

King's case outcome highlights the need for knowledgeable agents

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The landlord would also agree to comply with Cross-Compliance and maintain the land in a good agricultural and environmental condition (GAEC) throughout the Scheme year from January 1 to December 31.

The RPA accepted Naked Acre letting between 2005 and 2011

Initially the RPA openly acknowledged and accepted these naked acre letting arrangements, but subsequently got cold feet following a case in Europe which raised concerns about whether these arrangements could be considered to be artificial under Article 30 of Council Regulation (EC) No. 73/2009, which states: "Without prejudice to any specific provisions in individual support schemes, no payment shall be made to beneficiaries for whom it is established that they artificially created the conditions required for obtaining such payments with a view to obtaining an advantage contrary to the objectives of that support scheme."

Effectively this created a two test criteria and a claimant would have to fail both in order for them to be in breach of Article 30.

- (1) Is the arrangement artificial?
- (2) Is what is going on contrary to the objectives of the support scheme?

The effects of the RPA's increasing nervousness created more and more complex naked acre letting arrangements, involving longer term FBTs, evidence of practical management decision making arrangements, appropriate invoicing at the end of the contracting arrangements, and appropriate arrangements for dual use, NVZ and Soil Protection reviews.

BPS now accepts the need for flexibility and leasing without land

Thankfully the Basic Payment Scheme in 2015 incorporated the need for more flexibility and introduced leasing without land.

This reduces the risk further for the entitlement owner with an automatic return of the entitlements by the RPA after they have been lent to the landowner with excess land.

However there still remains a risk, however small, that the lessee/claimant does not comply with the 2-year usage rules and the entitlements are confiscated into the National Reserve. For many this is an acceptable risk. Although it dampened demand from lessees in the 2016 season as those leasing in were generally those that did not wish to pay or could not pay to buy entitlements, and therefore were reluctant to pay the leasing fee upfront.

King v DEFRA

The outcome of this recent test case may now revive the use of naked acre letting arrangements as the Court ruled the letting was not contrary to the objectives of the support scheme. The second test under Article 30. The RPA have not appealed the case and this now sets a precedent going forward for the aspects of the law the judge dealt with which can be relied on unless overturned in another case subsequently, or it is found not to apply to the new Basic Payment Scheme.

What does this test case tell us?
The case confirms, under the Single Payment Scheme rules, the following:

1. There remains little or no precedent as to whether naked acre letting was artificial in respect to the first test under Article 30, but confirms naked acre letting did not breach the second test and therefore did not trigger Article 30.
2. Land need only to be at the

disposal of the claimant on the "snapshot" day set, usually the 15th May.

3. In the UK there were no national rules to prevent speculative transfers and the accumulation of payment entitlements without a corresponding agricultural basis.

4. The claimant must be a "farmer" under Article 2, which would only have a minimum requirement of maintaining land in good agricultural and environmental condition under the GAEC rules.

5. GAEC rules and Cross-Compliance rules must apply to the land it is claimed on for the full 12-month season from the 1st January to the 31st December. The claimant need not be responsible for this and can under contract use a third party to ensure this.

6. Temporary control over agricultural land does not prevent it being at a claimant's disposal on the 15th May.

Conclusion

Of course it is satisfying to see Townsend Chartered Surveyors agreements so thoroughly validated as they were in this case, where we were the "national agents" involved in setting up and managing the arrangements between the landowner and the Kings. This on the face of it seems to give a clean bill of health for naked acre letting arrangements going forward.

Whilst years later, this test case illustrates the care needed in handling any entitlement/quota/subsidy scheme arrangements. The case was won by the Kings, with £100,000s at stake. This shows how critical it can be to use agents who "know their stuff".

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In 2005 the Single Payment Scheme rules allowed the permanent transfer of entitlements with or without land, but a lease (temporary transfer) could only be done with land.

UK farmers had become used to the flexibility of leasing quota when needed (as they had with milk quota and other subsidies), and there was immediately demand from those with excess entitlements wanting to either "lend" them to those with eligible land which was not being claimed, or to rent eligible land to include on their own claim so they could activate their surplus entitlements.

There were also farmers/landowners who had unclaimed eligible land ("naked acres") but who did not have the funds available to purchase entitlements, and who often also were resistant to getting involved with the complex paperwork and cross-compliance regulations, and therefore did not wish to complete a SPS claim each year and deal with the RPA.

It was in response to this demand that many land agents set up the "naked acre" or "paper acres" letting arrangements whereby a farmer with surplus entitlements would pay a farmer with naked acres to in effect rent his land for a period around the 15th May, so they could then include this land in their SPS claim.

A Farm Business Tenancy agreement would be drawn up and either just a contract farming arrangement (where no livestock was involved), or also a grazing licence granted back to the landlord. Originally these lettings were only for a matter of days operating on or around the claim date of May 15.