

Welcome to the latest edition of the Farming and Rural Business Team's newsletter. It has been an "interesting" time since the last edition with the recession well established and any green shoots seeming to wither on the vine. We have seen a contraction of the availability on finance and although the 2009 harvest has been regarded generally as not too bad as far as quantity and quality is concerned, wheat prices are still below £100/tonne at the time of writing. There has also been a general period of consolidation and focusing on the core business of farming, with the number of diversification projects diminishing significantly and the total acreages being bought and sold less than last year.

There has been a general tightening of approach to farmers by regulators, whether it be the RPA or HMRC and this is reflected in some of the articles in this newsletter. The debate on the future of the SPS and the CAP post 2013 has started so, with the possibility of a slow recovery and stagnant commodity prices, one thing is certain - the times will remain "interesting"!

Paul Rice



Salutory lessons (in the SPS)

If you are an adviser, how often have you come across a land owner who has "let" out his land but who continues to claim the Single Payment Scheme (SPS), or the contract farming agreement for land miles from the owner where he also claims the SPS? At best the SPS is at risk and at worst fraud has been committed.

The basic rules for claiming the SPS, set down by the Agriculture Council and updated earlier this year are based on the claimant being a farmer, a term which is defined broadly as an individual engaged in agricultural activity which, in turn, is defined as the production, rearing or growing of agricultural products. Although the regulation refers to the parcels of land eligible for SPS payments, it specifically does not mention ownership or any other form of land tenure. However, one thing is quite clear - it is a scheme for **farmers** to claim.

If you are an owner/occupier the situation is clear; if you are a tenant, again the position should be clear, but I am still encountering situations where there is a full-blown FBT but the landlord insists on claiming the SPS.

So what, you may ask? A tenant farming land under a tenancy should have exclusive occupation and will be taking the operational risk in its farming. Therefore as a matter of law and fact the land will be at the tenant's disposal and he is the only one permitted to claim the SPS. If the landlord is claiming the SPS on some of the land, not only must it appear

on his SP5 but the rest of the tenant's SPS may be at risk because he has under-declared the land at his disposal. If the land is not at the landlord's disposal, he is not eligible to claim the SPS and has arguably committed a fraud.

The situation with a grazing or contracting agreement is less clear but it is equally potentially perilous for all parties. Many agreements do contain provisions that the landowner remains the farmer and claimant for SPS purposes. The RPA does give guidance on what factors may be taken into account in determining who has land at their disposal.

The RPA is interested in, as a matter of fact, who has the land at their disposal. If the contractor/grazier takes all the decisions relating to its management without reference to the owner, then the RPA is likely to determine that the contractor/grazier has the land at his disposal. If the SP5s declare otherwise, then penalties for both the owner and contractor/grazier may follow.

The moral of the story is that if you are advising the owner of land who is claiming SPS when they are not actually farming land or tenants/graziers/contractors who are farming but not claiming, you need to identify what is actually happening on the ground. Failure to do so could result in expense all round.

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ALSO INSIDE

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What is the legal status of a horse?

As with all matters legal, it depends. A horse's status depends on the circumstances.

They are goods – if bought and sold, under the Sale of Goods Act, as 'chattels', i.e. tangible, moveable property. However, any comeback you have depends on whether the horse is bought privately or as part of a business transaction. Purchase from a dealer implies that it is of merchantable quality or fit for purpose but a purchase from a private individual implies no such conditions – caveat emptor applies.

They are animals - much has been written recently about s.2 Animals Act 1971 prompted by a recent case that held that a horse owner was liable for damage and injury caused by horses that escaped from a field, having been spooked for no apparent reason, in circumstances where the judge acknowledged that the owners had done all that had been expected of them. Therefore, as the law currently stands, an owner can be held liable for damage caused by his horse as he is under a duty of care towards others and their property. The courts will consider both the tort of negligence and whether a duty of care has been broken but also all the circumstances under the Animals Act 1971.

They are a conveyance - and provision is made in the Highway Code for riding on roads. There is still legislation applicable to the riding on the highway and the offence of furious riding still exists under the Town Police Clauses Act 1844 (although this is now generally used for cyclists). Modern legislation that acknowledges the use of the road by riders includes the Horses (Protective Headgear for Young Riders) Act 1990 which requires children under 14 to wear protective helmets when riding a horse on the road.

Unlike driving a car, it is not a legal requirement that a horse be insured. However the strong advice is that you should make sure that you and the horse are adequately covered and that you have sufficient third party cover. It is sometimes forgotten that if an uninsured driver causes an accident, it is only personal injury that is covered by the Motor Insurers Bureau, not damage to property (i.e.

your horse) or other items such as cars.

They are food - the introduction of horse passports, perceived as an unnecessary administrative burden for the horse industry in this country, were introduced to prevent horses that have been or may have been treated with certain veterinary products, from entering the food chain in Europe where they are a common food source. Therefore passports, although they do play a part in horse movements, must be seen in a human health context.

Thus rather with the definition of farmer, the definition/status of a horse depends on the circumstances in which the definition is sought so identify the circumstances before the question is asked.



Some members of Wright Hassall's equine team posing with Midget and Brown Bear, retired 2*eventer, at Warwickshire College's Equine Unit, Moreton Morrell. Taken by kind permission of Mrs L Powell-Brett and Warwickshire College.

L to R: Laura Wheeler, Richard Lane, Katherine Burley, Paul Rice and Stuart Cutting.

Trespassers will not be prosecuted

Contrary to popular myth, trespassers cannot be prosecuted as trespass is not a criminal offence. However, trespassers can certainly be evicted. To protect the interests of landowners from trespassers, we have put together a competitively priced package for a fixed price of £750 exclusive of VAT and disbursements, including Court fees and Court attendance.

Trespassers can be economically disruptive; a blot on the landscape and cause a good deal

of trouble as far as the landowner is concerned. However, by taking a series of straightforward steps, the negative impact of trespassing can be minimised cost-effectively.

We can also advise on ways to prevent trespass occurring in the first place by, for example, ensuring that property is not left empty and unlocked for long periods. Whilst it may be impossible for farmers and other owners of large pieces of open land to guard against intruders,

regular visual checks and warning signs may reduce the risk of trespass, particularly during the summer months.

For certain types of trespass the local council and Police may have powers to remove trespassers without the expense of a civil court action. We can identify when these powers apply and advise you accordingly.

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What right have the RPA got to make me pay for their mistakes?

The answer is that they have every right!

Earlier this year there was a flurry of activity generated by IAgSA concerning the RPA's recovery of overpaid monies and how unfair this was. It may be of interest to understand the legal basis for the RPA's actions.

The Single Payment Scheme (SPS) was implemented in England using the "dynamic hybrid" model which means that entitlements are dependent on the amount of money claimed from the CAP in 2000, 2001 and 2002. At the same time as the dynamic hybrid was introduced, RPA were in the process of procuring a computer system to deal with all IACS (Integrated Administration and Control System) which had to undergo a number of upgrades/repairs over the years with a considerable number of under/over/delayed payments.

One of the consequences of the model and the way the SPS has been implemented in England is that there are very few professional advisers who can state categorically that a client's SPS payment is accurate. This has been compounded by the controversy over the RPA's efforts to recover the alleged overpayments as well as their reluctance to explain how the overpayment is calculated. However, regardless of the complexities of implementation or computer problems, the RPA has a legal responsibility to deal with incorrect payments and, as a matter of law, it is obliged to recover any overpayments, even if it is their mistake, and can do so by means of intercepting future payments. In conclusion, if you have been overpaid, you must repay. But RPA must tell you how it is calculates that overpayment. If you are in any doubt – ask.

Annual Christmas Talk

Given that the economy is still staggering along, in spite of recent, buoyant talk of recovery round the corner, the agricultural sector continues to hold its own.

On this basis, our annual Christmas round up of topical issues affecting the agricultural sector seems even more appropriate than ever.

This year, as Moreton Hall is still out of commission, we are holding the talk at our offices in Olympus Avenue which have the enormous benefit of having plenty of parking! Last year's earlier start time of 3.30pm proved to be popular so we will repeat the exercise this year. Therefore, we are delighted to invite you to join us at Wright Hassall LLP, Olympus Avenue, Leamington Spa, CV34 6BF (CV34 6RJ for those of you using SatNav) on Tuesday 15 December.

This year's talk we will cover the following:

- David Hotton, Handelsbanken:** Current financial and associated issues
- Paul Rice, Wright Hassall LLP:** SPS – current issues and what might happen after 2013
- Sarah Faulkner, NFU:** The Campaign for the Farmed Environment ("voluntary" set-aside) the theory and the practise
- FWAG**
- James Walton, Sheldon Bosley:** A land agents perspective of an argument with the district valuer (or what happens when your approach to apr is wrong).
- James Leyland, Wright Hassall LLP:** Footpaths and village greens

Registration is from 3.00, when tea and coffee will be served. The presentations will start promptly at 3.30 and, after an opportunity to ask questions, will conclude at around 5.30 when light refreshments will be served.

SPS inspections and the consequences of failure

Cross-compliance is a central plank of the Single Payment Scheme and represents a change in emphasis from production to good husbandry relating to both agricultural and environmental conditions. Failure to cross-comply is met by some form of sanction which, in England and Wales, is usually a reduction in SPS payments.

The system is monitored by a combination of eligibility checks (administrative) and on-the-spot checks. All applications must be subjected to the eligibility checks and these include checking whether the farmer, the land and the entitlements are registered on the appropriate databases all of which involve cross-checks between various systems.

What is more contentious as far as the farming industry is concerned are the on-the-spot checks which, according to the regulations, require 5% of all farmers submitting a claim for the SPS in any one year be subjected to a spot-check.

The nature of cross-compliance means that a number of agencies (in addition to the paying agency) are involved in inspections, e.g. animal tagging is policed partly by Trading Standards which is required to report any breaches to the

paying agency. Such inspections, although generally announced can give up to 48 hours notice.

Administrative checks centre on an over-declaration of eligible land. If there is an intentional (i.e. deliberate) over-declaration (however small) then no aid is payable and if the intentional over-declaration is over 20% no aid for two years.

Breaches are categorised as either negligent or intentional and repeated breaches are dealt with more severely than a one-off. In addition the RPA looks at the effect of the breach, taking into account whether its impact is limited to the farm or not and whether the effect is permanent. The RPA produces matrices on its website showing the penalties for breaches.

Finally, the use of the word "reduction" is deliberate. Many of the possible cross-compliance breaches may be breaches of statutory requirements. Therefore it is possible that a breach may not only result in a reduction of the SPS but a "penalty" imposed by the courts for the breach of the law.

Taxing times

Rural land owners have traditionally had the protection of Agricultural Property Relief (APR) and Business Property Relief (BPR) against Inheritance Tax (IHT) on their land and businesses. Of these, APR has often been the most valuable relief but, in recent years, HM Revenue & Customs has tried to restrict its scope. It is limited to agricultural value only and not home, amenity or development value. In many ways BPR has proved to be a better tax saving vehicle than APR.



Charles McKenzie explains just why now is the ideal time to plan to protect your assets.

Given HMRC's tougher attitude towards APR and BPR, even if plans have been made in the past, they will need updating. If no planning has ever been undertaken then the need is urgent – with

IHT at 40% the family farm could be at risk. Under the rules, for a business to qualify for BPR, HMRC needs evidence that the farm, or rural business, is run as a business and that the owners are fully involved. Therefore, in the event of a farmer reducing his active involvement in the farming business but remaining a partner, records will have to be kept and the business structure reviewed to ensure BPR is protected. A succession plan should be agreed to ensure the business and land can pass to the next generation in a tax efficient manner.

HMRC are taking a close look at tenancies, share farming and contract farming agreements which not only must be carefully drafted to protect BPR and APR but also mirror the reality of the agreement.

Planning is another issue to consider with local authorities having to find development land to satisfy housing targets and housebuilders beginning to look for new sites. For those land owners with land that could be zoned for development, it is vital that any tenancy or

agreement is carefully prepared to ensure that BPR is preserved.

In summary:

- Review existing tenancies/ share farming and contracting agreements.
- There must be evidence that business owners take an active role
- For those with development land, look at transferring the land to the next generation and crystallize low property values and minimize any Capital Gains Tax liability.
- Keep your tax and estate planning under review to make sure it remains tax efficient.
- For those with diversification projects, review the business regularly to protect BPR.
- Review your will or make one if you have not already done so.

Now is the ideal time to carry out planning with land and assets to minimize tax liabilities for the next generation.

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Paul Rice talking to school children at the Festival of the Harvest, organised by the Warwickshire Hub. Over 500 children attended the event to find out more about food and farming

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