NEWS

from the Farming and Rural Business Unit

WINTER 2007

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Confused? You should be

Since the last newsletter we have had FMD, Bluetongue, the floods, a large fruit and vegetable producer in the area going bust, a doubling of grain prices, a firming up of milk prices, a 0% rate for set-aside next year and increasing land prices.

In addition, various farming-related stories have appeared in the press ranging from a UN reporter condemning biofuels as "a crime against humanity", to cattle being condemned as one of the biggest contributors of greenhouse gasses.

Where does that leave farmers? The best answer that I can come up with is "confused!"

However a distillation of the above reinforces the view that farmers are operating in a highly volatile, highly regulated, highly scrutinised world market. As such farmers should get on with what they do best – namely growing crops or producing meat or milk – and looking to the market place for the most profitable product.

It is a sign of the times that there are additional, hidden costs that are going to eat into any gross profit. These may range from legal fees in ensuring that a cropping licence with a vegetable grower is robust, through to having to fund a slurry-lagoon so as to comply with the new Water Frameworks Directive, to having to pay for the disposal of the plastic detritus from seed fertiliser and pesticide containers. There is also the risk of ignoring the consequences of extreme weather events.

It is clear that the benefits of a decoupled system are beginning to permeate through the industry and farmers realise that they have to grow/rear what is appropriate and profitable rather than relying on what has been done historically; it is equally clear that notice must be taken of extraneous factors that were not previously regarded as important. Therefore when preparing a budget/forward plan it is important not only to cost properly but also to ensure compliance with all relevant regulations and ensure, if dealing with other parties, that everything is documented in as robust manner as possible. Failure to do so could result in inspections, penalties for non-compliance or loss as a result of having insufficient documentation.

With the correct planning and advice any risk can be minimised and so, in going forward, do take account of anything that might impact on that plan. With that, a bit of luck and a fair wind, profit should follow. Good luck!

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High cost of selling sick cattle unintentionally

Animal diseases have been headline news recently and the latest of these is Johne's disease otherwise known as mycobacterium avium sub-species paratuberculosis or MAP.

This is "a chronic gastrointestinal infection of adult ruminants characterised by diarrhoea, weight loss, emaciation and eventual death." (Defra 2007).

It can take over two years for Johne's disease to manifest itself in an infected animal. As it is transmitted through dung, one diseased animal can present a significant risk to the rest. If a diseased animal is sold but it is not demonstrating any symptoms, can the seller be held liable? Arguably, yes!

There is an implied covenant that goods sold in the course of business are fit for the purpose for which they are intended. This is contained in the Sale of Goods Act 1979.

This can pose a real threat. We have just settled a case for a local farmer who sold his entire herd to a farmer who was restocking after FMD (2001). The herd had a few instances of Johne's in the year before sale. The animals were immediately culled and nothing more was thought of it. Neither the buyers nor their vets asked about Johne's and none of the sold animals displayed any symptoms of the disease until 2004.

Our client found himself at the receiving end of a High Court action that, had he lost, could have resulted in the family farm having to be sold. Although in an ideal world he wanted to defend the action, because there had been Johne's in the herd prior to sale, it was felt that a deal was needed to remove the risk of losing. The compromise reached cost the farmer nearly as much as the original deal.

The moral of the story is that if you are selling animals in the course of a business and there is a chance, albeit remote, that there might be something wrong, disclose that something. If you are buying animals make sure you ask detailed questions to uncover any pertinent facts that might cause you to reconsider your decision to buy.

Join us at Moreton Morrell

The agricultural team has had another a busy year with both internal and external speaking engagements on SPS and other matters. The final seminar of the year will be our annual agricultural round up at Moreton Morrell on 12 December where guest speakers, Suzanne James (Sheldon Bosley), Bob Slater (FWAG) and Stephen Rice (Fisher German) will join our team. A diverse range of topics from microgeneration to nitrate vulnerable zone regulations will be covered. You should have received your invitation to attend: if you haven't please ring Deanne Clay on 01926 884614.

Moving on to 2008, once again we are delighted to be sponsoring the Kenilworth Show on 2 June. We are also pleased to be sponsoring the World Simmental Cattle's Congress in June 2008, a biennial event which is being hosted by the British Simmental Cattle Society who will be welcoming members from 26 countries to the UK.

Otherwise it will be business as usual – keep an eye on our website where you can find all the latest news and links to other relevant sites.

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- Foot & Mouth – you may be entitled to compensation
- Polytunnels – when do you need planning permission?

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Refreshing guidelines to polytunnel planning

The question of whether the Planning Acts apply to the erection of polytunnels has long vexed many in the farming community – not to mention Planning Enforcement departments across the country. This position has not been helped by the inconsistent approach taken by different local authorities.

In the matter of Hall Hunter Partnership v First Secretary of State (and others) (2006), the Claimant appealed against the decision of the planning inspector, that the polytunnels erected by the Claimant were sufficiently substantial and permanent to require planning consent. The High Court held however that the inspector had been entitled to reach that conclusion, on the available evidence. This decision was met with dismay in rural communities. It set in more 'solid stone' the principle that planning consent is required for polytunnels, unless they are clearly very temporary, or insubstantial.

In July, Paul Hudson, chief planner within the Department for Communities and Local Government, wrote to all local chief planning officers. His letter included guidance upon how the government would prefer the various planning acts to be applied, at a local level, to the issue of polytunnels.

The letter suggests that two main questions should be considered before enforcement action is taken:

1. Does the polytunnel constitute development within the meaning provided by planning legislation?

In considering whether a polytunnel constitutes 'development', the planning authority will need to:

i. consider the type and scale of the polytunnels; and
ii. the degree of permanence with which the polytunnels are constructed and affixed to the ground, (but please note that in the Hall Hunter case the Court held that even polytunnels which were not erected year round were capable of having a sufficient degree of permanence to require planning consent).

2. Can the 'development' fall within the statutory exceptions known as the permitted development?

Paul Hudson suggests that, in recognition of the valuable role played by the farming communities, local planners should try to deal with polytunnels leniently. They should therefore consider whether planning legislation provides any exception that will permit the development. For example, the General Permitted Development Order 1995 allows operators of an agricultural unit exceeding five hectares, to erect a building which is reasonably necessary for the purposes of agriculture within that agricultural unit. There are however several restrictions:

i. only one 'building' can be erected at a time;
ii. the 'building' should not exceed 465 sq metres; and
iii. 'buildings' erected under this exception may not be nearer to each other than 90 metres.

Therefore the erection of a number of polytunnels may still fall outside the development permitted by the General Permitted Development Order 1995.

Nevertheless, Paul Hudson went on to suggest that the key issue in deciding whether to take enforcement action should be the extent to which the 'development' harms the local amenity. Provided no local objection is raised, retrospective planning applications should be encouraged and pre-consent infringements should be dealt with leniently.

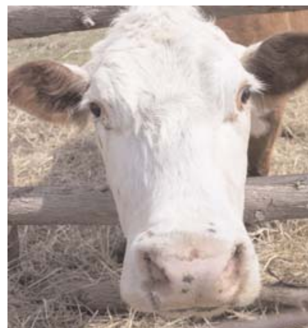
It is important to emphasise that the guidance provided by Paul Hudson is informal. Nevertheless, it is refreshing to note that the informal guidance and request for lenience in polytunnel matters recognises the valuable role played by the farming community in the rural economy.

For further advice call Paul Rice on 01926 880777 or James Leyland on 01926 883013.

FMD claims could spread far and wide

The outbreak of Foot and Mouth Disease (FMD) in Surrey during the summer has meant that, for the second time in six years, the farming community and its associated industries have suffered a severe financial blow.

Although compensation is generally available to farmers whose livestock are infected by FMD, or whose animals are involved in contiguous culls, this does not extend to those affected indirectly by livestock movement or export restrictions.



However, there may be grounds to make a claim under the laws of nuisance, quasi-nuisance or negligence as the source of the virus was deemed to have come from either the Institute of Animal Health or Merial Animal Health Ltd, both based at Pirbright, Surrey and both undertaking research involving the particular strain of FMD found in the affected cattle.

Under the law of quasi-nuisance a person responsible for bringing anything onto his land likely to cause damage or loss to others in the event of it escaping (e.g. FMD) could be liable. The landowner's liability is 'strict' (i.e. it is no defence to show that he was not responsible for its escape) which means that he would be liable regardless of whether the escape was accidental or not. The quasi-nuisance law is only likely to benefit those who have lost animals or property because of the outbreak.

To claim negligence, one must demonstrate that the duty of care owed (e.g. to prevent the release of FMD virus) has been breached (e.g. that the virus has escaped) and that the claimant has suffered a loss as a result. The losses claimed must also be reasonably foreseeable

The operators of both Pirbright research facilities must have been aware of the risks of widespread infection and resultant financial loss in the event of the FMD virus escaping, particularly in light of the highly publicised consequences of the 2001 outbreak; and the Foot–and–Mouth Disease (England) Order 2006.

Thus, it would have been reasonable for both Merial Animal Health Limited and the Institute of Animal Health to have foreseen that, if the FMD escaped from their facilities, livestock movement restrictions and an export ban were likely to follow, resulting in widespread financial difficulties in the agricultural industry.

What remains to be determined is the extent (geographical or otherwise) to which the risk of infection, following the escape from Pirbright, will be deemed to have been 'foreseeable'. This has the potential to be widely interpreted given the geographical extent of the 2001 outbreak. It is worth noting that the HSE report also concludes that Pirbright is the likely source of recent FMD in Normandy.

The Courts may seek to limit the liability of the Pirbright facilities in the current FMD outbreak as a matter of public policy. However, this is likely to involve a significant change to 50 years of common law principles.

On the basis of current case law, however, it would appear that livestock farmers in the vicinity of the 2007 outbreak, and quite possibly those further afield, may be in a strong position to recover financial losses arising from the various restrictions imposed.

Agricultural businesses (such as livestock markets, haulage etc) have also suffered substantial losses. Recovering these will hinge on individual circumstances since the law is less clear in this area.

For more information, please contact Paul Rice (Farming & Rural Business Team) on 01926 880777 or Richard Lane (Commercial Disputes) on 01926 880707.

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