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In this issue

ALA RURAL PROFESSIONALS

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Biodiesel and bioethanol: an opportunity for farmers

Tristan Ward, Macfarlanes, London

We all remember the fuel-price disputes of autumn 2000. Farmers and hauliers blocked the entrances oil refineries across the country. After a few days the country ran out of fuel – except for some inventive people who started using vegetable oil instead. After all, the first diesel engine was powered by peanut oil. And the engine gives off a pleasing aroma – rather like the local chippy.

The idea caught on in the Valleys, even after the fossil fuel started flowing again. So much so that the Swansea Asda sold way more cooking oil than any other Asda in the country. At 42p a litre, it was much cheaper than the 73p diesel available from a discounted retailer. It seems like a good idea.

The Western way of life depends on cheap, available energy. For almost the whole of the twentieth century, that energy has been supplied by crude oil. Sooner or later that oil will run out. Sooner than that, the price of oil and all its derivatives will become more expensive, increasing the cost of living. The Association for the Study of Peak Oil (ASPO) predicts that the supply of oil will peak in 2010. If demand increases (as it is predicted to) prices must rise sharply thereafter: *www.hubbertpeak.com/aspo/iwood/ASPOpress_2.pdf*.

Global warming

Most of the remaining oil is in politically unstable areas: Saudi Arabia and four neighbours sit on 65% of all known oil reserves. Iraq is one of those neighbours with one tenth of the world's known reserves. Much of the rest lies under Russia, the Caspian Sea, and Africa. Political instability causes huge swings in the price of oil with consequent damage to economies.

Even if these predictions are wrong – as argued by America's Geological Survey (*www.economist.com/surveys/displayStory.cfm?Story_id=497454*) – and the world experiences peace and tranquillity in the Middle East so that oil prices remain low for the foreseeable future, there is another very good reason why the use of oil, and its hydrocarbon cousins should be reduced. It is Global Warming.

While the exact effects are unpredictable, it is agreed the phenomenon is real and is caused by accumulation of the major product of the combustion of oil – carbon dioxide – in the earth's atmosphere: report of the Intergovernmental Panel on Climate Change, 2001: *www.ipcc.ch/pub/SYRspm.pdf*.

In light of the decreasing supply of oil, volatility in its price and the potential damage to the environment caused by its use, rational governments would seek alternative supplies of energy. Possible sources include natural gas, the sun, wind, geothermal power and hydroelectric power. These sources would be used to generate electricity which might then be converted to hydrogen for use as an energy carrier. However, the rest of this article considers biomass as a possible direct replacement for petrol and diesel as a fuel for vehicles.

The biomass alternative

The great advantage of biomass as a source of energy is that it is carbon neutral – that is, it releases no more carbon to the atmosphere than has been used in its production. It is also renewable since it can be grown, and is a predicable supply – compare wind and solar power, for example.

Biodiesel is an alternative transport fuel which can be derived from biomass such as animal fats, waste cooking oil or oilseed rape. Since oilseed rape is easy to grow, it has been proposed as a source of biodiesel. Biodiesel can be mixed with conventional diesel with minimal loss of performance in conventional diesel engines without adjustment, or used pure. It is biodegradable.

Use of biodiesel reduces serious air pollutants such as soot, particulates, carbon monoxide, hydrocarbons and sulphur as compared with conventional diesel: Sheffield Hallam University draft report *Evaluation of the Comparative Energy, Environmental and Socio-economic Costs and Benefits of Biodiesel*, June 2002: *http://www.shu.ac.uk/rru/reports/scp20-1r.pdf*. Some 20 million US gallons of Biodiesel was produced in the USA in 2001.

> "Western life depends on cheap, available energy ... sooner or later oil will run out"

Bioethanol is produced by fermentation of biomass such as sugar cane in Brazil or corn (maize) in the USA. Maize and sugar beet can easily be grown in the United Kingdom and accordingly have been proposed as a source of bioethanol. It can be mixed with conventional petrol and used in conventional car engines without adjustment: in Brazil, there is a minimum mandatory 25% bioethanol blend in all gasoline fuels. Like biodiesel, bioethanol is biodegradable and local air pollutants are reduced when compared with fossil fuels: British Association for Biofuels and Oils: *Budget Submission 2001* and references therein: *www.biodiesel.co.uk/press_release/submission_for_biofuell_1.htm*.

Is biomass likely to be competitive? The calculations in the table at the foot of this article suggest it is.

Technology under development

The Swansea experience shows that biodiesel might be competitive with fossil fuel today, at today's prices. The figures suggest that both biodiesel and bioethanol are competitive with electricity produced from solar and wind power. There are two important caveats.

Firstly, all these technologies are still under development. Accordingly, the costs of producing energy by any of these methods could fall dramatically. For example, genetic modification of biomass fuel crops could cut the costs of biodiesel and bioethanol. Or there could be a quantum leap in the efficiency of photo-electric cells leading to substantially reduced costs of electricity produced by solar power.

Secondly, under current practice, husbandry of crops requires substantial inputs of fossil fuel, either directly to power agricultural machinery, or indirectly as nitrogen fertilizer or used in the production of pesticides. Accordingly, as the costs of such inputs increase, the cost of the energy produced will rise also.

On the other hand, electricity from the national grid must be converted into another form before being used in a vehicle. In the long term, it seems that biofuels could be a viable from of energy for road transport.

Taxation of cooking oil

Unfortunately, if you put your cooking oil into a diesel tank, fuel duty immediately becomes due. At current rates, this increases the cost of the cooking oil by 25.82p per litre fuel duty. You must

also pay VAT – an extra 12p a litre or thereabouts. So a litre of oil for fuel costs about 80p, including all the tax. Not paying the tax is not recommended: Customs & Excise have the power to levy £500 fines. Of course, a business may be able to recover the VAT.

Today the duty payable on biodiesel is set 20p less than the duty payable on fossil fuel. That reduction was announced in the March 2002 budget. In the November 2002 pre-budget report, the Chancellor announced that the duty on bioethanol would be reduced in the April 2003 Budget, also by 20p a litre. Also in November, the government announced that biodiesel used for buses would be completely exempt from duty.

The European Union's targets envisage that each member state should replace 2% of road fuel with biodiesel by 2005 with biodiesel providing 5.75% of road fuel by 2010.

Farmers in support

There has been some success in stimulating the use of reclaimed vegetable oils as biodiesel. For example, Asda fries a million doughnuts a day in its shops. Perhaps as a result of their experience in Swansea, Asda has announced that from next year it will power its fleet of delivery vehicles on vegetable oil fuel made from the waste oil used in cooking. What Asda will do – which perhaps some Swansea drivers did not do – is to pay fuel duty. Since the raw material is otherwise wasted, the process is cost effective. However, the supply of free raw material is limited.

The farming industry sees the production of virgin biodiesel and bioethanol as a potentially important market. The National Farmers Union and the Country Land and Business Association have been lobbying for a greater reduction in fuel duty. Government policy is to encourage farmers to diversify their businesses, by seeking alternative crops and markets as well as by exploiting their assets for purposes other than agriculture.

The Curry Commission report notes that "alternative cropping plays to farmers' core skills and is one of the best diversification options available for farmers in arable areas who may lack opportunities in value added or tourist markets."

The Commission also believes that "growing crops for energy use is the most viable [alternative crop] option available at present." Given that the farming industry continues to suffer from declining income and costs the taxpayer substantial sums in subsidy, one might expect that government would be interested to support new crops.

Reluctance from industry

Industrial partners appear reluctant to invest without such duty reductions. International agricultural processor Cargill Plc believes that the UK agriculture industry can quickly produce enough rapeseed to supply 2% of the UK's total diesel requirement, and is "willing to consider investment in new industry if the duty regime is made more conducive". The company hopes to establish a plant to process more than 100,000 tonnes of rape a year, the product of about 27,000 hectares.

Turning to bioethanol, British Sugar is unlikely to develop new plant unless bigger duty reductions arrive. If the duty differential was reduced to 26p a litre or more, British Sugar might be willing to produce 1.2 million tonnes of bioethanol a year, requiring wheat and sugar beet produced by some 200,000 hectares. Clearly, under the existing UK tax regime, industry sees little reason to invest in the production of biofuel direct from the farm.

The use of biofuels as road fuel has come under attack from some environmental organisations. They believe that since the raw materials are produced by "intensive agriculture" and use substantial amounts of fossil fuel in their production, they are "not as green as they sound". The environmental organisations prefer increasing the efficiency of existing vehicle engines, and reducing the reliance of society on fossil fuels.

It might said that the environmental groups are letting 'the best be the enemy of the good'.

Politics – weighing in the balance

The political imperative on government to provide extensive personal mobility at as little cost as possible, combined with a possible reduction in agricultural subsidy and satisfaction of the European and North American agricultural lobbies might prove persuasive in assisting governments to decide to support the emerging biofuel sector. Certainly that has proved to be the case in continental Europe, where for example Germany, Austria and Italy provide tax incentives.

What is perhaps more certain is that a reduction in fuel duty and consequent move from fossil fuel might substantial reduce the UK Treasury tax take at a time when public expenditure is increasing and tax income is decreasing due to global economic circumstances.

Costs of producing a unit of energy using currently available technology ($1 = €1)

	Solar electricity	Wind electricity	Bioethanol	Biodiesel
Cost per kWh ($US)	0.12-0.14[a]	0.06[b]		
Cost per US gallon ($US)				1.75
Cost per litre (€)			0.418[c]	
Density (kg/l)			0.789	0.88
Calorific value (MJ/kg)			29.80	37.84
Cost per unit of energy ($US/MJ)	0.34	0.0167	0.0138	0.0177

[a] Coalition for Clean Air: *www.coalitionforcleanair.org/cca/energy-faqs.htm*

[b] DeCarolis and Keith 2001; Science (294) pp1000-01: *www.andrew.cmu.edu/user/dk3p/wind_science_pub.pdf*

[c] DG XVII of the European Commission: *europa.eu.int/comm/energy_transport/atlas/htmlu/biodbarr.html*

Geoff's Geottings

Brainstorming into the future

Over the last few months ALA's development has proceeded apace. Externally we have sown the seeds of working relationships with the Institute of Chartered Accountants' Farming and Rural Business Group and RICS Rural Faculty, as well as building on our already good relations with CAAV.

Internally, whilst *The Bulletin* remains our flagship member service, we have launched a website, and continue to develop our programme of national and regional meetings.

But – as I've said before and make no apology for repeating now – ALA would be nothing without its members. It is you who are the most important element of the organisation; providing what you want from us is our *raison d'être*.

We've recently held a Council 'brainstorming' meeting to discuss ideas as to how ALA might continue to grow and develop and some useful projects are now under investigation as a result.

But we should still like to hear from you with your own ideas on how we might expand the range of member services to your benefit. To make it easy, we're enclosing with this issue a Member Services Questionnaire – please take five minutes to let us know what you think of what we do, and how you think we can be even better.

I'll be happy receive the Form by fax or post, and you can let me have other comments by whatever communication medium you please.

ALA online

I mentioned the website above: we launched in January with a public area and a members-only section – I sent a circular e-mail at that time with the login name and password and have corresponded by e-mail since with many of you.

The idea is that the world be able to see who we are and what we are about, but privileged information be behind a screen for your eyes only. (That the world is taking notice has been borne out by e-mails I have received from abroad, including one from South Korea!)

The main thrust of the information so far has been the diary of events so that even if you've mislaid the formal notice you can go online, find the details and book a place.

I am updating the news pages as regularly as time permits, so keep coming back to the site for new information.

I'm working on an archive of *Bulletin* articles from the last couple of years, which you will be able to browse and download – an answer to "where did I put my *Bulletin*?"! – although to be candid this is a project filling in the spare time (if any!) between setting up and attending the ALA meetings, representing ALA on TRIG and in other fora, producing *The Bulletin* itself and doing the general admin work. I hope it will be up and running before long.

There will also shortly be a Members' Forum, a discussion group in which you can exchange views with fellow members on matters of mutual concern, even if it's only what the ECB should do to improve the fortunes of the England cricket team!

I had hoped to have it online by now, but there have been teething troubles which I am working with the site designer to overcome. These may well have been settled by the time you read this.

Also in due course – once the dust has settled on the matter of subscription renewals – I will prepare a fresh edition of the Directory of Members. A printed version will be sent to those of you not online; the rest of you will receive it in .pdf format, and it is proposed to make it available online in the Members' Section.

I hope you will find the page of weblinks useful – I've put up some 25 or so links to other organisations here and abroad where you can research the law or consult information on agri-legal matters.

As with all things, I would appreciate your views on the information which is already there and on that which you wish were there but isn't. I should particularly like to know of any weblinks you have found useful in your own browsing.

TRIG

Submissions from TRIG to government are still on track to be presented around the end of April.

I am enjoined from commenting on the proposals until they are submitted, but I will report to you in full as soon as the confidentiality restriction is lifted.

CAP Mid-Term Review

Publication of the draft regulations in January has caused great excitement and no little consternation amongst the professions.

I don't propose to comment on them here – others have done so more efficaciously: see Philip Day's article on page 12 and the report of the Master Class on page 9.

I do, however, draw your attention to our Working Seminar on 6th May. A short notice appears on page 11, and, of course, I circulated the details by e-mail in March. It promises to be a fascinating day, the ultimate object of which is to produce some solutions to dealing with the regulations – acknowledging that they are drafts only and may change before finalisation – and to assuage some of the concerns besetting the agricultural land market.

It won't be the last you hear of MTR from ALA. We shall hold further seminars as matters develop.

I am also conscious that the position in Scotland and Wales may be different, if not in matters of technical concern then perhaps in their impact. I should be grateful to hear from members in those two regions, especially, as to their particular concerns and how ALA may be able to help them. Please do contact me.

The right to roam – What is happening to the CRoW?

Michael McNally, Knights, Tunbridge Wells

The Countryside and Rights of Way Act 2000 creates a new right of access on foot for the purposes of open air recreation in respect of registered common land and "open land". Land subject to the new right of access is to be called "Access Land". The Act received the Royal Assent over two years ago.

It was originally envisaged that the access provisions would not be in force before 2005 but the government has recently announced that, in those areas where the consultation process has been completed, the provisions will be introduced some time in 2004.

The new access provisions in England are being managed by the Countryside Agency and in Wales by the Countryside Council for Wales (and references in this article to the Countryside Agency are deemed to include the Countryside Council for Wales).

In Scotland the position is entirely different: the Scottish Parliament has plans to introduce a general right of access to all uncultivated land and thus avoid the need for any mapping or consultation process.

"Over hill, over dale, thorough brush, thorough briar"

"Open land" means Mountain, Moor, Heath or Down. There is a provision for this definition to be extended to include coastal land but no such regulations have yet been introduced.

"Mountain" means all land over 600 metres above sea level and other upland areas comprising rugged land, bare rock and associated rough vegetation. It may include areas of bracken, trees and water.

"Moor" means land of an open character with features such as bogs, heath, unimproved grassland, scattered trees, rock and water.

"Heath" means land of an open character characterised by ericaceous dwarf shrubs but which may include bracken and unimproved grassland, trees and water.

"Down" means land comprising semi-natural grassland in areas of chalk or limestone geology. It does not include agriculturally improved or semi-improved grassland. It may include areas of scattered trees, shrubs or water.

Guidance from the Countryside Agency indicates that "improved grassland" is lush grass from a limited range of species produced by re-seeding and the use and application of artificial fertilisers and herbicides.

"Semi-improved grassland" is land which has a limited range of grasses – generally fewer than the number found on unimproved grassland – and which has been at least partly produced by re-seeding and the use of artificial fertilisers and herbicides.

It seems, therefore, that use of intensive farming methods to improve grassland would help to enable farmers to avoid their land being designated Access Land.

Grazing is not a relevant criterion for determining the status of land.

Exemptions

Land which is registered common land or open land and would therefore otherwise fall within the right of access can be exempt if it is either:–

(i) Land with existing public access (to be known as "Section 15" land), such as a common with public access rights or land subject to an access agreement under the National Parks and Access to the Countryside Act 1949; or

(ii) Excepted land. This is set out in Schedule 1 of the Act and includes:–

- Cultivated land;
- Land covered by buildings;
- Land covered by temporary livestock pens;
- Parks;
- Gardens;
- Land used for mineral mining;
- Golf courses;
- Racecourses;
- Land used for training racehorses;
- Aerodromes;
- Land used for the purposes of a railway or tramway;
- Land within 20 metres of a dwelling or livestock building.

To qualify as "excepted land", any necessary planning consents must have been obtained. To prevent farmers from immediately converting their land to another use to make it "excepted" where it would otherwise have been open, farmers must obtain prior permission to do so from DEFRA.

Access Land which is ploughed up after the conclusive map is issued will be excepted from the new access rights for one year from the date of any cultivation.

Exclusions or restrictions on access

Schedule 2 of the Act allows landowners to exclude or restrict access for any reason for up to 28 days a year, subject to the following limitations:–

- No bank holidays may be excluded;
- No more than four excluded days may be a Saturday or a Sunday;
- No Saturday between 1st June and 11th August may be excluded;
- No Sunday between 1st June and 30th September may be excluded.

Signposts should be used to notify the public of such closures.

Further exclusions or restrictions are possible but must be approved by the Countryside Agency for land management reasons.

Exclusion of dogs

The owner of land used for lambing may exclude dogs (but not a guide dog) for up to six weeks from any field up to 15 hectares. Future regulations will specify the procedural steps which a landowner must take to implement an exclusion.

Dogs must be kept on a lead of no more than two metres between 1st March and 31st July and whenever they are in the vicinity of livestock.

River banks

After sustained pressure from the fishing lobby and other interests, the Act does not provide for access to river banks – unless they already form part of Access Land, such as moor land.

Remedies in the event of a breach

Any rambler breaching restrictions or causing damage becomes a trespasser and loses his right of access for 72 hours.

Reaching Access Land

If there is no lawful route to the Access Land, the Countryside Agency may create such a route by applying for a Creation Order under S.26 Highways Act 1980.

Highways Authorities and National Parks have power to enter into agreements with landowners to carry out physical work such as construction of gates to facilitate access to Access Land.

Management of Access Land

The Highways Authority (or relevant national park authority if the land is within a national park) is obliged to establish a local access forum to prepare maps, make by-laws, appoint wardens and make restrictions and exclusions. A local authority may also put up notices indicating the boundaries of Access Land and informing the public of restrictions and exclusions.

Access dedication

Under S.16 of the Act a landowner can voluntarily dedicate additional areas of his land for permanent access or dedicate any areas for wider access than that permitted by the Act – e.g. cycling or riding.

Process for mapping Access Land

There are three stages in the procedure:–

1. Draft map stage

England has been divided into eight regions. Prospective Access Land is colour coded as follows:–

- Common land – Green
- Open land – Yellow
- Land which is common land or open land but is too small for inclusion – Purple

During the three-month consultation period after publication of the draft map, anyone can make submissions to the Countryside Agency as to why an area or areas of land should or should not be included.

2. Provisional map stage

Once the provisional map has been published, it is only those with a legal interest in the land (including those with sporting rights) who can appeal. The appeal is to the Secretary of State. The time limit for any appeal is three months. An appeal should ideally be made in electronic form.

After one has made written representations, one can either request a hearing or an enquiry. Detailed procedures have been set out by the Countryside Agency (see websites below).

3. Conclusive map stage

The conclusive map is final but the right of access will still not come into force until the Secretary of State has formally brought it in. Conclusive maps will be renewed by the Countryside Agency within 10 years.

Grounds for appealing

Possible grounds are that:–

(i) The land is not registered common land. The only common land which is relevant to new access provisions is land registered and maintained under the Commons Registration Act 1965. This will be a straightforward question to answer; either the land is registered at the Land Registry as common land or it is not. One cannot object on the basis that one does not agree with the original registration of the land as common land.

(ii) The land is not open land. The most obvious reason here is that the land constitutes improved or semi-improved grassland.

(iii) The land is too small to be useful – i.e. that there is no benefit to walkers in designating such a small area of land as access land.

Land smaller than five hectares will probably fall into this category but each parcel of land will be considered on its own merits.

The mapping programme

Draft maps for the eight regions are being published on a rolling basis. The first of them (in the South East) was published in November 2001; the last (in the East) is not due to be published until Autumn 2003. In general, provisional maps will be published between six and eight months after the issue of the draft maps.

The conclusive maps will be issued between six and 12 months after the issue of the provisional maps. These publication dates are, however, subject to appeals and other delays.

In general, provisional maps can be inspected at local council offices and local libraries, as well as the website addresses below.

Occupiers' Liability

Farmers will be concerned at the risk of injured ramblers bringing claims against them. The Act specifically prescribes that, although the occupier does owe a duty of care to ramblers, the duty owed is restricted to the duty of care owed to trespassers under the Occupiers' Liability Act 1984. The duty owed is not, therefore, the more onerous duty of care owed to lawful visitors and set out in the Occupiers Liability Act 1957.

Furthermore, ramblers are specifically prohibited from bringing claims in relation to injuries suffered as a result of natural features of the land or improper use of walls, fences or gates. As a result, farmers need only ensure that they do not create obvious risks to ramblers on their land. They should certainly, however, ensure that their public liability insurance is adequate to deal with any personal injury claims which may be brought.

Conclusion

Many farmers in the South East, for example, will be unaffected by the new provisions. Others, such as those with down land in Southern England, will be affected to a certain extent and others, such as those in the North of England, may well be very significantly affected by these new provisions.

They are an unprecedented intrusion into the right to peaceful enjoyment of one's own land, for which no compensation is payable. Despite lobbying, the right of access will apply during the night even though it is difficult to see what legitimate purpose members of the public could have for entering Access Land at night. (Scouts and CCF groups would no doubt be able to obtain permission from the landowner for camping or night time exercises.)

If a member of the public breaches the new access provisions, he becomes a trespasser (see above), but will be statutorily barred from the Access Land for only 72 hours.

Farmers will be well advised to follow the mapping procedure carefully and object to the inclusion of any of their land wherever there appears to be justification for objecting.

Useful websites

www.defra.gov.uk/wildlife-countryside/cl/bill/factsheet/index.htm: is a fact sheet on the Act.
www.countryside.gov.uk/access/mapping: sets out the programme for publication of the maps regionally.
www.ca-mapping.co.uk/mapping: enables comments on the maps to be made.
www.planning-inspectorate.gov.uk/access: sets out the procedure for appeals against the provisional map.

Caveat agricultor – Putting on the pain

Hugh Mercer and Isabelle Corbeel-Mercer, London

During 2002, a large number of farmers were penalised by the Rural Payments Agency (RPA) because the information given on their Beef Special Premium (BSP) and their Suckler Cow Premium (SCP) applications for the 2001 scheme, did not correspond to the data in the British Cattle Movement Service (BCMS) Cattle Tracing System (CTS).

After much correspondence from the NFU and the threat of an application for judicial review, the RPA has dropped the penalties in most cases.

The issue arose when the European Commission decided to fine the UK because there had been insufficient cross-checking as required by Article 6 of EU Regulation 3887/92. The immediate reaction of DEFRA was to use the prototype BCMS-CTS database first launched on-line on mid-February 2001 in order to operate the cross-checks.

Animal identification

As a result, the fine would be passed on to farmers. Indeed, the NFU understands that 1,000,000 'discrepancies' have been identified through the database. The trouble is that farmers had little real opportunity to rectify erroneous data and that the use of the database was arguably premature and illegal under the European Regulations.

In accordance with Article 21 of Council Regulation 1254/1999 on the common organisation of the market in beef and veal, in order to qualify for direct payments under the different schemes, the animal must be identified and registered in accordance with Regulation 820/97, recently repealed and replaced by Regulation 1760/2000. In both Regulations, the components of the system for identification and registration are the same: eartags to identify animals individually, a computerised database, animal passports and individual registers kept at the farm.

A "fully operational" database?

All data comprised in those four sources have to correlate with each other and with the actual position. Article 5 of Regulation 1254/1999 defines the computerised database more precisely: it is set up by the competent authority of the Member States in accordance with Article 14 and 18 of Directive 64/432/EC and shall become fully operational no later than 31st December 1999, after which they shall store all data required pursuant to the aforementioned Directive. What is a "fully operational" database is the nub of the problem.

The 1964 Directive, initially introduced for health and veterinary purposes, has been modified several times: in 1997 Article 14 was introduced in order to expand the purposes of the Directive to monitoring; in 2000, Articles 17 and 18 were modified in order to update the system.

What is important is that although it is up to each Member State to introduce a system of surveillance networks through a computerised database, the Commission has to approve the system and its experts "shall validate the systems by means of a system of audits. Where the result of the audit is favourable the Commission shall within 90 days of receipt of the request for approval make a report to the SVC together with appropriate proposals".

The chicken and the egg ...

The argument is that it is only once the Commission has given its approval that the database for bovine animals is fully operational. In this way the German database has been approved by Commission Decision 2002/67/EC of 28th January 2002 in accordance with which: "The German database for bovine animals is recognised as fully operational".

The French database has been approved and became fully operational by Decision 2001/399/EC. No such decision exists for the English database which must therefore be something less than fully operational.

RPA argued then that it faced an impossible situation: in accordance with Article 7(1) of Regulation 1760/2000: "Each keeper of animals shall … once the computerised database is fully operational, report to the competent authority all movements to and from the holding and all births and deaths of animals on the holding".

How could the RPA collect complete and accurate data in order to obtain the European Commission's approval for CTS if the farmers only have to give their data once the computerised database is fully operational?

In fact, under Article 7(2) & (3) the keepers have to report, upon request, all movements, births and death independently whether the database is fully operational or not. But, in that case, they do not have responsibility for the reporting and for the accuracy of the report. They cannot be held responsible for errors and inaccuracies in the database. The Member States have first to set up their own computerised database, then themselves record the relevant data under their own responsibility, then obtain the approval of the Commission and eventually farmers will have the obligation and will carry the responsibility for reporting the data within the time limit imposed by Article 7(2). Indeed as appears from the German and French decisions, the database does not need to be perfect to be recognised as fully operational.

The same logic should prevail when RPA wants to cross-check data using the CTS database. Council Regulation 3508/92 set up the integrated administration and control system (IACS) which covers most of the aid schemes. It requires two kinds of checks: on-the-spot checks and administrative checks.

Two separate cross-checks

In accordance with Article 6 of Commission Regulation 3887/92, which sets out the rules for applying the IACS, administrative checks include

(a) cross-checks on parcels and animals …

(b) once the computerised database is fully operational in accordance with Article 5 of Council Regulation (EC) No 820/97, cross-checks with a view to ensuring that Community aid is granted only for bovine animals for which the births, movements and deaths have been duly notified by the applicant for Community aid to the competent authority …

Consequently, there are two kinds of cross-checks and the second should only be used once the computerised database is fully operational. Meanwhile RPA has to make more cross-checks on parcels and animals in order to avoid the Commission's fine.

The conclusion is that RPA was not allowed to make any cross-checks using CTS as long as CTS is not fully operational with the result that any errors or inaccuracies between the computerised data and the on-farm register or indeed the actual position cannot be used to penalise farmers.

In the longer term, once the Commission has decided that the UK computerised database is fully operational, RPA may lawfully use it to make

> "RPA has to make more cross-checks on parcels and animals in order to avoid the EU fine"

cross-checks with the result that farmers will have to be extremely careful and will have to double-check the data in CTS. In the more immediate future and especially for the 2002 and probably 2003 schemes, the reasoning advanced for the 2001 aid schemes is slightly different because Commission Regulation 3887/92 concerning the IACS has been repealed and replaced by Commission Regulation 2419/2001.

Conflicting provisions

In its new version, the IACS regulation does not refer directly to the terms "once the computerised database is fully operational", probably because by now the Member States should have complied with the Directive 820/64 and their database should have received the approval of the Commission.

However, the 11th Recital of the new IACS Regulation still refers to Regulation 1760/2000, Article 5 of which requires a fully operational computerised database. Similarly, the 12th Recital also requires a reliable database.

After all, a Member State is certainly not entitled to rely on a Directive that it has not implemented in order to impose obligation on individuals (see *M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723 at para 48).

A leap of logic

Indeed, subject to the RPA's interpretation argument based on the purpose of the provisions, the overall logic of the RPA's position in this case may be summarised as follows: the UK should have had a fully operational database by 31st December 1999; it did not and is therefore fined by Brussels for failure to carry cross-checks using the database it should have made; therefore the UK must use its prototype database to carry out the cross-checks in any event, penalising farmers where discrepancies emerge. To state the position is to expose the logical leap involved in the word "therefore".

To adapt a well-known legal concept: *caveat agricultor* – let the farmer beware!

A MEMBER from Northamptonshire has contacted me in relation to a client whose problems stem from the matters referred to in this article.

His client is outstanding a large sum of money in payments arising from claims being held up as a result of errors in the CTS database.

If any other Members have had clients with similar problems and would like to exchange views, share information or pool resources, please get in touch with me.

Geoff Whittaker

MASTER CLASS

Land Law is changing

Nothing in life is constant save change itself. ALA's Master Class held in London on 20th March provided ample evidence of the truth of that statement.

Charles Harpum began the day by taking us through the Land Registration Act 2002. This Act is a fundamental rethink of land registration law, replacing previous statutes. In time, the land register will accurately reflect all matters germane to title, and the way is paved for electronic conveyancing in years to come – the principle will be title by registration, not registration of title.

To this end, the scope of transactions triggering first registration will be extended and other significant changes in practice and procedure will arise. In particular, land and charge certificates will be abolished – the register itself will be the evidence of title.

The number of overriding interests is reduced, with some abolished altogether in 10 years; the methods of protecting third party interests are radically overhauled; and the law relating to adverse possession completely revised.

The Act comes in on 13th October 2003, at which time precedents founded on the old law will become redundant.

The next speaker was Angela Sydenham. After her usual jocular opening, her talk gave a brief outline of the Countryside and Rights of Way Act 2002, which is slowly and steadily being brought into force. She paid particular attention to the mapping processes currently under way and the procedures for challenge which will be especially important for landowners and farmers.

She also discussed at some length the complex position regarding rights of way, particularly those over common land, noting the Vehicular Access Across Common and Other Land (England) Regulations 2002, which came in on 4th July last year. Attention was drawn to the procedure and time limits for applying to register a right and the rules regarding payment of compensation to the owner of the common.

Joanne Moss took us through some quirky, not to say startling, decisions of the English and European Courts. Illustrating the "Oh, my God!" factor, she discussed decisions which appear to go against those principles of law which we have considered to be well established.

Not all of the cases had agricultural subject-matter but all have effects that we will need to address when advising clients. There appears to be an increasing judicial tendency to look at the merits of each case (the Denning approach) which, whilst it is admirable in the interests of justice, plays havoc with the law of precedent.

After lunch, Jeremy Procter came in with what he called the 'Land Agent Sandwich' – a filling between two slices of lawyer! He reviewed the statistical evidence on current levels of farm rents, under both regimes, and concluded, as many of us have, that farming *per se* is no longer profitable, certainly without the CAP subsidies. Farmers increasingly are looking at other forms of income-earning, and earnings from non-farming activity have increased quite significantly as a result.

Practical issues from the land agent's perspective were covered: the effect of the *Spencer* case on the three-year rent review period under AHA; the efficacy (or otherwise) of formula rents for FBTs; the effect on rents of diversified activity – to name but three.

Mark Horvath (substituting for Richard Barker who had been called to Brussels on client business) finished the day with a look at the MTR proposals. We all know the uncertainty which has been created by the draft regulations, and Mark sought to put them in their political perspective.

His view was that farmers are being withdrawn from reliance on subsidies as a junky is cured of his addiction – by slow withdrawal to avoid the damaging consequences of 'cold turkey'. He saw the payment entitlements as a 10-year 'annuity' enabling farmers to arrange their affairs so as to do without the payments.

In that light, thoughts of land purchasers 'needing' to purchase entitlement where otherwise not transferred to them are perhaps less frightening – those who have become accustomed to dealing with IACS and the payment schemes thereunder need to change their mindset.

The draft regulations are only that, and one was advised to wait and see the final outcome. The reform will happen: the Commission is seeking to put it in place before enlargement since it will be more difficult to achieve with a 25-member Union, and WTO negotiations are in any event putting the EU under pressure to get its own house in order at this stage. It may yet hinge on a bipartite meeting between Gerhard Schröder and Jacques Chirac in the weeks to come.

We regret that some of you were not able to attend due to the course having been sold out, but the papers are available for sale for £15. Contact Alan Brakefield if you would like a set.

Surrender – doing the deal

Ellen Allwood, JHWalter, Lincoln

It is inevitable and essential for any industry in such turmoil as the agricultural industry, that there will be change – for the survival of both the industry and the constituent individuals.

For tenant farmers, the decisions they must now make are fundamental to their continued existence as tenants. Where a business restructure is not simply not enough to address the critical issues, then *prima facie*, this appears to be a straightforward decision of surrender for a golden handshake.

But that assumption is too simplistic an assessment of the practicalities and realities of such surrender negotiations. The tenancy is a valuable asset; an Agricultural Holdings Act 1986 tenancy (AHA) more so than a Farm Business Tenancy (FBT), due to the security of tenure provisions, succession rights and rent review provisions.

Applying simple valuation theory, the value of an asset in the market place is only what someone will pay for it. The difference between a tenancy and most other assets is that the tenancy has only one 'purchaser', the landlord.

For a successful surrender deal, it not only 'takes two to tango' but most parties must at the very least be willing participants. Even that will not always produce a successful deal as the terms proposed may simply not be acceptable or feasible for the other party.

Do we have a willing Landlord?

Why wouldn't a landlord be willing to regain possession? This could be for as simple a reason as the landlord's own assessment of the tenant's true predicament. A tenant who has not paid the rent on time and faces a Notice to Pay/Quit, or who cannot afford to repair the buildings or is simply exercising his right to pursue a rent reduction, may be viewed as a tenant 'on the way out'!

> "It not only 'takes two to tango' but the parties must at least be willing participants"

Add to this a lack of successors (whether actual or perceived) for an elderly or infirm tenant or the common knowledge that the bank/creditors are forcing the issue and the landlord may well adopt the stance: "Why pay a penny – the end is nigh"!

And some landlords will simply do this – sit it out until the tenant's resolve and bargaining position are so weakened that the most the tenant can hope for is a 'dilapidation free' surrender and nothing more. It is crucial that the landlord believes that the tenant has a viable alternative to surrender.

What are the Landlord's plans for the holding?

The ideal scenario is where the landlord wishes to sell the holding with vacant possession or 'asset strip' the farmhouse, cottages, for example. This immediately provides a means of raising capital with which to pay the tenant. Otherwise, it is usually the inability or reluctance to raise capital from other sources that will frustrate a deal.

In other cases, particularly on a traditional family estate, the landlord may have a genuine wish to continue a longstanding relationship with the tenant. The landlord's agent may think differently! The more commercially minded Landlord may also consider that at the present time there is no safer place for his investment and therefore does not need to release capital.

However, even for such a landlord, the combination of the Inheritance Tax advantages of a FBT over a 1986 Act tenancy, together with the potential for a increased rental income, should, theoretically, persuade a landlord to negotiate with the AHA tenant, if not the FBT tenant. But I stress: theoretically.

Where there is a reluctant landlord, his surrender proposal may simply not be sufficient for the tenant to contemplate surrender. It will depend on the tenant's circumstances and how willing or otherwise he is to surrender.

Do we have a willing Tenant?

In the present climate, faced with the dire forecasts for agriculture, it would be easy to assume that every tenant is willing to consider surrender, subject only the size of the payment. And we do often meet tenants who have not put a surrender proposal into perspective but rather takes it on face value because the alternative (as they see it) is so dire.

That is not to say that every tenant is a willing participant or, even if initially willing, remains so when the proposal is put into perspective.

For other tenants, surrender is something that they never, either initially or ever, want to contemplate. Surrendering can be seen as giving away the inheritance and that can be a bitter pill for father who believes he is 'selling out' his son – not always a view shared by the son who may actually want to quit a struggling business but is reluctant to admit that to father. On the other hand, it may be the son who feels that it is father's failings which has deprived him of his rightful inheritance.

For the family, there may be a feeling of loss of prestige, for example, if they are leaving a large farm with Manor Farmhouse. There may also be a fear that the surrender will be perceived, by their peers in the farming community, as a sign of failure. These are highly emotive but real issues, especially when the holding has been farmed, 'man and boy', by more than one generation.

Very few surrenders take place with no emotional baggage attached and the land agent is often caught in the middle, often as the only adviser to the tenant and his family who is able to guide and advise on all the relevant matters, including those which are so difficult to quantify. But then that is the nature of this specialised instruction.

Factors to be taken into account

Most factors are quantifiable. Not all can be categorised as 'positive' or 'negative' factors for or against surrender, but must be acknowledged, quantified and ultimately weighed up against the landlord's proposal. For example:–

Source of income – subject to restructuring, there may be other methods of farming to make a profit or at least cut the farming losses but is this enough to save the business/holding? Can this be replaced by any other source of income?

The family home – the house within the AHA tenancy is often viewed as the cheapest way of providing accommodation particularly if the family want to continue living in an attractive rural area.

The cost of repairing your own house may also not be appreciated by a tenant who has been used to a proactive landlord fulfilling his repairing obligations. Tenants who have experienced the opposite may welcome the opportunity to have control over their owned house.

A tenant's own investment in the tenanted house may not always be recognised by a landlord and without the right to remain in the house for the full life of these works, the tenant may feel this investment has been lost. But a tenanted house is never entirely secure and the tenant's family remains at risk of losing the family home on termination of the tenancy or the tenant's death. The ability to invest a surrender payment in bricks and mortar should mean that there is not only a secure 'inheritance' for the next generation but will also ensure the security of the tenant's dependants.

Trading viability – continuation of the business in any form may result in increasing numbers of creditors and inability to maintain loan repayments or reduce the overdraft. Ultimately, the tenant will be at risk of bankruptcy and bank foreclosure resulting not only in the loss of his business but also the landlord would have grounds to terminate the tenancy with no surrender payment.

The benefits of trading – few tenants fully appreciate the financial benefits of being able to offset certain living expenses against trading income, a benefit which will disappear on surrender and termination of the tenancy.

Releasing the tenant's time – the cessation of a farm business and surrender will release the tenant's time to enable him to obtain another, hopefully more lucrative, job. But is this a realistic option for a middle-aged farmer with no other formal training? Usually this depends more on the man himself than a lack of formal training. It can be an opportunity to develop under-utilised skills such as mechanical engineering or consultancy services.

For others, however, whether due to age, character or lack of aptitude or business acumen, this can be a real problem. A tenant restructuring the business to release time whilst retaining the tenanted land and buildings at least provides a potential for alternative enterprises to be run from the holding (subject to landlord's consent). Or he can obtain another job to supplement the farming income. Most contracting arrangements will at least cover the farm rent.

Cash or benefit?

Once the value of a surrender has been identified, a landlord who is unable or unwilling to raise the cash equivalent to pay the tenant, may propose alternative terms of 'benefit', which can be evaluated and possibly discounted to assess there real value to the tenant. Such benefits suggested may include:–

- FBTs at advantageous terms for all or part of the land for a fixed period;
- Tenancy of the farmhouse either rent free or low rent fixed term tenancy for a long fixed period or until death;
- Share of future sale proceeds of all or part of the holding.

At the end of the day, assuming a willing landlord and a willing tenant, the success of the surrender deal will be a matter for the specific landlord and tenant to evaluate from their own point of view. Ultimately money is a great facilitator and the more that is on offer through vacant possession for the landlord and hard cash (or benefit equivalent) for the tenant, the easier the decision will be.

MID-TERM REVIEW A Working Seminar

Institution of Civil Engineers
1 Great George Street
London, SW1
6th May 2003

WE ARE all aware of the difficulties the draft CAP Mid-Term Review regulations have caused since they were presented in January. Tales of woe have appeared from all around the country: land deals are in peril, farmers are concerned about their 'entitlements' and professionals are scratching heads to try and find the way forward, not to mention looking carefully at their indemnity insurance!

ALA has arranged a working seminar to review the regulations, with contributions from DEFRA officials and from Jeremy Moody, CAAV Secretary and Adviser, who has been consulting at length with both DEFRA and the EC Commission.

Two practitioners will give commentary on their own experiences with land deals caught up in backwash of the draft regulations.

THEN IT'S OVER TO YOU! We will have a lengthy open discussion in which you can present your own concerns and the panel, comprising the speakers along with other specialists from ALA, will respond.

We hope that by the end of the day your concerns, if not completely alleviated, will be allayed sufficiently to enable you to proceed with transactions and advise your clients with greater confidence.

We have invited other professional organisations to circulate their memberships about this meeting, but ALA Members will get preference in booking and a discounted price. The fee for Members will be £130; that for non-Members will be £170. No bookings will be accepted from non-Members until 17th April.

Places are limited to the first 90 bookings accepted, due to limitations on the size of venue, and at the time of writing places are selling well. We anticipate that this workshop will be popular and you are therefore advised to book early and by 23rd April in any event

Please call Alan Brakefield on (020)8467-0722 for more information or to book a place. You can also book online by e-mailing *meetings@ala.org.uk*.

EUROPEAN FOCUS

The CAP is in the air

Philip Day, Wilkin Chapman Epton Blades, Lincoln

On 22nd January 2003 the EC Commission issued, amongst others, a draft Council Regulation establishing Common Rules for direct support schemes under the Common Agricultural Policy and support schemes for producers of certain crops. This is one of the regulations to implement the mid-term review of the Common Agricultural Policy. This article is based on the draft Regulation as first published and considers the implications for land transactions of the proposals.

The basis of the proposals is that from 2004 there will be a single annual payment to a farmer. Under Article 47 there are two elements which give rise to the right to payment. The farmer must have, first, the entitlement and, secondly, the eligible number of hectares.

Who will be entitled?

Article 46 sets out the determination of the entitlement. The entitlement will be calculated on the basis of claims made in the three years 2000, 2001 and 2002 (the "reference period"). There are provisions in Article 43 covering hardship cases, where a farmer whose production was adversely affected during the reference period may be entitled to request the reference amount be calculated on the basis of the calendar year or years in the reference period not affected by exceptional circumstances or force majeure. Exceptional circumstances are not set out in their entirety in the draft Regulation although examples are given.

All payments which a farmer received under the existing direct payments from the various schemes during the reference period will be taken into account when arriving at the entitlement under the new Regulation.

In summary, therefore, an entitlement per hectare will be arrived at by looking at the average over the three year period from 2000-2002. Once that entitlement is arrived at, and provided the farmer has the hectares in 2004 to justify the payment, then the payment will be made. The payments will not, therefore, as at present, be linked to what is produced on the land. The obligation on the farmer under the new de-coupled payments appears to be that he must only keep the land in good order or keep animals, manage the land or cut hay.

Personal entitlement of farmer

The payments will not attach to the land but to the farmer. Indeed, in Article 49 there is specific provision with regard to transfer of entitlement which may be transferred by sale with or without land. The draft Regulation states that lease or similar type of transactions shall only be allowed if the entitlements transferred are accompanied by the transfer of an equivalent number of eligible hectares. This is not the case in relation to sales.

A farmer is defined in the Regulations as a natural or legal person, or a group of natural or legal persons, whatever legal status is granted to the group and its members by national law whose holding is situated within the community territory and who exercises an agricultural activity.

The nature of the problems

I turn now to the practical implications of the proposals so far as they affect land transactions. I take as an example a farm which was sold in the autumn of 2002 following that year's harvest and the seller retired following the sale. The seller had made all of the necessary claims for the reference period. The buyer is someone who is entering agriculture for the first time (but these comments could equally apply to someone extending their land holding).

The seller would have made the requisite claims during the reference period but would not have any land holding in 2004. The buyer would have the necessary hectares to support the payment in 2004 but would not have the entitlement because he was not in receipt of any payment during the reference period.

The draft Regulation does not clarify which of the two would qualify for the entitlement. If it is the former – i.e. the farmer who has gone out of production – then he will have a valuable asset which can be sold in the open market. The buyer of the land who did not have an entitlement in the reference period would himself have to go out and acquire the same by purchase. Conversely, the entitlement could be granted to the buyer as the farmer in occupation in 2004. This would appear to be the equitable solution and, it is hoped, the one which will be adopted.

This is a matter which will have to be considered by the relevant member States and over which clarification is required.

Tenanted land

What of tenancies? The single payment will be the entitlement of the farmer, i.e. the tenant and not the landlord. The single payment can be sold. Under an Agricultural Holdings Act 1986 tenancy if the tenant sells the entitlement away from the holding then he faces a substantial dilapidations claim when the tenancy comes to an end for diminution in value.

What of the farm business tenancy for say five years which commenced in 2000? The tenant would have made the claim for the whole of the reference period and would still be in occupation in 2004. The tenant would therefore have the entitlement and the hectares and would receive the payment.

After 2004 the tenant could sell the entitlement and at the end of the tenancy the land would have no benefit of the single payments scheme for ensuing years. As the present system of de-coupling the payment from the land was not envisaged I suspect that there are no farm business tenancy agreements which cover this situation.

Existing tenancies will have to be looked at by landlords to see if there is any way in which they can prevent the tenant from disposing of the

> "The buyer would have the hectares but would have no entitlement because he was not in receipt of any payment in the reference period"

entitlement from 2004 or if there is no way to prevent such disposal to seek compensation for the diminution in value of the land at the end of the tenancy.

The 2003 land market

Finally, what of land transactions in 2003? At the present time, as the draft Regulation is itself uncertain, it can equally not be certain that a purchaser of land in 2003 will be entitled to the new direct payment. A purchaser should, however, be looking at the contract to make provision that so far as is allowed the seller will transfer to the buyer the entitlement granted in 2004. This is assuming that in 2004 the entitlement will be given to a farmer who by then has gone out of farming and would not have the number of hectares to justify the payment.

If ultimately the farmer who made the claim in the reference period must also have the necessary number of hectares in 2004 then there will be a substantial number of cases where the entitlement is lost altogether and the purchaser will have to fall back either on the national reserve to be established under Article 45 or on the purchase of entitlement in the open market. The situation at the present time is so uncertain that clients must be fully advised of all of the risks involved.

In respect of new tenancies in 2003, again there will need to be reference to the proposed entitlement. Acting for the landlord, a covenant should be inserted to bind the tenant to transfer the entitlement to the landlord at the end of the term. If someone is considering retiring from farming in 2003 and either selling their land or granting a farm business tenancy of the same, I suspect that they will be strongly advised to consider contract farming for a couple of years until the situation in respect of the draft Regulation becomes clear.

If such a person enters into a contract farming arrangement they will quite clearly still be the occupier of the necessary number of hectares and assuming that they have been farming for many years will also have been the claimant during the reference period. By entering into a contract farming arrangement this should preclude any dangers of losing the entitlement to the single payment for 2004 and onwards.

Conclusion

As the title of this article indicates, the CAP is well and truly in the air. Where it will ultimately land and the effect it will have upon land transactions, land values, and farming economics remains to be seen.

1986 and 1995 – The two Acts compared

Eleanor Pinfold, Pinfold & Co, Cheam

Last September, I gave a lecture at the 'Starter for Ten' training course at Downing College. I have been asked to put it into print, because some of the students (and lecturers) thought this would be beneficial for Members to read. I have made no real amendments to my original draft, save to expand in certain places where others 'chipped in', or where the difference between speaking and writing contributes to confusion.

I expect that all of you wonder why we include this section in the programme bearing in mind that the rest of the programme is so practical and this appears theoretical by comparison.

Well, when you get a client who wants to diversify and a landlord who will not let him, these contrasts in the two systems are going to be important. There are various points which I have set out in my notes, but I am going to take three points and deal with them in detail.

Diversification

Over the last two days each of the tutors has mentioned *Jewell v McGowan and Gibbons*. The facts you have been told, but to reiterate, the tenant farmer Jewell was doing what the Government, the NFU and the CLA are telling all farmers to do – diversifying. He was a dairy farmer and, with the initial consent of the landlord, he created an open farming trail and tour to show the townies farming and good farming methods. His tenancy was under the 1986 Act which as usual had the clause that the farm was to be used "for agricultural purposes only". So what does that mean?

The Court of Appeal (including an ex-tax barrister) held that the words in quotes meant just that – no open days, no trails, no tours – because it was accepted by both parties (and therefore the point was not, so far as I am concerned, argued properly) that such matters were not agricultural and therefore they were in breach of the user clause.

What is "agriculture"?

The judgement goes into the definition of agriculture as set out in S 96 of the Agricultural Holdings Act 1986. That definition is this:–

> "agriculture includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land meadow land, osier land, market gardens and nursery grounds and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and 'agricultural' shall be construed accordingly"

That is by no means a full definition – note: the section says it *includes*, not that it *is*. All the tutors would agree that the using of land for growing cereals is agriculture but it is not included in the definition – unless it was intended that seed growing was considered in 1948 (the definition has not changed since then) to cover the growing of cereals.

It does not include the use of land for growing flax, an important industry in parts of the British Isles, or linseed or vines. So is use of land for those purposes agricultural use or is it a business use? – because none of those items are contained within that definition of "agriculture".

What about livestock?

Now let us look at the definition of "livestock" without which I do not think you can understand the definition of "agriculture" properly, since the words "livestock breeding and keeping" are included in the definition of "agriculture".

> " 'Livestock' includes any creature kept for the production of food, wool, skins or fur or for the purposes of its use in the farming of land or the carrying on in relation to land any agricultural activity".

So if a person breeds ostriches for use in place of guard dogs or for the feather boa industry, would the use of the land be agricultural? Or if someone kept crocodiles for the sale of skins to the fashion industry is that agricultural or business use? And would your answer differ of the crocodiles were kept for food production and the use of the skins for handbags was a by-product?

Take also the case I was asked about: the man who was let land – an acre and a half – which was used as a gigantic compost heap. He was a keen fisherman and from small beginnings had a large business of cultivating

worms for fishing, supplying both home grown and 'organic' worms to fishermen. He was even trying to get into the export market!

The local authority said he needed planning permission to run a business from the land and the landlord said that he was in breach of his tenancy agreement. The landlord was easily dealt with – the tenant bought the land – but he argued that the compost heaps were agricultural, since worms were livestock and used to feed fish and fish farming is an agricultural use – or at least it is in this country.

There is nothing in the books to help him and as Jersey planning law is different from ours (he lived in Jersey) I could not really help him save to let him know that the books were of no use! But in English Law – what do we think?

The drawing of the line

The questions are these: where is the line drawn? and how can you draw it with an increasingly wide use of exotic animals on farmland in this country used to give the farmer a proper standard of living?

What the *Jewell* case shows is that a businessman tenant farmer with a 1986 Act tenancy may be prevented from diversifying; and that a landlord with an old-fashioned land agent who wants a tenant on a tenancy with an agricultural use only will find himself without tenants.

But maybe this is an 'opportunity for profit' (a good Ferengi principle!)*.

A businessman tenant may be willing to give up a 1986 Act tenancy and successions in order to take a 50-year lease which allows him freedom to farm how he wishes and use the land for any business, so long as that business is ancillary to the main farming business and provided the 1995 Act notice is served to make sure that it is an agricultural tenancy throughout.

The 1954 Act

All that said, why is everyone so afraid of a tenancy falling within the business tenancy regime and under the Landlord and Tenant Act 1954? The only reason I have ever been able to discover is the automatic end to an agricultural tenancy for the non-payment of rent (Case D – and even that has gone under the 1995 Act).

I know that originally the relationship of agricultural landlord and tenant was said to be closer than that of a shopkeeper and his landlord, because the rural community worked and lived together helping each other in times of stress, but from my reading of history that was a very rosy picture of the rural scene in bygone times and has largely disappeared now.

A landlord cannot afford to keep a lazy tenant on the land and some tenant farmers are large landholders with several landlords who farm in a much more intensive way than the previous generations. To them farming is a business.

A single regime for tenancies?

I know too, there is going to be new business tenancy legislation at the end of the year, so some may worry because of that, but the advantage of a business tenancy is that you can have a fixed term tenancy and on renewal at the end of the fixed term, the judges can order a tenancy only for a term up to a maximum of 14 years (15 years under the new legislation). And it does allow open market rents, which all the landlords' agents have been pressing for for years!

In fact, I think the hidden reason for the review of FBTs is to see if agricultural tenancies can fall within the Law Commission's general view that there should be one system for every conceivable type of tenancy and the new 'business' legislation is looking to have some sort of commercial lease for business and residential – so why not for agriculture?

Repairs and maintenance

The second point I want to discuss is repairing obligations. In the 1995 Act there is no statutory instrument to fall back on. You must under a 1995 Act tenancy write in the repair and maintenance clauses, and in sufficient detail to make it clear both to landlord and tenant what are to be their individual responsibilities.

It is possible to draft a full repairing and insuring (FRI) lease as with a 1954 Act tenancy, but if you accept that on behalf of a tenant remember that if part of the building has to be demolished in order to be repaired that will be considered a repair and nor a replacement or improvement – *Lurcott v Wakely and Walker* [1911] 1KB 905 – and further that a covenant to keep the buildings in repair and the buildings are in a state of disrepair at the beginning of the tenancy that obliges the tenant to put the buildings into the required state of repair – *Payne v Haine* (1847) 16 M&W 541.

If you are acting for the landlord remember the FRI lease may mean that the landlord only has to take the rent, but that rent will be lower than where repairs are shared, and in some cases substantially lower.

If either party wishes to share the responsibilities do not just incorporate SI1973/1473 – the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973 – because only those that have not read it would do so: that is also the reason why it has not been replaced in the way that the other legislation has!

The SI states a list of repairing obligations on behalf of the tenant, and a similar list on behalf of the landlord. Part I of the Schedule to the SI sets out the rights and liabilities of the landlord and begins "to execute all repairs or replacements to the undermentioned parts of the farmhouse cottages and farm buildings" and Part II of the schedule, which sets out the rights and liabilities of the tenant, states "*except in so far as such liabilities fall to be undertaken by the landlord under Part I* to repair and to keep or leave clean and in a good tenantable repair etc" (my emphasis).

Ancient law it may be, but 'to execute repairs' and 'to keep and leave in a good tenantable repair' have little difference, and as the two Parts to the Schedule are almost identical it is difficult to tell who should do what without a proper clause even in a good old fashioned 1986 Act agreement!

Surrenders

My third point relates to surrenders. First and foremost please do not add land to a 1986 Act tenancy however good the deal is. To do so will operate as a surrender and regrant: the 1986 Act tenant will find him- or herself with a Farm Business Tenancy under the 1995 Act, and your insurers will be finding themselves with a large claim especially if there were two successions to go.

Graham Smith and I disagreed yesterday about what one can do if one is asked to take land out of a tenancy agreement. I do not consider that should be done either, for the same reason that there is a surrender and regrant, although I know that in both Acts there are some *de minimis* rules which, some say, allow the landlord to take land out of the tenancy.

It was important originally under the 1986 Act not to take land out of a tenancy save at a rent review, because, if one took land out and reduced the rent at that time, the three-year review cycle would start all over again – when there was an upward trend in rents it was vital that that should not happen.

However, if one took out the land without a rent reduction then that meant while there was an increase in rent per acre – there being no change in the rent – the three years continued to run unbroken by the change in acreage.

With the trend in rents now being downward and each party being reluctant to review rents every three years at the present time, such niceties may be less important.

1995 Act, S.4 – difficult to follow

None of the speakers has really tackled S.4 of the 1995 Act, so I am going to do so. This is my interpretation which my colleagues may or may not agree with. Section 4 we all agree is a very difficult section to understand. It states that the 1986 Act will not apply to any tenancy begun after 1st September 1995 except any tenancy of any agricultural holding:–

(a) granted before that date;
(b) succession tenancy granted on death;
(c) succession tenancy granted on retirement;
(d) an agreed succession;
(e) Evesham custom;
(f) is granted to a person who … was the tenant of … an agricultural holding which comprised the whole or a substantial part of the land comprised in the holding …

So what is "a substantial part"? Field boundaries I shall concede are within that definition, but swapping of fields between two tenanted farms?

I doubt it, if the 'farm' is my compost farmer's area of 1½ acres and the field to be swapped is ¾ of an acre or even ½ an acre.

Further, I am not so sure that "substantial" necessarily means substantial in terms of acreage, but it could mean such a part of the farm as to make that farm unviable, e.g. 20 acres of prime land upon which the farmer grows produce that pays for all the other operations of the farm.

I think that "substantial" has a meaning which is different in every single case and that each has to be considered on it own merits.

Payments on surrender – tax traps

My final point on surrenders deals with payment for surrenders. Someone once said enough money would make a tenant give up possession of land to the landlord. But two traps for the unwary.

First Capital Gains Tax provisions do apply to a surrender unless a notice to quit has been served. Serve the notice to quit – by arrangement – and the tenant will not have to pay CGT on the money he receives as the amount is considered to be compensation for giving up the tenancy.

That is fine up to a point, but bear in mind the limit on the compensation under the terms of the 1986 Act, being a multiple of the rent, which may not be enough for tax purposes.

Further S.78 of the 1986 Act (the old S.65 of the 1948 Act) states that the parties cannot agree compensation save under the terms of the Act. There is no sanction on this, but the Revenue will come down hard on any who do not structure the payments properly.

Bear in mind that under Case B the compensation is only five or six times the amount of rent: and if a tenant is surrendering the whole farm and leaves with a notice to quit one will have to structure payments carefully to be within S.78. It is possible to exchange interests in part of the property – with compensation for the rest of the payment.

Alternatively, if the landlord is selling, it is possible to get the purchaser to buy the freehold subject to the tenancy from the landlord and the agricultural tenancy from the tenant, the two interests merging on completion. That way the tenant does have to pay capital gains on the proceeds of sale as does the landlord, but the division is then fair and the tenant can take into account all the improvements which he has paid for and any other allowable expenditure he has spent on the farm, as similarly can the landlord.

In the case of a dairy farm, if the land is being sold, the landlord could allow the tenant to take the milk quota as part of the payment, because compensation for milk quota is outside the 1986 Act even through proscribed by the Agriculture Act of 1986.

I hope this article will not only remind those that heard me give the talk that there was a lot to think about, but also help the other 'students' who read these pages.

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* *Pace* those who have no interest in *Star Trek*!

Live&Learn

ALA Student/Training Section

Agriculture and the Environment – Nature Conservation, Part II

Stephen Tromans, Cambridge

In the last issue of *The Bulletin* I looked at some of the changes effected by Part III of the Countryside and Rights of Way Act 2000. I now turn to consider a recent case concerning the procedures for confirming SSSI designations and their compatibility with the Human Rights Act 1998.

The case in question is *R (on the application of Aggregate Industries UK Limited) v English Nature* [2002] EWHC (Admin.) 908 (24th April 2002, Forbes J).

English Nature's Council had confirmed the notification of land at Bramshill plantation, Hampshire, under S.28(5) of the Wildlife and Countryside Act 1981. Some 12% of the site had already been confirmed as an SSSI in 1989, on the basis of its interest for flora, dragonflies and certain bird species.

In 1994, the Council had declined to confirm the remainder of the site as of interest for bird species, on the basis that the habitats in question were of a temporary nature as rotational management of the plantation continued.

However, English Nature's approach to the notification of temporary habitats changed in 2000. The species in question were of European importance, as Annex I species under the Birds Directive (woodlark and nightjar), and Government policy is that all sites of European importance should be designated as SSSIs.

Aggregate Industries objected to notification, and were represented at the relevant Council meeting by their solicitor, who was allowed to address the Council for 10 minutes. The Council, accepting the recommendation of its officers, decided to confirm the notification. There were various grounds of Aggregate Industries' challenge.

Article 6 of the ECHR

It was argued for the Secretary of State that Article 6 was not engaged. Whilst the civil rights of Aggregate Industries to use and enjoy their property were affected, it was said that the decision to confirm notification was not "directly decisive" of those rights: the restrictions only bit at the point when permission to carry out a particular operation was sought and refused.

For Aggregate Industries, it was argued that confirmation changed the status and value of the land, and restricted the activities which could be

carried out there. Forbes J held that Article 6 was not engaged by the zoning or designation of land under development plan policies (see the ECHR decisions in *Schertler v Austria* (App. 26794/95), *Maser v Austria* (App. 26508/95), *Enzi v Austria* (App. 29268/95), and *Ludescher v Austria* (App 32098/96) and also the decision of Ouseley J in *Bovis Homes v New Forest District Council* (25th January 2002)).

However, it was, he held, engaged by the process of confirming the notification of a SSSI, as constituting the outcome of a dispute which was directly decisive of the land owner's civil rights. The confirmation narrowed the scope of the enjoyment of the land and created both positive and negative conditions on which its enjoyment became contingent.

Status of English Nature Council

It was argued that the Council of English Nature did not fulfil the minimum requirements of Article 6 to be a "tribunal established by law". It was held that an administrative body could constitute such a tribunal, even if it is directly concerned in the proceedings to be decided. The issue was whether it was, coupled where necessary with the High Court's review powers, an independent and impartial tribunal. On this it was said for Aggregate Industries that the Council lacked the appearance of independence and impartiality.

Forbes J agreed with this submission, in that the Council was determining disputed issues between the objector and its own officers. The issue was then whether the High Court could cure that defect by having "full jurisdiction" to deal with matters arising on judicial review: Forbes J quoted extensively from the judgment of Laws LJ in *London Borough of Tower Hamlets v Runa Begum* [2002] EWCA Civ 239 on this issue.

It was held not to be essential for this purpose for the Council to be electorally accountable, or that there must be an independent fact-finder with procedures akin to a public inquiry. It was noted that the statutory provisions and the administrative processes adopted by English Nature in confirmation had a number of important procedural safeguards to allow informed objections to be made and considered.

Moreover, English Nature Council was required to exercise its expert judgment, and was far better placed and qualified than a court to do so.

Importantly, the decision did not involve resolving issues of primary or disputed fact, but was essentially one of policy or expediency. Accordingly, the requirements of Article 6 were satisfied, looking at the statutory framework and procedures as a whole.

Other challenges

Factually based challenges, that legitimate expectations of Aggregate Industries had been infringed, and that there was no justifiable basis for the Council's decision, were also rejected. The reasons for English Nature's change of policy and of approach to the site were entirely rational, and the site clearly qualified as part of a larger area of European importance.

Having now dealt with the Human Rights aspect, let us look at the procedures themselves for objecting to a SSSI designation.

Objecting to SSSI notifications – practical advice

Until 2001, objections to SSSI confirmations and notifications were entirely on paper. English Nature now provides a hearing for those objecting at confirmation stage. The following points (gleaned from my experience as a Council member of English nature from 1996-2002) may be helpful for those faced with the prospect of notification of their land and their advisors:–

- Bear in mind that the crucial question is the special interest of the site. Many objections are irrelevant as they are essentially complaints of bureaucratic interference, or concerns as to the possible economic impact of notification.
- English Nature will be keen to resolve as many issues as possible at local team level. It may well be possible to obtain agreement in advance that certain operations can be carried out.
- The initial decision to notify will not now normally be taken by full Council, but at senior management level. Clear presentation of the objections on paper is important. In complex cases clarity of presentation is very important (for example, use of executive summaries). Be aware of any relevant Guidance relating to the habitat type or species in question.
- If objections are maintained following notification, the matter will go before Council. English Nature has to operate a tight timetable for the preparation of the voluminous Council papers to allow circulation for pre-reading two weeks before the meeting, and there will be cut-off points after which no further information will be accepted. Do not assume these can be ignored or extended.
- Know the audience. EN Council comprises a variety of individuals with differing backgrounds and expertise (e.g. agriculture, land management, marine biology, insects, birds, plants, geology, etc). There may well be an expert on the subject matter of the confirmation. Details on Council members are available on the EN website. They will have read the papers very thoroughly, and one or two members will have been asked to lead the discussion.
- The meeting will normally be held in a hotel. Get there early to assess the room and facilities.
- As to procedure, the Chair will introduce the item. The local team representative will give their view in a short presentation, probably using PowerPoint. A representative of the objector will be given 10 minutes to address Council. Members of Council can then ask questions or make comments, and almost certainly will, often in robust terms. If legal issues arise, the Chair may call on EN's solicitor to speak. The presentations will be summed up by a senior manager. Council Members will be asked to indicate their views as to confirmation. The area of the site may be varied (but not extended) and the citation amended.
- In presenting the objection, assume the papers will have been read thorough. Summarise and supplement, rather than repeat. A good plan or aerial photo on PowerPoint is invaluable. Don't try and pack too much in. Generally 'legal' submissions go down badly. The presentation is best made by a competent ecologist.

STATUTORY INSTRUMENTS to 28th February 2003

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

SI2002/2834(W272) = Plastic Materials and Articles in Contact with Food (Amendment) (Wales) Regulations 2002 – amend 1998 Regulations (SI1998/1376, amended by SI2001/1263) – 30th November 2002

SI2002/2860 = TSE (England) (Amendment) (No.2) Regulations 2002 – amend TSE (England) Regulations 2002 (SI2002/843 as amended by SI2002/1253) – 11th December 2002

SI2002/2980 = Waste Incineration (England and Wales) Regulations 2002 – require application between 1st January and 31st March 2005 for variation to permits existing on 31st December 2004 – 28th December 2002

SI2002/3008 = Plastic Materials and Articles in Contact with Food (Amendment) (England) (No.2) Regulations 2002 – amend 1998 Regulations (SI1998/1376, amended by SI2000/3162 and SI2002/2364) – 28th February 2003

SI2002/3011(W283) = Products of Animal Origin (Third Country Imports) (Wales) (Amendment) Regulations 2002 – amend Products of Animal Origin (Third Country Imports) (Wales) Regulations 2002 (SI2002/1387(W136)) – 7th December 2002

SI2002/3012(W284) = Commonhold and Leasehold Reform Act 2002 (Commencement No.1, Savings and Transitional Provisions) (Wales) Order 2002 – brings into force stated provisions of C&LR Act 2002 – 1st January 2003

SI2002/3026 = Forest Reproductive Material (Great Britain) Regulations 2002 – replace 1977 Regulations (SI1977/891) – 1st January 2003

SI2002/3151(NI5) = Fur Farming (Prohibition) (Northern Ireland) Order 2002 – does what it says on the tin – 31st December 2002

SI2002/3171 = Beet Seed (England) Regulations 2002 – (England only) revoke and replace Beet Seeds Regulation 1993 (SI1993/2006) and revoke amending regulations – 31st January 2003

SI2002/3172 = Fodder Plant Seed (England) Regulations 2002 – (England only) revoke and replace Fodder Plant Seeds Regulation 1993 (SI1993/2009) and revoke amending regulations – 31st January 2003

SI2002/3173 = Cereal Seed (England) Regulations 2002 – (England only) revoke and replace Cereal Seeds Regulation 1993 (SI1993/2005) and revoke amending regulations – 31st January 2003

SI2002/3174 = Oil and Fibre Plant Seed (England) Regulations 2002 – (England only) revoke and replace Oil and Fibre Plant Seeds Regulation 1993 (SI1993/2007) and revoke amending regulations – 31st January 2003

SI2002/3175 = Vegetable Seed (England) Regulations 2002 – (England only) revoke and replace Vegetable Seeds Regulations 1993 (SI1993/2008) and revoke amending regulations – 31st January 2003

SI2002/3176 The Seed (Registration, Licensing and Enforcement) (England) Regulations 2002 – (England only) revoke and replace Seeds (Registration, Licensing and Enforcement) Regulations 1985 (SI1985/980), as amended, and Seeds (Fees) Regulations 1985 as amended – 31st January 2003

SI2002/3187(W303) = Leasehold Reform (Notices) (Amendment) (Wales) Regulations 2002 – amend Leasehold Reform (Notices) Regulations 1997 (SI1997/640) – 1st January 2003

SI2002/3188(W304) = Genetically Modified Organisms (Deliberate Release) (Wales) Regulations 2002 – revoke 1992 Regulations (SI1992/3280) and amend to Pt.VI Environmental Protection Act 1990 – 31st December 2002

SI2002/3198 = Plant Varieties and Seeds Tribunal (Amendment) (England and Wales) Rules 2002 – amend 1974 Rules (SI1974/1136) consequent upon SI2002/3026 (q.v.) – 27th January 2003

SI2002/3203 = Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002 – removes maximum number of partners in a partnership or limited partnership – 21st December 2002

SI2002/3206 = Products of Animal Origin (Third Country Imports) (England) (Amendment) (No.4) Regulations 2002 – amend Products of Animal Origin (Third Country Imports) (England) Regulations 2002 (SI2002/1227 as amended by SI2002/2151, SI2002/2570 and SI2002/2639) – 1st January 2003

SI2002/3208 = Leasehold Reform (Collective Enfranchisement) (Counter-notices) (England) Regulations 2002 – regulations regarding reversioner's counter-notice under Leasehold Reform, Housing and Urban Development Act 1993 – 10th April 2003

SI2002/3209 = Leasehold Reform (Notices) (Amendment) (No.2) (England) Regulations 2002 – amend Leasehold Reform (Notices) Regulations 1997 (SI1997/640 as amended by SI2002/1715) – 10th April 2003

SI2002/3229 = Movement of Animals (Restrictions) (England) Order 2002 – revokes and remakes the Disease of Animals (Ascertainment of Disease) Order 1985 (SI1985/1765) and the Movement of Animals (Restrictions) Order 1990 (SI1990/760) – 20th January 2003

SI2002/3230(W307) = Products of Animal Origin (Third Country Imports) (Wales) (Amendment) (No.2) Regulations 2002 – amend Products of Animal Origin (Third Country Imports) (Wales) Regulations 2002 (SI2002/1387 (W136)) – 1st January 2003

SI2002/3231 = Animal By-Products (Identification) (Amendment) (England) (No.2) Regulations 2002 – amend Animal By-Products (Identification) Regulations 1995 (SI1995/614 as amended) – 1st April 2003

SI2003/4(W2) = Agricultural Holdings (Units of Production) (Wales) Order 2003 – prescribes units of production for land in Wales – 13th January 2003

SI2003/28 = Pigs (Records, Identification and Movement) (Interim Measures) (England) (No.2) (Amendment) Order 2003 – amends Pigs (Records, Identification and Movement) (Interim Measures) (England) (No.2) Order 2002 (SI2002/2154) – 31st January 2003

SI2003/29 = Sheep and Goats Identification and Movement (Interim Measures) (England) (No.2) (Amendment) Order 2003 – amends the Sheep and Goats Identification and Movement (Interim Measures) (England) (No.2) Order 2002 (SI2002/2153) – 31st January 2003

SI2003/30 = Disease Control (Interim Measures) (England) (No.2) (Amendment) Order 2003 – Disease Control (Interim Measures) (England) (No.2) Order 2002 (SI2002/2152 as amended by SI2002/2300) – 31st January 2003

SI2003/31 = Animal Gatherings (Interim Measures) (England) (Amendment) Order 2003 – amends Animal Gatherings (Interim Measures) (England) Order 2002 (SI2002/202 as amended) to continue it in effect until 1st April 2003 – 31st January 2003

SI2003/32 = Access to the Countryside (Provisional and Conclusive Maps) (England) (Amendment) Regulations 2003 – make certain minor amendments to Access to the Countryside (Provisional and Conclusive Maps) (England) Regulations 2002 (SI2002/1710) to correct minor defects – 3rd February 2003

SI2003/54(W5) = Housing (Right to Acquire and Right to Buy) (Designated Rural Areas and Designated Regions) (Wales) Order 2003 – designates rural areas for the purposes of S.157 Housing Act 1985 and S.17 Housing Act 1996 – 7th February 2003

SI2003/56(W6) = Seeds (Miscellaneous Amendments) (Wales) Regulations 2003 – further amend Cereal Seeds Regulations 1993 (SI1993/2005 as amended by SIs1995/1482, 1997/616, 1999/1860, 2001/3510 and 2001/3664(W296) and the Fodder Plant Seeds Regulations 1993 (SI1993/2009 as amended by SIs 1993/2529, 1996/453, 1997/616, 1999/1864, 2001/3510 and 2001/3665 (W297)) – 16th January 2003

SI2003/63 = Environmental Protection (Duty of Care) (England) (Amendment) Regulations 2003 – amend Environmental Protection (Duty of Care) Regulations 1991 (SI1991/2839 as amended by SIs1996/972, SI2000/1973 and 2002/1559) – 20th February 2003

SI2003/114 = Common Agricultural Policy (Wine) (England and Northern Ireland) (Amendment) Regulations 2003 – amend the Common Agricultural Policy (Wine) (England and Northern Ireland) Regulations 2001 (SI2001/686) – 17th February 2003

SI2003/130 = Bluetongue Order 2003 – implements Council Directive 2000/75 laying down specific provisions for the control and eradication of bluetongue (OJ L327, 22.12.2000, p74) – 19th February 2003

SI2003/135(W9) = Countryside Access (Dedication of Land as Access Land) (Wales) Regulations 2003 – procedural regulations for dedication of land under S.16 Countryside and Rights of Way Act 2000 – 28th January 2003

SI2003/142(W14) = Countryside Access

STATUTORY INSTRUMENTS

(Exclusion or Restriction of Access) (Wales) Regulations 2003 – procedural regulations for exclusion or restriction of access under Ch.II Pt.I Countryside and Rights of Way Act 2000 – 28th January 2003

SI2003/151(W21) = Sheep Annual Premium (Amendment) (Wales) Regulations 2003 – amend Sheep Annual Premium Regulations 1992 (SI1992/2677 as amended by SIs1994/2741, 1995/2779, 1996/49, 1997/2500 and 2000/2573) – 3rd February 2003

SI2003/164) = Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 – finish implementing Council Directive 85/337 (OJ L175, 5.7.1975, p40), as amended, for agricultural water management projects in England and Wales – 1st April 2003

SI2003/165 = Land Registration Fees Order 2003 – supersedes Land Registration Fees Order 2001 (SI2001/1179) – 1st March 2003

SI2003/167(W27) = Sheep and Goats Identification and Movement (Interim Measures) (Wales) (No.2) (Amendment) Order 2003 – amends Sheep and Goats Identification and Movement (Interim Measures) (Wales) (No.2) Order 2002 (SI2002/2302 (W.27)) – 31st January 2003

SI2003/168(W28) = Disease Control (Interim Measures) (Wales) (No.2) (Amendment) Order 2003 – amends Disease Control (Interim Measures) (Wales) (No.2) Order 2002 (SI2002/2304(W229) as amended by SI2002/2480(W243)) – 31st January 2003

SI2003/169(W29) = Animal Gatherings (Interim Measures) (Wales) (Amendment) Order 2003 – amends Animal Gatherings (Interim Measures) (Wales) Order 2002 (SI2002/283(W34) as amended) so that it continues in effect until 1st April 2003 – 31st January 2003

SI2003/170(W30) = Pigs (Records, Identification and Movement) (Interim Measures) (Wales) (No.2) (Amendment) Order 2003 – amends Pigs (Records, Identification and Movement) (Interim Measures) (Wales) (No.2) Order 2002 (SI2002/2303 (W228)) – 31st January 2003

SI2003/253 = Animal Gatherings (Interim Measures) (England) Order 2003 – revokes and replaces Animal Gatherings (Interim Measures) (England) Order 2002 – 4th March 2003 expiring 1st August 2003

SI2003/254 = Disease Control (Interim Measures) (England) Order 2003 – revokes and replaces Disease Control (Interim Measures) (England) (No.2) Order 2002 – 4th March, expiring 1st August 2003

SI2003/259 = Regulatory Reform (Assured Periodic Tenancies) (Rent Increases) Order 2003 – applies to notices served under S.13(2) Housing Act 1988 after 10th February 2003

SI2003/260 = Assured Tenancies and Agricultural Occupancies (Forms) (Amendment) (England) Regulations 2003 – amend 1997 Regulations (SI1997/194, amended by SI2002/337) in consequence of SI2003/259 (*q.v.*) – 11th February 2003

SI2003/272(C16) = Countryside and Rights of Way Act 2000 (Commencement No.3) Order 2003 – brings into force stated provisions of Countryside and Rights of Way Act 2000 on 12th February 2003

SI2003/289 = Hill Farm Allowance Regulations 2003 – implement Commission Regulation 445/2002 (OJ L74, 15.3.02, p1) laying down detailed rules for the application of Council Regulation 1257/1999 (OJ L160, 26.6.1999, p80) and Ch.9 of England Rural Development Programme – applies in England as to the whole; certain provisions apply also in Scotland – 8th March 2003

SI2003/299 = Welfare of Farmed Animals (England)(Amendment) Regulations 2003 – amend Welfare of Farmed Animals (England) Regulations 2000 (SI2000/1870) – 14th February 2003

SI2003/307(W46) = Assured Tenancies and Agricultural Occupancies (Forms) (Amendment) (Wales) Regulations 2003 – amend Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997 (SI1997/194) – Regs. 1 & 2, 8th February 2003; Reg.3, 18th April 2003

SI2003/326(W47) = Bluetongue (Wales) Order 2003 – Welsh equivalent of SI2003/130 (*q.v.*) – 19th February 2003

BRUSSELS UPDATE to 28th February 2003

Council Decision 2003/33 regarding acceptance of waste at landfills pursuant to Art.16 of and Annex II to Directive 1999/31

Council Regulation 2154/2002 amending Regulation 4045/89 on scrutiny of transactions financed by the Guarantee Section of EAGGF

Commission Decisions 2002/943 & 944 approving programmes for eradication and monitoring of certain animal diseases and prevention of zoonoses presented for 2003 and amending Decisions 2001/729 & 853 re. 2002

Commission Decision 2002/945 amending Decisions 2001/730 and 2001/854 financial contribution by EU to Member States' TSE monitoring programmes for 2002

Commission Decision 2003/23 on EU financial contribution for the compulsory slaughter between 1st July and 31st October 2001 of animals due to foot-and-mouth disease in the UK

Commission Decision 2003/102 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of EAGGF

Commission Regulation 2179/2002 on special conditions for the granting of private storage aid for pigmeat

Commission Regulation 2188/2002 concerning the provisional authorisation of new uses of additives in feedingstuffs

Commission Regulation 2251/2002 amending Regulation 2759/1999 laying down rules for the application of Council Regulation 1268/1999 on EU support for agriculture and rural development in the applicant countries in the pre-accession period

Commission Regulation 2319/2002 replacing the Annexes to Regulation 3846/87 establishing an agricultural product nomenclature for export refunds

Commission Regulation 2355/2002 amending Commission Regulation 438/2001 laying down detailed rules re. Council Regulation 1260/1999 on management and control systems for assistance granted under the Structural Funds

Commission Regulation 2328/2002 opening public sales of wine alcohol for use as bioethanol in the European Community

Commission Regulation 45/2003 correcting Regulation 1274/91 introducing detailed rules for implementing Regulation 1907/90 on certain marketing standards for eggs

Commission Regulation 68/2003 concerning the use of information from certain sources and the time limits for the communication of results for the 2003 survey on the structure of agricultural holdings

Commission Regulation 162/2003 concerning the authorisation of an additive in feedingstuffs

Commission Regulation 188/2003 amending Regulation 2222/2000 on financial rules for the application of Council Regulation 1268/1999 on EU support for agriculture and rural development in the applicant countries in the pre-accession period

Commission Regulation 296/2003 amending Council Regulation 959/93 re. statistical information to be supplied by Member States on crop products

Commission Regulation 318 & 326 /2003 amending and correcting Regulation 1274/91 introducing detailed rules for implementing Regulation 1907/90 on certain marketing standards for eggs

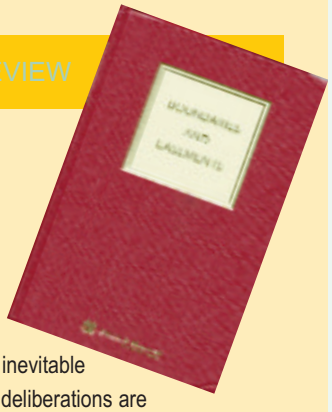
Commission Regulation 335/2003 amending Regulation 2316/1999 laying down detailed rules for the application of Council Regulation 1251/1999 establishing a support system for producers of certain arable crops

Decisions of the EEA Joint Committee 112-123 & 156-158/2002 amending Annex I (Veterinary and phytosanitary matters) to the EEA Agreement

Decisions of the EEA Joint Committee 134, 144, 146-149, 173-175/2002 amending Annex XX (Environment) to the EEA Agreement

See also the following Official Journals for information regarding cases before the ECJ and the Court of First Instance: C305 (7.12.02); C323 (21.12.02); C7 (11.1.03); C19 (25.1.03); C31 (8.2.03); and C44 (22.2.03)

Boundaries & Easements



Colin Sara – Published by Sweet & Maxwell, 716 pp. plus Index, price £155

At first sight, on the author's own admission, these two subjects may seem uneasy bedfellows. But how often, on deeper consideration, has a problem which presents initially as a boundary dispute turned out to be an argument over a right of way, or drainage?

This Third Edition of the book deals with matters, as its predecessors have done, by attempting to compartmentalise the law relating to each of the categories; a third section covers jurisdiction and procedure common to both.

That works well for the most part, although there are difficulties where the distinction between the two is grey and one occasionally finds oneself reading elements of the subject which one might have expected to find in the companion section.

For example, the chapter on highways deals very properly with the rules governing the boundary of land with a highway, but also discusses the nature of the right in a highway, which one might think of as more akin to an easement. The problem is not serious and can be overcome by judicious consultation of the Table of Contents and Index.

The writing is clear and precise and the background to the subject under discussion is explored in sufficient depth to allow the reader to understand not only what the position is, but why. This is only to be expected of a book of this size and purport which, from its weight and appearance, seeks to be found on bookshelves alongside the likes of *Gale on Easements* and *Emmett on Title*.

Part I, on boundaries, deals with the setting of the boundaries, both by reference to the original conveyance and extrinsic evidence. The latter chapter will assist any practitioner seeking to establish the line of a vague or undefined boundary.

The position as between registered and unregistered land is distinguished, although in relation to the former the book, for me, comes rather unstuck.

It is a pity that the publishers could not have held their water until the contents of the Land Registration Rules 2003 were known. The chapter was written after passage of the 2002 Act – and the author has made the best of a bad job – but in the limbo in which the book has been published the attitude is: "the position is thus, but it will change, although I'm not yet sure how". Cynically, this is, of course, good business, since one will have to buy not only this book but also the inevitable supplement once deliberations are complete and the Rules have been passed. Dare one suggest a free update?!

There is full discussion of adverse possession and the changes which the 2002 Act will bring about, since these do not depend on the Rules.

Likewise, party structures, boundaries with water features and the position regarding mines are also fully explored.

Part II deals with easements, defining the nature of the interest and comparing it with other similar rights such as licences, profits à prendre and wayleaves. There is also a commentary on the effect of the Countryside and Rights of Way Act 2000.

Other chapters deal with the several methods of creating easements and how they may terminate or be terminated. Particularly notable are specific analyses of peculiar easements – rights of way, light and support – which are known to cause especial problems in practice.

The third part, as intimated above, covers the remedies available to injured parties and the procedures whereby they may be exercised.

A fourth section gives some precedents for draftsmen dealing with these issues, and also precedents for proceedings.

As several of us have said many times, a legal volume is no better than its index. The Index in this case is generally quite thorough and one has found no evidence in a selective sampling of any problems of inadequacy or mis-reference.

However, cross-referencing could be improved. For example, one finds oneself reading, in the opening paragraph of the chapter on Water Boundaries, to which one may just have turned: "We have seen that this space may not involve any actual land at all." A footnote to a cross-reference to read further would be useful but is absent.

Likewise, one is informed that a topic is more fully discussed "below" but isn't informed where. It is too much, I think, to expect readers to browse the remaining 600 pages in the hope of finding the further discussion.

Another minor point of irritation – speaking as a proof-reader oneself – is at the quality of the proofing. Expressions such as: "… the two essentials factors …" and "… whether it amount … to a conveyance …" are silly mistakes and, to the pedant (i.e. me!), take the gilt off the gingerbread.

This is a textbook, with precedents, for the specialist. Whilst it undoubtedly contains a great deal of interest to the academic or casual reader, I cannot pretend that there is any justification for spending this amount of money unless one is likely to have recourse to the book reasonably frequently. However, for those who make draftmanship or property litigation their living, there is much to recommend it.

Geoff Whittaker

Forthcoming events...

Training Courses – Your Bonus of Fifteen

Planning, Clawbacks & Options

15th May 2003
Moncalm Hotel, London

12th June 2003
Holiday Inn, York

Subject to be confirmed
September 2003
Montcalm Hotel, London
Grange Hotel, York

Mid-Term Review

A Working Seminar
6th May 2003
Institution of Civil Engineers, London

Regional Meetings

11th April 2003
South West Region
Southgate Hotel, Exeter

8th May 2003
South West/Midlands Regions
Prestbury, Cheltenham

22nd May 2003
West Midlands Region
Shrewsbury

6th June 2003
Scotland Region
Edinburgh

Annual General Meeting

12th February 2004 (provisional)
Inner Temple, London

Members are invited to contact Alan Brakefield for information on all meetings