

Briefing
Summer 2011
Clarke Willmott
Agricultural Law



*Ganging Up: Lessons for the farming industry

The ongoing prosecution of 19 dairy farming businesses for breach of the gangmaster's licensing legislation sent shock waves across the country. As solicitors acting for most of the farmers, we consider the lessons so far.

The Gangmasters Licensing Authority (GLA) was created after the death of Chinese cockle pickers in Morecombe Bay. Although it started its work in 2006, very few farmers understood the extent to which the GLA regulates the supply of labour to agricultural businesses. The common understanding was that it applied only if a farmer was being supplied with a gang of labourers eg foreign workers to assist with harvesting.

The GLA has until recently been a modest enforcement authority in terms of prosecutions. In the last few weeks it has become more visible with a press report covering the illegal supply of migrants to farms in Kent. The Daily Mail also published a piece suggesting that publicity for the GLA was more important than outcomes. This related to their self-proclaimed "busting" of a group, employing child slaves to pick spring onions. It appears that the children (taken into social services care) were in the field with their parents and that there was no evidence of child labour. No explanation was provided to the Daily Mail as to why the GLA continued to promote a story, which was untrue.

How does the law work?

The starting point is that any supply of labour must be made by a licensed Gangmaster. That applies whether it is a single British worker or the supply of a coach load of Bulgarian fruit pickers. If a farmer takes workers from an unlicensed Gangmaster, he commits a criminal offence punishable by a fine or imprisonment, unless he can show that he had made reasonable checks before doing so.

Although the word "Gangmaster" carries overtones of forced labour and exploitation, it should be appreciated that any employment agency in this industry will need a gangmaster's licence.

There are exclusions:

- supplies of labour between those engaged in share farming,
- short term loans of labour between farms,
- the supply of family members from farm to farm.

In the context of dairy farmers, the supply of a qualified herdsman will be exempt, but only if the farmer then employs him.

The fact that individual workers supplied by agencies are highly paid and highly qualified will not, of itself, mean that the supplier does not need a gangmaster's licence.

What should farmers do?

Farmers considering taking on a worker or workers from an agency should first check whether the supply of labour falls within the exclusions, in which case a licence is not required. If in doubt then proper legal advice should be obtained, to ensure that the correct determination is made.

If the supply is excluded for one of the reasons set down in the Gangmasters Licensing (Exclusions) Regulations 2010 (eg. because the farmer is involved in a share farming arrangement), then confirmation of that exclusion should be included within the relevant documentation (in this case the share farming agreement).

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Welcome

to the Summer edition of our
Agricultural Law Briefing

The last few months have brought a reasonably buoyant time for most sectors of the farming industry, although of course soaring prices for wheat farmers can cause real pain in the livestock sector.



With the publishing of the Macdonald report we have, at last, seen positive movement on the cutting of red tape. Even after a year, however, this coalition still feels like a government getting to grip with things rather than implementing change – a badger cull decision yet to be made, an RPA still being sorted out, the list goes on.

The savage budget cuts are prompting a more pragmatic and cost efficient approach towards many issues - it is astonishing how many fewer announcements are being made by Defra and other agencies, compared with two years ago. The cuts are, however, also making the remaining agencies concerned to justify their existence. This in turn is sometimes encouraging an overzealous approach towards enforcement (see the Gangmaster's article on page 1-2), which is precisely what the government has promised to end.

Let's hope that there will be some real changes by the Autumn edition of Fieldtalk.

We hope you enjoy this edition. As ever, please do contact us for a no-obligation discussion if you need further advice.

Tim Russ

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If the supply of labour does not fall within the exclusions, then the farmer must carry out essential checks:

- check the agency has a gangmaster's licence (on the GLA website) and obtain a copy of the register entry
- ensure person at the agency who is supplying the labour is actually registered with the GLA and has authority to act on behalf of the agency. – see GLA website for more details
- check evidence of the identity of the supplier (driving licence, passport etc)
- check the GLA's register every 3 months.

Farmers should not rely on warranties and protection clauses given by the agency in any contract, because these will not prevent the farmer from being prosecuted under the Gangmasters (Licensing) Act 2004.

Penalties for breaches

A farmer convicted of a breach of the gangmaster's legislation risks suffering a fine or even imprisonment under the Proceeds of Crime Act 2002 (POCA). This Act was originally envisaged as a method to deal with the ill-gotten gains of drug dealers, counterfeiters etc. These provisions are now being applied in routine matters and they are tough.

The proceeds of crime means all of the proceeds received from an activity, which is found to be unlawful, not just the profit – thus all the proceeds from a farming business could be in jeopardy.

The GLA may also seek to recover (for the State not for the workers concerned) the difference between the sums that have been paid by farmers for agency staff and the sums that the GLA consider should have been paid.

This sum could be substantial. In one case a Chinese restaurant was found to have 5 illegal workers. The original POCA application was for all of the turnover of the business, whilst it was using illegal labour. After legal argument, this was reduced to 25% of the turnover, being the proportion of the workforce which was illegal. This was still a very substantial payment.



Critical to the whole process is the way in which matters are handled right from the start. The wrong comment by the farmer during an official visit or a failure to consider at the start, potential applications for confiscation can alter the final outcome. As soon as any suggestion of irregularity is made, even if it appears routine, advice should be obtained to ensure the best possible outcome.

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*Introducing 'Next Generation' Networking

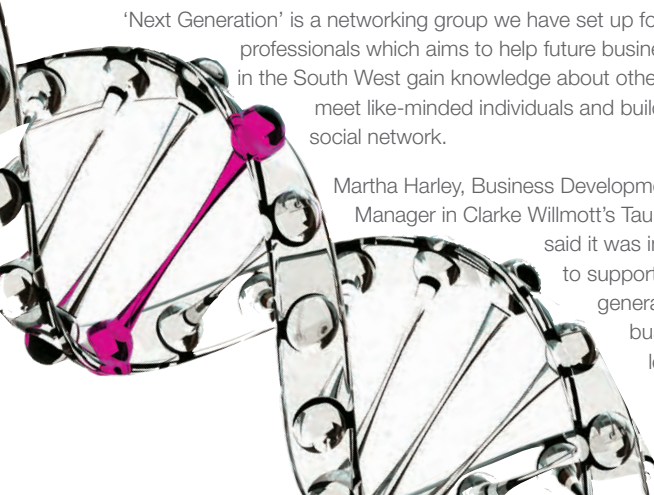
'Next Generation' is a networking group we have set up for professionals which aims to help future business leaders in the South West gain knowledge about other industries, meet like-minded individuals and build a strong social network.

Martha Harley, Business Development Manager in Clarke Willmott's Taunton office, said it was important to support the next generation of business leaders.

She said, "These events are all about getting up and coming professionals linked up to make great business connections. In a few years' time these will be the individuals responsible for the economic health of the region, so we need to nurture them now".

Daniel Eames, Partner in the Family team, said, "With many businesses in more rural areas having moved onto business parks it is harder to network easily and effectively. We have set this group up for the benefit of professionals who want to improve and maintain their regional connections. Furthermore, we will aim to hold events that are always unusual, useful and fun and would encourage companies to come on board."

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*Tax: Farmhouse tax victory for farmers

The recent decision by the Tax Tribunal in the case of *Golding v HMRC* concerned the availability of tax relief on a farmer's home and was a startling victory for the taxpayer.

If the decision stands it will dramatically restrict the scope for HMRC to apply tax to farmhouses and farm cottages.

Mr Golding lived at Blue Gates Farm for over 60 years until his death in 2007. The farm comprised 16 acres of land, a limited range of old farm buildings and Blue Gates Farmhouse.

Mr Golding's executors claimed inheritance tax relief on the land, the buildings and the house. HMRC refused tax relief on the house.

By way of background, tax relief is available on a farmhouse that is of a character appropriate to the land that is farmed from it. Broadly, this means that the house should be in keeping with the surrounding farmland.

HMRC's contention was that the house was not proportionate to only 16 acres of land; though humble, the house was simply too big by reference to the land that was farmed from it.

In the last years of his life Mr Golding's agricultural activities on the land dwindled to the direct sales of eggs from 70 free range hens. In 2007 these egg sales produced just over £1,000 of taxable profit. In HMRC's view there was also insufficient agricultural activity to justify a claim for tax relief on Blue Gates Farmhouse.

The Tribunal disagreed and awarded relief on the house.

The Tribunal was not swayed against the taxpayer as a result of the low level of farm income or the relatively low level of farming activity, commenting of the former that "we do not accept that lack of a substantial profit is detrimental to a decision that the farmhouse is character appropriate", and of the latter that "at 80 years of age it would be unreasonable to expect there to be extensive activity". This is perhaps a commonsense analysis, but it is one that HMRC has until now been very reluctant to accept.



This approach from the Tribunal holds the promise of tax relief on farmhouses that are owned by farmers who, like Mr Golding, have reduced their agricultural activity as they grow older, but have not retired from farming. It does not, however, open the floodgates. The inevitable caveat is that every case must be looked at carefully and on its own facts.

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*Wills: Charity legacies to appeal?

The Chancellor announced a tax concession in the budget for those leaving gifts to charity.

Under this concession the Inheritance Tax (IHT) Rate will fall from 40% to 36%, if 10% of a net estate after deducting reliefs and nil rate bands, is left to charity. This is likely to be of great interest to those who might otherwise have concentrated in providing for their families.

A consultation is underway and is addressing tricky questions such as how trust funds might be affected and also how to treat lifetime gifts.

How does it work?

In simple terms, a couple with a taxable estate of £1,150,000, would normally pay £200k IHT, leaving £950,000 for the family. Under the new rules, likely to apply to deaths after 06/04/2012, the couple

could leave £50,000 to charity, pay £162,000 IHT which would leave £938,000 to the family. The net result is that a £50,000 gift to charity is funded as to £38,000 by the taxman and only £12,000 by the family.

Wills are already being drafted to take advantage of the relief, if it applies at the time. This is potentially very big news as the "big society" gathers momentum.

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*Sporting Rights: The prospect of multiple landlords

The lease of sporting rights to shoot, hunt and fish have proved to be a valuable source of income to many landed estates across the country.

Individuals or sporting syndicates, who take sporting leases, often invest capital in the enterprise, establishing equipment, such as pheasant pens and shelters etc. Consequently they often expect to renew the lease repeatedly.

If the original land owner, who granted the lease (lessor), remains the same throughout, then a good lessee is likely to be able to negotiate a renewal of the lease at the end of the term.

Problems can arise, however, when the lessor dies or if he decides to sell the land, over which the sporting rights have been granted.

If the land is divided up then the lessee will find himself potentially with numerous different landlords. At the end of the lease it could be unlikely that all those landlords would wish to renew the lease, which could leave the lessee with critical gaps in the area available. Furthermore, for those landowners prepared to renew the lease, the lessee would have to negotiate terms separately with each landlord.

In some circumstances the prospect of multiple landlords can be avoided if the original lessor, reserves the sporting rights for the benefit of his retained land, whenever he sells off part of his estate. The land registry will then note the sporting lease against the titles of the land sold off.

So long as the original lessor keeps his retained land, then a renewal of the sporting lease should be possible, if agreed between the parties. Once again, however, when the lessor dies, his retained land, with the benefit of the reservation could be divided up, thus creating the same potential problems.

When negotiating the grant of a sporting lease, landowners and sporting syndicates alike need to consider carefully how to structure the deal and obtain proper advice to ensure they do not face unexpected difficulties further down the line.



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*Court of Appeal: Thorne v Courtier

Clarke Willmott has won an important victory in the Court of Appeal in a case considering when a court should intervene in an expert determination and how damages for trespass should be assessed.

An original dispute between the parties relating to an agricultural tenancy was settled and the terms of that compromise were put into a written agreement. A further dispute then arose over the precise meaning of agreement and the role of an expert witness valuer in identifying what settlement amount might be payable. The difference between the two parties was very substantial.

We sought the Court's ruling on this point and won at trial. Our opponents then appealed that decision to the Court of Appeal.

The Court of Appeal found that if the parties have agreed a particular way of resolving their disputes, then they should be held to that bargain and the expert should be allowed to get on with his task. The Court retains a jurisdiction, however, to decide what it is that the parties have asked the expert to determine.

Although it would be an exceptional use of that jurisdiction to interfere before the expert had undertaken his task, it was the sensible course in this case, as the difference between the interpretations was dramatic. Whatever the expert determined, it was likely in any event that the Court would then be asked to intervene, so the Court took a sensible approach.

The Court of Appeal then agreed with the Judge at the first trial, confirming our win.

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*Striking the Balance: Outcome versus process for a badger cull

Richard Macdonald's recent report, 'Striking a Balance,' highlights the choice facing Government between a focus on process or outcome.

A central theme is the concept of earned recognition; ie identifying good farming practice and trusting businesses that have proved they can maintain appropriate standards. Clear evidence of regulatory compliance (e.g. membership of farming accreditation schemes), should allow businesses to avoid multiple government inspections.

This is in stark contrast to the regulatory approach of the past two decades, which has encouraged armies of 'inspectors' to micromanage agriculture and then report back to the general public that farmers remain an untrustworthy group, who require the firm hand of the State to keep them on the straight and narrow. Earned recognition is a radical, pragmatic and potentially hugely cost efficient approach.

It is fascinating to note that the report's balanced approach includes a radical position in the welcome given to the Government's commitment to reviewing welfare legislation, including the Protection of Badgers Act.

The big challenge for the coalition in dealing with badgers and bovine TB remains the battle between scientific and political realities. Defra's current proposal is to license organised groups of farmers to cage, trap and shoot badgers. The culls that are licensed will be expensive due to the methods prescribed.

Defra is concerned that some licensed farmers may drop out before the cull is completed, due to the cost. Defra may well therefore require payment up front to ensure that the job is done. Farmers are rightly concerned that this is a very expensive way of solving a relatively simple problem that has devastating effects on animal welfare.



If, as a result of these proposals, farmers reject the opportunity to apply for licenses, the chance of a cull may be missed. If the coalition does not provide for the proper management of badger populations, this may do irreparable harm to the livestock industry. It will be very interesting to see how this particular balance is to be struck.

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*Recovery of Debt: Warrants of execution

In the last of the series of articles on Recovery of Debt, we consider warrants of execution.

We started this series in Spring 2010 with distress for rent – a process which involves a bailiff entering onto someone's property to seize assets and either hold them as security against payment of rent, or sell them to pay the debt. In this last article we have come full circle, with warrants of execution, which entail a similar process.

Unlike distress, which is a private remedy only open to landlords, a warrant of execution is a method of judicial enforcement and is only carried out by a County Court bailiff or High Court sheriff (in the High Court it has a different name).

It is particularly suitable for cases where first, the amount owing is not that high (particularly less than £30,000) and secondly, there are assets available which, when sold, would satisfy the debt and bailiff's fees.

A warrant of execution is available where judgment for a debt has been obtained, but the debt has not been paid by the Court deadline. The creditor can then apply to the Court for a warrant of execution. The Court will issue the warrant to the County Court Bailiff or High Court Sheriff, who will then make an appointment to visit the debtor and seize any goods he can find on the premises.

If suitable assets are available, a warrant of execution is quick and direct. Its use delivers a shock to a debtor and can result in a prompt settlement.

It is not a universal tool, however – arguments about ownership of goods can quickly arise, if the debtor claims that valuable items actually belong to a third party or have been bought on hire purchase.

That aside, in the right case, a warrant of execution can result in the judgment being paid fully and promptly.

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*Septic Tank and Private Drainage: Get permit or risk £20,000 fine!

Property owners with a septic tank or private sewerage system must obtain a permit by the end of 2011 or risk a £20,000 fine.



New regulations now require all discharges from septic tanks and private sewerage systems either to be authorised by an Environment Agency (EA) permit or to be registered as an exempt discharge.

The first step is to identify the type of sewage system. If it is a sealed cesspool then no permit or registration is required.

If it is a septic tank or private sewage treatment plant, then depending on the level of daily discharge, a permit or exempt registration is needed.

Septic Tanks

If a septic tank discharges directly to surface water, a permit will most probably be needed. The EA will also probably demand an upgrade to a treatment plant (usually within 12 months). In a very few low level discharge cases, exemptions may apply, where the EA is satisfied that the discharge will have no detectable impact on the environment.

Private Sewage Works

If there is a private sewage treatment plant the effluent is much cleaner. An exemption is therefore available, which normally allows effluent of less than 5 cubic metres daily to be discharged to surface waters, (rivers or streams etc).

Exemptions

If an owner thinks the discharge is exempt, it must be registered with the EA. Thereafter to maintain that exempt status the owner must continue to keep to the registration conditions (including proper inspections, maintenance, regular removal of excess sludge and maintenance/repair records).

Permits

If a permit is needed then the owner must determine whether a standard permit suffices or whether a more expensive bespoke permit is needed. There are also specific types of permits for the disposal of hazardous substances (eg sheep dip) and non hazardous pollutants (eg nitrates).

Change of Occupier

If the Property is sold any permit will need to be transferred to the new owner. Specific conditions and procedures must be followed (see the EA website).

If the discharge is exempt, full details of the exemption, conditions and maintenance records should be passed on to the new occupant.

The new regulations have created numerous new issues to consider when buying or selling property. Sellers need to prepare all the paperwork and ensure their sewage system is satisfactory and registered. Buyers need to ask the right questions, verify the paperwork and obtain contractual protection with appropriate warranties.

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