ALA Bulletin

Issue 64 – Spring 2011

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RURAL PROFESSIONALS

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The *ALA Bulletin* welcomes readers' letters or comments and enquiries from anyone wishing to contribute material. Photographic contributions will be gratefully received and credited accordingly. The *ALA Bulletin* does not accept advertisements but is happy to insert flyers.

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The powerless Attorney – Eleanor Pinfold (*Summer 2010*)

The right of agricultural tenants in Scotland to diversify – Richard Blake (*Spring 2010*)

An archive of materials from Autumn 2002 onwards is available on the Members' Section of the ALA website.

AGM2011

New Chairman's note

Andrea Nicholls, Keystone Law, London

Andrea Nicholls

It's a great honour to be beginning my two year term as Chairman of the Agricultural Law Association.

If we haven't been introduced, I am a consultant solicitor at Keystone Law where I specialise in property litigation. Back in the mists of time I took a first degree in Agriculture at Edinburgh University and then took the old CPE route to qualification. I live in Suffolk with daughter, dog, horse and husband, and I look forward to meeting you soon.

The outgoing officers, in particular Roderick Mackay and Eleanor Pinfold, have left us an outstanding legacy: the ALA Fellowship has now run successfully for its second year; the Starter for Ten has a fabulous new teaching team; our conferences are successful and popular; and we have a thriving and growing network of regional groups. Follow that! as they say.

But there is a lot more to do. Like all new chairmen, I suppose, I'd like more people to be involved in more things, but in my defence, I've had a great time through being involved in the ALA and I'd hate you to miss out.

We as an organisation get invited to participate in all sorts of meetings and consultations, from the formal CEDR and TRIG to the more surprising and informal opportunity to meet up with a group of Chinese Agricultural Lawyers. I'd like to offer to Council members and the wider membership the opportunity to participate in as many of those things as I possibly can.

And if there is an opportunity you'd like to take, but you feel you lack experience, we can 'buddy you up' with a mentor to go to your first meeting, so don't be reticent.

On a more social point I'd love to see 10% of our membership at the AGM and dinner next February so do consider coming.

I also need your help with two pressing issues:

1. What is the best way to confer with the membership and respond to statutory consultation opportunities? We tried standing committees with mixed fortunes. Do we convene a special one-off meeting on a 'book club' model? Do we try committees again? Are you happy to leave it to counsel, bearing in mind we are unlikely to all be experts with the subject matter?
2. Does the association venture into book publishing? As a Council we are going to investigate costs and options and I will come back to you on this but as, a more philosophical question, is this what we should be doing?

Drop me your thoughts on these points and anything else you think we should be doing by email *andrea.nicholls@keystonelaw.co.uk*

I'm looking forward to working with the new Council and my Vice-Chairman Philip Day to take these ideas forward. See you soon.

ALA Council 2011/12

At the Annual General Meeting in February, the usual election took place for Council Members, as a result of which Felicity Wyatt, Rory Hutchings and Donald Rennie were re-elected to serve for a further term of two years. In addition, Rachel McKillop and Bruce Monnington were elected for their respective first two year terms. Our congratulations go to all concerned.

As a result the composition of ALA's Officers and Council is as follows:

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Single Payment Scheme cases

There have been a couple of cases relevant to the Single Payment Scheme recently which may be of interest.

R (Peter Strawson Ltd) v SSEFRA [2010] EWHC 3286 (Admin) was an obvious errors case. Mr. Strawson mistakenly adopted the incorrect start date for his 10-month period in 2007. The Rural Payments Agency raised the point with him. He immediately corrected the error and the RPA official in charge led him to believe that would be the end of the matter. It wasn't.

He was denied his claim, worth about £14,000, and penalised a further £36,000 for the resulting underdeclaration of eligible land.

The High Court somewhat surprisingly held this to be an obvious error. As can be seen from the article on Page 6, to be an obvious error, it must be plain on the face of the form. What is less surprising is the finding that the conduct of the RPA officer in leading Mr. Strawson to believe all would be in order gave rise to a legitimate expectation, which the RPA was not later entitled to deny by raising the penalty.

Landkreis Bad Dürkheim v Aufsichts- und Dienstleistungs-direktion, Case C-61/09 ECJ, clarified some of the elements of eligibility of land for matching against SPS entitlements.

Frau Niedermair-Schiemann had two parcels of land in Rheinland-Pfalz on which she kept sheep. For the first, she paid no rent; she merely contracted to pay the subscription to a local trade association. For the second, she was remunerated for undertaking nature conservation work on the land and that was the primary purpose of the arrangement.

The authorities questioned the eligibility of land if the "overriding objective" was landscape management and nature conservation, in particular where, as here, the occupier were subject to the instructions of the landowner in that respect. They also questioned eligibility where the nature of the agreement was less than a formal lease.

The Court confirmed that land, to be eligible, simply had to be used for an agricultural purpose, according to the Regulation. If the land is put to an agricultural use, it is agricultural land, and it does not matter that that may not be the primary purpose of the occupation.

It also confirmed that, in order for land to be part of a holding for the purposes of the SPS, the nature of the legal relationship between the owner and the occupier (where they are different persons) is not important. All that is required is that the farmer have the power to manage the holding for agricultural purposes.

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Solar Farms – A First Guide for Valuers

CAAV Numbered Publication 202, Price £75 (to non-members of CAAV)

The introduction last Spring of Feed-in Tariffs (FITs) for renewable energy production sparked frantic activity across the sector as landowners, developers and electricity providers sought to take advantage (see Tristan Ward's article in the *ALA Bulletin*, Winter 2010/11 edition).

This guide, No.202 in the CAAV Numbered Publication Series, deals specifically with solar farms – field-scale installation of photovoltaic cells – and, like its brethren, brings together in one place the technical, commercial, legal and valuation issues. It may be unfortunate that the government has, so soon after its publication, decided to revisit the future of FITs in this arena, but that sort of thing is a hazard of working in such a rapidly developing field and does nothing to diminish the value of this excellent guide.

It is expressly a "First Guide for Valuers" and is a forerunner to a wider publication on on-farm generation of electricity which is just off the stocks but, at time of writing, not yet seen at ALA HQ.

The first guide gives an overview of the whys and wherefores of PV technology and the economics of solar energy generation, and a summary of the requirements – site size, access, wayleaves, grid connection, planning permission, finance, etc.,etc. – before a project can get underway. Much to do in a very short time.

The principles of deals being undertaken are discussed, by way of sharing of a range of experience limited by the sudden take-up. Specialist companies seeking land to rent and landowners being called upon to grant options – periods of three or five years seem most common – for leases of 25 years, the period of the FIT commitment. The agreements being drafted, as they normally are, by the developers, landowners are rightly reminded to scrutinise them carefully and argue against anything which might unduly interfere with their use of the land, an important consideration given the length of the deal.

The commentary on the content of agreements is useful as a guide. It will be obvious for the most part to those familiar with the granting and taking of options and, as with all such guidance, is an inspiration and not a substitute for bespoke thinking.

There is particular consideration of the position where the land is tenanted. The potential use of Case B, for example, where the tenant benefits from the Agricultural Holdings Act 1986, or the need for a notice of 12 months or more to break an FBT of more than two years duration. Again, obvious stuff, but no less useful to have a reminder of it.

There is also a commentary on the effect of any such scheme on the use of the land to match against claims under the Single Payment Scheme. Covering a plot of 20-25 acres with large panels at head height angled towards the sun is unavoidably going to impact agricultural use of the land and is likely to disqualify it altogether. The Publication addresses potential structuring arrangements to get around that issue, although it is rightly fenced with caveats since, by definition, no such arrangements have been tested.

There are also issues with cross compliance where a farmer's other land is impacted by any arrangements ancillary to the solar farm, and where land is incorporated in an agri-environment scheme, compliance with obligations under that agreement will also be in issue.

Tax issues are also explored, particularly the effect on Capital Gains and Inheritance Taxes resulting from the change in status of the land.

Clearly, guidance will evolve in this fast-moving area, but this First Guide is an excellent starting point.

Geoff Whittaker

Practical SPS points

While there is so much uncertainty surrounding the ongoing CAP reforms (see facing page) it is difficult to know how to protect one's client and oneself from the consequences of the unknown. A couple of issues, however, do bear mention at this stage.

In transactions involving the transfer of entitlements, whether permanent or temporary, the acquirer is going to want some comfort that the asset will be preserved until the deal is complete. Clauses to that effect are common.

In the days of quotas, it was equally common to see provisions requiring a party to preserve the value of and to comply with all necessary conditions attached to such quotas, or to any equivalent benefit or right to support that may replace them.

Even though it appears reasonably likely that the Single Payment Scheme will survive in more or less the current format, similar thinking may be appropriate at this time in relation to entitlements.

Contracts for the sale of entitlements, and more especially those for letting, where the landlord will expect to see the asset returned undiminished at the end of the term, could well be amended to include clauses to similar effect.

There is guidance in the *Tenancies* chapter of Jordans' *Agricultural Precedents Handbook* which can be adapted for this purpose.

The second, much more straightforward, point concerns the yield from entitlements in England under the dynamic hybrid system.

Many practitioners have taken to asking in pre-contract enquiries for differentiation between ordinary entitlements pure and simple and those which were formerly set-aside or National Reserve entitlements. The latter would yield only the relevant percentage for the current year of the area payment and would therefore be worth less than the former, which would have some historical value as well.

That position will become redundant in transactions after 3rd April, since any entitlements transferred after that date will not be capable of use by the acquirer in 2011 and in 2012 and subsequently the yield will be entirely based on the area payment without reference to history.

Pre-contract enquiries may, to that extent, be tidied up.

A question of perspective

Wherever you stand, there is a bigger picture. Like the great fleas who have little fleas upon their backs to bite 'em and, in turn, have greater fleas to go on, the level of appreciation depends on the position of the observer.

While the Member States of the EU argue their corners on the reform of CAP, commentators on the global scene are pointing out the damage that introspection and self-interest can do to the introspective and the self-interested.

The worldwide debate is moving to focus on food production, water resources and the equitable distribution of each. The year 2050 is far enough away to give the impression that there is little cause for present worry and the need to feed half as many people again by then is something that many misguidedly feel able to leave to future generations.

But the latest Foresight Report, produced by the Government Office for Science, attempts to bring together the threads of the required actions and, encouragingly, sees farmers as key players. "The 'Cinderella status' of primary food production in international development financing has for too long ignored the crucial role that it plays in rural and urban livelihoods". Cinderella, it seems, has been invited to the ball.

The Report looks to 'sustainable intensification', an apparent oxymoron but a concept which in effect means 'getting more from less'. In pursuit of that Holy Grail, no policy option, it says, should be closed off. New technologies, such as genetic modification, cloning and nanotechnology, "should not be excluded a priori on ethical or moral grounds".

Commentators at the recent *Informa Agra Outlook* conference were of a similar mind. According to Bernard Graciet, the senior adviser at Syngenta, if crop yields remain at 2009 levels, a further 140 million hectares will be needed by 2025 – only 14 years from now – to feed everyone. If growth continues at the current rate of 1.2%, only 20mha would be needed; if it were to be boosted to 1.8%, the world could be fed from the same area of farmland as in use at present.

It is easy to say "Well, he would say that, wouldn't he?", but it's food for thought – if you'll pardon the pun – in any case.

Leading analysts are also predicting that by 2020 – just nine years from now – we will need 45% more water to keep pace with food demand.

There is increasing talk of assessing food and consumer products by reference to their 'water footprint', a creature of the Water Footprint Network, an organisation based in the Netherlands promoting sustainable water use.

Did you know, for example, that it takes 140 litres of water to produce a cup of coffee? Or 1,000 litres per litre of milk? Or 16,000 litres per kilogram of beef? Looked at in that light, food production takes on a different appearance.

Thomas Malthus wrote in the early 19th century that populations are restrained sooner or later by war, famine and disease. There are those who point to current events in North Africa and claim they are a manifestation of Malthusianism.

Who will be right: Malthus or Syngenta? It's all a question of perspective.

Subs: please and thank you

Members will by now be aware that the subscription for the 2011/12 year is now due. As indicated before February's AGM, the subscription has, for the first time since 2006, had to be increased to keep pace with costs, but at £75 we like to think that it still represents excellent value for money.

As I have said before, it amounts to less than the cost of a glass of wine a week, and for that you get not only this publication and the specialist information available on the Members' Section of the website, but are also part of the nation's largest organisation devoted to promoting the knowledge and understanding of the law, as distinct from other skills, relating to rural practice.

It is most encouraging to see that one in three of you have renewed your subscriptions pretty much by return of post. Many thanks to all who have done so for your continuing support.

To those who have not yet got around to it, I look forward to hearing from you presently.

May I plead with you, though, to quote your membership number when sending your cheque or your BACS payment. It does make things so much easier at HQ!

EUROPEAN FOCUS

Single Payment Scheme applications

Jo Batchelor & Richard Wordsworth, National Farmers Union

Spring is a busy time for farmers, and it is also time for the 2011 Single Payment Scheme (SPS) application forms (SP5 forms) to become available. That means it is also a busy time for their advisers and agents as they strive to ensure that applications are submitted on time and are correct.

However, every year the NFU hears from a number of its members experiencing the same common problems: errors on applications that are not noticed until the RPA contacts the farmer regarding areas being removed and/or penalties being imposed on claims; forms that, for whatever reason, have not arrived at the RPA on time. All too often, these issues could have easily been avoided or resolved if they had been detected earlier, but by the time the problem becomes apparent it ends up being a very costly mistake for the farmer.

In this article we consider some of these common problems we see and some of the things advisers can discuss with their clients to ensure that they do not fall into these traps. Much of this will sound obvious, but each year we see many farmers affected by these issues.

Deadlines for submitting applications

The deadline for submitting an SPS application without penalty in 2011 is midnight on the 16th May 2011. (This is because 15th May 2011 falls on a Sunday.)

Applications can be submitted until midnight on the 10th June 2011, however a penalty of 1% will be imposed for each working day after 16th May (e.g. a form submitted on 24th May 2011 will be six working days late, therefore a 6% penalty will be imposed on the claim). Forms received after midnight on 10th June 2011 will be inadmissible.

For that reason, it is vital that checks are carried out to ensure that the form has reached the RPA in time. If submitting multiple forms, check that acknowledgements have been received for every application. It goes without saying that any missing applications need to be dealt with immediately. If acknowledgements will go to the farmer, ensure that the farmer knows that the application has been sent and when to expect the acknowledgement back. Importantly, also ensure that the farmer knows what to do if they do not receive their acknowledgement card back from the RPA.

If sending forms in the post, it is always worth using a form of postage which enables proof of posting and delivery to be obtained; keep this safe as it could be vital proof that the form did arrive at the RPA if it is somehow misplaced after arrival. The Royal Mail also offers various options for postal insurance, and those concerned about the implications of lost or late applications may wish to consider taking out such cover to protect themselves from the consequences of the application being lost in the post.

Force majeure and exceptional circumstances and late forms

For forms submitted before midnight on 10th June 2011, the force majeure and exceptional circumstance provisions can be used in appropriate cases to challenge any penalties imposed as a result of the application form being late. However, it is necessary to write to the RPA within 10 working days of the event occurring or of being in a position to do so, to notify them of the situation (see the *Single Payment Scheme Handbook for England 2011 and 2012* ("the 2011 Handbook") for further details).

However, forms which are submitted after midnight on 10th June 2011 will be regarded as inadmissible; the force majeure and exceptional circumstance provisions cannot be used in these circumstances. This limitation is set out in the EU legislation[1] governing the SPS, and the RPA does not have discretion to accept claims submitted after this date.

This situation does seem harsh for farmers who are genuinely affected by force majeure or exceptional circumstance events which result in an SPS application not being submitted before the final deadline. Indeed, in these cases a difference of one day in submitting the form can make the difference between a full SPS payment and no SPS payment. So, no matter how difficult a client's situation is, it is vital that their SPS application reaches the RPA before midnight on 10th June 2011 if they are to receive an SPS payment in 2011.

If mistakes occur

Obviously, it is better to check applications for mistakes and correct any mistakes that have been made before the form is submitted to the RPA. However, if mistakes are made there are a limited number of situations in which mistakes can be corrected. In many of these cases, time will be of the essence, so it is important to act promptly.

Common mistakes include:

- incorrect land use codes being used (remember to read the guidance and the criteria for each code carefully as there are occasionally changes to the codes);
- failure to enter a land use code; and
- failure to enter an area on which to activate entitlements.

In these circumstances, the application itself is still likely to be valid (unlike situations where the form is not signed for example), so the form will not be returned to the farmer as a result of the error. Consequently, it is important that forms are checked carefully for these types of mistake prior to being submitted.

Consequences of mistakes

If there is an error in relation to a particular land parcel (for example, if a land parcel is coded as SA3 and does not meet the criteria for SA3) the RPA is likely to consider the parcel ineligible for SPS. It may be that the land would have been eligible under a different code, but the use of the wrong code can, in the RPA's view, make the land ineligible. The result of this is that the parcel in question will be removed from the claim. The RPA may then take the view that the farmer over-

> "An 'obvious error' must be obvious to someone looking at the application form, as a result of information contained in the form"

> "Issues which could have easily been resolved if detected earlier can by the time the problem becomes apparent end up being a very costly mistake for the farmer"

declared his eligible land, and impose penalties in accordance with the provisions contained in the 2011 Handbook. If the area removed from the claim is more than 3% of the land remaining, or more than 2ha, but not more than 20% of the area, a penalty equal to twice the area removed will also be imposed on the claim. (Higher penalties apply to larger over-declarations).

Practical example:

Farmer A declares 100ha on his SP5 form. However, due to an error (e.g. missing information or an incorrect land use code being used), a 10ha field is removed from the claim by the RPA; the area determined by the RPA will then be 90ha. As the parcel removed was more than 2ha but less than 20% of the area determined, the RPA will impose a penalty of 20ha on top. So, effectively, Farmer A will be paid on 70ha, losing 30% of the SPS payment he would have received had the error not being made.

Amendments

There are provisions which enable farmers to amend their SP5 forms after they have been submitted to the RPA. However:

- the farmer must write to the RPA requesting the amendment before midnight on the 10th June 2011, although penalties will be imposed for amendments requested after midnight on the 31st May 2011; BUT
- farmers cannot correct mistakes after the RPA has notified them of the error or of an inspection which subsequently reveals the error.

Unfortunately, all too often the farmer does not become aware of the problem until they are contacted by the RPA. By this time, it is too late for the farmer to make use of the amendment provisions.

Often farmers mistakenly believe that the RPA will contact them to discuss any problems or discrepancies which come to light when processing the application, and give them the opportunity to rectify those mistakes. This is not the case. The RPA's view is that the onus is on the farmer to check their application and ensure that all of the details contained in it are correct. The RPA will not contact the farmer to discuss any problems it finds. By ensuring that their clients are aware of this, and making clients aware of the limited period for amending the SP5 form, advisers/agents can help their clients to avoid large losses.

Obvious error

If an error is an "obvious error" it can be corrected at any time, without penalty. This is, therefore, a very important provision for farmers. However, it cannot be used in all situations, and even some genuine clerical errors may not fall within the scope of the obvious error provisions.

Very simply, in order to be an obvious error, the error must be obvious to someone looking at the application form, as a result of information contained in the form. The farmer must also have acted in good faith if the error is to be corrected under these provisions.

The EU Commission issued a guidance note[2] on the concept of obvious error in 2002; this document contains further guidance on the types of mistake which will be considered as obvious errors. This guidance confirms that whether a mistake is an obvious error has to be considered on a case by case basis, but that the mistake should, generally, "be detected from information given in the aid application form submitted, i.e. where an administrative check on the coherence of the documents and the information submitted to support the claim (especially the application form, supporting documents, declarations etc) reveals such errors".

The EU Commission's guidance also states that the following categories of irregularities may usually be classified as obvious errors:

- errors of a purely clerical nature that are obvious from a basic examination of the claim, such as boxes that have not been filled in and information that is missing; and
- errors detected as the result of a coherence check (contradictory information), such as missing information, inconsistencies between information provided in the same application form (e.g. declaring the same parcel twice) and inconsistencies between the information supporting the application and the application itself (e.g. maps not in agreement with the application).

The EU Commission's Guidance also states that some errors (e.g. reversed figures or errors resulting from map reading errors) may be considered as obvious errors even if the information which reveals the error does not

> "The importance of completing and submitting the SPS application form in time and without errors cannot be overstated"

come from the farmer. This guidance can be very useful when making representations to the RPA.

Helpfully, the EU Commission's guidance confirms that in appropriate cases, errors can be corrected under the obvious error provisions even if they would have resulted in a higher payment being made to the farmer. This is particularly useful in cases where, for example, the farmer has sought to activate entitlements on a greater area than the total field size.

So, in cases where the farmer was notified of an error by the RPA it is worth looking carefully at all of the information submitted in/with the SP5 form, and the EU Commission's guidance on obvious error to ascertain whether the mistake in question can fit into this category. If it can, then it may be possible to challenge the RPA's decision to remove the affected land from the claim on the basis that the mistake should be rectified under the obvious error provisions.

Generally speaking, the RPA will not accept that a mistake is an obvious error if the farmer has made the same mistake before. So, if a farmer uses the obvious error provisions it is important that he checks his form extra carefully in the future.

Notified error & withdrawal

If a farmer notices that he has made an error on his SP5 form, the deadline for amending the application has passed and the mistake cannot be classed as an obvious error, it may still be possible to avoid penalties being imposed as a result of the mistake. However, this is still dependent on the farmer acting before the RPA notifies him of the mistake.

One option is for the farmer to write to the RPA to notify the RPA of the error (see the 2011 Handbook for further details). This may not result in the error being corrected but the RPA should not impose any penalties as a result of the error. For example, if the farmer had declared a parcel as being 6.96ha instead of 9.69ha the area of the field would not be increased, but, if he makes use of the notified error provisions, the farmer should not be penalised for under-declaring his land.

Farmers are also able to withdraw all or part of their application at any time without penalty, provided they have not been notified of an error or an inspection that subsequently reveals the error (see the 2011 Handbook). This could be useful if the farmer realises, for example, that he has declared a field as being eligible for SPS but, due to a change of circumstances, has had to use that land for a non-agricultural purpose.

It is important to be aware that farmers who make use of these provisions may be required to repay any sums they have received, plus interest, in respect of areas withdrawn or in relation to areas that have been over declared.

Key Dates

16th May 2011 – Deadline for submitting an SP5 form without penalties

31st May 2011 – Deadline for amending SP5 form without penalties

10th June 2011 – Final deadline for submitting an SP5 for, AND deadline for amending the SP5 form (Penalties apply for amendments after 31st May 2011)

All dates are based on the latest information available at the time of writing. Please check the Single Payment Scheme Handbook and Guidance for 2011 and 2012 to confirm (available on the Members' Section of the ALA website).

Conclusions

Many farming businesses are heavily reliant on their SPS payment to remain viable. Relatively small errors on application forms can quickly start to result in large reductions to the value of the SPS claim. Likewise, a difference of just one day can be the difference between a valid application being made, but penalties being imposed for late submission, and an application being inadmissible, even if there are exceptional circumstances. So, the importance of ensuring that SPS applications are completed and submitted in time and that there are no errors on the form cannot be overstated.

The NFU deals with a large number of SPS appeals in relation to both errors on application forms and cross compliance breaches. We are able to discuss the issues involved with our members and in some cases we can provide sample wording which can be used as the basis for an appeal against a decision/penalty. We are happy to work with/alongside member's professional advisers. So, if you are assisting a client with an SPS appeal, if they are an NFU member, please do give us a call on 0870 845 8458.

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[1] Article 23 of Commission Regulation (EC) 1122/2009 of 30th November 2009

[2] Working Document AGR 49533/2002 on the concept of obvious error according to art.12 of Commission Regulation (EC) No 2419/2001

LITIGATION

Five most common quantum errors in agricultural claims

Mark Shelton, Forensic Accountant, Wells

A review of a number of quantum calculations in agricultural litigation cases would show the same errors recurring in a good proportion of these whether this is an initial assessment of the quantum by the claimant himself or, more concerning, a calculation prepared by the claimant's expert and submitted to the defendant.

Three factors need to be considered when deciding how to resolve a commercial dispute:

Cost – in terms of money, time and mental anguish;

Risk – the chance that a satisfactory outcome can be achieved; and

Benefit – the likely range of quantum.

Without a realistic assessment of quantum it is impossible to carry out a proper appraisal of the various options for resolving the dispute. It may therefore be helpful for litigation lawyers to be aware of, and look out for the most common errors seen in quantum calculations all of which will tend to inflate the claim.

The following are the five most common errors seen in agricultural claims. Whilst they may appear to be very basic when spelt out they nevertheless occur with great regularity.

Revenue v capital losses

A claim might revolve around a loss of milk production or perhaps the lower productivity of a machine and (quite rightly) the loss of gross profit from the reduced output will have been assessed. Frequently the claimant will also include a reduction in the capital value of the asset concerned (the cows or the machine) on the basis that its sale value is now less than before.

There are two issues here: firstly, the loss in capital value will only be crystallised if and when the asset is sold; and secondly, the loss in the capital value, assuming it is purely as a result of the lower productivity, will already have been taken into account in the loss of income. The loss in value of the asset represents the capitalised future revenue losses over the remaining life of the asset.

To include both the revenue loss and the loss in value is therefore double counting the same loss. If the asset is to be retained then it is only the revenue losses that are relevant and the capital loss will never be realised. If the asset is to be sold rather than being retained in production then it is appropriate to include the loss of capital value but not the revenue losses.

Proprietors' time

A claim will often include the value of additional time that the partners in a business have had to put in as a result of the event to which the claim relates. The additional time spent by the partners, in itself, does not represent a loss to the business and therefore is not a valid element of the claim.

Recent cases[1] have indicated that proprietors' time can only be claimed where there is an actual cost involved or where the additional time required has caused significant disruption to the business. The validity of this element of the claim may therefore be merely a matter of presentation: did the proprietors just have to work additional hours or is it the case that there was a diversion of time away from other activities causing a loss of revenue?

The same principles apply to salaried staff where they have put in additional time with no additional remuneration.

Supporting evidence

All too frequently there will be a theoretical calculation of the additional costs arising as a result of the event to which the claim relates with no reference to the relevant evidence (such as the accounts for the business) that would support or refute this calculation. An example might be labour costs where it is assumed that workers will have had to work additional hours. In practice it may be that this time was absorbed within the normal working day and that no additional cost is incurred despite the time that was spent dealing with the particular matter.

> "Claims can be reduced in size by 50% simply by correcting errors of accounting principles"

A simple review of the accounts, pay records or timesheets can provide the necessary evidence of whether additional labour costs were incurred. Even if the evidence does not necessarily identify the additional cost, an explanation of why the cost is not reflected in the records can avoid a presumption that no additional costs were incurred.

All available evidence should be referred to ensure consistency with the loss calculations and reliance on theoretical calculations should be kept to the minimum.

Sunk costs

The situation may arise where, as a result of misfeasance, an asset unconnected with the claim becomes obsolete.

For instance a farmer may have recently put up a new building to house additional cows and following a particular event, herd size fails to increase at the expected rate and the building is no longer required.

It is not uncommon for such wasted costs to be included within the claim even though the decision to invest was unrelated to the claim itself.

The loss in this situation arises from the reduced herd size and not from the wasted costs of the building (which would theoretically have been funded by the income from the additional cows had the expansion occurred).

This is another form of double counting where both the loss of revenue and the capital expenditure which this revenue would have funded are both claimed.

Cull cows

In claims involving dairy herds (or other breeding livestock) there may be an amount for additional animals culled as a result of the misfeasance. All cows in a herd will have to leave the herd eventually and so the culls that are claimed for are not additional culls but earlier culls. Accordingly it is only part of the cow's productive life that is lost.

As an example, if we assume that a heifer costs £1,250, a cull cow is worth £250 and the average herd life of a cow is four years, the replacement cost of a cow equates to £250 per year [(£1,250-£250)/4]. If a cow has already had three lactations by the time she is prematurely culled the loss is £250 [(4-3) x £250] and not the full cost of the replacement of £1,000. On average, assuming that the additional cows culled reflect the full age range of cows in the herd, the average cost of the earlier cullings will be 50% of the cost of replacement (£500 per cow in this example).

Tempering optimism

Claimants can be unduly optimistic with regard to the settlement they expect and it is not uncommon for a claim to be reduced by 50% simply by correcting these obvious errors of principle. A margin of error of this magnitude could well affect the lawyer's view as to how a dispute should be resolved. Solicitors may therefore want to be on the look out for such mistakes or, ideally, bring in an accountancy expert at an early stage to provide an early assessment of the quantum of a claim. This should ensure that there is a reliable basis on which to make decisions about how to pursue the claim.

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[1] e.g. *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002 EWHC 233 (Ch); *R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA No.3* [2006] EWHC 42 (Comm); *Aerospace Publishing v Thames Water Utilities* [2007] EWCA Civ 3

PLANNING

Seasonal workers living in temporary agricultural accommodation

Matthew Knight, Knights, Tunbridge Wells

When considering the situation of seasonal workers including gypsies and travellers living in temporary agricultural accommodation – as with most planning, development and settlement issues – the first place to start is the Town and Country Planning (General Permitted Development) Order 1995. In this instance, the most relevant parts of the Order are Parts 4, 5 and 6.

Temporary buildings under the GPDO

Part 4 of the Order deals with temporary buildings and their uses and allows buildings, moveable structures, works, plant or machinery required temporarily in connection with and for the duration of operations being or to be carried out on, in under or over that land or on land adjoining that land. Development under this part of the Order will not be permitted if planning permission is required but not granted or deemed to be granted.

All of this is also subject to the conditions that any buildings etc are removed and that any adjoining land is to be reinstated to its pre-development condition as soon as this is reasonably practicable.

Temporary agricultural accommodation for seasonal workers more often than not involves caravans, mobile homes or similar. Part 5 of the Order is specifically designed to deal with Caravan Sites. Permitted development under Part 5 of the Order covers the use of land, other than for a building, as a caravan site. Such permitted development is subject to the condition that the use be discontinued when the circumstances specified in paragraph A.2 cease to exist and that all caravans on the site shall be removed as soon as reasonably practicable.

The circumstances referred to in Paragraph A.2 are in fact the same "circumstances" covered by paragraphs 2 and 10 of Schedule 1 of the Caravan Sites and Control of Development Act 1960 (in that context being cases where a caravan site licence is not required).

The most relevant circumstances are contained in paragraphs 7 and 8, which apply to Agricultural and Forestry Workers.

Paragraph 7 deals with agricultural workers. In such cases, a site licence shall not be required for the use of agricultural land as a caravan site for the accommodation during a particular season of a person or persons employed in farming operations on land in the same occupation.

Paragraph 8 deals with and makes provision for creation of a seasonal caravan site for forestry workers in similar terms.

Take a sequential approach

- Accommodate seasonal workers in existing buildings either on or off site where possible;
- If not, choose a site outside a designated green belt;
- If not possible, convince Local Authority that there are very special circumstances and that all other alternatives have been examined;
- Choose the most suitable site within the landholding;
- Consult with local people and others affected

Agricultural buildings and operations

Part 6 of the Order deals with Agricultural Buildings and Operations. This legislates for various different scenarios in respect of site sizing. Permitted development under Class A of Part 6 of the Order includes the carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of works for the erection, extension or alteration of a building or any excavation or engineering operations which are reasonably necessary for the purposes of agriculture within that unit.

Development will not be permitted under Class A in various circumstances. These circumstances relate to the size of the land, the height and use of the buildings upon it and the activities carried out upon it.

Class B covers units sized between 0.4 and 4.99 hectares. Development under this class include various scenarios, the most relevant here being the extension or alteration of an agricultural building. Development will not be permitted under Class B in circumstances relating to the size of the land, external appearance of the development and the location and size of buildings in relation to the road.

Under Part 6 of the Order, "agricultural land" means land which, before development permitted by this Part is carried out, is land in use for agriculture and which is so used for the purposes of a trade or business, and excludes any dwellinghouse or garden. "Building" does not include anything resulting from engineering operations. This does not specifically include temporary buildings; hence this is included in this article.

Local plans

When looking at a situation in a particular locality, the next port of call after the GDPO should be the relevant Local Plan or similar document. A good example of this is the West Lancashire Replacement Local Plan Supplemental Planning Guidance, which was issued in 2003 and updated in January 2007. This deals with the issue of Accommodation for Temporary Agricultural Workers and states that planning permission is not required for temporary seasonal accommodation for farm workers.

As stated above, this is allowed under the GPDO during a particular season on land in the same occupation, as long as caravans are removed when circumstances cease to exist. This only relates to the short-term solution of providing adequate labour to meet the demands during peak periods of activity.

A Planning Inspector's decision in December 2002 stated that caravans can only be kept on a site for one particular season i.e. during planting or growing or harvesting of a single crop, but not for the whole crop cycle. The nature of horticultural businesses where multi-cropping and rolling planting programmes result in overlapping crop cycles, means that most farmers and growers would find it difficult to rely on the GPDO exemption rights alone and will need assistance from the Local Plan or similar or get planning permission for what is proposed.

Whilst the guidance is intended to be specific to this particular locality, it still provides a useful starting point when thinking about how to approach this matter generally. Generally speaking, a planning application should be made where workers will be housed for longer than a single planting or growing or picking season or where caravans and other related buildings (e.g. canteens and toilets) are to be kept on site permanently or where the change of use to an existing building is involved or where hardstandings and permanent services (e.g. water or electricity supply or septic tank) need to be provided or where a new building is required.

Sequential approach

It is sensible to take a sequential approach to planning. Having checked with the Local Planning Authority as to whether planning permission is required, the landowner should make every effort to accommodate his seasonal workers in existing buildings either on or off site.

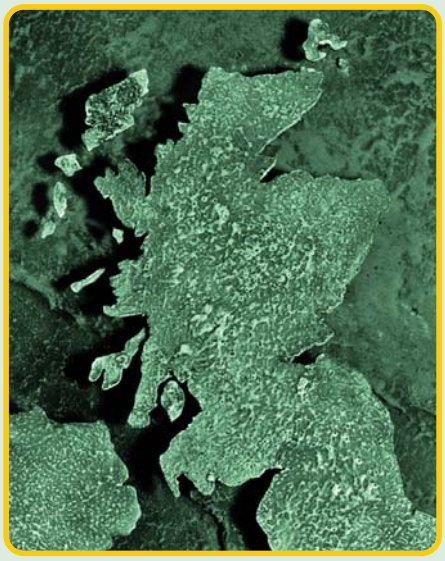
If he does need to build and if there is nothing other than a green belt site to do this on, the Local Planning Authority will need to be convinced that there are very special circumstances and that all other alternatives have been examined.

The landowner will also need to show that the proposed site is the most suitable within his own land holding. He must also consult local residents prior to taking any action and comply with all other regulations, such as the caravan sites standards and the drainage requirements of the Environment Agency, Building Regulations etc. and, in addition, ensure that adequate arrangements are made for the disposal of refuse and sewage from the site in order to avoid causing pollution to the environment and nuisance to neighbours. These issues are likely to be dealt with by conditions in any planning permission.

SCOTTISH PERSPECTIVE

Some timely adjustments to the tenancy legislation

Mike Gascoigne, Gillespie Macandrew LLP, EdinburgH



It is eight years since the 2003 Act received Royal Assent and during that time there have been various calls for adjustments to its provisions. The previous Scottish Government indicated that it would prefer the Act to "bed in" before any changes were contemplated, but the present Scottish Government has taken a more sympathetic view on the need for amendments.

In June 2007 it instigated an investigation into the barriers which confront new entrants to farming, with a view to identifying practical solutions and establishing recommendations. The organisation chosen to undertake this was the Tenant Farming Forum ("TFF") in which NFU Scotland, RICS Scotland, the Scottish Estates Business Group, the Scottish Tenant Farmers Association, the Scottish Rural Property & Business Association and the Scottish Association of Young Farmers Clubs are the representative members. The TFF's stated primary purpose is "to help to promote a healthy tenanted farm sector in Scotland".

Having conducted a consultation and survey across Scotland the TFF made recommendations to the Cabinet Secretary for Rural Affairs in March 2008. Further discussions followed and the TFF ultimately recommended ten measures to the Scottish Government which would assist new entrants to farming and remove some of the ambiguities from the existing legislation to reduce the potential for dispute. The TFF saw their ten recommendations as a complete package.

The Scottish Government decided that the proposed amendments should be introduced by a Scottish Statutory Instrument made under s.17 Public Services Reform (Scotland) Act 2010. Such an Order would achieve an accelerated introduction of the amendments to the legislation, provided that its provisions satisfy the various pre-conditions laid down in that 2010 Act. The consequence of this has been that four of the ten TFF proposals have been "parked".

> "Measures to assist new entrants and to remove some of the ambiguities"

The remaining six came into effect on 22nd March 2011 in terms of the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 (SSI2001/232). Three of the six provisions amend the 1991 Act and the other three amend the 2003 Act. The terms of the amendments and the manner in which the previous legislation is affected are as follows.

Substitution of definition of "two-man unit" in 1991 Act, Schedule 2 – Box 1

The provision of the 1991 Act which is now amended in this way is relevant where a "near relative" successor has acquired a 1991 Act tenancy on the death of the previous tenant. The landlord in these circumstances may seek to challenge the succession by serving a counter-notice on the successor, specifying one or more of the grounds or Cases listed in Schedule 2 of the 1991 Act.

Slightly differing provisions apply depending on whether the tenancy in question commenced before or after 1 January 1984. In each case, the "fair and reasonable landlord" test applied where "the holding or any agricultural unit of which it forms part is not a two-man unit …". That latter phrase was defined as "an agricultural unit which in the opinion of the Land Court is capable of providing full-time employment for an individual occupying it and at least one other man".

The "two-man unit" definition, considered to be outdated in its application, has been replaced with the new "viable unit" definition. On the relatively infrequent occurrence when a landlord may choose to challenge a succession to a 1991 Act tenancy on the grounds mentioned above, the new term of "viable unit" will now be pertinent in either satisfying or failing the test to be applied by the Land Court. In essence, the new test relates to the holding's capability of providing (a) full-time employment for its occupier and (b) the means of funding the rent liability and the maintenance obligation.

Annulment of post lease agreements under 1991 Act, section 5 – Box 2

Subsections (4A) and (4B) were inserted into s.5 of the 1991 Act by s.60 of the 2003 Act. They enabled a tenant to nullify a post lease agreement ("PLA") provided that –

(a) notice to that effect was given by the tenant to the landlord on the date specified in the notice and which occurred after the date on which a

BOX 1

Article 3

In Schedule 2 (grounds for consent to operation of notices to quit a tenancy where section 25(3) applies)—

(a) in Part I (grounds for consent to operation of notice to quit a tenancy let before 1 January 1984) and Part II (grounds for consent to operation of notice to quit a tenancy let on or after 1 January 1984) in Cases 2, 3, 6 and 7, for "two-man unit" substitute "viable unit";

(b) in Part III (supplementary)—

(i) in paragraph 1, for the definition of "two-man unit" substitute—

""viable unit" means an agricultural unit which in the opinion of the Land Court is capable of providing an individual occupying it with full-time employment and the means to pay—

(a) the rent payable in respect of the unit; and

(b) for adequate maintenance of the unit."; and

(ii) in paragraph 2, for "two-man unit" substitute "viable unit".

BOX 2

Article 4

For section 5(4B) (fixed equipment and insurance premiums) substitute—

"(4B) This subsection is complied with if—

(a) subject to subsection (4BA), no later than 6 months before the date from which any variation of rent will take effect, the tenant gave written notice to the landlord stating that the agreement is to be nullified on that date;

(b) the rent is reviewed in accordance with the terms of the tenancy or is determined by the Land Court in accordance with section 13 of this Act; and

(c) on the date referred to in paragraph (a)—

(i) the buildings and other fixed equipment are in a reasonable state of repair; or

(ii) if the buildings and other fixed equipment were in an unreasonable state of repair when the agreement was made, they are not in a worse state of repair than they were then.

(4BA) Where a rent review is initiated less than 6 months before any variation of rent would take effect, subsection (4B)(a) is complied with if notice is given when it is initiated, or as soon as reasonably practicable thereafter.".

determination of the rent for the holding had been made by the Land Court, and

(b) on the date in question the buildings and other fixed equipment were in a reasonable state of repair or, if they were in an unreasonable state of repair, they were in no worse a state of repair than they were when the PLA was made.

Comment had been made that this provision disadvantaged landlords because the rent determination preceding the annulment of the PLA would set the rent at a level which reflected the existence of the PLA. Thus, the landlord would have to wait a further three years before the opportunity would arise for the rent to be adjusted to reflect the annulment of the PLA.

The changes to these 2003 Act provisions are subtle but helpful. Firstly, the tenant's notice of nullification of the PLA has to be served either (a) no later than 6 months before the date on which the rent review will take effect, or (b) in cases where the rent review is initiated less than 6 months before the date when the variation of rent would take effect, when the rent review is initiated or as soon as reasonably practicable thereafter. Secondly, the variation of rent can be either by a review conducted according to the terms of the tenancy or by a rent determination by the Land Court.

Amendment of 1991 Act, section 13 – Box 3

The switch from arbitration to the Land Court as the initial dispute resolution forum for both 1991 Act tenancies and the new fixed term tenancies introduced by the 2003 Act involved numerous amendments to the 1991 Act. Perhaps inevitably one such amendment was not properly made and the error was not spotted before the 2003 Act received Royal Assent.

Its s.13 provides for variation of rent as determined by the Land Court and in amending the previous wording which referred to arbitration, the parliamentary draftsman deleted more words than were necessary from the old provision.This unsatisfactory variation of the terms of section 13 of the 1991 Act was brought before the Land Court in the case of *Morrison-Low v Paterson's Executors*. The Court considered that the "whole provisions of the section …. had no practical meaning" and that "the draftsman had accidentally made the clause unworkable".

It concluded that, in order to provide an interpretation of the section's wording as enacted, it should revert to the wording before its amendment and insert such additional words as would reflect what had accidentally been omitted. The Court therefore resolved to proceed on the basis that the words "following notice in writing served on the other party" were to be read after the word "Act" in s.13. Exactly the same words have now been added to section 13 by the 2011 Order.

BOX 3

Article 5

In section 13(1) (variation of rent), after "Act," insert, "following notice in writing served on the other party,".

Limited duration tenancy – minimum term – reduction from 15 years to 10 years: 2003 Act, section 5 – Box 4

The introduction of the short limited duration tenancy (SLDT) and the limited duration tenancy (LDT) in the 2003 Act – the former for a maximum of 5 years and the latter for a minimum of 15 years – seemed to many at the time to leave an unnecessarily wide duration gap between these two types of tenancies. Indeed, the Scottish Government has acknowledged that many limited partnership tenancies created prior to 2003 were for periods which mostly lay between 5 and 15 years.

There is also evidence that landowners have been unwilling to commit to a fixed term tenancy with a minimum of 15 years. In order to attract newcomers to farming it was felt that a minimum of 10 years would be beneficial and this provision of the 2011 Order introduces the new 10 years minimum period for LDTs

Conversion of a short limited duration tenancy to a limited duration tenancy by agreement: 2003 Act, section 5(2) – Box 5

Section 5 of the 2003 Act defines the various circumstances in which LDTs exist or are deemed to exist. Section 5(2) specifies one of these as follows:

"Where the tenant remains in occupation of the land after the expiry of the term of a short limited duration tenancy of 5 years (including such a term fixed by virtue of section 4(2) or (3)) with the consent of the landlord, the tenancy has effect as if it were for a term of 15 years commencing on the expiry of the term of a short

BOX 4

Article 6

(1) In section 5 (limited duration tenancies)—

(a) in subsection (1)(a), for "fifteen" substitute "10"; and

(b) in subsections (3) and (4), for "15" (wherever it appears) substitute "10".

(2) In section 8(6) (continuation and termination of limited duration tenancies), for "fifteen" substitute "10".

BOX 5

Article 7

For section 5(2) (limited duration tenancies), substitute—

"(2) Where—

(a) at any time before the expiry of the term of a short limited duration tenancy, the landlord and tenant agree in writing to convert the tenancy to a limited duration tenancy; or

(b) the tenant remains in occupation of the land after the expiry of the term of a short limited duration tenancy of 5 years (including such a term fixed by virtue of section 4(2) or (3)) with the consent of the landlord,

the tenancy has effect as if it were for a term of 10 years commencing at the start of the term of the short limited duration tenancy, and the tenancy is, by virtue of this subsection, a limited duration tenancy.".

limited duration tenancy; and the tenancy is, by virtue of this subsection, a limited duration tenancy."

The 2011 Order amends Section 5(2) by providing that (a) in these particular circumstances the tenancy has effect as an LDT with a term of 10 years and (b) the 10 years commences at the start of the term of an SLDT (as opposed to its expiry, as originally specified in section 5(2)). In addition, the 2011 Order also enables the landlord and the tenant under an SLDT tenancy to agree, prior to the expiry of the tenancy's term, to convert it to an LDT.

Fixed equipment, etc: amendment: 2003 Act, section 16 – Box 6

This is a substantial re-working of the now superseded section 16(1) to (5) and it should be noted in particular that the new provisions refer only to SLDTs and LDTs. 1991 Act tenancies are not affected.

> "Provisions in s.16 of the 2003 Act relating to fixed equipment are substantially reworked"

Gone are the landlord's previous obligations to put the fixed equipment let by the lease into a thorough state of repair at its commencement and to provide such other fixed equipment as will enable a reasonably skilled occupier to maintain efficient production.

> "New 10-year minimum term introduced for LDTs"

Now the landlord is obliged within the first six months of the tenancy (or longer if some statutory obligation so dictates) (a) to provide such fixed equipment as will enable the tenant to maintainefficient production with reference to the land use specified in the lease and (b) to have such fixed equipment put into such condition as the landlord and tenant may agree, or as determined by arbitration if they disagree.

Gone also is the requirement that the fixed equipment must be specified in the lease. Instead there is now a mandatory written schedule which lists all the fixed equipment let by the lease and which also states the condition of such fixed equipment.

The cost of making and agreeing this schedule is shared equally between landlord and tenant, unless they determine otherwise. Once agreed, the schedule is deemed to form part of the lease, but it can be amended or substituted if there is a variation in the fixed equipment or in its condition during the tenancy.

The tenant's fixed equipment maintenance obligations and the landlord's fixed equipment renewal or replacement obligations remain virtually the same as before.

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1 See ALA Bulletin, Spring 2006, p.10

2 2005 SLCR 5

BOX 6

Article 8

For section 16(1) to (5) (fixed equipment etc.), substitute—

"(1) There is incorporated in every lease constituting a short limited duration tenancy or a limited duration tenancy an undertaking by the landlord that the landlord will—

(a) within 6 months of the commencement of the tenancy or, where that is not reasonably practicable by virtue of any obligation on the landlord under any other enactment, as soon as reasonably practicable thereafter—

(i) provide such fixed equipment as will enable the tenant to maintain efficient production as respects the use of the land as specified in the lease; and

(ii) put the fixed equipment so provided into the condition specified in the schedule of fixed equipment that is required by virtue of subsection (2); and

(b) during the tenancy, effect such renewal or replacement of the fixed equipment so provided as may be rendered necessary by natural decay or by fair wear and tear.

(2) Where a lease constituting a short limited duration tenancy or a limited duration tenancy is entered into and fixed equipment is comprised in the lease, the parties must agree in writing a schedule of fixed equipment specifying—

(a) the fixed equipment which the landlord will provide in terms of subsection (1)(a); and

(b) the condition of the fixed equipment,

and on being so agreed (or, failing such agreement, on being determined in accordance with section 77 or 78 of this Act) the schedule of fixed equipment is deemed to form part of the lease.

(3) If at any time after the commencement of the tenancy the fixed equipment or its condition is varied, the landlord and tenant may agree to amend the schedule of fixed equipment accordingly or to substitute for it a new schedule.

(4) There is also incorporated in every such lease a provision that the liability of the tenant in relation to the maintenance of fixed equipment extends only to a liability to maintain the fixed equipment specified in the schedule of fixed equipment in as good a state of repair (natural decay and fair wear and tear excepted) as it was in—

(a) immediately after it was put into the condition specified in the schedule of fixed equipment; or

(b) in the case of equipment improved, provided, renewed or replaced, during the tenancy, immediately after it was so improved, provided, renewed or replaced.

(5) The cost of making and agreeing the schedule of fixed equipment under this section must, unless otherwise agreed, be borne by the landlord and tenant in equal shares.".

EUROPEAN FOCUS: CAP UPDATE

It all comes down to money

Geoff Whittaker, West Mersea

Before taking the presidency of the EU Agriculture Council at the beginning of the year, Hungarian agriculture minister Sandor Fazekas bravely, ambitiously, optimistically stated that he expected to achieve political consensus among the Member States on the next round of CAP Reform by the end of March. Those who felt he had a better chance of nailing jelly to the ceiling are beginning to think they might have been right.

If, as the old saw has it, a week is a long time in politics, the 2½ years before the reforms will take effect at the start of 2014 can be considered an eternity. In a telling recent development, the Commission has indicated that its detailed proposals, originally scheduled for July, will not now be published until mid-October at the earliest. In that light, it is unsurprising that there is a lot of hot air and very little detail.

It must also be remembered that this will be the most complex reform to engineer and, therefore, the most difficult to predict in the history of the CAP. For the first time, we have 27 Member States each with its own input reflecting the cultural and political divergence from Ireland to Romania to Finland to Portugal, and each with an equal voice.

For the first time, too, under the Treaty of Lisbon, we have a European Parliament which is co-decision-maker, not merely adviser. It has already taken issue with the Commission on various elements of its proposals.

All of these things have to be borne in mind when endeavouring to advise clients on what to do in 2014 and beyond.

An element of clarity?

A few things are becoming reasonably clear. The Single Payment Scheme or something looking very like it will still be in place in the next perspective. There is likely to be some tightening of environmental conditions of payment (although for reasons given below this may not be as frightening for UK farmers as some are making out). It is also probable that there will be an attempt of a sort – although what shape it may take is far from clear – at reducing the level of discrepancy between Member States in the amount of payments.

The Agriculture Council meeting in March has delivered a formal response to the Commission's communiqué produced in November. However, the only clear consensus is that there is very little consensus. Seven Member States, including the UK, voted against the paper, so there was barely a qualified majority in support.

The proposal is accepted to "move away from" historical payments. This will not affect English farmers – the historical element of the payment under the dynamic hybrid system disappears next year in any case – but the Scots and Welsh have some thinking to do. The drift, however, appears to favour a phasing in of any change, so it may be that the shock will be reduced somewhat.

A greener CAP?

The suggestion that further "greening" conditions will become attached to receipt of payments has excited much debate and concern. The principle appears to be accepted, but the mechanics are not. Commissioner Dacian Cioloş has nailed his colours firmly to this mast, but has indicated that he is not dogmatic about attaching conditions to Pillar 1 payments – the SPS – and would accept similar conditions within Pillar 2.

When one looks at his language, however, there may not be as much to worry about in a UK context as might at first appear. The conditions of which he speaks relate to such matters as permanent pasture, crop rotations and green cover, the like of which are already adopted fairly uniformly here as good agricultural practice.

The Commission has made great play of the need, as it sees it, to redistribute payments between Member States and between claimants. There are two issues: the levels of payments vary from €95/ha in Latvia to €800/ha in Malta and some reduction of that discrepancy is thought to be desirable; and it is still the case that the highest 2.5% of claimants receive twice as much between them as the lowest 70%.

The Parliament has produced a paper suggesting that the allocation of CAP funding to Member States should be adjusted so that all national envelopes contain sums within 35% either side of the average. This, predictably, is too much for some and not enough for others and it will take some time before we can see how that may resolve.

Capping?

The relationship of claimants inter se is another matter. The simple proposal from the Commission is to cap payments to larger farmers. This has been emphatically opposed by the recent Council paper, and in any event is fraught with problems of equity. There is a world of difference between the large commercial farms of the UK and the large former State-run commune farms of eastern Europe. Where the former will support one, two or maybe three families and employ a handful of people, the latter may support tens of families and employ hundreds. Apples and oranges.

Several commentators have pointed to similar capping proposals in the past and noted that they have fallen by the wayside, but, as noted above, the rules of the game are different this time around with more players and more points of view. Also, the dam has to a certain extent been breached in terms of the €300,000 threshold above which compulsory modulation is increased. Only a fool would write off the possibility.

Beware abus de droit

But before we get too excited and start talking of subdividing businesses, there are two words of caution. First and most obvious, wait and see whether the threat becomes a reality and, if it does, on what terms it will impact.

Secondly, and even more important, beware the principle of *abus de droit* – abuse of rights. We've spoken of this in these columns before (*ALA Bulletin*, Autumn 2009), but the simple proposition is that any restructuring must have a commercial justification above and beyond the desire simply to receive more money from the kitty. If that is all that is achieved by it, the separate claims may be aggregated.

How much money and for what?

Outside the nitty-gritty of the detailed reform, there is another ogre who needs to be satisfied: Mr. Budget. The Commission will not produce its proposals for the EU Budget until June and that is the reason why DG AGRI has postponed its own delivery of detailed proposals.

One can't help feeling that DG AGRI has gone on the back foot too soon in this debate. Had it had the courage last year to shape its proposals for food security, environmental welfare and other so-called public goods in a way more closely related to the demands made by the public of its farmers, it might have been in a better position to demand the money to carry out those objects.

As it is, it has decided to wait and see how much is allocated by the money-masters to the CAP before creating its policies in accordance with what may be a tightened purse. As in so many walks of life, it all comes down to money in the long run.

Environmental Impact Assessments

Geoff Whittaker, West Mersea

There has been a number of cases in the courts recently regarding the making of Environmental Impact Assessments (EIAs) in connection with proposals for development in the context of the planning regime.

As is often the case where decisions of public authorities are questioned judicially, the arguments have generally centred on the compliance or otherwise with procedure, or the legal efficacy of the decision. This is a natural course for objectors to follow since, under the relevant law, decisions on the merits are within the discretion of the body concerned and are not subject to judicial challenge other than n *Wednesbury* grounds[1], i.e. that it is so unreasonable that no reasonable person acting reasonably could have made it.[2]

EU Directive and local implementation

The underlying principle of EIAs stems, however, from Council Directive 85/337 (the EIA Directive) which requires Member States to ensure that decisions on consents for projects likely to have a significant effect on the environment are made subject to assessment of the nature of that effect.

Regulations were put in place in 1988 covering situations where planning consent was required, but that left loopholes in cases where, for example, consent was deemed by a General Permitted Development Order or where an operation was exempt from the need for permission, such as the conversion of land to agriculture or a change of the agricultural use of land.

The general position is now governed by the Town and Country Planning (Environmental Impact Assessment) Regulations 1999[3] (the EIA Regulations). Similar provisions are applied in relation to agricultural operations under the Environmental Impact Assessment (Agriculture)(England)(No.2) Regulations 2006[4] (the Agriculture Regulations).

The Agriculture Regulations apply to:

- uncultivated land projects greater than 2ha;
- field boundary work affecting more than 4km;
- restructuring projects covering more than 100ha surface area or involving the addition or removal of more than 10,000m3 of earth.[5]

(Note that lower limits for restructuring projects apply where the land is within an Area of Outstanding Natural Beauty (AONB), the Broads or a National Park or is a scheduled ancient monument.[6])

In addition, the right to permitted development under the Town and Country Planning (General Permitted Development) Order 1995[7] is withdrawn by art.3(10) of that Order in cases where an EIA would be required under the EIA Regulations did the development in question require planning permission.

Provision of environmental information

Where planning permission is required or where the Agriculture Regulations apply, the EIA Regulations require that no permission for any relevant development is to be granted without consideration of "environmental information".[8]

It is the applicant's duty to submit a statement of the environmental impact of the project; the Regulations also provide for consultation with bodies such as the Environment Agency and Natural England (or Countryside Council for Wales); and the public must be given an opportunity to make representations. All of that information taken together is "environmental information".

Some projects will clearly require an EIA; others may be less clear. The EIA Regulations therefore contain provision for a screening opinion to be given by the local authority at the behest of the applicant as to whether an EIA is required.[9] There are further provisions allowing an applicant to request a scoping opinion as to the content of an EIA.[10]

EIA development

The EIA Directive lists the types of projects requiring an EIA. Those in Annex 1 require an EIA in every case; those in Annex 2 require one if, having regard to their characteristics and/or location, they will have "a significant effect" on the environment. Those Annexes are repeated in schs.1 and 2 respectively of the EIA Regulations and projects subject to them are known as Schedule 1 or Schedule 2 development, as the case may be.

In an agricultural context, only large-scale pig and poultry units will be caught by sch.1, that is installations with more than:

- 85,000 places for broilers, 60,000 places for hens;
- 3,000 places for production pigs (over 30 kg); or
- 900 places for sows.[11]

Intensive livestock facilities smaller than that are within sch.2 if the area of new floorspace exceeds 500m^2.

Other agricultural projects within sch.2 include:

- any project to reclaim land from the sea;
- irrigation, land drainage and other water management projects larger than 1ha; and
- those for the use of uncultivated or semi-natural land for agricultural purposes.

Uncultivated or semi-natural land

The last of those was the subject of *R (Wye Valley Action Association Ltd) v Herefordshire Council*[12].

A soft fruit and arable farmer had used polytunnels for several years, but, following the decision in *R (Hall Hunter Partnership) v First Secretary of State*[13] that erection of polytunnels might amount at law to development, the decision was taken to apply for planning permission for their increased use.

The proposal was to use 225 of the 377ha of the farm, with a maximum of 54ha under cover at any one time and a maximum of 10ha for any single polytunnel.

The Council decided that an EIA was not, in this case, required, since the operations were to be carried out "on land that is already cultivated". The Action Association objected on the grounds that the consideration is required of the fact that the land was in an AONB and of the broader issues of nature conservation, landscape and historic monument designations both on the site and in the immediate vicinity. Those factors taken together arguably brought the land within the definition of "semi-natural".

The Court considered published guidance from the European Commission and from Natural England (NE) and concluded that the land was clearly not uncultivated land, but neither was it semi-natural land. Although the NE guidance indicated that hay meadows, unimproved grassland, grazing marshes, moorland and heathland, inter alia, might be considered as 'semi-natural areas', it contained also the statement that all arable and horticulture and built-up areas and gardens are excluded from the semi-natural habitat definitions.

The court said that the designation as an AONB was "far from determinative", because natural beauty can arise "from the appearance of cultivated land within that area".

Rural projects other than agriculture

Other projects for rural land use may also fall within the EIA Regulations. In particular, hydro- and wind power projects come under sch.2,

> "Annex 1 requires an EIA in every case; Annex 2 requires one if the project will have 'a significant effect' on the environment"

dependent on size (although not yet solar farms). Any hydroelectric installation producing more than 0.5MW requires an EIA, as does any wind farm comprising two or more turbines or where the height of the hub exceeds 15m.

The interaction of EIAs and wind farms came under scrutiny in two recent cases. *R (Hulme) v Secretary of State for Communities and Local Government*[14] concerned a proposed wind farm in Devon, consisting of nine 3-bladed horizontal access turbines with electricity transformers and associated works. Mr. Hulme attacked the Inspector's decision to grant permission on the basis of the development's contribution to renewable energy generation, as well as on grounds of visual impact and technical issues concerning the local impact. He was concerned particularly by the measurement of noise and so-called 'shadow flicker', the effect of the rotating blades through sunlight.

The judgement is useful for the analysis of the technical mechanisms employed to assess the environmental impact of a wind farm. Guidance is issued by ETSU[15], setting out how noise is to be measured and accounted for, and the evidence here, given a proper interpretation, was that the guidance had been correctly followed.

Thus, there was no error of law in the Inspector's decision and it was not so irrational as to be *Wednesbury* unreasonable. The challenge therefore failed.

An interesting case in the context of wind farms in National Parks, although not directly founded on EIA considerations, was *Derbyshire Dales DC v Secretary of State for Communities and Local Government*[16]. This concerned an application for four wind turbines in the Peak District National Park. The Inspector granted permission after consideration, amongst other points, of:

- whether, as a matter of law, there was a requirement to consider alternative sites for the development to the one proposed, bearing in mind local and national planning policies; and
- the contribution that the proposals would make to renewable energy targets and the extent to which that needs to be weighed against adverse impacts on other grounds.

The court concluded that, whilst the Inspector was entitled to consider other sites, there was no duty to do so which would cause him to err in law if he did not.

As regards the question of contribution to strategic renewable energy targets, the Inspector had considered *Planning and Climate Change: Supplement to Planning Policy Statement 1*, para.16 of which states that strategic targets of that nature form part of the framework for planning decisions but "should not be applied directly to individual planning applications".

The Inspector had interpreted this to mean that the targets were not a matter such as would require the refusal of an application where they had been met or an allowance where there was a shortfall against target. Nevertheless he had regarded them as being a relevant consideration in individual cases "simply because it is only through an accumulation of those individual projects that any target will be achieved". The court found no grounds on which that logic could be impeached.

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1 Derived from *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

2 A principle set out by Buxton LJ in *R (Goodman) v London Borough of Lewisham* [2003] EWCA Civ 140 and approved by the Court of Appeal in *R (Wye Valley Action Association Ltd) v Herefordshire Council* [2011] EWCA Civ 20

3 SI1999/293

4 SI2006/2522

5 Agriculture Regulations, reg.5 & sch.1

6 Agriculture Regulations, reg.5(7)

7 SI1995/418

8 EIA Regulations, reg.3

9 EIA Regulations, regs.4-6

10 EIA Regulations, regs.10-12

11 EIA Regulations, sch.1, para.17

12 [2011] EWCA Civ 20

13 [2006] EWHC 3482 (Admin)

14 [2008] EWHC 637 (Admin)

15 The Energy Technical Support Unit of the Department of Trade and Industry

16 [2009] EWHC 1729 (Admin)

STATUTORY INSTRUMENTS to 28th February 2011

Instruments with a Welsh reference (W...) apply to Wales only unless otherwise stated
The date stated is the date on which the Instrument comes into force

SI2010/2840 = Genetically Modified Organisms (Contained Use) (Amendment) Regulations 2010 – amend eponymous regulations of 2000 (S.I. 2000/2831 as previously amended) – 21st December 2010

SI2010/2922(W243) = Flavourings in Food (Wales) Regulations 2010 – application in Wales of Regulation 1334/2008 of the European Parliament and of the Council on flavourings and certain food ingredients with flavouring properties for use in and on foods and amending Council Regulation 1601/91, Regulations 2232/96 and 110/2008 and Directive 2000/13 – 20th January 2011

SI2010/2941 = Agriculture (Cross compliance) (No.2) Regulations 2009 (Amendment) Regulations 2010 – mend Agriculture (Cross compliance) (No.2) Regulations 2009 (SI2009/3365) – 1st January 2011

SI2010/2962 = Plant Health (England) (Amendment) (No.2) Order 2010 – amends eponymous regulations of 2005 (SI2005/2530) to transpose Commission Decision 2010/380 amending Decision 2008/840 as regards emergency measures to prevent the introduction into and spread within the EU of Anoplophora chinensis (Forster) – 10th January 2011

SI2010/2976(W247) = Plant Health (Wales) (Amendment) (No.2) Order 2010 – Welsh equivalent of SI2010/2962 (*q.v.* above) – 5th January 2011

SI2010/3033 = Welfare of Farmed Animals (England) (Amendment) Regulations 2010 – amend Welfare of Farmed Animals (England) Regulations 2007 (SI2007/2078) to implement Council Directive 2007/43 laying down minimum rules for the protection of chickens kept for meat production – 23rd December 2010

SI2010/3034 = Mutilations (Permitted Procedures) (England) (Amendment) Regulations 2010 – amend eponymous regulations of 2007 (SI2007/1100) to remove ban on beak trimming of poultry intended to become laying hens – 23rd December 2010

SI2011/135 = Uplands Transitional Payment Regulations 2011 – partially implement Council Regulation 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development and Council Regulation 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund by defining conditions of

BRUSSELS UPDATE to 28th February 2011

Communication from the Commission 2010/C336/01 establishing formal recognition that a certain number of acts of Union law in the field of agriculture have become obsolete

Commission Decision 2010/732 approving certain amended programmes for the eradication and monitoring of animal diseases and zoonoses for the year 2010 and amending Decision 2009/883 as regards the financial contribution by the Union for programmes approved by that Decision

Commission Decision 2010/734 amending Decisions 2005/692, 2005/734, 2006/415, 2007/25 and 2009/494 as regards avian influenza

Commission Decision 2011/128 amending Decision 2007/863 granting a derogation requested by the United Kingdom with regard to Northern Ireland pursuant to Council Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources

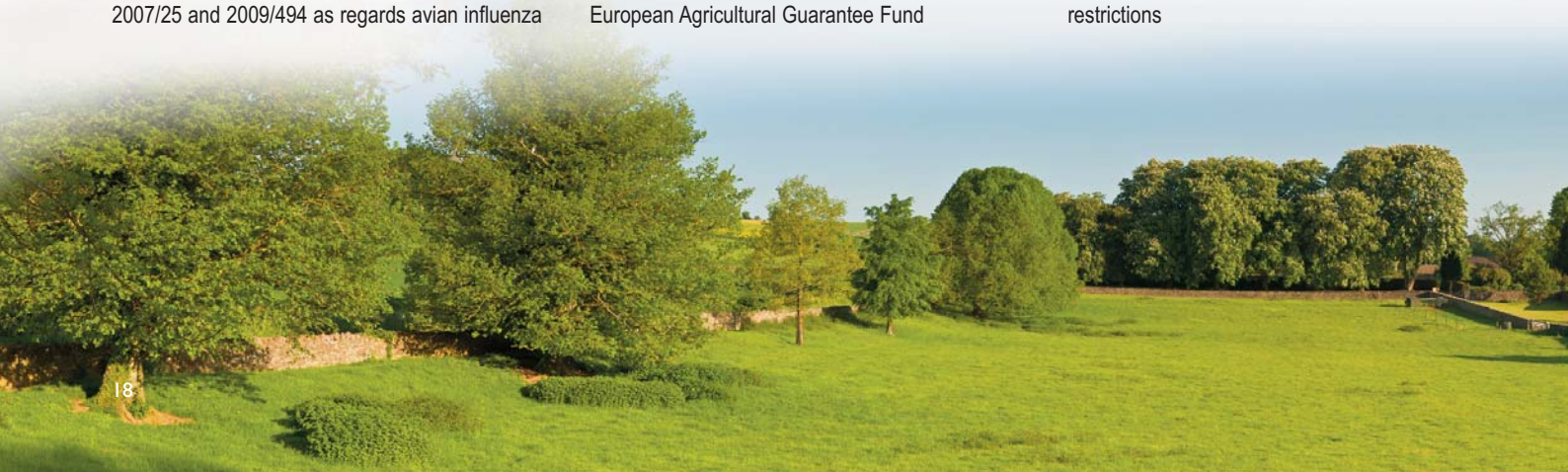
Commission Regulation 1106/2010 establishing the list of measures to be excluded from the application of Council Regulation 485/2008 on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund

Commission Regulation 1113/2010 fixing the coefficients applicable to cereals exported in the form of Scotch whisky for the period 2010/2011

Commission Regulation 1178/2010 laying down detailed rules for implementing the system of export licences in the egg sector

Commission Regulation 1260/2010 publishing, for 2011, the agricultural product nomenclature for export refunds introduced by Regulation 3846/87

Commission Regulation 53/2011 amending Regulation 606/2009 laying down certain detailed rules for implementing Council Regulation 479/2008 as regards the categories of grapevine products, oenological practices and the applicable restrictions



eligibility for an uplands transitional payment – 17th February 2011

SI2011/136 = Official Feed and Food Controls (England) (Amendment) Regulations 2011 – amend eponymous regulations of 2009 (SI2009/3255) – 1st April 2011

SI2010/150 = Animal Welfare (Code of Practice for the Welfare of Gamebirds Reared for Sporting Purposes) (Appointed Day) (England) Order 2011 – brings into force stated Code of Practice on 30th January 2011

SI2010/226(W44) = Bee Diseases and Pests Control (Wales) (Amendment) Order 2011 – amends eponymous Order of 2006 (SI2006/1710(W172)) regarding enforcement of art.13 of Commission Regulation 206/2010 laying down lists of third countries, territories or parts thereof authorised for introduction into the European Union of certain animals and fresh meat and veterinary certification requirements – 28th February 2011

SI2011/243 = Promotion of the Use of Energy from Renewable Sources Regulations 2011 – transpose arts.3(1), 3(2), 13(5), 14 and 16(4) of Directive 2009/28 of the European Parliament and of the Council on the promotion of the use of energy from renewable sources – 14th March 2011

SI2011/258 = Food Additives (England) (Amendment) Regulations 2011 – implement Commission Directive 2010/37 amending Directive 2008/60 laying down specific purity criteria on sweeteners and Commission Directive 2010/67 amending Directive 2008/84 laying down specific purity criteria on food additives other than colours and sweeteners – 31st March 2011

SI2011/402 = Food Labelling (Declaration of Allergens) (England) Regulations 2011 – further amend the Food Labelling Regulations 1996 (S.I. 1996/1499, as last amended by SI2010/2817) – 17th March 2011

SI2011/452 = Poultrymeat (England) Regulations 2011 – revoke in relation to England Poultry Meat (Water Content) Regulations 1984 (SI1984/1145) and make provision for enforcement and execution of directly applicable European marketing standards relating to poultrymeat (Commission Regulation 543/2008) – 21st March 2011

SI2011/463 = Seed Marketing Regulations 2011 – revoke and replace eponymous regulations of 2010 (SI2010/2605) to implement various Council Directives on seed marketing – 1st April 2011

SI2011/465(W70) = Food Labelling (Declaration of Allergens) (Wales) Regulations 2011 – Welsh equivalent of SI2011/402 (*q.v.* above) – 17th March 2011

Commission Regulation 65/2011 laying down detailed rules for the implementation of Council Regulation 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures

Commission Regulation 90/2011 laying down detailed rules for implementing the system of export licences in the poultrymeat sector

Commission Regulation 150/2011 amending Annex III to Regulation 853/2004 of the European Parliament and of the Council as regards farmed and wild game and farmed and wild game meat

Commission Regulation 151/2011 amending Annex I to Regulation 854/2004 of the European Parliament and of the Council as regards farmed game

Commission Regulation 173/2011 amending Regulations 2095/2005, 1557/2006, 1741/2006, 1850/2006, 1359/2007, 382/2008, 436/2009, 612/2009, 1122/2009, 1187/2009 and 479/2010 as regards the notification obligations within the common organisation of agricultural markets and the direct support schemes for farmers

Commission Regulation 189/2011 amending Annexes VII and IX to Regulation 999/2001 of the European Parliament and of the Council laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies

Decisions of the EEA Joint Committee 97-99/2010 amending Annex I (Veterinary and phytosanitary matters) to the EEA Agreement

See the following Official Journals for information regarding cases before the ECJ and the Court of First Instance: C328 (4.12.10); C346 (18.12.10); C13 (15.1.11); C30 (29.1.11); C38 (5.2.11); C46 (12.2.11); C55 (19.2.11); C63 (26.2.11)

See also the following Official Journals for information regarding cases before the EFTA Court: C325 (2.12.10); C50 (17.2.11); C58 (24.2.11)

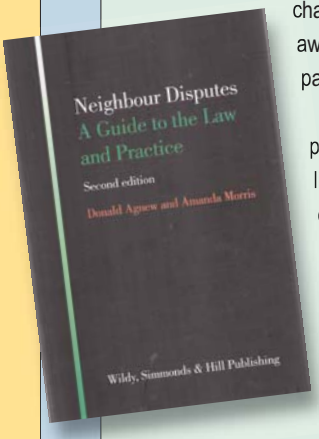
Neighbour Disputes – A Guide to the Law and Practice (2nd Edition)

Donald Agnew and Amanda Morris, 224 pp plus appendices and index, published by Wildy, Simmonds & Hill Publishing. Price £39

Disputes between neighbours are, at times, inevitable and the way that they are handled will make all the difference to the parties' continuing relationship long after the lawyers have left the equation.

The preface to this book gives an open and honest account of what it holds in store – it states that this book is "not a comprehensive treatise and does not deal with every aspect of this wide topic, but it is hoped that it will enable the practitioner to give at least preliminary advice."

The book covers the fundamentals of the types of disputes between neighbours from misrepresentation and negligence to trees, hedges, weeds and pests and its designated chapter on the resolution of disputes is exceptionally useful. The remedies available for each type of action are discussed in separate chapters, and details of the court's attitude to awarding them helps to focus attention on how parties will need to proceed.



The recurring theme is to encourage the parties to try to solve the dispute non-litigiously and to keep costs at the forefront of client's minds to avoid them being disproportionate or hidden. The writers clearly recognise that where emotion is involved, common sense may not prevail and practical hints are provided on how to find a resolution as quickly and effectively as possible.

The contents list and index are organised by topic areas and are comprehensive and well laid out, giving a clear guide of what is covered in each section and enabling the reader to find what they are looking for quickly and easily.

Each chapter offers an introduction to what any adviser will need to consider. The information provided is clear and concise, if limited, and the reader is advised to seek supplementary information by "reference to specialist works". That said, there are few references to such materials and no footnotes to direct the reader to further reading, nor is there a bibliography to provide further information to give the reader any guide on where to start.

The section on instructing Expert Witnesses details how to comply with the CPR and accompanying Direction and Protocol.

The writers focus throughout on what the Court is more likely to attach weight to and give give balanced reasoning for what each side is looking to achieve.

There are useful checklists and diagram boxes to assess the probability of success and aid understanding.

The final chapter on resolution of disputes deals so openly and frankly with the issue of costs that if all litigants were to read it, the number of applications to court could well be halved! "Neither party will come out of the dispute feeling satisfied with the outcome and will invariably maintain that the law is an ass".

The helpful, if limited, appendices contain eight specimen forms, including three particulars of claim. A broader range of forms would be helpful: something for the next edition, perhaps?

The text was clearly not produced to be a work of authority, however it is a handy little book which would be of particular use to a trainee or newly qualified solicitor or to those moving into practising in this area. It will also be of benefit to those more experienced practitioners as a general aide memoire. Personally, I'm more than happy for it to have a place in my bookcase.

Helen Gough

Forthcoming events...

ALA North East
5th May 2011
Dickinson Dees LLP, Newcastle

ALA Spring Conference
17th May 2011
National Science Learning Centre, York

ALA South Central
26th May 2011
Southampton

ALA/WS Society 14th Annual Joint Conference on Agriculture
3rd June 2011
Signet Library, Edinburgh

ALA Fellowship 2011
18th-20th October & 26th/27th October 2011
Scarman Conference Centre, Warwick University
Examination: 10th November 2011, London

For full details of all meetings and other events please see the *Calendar of Events* on the ALA website, contact Geoff Whittaker on (01206)383521 or email *meetings@ala.org.uk*