

Vicarious Liability Impact on Agricultural Holdings

Important Note:

This note is intended to draw attention to some of the main issues and uncertainties surrounding the impact of vicarious liability in agricultural tenancy situations. It reflects the writer's personal opinion and is based on information reviewed at the time of its publication. Accordingly, account must always be taken of any relevant changes in law, policy or other circumstances since that time. This note is for general information only, and must never be relied upon as any substitute for appropriate professional advice, which should always be taken in relation to any particular set of circumstances or where financial or other interests may be at stake. No liability can be accepted by Scottish Land & Estates or its employees or agents for any misstatement in it or omission from it.

Introduction

The Wildlife and Natural Environment (Scotland) Act 2011 (WANE Act) introduced the concept of holding a person liable for certain criminal actions of another person, where specific relationships exist between them and where the criminality involves specific offences relating to wild birds. The relevant offences are set out in the Annex to this paper.

The primary offence must be shown to have been committed but the primary offender need not be prosecuted in order for someone else to be held vicariously liable for his actions.

The more common scenarios will be an employer being held liable for the actions of an employee or a principal being liable for actions of an agent. However the legislation also covers "service providers" which will capture a much wider range of relationships and in some cases this might include agricultural landlords and tenants.

The legislation

The WANE Act amended the Wildlife and Countryside Act 1981 to include new vicarious liability offences. The legislation envisages vicarious liability where a relevant offence is committed by two different groups of persons:-

- (1) employee or agent; or
- (2) someone providing relevant services

In other words, it is the employer/principal or person receiving certain services who may be held vicariously liable.

There is a defence if (a) you did not know the offence was being committed AND (b) you took all reasonable steps and exercised all due diligence to prevent the offence being committed ("the due diligence defence").

(Refer to SLE Guidance Booklet for further detail of the legislation and what the due diligence defence entails).

Offences by Employees/Agents

If an employer or principal (person B) holds shooting rights in relation to wild birds or manages or controls the shooting of wild birds over land then he can be liable for offences by his employee or agent (person A). For these purposes managing or controlling shooting rights includes (i.e. is not limited to) management or control of any of the following:-

- (a) operation or activity of killing or taking wild birds
- (b) the habitat of such birds
- (c) the presence of predators of such birds
- (d) the release of birds for the purpose of being killed or taken

Potential liability for agricultural landlord/tenant?

If the person who holds or controls shooting rights (usually owner or shooting tenant) is also an agricultural landlord it is unlikely vicarious liability would arise in respect of the actions of the farm tenant unless it could be shown the tenant was also his agent or employee.

However, an agricultural lease will usually permit the farm tenant the right to shoot some species of wild birds in his own right (e.g. pest species). Therefore if he has an employee or agent who manages or controls those shooting rights then he might find himself liable for offences committed by that employee or agent unless he can demonstrate "due diligence" in preventing the offences.

Offences where services secured through another

This part of the legislation is more problematic. If a person who holds shooting rights or manages or controls shooting rights (person B) receives certain shoot related services from another person then he can be liable for offences committed by that contractor/service provider.

This applies even if there is no direct contractual relationship between B and the person actually providing the service (e.g. where A is employed by or is an agent of or is subcontracted by another person (person C)). There does not need to be any formal contract. An "arrangement" between A and B or between B and C will suffice to create the potential of liability for A.

Confusingly, what is required for B to be deemed to be managing or controlling shooting rights is not defined for these purposes (as it is where there is an employer/employee relationship).

However, the legislation does specify that person A is providing relevant services for B (or, as the case may be, C is providing or securing the provision of relevant services for B) if either A (or C) manages or controls any of (i.e. it is limited to) the following:-

- (1) the operation or activity of killing or taking wild birds
- (2) the habitat of such birds
- (3) the presence of predators of such birds
- (4) the release of birds for the purpose of taking or killing

Potential liability of agricultural landlord/tenant?

If the person who holds or manages/controls shooting rights (e.g. landowner or shooting tenant) is also an agricultural landlord then he could be vicariously liable for actions of a farm tenant if there is any arrangement between them for the farm tenant to provide of any of the listed activities such as predator control (or if the farm tenant arranges for anyone else, such as a pest controller, to carry out these services).

The same applies as for the employee/agent scenario if the farm tenant has the right to shoot wild birds on or over the land himself and, if he has an arrangement with anyone else for provision of any of the relevant services, he could be liable for the actions of that service provider/contractor.

Liability for other contractors

The question of non-shoot related contractors committing offences on your land is not entirely clear. For example if a forestry contractor recklessly destroys a nest in the course of clearing a wood he will have committed an offence but it is not clear whether the farmer/owner could be vicariously liable. For vicarious liability to arise the forestry contractor would have to be providing one of the four relevant shoot related services listed above. Managing or controlling the habitat of wild birds is a possibility but it is unlikely this scenario was the target of the legislation.

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