

# Agricultural Brief

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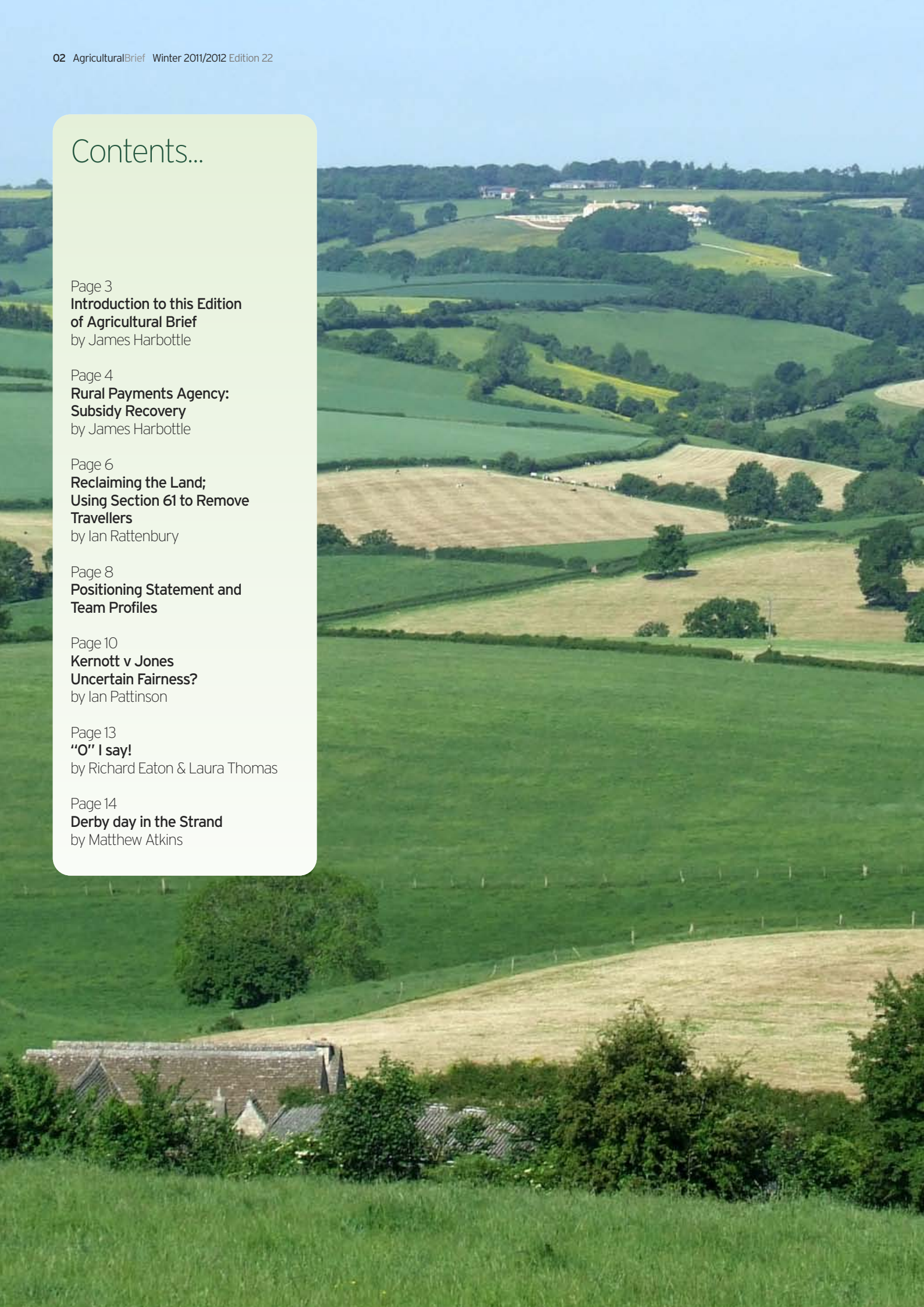
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Introduction by James Harbottle

# Welcome to the latest edition of Agricultural Brief

Welcome to the latest edition of Agricultural Brief which follows on the heels of an engaging debate at the Oxford Farming Conference in January 2012, co-sponsored by Birketts, where European Union influence over UK farming was discussed with healthy doses of both passion and humour. These are qualities which can be severely tested by any land user seeking to deal with the recovery of withheld subsidy from the Rural Payments Agency, a topic considered in more detail in the immediately following article.



**James Harbottle**  
Partner

For further information on this topic, please contact James Harbottle on 01223 326600 or [james-harbottle@birketts.co.uk](mailto:james-harbottle@birketts.co.uk)

My colleague Ian Rattenbury provides some helpful guidance on another issue which can often exasperate rural land owners – where land has been occupied by travellers. Ian considers how a landowner might work with the police to use the often cited Section 61 Criminal Justice and Public Order Act 1994. Ian clarifies this often misunderstood piece of legislation and gives examples of where and how it might be applied should you find your land occupied on this basis.

Birketts Family team are, as ever, working hard to protect the interests of their clients and Ian Pattinson, a Partner in our Cambridge office, comments on property rights which are relevant to any relationship outside a marriage that comes to an end with real estate interests to be divided. The developing attitude of the courts to see fairness triumph over strict legal principles makes sobering reading for those investing in property in these circumstances.

A recent seminar headed by Laura Thomas, Head of our Corporate Criminal Defence Team, provided an overview of recent changes to the "o" licence affecting many landowners who might use vehicles for commercial gain. Together with Richard Eaton she has summarised this presentation in this edition.

Finally and on a lighter note, Matthew Atkins has provided an account of a recent equine case from the world of sport which many will have seen in the news. The intense competition of horse racing is mirrored in many sectors of the economy and the points regarding binding agreements remain salient to all those engaged in commercial contracts.

Birketts will once again have an active presence at the agricultural conferences that populate the early months of the year. Having seen many of our readers in Oxford we look forward to catching up with others at both the Sentry Farming Conference and the Norfolk Farming Conference in the coming weeks.

We hope all our clients and readers enjoy a happy and prosperous 2012.



# Rural Payments Agency: Subsidy Recovery

Article by James Harbottle

**Even if you have not suffered personally at the hands of the Rural Payments Agency, we are confident that you will have at least read about its perceived failings and its approach to the implementation of the Single Payment Scheme (SPS) in England.** As a firm, we have seen an increase in the number of vigorous inspections, resulting in alleged overclaims and the imposition of penalties which seem disproportionate and unjust.



**As a result of this increase in financial penalties for many clients who are participating in the scheme, this advice sets out what to do if you find yourself in the unfortunate position of being involved in a dispute with the RPA.**

## Background

When the SPS was introduced in 2005, each applicant was required to make a number of declarations, including:

1. the total agricultural area comprised in its holdings;
2. the area of eligible land that the applicant would be using to establish entitlements; and
3. the area of eligible land over which payment was claimed for 2005.

Applicants have tended to adopt a practice of repeating the final declaration each year and payments made by the RPA have accordingly been based upon it. This can lead to discrepancies being repeated annually, due to an oversight by applicants who ought to have updated their declarations over the period of the scheme.

In order to check the validity of the applications it receives, the RPA use inspectors to visit claimant property periodically. If on inspection it appears to the inspector that the area determined as eligible is less than that declared, the Single Farm Payment will be calculated on the basis of the area determined. However, penalties may be imposed by the RPA, depending upon the level of difference between the area declared and the area determined. Possible penalties are shown in the table to the right.

In addition to a penalty, interest is added to any repayment sum not paid by the date of notification of the repayment obligation at the rate of 1% above the LIBOR. Due to the recent strains in the international money markets, the LIBOR has recently been fluctuating in the region of 0.5% - 0.75%. However, looking back only to April 2008 the LIBOR was as high as 6%, so this can amount to a significant sum of interest payable.

## Options to appeal the decision of the RPA

If the decision to reduce or penalise your subsidy payment was made according to the letter of the relevant legislation, there are no grounds for appealing the RPA's decision. However, an applicant can require the RPA to check that the correct legal procedure has been applied to your particular circumstances, for example, the RPA may have refused to accept that part of the land over which the SFP has been claimed falls within the definition of 'agricultural activity' being:

"...the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition..."

There are two methods of appealing the RPA decision to take away SFP; an appeal procedure through the RPA itself, or via a judicial review.

### 1. Appeal procedure through the RPA

There is an internal, three stage appeal procedure within the RPA.

#### Initial step

Write to the Customer Service Centre (CSC) setting out the reasons for disagreeing. This is very informal and is often decided in favour of the RPA unless an obvious error has been made.

#### Stage 1

Complete SP6 and send it to the Customer Relations Unit (CRU) within 60 days of receiving the letter from CSC. Again, most Stage 1 appeals are unsuccessful and Stage 2 therefore requires considerable focus in advance of any Stage 1 submissions.

**Stage 2**

Complete form SP7 and send it to CRU with a fee and full particulars of the reasons for the appeal within 60 days of the date of the CRU decision. Unless the CRU amends their decision, they pass the matter to an Independent Appeal Panel (IAP). The IAP have three members and, if required, may allow the appellant to present in person (whether personally or through a legal representative).

The IAP give their recommendation to Ministers in the Department for Environment, Food and Rural Affairs. The Ministers then make the final decision whether to accept or reject the appeal.

If unsuccessful at Stage 2 then the only way of challenging the Ministers' decision would be through the court system, by way of judicial review.

It is worth noting that any costs incurred by the applicant throughout the RPA appeal procedure would not be recoverable from the RPA even if the applicant were successful in appealing their decision. Fortunately, this works both ways and the applicant does not therefore have any third party costs risk if unsuccessful.

**2. Judicial Review**

Judicial review is the procedure by which the courts examine the decisions of public bodies to ensure that they act lawfully and fairly and apply good standards of public administration. Judicial review may be a valuable tool in the context of any dispute with the RPA, so for example if the IAP made a recommendation to the Ministers under the procedure outlined above which was not adopted, it would be

worth considering whether there may be good grounds for a judicial review claim to ensure that the decision is reconsidered.

An application for permission to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.

**Case Strategy**

It is essential that any appeal against the RPA is pleaded in its best and highest form from the outset to show continuity throughout the process. Whilst this means significant investment at Stage 1, in our experience this improves the prospects of success at an early stage. However, if unsuccessful it allows a smooth and quick transition through Stage 2 and, if necessary, judicial review. A proper and thorough preparation of such an appeal is likely to require the involvement of solicitors, leading counsel, experts, land agents and witnesses.

In a recent appeal conducted by the Birketts agricultural team, the RPA had stated that, as the difference between the land declared and the land determined by the RPA as eligible for SFP was more than 20%, no payment would be made at all for the claim that year. However, although the inspection related to one claim year, the RPA sought to further apply the reduction in the eligible area to all scheme years. This would have had devastating financial implications for our client. Our team conducted a thorough review of the claim history and with the help of relevant experts, persuaded the RPA to concede their case entirely. They are currently calculating the sums due to our client by way of restitution.

Further, in view of the penalty system, there will usually be a point at which (usually where the difference between the area declared and the area determined is below 20%) the penalty imposed would be significantly reduced and will not result in the reduction of the year's entitlement in full. This can present an opportunity for negotiation with the RPA if the claimant's case presents some weaknesses, making a wholly successful appeal unlikely.

It is evident that a dispute with the RPA is time consuming and costly but a robust and experienced team in place at the earliest stage can help to maximise the prospects of success. If you have significant sums at stake and wish to consider your appeal options, we would be happy to draw on our existing claims experience to formulate an appeal strategy for you. Please contact James Harbottle in our Cambridge office for further details.



**James Harbottle**  
Partner

For further information on this topic, please contact James Harbottle on 01223 326600 or [james-harbottle@birketts.co.uk](mailto:james-harbottle@birketts.co.uk)

James joined Birketts in 2000. He is a partner and head of our agriculture team. He has been a key individual in growing the team to its current size and standing in the market.

James' particular area of expertise are the acquisition and disposal of substantial farms, estates and equestrian properties for private clients and institutions, advising on wealth succession strategies, including advising non-UK families, particularly those based in the Middle East, and resolving disputes under the Agricultural Holdings Act 1986 and the Single Farm Payment Scheme.

James has been described in Chambers [UK 2009] as "brilliant for agricultural issues," and his "incredibly reassuring manner" is singled out by clients. In the 2012 edition he is credited with "arriving at imaginative solutions to complex problems."



Difference between the area declared and the area determined (within crop groups)	Penalty imposed
less than or equal to 0.1 hectare for the crop group and less than or equal to 20% of the total declared area	None - the area determined shall be set equal to the area declared, unless this is a repeat occurrence.
more than either 3% or 2 hectares, but not more than 20% of the determined area	payment will be further reduced by twice the difference determined
more than 20% of the determined area, but less than 50%	no payment will be made for the whole crop group concerned
more than 50%	no payment will be made for the whole crop group concerned. In addition, the RPA will recover the value of the over claim by setting it off against future payments for a period of up to 3 years. If there is insufficient payment over the next 3 years to cover this payment, the RPA will waive the balance.



# Reclaiming the Land; Using Section 61 to Remove Travellers

Article by Ian Rattenbury

Recent focus in the news relating to the occupation and unlawful development of Dale Farm in Essex and the subsequent eviction of the community of travellers living there will have made many a landowner aware of the risks inherent in owning swathes of open land vulnerable to such occupations. The implications of any such occupation would be serious to both the landowner and the local community and it is therefore important to be aware of your rights and the powers of the police to assist you should you find yourself in this position.



Private landowners are entitled to remove trespassers from land by the use of reasonable force, either via the execution of a possession order or via powers available under common law without obtaining a possession order. Bailiffs are usually required in both scenarios. Of the two, the possession order method is considered to be the more reliable and effective.

Both procedures may take time and matters are made more difficult by the fact that trespassers who cannot be removed by reasonable force are not committing a criminal offence (although failure to comply with an order for possession can be regarded as contempt of court and is punishable by imprisonment, the procedure for committing a person for contempt of court can be complex and take a considerable period of time.)

Under Section 61 of the Criminal Justice and Public Order Act 1994 ("Section 61"), the police have the power to remove trespassers from land. These powers are often overlooked by landowners seeking to regain use and control of their land. It is also true that the police are reluctant to use Section 61 unless there are compelling reasons.

For those considering whether to try to obtain a possession under the court procedure, or exercise their common law right to use reasonable force, it is also worthwhile considering asking the police to use their powers under Section 61 in the right situation.

### What are the police powers pursuant to Section 61 and what offence is created by it?

The police have the power to direct trespassers to leave the land. Any person who fails, within a reasonable time, to comply with a direction to leave the land, or who returns within three months of being directed to leave, commits an offence for which they can be imprisoned for up to three months, or fined up to £2,500, or both.

NB: the term 'land' does not include buildings although it can include agricultural buildings.

### When do the police have the right to use their powers under Section 61?

The powers under Section 61 can be used where:

- (a) two or more persons are trespassing on land and may intend to reside there for any period;
- (b) the occupier of the land has taken reasonable steps to require the trespassers to leave;

- (c) any of the trespassers has caused damage to land or property on the land or used threatening, abusive or insulting words or behaviour to the occupier of the land, a member of their family, an employee or agent; or
- (d) the trespassers have six or more vehicles on the land.

It is a common misunderstanding that the police cannot rely on Section 61 unless there are six or more vehicles on the land. In fact the Section 61 powers may be used if any one of (a) (b) or (c) are satisfied in addition to (d).

### When are the police willing to use their powers under Section 61?

The decision on whether to use the Section 61 powers is an operational decision for the police alone. The types of scenario which should lead the police to seriously consider using this legislation include:

- (a) unacceptable behaviour by unauthorised campers at the encampment; including criminal activity which cannot be controlled by means other than eviction;
- (b) significant disruption to the life of the surrounding community;
- (c) serious breaches of the peace or disorder caused by the encampment.

The approach will vary from force to force, but no force should adopt a policy or presumption which is either for or against Section 61. Although police are not required to carry out a full enquiry into the welfare of the trespassers, they are expected to have regard to humanitarian considerations. For example, it may be decided to use Section 61 to remove certain trespassers regarded as key troublemakers, but to exclude elderly or unwell persons from the direction to leave.



**Ian Rattenbury**  
Legal Executive

For further information on this topic, please contact Ian Rattenbury on 01603 756471 or [ian-rattenbury@birketts.co.uk](mailto:ian-rattenbury@birketts.co.uk)

### Are there any locations that should be generally considered as unacceptable for encampments?

The Department for Communities and Local Government considers that the following are examples of unacceptable encampment locations:

- (a) a site of Special Scientific Interest;
- (b) a school car park or playing fields;
- (c) an urban park;
- (d) car parks;
- (e) industrial estates;
- (f) recreation grounds and public playing fields;
- (g) sites where pollution from vehicles or dumping could damage ground water or water courses;
- (h) derelict areas with toxic waste or other serious ground pollution;
- (i) a village green or other open area within a residential area;
- (k) the verge of a busy road where fast traffic is a danger to children.

Please note that this list is not considered by the DCLG to be exhaustive.

To discuss the issues detailed in this article in any further detail, or to review your current position and vulnerability to encroachment of your land, please contact Ian Rattenbury in our Norwich office.

Ian joined Birketts in September 2011 and is a legal executive in our property litigation team in Norwich.

He specialises in residential landlord and tenant litigation and has broad experience in housing law, providing advice to housing associations, local authorities and private individuals. Ian's main focus includes the preparation of possession and demotion claims, preparation of injunction/anti-social behaviour injunctions, defending disrepair claims, forfeiture proceedings, advice on service charge disputes and providing general housing management and policy advice.

Throughout his career, Ian has spent a number of years within the housing departments of both a District and a City Council and before joining Birketts, worked for a large international law firm. Ian is a Fellow of the Institute of Legal Executives.





# Agriculture & Equine Team

**Our agriculture team provides a comprehensive range of legal services to farmers, landowners and others involved in agribusiness.** Apart from day to day requirements (such as the acquisition, disposal and letting of property of all kinds - including agricultural land) the team recognises that farming is an industry. The firm's farming clients require the same kind of legal advice as those operating in other industries but with due regard for legislation which is of particular relevance to landowners and farmers.

We are frequently complimented on the speed of our response, particularly in the area of land transactions and on how accessible our partners are to clients. We believe this industry sector values the blend of tradition and forward thinking the team offers.

The team continues to guide transactional clients through the implications of CAP reform, both on freehold sales and on tenancy arrangements with acceptable levels of risk involved for the contracting parties. It has designed a variety of legal structures in each case to satisfy clients' requirements and is heavily involved in subsidy/direct payment advice to farmers and landowners generally.

We can advise on many other related areas including public rights of way and access to land, mineral extraction, statutory regulation, planning and listed buildings, subsidies, trusts, dispute resolution and business models.

For clients seeking a comprehensive service, allowing them to enjoy their assets while protected from unnecessary risk, we offer one of the best qualified and largest agricultural and equine teams in the UK market.

Examples of our experience include:

- Farm acquisitions and disposals
- Agricultural tenancies
- Business structures
- Succession issues
- Wills, trust planning, probate matters
- Trust creation, management and dissolution
- Renewables
- Tax advice
- Diversification issues
- Rights of way and access to land
- Planning issues
- Agri-environmental scheme issues

# TeamProfiles:

## Agricultural Unit:

### Fiona Ashworth

Wills, Trusts and Estate Planning  
+44 (0)1245 211221  
fiona-ashworth@birketts.co.uk

### Matthew Atkins

Commercial and Environmental Litigation  
+44 (0)1223 326600  
matthew-atkins@birketts.co.uk

### Simon Blackburn

Agriculture and Equine  
+44 (0)1473 299170  
simon-blackburn@birketts.co.uk

### Charles Boscawen

Equity and Taxation  
+44 (0)1473 406220  
charles-boscawen@birketts.co.uk

### Ginny Colman

Family and Matrimonial  
+44 (0)1603 756431  
ginny-colman@birketts.co.uk

### Chris Coupland

Agriculture and Estate Planning  
+44 (0)1603 756489  
chris-coupland@birketts.co.uk

### Nigel Farthing

Public Rights of Way and Property  
and Trust Disputes  
+44 (0)1473 406255  
nigel-farthing@birketts.co.uk

### Ben Goodfellow

Taxation  
+44 (0)1603 756488  
ben-goodfellow@birketts.co.uk

### Oliver Gravell

Family and Matrimonial  
+44 (0)1473 406372  
oliver-gravell@birketts.co.uk

### James Harbottle

Agricultural Property  
+44 (0)1223 326600  
james-harbottle@birketts.co.uk

### John Hurst

Agriculture and Estate Planning  
+44 (0)1603 756490  
john-hurst@birketts.co.uk

### Stuart Jones

Aggregates  
+44 (0)1603 756501  
stuart-jones@birketts.co.uk

### Paul Matthews

Agricultural Disputes and Mediation  
+44 (0)1603 756403  
paul-matthews@birketts.co.uk

### Laura McCarthy

Agricultural Property  
+44 (0)1245 211315  
laura-mccarthy@birketts.co.uk

### Rachel McKillop

Agriculture and Equine  
and Agricultural Disputes  
+44 (0)1223 326580  
rachel-mckillop@birketts.co.uk

### Jane Mickleburgh

Residential Property  
+44 (0)1603 756517  
jane-mickleburgh@birketts.co.uk

### Matt Newnham

Employment Law  
+44 (0)1603 756412  
matthew-newnham@birketts.co.uk

### Ian Pattinson

Family and Matrimonial  
+44 (0)1223 326768  
ian-pattinson@birketts.co.uk

### Carol Ramsden

Public Rights of Way  
+44 (0)1473 406338  
carol-ramsdend@birketts.co.uk

### Jack Royall

Agricultural Property  
+44 (0)1603 756487  
jack-royall@birketts.co.uk

### Malcolm Savory

Regulatory and Health and Safety Law  
+44 (0)1603 756420  
malcolm-savory@birketts.co.uk

### Neil Sparrow

Agriculture and Estate Planning  
+44 (0)1603 756483  
neil-sparrow@birketts.co.uk

### Caroline Stenner

Estate and Tax Planning  
+44 (0)1223 326621  
caroline-stenner@birketts.co.uk

### Angela Sydenham

Agricultural Law and Public Access  
+44 (0)1473 232300

### Nick Tavener

Agricultural Property  
+44 (0)1473 406343  
nick-tavener@birketts.co.uk

### Laura Thomas

Regulatory and Health and Safety Law  
+44 (0)1473 299173  
laura-thomas@birketts.co.uk

### Melanie Wilson

Family and Matrimonial  
+44 (0)1245 211312  
melanie-wilson@birketts.co.uk

### Rachel Winter

Wills, Trusts and Estate Planning  
+44 (0)1223 326602  
rachel-winter@birketts.co.uk

# Kernott v Jones

## Uncertain Fairness?

**Article** by Ian Pattinson

**In November, the Supreme Court made a landmark ruling in a contentious case,** the result of which may be an increase in Court disputes involving unmarried couples who are property owners, seeking to divide their assets on ending a relationship.



**Before Kernott v Jones was finally decided, the legal position of an unmarried couple disputing their shares in a jointly owned house required them to resolve this in accordance with the shares agreed at the time of purchase. It is a myth that the legal remedies open to cohabitants after relationship breakdown are similar to those available to married couples or civil partners; in fact, the applicable law is completely different.**

Leonard Kernott and Patricia Jones bought 39 Badger Hall Avenue, Thundersley, Essex for £30,000 in 1985. The title deeds of the property specified that they were joint owners in equal shares. Ms Jones alone paid the deposit of £6,000. Mr Kernott's initial contribution was confined to £100 per week towards the mortgage and housekeeping, although he did help to build an extension which increased the value of the property to £44,000. After living in the property with their children for eight years, their relationship broke down and Mr Kernott moved out. For the next thirteen years Ms Jones paid all the mortgage instalments and all other outgoings, receiving no child maintenance. In 2006, Mr Kernott sought to obtain the release of his interest in the property and maintained that this should still be 50% in accordance with the terms of the original purchase.

The Court considered this unduly generous to Mr Kernott and on the basis of Ms Jones' greater financial contributions, awarded her a 90% interest in the property.

Mr Kernott appealed, unsuccessfully at first, to the High Court and then to the Court of Appeal which held that neither the thirteen years during which Mr Kernott had absented himself from the property nor his simultaneous and total failure to contribute to the mortgage carried sufficient evidential weight to override the parties' original intention at the time of purchase that they should own the property on a 50/50 basis.

At the third and final appeal, this time instigated by Ms Jones, the Supreme Court overruled the Court of Appeal, holding that the presumption of 50/50 ownership had been displaced by the formation of a common intention, deduced from the parties' conduct, that their respective shares would change. In short, the original 90/10 decision was reinstated.

There is no doubt that the Supreme Court judgment achieved what most people would think is a fair outcome - perhaps a triumph of common sense over legal rigidity! However attractive this seems, virtual certainty of outcome has now been substituted by the opening of a Pandora's Box where each disputed case will now fall to be decided after a minute dissection of its own facts rather than under established principles where actual legal ownership governs the outcome.

The real solution to these difficult problems is for Parliament to address its continued failure to confer upon the Court proper defined power to redistribute property rights upon the breakdown of a non-marital relationship. Until it does, Kernott -v- Jones is yet another reminder of the importance for cohabitants to define clearly their respective shares in a property upon purchase and crucially, the need to revisit any such agreement as their circumstances change.

It will be a false economy for couples to assume that legal documents showing co-ownership at the time of purchase are sufficient to deal with later disputes. In short, cohabitants should take legal advice on the impact of such relationships as they begin and develop rather than having to address these when emotions are running high and at a time of great unhappiness.

While for Ms Jones the outcome was equitable, the fact that it took four different hearings in four different Courts to resolve this highlights that the law for cohabitants is in a mess and overdue for reform.



**Ian Pattinson**  
Partner

For further information on this topic, please contact Ian Pattinson on 01223 326768 or [ian-pattinson@birketts.co.uk](mailto:ian-pattinson@birketts.co.uk)

Ian joined Birketts in October 2009. He is a partner and heads our family and matrimonial team in Cambridge.

Ian specialises in family law, particularly involving high net worth financial cases. He has over thirty years experience, most notably in cases involving the preservation of business, farming and trust assets. Wherever possible, he conducts his own advocacy in the County Court.

A member of the Cambridgeshire and West Suffolk Resolution committee and a trained Collaborative lawyer, Ian believes in adopting a non-confrontational approach and is regarded as a sympathetic and practical commonsense practitioner by clients and peers alike. Ian is accredited by Resolution as a specialist in Advanced Financial Provision cases as well as Advocacy - Financial Provision.

He has been ranked in 'Band 1' for family law by the legal directory, Chambers [UK] for 2010 and 2011 and is recognised as a leader in his field in Legal 500. He has been described in these publications as someone "who confidently navigates often complex marital finances" and as a "robust practitioner, a trained collaborative lawyer as well as a good litigator".

CV

# “O” I say!

Article by Richard Eaton & Laura Thomas

## Some important changes to the system of operator or "o" licence regulations came into effect on 4th December 2011 (EC Regulation 1071/2009). The main changes are set out later in this article.

Before looking at what is new, it may be useful to remind those engaged in agriculture of the main obligations arising from operating heavy goods vehicles.

An "o" licence must be held when operating vehicles with a plated weight of 3.5 tonnes or more (or if there is no plated weight, an unladen weight of more than 1.525 kg), on the road, in the connection with any trade or business, or for the carriage of goods for hire or reward. No "o" licence is therefore required if you only intend to use a vehicle within your farm i.e. not on the public highway. There is also an exemption for any vehicle licenced as an agricultural machine, including a trailer, being used solely for hauling specified objects.

Many in the agricultural sector may hold a Restricted Licence, which is all that is required when using vehicles on the road, purely in connection with your own farming operation, for example taking livestock to and from a market.

If however you are "pulling" for others, then a Standard Licence is needed. If embarking on international work a Standard International Licence will be obligatory.

The key concession for Restricted Licences is that a Transport Manager is not required. On Standard Licences, a Transport Manager must be in post and must exercise continuous and effective responsibility for the fleet. He or she is also subject to specific professional competence and good reputation obligations. This is an area where some changes have been introduced under the new regulations.

"O" licence holders must also be able to demonstrate that they have readily available a prescribed level of funds per vehicle. This is to ensure that there are sufficient funds at any time to ensure the vehicles are kept in a good roadworthy condition. The new rules contain some amendments to the existing requirements.

Traffic Commissioners oversee the system of "o" licensing. They have the power to "call up" "o" licence holders to public inquiry if they have concerns that the operator is not complying with the obligations imposed upon them. The commissioners' key concerns are to maintain the highest standards of road safety, to maintain fair competition and, increasingly, to ensure that operators comply with environmental standards. For example, if your vehicles are failing MOT's too often, if your vehicle shows serious problems at a VOSA spot check, or if you have been issued with an unduly high number of prohibition notices, then an inquiry may follow at which the commissioner may revoke, or suspend the licence or reduce the number of vehicles that you may operate on it.

Given the potentially catastrophic impact that revocation or suspension may have on a business, it is critical to seek early legal advice and representation for an inquiry. Upon receiving notice of an inquiry, you will find yourself inundated with correspondence from transport "consultants" offering their services to you in connection with the inquiry (having



obtained your details from public records). Whilst there may well be some highly skilled consultants, a point not lost on the commissioners is that qualified solicitors or barristers have the advantage of belonging to a highly regulated professional body and being subject to stringent professional conduct obligations, such as not to mislead a court or tribunal. A commissioner is therefore more likely to accept submissions made on your behalf by a qualified legal professional.

It is important to ensure that all the undertakings and conditions on your licence are being observed. A particularly good way to check this is to sign up to an audit from one of the recognised trade bodies such as the Road Haulage Association. Do also ensure that the licence holder, Transport Manager and all drivers keep up to date with regular training.

It is vital that you do not wait to be called before an inquiry before familiarising yourself with the new rules. These are briefly:

- All operators must be of 'good repute' to be granted and maintain a licence. This has now been extended to include all designated Transport Managers. If convicted of a serious infringement, the Transport Manager's good reputation can be taken away, ultimately meaning they lose their profession and employment.
- A national database register will be created of all operators and Transport Managers

which will eventually cover the whole of the EU. This will include loss of repute and records of any serious infringements even where repute is not lost as it would be disproportionate to do so.

- Where the role of Transport Manager is delivered via an external consultant, the consultant will only be permitted to manage a total of four operator licences and a total of 50 vehicles.
- The operator must be able to provide a core business address. Even if it operates across multiple sites a central address where driver records, documents and tacographs etc will be held must be provided.
- Previously Transport Managers needed to hold either a national or international certificate of professional competence (CPC). The national certificate will now be abolished. For those who currently hold a national CPC it will remain valid, but any new Transport Managers will need to have an international CPC to prove professional competence.
- Transport Managers without a CPC could previously prove professional competence through 'grandfather rights'. This will now be referred to as 'acquired rights' and is only valid if the manager can prove at least ten years continuance management of a transport operation prior to 4 December 2009.
- The EC has tightened up on the proof of 'financial standing' required by operators to demonstrate that, in the event of a problem with the fleet, finance was available to fix it. Operators will now need to show certified accounts or opening bank balances. However UK Traffic Commissioners have recognised this could be difficult for smaller businesses and will consider overdraft and credit facilities etc where appropriate. The good news is that the amount needed for each vehicle will be reduced from January 2012.
- Operators can only be granted a licence if they can prove access to relevant vehicles owned or brought via hire purchase or available through a formal arrangement.
- The small trailer exemption no longer stands which may bring those who previously did not need a licence into the operator licensing system.

The new regulations were detailed in a recent seminar led by Laura Thomas from our Ipswich office. If you would like a copy of the notes from this presentation, please contact Laura. Should you wish to discuss these or any other aspect of operator licensing or haulage regulation, please contact Richard Eaton or Laura Thomas.



**Richard Eaton**  
Partner

For further information on this topic, please contact Richard Eaton on **01473 406291** or [richard-eaton@birketts.co.uk](mailto:richard-eaton@birketts.co.uk)

Richard joined Birketts in 2004. He is a partner in our property litigation team.

Richard has a broad range of experience in property, planning and public law. A litigation specialist, he has extensive advocacy experience having gained his rights of audience for all higher courts in 2002. He is one of only a handful of solicitors to have appeared in the House of Lords.

His property background covers all aspects of real property and landlord and tenant work. To this, Richard brings planning, public and regulatory law experience. Richard has appeared before numerous courts and tribunals, including at planning inquiries, leasehold valuation tribunals, licensing committees, magistrates and the High Court.

Richard is a member of the Property Litigation Association, and was a founder member of the Human Rights Lawyers' Association. Between 2006 and January 2010, Richard sat on the board of Ipswich Hospital NHS Trust as a Non Executive Director.

In Legal 500 [UK 2010] Richard is recommended by clients and impresses "with his empathy, speed of action and good grasp of the law". He is also credited as being "incredibly calm and sensible".

CV



**Laura Thomas**  
Employed Barrister

For further information on this topic, please contact Laura Thomas on **01473 299173** or [laura-thomas@birketts.co.uk](mailto:laura-thomas@birketts.co.uk)

Laura is head of the Corporate Criminal Defence team. She is an employed barrister who joined Birketts in 2007.

Laura joined Birketts from London Chambers and specialises in corporate criminal defence, advising and representing a range of clients, including local authorities and private sector. Her areas of expertise include health and safety, environmental regulation, Trading Standards prosecutions, food law, transport and logistics, road traffic defence, private criminal defence and contentious licensing. She represents clients in the Magistrates and Crown Courts and the Court of Appeal. As well as defence work, Laura is a member of the highly acclaimed Attorney General's Approved List of Prosecutors and as such has valuable prosecution experience.

Laura has particular expertise in health and safety and previously worked at the Health & Safety Executive Solicitor's Office; advising on health and safety prosecutions of national importance. She has further conducted legal training for HSE Inspectors as well as speaking at health and safety seminars within the City of London. In addition, she significantly contributed to the Butterworths' publication 'Health and Safety Law: Enforcement and Practice by Matthews and Ageros'.

CV





# Derby day in the Strand

Article by Matthew Atkins

**In a case more worthy of Dick Francis than a legal text book, the judgment in *Arachi v Fallon* was given by the Court of Appeal at 9am on the day of the running of the 2011 Derby.** It involved three main characters: Vefa Archi, a well known racehorse breeder and owner ("The Claimant"); Kieren Fallon, the well known and extremely successful jockey ("the Defendant") and Native Khan, a horse trained by Ed Dunlop who was fancied to run well in the Derby later that day.





**Matthew Atkins**  
Partner

For further information on this topic, please contact Matthew Atkins on 01473 406211 or [matthew-atkins@birketts.co.uk](mailto:matthew-atkins@birketts.co.uk)

Matthew is a partner in our corporate services department and leads the commercial litigation team in Ipswich. He is a commercial litigator with a special interest in intellectual property law.

Matthew's recent commercial litigation work includes advising in connection with, and claims arising from, the sale/purchase of companies/shares; other advisory work and claims in relation to contracts (principally in the manufacturing and agricultural industries); shareholder disputes; claims arising from professional negligence (involving solicitors, accountants and surveyors); claims in connection with individual and corporate insolvency, including the enforcement of guarantees.

Recent work in the field of intellectual property includes advising in relation to claims in the fields of copyright, design right, trade mark infringement and passing off.

Matthew is a lecturer at the University of Essex, and has taught the copyright and trade mark seminars on the LLM in Information Technology, Media and E-Commerce. He has delivered seminars at UCL's former Adastral Park Postgraduate Campus on the protection of ideas in the electronic environment by knowledge based industries, and on general intellectual property law. In Chambers [UK 2010] he receives high praise for his negotiating skills and in Legal 500 [UK 2010] his team is described as "fair, practical, no nonsense and good value for money", and "calm and quick to understand; a pleasure to deal with".

CV

In five outings before the Derby, Native Khan had won on two occasions when ridden by the Defendant. In April 2011 the Claimant and the Defendant entered into a "Rider Retainer Agreement" ("the Agreement") which provided amongst other things that the Defendant:

**(a) would not ride any other horse if he had been retained to ride Native Khan**

**(b) would ride the Claimant's horses whenever possible when requested to do so**

**(c) would always ride the Claimant's horses in preference to any other horses whenever a conflict of interest or a choice of horses to ride arose**

The Agreement therefore contained a positive covenant to ride Native Khan when requested to do so and a negative covenant not to ride a rival in the same race as Native Khan without consent.

The Agreement also contained what, on the face of it, was a liquidated damages clause providing that in the case of a breach of contract by the Defendant in opting not to ride the Claimant's horses "damages are to be liquidated and assessed at a sum of minimum £30,000 per race not ridden".

The Claimant's evidence (disputed by the Defendant, but accepted by the court at first instance and by the Court of Appeal) was that the Defendant had been requested to ride Native Khan on Derby day. However, on the Monday before the Derby the Defendant sent a text message to the Claimant's daughter (who manages his racing interests) saying that he would not be riding Native Khan but would instead be riding a horse called Recital from Aidan O'Brien's stable.

On the Wednesday before the Derby the Claimant applied for an injunction restraining the Defendant from riding any horse but Native Khan in the Derby. The connections of Recital played no part in the claim, or the hearings that followed.

The principal issue for the judge at first instance was whether, given that it would be a breach of contract for the Defendant to ride a horse other than Native Khan in the Derby, the court should exercise its discretion and grant an injunction? In the event, he refused to grant this. The Claimant's appeal was heard in the Court of Appeal on the day before the Derby, with judgment being given on the day of the race.

The principal issue (being the same at first instance and on appeal) is a reminder that an injunction is an equitable remedy and is

therefore a matter for the judge's discretion. That is to say, even if the court is persuaded as a matter of law that, on the facts, the claimant is entitled to an injunction, the court must still balance the interests of the claimant and the defendant. An injunction can be refused where the grant of an injunction would cause a defendant particular hardship and where the award of damages would adequately compensate the claimant for the defendant's breach.

It is interesting that, in deciding whether the judge at first instance had been right to refuse to exercise his discretion in favour of granting an injunction, the Court of Appeal took into account not only the effect on the Defendant of granting an injunction, but also other factors such as the perceived difficulty in assessing damages, whether the Defendant would be in a position to pay substantial damages in any event and the public interest (including the effect on racing as a whole and the Derby in particular).

Jackson LJ said as follows:

"I accept that the grant of an injunction would be a grievous blow for the Defendant, but that would not be oppressive or unjust. The Defendant has voluntarily entered into a contract for substantial reward, which prohibits him from riding Recital this afternoon. The Defendant has brought this present predicament upon himself. . . There is nothing special in the world of racing which entitles the major players to act in flagrant breach of contract. . . The Defendant has promised in the context of a commercial agreement that he will not compete against Native Khan on the Derby this afternoon. In my view, that promise should be enforced"

## UK locations:

### Birketts' Agricultural Unit

operates from our Cambridge, Chelmsford, Ipswich and Norwich office locations allowing us to service our UK and overseas clients with ease.

#### Cambridge:

Thirty Station Road  
Cambridge Cambridgeshire  
CB1 2RE

T: +44 (0)1223 326600  
F: +44 (0)1223 326629  
E: [mail@birketts.co.uk](mailto:mail@birketts.co.uk)

#### Chelmsford:

Brierly Place  
New London Road  
Chelmsford Essex  
CM2 0AP

T: +44 (0)1245 211211  
F: +44 (0)1245 354764  
E: [mail@birketts.co.uk](mailto:mail@birketts.co.uk)

#### Ipswich:

24-26 Museum Street  
Ipswich Suffolk  
IP1 1HZ

T: +44 (0)1473 232300  
F: +44 (0)1473 230524  
E: [mail@birketts.co.uk](mailto:mail@birketts.co.uk)

#### Norwich:

Kingfisher House  
1 Gilders Way  
Norwich Norfolk  
NR3 1UB

T: +44 (0)1603 232300  
F: +44 (0)1603 230533  
E: [mail@birketts.co.uk](mailto:mail@birketts.co.uk)

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The content of this brief is for general information only. Specific legal advice should be taken in any individual application. Law covered as at January 2012.

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