



Share-farming agreements

The court has provided little comfort for the National Trust after DEFRA told the nation's largest farmer that it is not a farmer.

Given that the most publicly recognised arm of the National Trust's operation consists of its country houses, parkland and open spaces, it is easy to forget that the trust has a substantial sideline in farming, with over 250,000 hectares (just under 1,000 square miles) of land and 2,000 tenants in occupation.

Managing these tenancies has become far simpler from a landowners' point of view since the introduction of the Agricultural Tenancies Act 1995 and with it the advent of the Farm Business Tenancy. The new regime has dispensed with a lot of the security of tenure which tenant farmers had previously enjoyed under the Agricultural Holdings Act 1986, notably the tenant's right to pass his tenancy on to two successors before the landlord could regain possession. Before the 1995 Act a 'workaround' was often used in which landowners could have their land farmed by somebody else and yet avoid most of the ties of a 1986 Act agricultural tenancy: the share-farming agreement. This avoided the relationship of landlord and tenant, cut out the risk of a conventional partnership, and to some extent sidestepped any difficulties of a principal/agent setup. It also gave an individual landowner (although not the National Trust) certain tax advantages.

Put simply, a share-farming enterprise involves the landowner providing the land, buildings and fixed equipment at his own expense, and the farmer providing his labour, expertise and machinery. Income and outgoings are divided up in a pre-agreed ratio. It should be emphasised that share-farming agreements are becoming rarer. This is in part because of the alternative of contract farming agreements, and partly because agricultural tenancies are now less onerous on the landlord; although there remain circumstances in which such an agreement may well prove to be expedient for a client.

It was the terms of such an agreement which were examined by the High Court in *National Trust for places of Historic Interest v Birden* (2009). Hardwick Park Farm (part of the Hardwick Hall Estate) in Derbyshire has belonged to the National Trust since 1959, and was farmed by Mr Birden from 1994 until 2004, when he left to take up a Farm Business Tenancy elsewhere.

Introduced in 2005, single farm payments (SFP) took into account the payments that the farmer had received in the years 2000, 2001 and 2002 – known as the "historic payment element". Since Birden had held the majority stake in the share-farming agreement under approximately a 60/40 split and because ostensibly MAAF (DEFRA's predecessor in the 1990s) did not recognise share-farming agreements, MAAF refused to view the trust as a farmer at all. As such, Birden ended up claiming all the entitlements for the farm, and paying the trust's share into a joint bank account held for that purpose.

briefing continued

Following Birden's departure in 2004, the trust ran into difficulties with its SFP. Birden was farming his new holding with subsidies based on the amount which he was paid while at Hardwick; meanwhile the trust found itself only able to claim basic SFPs because DEFRA would not acknowledge that the trust had any claim on the historic payment element relating to its farm.

The trust's loss was stated to be just over £37,000, for which it sued Birden, citing a number of grounds:

1. That the clause preventing Birden from claiming benefits under the predecessor to the SFP scheme beyond the end of the share-farming agreement prevented him from claiming any sort of connected benefit for his new tenancy. Therefore, he should account to the trust for the fact that he had used his occupation of Hardwick Park Farm to derive "future benefit" and indemnify them for their loss by paying them 32 per cent of the sums which he stood to receive up to the end of 2012 as a result of this.
2. That it was an implied term of the agreement that any benefits claimed under the new SFP scheme would come within the ambit of the agreement and should be divided accordingly.
3. That in claiming the benefits such as those in place while he farmed at Hardwick Farm, Birden was acting as agent for the trust because he had to claim the trust's share on his claim form as a result of MAAF's failure to recognise it as a farmer.

Contradictions

In dealing with the trust's claims, HHJ Toulmin gave some weight to the fact that the trust had drafted the agreement to prevent Birden from acquiring any tenant's rights. One key aspect was that the agreement (by an 'entire agreement' clause) outlawed any variation to it without the written agreement of the parties. Therefore, to try and imply a variation to it which included a right for the trust to claim a share of Birden's benefit under the SFP scheme payable in respect of his new farm runs contrary to such a provision.

Secondly, it was found that Birden's obligation to share the "production grants or subsidies" was only a live one during the existence and process of termination of the agreement, not an ongoing one as the trust contended. As a result, any claim of "common intention", or that Birden was holding these benefits on constructive trust was rejected. The purpose of the transfer of entitlements clause was to ensure that Birden transferred his entitlements to the trust when he ceased farming; that DEFRA stood in his and the trust's way was not Birden's fault.

Addressing the trust's implication that the SFP was just as applicable to the agreement as the previous quota system was "so obvious that it goes without saying", HHJ Toulmin held that such an implication was incorrect. He asserted that if this were the intention of the parties, then surely the agreement would have been re-negotiated at some point before its term date. Further, he did not find that the implication of such a term was necessary to lend "business efficacy" to the agreement, as the trust had contended.

In terms of agency, the judge again referred the trust back to the drafting of the agreement, which stated expressly that it was not to import a relationship of agency between the parties. Therefore, Birden was only claiming on his own behalf, because, in spite of the trust's entitlements being paid under his claim, he was accounting to it for the benefit received in the accordance with the agreed percentage split.

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A purposive approach

The courts are increasingly going for a purposive approach to their reading of contracts. Therefore, to rely on a sub-clause in isolation is likely to result in a judicial reading of that sub-clause within the framework of the whole clause. There is a strong implication that the trust had burdened Birden with the share-farming agreement in order to curtail his rights under the 1986 Act. To try to vary that very strict wording to suit the trust does not, therefore, sit comfortably with the old maxim that “those seeking equity must do equity”.

Finally, while the old quota scheme may be history and share-farming agreements now rare, the thorny issue of future benefits remains with us and solicitors should exercise great care when drafting agricultural farming or tenancy agreements to ensure that their landowning clients do not fall foul of any future subsidy schemes. In truth, it may not be possible to draft something so wide as to be sure to catch the benefit of some future scheme not yet even stirring in the legislators’ collective imagination.

Protection: subsidies and entitlements

Do

- o Make sure that all possibilities are covered when dealing with subsidies and entitlements.
- o If you are acting for the farmer/tenant, ensure that the agreement does not extend his obligations beyond those directly relating to the land in question.

Don't

- o Expect a court to be sympathetic when the purpose of an agreement is to deny the tenant rights and benefits.
- o Assume that any new entitlements system will account for every possibility!
- o Warn the landowner that if he wants to be certain of owning future subsidies, the only way to be 100 per cent sure is to farm in hand.



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