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# Rural Business Law

NEWS AND ADVICE FROM BIRKETT LONG

## Landlords - beware of compensation claims

One little known element of the Agricultural Tenancies Act 1995 is that tenants of Farm Business Tenancies are, in certain circumstances, entitled to claim compensation in respect of improvements they have made to the leased property.

Perhaps even more alarmingly, it is not possible for a landlord to contract out of the obligation to pay this compensation. The Act is clear that any attempt to do this will be invalid. However, there are still options open to a landlord seeking to avoid a nasty surprise at the end of the tenancy.

A change in the law means that landlords are able to agree an upper limit to the amount of compensation payable. Where the parties agree that there should be a limit, but are unable to agree on the amount of that limit, the amount is the cost to the tenant of making the improvement.

It is crucial to note that for the cap to be enforceable there must be a written agreement to that effect, which is signed by both parties. It is therefore essential for any landlord who intends to allow improvement works on his leased property to enter an agreement with the tenant and to make sure that the agreement is appropriately drafted.

A further consideration is whether the tenant can claim the improvements they have carried out amount to a tenant's fixture at the end of the tenancy. If the works do amount to a tenant's fixture, the tenant will have the right to remove them when the tenancy ends. As above, a clause will need to be inserted into the farm business tenancy to counteract this possibility. It is crucial that suitable wording is used to ensure that there is no room for doubt.

For more information on Farm Business Tenancies, please contact our rural business team.

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# Renewable energy - not just hot air!

**Like many farmers and landowners, many of you will be thinking about the possibility of diversifying into renewable energy. There are benefits to be gained but there are also points to consider. This article will concentrate on solar and wind projects, and consider some of the practical points that you will need to bear in mind.**

### 1. Who are you getting into bed with?

There are many solar and wind companies out there who will be keen to sign up with you. Some are reputable and have established a good track record - others, less so! Check out your prospective partner carefully. Whoever you decide to work with, they will have a suite of documents that they will want to use, largely unamended. Depending on the particular concerns that you or they may have, and the circumstances of your property and deal, you may need quite lengthy negotiations to get the documents into an acceptable form. For example, one of our clients has a shoot on his land, which generates significant income and had to continue uninterrupted. The renewable energy company didn't want the shoot damaging its equipment or raising health and safety issues for its employees and contractors. Sensible restrictions on when, and in which direction, the shoot could take place; notification from the energy company of when their people were likely to be on site and a much reduced exclusion zone around the energy equipment, meant that a workable compromise could be found.

### 2. Know the tax consequences

What are the tax consequences of granting an option to the energy company and, once all of the conditions necessary for a successful energy project have been fulfilled, a lease. Will you take a straight rent (subject to regular reviews), or are you also taking a supply of cheap electricity in return for which the energy company will keep all Feed in Tariffs and other Government incentives, and the profits from selling electricity to the grid?

### 3. Obtaining planning permission

This will be done by the energy company but they will need your help and you will certainly want to be kept informed. On a practical level, are you prepared for possible upset within your local community? You may be surprised at how well organised opposition groups can be – and it can get quite personal!

### 4. Connecting to the grid

Along with planning, this is the main obstacle to overcome. Although the energy company will deal with this, they will need your assistance and you will want to be kept informed. The route of the connection may take you by surprise! The energy company will want to reserve as much flexibility as possible when it comes to routes over your land.

# Wybar's sidebar

## A year of changing prices

It's been an interesting year on the farm. The comparative warmth of the Spring meant that, for the most part, harvest was early with many East Anglian arable farmers finished by the beginning of August.

This in turn led to relatively early autumn cultivations. Against that, better harvests in other parts of the world have kept prices very low, barely covering the cost of production. Those who sold forward at reasonable prices earlier in the year are pleased to have done so; those with storage are hanging on.

In the meantime, land prices continue to soar – a year ago, one might assess the true value of good arable land in East Anglia to be about £8,000 per acre, with a special purchaser being prepared to pay a premium price of £10,000; this year, £10,000 seems to be par and the premium price is perhaps £12,000.

For advice on any aspect of rural business, contact a member of our team.

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### 5. What about rights of access?

Even once you think you have tied things down, the energy company will need to reserve rights to change routes to meet the requirements of the Distribution Network Operator (DNO). Potential conflict could arise between you wanting to keep tight control on where and what the energy company and the DNO can go and do, and their need for as much latitude as possible until final decisions are made. Sensible compromises, such as delineating an area where works, cables and access are accommodated (other than with your agreement or in an emergency) will be necessary.

Other issues, such as use of land under or near the energy project, are usually easy to resolve. But even here, negotiation and compromises may be required. For example, the energy company will want to ensure that trees, shrubs and even buildings, do not interfere with the sunlight access on solar panel arrays or disturb wind flows to turbines. You may need to consider whether your subsidies could be affected and whether the energy company should pay compensation should you lose subsidy or suffer crop damage through their activities.

The final question is what happens at the end of the lease or if the energy company decides to break the lease – usually triggered by the level of government incentive falling. For how long have you anticipated a guaranteed income from the project and should the energy company be providing – or at least building up - a removal and remediation fund or bond to back up their obligations to restore your land back to proper agricultural use?

With expert advice from both land agents and lawyers, deals can be concluded successfully and profitably for all parties.

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# Meet the team

## David Wybar

Head of rural real estate at Birkett Long, David specialises in agriculture. He sits on the Executive Board and is a Council member of the Suffolk Agricultural Association, as well as a member of the Agricultural Law Association.

Before his career in the law, David studied mediaeval history at St. Andrew's University. He trained as a solicitor with Macfarlanes in London and worked at Mills & Reeve in Norwich. Prior to joining Birkett Long as a partner in 2003 he was a partner at Bankes Ashton in Bury St Edmunds. The legal directory, Chambers, continues to rank Birkett Long as a top-tier firm for agriculture in Essex, noting its strengths in non-contentious property and commercial work, private client instructions and litigation.

> "David Wybar's team at Birkett Long LLP advises clients on issues including the sale and purchase of agricultural land, rights of way and access, and taxation and succession planning."
> *Legal 500*

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# in brief

## Commercial rent arrears recovery: an end to distress?

The remedy of distress has long been a powerful and effective weapon in a landlord's arsenal for recovering rent arrears from commercial tenants. It allows a landlord to enter a tenant's premises, seize goods and then, having given notice, sell those goods and use the proceeds to pay the rent arrears, unless the tenant pays up prior to the expiry of the notice period.

As you might imagine, distress was not so popular with tenants who argued that it was open to abuse by unscrupulous landlords. Ultimately, parliament agreed and passed legislation which, with effect from 6 April 2014, abolishes the remedy of distress and replaces it with a new regulated Commercial Rent Arrears Recovery procedure, or "CRAR".

The circumstances in which CRAR may be used are more limited than had been the case for distress:

- there must be a written lease in place;
- it applies only to rent (not to service charges or insurance premiums);
- it may only be carried out by a certificated bailiff;
- it introduces a minimum level of arrears equivalent to 7 days' rent;
- it cannot be used if any part of the premises is residential (such as where a shop is let with a flat above). Landlords may, therefore, be more inclined to let commercial and residential premises by way of separate agreements in future, so as to preserve their rights to use CRAR.

However, the most significant and controversial change is definitely the requirement for the landlord to give the tenant at least 7 days' notice before using CRAR to seize goods on the tenant's premises and so removing the element of surprise that had been such an important factor in the landlord's favour under the previous remedy of distress. Whilst tenants may argue that this provides a window in which to pay the arrears and avoid the inconvenience and damage to their business that could be caused by goods being seized, the fear from the landlord's perspective is that tenants will simply use the notice period to remove any goods liable to seizure rendering the CRAR procedure largely ineffective.

Tenants will welcome these changes, which were intended to remove what was seen as a heavy handed process unfairly balanced in favour of landlords. Landlords, on the other hand, will mourn the loss of a potent remedy and may turn more quickly to other remedies, such as court action or forfeiture of the lease, rather than using the new CRAR procedure.

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