord and tenant to a more pragmatic split of responsibilities.

Labelling of fresh meat

New rules on the labelling of fresh, chilled or frozen meat (from sheep, goats, pigs and poultry) will have been applied since 1 April 2015.

The rules require the label to indicate the country which the animal was "reared in" and "slaughtered in". If animals were born, raised and slaughtered in the same country, then the label can simply state the "origin" country.

Agreed by Member States in December 2013, the new rules were required under the **Food Information for Consumers Regulation** of 2011. They reflect the consumer interest above all in the place where animals are farmed while avoiding a major additional burden and costs for the supply chain.

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Henson Foods

The Corporate team from Burges Salmon has advised the individual shareholders on the sale of shares representing 82.67% of the entire issued share capital of Henson Foods Ltd to Bidvest Fresh Limited, with an option over remaining shares and three of the shareholders staying on until 2017.

The firm assembled a multi-disciplinary legal team to advise the Sellers on this transaction. The team was led by Corporate partner Richard Spink with assistance from Tax, Real Estate and Employment.

For over 100 years, Hensons has been at the heart of London's meat industry. Famous for its Salt Beef supplied to top restaurants and delis nationwide, Hensons is also a leading supplier of premium fresh, frozen and ambient food to restaurants, caterers and wholesalers. Its bespoke butchery and growing range of freshly made gourmet burgers are menu leaders in the booming premium casual dining sector.

Henson Foods provides a unique range of meat, chilled, cheese, deli and premium frozen products for restaurants, casual dining and wholesalers throughout the UK.

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Clarity on residential tenancy deposits

Landlords in the sector who have residential tenants under assured shorthold tenancies should be aware of two recent changes in the law.

Since 6 April 2007, landlords of ASTs have had to protect tenant deposits in one of a limited number of schemes and to provide tenants with 'prescribed information' about the holding of the deposit; failure to do so may lead to financial penalties and, importantly, render the landlord unable to regain possession of the property using the 'no reason' section 21 notice procedure. Recent court decisions had caused some confusion as to a landlord's duties when the fixed term of an AST comes to an end and the tenancy is left to run as a periodic tenancy. The Deregulation Act 2015, which came into force on 26 March 2015 clarifies the law:

- where a deposit was taken before 6 April 2007 and an AST became a periodic tenancy before that date, the deposit should be protected and the prescribed information served if the landlord wishes to regain possession of the property by serving a section 21 notice;
- where a deposit was taken before 6 April 2007 and an AST became a periodic tenancy after that date, if the deposit has not been protected, service of a section 21 notice cannot now be used to regain possession of the property unless the deposit is first returned to the tenant and, in any event, the landlord will be liable to pay a penalty;
- where a deposit was taken after 6 April 2007, the tenant deposit protected and the prescribed information served, the landlord need not re-protect the deposit or reissue the prescribed information, so long as the landlord, tenant and property remain the same.

Landlords who propose to grant an AST to an agricultural worker should also be aware that the form of notice (the 'form 9' notice) which must be served on the tenant before the start of the tenancy to prevent the tenant from becoming an assured agricultural occupier has, with effect from 6 April 2015, been revised by The Assured Tenancies and Agricultural (Forms) (England) Regulations 2015. Landlords should ensure that when granting an AST to an agricultural worker, the new form 9 notice should be used.

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FBT precedents

Burges Salmon first issued its set of FBT precedents in 2008. The aim was to create documents that were easy to use and balanced between landlord and tenant, reducing the likelihood of costly negotiation. The draft FBTs are supplemented by a checklist and by optional clauses dealing with rent review and compensation issues.

A new set of precedents reflecting the changes to the Basic Payment Scheme and also the changes reported by Sian Edmunds above will be available over the summer at a cost of £250 plus VAT per set.

Please register your interest with:

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