

# Agricultural Tenant's Right to Buy

## **North Berwick Trust v. James B. Miller & Co.**

The full court of the Land Court recently decided twin cases brought by the North Berwick Trust against their tenant farmer. Both cases were concerned with Notices to Quit but the Court addressed two important issues in relation to on “the Right to Buy” introduced by the Agricultural Holdings (Scotland) Act 2003.

### **Hope Value**

In its discussion the Court made clear that it considered that the valuation formula prescribed under Section 34 of the 2003 Act did not preclude “hope value”.

Some commentators had suggested that because the Section provides that a valuer must ignore “any factor attributable to any use of the land which is or would be unlawful” that this excluded hope value. The line of argument, now discredited by the Court, was that until planning consent had been obtained the proposed use giving rise to the hope value was unlawful and hence must be discounted.

### **Right to Buy Triggers**

The Land Court also provided some guidance (albeit not binding) for landlords as regards what they can and cannot do in relation to their land once the tenant has registered a Right to Buy. In other words - *What Triggers the Tenant's Right to Buy?*

The issue is primarily concerned with the way Sections 26 and 28 of 2003 Act are interpreted.

The Land Court guidance focuses on the following three aspects:-

1. What triggers the right to buy in relation to a possible transfer of land to a third party?
2. Can negotiations with the tenant with a view to a sale of the land to the tenant trigger the right to buy?
3. If the right to buy is triggered, but the landlord does not then proceed with a transfer what can the tenant do to exercise the right to buy?

In relation to the first question, the guidance suggests that negotiations with a third party with a view to a transfer of the land is sufficient of itself to trigger the right to buy even though that negotiation may not proceed to the stage of effecting a transfer. Any advertisement or exposure of the land for sale would also trigger the right. Accordingly landlords must be very careful that they are not engaged in any discussions or correspondence with third parties which could be construed as “negotiations with a view to transfer of the land”.

So far as the second question is concerned, the Land Court takes the view that it cannot have been the intention of the 2003 Act for the Right to Buy to be triggered by the landlord entering into discussions with the tenant with a view to selling the land to the tenant in circumstances where a negotiated transfer ultimately does not take place. The Court’s view is that the Act seeks to encourage such discussions which would not be the case if they triggered the Right to Buy.

In relation to the final question, the point arises because there is a perceived “gap” in the legislation in that it does not provide a mechanism to force the landlord to serve the relevant notice on the tenant which would set in train the mechanics of the Right to Buy process (otherwise provided for). Unfortunately, in this case, the Land Court does not consider it appropriate to give a clear steer. One interpretation of Section 26 suggests that if a tenant is able to show that the Right to Buy has been triggered the tenant could make an application to Court for the Court to order that the landlord serve the relevant notice on the tenant thereby initiating the process.

Given the guidance (or lack of) provided by the Land Court it would be inadvisable for a landlord to consider (a) that it is possible to have preliminary and non-binding discussions with a potential acquirer of the land without triggering the Right to Buy and (b) that the land cannot be acquired by the tenant simply because the landlord has not proceeded with a transfer.

One of the cases has been appealed and the other is going to a proof. Consequently, there may yet be further judicial comment on these matters.

27 November 2007

**Disclaimer** - The above information is a summary of the main legal provisions and given for general information only. It is not a full statement of the law and detailed advice should always be obtained from a suitably experienced solicitor. Accordingly Gillespie Macandrew LLP does not accept any liability for the information given or any resulting action taken by any person. Gillespie Macandrew LLP is a limited liability partnership, registered in Scotland number SO300743. Authorised and regulated by the Financial Services Authority.

For more information please contact Robert Scott-Dempster 0131 225 1677  
or [robert.scott-dempster@gillespiemacandrew.co.uk](mailto:robert.scott-dempster@gillespiemacandrew.co.uk)  
Gillespie Macandrew LLP, 5 Atholl Crescent, Edinburgh, EH3 8EJ  
Authorised and regulated by the Financial Services Authority