

Agricultural Write News

Offering clear, pragmatic legal advice to the rural
business community

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SPS Entitlements and your Lease?

Following the somewhat shambolic approach of the Rural Payments Agency in connection with submission of this year's SPS entitlements, we thought now would be a useful time to take a look at the SPS structure generally and to highlight the importance of considering SPS transfer entitlements in your tenancy arrangements.

Background to the Single Payment Scheme ("SPS")

The Single Payment Scheme came into force (following EU legislation) in 2005. It replaced the existing crop and livestock schemes (then available under the Common Agricultural Policy). The introduction of the SPS was intended to decouple EU grants from the historic link to production and instead to link such entitlements to other factors such as changing market demands and environmental considerations.

Each part of the UK has different SPS arrangements, however, in England, the SPS is run by the Rural Payments Agency.

To be eligible for single payment scheme payments, you must:

- be a farmer;
- have eligible land at your disposal on 15 May in each scheme year (this land must be eligible for SPS for the entire calendar year). "Eligible land" is defined as any area of your holding taken up by arable land and permanent pasture (except for forested areas or areas used for non-agricultural activities).

- hold payment entitlements on 15 May (although applications can be varied up to 31 May in some circumstances). As SPS payments are based on payment entitlements, you must have a hectare of eligible land for each entitlement that a claim is made on. Agricultural production on entitlement land is not necessary, however, you do need to comply with the cross-compliance standards;
- be able to match the entitlements to a corresponding area of eligible land.

Transfer of SPS entitlement

Payment entitlements may be transferred by sale or by any other transfer (not necessarily a land transfer). In a lease situation, however, transfer of SPS entitlements is only allowed if the entitlement transfer is accompanied by a transfer of the equivalent number of eligible hectares.

SPS entitlements and leases

It is important (whether you are a landlord or a tenant), particularly in the context of leases, to consider how best to deal with the transfer of SPS entitlements to tenants and what happens to these at the end of the tenancy. A recent case before the European Court of Justice has brought this into sharp focus with the decision that, where a tenancy agreement contains no provision in relation to SPS entitlements at the end of the tenancy, the tenant is not automatically obliged to transfer those entitlements back to his landlord.

No automatic landlord entitlement – the facts

The case was brought before the European Court of Justice in January of this year. It concerned a tenant who had leased land in the Netherlands.

Following the introduction of the SPS in 2005, the tenant was allocated payment entitlements for the leased land.



The tenant's lease, however, contained no provisions dealing with the transfer of any support or entitlement schemes.

There then followed a disagreement between the landlord and tenant with regard to whether or not the tenant was obliged to transfer its SPS entitlements back to the landlord on the expiry of its lease. At first instance, the relevant District Court ruled that the tenant was obliged to transfer the payment entitlements back to the landlord on expiry of the lease (but was entitled to receive compensation up to half the value of the entitlements in return). The Court also ruled, at the first instance, that the tenant was unable to transfer the payment entitlements without the express approval of the landlord.

The tenant appealed and argued that, unlike entitlements such as milk quota, the SPS entitlements were not linked to the land, but to the farmer himself. The matter was referred to the European Court of Justice for clarification.

The ECJ felt that the SPS regulations were vague regarding transfer of payment entitlements to the landlord on expiry of a lease; however, the Court held that the objectives of the regulations were that SPS payment entitlements should belong to the tenant and remain with the tenant on the expiry of the lease.

It is vital therefore to address the issue of SPS entitlements in the lease and to ensure that the lease contains adequate provision for the return of these at lease expiry.

Although entitlements can be separately transferred (i.e. outside of the lease), it is often better practice to specifically deal with these in the body of the document itself to prevent any ambiguity arising as to SPS entitlements at the expiry of the lease term.

In addition, another important consideration is ensuring that the tenancy arrangement obliges the SPS claimant to be responsible for ensuring that cross-compliance rules are respected on the holding for the full scheme year. Those claiming SPS entitlements will also want to ensure that there is necessary provision in the tenancy agreement obliging either the landlord or the tenant to comply with all necessary cross-compliance rules (to ensure that they are not held liable under the agreement for actions or omissions in which they played no part).

Conclusion – be clear in your lease

It is important for both landlords and tenants to deal specifically with SPS entitlements in their lease and, in particular, to deal with entitlement to SPS payments at the end of the lease, by setting out the procedure clearly in the lease itself. In the case of 'old' leases (which may not contain any reference to the entitlements), then landlords and tenants need to negotiate with one another to clarify the position. Both landlords and tenants need to get their leases in order regarding SPS entitlements as, should they fail to do so, it is clear that SPS entitlements do not automatically revert to the landlord at the expiry of the lease.

Fighting for the farm - Inheritance disputes and contested Wills?

The estates of deceased farmers are proving to be fertile ground for disputes relating to Wills. Focussing on a recent case this article looks at one of the ways a Will can be challenged.

The case of *Key v Key* has reviewed the test used to decide whether someone has capacity to make a Will. Mr Key had farmed his land in partnership with his two sons and made a Will in 2001 leaving his estate to be divided between them if his wife had died before him. He made no provision for his daughters.

In 2006 Mr Key and his sons dissolved their partnership so that the sons each had a separate farm. Mr Key was left with the farmhouse, cash and a smaller amount of land. Mr Key's wife died in 2006 and a few days later, with assistance from his daughters, Mr Key saw a Solicitor to change his will and divide his estate between them, cutting his sons out.

When Mr Key died in 2008, aged 90, his sons challenged the Will on the basis that Mr Key did not have testamentary capacity at the time he made the new Will.

Mr & Mrs Key had been married for 65 years and the Court ruled that because the effects of bereavement can be almost identical to the symptoms of severe depression it affected Mr Key so heavily that he did not have testamentary capacity when the new Will was made.

What is testamentary capacity?

The 1870 case of *Banks v Goodfellow* established the test for capacity when making Wills. Essentially, the person making the Will must understand the nature of the act and its effects, the extent of the property being disposed of, any claims that may be made against their estate; and must not have a disorder of the mind which influences or distorts their actions.

Bereavement is not the only condition that can affect capacity to make a Will. Illnesses or other conditions may affect your testamentary capacity. Another recent case occurred when a farmer's children challenged her Will as she had not treated them equally. The lady suffered from delusions and mistakenly believed that her children had done little or nothing to help her after the death of her husband.

If a person's capacity is in doubt a medical opinion should be sought. If the Will is challenged at a later date the medical opinion provides evidence from the time the Will was made and may help avoid a dispute, or settle it more rapidly.

What can be done to prevent a challenge?

You should review your Will regularly and consider whether anyone is likely to claim against your estate. If you do not make provision for someone who is financially dependent on you, they may claim against your estate under the *Inheritance Provision for Family and Dependents Act 1975* or challenge the validity of your Will. Anyone who thinks they should have been included in a Will, should consider whether the testator had capacity when the Will was made.

Key Points

- Various factors can affect your testamentary capacity
- You should consider whether anyone may challenge your Will or make a claim against your estate
- If you have been cut out of someone's Will consider whether they had capacity at the time it was made.

New “fit notes” to replace sick notes from April 2010.

On 6 April 2010, “fit notes” were introduced to replace the current format for assessing sickness by way of a doctor’s certificate (or sick note). Fit notes will allow doctors to certify whether an employee may be fit for work, for some work or for no work at all. They will also allow doctors to suggest various adaptations which an employer could make to assist the employee’s return to work.

Fit notes will include a list of common changes which could be made to an employee’s role or work environment in order to assist their return to work. Examples include amending their duties, altering their hours, offering a phased return to work or making other workplace adaptations. Doctors will also be able to suggest any other changes in a comments box.

It is hoped that fit notes will provide employers with greater information as to an employee’s condition and ability to do their role. They should also assist the employer in deciding whether an employee is disabled for the purposes of the Disability Discrimination Act. However, there is no option for a doctor to certify that a patient **is** fit for work (only that he/she **may** be fit for work). This is because it was thought that doctors would not have enough information about an employee’s individual role to be able to assess their ability and make that decision. The onus is therefore on the employer to carry out a risk assessment and determine what “may be fit for work” actually means in terms of an employee’s ability to

undertake their usual duties. This is likely to be problematic for employers and could cause contention with employees over exactly what work they are deemed fit to do.

Ultimately, it is for the employer to decide whether any adjustments are appropriate in assisting an employee’s return to work. However, if the changes recommended in fit notes are not adhered to and an employee is later found to have a disability, they could be used as strong evidence that an employer has failed to make reasonable adjustments, giving rise to more claims of disability discrimination.

GPs can specify any period of time for which an employee will not be fit for work and this could even be an indefinite period. However, the maximum duration of a fit note which is issued during the first 6 months of a patient’s health condition will be 3 months (a reduction from the previous 6 month maximum duration of sick notes).

The advice for employers in light of these changes is to be prepared for the new forms and consider how to respond if adaptations are recommended for an employee. The onus will be on the employer to rehabilitate the employee and decide whether the changes are acceptable or whether the employee should not yet be returning to work at all. It may be sensible for employers to review their risk assessment process and to be particularly aware of the risk for potential disability claims.

Further guidance for employers has been produced by the Government on fit notes, including useful case studies. This can be accessed at <http://www.dwp.gov.uk/docs/fitnote-gp-guide.pdf>.

Key Contacts



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