

Welcome

Welcome to our latest issue of **Agricultural Law Quarterly**. We hope you will find these articles on recent developments in agriculture to be of interest.

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Polytunnel controversy - again!

Fruit and vegetable growers will be concerned about a recent High Court case which quashed planning permission granted by Herefordshire Council for polytunnels (*R(Wye Valley Action Association) v Herefordshire Council*).

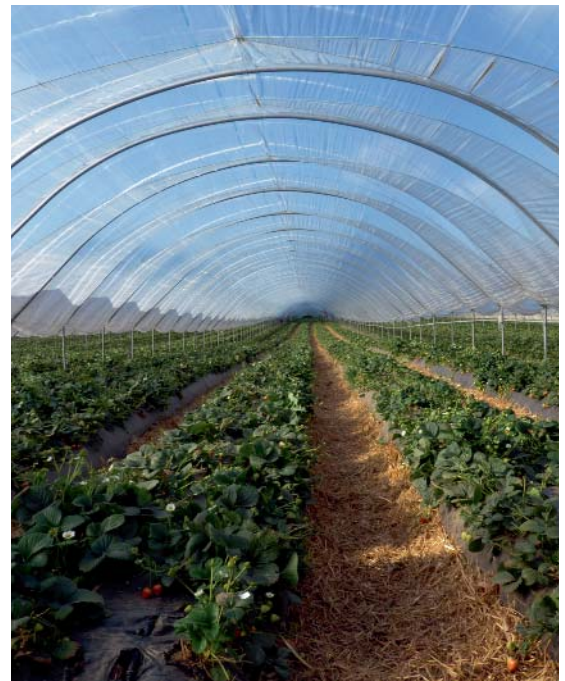
The *Hall Hunter* case in 2006 clarified that polytunnels may require planning permission as previously the practice of planning authorities varied. The WVAA case clarifies that such development may also require Environmental Impact Assessment (EIA).

In the WVAA case, a soft fruit grower sought planning permission to continue using polytunnels, rotating them across a site of 225ha and covering at most 54ha at any one time. The site is in an Area of Outstanding Natural Beauty (AONB) and abuts both a Special Area of Conservation (SAC) and a SSSI. Several listed buildings are nearby, and it is overlooked by a scheduled ancient monument (SAM). Importantly, this application was for retrospective permission as polytunnels were used on the site to grow soft fruit for most of the previous 10 years.

The question for the court was whether the Council wrongly decided that EIA was not required. EIA would be required if the development was a project for intensive agricultural purposes and in a semi-natural area. The Council decided it was not in a semi-natural area and EIA was not required. The court considered whether a semi-natural area could include cultivated land and had to determine the meaning of intensive agricultural purposes.

The judge apparently ignored Natural England's guidance, which lists habitats such as hay meadow and unimproved grassland as semi-natural areas, and which acknowledges that land may be semi-natural even if it has undergone low levels of cultivation. He preferred European guidance that the context of a site, including nature conservation, landscape and archaeological designations, should be taken into account when considering the question.

The judge went on to determine that because (1) the site is within an AONB, (2) abuts an SAC and a SSSI, and (3) is overlooked by a SAM it must, as a matter of law, be a semi-natural area. He appears not to have considered the fact that fruit had been grown under these polytunnels for almost 10 years. Readers may find it strange that he could reach



such a conclusion just by counting the number of designations applicable to a site, rather than leaving the Council to answer the question from local knowledge and, no doubt, site inspection.

On the meaning of intensive agricultural purposes, the judge decided this simply equates to increasing productivity for agriculture. He left open the question of how much increase is necessary. So, would a 1% increase count? Or 10%? Or some other amount?

As these definitions are also used in the 2006 EIA Agriculture Regulations, this case potentially has implications for certain agricultural projects (not caught by the planning system) that require consent from Natural England.

Perhaps it is not surprising that the Council has made an application to the Court of Appeal for permission to appeal the judgment.

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Planning

Hiding your unlawful home - under a barn or under a bushel?

“Both these cases involved deliberate attempts to circumvent planning control but there are clear factual and legal distinctions between them.”

Two court decisions on the immunity afforded to unauthorised dwellings have attracted recent widespread media attention: *Welwyn Hatfield Council v Secretary of State* (the Barn Case) and *Fidler v Secretary of State* (the Castle Case).

The Barn Case

In 2001 Welwyn Hatfield Council granted permission for the erection of a hay barn in the Green Belt. When constructed, externally it complied with the permission but internally it was fitted out as a dwelling house with kitchen, en-suite bedrooms and a gym. The applicant said he had always intended to use the building as his home and that he was seeking to circumvent restrictive greenbelt policies.

Four years after moving in he applied to the Council for a Certificate of Lawfulness for use of the barn as a dwelling. A successful application would prevent enforcement action against his home. This went all the way to the Court of Appeal who reluctantly concluded that because the development was not constructed internally in accordance with the planning permission and that there had been a change of use from the barn envisaged in the application to the home that was actually constructed, the development was immune from enforcement action and could stay.

The Castle Case

Without planning permission and again in the Green Belt in around June 2002 Mr Fidler constructed a new dwelling modelled on a Tudor castle (complete with a mock cannon). He managed to keep his new home hidden from Reigate

and Banstead Borough Council behind a stack of straw bales which remained in place for a further four years.

When they were removed the Council served an enforcement notice requiring the removal of the building. Mr Fidler also sought to rely on the four year immunity from enforcement rule but he was not successful because the court said that until the straw bales were removed in 2006 the development was not *substantially complete* and was therefore still capable of being subject to enforcement action. This conclusion was based on the Court's view that based on the design of the house it could never have been envisaged that the bales would remain indefinitely and their removal was an essential step in the construction process. Unless appealed the castle will have to fall.

Both these cases involved deliberate attempts to circumvent planning control but there are clear factual and legal distinctions between them. The barn case turned on the question of whether a material change of use had actually taken place so as to benefit from the immunity whilst in contrast the central issue in the castle case was the correct interpretation of substantial completion.

As two of the three little pigs found out the house of bricks survived whilst the house of straw did not.

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The time has come for AD development

In January this year we secured permission on behalf of a client for a large farm based anaerobic digestion plant in the Brecon Beacons National Park, Wales. The plant will be located on a family farm in Talgarth and will receive a mixture of farm derived materials including livestock waste and energy crops, along with abattoir waste.

At appeal we overcame concerns about the need for Environmental Impact Assessment, the impact of the development on the protected landscape of the National Park and the impact on the setting of the listed buildings located at the farm. The main policy based objection was the ability of the project to comply with the local plan policy on farm diversification.

The Inspector granted the permission noting that the Welsh Minister did not consider that schemes of this size required EIA and that, with an appropriate balance of feedstock source and with sufficient land under the control of the applicant to receive the digestate, that conditions can be applied to secure compliance appropriate policies on farm diversification.

If planning consent for medium sized AD plants such as this can be secured in the sensitive environment of a National Park then permission ought to be achievable in most locations, so this must surely be the first of many new permissions. Anaerobic digestion has undoubted benefits and is receiving significant national support. The key to successful permission is to work to overcome the residual resistance, be it in the mind of the planning officer's or in the minds of those living in the vicinity of the scheme. By removing the misconceptions about AD plants they almost sell themselves.

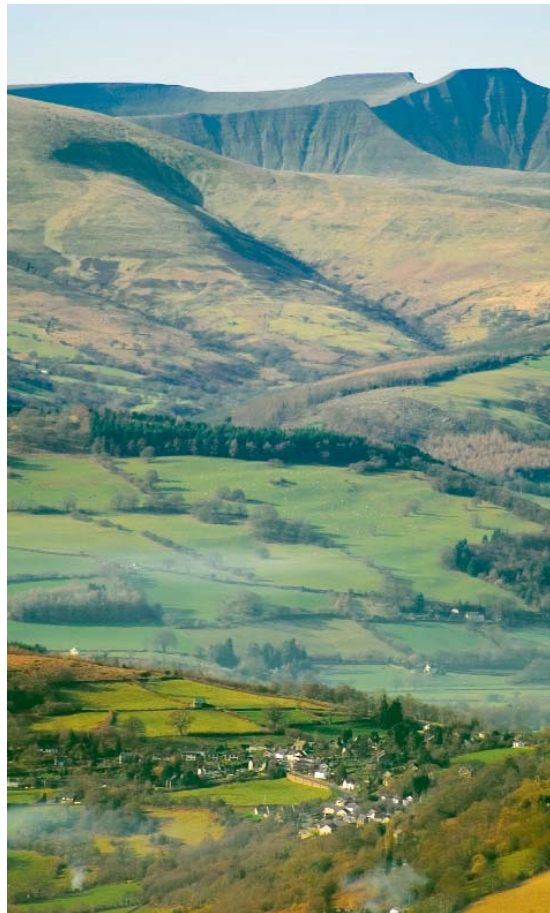
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A warning to landowners

It is well known that a claim for a town or village green (TVG), based on 20 years use by local inhabitants, can delay or even prevent development. Expensive public inquiries and even more expensive court proceedings may be necessary to deal with claims.

TVG law is technical and complex and the highest court has had to consider it on four occasions over the last decade.

The Supreme Court recently gave judgment in a case concerning Redcar and Cleveland Borough Council (landowner) v Persimmon Homes (developer). The land in question had been used for many years as a private members golf club and it was also used by local residents for recreation. In 2003, the Council granted itself planning permission for a major development, including more than 300 houses and a sports centre. Seeking to prevent development, objectors applied to have the land registered as a TVG.



To be a TVG, use of land by local inhabitants for lawful sports and pastimes must be carried on without force, secrecy, or permission. At a public inquiry to consider the application, an independent Inspector held that recreational users of the land had not used it "as of right" as they overwhelmingly deferred to the golfers. For example, recreational users would mostly stand clear to let golfers play shots unimpeded. Registration as a TVG was thus refused and that decision was judicially reviewed in the High Court. Although the judge agreed with the Inspector (so did the Court of Appeal) that decision has now been overturned by the Supreme Court.

Lord Walker said: "I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the Inspector's word, deference) towards members of the golf club who were out playing golf... A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it."

Unsurprisingly, calls for reform of the law are growing and Defra has promised a review this year. Meantime, the message for landowners is very clear - if recreational users customarily use your land, seek specialist legal advice urgently.

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"If planning consent for medium sized AD plants such as this can be secured in the sensitive environment of a National Park then permission ought to be achievable in most locations."

Landlord and Tenant

VAT on rent: What is the right rate?

Following *Mason v Boscawen*, it is important that practitioners include VAT on agricultural holdings notices to pay as VAT is treated as rent. A problem arises when the rental period spans the VAT rate changes. This caused difficulties earlier in the year and it could be a problem again. The question you need to ask is: when is the tax point?

The tax point is when the tax invoice (rent demand) is issued or the rent is paid whichever is earlier.

So, for a rental period which spans the 31 December 2009/1 January 2010 rate change for VAT, if the rent invoice was issued (or the rent paid) on or after 1 January 2010 the tax rate will be 17.5% for the entire rental period.

The landlord can, where rent is payable in arrears, choose to apportion the rent between the old and new VAT rates. There is rarely any benefit in apportioning tax rates like this as the tenant can recover the VAT anyway so should not mind what rate he pays and it simply creates more administration for the landlord and a potential ground of challenge to the notice to pay if the maths is wrong.

If the tax point is before 1 January 2010 the rate will be 15% for the entire period. There is no option for the landlord to apportion the rent between the different rates.

There are lessons to be learnt from the January 2010 VAT rate change and it is quite conceivable that we might see another VAT rise after the election.

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A timely reminder for landlord's and their agents

Agents acting on behalf of landlords granting assured shorthold tenancies should take note of a recent case which has held that a tenant can claim against a landlord's agent where the agent has failed to safeguard the deposit in a tenancy deposit scheme on behalf of the landlord.

Tenancy deposit schemes have applied to new deposits paid under assured shorthold tenancies entered into since 6 April 2007. The legislation places an obligation on the landlord, or the person acting on their behalf, to: 1) safeguard a deposit paid by a tenant within 14 days of receiving that deposit and 2) pass to the tenant the information prescribed in the legislation.

Non-compliance results in landlords losing their right to regain possession on the no-fault basis permitted under Section 21 of the Housing Act 1988. Fines may also be levied.

Case law has determined that safeguarding a deposit outside the 14 day window but before proceedings are issued by a tenant may prevent such a claim from succeeding where a custodial TDS is used but possibly not where an insurance backed scheme is used.

Given the punitive sanction for not protecting the deposit, all landlords, and where relevant their agents, are advised to comply strictly with the terms of the TDS.

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High rent residential tenancies



Tenancies where rent is over £25,000 per annum currently fall outside the assured shorthold tenancy (AST) regime. However, from October residential tenancies with rents up to £100,000 per annum will come within the AST regime. This change, which will apply to *existing* tenancies as well as to new tenancies granted after the changes come into force, gives tenants the right to two months notice but perhaps most importantly will require landlords to safeguard tenant's deposits in a tenancy deposit scheme or risk punitive sanctions. Landlords and agents should, in anticipation of this change, take steps to safeguard deposits already held in connection with tenancies which will become ASTs in October.

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"The question you need to ask is: when is the tax point?"

Trusts

HMRC on the offensive

“The Trustees chose to exercise them but the effect of the exercise was in each case different from that which the trustees intended”

In the past trustees have been successful in persuading the courts to set aside the exercise of discretionary powers on the basis that they had not foreseen the consequences of their actions and had they done so they would not have exercised the power in the way that they did. This is known as the Hastings-Bass principle following a case of that name. This principle has recently come under attack from HMRC.

In *Pitt v Holt & HMRC* Mr Pitt suffered serious multiple injuries in a road traffic accident and he became permanently incapable of managing his own affairs. Mrs Pitt was appointed receiver.

He received damages of £1.2 million and Mrs Pitt took investment advice creating a settlement for her husband's benefit. An unintended consequence of that arrangement was that Inheritance Tax became payable on the creation of the settlement, upon subsequent capital distributions, on the tenth anniversary of the creation of the settlement and on the Mr Pitt's death. The Inheritance Tax position was not taken into account at all by Mrs Pitt and her advisors when the settlement was created. It could easily have been resolved by adopting a different form of settlement. Mrs Pitt wanted to set aside the terms of the settlement and to relieve it of those unintended tax liabilities. HMRC opposed the application but the Court allowed it. HMRC have been given permission to appeal.

Most recently in *Futter v Futter*, Mark Futter created a settlement which gave the income from the trust to him for

life but conferred on the trustees a conventional power of enlargement and a power of advancement.

They were free to decide whether or not to exercise them. The trustees chose to exercise them but the effect of the exercise was in each case different from that which the trustees intended. They did not take into account the tax liability of £90,000 and had they done so they would not have acted as they did. Minimising the exposure to CGT on extracting the funds from the settlements was a priority and it was the perceived tax consequences which determined the form of the advancements.

HMRC opposed the application arguing that the rule in Hastings-Bass had been carried to “almost absurd lengths”. Nevertheless the Court found in favour of the Trustees and allowed the application.

HMRC are very much still alive to the application of the Hastings-Bass principle and will seek to attack it with a view to increasing tax revenues. The best outcome is not to make the mistake in the first place and in this context, it is important for trustees to obtain proper advice about the fiscal consequences of the exercise of their discretion under a trust before taking steps which leave them wholly dependant upon applications to set aside the exercise of that power.

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Real Property

Plans: Land Registry requirements tighten



Over the last few years the Land Registry has changed and tightened its requirements in respect of plans. As greater numbers of transactions are now compulsorily registerable, there is a much greater reliance on plans to define the property involved.

The Land Registry requirements are now much more strictly

enforced than ever before and must be complied with to ensure that any documents can be registered. In brief the requirements are:

1. That the plan must be to the stated scale and ideally be printed on A3 or A4 size paper;
2. The plan must have a north point;
3. The scale be no greater than 1:5,000 but otherwise at 1:1,250 or 1:2,500; and
4. The plan must not be marked for information only.

It is important that plans are accurate. Having good quality, accurate plans at the outset pays dividends in the long run.

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Tax

Tax on development

From 6 April 2010 local authorities will have the right (not the obligation) to charge Community Infrastructure Levy ("CIL") in order to provide a co-ordinated and predictable method for the funding of infrastructure works on developments.

Payment (possibly by instalments) is triggered by the commencement of development. It is paid by the freehold owner at the time of the commencement of development and he will share liability with any tenants with more than 7 years of their lease to run at the date when planning permission was granted. There is provision for liability to be "assumed" under contract by someone who does not have a material interest in the land, but if that person fails to pay, the responsibility returns to the owner and his long term tenants.

The collecting authority has a wide range of remedies and enforcement methods if payment is not made including surcharges, interest, stop notices, injunctions, distress and charging orders. Criminal offences resulting in imprisonment may also be committed.

How much is to be paid?

We do not know. The answer to this question depends on each charging authority publishing (after approval from an independent examiner) a charging structure. This process is likely to take months even for the most determined charging authority.

Does this apply to all developments?

The only exemptions are for small developments of less than 100m² (except dwellings), and buildings into which people do not normally go or go only intermittently to inspect or maintain fixed plant or machinery.



What effect will it have on landowners?

- Landowners will need to think carefully about the potential cost of new farm buildings (even if erected under permitted development rights). They will attract CIL, calculated by reference to the increase in net floor space.
- CIL will not be payable if the commencement of development predates the publication of the charging schedule. In the case of buildings erected under permitted development rights there is a "CIL-free" period ending on 5 April 2013.
- If you are obliged to make a clawback payment, you will want your obligation to pay CIL to be deducted from the notional "profit" which is being shared.
- s106 Agreements will still be relevant but from 6 April, policy requirements for s106 obligations to be necessary relevant and reasonable are being given the force of law and so aggrieved applicants can challenge the planning authority more easily.
- Care will need to be taken to attribute liability if a sale might follow shortly after the start of development

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APR Stop Press!

A farmer farmed in partnership with his son and daughter-in-law. Father lived in a bungalow which was part of the tenancy of the farm that he had granted to the partners. Four years before his death the father moved into a nursing home where he remained. The bungalow was unoccupied but for the partners coming in and making sure the pipes were not freezing, collecting post etc.

HMRC argued that the bungalow was not occupied for agricultural purposes in those last four years. The tribunal disagreed and found that the partnership was still occupying the house for agricultural purposes by

virtue of the tenancy. It seems that it was the tenancy that was key here and the lack of physical occupation in the last four years up to death did not undermine the position. The case gives some comfort for farmers facing the nursing home dilemma. However, the existence of a tenancy is relatively unusual and whilst one might engineer a tenancy if there is a partnership it would not provide any help for sole traders.

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