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Mediation – settling arguments the civilised way

Hugh Davey, Fleet Solicitors LLP, Taunton

Disputes can arise for the farming client in many different ways. All too often there is the intra-family disagreement; we have also the familiar boundary dispute; then there are rights of way, damage caused by escaping stock and mud on the road: all a breeding ground for problems – the list is endless for the poor farmer. These issues have one thing in common: the need to find a fast and cost effective route to resolution.

One answer can be mediation. So what is it, and what is it not? Mediation has been defined in a number of ways, but probably as good as any is to describe it as a voluntary, non-binding ‘without prejudice’ method of resolving disputes. What it is most certainly not is a dress rehearsal for trial. Consequently, it is not necessary (or even appropriate) to lay the entirety of the evidence before the mediation or to ‘cross examine’ the other party’s evidence.

Mediation is a word which is often bandied around, but has built up something of a mystique around itself. How does it work?

A trend that will continue

The starting point is that there must be an agreement between the various parties to the dispute to enter into the mediation process. Whilst mediation has been very actively supported and promulgated by the judiciary the courts have been shy to actually force parties to enter into mediation. However, where a party has refused to mediate and the case has then gone on to trial the reluctant party has, on occasion, ended up being heavily penalised in costs.

Most commentators agree that this trend towards mediation is likely to continue; although it is worth bearing in mind that it would seem to be entirely inappropriate for every case to be mediated and for it to become a necessary step for every dispute. This would result in a watering down of the strengths of mediation.

Once the parties have agreed to mediate they then contact one of the number of companies that provide a mediation service. There are a handful of organisations that have built up a substantial reputation in this field and have become clear market leaders, although it should be remembered that most mediators will take instructions direct and by following this route there are usually substantial savings.

The mediator sends out an agreement to mediate for the parties’ legal representatives to sign. This will covers, for example, the fees to be charged, confidentiality, termination rights and the right for the mediator to hold “private sessions” with one party at a time.

Normally it takes about six to eight weeks from the parties deciding to mediate to the mediation itself. It is usual for the parties prior to the mediation to prepare a small mediation bundle. This is categorically not a trial bundle, but is more similar to a ‘core’ bundle that is often prepared in large cases, especially those conducted in the commercial courts.

What this bundle includes (which is significantly different from litigation) is a position statement. This is a ‘without prejudice’ document and should include all offers that have been made to date and any new offer the party is prepared to make at the beginning of the mediation. It might also state on a ‘without prejudice’ basis lines of argument and, perhaps, claims that for the purposes of the mediation will not be pursued or defended.

It is rare for the choice of mediator to be a contentious process in itself. Normally, the parties’ legal representatives exchange a shortlist of suitable mediators and then one is chosen from this list.

Significant benefits

The benefits of mediation in agricultural disputes are significant. First, there is speed. By definition, a mediation which works will resolve the claim sooner than trial. Some mediations occur even before a claim has been issued at court. However, by and large, most occur after statements of case (pleadings) have been served, although a number take place at a relatively late point in the case.

That leads on to the second significant benefit which is, of course, savings on costs. Even if the process takes place close to trial, it has to be remembered that usually about a third of litigation costs are incurred in the immediate preparation for and then trial hearing itself.

The third factor is flexibility. This can be of considerable importance in finding a resolution which finds favour with both parties (which of course is necessary for there to be a successful outcome to the mediation). This freedom can be particularly useful in the sphere of agricultural litigation. There can, for instance, be bartering of assets between family members or property issues resulting in, say the grant of access/rights of way or property transfer between neighbouring properties owned by different parties. Or a strip of land could be exchanged for a right of way.

Such settlements are completely beyond those available to a court.

Finally, there is the huge incentive of control. As discussed above, a mediation will only have a successful outcome if it is signed up to by the parties. Consequently, the parties themselves agree to the outcome. It is not forced upon them by a judge. Often parties come away from mediation considering that they may perhaps have not achieved the very best outcome available to them in the litigation, but that they have made substantial savings in costs and time.

Further, what they have agreed to is a substantially better outcome than the worst case scenario. The parties will have been told that however strong their claim or defence of the litigation there are always risks in litigation. Are they prepared to take the gamble of having ‘a bad day in court’ and its repercussions? The success rate for mediation speaks for itself. Over 85% of cases that are mediated settle on the day or very shortly afterwards.

Potential downside

So what are the difficulties that can be faced when embarking on mediation? There are certainly instances from time to time when one party may go through the mediation process with
mala fides. This is often caused by the party not wanting to mediate at all but also not wanting to risk an adverse costs Order by refusing to mediate.

Even if this is the view before the mediation process starts it is surprising how often once the parties are actually involved in mediation then the process takes over and even the most unsettleable of cases finds some middle ground and a resolution.

The other main problem that occurs is due to a poor quality mediator. It is essential that the mediator ‘controls’ the mediation and has the respect of the parties. If that is not the case and there creeps in any suggestion that the mediator is in some way partisan, then the process will almost certainly flounder.

It is usual for the costs of the mediation to be borne equally between the parties, although that may change, in that where there is a costs Order it is normal for the mediation costs to be included in this figure.

Risks of not mediating

The perils of robustly ignoring mediation were shown in the case of Halsey v Milton Keynes NHS Trust. The Claimant proposed mediation on a number of occasions both before and after proceedings were issued. The Defendant refused to mediate believing that it had no case to answer. The Defendant then won at trial (which one might have thought would have vindicated its position).

The Trial Judge did not see it that way at all and held that all lawyers who conduct litigation should now consider alternative dispute resolution (which in most cases will mean mediation), and although the court could not compel mediation it could make an order encouraging parties to mediate.

The judge gave six factors which may be relevant to the question whether a party had unreasonably refused alternative dispute resolution. These factors were:

- the nature of the case;
- the merits of the case;
- the extent to which other settlement methods had been attempted;
- whether the costs of alternative dispute resolution would be disproportionately high;
- whether any delay in setting up and attending the alternative dispute resolution process would have been prejudicial; and
- whether alternative dispute resolution had a reasonable prospect of success.

Most agricultural litigators now consider that it is extremely risky to refuse in any circumstances to mediate where it is proposed by the other side.

In the case of Leicester Circuits Limited v Coates Brothers Plc Coates pulled out of the mediation two days beforehand after having agreed to mediate. Coates argued that mediation was just another form of negotiation. Moreover, they argued that in this instance such steps had merely come to nothing and that in any event there had been no real prospect of a successful resolution of the issues.

These arguments found little favour with the court of appeal, with Judge LJ commenting: “the whole point of having mediation, and once you have agreed to it, proceeding with it, is that the most difficult problems can sometimes, indeed often are resolved... having agreed to mediation it hardly lies in the mouths of those who agree to it to assert that there is no realistic prospects of success”. The court went on to penalise Coates in costs.

The courts’ fondness for mediation was further shown in the case of Mona Al-Khatib v Abdullah Masry. The court directed that letters should go out to the parties “inviting” them to mediate. This mediation failed, despite which one of the Court of Appeal judges themselves supervised the appointment of another mediator. This time round the parties reached settlement. It is interesting to speculate what costs penalties might have ensued had that mediation failed.

The client’s viewpoint

So it is clear that the judges like mediation, but what of the agricultural client?

The wide variety of agricultural disputes that exist are often complex because there are underlying issues beyond the legal ones lying on the surface. This complexity may not necessarily be reflected in great monetary value, but causes major disruption and distress in the lives of those involved.

This combination makes such claims ripe for resolution by mediation, to the satisfaction of clients.

Hugh Davey is an agricultural litigator and qualified mediator

1 [2004] EWCA Civ 1353
2 [2003] EWCA Civ 333
3 [2004] EWCA Civ 576

Cross compliance revisions proposed

The EC Commission has proposed revisions to the cross-compliance regime following its own review of the system and representations made to it by representative bodies across Europe.

Cross compliance requires farmers to comply with pre-existing environmental, animal welfare and sanitary and phytosanitary standards as a condition of receiving the single farm payment.

It has come in for criticism – not just in the UK – for the additional burdens of inspections to which it subjects farmers. Tales are widespread of heavy-handed and arrogant inspectors appearing unannounced at the farm office and demanding, effectively, that the farmer cease to work in order to accommodate their requirements.

The Commission has reacted by proposing a series of individually relatively minor revisions which, it hopes, taken together will improve the farmer’s lot and reduce the burden of red tape. Amongst its proposals:

- a de minimis rule would exempt any penalty below €50 and substitute a warning letter;
- a single control rate of 1% would be applied for on-the-spot checks;
- repeat checks in cases of non-compliance would need to address only the areas of weakness, not the gamut of obligations, as at present;
- 14 days’ notice of inspection would be allowed, except where it would prejudice control;
- authorities would be obliged to identify optimal times of year for inspection, subject to the same exception;
- an inspection would need to cover only 50% of the land instead of the whole;
- control reports would have to be issued to farmers within three months;
- an improved method of selecting farms for inspection would be implemented;
- clarification would be issued to authorities of the information to be given to farmers;
- simplification of the 10-month rule is also proposed.

Further detail will be published in due course: see ec.europa.eu/agriculture/simplification/crosscom/
Cross compliant drafting

Noted on the facing page are the EC Commission’s intentions to review the mechanics of the cross compliance regime. Most of us have experience of cases where the authorities have ‘come the heavy’ with a complete absence of any empathy with the farmer’s position.

The complaints were mirrored all over the Union and we shall have to see what difference the relaxations and clarifications will have in practice.

An aspect of the regime which causes some surprise is the number of Members who have reported that the whole question is ignored in agreements submitted to them by others. Land use agreements of all sorts are being prepared without any thought apparently being given to the cross compliance consequences.

Liability for cross compliance rests with the SPS claimant. It is his claim that will suffer in cases of breach, he who will lose money and possibly be excluded from the scheme.

It therefore makes sense that he should seek to protect himself if he enters into any arrangement with a third party for the use of his land, whether by tenancy, licence, contract- or share farming, agistment or whatever. And bear in mind also that liability for compliance covers the whole of the land under a claimant’s control for the whole year, not just that matched against entitlements, nor that comprised in a third party agreement, and without reference to the 10-month period. It is, in essence, indivisible.

Therefore, the contract should contain provisions which will make sure that the chickens come home to roost with the person who is in a position to ensure or control compliance.

That does not mean that the landowner should seek to foist everything on to the third party – there may be some things which remain within his purview – but he should make sure that he is properly indemnified, so far as possible, against any acts or omissions of the third party insofar as his SPS claims are concerned.

Land Registry feedback

With the help of your comments in response to this column in the last issue I was able to take up your concerns with the Land Registry in their Customer User Panel at the end of January.

By far the majority of my correspondents said that they had had positive experiences with their local office. Registry officers do adopt the practice of visiting professional offices and helping out wherever possible.

There are certain local difficulties, I was told, with the York office, due to internal internal ‘rationalisation’ which will see the office close. I was promised that Head Office knows the score and would take our comments on board.

The Registry is still highly committed to the completion of the register, although notably the target date of 2012 has evolved into a generic “as soon as possible”.

In spite of some evidence to the contrary, they assure me that they will involve professional advisers at an early stage whenever they can – that is their clear preference. The fact is, however, that in many cases they do not know who the landowner’s adviser is. Even if they do, the owner may have changed advisers or may choose not to instruct them.

There is another meeting of the Panel in July. It is well worth keeping these matters under review and my email box is open to anyone who wants to add their comments to those already received.

ALA: The Original Series

Last time, I mentioned the development of ALA: The Next Generation, a project aimed at our less experienced Members to enable them to develop working relationships with one another as well as catering for some of their CPD requirements.

The project has got off to a good start with a meeting in Norwich in March and others fixed for Newcastle in April and Market Harborough in June. Let this not create the impression that the more time-served amongst you are to be ignored. Not so, and far from it.

For many years, as many of you will know, we have run several regional meetings – The Original Series, if you want to continue the Star Trek metaphor – throughout the year, on top of our national meetings. A couple of hours in the late afternoon has been followed by a glass of something convivial and a chance to discuss. The reality, however, is that those meetings, with one or two notable exceptions, have not been well attended over the last two or three years.

I am far from alone in seeking to ensure that ALA does not become a London-centric organisation and that we continue to take it to Members in their own neck of the woods. If that is to work, however, I need to be able to arrange programmes which suit those Members on subjects which have an immediate impact in their geographical and technical area.

If anyone has an idea for a location, a subject or a particular group of practitioners who would benefit from a meeting of that type, they have only to let me know and I will do what I can to arrange it.

Amongst the membership, apart from those in training or the early stages of their career, are basically two categories of practitioner: those who deal with rural affairs full time, are specialist and are willing to share their knowledge – or at least argue the toss – with others; and those – by some distance the majority – who encounter rural business less frequently but recognise it for the oddball it can be and appreciate their need for specialist knowledge in order to deal with it.

We are fully committed to serving both elements. I will welcome any suggestions as to how we may do so to better effect.

Retirement

Being one of those rare people who can retire twice in their careers, Alan Brakefield has decided that he will retire from his duties with ALA at the end of May.

Alan has been a fixture with the Association for more than two decades and is held in respect and affection by all of us who have been privileged to work with him. A past Chairman, he has been in charge of ALA’s funds as Treasurer or Financial Director since 1996.

Many Members have reason to remember kindnesses delivered courtesy of Alan and his long-suffering wife Joyce, who has herself done much in ALA’s cause. If I may be permitted a personal note, I will be eternally grateful to them both for the support I have enjoyed in the five years since I took up this post.

May they both enjoy their richly deserved retirement.
The future’s bright,
the future’s green

Geoff Whittaker, West Mersea

As I write this, I am just back from two enthralling days at the Agra Outlook 2007 conference in London. The word ‘outlook’ is often put down as mere crystal-ball gazing, but when those who are doing the gazing include not only the EU Agriculture Commissioner and the UK Minister for Farming, but also representatives of principal WTO participants and leading commercial operators and academics in the field, it is foolish not to take notice.

To be honest, Commissioner Mariann Fischer Boel did not say much that she and her senior officers have not said often of late: the future of the CAP will be decided in two steps, namely a Health Check in 2008 and a full discussion, including a complete review of all budgetary issues, immediately afterwards in order to shape the Policy from 2013 onwards.

Her opinions on the need to make full decoupling universal, to abolish set aside and to bring an end to milk quotas are well known. However, this time she took the opportunity to expand her thoughts into other areas.

More modulation

If she has her way, the Single Payment Scheme will endure – “in some form or other” – for some time to come, but there will need to be a “rebalancing of funds” between Pillar 1 and Pillar 2 sooner rather than later.

The problems there, of course, lie in the budget compromise agreed at the end of the UK Presidency in 2005. Its attempts to reduce overall CAP spending backfired when the cuts were directed principally towards the Pillar 2 budget for rural development, which the Commissioner described as an own goal on the part of the Council.

The proposal to permit voluntary additional modulation of up to 20% to compensate was rejected by the European Parliament, which until recently has frozen that much of the budget. Resolution of the voluntary modulation problem was achieved in mid-March, but only by limiting its availability to the UK and Portugal, the only two Member States to have expressed any interest in it.

The UK did win what it regards as significant concessions, however. Different rates may be applied in the component parts of the UK – Wales, Scotland, Northern Ireland and England – subject to an overall maximum modulation of 20%, and the voluntary element will not be subject to the ‘franchise’ for the first €5,000 which applies to the present compulsory modulation. Much of the detail is still lacking, but a summary of what is known at the time of writing is on the Page 20.

We are assured that DEFRA is working all hours to finalise the England Rural Development Programme for 2007-13 now that it knows how much it will have to spend. Doubtless the same can be said of the National Assembly for Wales and the Scottish Executive.

Pillar 1 v Pillar 2: a balance to strike

Although the Commissioner welcomed the settlement, she repeated her view that voluntary modulation at the behest of individual Member States is destructive of the cohesiveness of the CAP and that she would prefer to see an increase in compulsory modulation across the EU instead.

The fundamental issue between the two Pillars, she said, is that the public’s support for the concept of rural development as opposed to direct payments and market support is not matched by the financial support necessary to achieve it.

WTO: a compromise?

Of course, any reforms of CAP are driven – though you will find it difficult to get any Commission official to admit it – by wider global issues still up in the air in the WTO Doha Round. The talks stalled spectacularly last summer, but are being revived against a deadline of the end of June, when the US Congress’s mandate to its negotiating team expires.

What may happen within the EU depends on what sort of compromise, if any, can be reached in that forum, which in turn depends upon the extent to which the new weight being thrown about by the developing nations – the South American countries in particular – affects the final outcome.

A bright green future

A sector that does appear to have a bright future at present, almost regardless of that outcome, is biofuels. We had two very enlightening talks by Tim Shuldham (Coppice Resources, Doncaster) and Richard Collins (John Amos & Co., Leominster) at our Rural Diversification & Development conference in March, and their optimism was borne out at Agra Outlook by several commentators.

The EU agreed, in January, mandatory targets of a 20% reduction in greenhouse gas emissions by 2020 and a 10% biofuel component in road fuel by the same date.

Although, when I asked the Commissioner what sanctions would be exercised against Member States who failed to meet those targets, she was unable to say more than that “the usual infringement proceedings” would be available, mandatory targets have to be better than the current voluntary targets under the Biofuels Directive. Thirteen years is, however, a long time, and it is unlikely that many of the present Agriculture Ministers will be around in 2020 to celebrate compliance or answer for failure.

Fuel v Food, Feed & Fibre

Industry commentators have been concerned that increases in oilseeds for biodiesel and grains or sugar beet for bioethanol might lead to pressure on space for food crops.

With the oncoming ‘second generation’ biofuel plants, which can convert not only grains and beet but also cellulose and waste materials, this becomes less of a problem. Technology to convert biomass to liquid (BTL fuel) will help further. Both of those are expected to be commercial realities within about five years.

The Commission’s analysis has concluded that there is enough land to meet our needs in respect of the new targets. Biofuels, it says:

• increase both food and energy security;
• comply with sustainable feedstock requirements; and
• create new jobs and raise standards of living in depressed areas.

Economic analysts at Agra Outlook were reasonably convincing in their support for those conclusions and their predictions that the one market can be satisfied without damage to the other.

Whilst they were pessimistic of the chances of compliance with the existing target of 5.75% biofuel use by 2010 (measured by energy output), they were less so about the possibilities of compliance with the newly-agreed 2020 targets.
FOOTPATHS

Choose your weapons carefully

Alexander Hall, Countryside Service, Worcestershire County Council

On 15th February this year, Worcestershire County Council successfully defended an appeal against a Notice it served under S.154(1) Highways Act 1980 in Curtis v Worcestershire County Council at Cirencester Magistrates Court.

Such an appeal is very rare, even unique, and the outcome provided an insight into the choice of forum for such disputes and a salutary lesson about the potential financial impact making the wrong choice.

Background

In June 2005 the Council served on Mrs. Curtis, of Bushley, Worcestershire a Notice under S.154 Highways Act 1980 requiring the removal of overhanging vegetation that was obstructing a public footpath that crosses her land.

The footpath passes through the complainant’s garden along the bank of the River Severn. A Leylandii hedge and shrub had grown across the footpath making the path difficult to use.

Mrs. Curtis appealed the Notice by complaint to the Magistrates Court on, inter alia, the following two grounds:

1. The footpath no longer existed as the land, over which the footpath passed had been eroded away by the river.
2. An allegation that the Definitive Map had been altered by the Council without proper modification orders.

Ruth Stockley of Kings Chambers, Manchester, ably represented the County Council. Deputy District Judge Hine found for the Council and dealt with the stated two grounds as follows:

1. Had the path eroded away? The footpath is shown on the Definitive Map, which according to S.56 Wildlife and Countryside Act 1981 is conclusive evidence of a highway with public rights existing at the relevant date of the Map.

Consequently, the Judge had no jurisdiction to go beyond that section and ruled the public footpath exists. The complainant should have pursued this issue in the correct forum rather than by appealing the notice. Highways Act 1980, S.53, provides the correct procedure for challenging the existence of the footpath on the Definitive Map. Evidence should have been presented to the Highway Authority for their consideration in order to make a modification order if appropriate.

2. Had there been ‘unlawful’ alterations to the Definitive Map? Many of the perceived discrepancies adduced in evidence by the complainant related to sections of footpath nearby but not at the material location. Consequently, the Judge disregarded many of those submissions.

However, once again, he ruled that the appeal against the Notice was not the correct forum for raising this issue. If the Highway Authority had made changes without following the correct procedure, which was denied, then it would have acted ultra vires. In such a case, the appropriate way to challenge its actions would be by Judicial Review.

Appealing a Notice

Section 154(3) is silent regarding the merits or grounds of any appeal, but simply states that a recipient is entitled to appeal if they feel aggrieved by the requirements of the Notice. Many of the obvious grounds – for example, disputes about the existence of the path or its existence or location as shown on the Definitive Map – were ruled to be inappropriate grounds for appeal in this case. Other procedures are in place to deal with those.

So, on what sort of grounds might such an appeal be based? We are left with issues including the form and clarity of the Notice itself, whether it has been served on the correct person, and whether it accurately and sufficiently identifies the offending tree or bush.

During the course of the hearing the complainant sought to demonstrate contradictions between the Definitive Map and the Statement. It was suggested that the Statement was ambiguous and demonstrated that the path exists but in a different location.

The Judge felt bound to follow the authority of R(Norfolk County Council) v Secretary of State for the Environment, Food and Rural Affairs, which propounded the proposition that where such conflict exists, the Definitive Map takes precedence. Consequently, the Judge accepted the path as shown on the Definitive Map.

Choose your weapon ...

The Judge identified early in the proceedings the fact that the grounds for appeal were inappropriate. At that stage it was open to the complainant to withdraw the appeal. She decided to continue, which had an impact on the eventual costs she was ordered to pay.

Further, the complainant spent a considerable amount of time corresponding with the Highway Authority, persistently requesting extraneous information by letter and under the Environmental Information Regulations. A great deal of officer time was spent answering queries regarding matters that were ultimately irrelevant and fell outside of this appeal process. Partly due to this behaviour, the Highway Authority’s costs rose and the complainant was ordered to pay its costs of £52,000.

... or pay the price

Central to this hefty costs award was the fact that, despite obtaining legal advice and representation, the complainant continued to pursue her arguments regarding the existence of the path through the appeal process instead of in the correct forum.

The moral of this story does not need to be spelled out. It is essential to bring your action in the proper forum.

1 [2005] 4 All ER 994

“A great deal of officer time was spent answering queries regarding matters that were ultimately irrelevant and fell outside of this appeal process”
RURAL CONVEYANCING

Environmental due diligence for agricultural land and property

Chris Taylor, Argyll Environmental Ltd, Brighton

Approximately 70% of the UK is currently in agricultural use (DEFRA 2005) but there is no register of agricultural land which might be polluted. With farming and other rural practices becoming increasingly intensive, it is worth recalling that soils, crops and livestock are all regarded as receptors under Part 2A of the Environmental Protection Act 1990 (Part 2A), with an increased potential for compulsory clean-up of contaminated land.

Where contamination affects such receptors, there is risk that the Environment Agency may require the owner of the polluted land to clean it up. Further, every farmer knows of the increasing demands of other environmental legislation, most recently relating to oil storage and the management of waste and asbestos.

It has been estimated by the Environment Agency that there are approximately 300,000 hectares, or 325,000 potentially contaminated sites in the UK, of which between 10% and 40% may lie in rural areas. One cannot assume, therefore, that green fields carry no environmental risk.

Furthermore, while the agricultural industry accounts for around 1% of Gross Domestic Product (GDP), approximately 10% of all significant pollution incidents involve agriculture in one form or another. It is therefore important for purchasers of rural property assets to take environmental risk and management seriously and to undertake proper assessment of such risks during a due diligence process.

Types of risk

There is a wide range of both operational and historic environmental risk associated with agriculture. During the Industrial Revolution there was a growing demand for raw materials. Often these raw materials came from the outlying rural areas, and, in particular, the extraction of minerals (clay, and chalk, etc.) led to a network of pits across rural areas, many of which were later infilled and used as farm tips or landfill sites.

Before the Control of Pollution Act 1974 (COPA) there was no requirement for the regulation of such sites and even after this time waste management practices on farms were poor, with such tips often used to dispose of asbestos, pesticides, herbicides and other agricultural chemicals.

Other historic risks include gas works and electricity generating stations which one normally associates with large towns and cities. Some large estates operated small gas works during the early 1900’s, until the introduction of the national grid allowed a cheap accessible source of power and oil fired heating became more widespread. Other estates had small electricity generating stations which used oil or sometimes water to generate power.

In terms of operational risks, it is important to distinguish between point and diffuse sources of contamination.

Diffuse sources such as crop spraying and the application of fertiliser can lead to the general degradation of the quality of soils and impacts upon groundwater. However, such contamination is difficult to detect without soil sampling or average yield analysis (a technique which compares the crop yield of an area where contamination is suspected with the yield of a similar area without contamination).

Point sources are more easily detected using standard due diligence techniques. These may include chemical stores, silage/slurry stores, fertiliser stores, fuel stores, sheep dips and waste disposal facilities. Land or buildings associated with such operations can usually be detected via interrogation of historic maps, environmental databases or if necessary, with the aid of a site inspection.

Sensitivity of agricultural areas

Agricultural areas can be very sensitive to contamination and it is vital that owners and operators have a clear grasp of potential contaminants associated with current and historic working practices.

Due to their rural location, agricultural sites are often situated close to or within statutorily designated sites such as Local Nature Reserves (LNRs) and Special Protected Areas (SPAs). These together with six other eco-receptors are now designated receptors under Part 2A.

Agricultural sites may also be particularly sensitive to pollution because they are commonly located above important ground water resources (known as aquifers) and because surface water features (lakes, rivers, etc.) may lie within or near by them. Both surface and groundwater resources are vital for farming and other rural practices (irrigation, fishing) as well as to rural communities.

Groundwater provides a third of our drinking water in England and Wales and over 80% in the South East (Environment Agency). Many Source Protection Zones (SPZs) – of which there are over 2,000 – are located in rural areas and these are further being reinforced via Nitrate Vulnerable Zones (NVZs), designed to reduce the nitrate levels in drinking water caused by agricultural practices.

In addition, many agricultural sites can be considered as sensitive as they may contain crops, livestock and residential dwellings all of which are sensitive to contamination.

Past practice

Hitherto, environmental due diligence of agricultural sites has been limited due to time and cost constraints, and by the mistaken perception that agricultural areas are unlikely to be polluted. Assessments have tended to use desktop procedures developed for residential or urban commercial property, despite the fact that the risk profile of large farms and estates is quite different.

Indeed, a recent review of the market indicated that there were no bespoke desktop reporting options available to deal with the risk associated with agricultural sites. Given the Law Society Warning Card issued in 2001 this was a dangerous situation both from a contaminated land perspective and because of the numerous other important operational compliance issues.

A new solution

What was needed was a desktop solution tailored with the agricultural and rural practitioner and his client in mind. It is for that reason that my company has been working with many leading law firms as a preferred specialist environmental desktop report provider, with particular focus on the examination of the risks associated with the acquisition and disposal of agricultural land. Such
sites may include farmland, estates, woodland and associated buildings and infrastructure. Working in this environment has led us to the conclusion that agricultural land holdings commonly fall into three broad categories:

- small areas of land, sometimes associated with a single dwelling. These smaller land parcels are normally up to 40 acres (c. 15 hectares);
- amenity farms / small working farms or estates of up to 300 acres (c. 120 hectares); and
- very large working farms/estates often with a variety of land uses such as arable, livestock farming, shooting and the provision of light industrial units (sawmills, stone masons etc.).

These might be as large as 10,000 acres (c. 4,000 hectares).

With this in mind and some assistance from London solicitors Macfarlanes, we have concluded that a modular approach to the investigation is the most flexible. The need for a reasonable cost and fast turnaround is a given, but any reporting system must have the ability to include high-detail map review, for instance, of regulatory consultation and site inspections when occasion demands, albeit at extra cost.

A small site, for example, can be investigated from the desktop for around £139 (plus VAT). Higher-risk areas, such as the farmyard, can be reviewed in more detail for, say, £60 for a 4-hectare parcel. Further consultations and site inspections can be arranged on a bespoke basis if the desktop report prompts more questions.

It goes without saying that any report, to be worth its salt, must use a comprehensive range of environmental datasets. It must also cover the ground outside the boundaries of the searched area, typically to a radius of 250m. Information presented on that basis would both satisfy the Law Society Contaminated Land Warning Card and answer many of the questions typically asked of the Environment Agency (albeit to a reduced radius). The datasets used should also provide valuable additional information on natural and mining related hazards, such as risk from flooding and subsidence.

Protecting the client
Should any search and investigation reveal cause for concern, the question arises of how to deal with it. A flexible range of environmental and legal indemnity insurance solutions are available to insure the risk, the leading legal indemnity intermediary being Countrywide Legal Indemnities Ltd., which is authorised and regulated by the Financial Services Authority and specifically endorsed by the Law Society and with whom my company is pleased to have negotiated a partnership.

Summary
Agricultural sites have unique environmental risks and are governed by a complex array of environmental and health and safety legislation.

When considered in combination with site size and their sometimes remote location, comprehensive due diligence can be difficult and costly. Using a modular system specially tailored to the rural environment helps identify potential soil and groundwater liabilities cost-effectively and can act as the starting point for more detailed environmental due diligence or risk transfer options.

Chris Taylor is Technical Director of Argyll Environmental Limited – 0845 458 5250 – and has created a modular bespoke desktop reporting package, SITESOLUTIONS, for use as a first-step facility in environmental due diligence and risk transfer options. Grateful thanks are due to Tristan Ward of Macfarlanes for his guidance in preparing this article.

1 DEFRA (CLAN 4/04) – Contamination of Agricultural Land and Part IIA of the Environmental Protection Act

2 The Waste Management (England and Wales) Regulations 2006 otherwise known as the Agricultural Waste Regulations, the Control of Asbestos Regulations 2006 and various legislation and codes of practice relating to chemical storage including the Control of Pollution (Control of Silage, Slurry and Fuel Oil) Regulations 1991 and the Code of Practice for the Safe Use of Pesticides on Farms and Holdings – the Green Code

3 Environment Agency (Science Report SC030039/SR) – Indicators for Land Contamination

4 See PLC Environment Practice note on Environmental searches and Desktop Reports http://environment.practicallaw.com/ 7-216-0451

Rural conveyancing
Rural conveyancing
Rural conveyancing
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Conveyancing Searches and Enquiries

Russell Hewitson – Published by Jordans, 412pp. plus index and tables, price £49.00 + p&p

All conveyancers know about searches and enquiries, don’t they? Take a look at this book, and maybe you won’t be so sure.

Some properties need more than just the local, commons, Land Registry and bankruptcy searches and standard Protocol enquiries, although even in the most basic cases Russell Hewitson offers a guide, with a complete analysis of the relevant forms, the issues the questions cover, and the appropriate circumstances in which to ask them.

It is when we come to the more esoteric that the book really comes into its own. Part IV – the first three parts deal with general principles and “the usual” searches – contains chapters on no fewer than 17 different categories of less common searches of general application. With some, most practitioners will be familiar, but let’s not overlook railways, chancel repairs, registered Enduring Powers of Attorney, rent (yes, they do still exist), the register of SSSIs and, of course, agricultural credits.

Mining and industrial searches of various shapes and sizes are described together with an indication of the geographical areas in which they will be relevant. Coal is encountered reasonably regularly; tin, clay and limestone less so, and brine workings only by those used to buying in certain parts of Cheshire. Nevertheless all are thoroughly covered.

What is most impressive is that, while the book will act as an aide memoire or Noddy’s Guide to those who want it, it goes into greater examination of history and mechanics for those with more time, inclination or need to read up.

In every case, there is a comprehensive indication of when the particular search will be needed and of how to go about getting it, with names, addresses and website details to hand.

This is the third edition of a book first pioneered by Frances Silverman, who needs no introduction to anyone who has ever laid hands on a conveyance or transfer. Russell Hewitson carries the torch clearly and concisely for the next generation. It would make an ideal prize for a newly-qualified property lawyer, and at £49 it is excellent value.
According to Albert Einstein “the hardest thing in the world to understand is the income tax.” Fortunately for him, Stamp Duty Land Tax was not invented until nearly 50 years after his death, otherwise he would surely have referred to SDLT instead.

One strong candidate for its nadir of obscurity is Part 3 of Sch.15 Finance Act 2003, which deals with partnership transactions “to which special provisions apply”. “Special” in this context is a synonym for “Byzantine”.

Finance Act 2006
For many partnership businesses, the Finance Act 2006 contained good news, as trailed in The Bulletin in the Spring of last year (Issue 44). Since 19th July 2006, a transfer of a partnership share is now only treated as a chargeable transaction involving a partnership’s real property if the partnership is a property-investment partnership; known in SDLT-speak as a PIP.

A PIP’s “...sole or main activity is investing or dealing in chargeable interests (whether or not that activity involves the carrying out of construction operations on the land in question)”. Many farming and other agri-business partnerships will therefore no longer be caught by the Para.14 charge deeming transfers of partnership shares to be land transactions in respect of the partnership’s estates or interests in land.

A transfer of a partnership share will usually be effected by variation of the partnership agreement or by making a new partnership agreement in substitution for the old one. If, as a result, new trustees of partnership property need to be appointed, HMRC accepts that the appointment is a transaction for no consideration, for which an SDLT60 self-certificate can be filed at the Land Registry.

Incorporating the partnership business
The other good news on partnerships in very informal. Many businesses start as partnerships, but grow to the point where partnership is no longer the appropriate ownership or management structure, at which juncture they are incorporated. The consequent transfer of the partnership property from the partners to the company appears to be taxable under two different provisions with two very different results. One is S.53 FA2003, headed “deemed market value where transaction involves connected company”; and the other is Para.18 of Sch.15, the so-called partnership “exit charge”.

Section 53 FA2003 applies where the purchaser is a company and either the vendor is connected with it or the consideration includes the issue or transfer of shares in a company connected with the vendor. If S.53 applies, the consideration is treated as being not less than the market value of the property, regardless of whatever is said in the actual transaction documents.

Suppose, for example, that Oliver, Ed and Mike are equal partners in a business selling dairy products direct to the public. It is so successful that they decide to incorporate it to a company, Grange Farm Dairies Ltd, in which each owns one third of the shares. The company purchaser is controlled by all three individual partners, so they are “connected” with it, under the combined effect of S.839 and S.416 Income and Corporation Taxes Act 1988.

Were S.53 to apply, the company would have an SDLT liability on the land transfer based on the market value of the land in question; unless unusually the price paid by the company exceeded market value, in which event the higher figure would apply.

Happily, HMRC has confirmed in informal correspondence, although not yet in any generally published guidance, that S.53 FA2003 does not apply in this circumstance. Sch.15 para.18 applies instead.

Para.18 is designed to tax the extent to which economic value in land has shifted outside the combined net of the owning partners plus those “connected” with them. The para.18 charge applies therefore to a percentage of market value. That percentage is our old friend, the formula “MV = (100 – SLP)”. SLP is the “sum of the lower proportions”. Shortage of space prevents an explanation of the five steps taken by para.20 to establish SLP; but the result in the above example is an SLP of 100. This is because under S.839(7) ICTA 1988, a number of persons acting together to control a company are connected with each other in relation to the company and with the company.

If the SLP is 100, then 100 – 100 = zero. Thus zero percent of the market value is brought into charge. In this context, an SDLT1 must be used, even though there’s no consideration, because Sch.15 para.25 provides that “no consideration” exemption does not apply to Sch.15 transactions. Since the transaction is not exempt under Sch.3, merely one for which no SDLT is due, a formal SDLT1 return is required.

Pre-Budget Report changes – December 2006
However as a result of the legislative changes brought in on 6th December 2006, this treatment now only works in respect of partners who are individuals rather than companies. In the example, if one were to replace Ed with Ed’s Dairy Consultants Ltd, there would now be a charge to SDLT. In order to calculate SLP one must identify persons who are “corresponding partners”.

As from 2.00 p.m. on 6th December 2006, companies can no longer be corresponding partners unless they are also a “relevant owner”, which in this case is Grange Farm Dairy Ltd. They can no longer be corresponding partners merely by being connected with a relevant owner. In this case, the result is that the SLP is reduced to 66.66%. Thus, the deemed consideration would be 33.34% of the market value.

Changes to the Entry Charge
The same new rule applies to the “entry” charge under Sch.15 para.10. If Jill were to transfer land to a honey-producing partnership of Jill, her son David and her daughter-in-law Ruth (David’s wife); all of Jill, David and Ruth would be corresponding partners and the SLP would be 100, giving rise once again to a deemed consideration of nil.

But if we were to replace Ruth with Bowman Honey Ltd, a company wholly controlled by Jill and David, then although the pre-6th December rules would have produced the same nil result, the new rules will produce a deemed chargeable
consideration equal to Bowman Honey’s income-sharing proportion in the partnership.

These new rules are adjusted where the "relevant owner" under the entry or exit charge is itself a company and another company is the same group would have been a corresponding partner under the pre-6th December rules. In effect, the tax due on proportion of market value that has become chargeable as a result of the new rules is treated as eligible for group relief, but subject to clawback if the transferee company de-groups in at a time and in a way that results in withdrawal of the relief.

What is partnership property?

Advice given in Paragraph SDLTM 35100 of the draft SDLT Manual Chapter on partnerships has proved particularly problematic. It says: ‘… property held by one of the partners and used for the purposes of the partnership business is partnership property (see FA03/SCH15/PARA34(1) ….’

HMRC has, until very recently, taken the view that if, for example, Oliver owns the freehold of Grange Farm and permits the partnership (in which the partners are himself, Ed and Mike) to use it for the purposes of the partnership’s dairy business, this somehow operates for SDLT purposes as an implied transfer of Oliver’s freehold to the partnership.

However, HMRC now accepts that this goes further than para.34(1) of Sch.15 allows, so long as the identity of the owners does not precisely match the identity of the partners. Apparently revised guidance will be issued. This is good news for practitioners and those involved in partnership businesses, particularly those involving Harrison-Broadley v Smith-type arrangements.

Welcome as this revised view of para.34(1)’s meaning is, it leaves open the question of what happens when the identity of the owners does not precisely match the identity of the partners. Apparently revised guidance will be issued. This is good news for practitioners and those involved in partnership businesses, particularly those involving Harrison-Broadley v Smith-type arrangements.

In September 2007, Josh gives his share in the property (not the partnership) to his son David. David is content to allow the partnership to go on using the land. There either is or is not a transfer to new trustees to reflect this, but this ought not to make the slightest difference in SDLT terms. The first lambing season is enough to convince Pip that sheep farming is not for her. She retires from the partnership in April 2008. But both she and David, as well as Ben, are content to allow Josh and Ben to go on using the land in partnership for the sheep farming business.

Setting up the partnership

HMRC appears to consider that, because Pip, Josh and Ben are both the owners and the partners using the land, there is a notional land transaction in April 2007, consisting of the deemed transfer of the freehold to the partners. In the example, no SDLT is due because, under the para.10 entry charge, the SLP will be 100 and the deemed market value will be nil. However, an SDLT1 is required because of para.25.

How many lay people can be expected to realise that an important tax event has notionally occurred for which a return must be filed, even though no tax is payable? Failure to file such a return promptly will give rise to penalties.

In para.34(1) cases involving precise coincidence, one suspects there will never be an actual para.10 liability, because the SLP will always equal 100. However, as we shall shortly see, a zero SDLT charge on the formation of the partnership is far from the end of the story.

The Gift to David

Is the gift to David in September 2007:
(A) an ordinary gift by Josh of his equity in the freehold; or
(B) a para.18 disposal by the partnership of Josh’s share in the land; or
(C) a para.18 disposal of the entire freehold by the partnership to Pip, David and Ben (because the coincidence between the identity of the owners and that of the partner users has ceased)?

If HMRC’s view that the June 2007 events give rise to a deemed transfer of the freehold is correct, then logically it ought to follow that the September 2007 events have the reverse effect and analysis (C) will be correct.

However, this has a very expensive consequence. Pip, David and Ben now have a deemed para.18 exit charge on which, because of para.21, their SLP is nil.

Para.21’s objective is generally thought to have been the prevention of tax avoidance involving partnership schemes during the transition between Stamp Duty and SDLT. It says that the SLP for any para.18 exit transaction where no Stamp Duty or SDLT was paid on the transfer in to the partnership is always nil, regardless of what Sch.15 says elsewhere.

In effect, Para. 21 appears to provide that, if the partners did not pay tax when they acquired the land, they must pay SDLT when it ceases to be partnership land. This is particularly hard on those who “innocently” acquire land by a transaction on which no SDLT is payable, e.g. by inheritance or other gift.

Accordingly Pip, David and Ben have an SDLT liability based on the entire market value of the whole of the land, even though only a third of it has been actually been given away. Again it seems that HMRC expects lay persons to have an unrealistically profound knowledge of Sch.15.

Even if Josh and David get a conveyancer to advise on the gift, it may not come to light that the land is used by a partnership. Josh, ignorant of its significance, may never mention the fact. The conveyancer may have no cause to ask. Clearly an SDLT1 return ought to be filed and the SDLT paid within 30 days of the effective date of the deemed para.18 exit transaction. It seems that, in this example, that is the date of the gift.

Josh’s divorce

Alternatively, what happens if we replace the gift by Josh with a transfer to Josh’s ex-wife as part of a divorce settlement?

Were Sch.15 not in point, divorce transaction exemption under Sch.3 para.3 would apply. If the deemed transaction for SDLT purposes is not one between “one party to a marriage and the other”, but rather one between partners in a commercial a partnership and a divorcing spouse of one of them, one presumes that para.3 divorce exemption cannot apply. HMRC has not yet given its view on this issue.

If this analysis is correct there is again a deemed exit transaction in respect of which the acquiring parties are Pip, Josh’s ex-wife and Ben. But once again para.21 intervenes to deprive all corresponding partners involved of their “lower proportions”. Once again there is an SDLT charge on the entire market value.

Those advising Josh’s wife will probably be very surprised to hear that the Court-ordered equity transfer is not exempt under Sch.3 para.3. Instead, their client is jointly and severally liable for SDLT on 100% of the market value of the property in which she has been awarded a one third share! Pip and Ben would be equally astonished when they learn that their brother’s matrimonial difficulties have lumbered them both with joint and several liability for SDLT on 100% of the market value of the land.

Retirement from the partnership

Suppose neither the gift nor the divorce happen, but Pip’s retirement in 2008 does. Presumably
the analysis at (C) above applies. Again the operation of para.21 gives rise to an SDLT liability on the entire market value.

The same would seem to apply if the first lambing season puts all three of them all off and the partnership is dissolved in April 2008 and its ability to use the land comes to an end. To incur a full SDLT liability on the entire market value of the land seems a disproportionate and unfair way of rubbing salt into the wounds caused by the failure of their sheep farming enterprise.

There are many permutations of circumstance in which this problem may arise unexpectedly. Suppose Pip had been cautious in 2007, and merely accepted a job as a paid employee of Josh and Ben’s partnership. Fired with enthusiasm after her first lambing season, she throws caution to the winds and accepts their offer of partnership. The baleful coincidence of both owners and partner users arises as soon as she does so.

What to do about para.21?

Para.21 means one has to take care to avoid allowing para.34 (1) to apply unless all the consequences have been carefully considered. But what else could the three siblings have done in June 2007, had they been aware of the risks posed by paras.21 and 34(1)?

1. They could not have granted the partnership a lease, because a lease by property owners to themselves as partners is a legal nullity (Rye v Rye[1]).
2. They could have formed a company to undertake the business and leased the property to it, but this might have had many other unpalatable consequences.
3. If Josh had given his equity to David before the partnership started using the land rather than after, the disparity of identity between the owners and the partners would have prevented the problem arising.
4. They might have set matters up so that there was a disparity of identity between the owners and the partners, for example by making one of the partners a salaried employee rather than a partner.
5. They might have granted a lease of the land to a suitable stooge (for example an off-the-shelf company) and then persuaded the stooge to lease the land back to the partnership.

Compelling UK businesses with no avoidance motive whatsoever to resort to such unnecessary machinations, merely to avoid falling foul of anti-avoidance legislation that was not intended to catch the transaction is question is a counter-productive waste of time and money.

Of course, all of strategies 2 to 5 above may now fall foul of S.75A FA2003, the new general anti-avoidance rule introduced at 2.00 p.m. on 6th December 2006, several hours before most tax-payers and their advisers could actually read it. But that, as they say, is another story.

Einstein also said “Things should be made as simple as possible, but not any simpler.” Let us hope the Treasury can eventually be persuaded to amend Sch.15 and S.75A so as to accord with his admirable view.

1. [1964] 1 All ER 867
2. [1962] 1 All ER 146

Lack of official communication

Whilst the fiasco of the implementation of SPS in England continues to hamper its smooth running after all this time and the authorities lead us to believe that it will be 2008 at least before it is completely sorted, two reports published last month throw some light on what went wrong and what might be done to improve matters in the future.

Much of the content is unsurprising. I am sure, to Members of ALA, as close as we all have been to the disaster that has befallen our clients and, in many cases, our friends.

The investigation by the House of Commons Environment Food and Rural Affairs committee began as soon as it became apparent that targets for payment of 2005 monies would not be met. Its principal conclusion was that the Rural Payments Agency “was required to do too much in too little time”.

That rather obvious statement is bolstered by a thorough analysis of some 306 pages of evidence dealing with the matter from the very beginning: the choice of a “complex and high risk” dynamic hybrid scheme; the failure to learn the lessons of previous failures in relation to new IT projects; the inappropriate ‘task-based’ approach which “hindered the Agency’s own understanding of the degree of progress it was making in dealing with claims”.

It criticises heavily the lack of accountability in public office of some of those responsible for the failure. Johnston McNeill, RPA Chief Executive at the time, has, after a prolonged period of ‘gardening leave’, finally gone, but former Secretary of State Margaret Beckett, Permanent Secretary Sir Brian Bender and DG of Sustainable Farming Andy Lebrecht have been singled out as having “moved on unscathed or stayed in post”.

“A culture where ministers and senior officials can preside over failure of this magnitude and not be held personally accountable creates a serious risk of further failures in public service delivery.” Not only that: it is dishonourable and plain wrong!

The second report, by David Hunter, focuses less on what went wrong as on what should happen with RPA in the future. Mr. Hunter was one of the senior officials within DEFRA during the implementation process and convened the stakeholder group which included RPA and which was the main interface between the authorities and the industry.

His principal conclusion is that, for the time being at least, the RPA boat has been rocked sufficiently not to risk any further structural changes which might distract from the principal objective of stabilising SPS by 2008, which includes the rebuilding of the badly damaged relationship between the Agency and its customers, the farmers.

Mr. Hunter is especially critical of the lack of empathy on the one hand, between DEFRA and RPA and, on the other, between RPA and the farming community. It is clear to him that those who made the policy had insufficient idea of how it would be delivered, and those who were delivering it knew not enough about its goals.

The welcome recommendation that more effort should be put into advising farmers on how to comply rather than beating them up for not doing so is one that we and many others urged him to make.

Above all, it is clear that the Agency was too much an island and needs to communicate more, both with its masters in DEFRA and its customers on the ground. As the old BT adverts had it, it’s good to talk!

For those who wish to read further, I have posted copies of both reports to the Members’ Section of the ALA website.
Landowners across Scotland are faced today by the threat of compulsory acquisition of land on a scale that has not been seen for 100 years. Since the construction of Scotland’s railways most landowners have only faced occasional piecemeal compulsory acquisition in connection with road schemes and local authority development.

However, over the last few years major infrastructure projects have been promoted by Scottish Transport, Local Authorities and Network Rail. This means that large scale compulsory acquisition of land is again a reality for many landowners.

Although the recent railway schemes – which include the Stirling–Alloa–Kincardine railway, the Airdrie to Bathgate railway, the Borders or Waverley railway, the Edinburgh Air Rail Link and the Glasgow Rail Link – may be more relevant to landowners in Scotland’s central belt, road schemes such as the Aberdeen peripheral route mean that compulsory purchase may affect those in many parts of Scotland.

If a landowner faces the threat of compulsory purchase, what should he or she do? The options may depend upon the procedure being used for the compulsory acquisition. Recently the major Scottish railway projects have proceeded by use of the Private Bill procedure in the Scottish Parliament.

**Early objections**

Perhaps the most important point for landowners to note in the context of compulsory acquisition under a Private Bill is that the opportunity to object to the compulsory acquisition of land arises at a very early stage in the proceedings. That may seem very obvious but many people do not appreciate that by the time a Private Bill becomes law, there is no further opportunity to object to the actual acquisition of land or rights in or over it (although it is, of course, still possible to claim compensation).

This means that if a landowner receives a notice of the introduction to the Scottish Parliament of a Private Bill relating to a major infrastructure project and that landowner has a reason for wishing to try to stop the compulsory acquisition entirely or, perhaps, wants to suggest an alternative route or slight diversion, the landowner must lodge an objection to the Private Bill within the 60-day period following receipt of a Notice of its introduction.

It may seem to parties receiving a notice under a Private Bill that the objection period relates to more general matters such as objecting to the proposed railway line in principle. However, this is most definitely not the case and although the objection period allows for objections to the whole scheme, it also provides the only opportunity for objection to any acquisition of land which is to be acquired for the scheme.

**Reasons and counter-proposals**

An objector to a Private Bill will be heard by an Assessor who will prepare a report for the Parliamentary Committee. It may be that the Parliamentary Committee responsible for the Private Bill will call for further evidence. It is essential that in lodging the objection and in giving evidence at the Assessor’s Hearing, the landowner clearly expresses the reason for the objection and any counter-proposal.

For example, if a landowner has planning permission for development, then a copy of the planning permission should be lodged. If a landowner is conscious that a scheme will result in severance of one part of that landowner’s land from another, evidence of the severance should be provided.

In the event of severance, the promoter of the scheme is not under any obligation to provide an accommodation bridge and may choose to pay compensation to the objector. However, it is more likely that an accommodation bridge can be negotiated if the need for that bridge is made known to the promoter of the scheme at an early date and can be incorporated in the promoter’s design.

If the compulsory acquisition proceeds by way of the Compulsory Purchase Order (CPO) procedure (which is likely to be the case for a roads project promoted by Transport Scotland or a Local Authority), then the opportunity for objecting arises at the stage when a landowner receives a notice that it is intended to make a CPO. The grounds of objection are similar in any compulsory purchase situation and again there is a time limit for lodging objections. If an objection is not answered to the satisfaction of the landowner, the Scottish Ministers may call for a public inquiry to be held.

**Freedom of expression**

There is no particular style of objection nor are there any statutorily prescribed grounds. The most common grounds are that there is no need for the scheme for which the land is being acquired or that the importance of retaining the land in its present use should override the scheme’s purpose. An objector may simply wish to have a slight adjustment to the boundary of

“Enquiries should be made as early as possible to ascertain the likely effect of the proposed scheme on the interest of the landowner or the tenant”
land to be acquired or a slight relocation and in those circumstances an objection with an alternative proposal may result in a satisfactory resolution for both parties.

If an objector is willing to implement the scheme without compulsory acquisition, he may argue that compulsory acquisition is not necessary. Finally he may seek to argue that a better alternative site exists where the scheme could be implemented. If that is so, then he must identify the alternative site.

From the landowner’s point of view the earlier a clear objection stating the grounds for objection and any alternative proposal can be put forward, the better the chances of achieving a resolution with the party promoting the scheme.

However, if a landowner has missed the objection period, it may still be possible to negotiate an agreement with the acquiring authority, particularly if all that is required is a slight variation of boundary or an alternative location for a works or construction compound.

In order to try to minimise loss, maximise the compensation received and speed matters along it is essential that those threatened with compulsory acquisition contact a solicitor and/or agent with experience in compulsory purchase as early as possible. One of the reasons why this is particularly important for rural landowners is because of the special legal provisions relating to agricultural land.

Additional land

Compulsory purchase legislation provides that a party from whom agricultural land is to be acquired may seek to force the acquiring authority to take more land than it intends. This is only possible where the acquisition will result in the land which remains ceasing to be viable as an agricultural unit. In these circumstances when a party with an interest in agricultural land receives a notice, he may serve a counter-notice claiming that the land which remains is not reasonably capable of being farmed by itself or along with other land belonging to him. Such a counter-notice must be served within two months of the date of service of a notice to treat or notice of a general vesting declaration.

The landowner must prove that the land remaining is incapable of being farmed. An acquiring authority may accept a counter-notice and acquire all the landowner’s land but if it does not do so within two months, then either party may refer the matter to the Lands Tribunal for Scotland. If the Lands Tribunal upholds the landowner’s claim that the remaining land is not reasonably capable of being farmed, then the acquiring authority must acquire all the land contained in the counter-notice.

Unfortunately, the relevant legislative provisions are very complicated, particularly where there are agricultural landlord’s and tenant’s interests involved. It is therefore essential that there is clear understanding of the landlord’s and tenant’s entitlements before a counter-notice is served.

Three questions to answer ...

Given the very short timescale for service of the counter-notice and the fact that, if it is not served within the relevant period, it cannot be served later, it is essential that a landowner with agricultural land, whether tenanted or not, faced with compulsory purchase seeks advice early with regard to his or her options.

If however land is to be acquired compulsorily, the landowner must consider his claim for compensation.

From a landowner’s point of view there are three basic questions to answer. These are:

- For what can you claim compensation?
- How much will you get?
- When will you get it?

Unfortunately, there is no easy answer to the first of these questions. In so far as the other two are concerned the answers are more predictable. From a landowner’s point of view it is very likely that matters will take years rather than months to resolve and that a claimant who has had property compulsorily acquired will be worse off at the end of the day.

Parties should be aware that the entitlement to compensation in compulsory purchase situations is enshrined in the law. It is not necessary to object in order to retain the entitlement to claim compensation.

... and three principles of compensation

There are three basic principles of compensation in a compulsory purchase situation. The most important of these is the principle of ‘financial equivalence’. This principle recognises that the purpose of compensation in compulsory purchase situations is to place the claimant in the same position as he would have been in if the compulsory acquisition had not taken place.

The second principle provides that there must be no ‘double counting’ – for example if a claim is made for agricultural land on the basis of its development potential for residential purposes, then there cannot be a claim for disturbance to an existing farming business at the same time.

Finally, any person claiming compensation in compulsory purchase situations is subject to a general duty to act reasonably to mitigate his losses.

There is not room in this article to consider compulsory purchase compensation in detail but there are four main heads of claim.

These are:
- a claim for the value (price) of the land taken;
- a claim for disturbance arising as a result of the claimant’s displacement from the land acquired;
- a claim for ‘injurious affection’ which is where there has been depreciation in the value of the land retained by the claimant as a result of the construction or use of the works for which the land was acquired; and
- a claim for severance which arises where part only of a parcel of land belonging to one owner is taken and another area of land is ‘cut off’.

Finally, turning to the practical aspects of claims for compensation in compulsory purchase situations, the first point to note is that a landowner’s surveyor’s reasonable fees will generally be met by the acquiring authority. The landowner should get written confirmation of this and appoint a surveyor as soon as possible so that he can, if appropriate, negotiate accommodation works. These are works whose sole purpose is to mitigate the effect of the scheme on the landowner’s remaining land and they could include new roads or accesses, sound proofing, tree planting, etc.

However, the landowner should be aware that fees incurred in simply opposing the scheme are unlikely to be met by the acquiring authority. It is also likely that the acquiring authority will expect the landowner to include surveyors’ and solicitors’ fees in the claim for compensation and will not be keen to pay these ‘up front’.

Paramount need for early action

In summary, if there is one thing which a landowner or tenant should remember when faced with compulsory purchase, it is that if he receives a notice which mentions the possibility of compulsory acquisition, enquiries should be made as early as possible to ascertain the likely effect of the proposed scheme on that landowner’s or tenant’s interest.

Depending on the result of their inspection the landowner or tenant can decide whether to object or not.

If the scheme goes ahead and a notice of intention to acquire land is received, the landowner must act quickly to ensure that he does not neglect the opportunity to serve a counter-notice if appropriate.
Given that the Agricultural Holdings Act 1986 has not applied to new tenancies for nearly 12 years (except in very limited circumstances), it is surprising how many people still present agreements for grazing or mowing clearly drawn with that Act in mind.

The ‘statutory magic’ – whereby most lettings and licences were converted into full-blown year-to-year tenancies which would, to all intents and purposes, last for ever – no longer applies and the need to confine a grazing agreement to ‘some specified season of the year’ is now irrelevant.

So what modern considerations should a draftsman be thinking of in the context or grazing or mowing?

What type of contract?

Types of agreement fall basically into three categories: tenancy, licence and, increasingly, profit à prendre.

The case usually cited to resolve the confusion between tenancies and licences is Street v Mountford. Strictly speaking, that case is authority only for the proposition that, where parties have entered into a written contract which provides the three principal ingredients of a tenancy – exclusive possession at a rent for a term – they may not, merely by labelling it a licence, turn it into anything but a tenancy.

Subsequent cases, however, have subdivided the issues into sections: the ‘moving in’ cases, where a person takes up occupation in anticipation of concluding a written agreement; and the ‘staying on’ cases, where the term of a written contract comes to an end but the tenant remains in possession.

Political considerations, such as a desire to avoid bringing the arrangement under statutory protection, and a more purposive approach to consideration of the motives behind the arrangement have watered down the strictness of the ‘exclusive possession + rent + term = tenancy’ formula, but it remains relevant nonetheless.

A licence, on the other hand, is, at its most basic, a permission granted by a person with an interest in land to another to come onto that land for a stated purpose. On the nemo dat principle, the grantor must have an interest greater than the licence he proposes give, but that is the only limitation.

The consequences of inadvertently creating a tenancy may no longer be as severe as before 1995 in terms of security of tenure, but there are, as we shall see, other reasons why the distinction remains important.

A profit à prendre is a wholly different form of incorporeal hereditament from the tenancy and the licence. Broadly, it is a right given to someone to take something from land which is capable of being sold from it; in this context, a crop of grass.

These days, the parties’ choice of agreement can be determined by factors quite unrelated to the land in question or to the grazing itself: for example, taxation, the Single Payment Scheme (SPS), animal movement regulations, or consequences upon milk quota holdings. Not least is the attitude of the landowner, who may farm nearby and want a supervisory role, or may indeed have his own contemporaneous need for the land.

Income tax

The income tax treatment may depend upon whether the grantor is or is not a farmer, according to S.876 Income Tax (Trading and Other Income) Act 2005: farming is “the occupation of land wholly or mainly for the purposes of husbandry but does not include market gardening”. If the grantor is a farmer, the income will probably be taxed under Pt.2 or Pt.5 of the 2005 Act, if not, then under Pt.3 (successors to Sch.D Case I; Sch.D Case VI; and Sch.A respectively).

Whether the grantor is a farmer is a question of fact in each case, but the decision may be affected by whether or not the grazier has exclusive possession. The principal authority on the point is CIR v Forsyth Grant, where the decision was based on the grantor’s having established, fertilised and maintained the grass and used it himself or given others the right to do so.

Before 1995, it was generally assumed that where the agreement was for more than a year, the grazier would be the farmer for tax purposes, but in other cases the grantor would remain the farmer and be taxed under Sch.D.

Nowadays, there is no technical reason why grazing agreements may not be made for longer than a year. However, there is no authority for the proposition that a grantor may be considered the farmer in respect of longer terms and no indication of the current view of H.M. Revenue & Customs on the point. Care needs to be taken.

Capital Gains Tax

From the point of view of capital gains tax, taper relief is most significant. Business assets are treated much more favourably than others: the chargeable gain is reduced by 75% after two years for the former, and only 40% after 10 for the latter.

A business asset is one used by the taxpayer’s business, land let to a non-quoted trading company and land let to individuals for trading purposes. This last seems to include farmland so that there would be no difference in CGT treatment between a tenancy in favour of a grazier for his business and a licence where the landowner was in the business of farming.

No agreement, of whatever nature, with a non-business user – recreational equine use, for example – would qualify.

On the other hand, rollover relief from CGT does require the taxpayer to be carrying on a business and to be using the asset (and its replacement) in that business.

Inheritance Tax

The nature of a grazing agreement can also bear upon the IHT treatment of the land itself and upon related land such as farmhouses and cottages.

A person’s interest in a business is in most cases entirely releivable under the business
property relief (BPR) provisions provided it has been held for two years (unless it falls within the rules relating to replacement assets) and is not comprised wholly or mainly of investments.

Land subject to a tenancy would normally be treated as an investment asset, unless the letting is ancillary to in-hand business interests. This will be a question of fact in each case: broadly, the greater the proportion of the lettings, the more chance that they will be disallowed.

The leading case on the point is Farmer v IRC. A farmer’s lettings for non-agricultural activities were treated as a single business and dealt with in the same set of accounts as the farming. The Revenue disallowed the income from the lettings but the Special Commissioner decided that, taken as a whole and looking also at the relative time and labour commitment, the farming business still predominated and relief was allowed on the entirety.

More recently, Stedman v IRC concluded that the provision of services inherent in the running of a residential caravan park outweighed the mere letting of the sites and permitted BPR. On the other hand, where income from lettings subsidised other business activity, relief was refused. The line between allowance and refusal is clearly difficult to draw.

To qualify for agricultural property relief (APR), the taxpayer first of all must have agricultural land or pasture. If that is so, other assets may be brought in as well: ancillary woodland and livestock buildings occupied with it, and farmhouses, cottages and farm buildings where they are of a character appropriate to the land. The grazing arrangements may therefore impact upon the APR treatment of such other assets.

With considerable effort on the part of the Country Land & Business Association, it and other industry stakeholders have persuaded the authorities that a properly drawn profit & precedent will permit the grantor to remain in occupation as a farmer so as to relieve the land the subject of it from inheritance tax under APR at the same time as supporting any associated ancillary land or buildings in qualifying for relief.

Single Payment Scheme

The main issue under SPS is the application of the ten-month rule, under which the claimant must have the land “at his disposal” for ten months of the year. In England, that period may commence at any time of the claimant’s choosing between 1st October in the year previous to the claim and 30th April of that year; in default of his choice, it begins on 1st February.

The guidance produced hitherto has been inconclusive as to the criteria by which a claimant can judge whether land is at his disposal. Matters such as actual and predominant uses; identifying the person who takes the risks and the profit and who controls eligible uses and ensures cross compliance; and the terms of any agreement under which he occupies, including duration, rights of termination and permitted uses, are all relevant.

A tenancy clearly will give the tenant control of the land, subject to its terms, and the exclusivity of possession will enable the tenant to demonstrate that the land is at his disposal.

A licence may also be adequate, although much will depend upon the drafting. Most conventionally drawn licences will make it clear that the grantor remains in possession and occupation and the grantee merely has temporary and limited rights; indeed, that may well be the point of choosing a licence as the vehicle.

But it is not yet clear whether that necessarily precludes the grantee from claiming that the land is “at his disposal” within the meaning of Art.44(3). The very novelty of the phrase seems designed to be less rigid than forms of occupation hitherto known to our law and the guiding legal philosophy of permissive flexibility in most continental legal systems would suggest that the correct official approach should be elastic. Until there is a test case, however, the matter remains uncertain.

Cross compliance

Whatever the form of the agreement, there are several areas which require special attention on the part of the draftsman, of which cross compliance is one of the most important.

Breaches of cross compliance will lead to penalties on the SPS claimant. The agreement must ensure that the burden of those penalties falls on him who is in a position to prevent them.

Various regulations control the activities of the grazier as regards animal movements. A labyrinthine tangle of rules govern timing, licensing and reporting of animals, with different provisions according the type of animal concerned.

Under certain circumstances, DEFRA may record sets of separate premises as “sole occupancy groups”. This applies where they are “linked in terms of their control” and has the effect that movement of animals between premises within the group is permitted where it would otherwise be an offence.

A grantor should be aware of precisely the animals under the control of the proposed grazier. It would be wise to consider whether the grazier ought to bring the land within his sole occupancy group. In any case, the contract needs to be drawn to ensure that the grazer complies with all animal movement requirements and indemnifies the grantor against the consequences of any failure.

The draftsman will also need to be alert to the responsibilities imposed under the various Directives and regulations dealing with identification and welfare of livestock and the control of weeds.

Different provisions regarding identification apply in the case of sheep and goats, cattle and pigs, and all form part of the suite of cross compliance requirements. New for 2007 is compliance with separate Directives on the welfare specifically of calves and pigs, and of farm animals in general. Once again, provisions will need to be drawn to ensure that liability ends up where it belongs.

Liability for control of weeds derives from two main sources: the Weeds Act 1959 and the Wildlife and Countryside Act 1981. The former requires notification of the presence of “injurious weeds”, namely common ragwort, spear thistle, creeping (or field) thistle, curled dock and broadleaved dock; the latter creates offences in relation to giant hogweed and Japanese knotweed. Cross compliance rules apply to all of those plus Himalayan balsam and rhododendrons. See previous comments regarding the duties of a draftsman.

Special considerations arise in respect of dairy farmers on account of holdings of milk quota. The point has diminished in general importance lately since most transfers of quota nowadays take place on a without-land basis, but occupation of land for more than 10 months may inadvertently result in the transfer of milk quota

“"The parties’ choice of agreement can be determined by factors quite unrelated to the land in question or to the grazing itself."
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due to ‘massaging’. Appropriate provisions should be added to the contract to avoid it.

Horses
Confusion is rife in respect of the use of land for horses and at least part of it stems from the fact that, whilst a horse is a horse is a horse, the legal categorisation of agreements involving it is nothing like as simple. As far as land law is concerned, the regime under which the agreement will fall depends upon whether the use is agricultural or business, or perhaps both or neither; other considerations again apply in relation to taxation.

What is agricultural use also varies according to context, because of the several definitions according to whether one speaks of the SPS, taxation, tenancy law, rating or planning.

So far as concerns the letting of land – and by analogy the licensing of the use of land – the definition in S.38 Agricultural Tenancies Act 1995 is perhaps the most useful. “Agriculture,” it says, “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.” Note, it “includes”, in the same way as its predecessor in the Agricultural Holdings Act 1986 did; thus, there are conceivably activities beyond those specified which would be agriculture.

The Act goes on to define “livestock” as including “any creature kept for the production of food, wool, skins or fur or for the purpose of its use in the farming of land”. Thus, horses will be livestock only in the limited circumstances of being farmed for food – there are those who

export to the Continental meat market – or used at the plough or for haulage. Otherwise, horses are not livestock and thus their keeping is generally not agriculture.

But “the use of land for grazing” is within the definition of agriculture. So where the land is let in order for it to be grazed, it matters not what type of animal is used for the purpose. Occupation by horses under such an arrangement would be agricultural.

Then come questions of primary purpose. If the letting is of a livery stable, for example, with a paddock attached, then it can fairly be said that the primary purpose is the livery and the grazing of the paddock is merely incidental. But what of the livery stable owned freehold – or, indeed, let – with the grazing taken under a separate agreement with a different grantor? Arguably the grazing let would then be an agricultural tenancy, for that would be its primary – its only – purpose.

The easier question will be whether the horses are kept for business. That is one of fact in each case.

Beware, in the taxation context, the case of Wheatley v IRC12, a case that dealt with APR from IHT. It decided that for land used solely for grazing horses to be “occupied for the purposes of agriculture” within S.117 Inheritance Tax Act 1984, the horses had to have a connection with agriculture.

In the context of landlord and tenant:

- a letting of land for the commercial grazing of horses, pure and simple and without any other activity, can be agricultural, and would be a farm business tenancy;
- a letting for other equine business purposes with the grazing ancillary thereto would almost certainly not be agricultural and would thus be governed by the Landlord and Tenant Act 1954, Part II;
- a letting of land to provide accommodation for a pet pony would be neither agricultural nor business and would be a common law tenancy; the grazing activity might well be agricultural, but the absence of business use would take it outside the 1995 Act.

None of those considerations applies in the case of a licence, so long as it is not a sham or cannot otherwise be deemed a tenancy.

Grazing Arrangements – Issues affecting land, livestock and horses

CAAV Numbered Publication 186

For those who wish to read more about the points made here in relation to grazing arrangements, and others, the CAAV has produced a guide in its series of Numbered Publications.

No.186 replaces Nos.167 & 177, which were issued some time ago, and deals from a practical point of view with the issues relevant to putting together a deal for the use of land by animals.

As well as the matters covered on these pages, the booklet covers liability for dangerous and straying animals, animal identification and movement rules, disease control, and more.

Various specimen documents are also included, with the usual caveat that a precedent should be no more than a starting point for a bespoke contract.

Copies (price £25 to non-members) can be obtained direct from CAAV at 35 Market Place, Coleford, Gloucestershire, GL16 8AA or via its website at www.caav.org.uk

1 S.2(3)(a) Agricultural Holdings Act 1986
2 [1985] 1 AC 809, HL
3 E.g. Jawad v Aqil [1991] 1 WLR 1007, CA; Sopwith v Stuchbury (1985) 17 HL R 50, CA
4 E.g. Burrows v Brent LBC [1996] 1 WLR 1448, HL, which introduced the concept of the tolerated trespasser; Newnham LBC v Hawkins [2005] EWCA Civ 451; Lambeth LBC v O’Kane / Helena Housing Ltd. v Pinder [2005] EWCA Civ 1010
5 Nemo dat quod non habet – no-one can give a better title than he has
6 (1943) 25 TC 369
7 [1999] SpC 216
8 [2002] SC3001/02
9 Clark v HMRC [2005] SpC00502
10 S.115(2) Inheritance Tax Act 1984
11 Art.44(3) of Regulation 1782/2003
12 [1998] STC (SCD) 60


SI2006/3343 (W304) = Rural Development Programmes (Wales) Regulations 2006 – regulate existing and new programmes administered by the National Assembly for Wales – 1st January 2007


SI2007/540 = Commons Registration (Objections and Maps) (Amendment) (England) Regulations 2007 – amend Commons Registration (Objections and Maps) Regulations 1968 to enable the registration of certain land or rights to be made final or be removed from the register – 6th April 2007

SI2007/560 = Home Information Pack (Redress Scheme) Order 2007 – requires estate agents to be members of an approved redress scheme to deal with complaints related to HIPs – 1st June 2007


Council Regulation 2011/2006 adapting Regulation 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulation 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)

Commission Decision 2006/875 approving programmes for the eradication and monitoring of animal diseases, of certain TSEs, and for the prevention of zoonoses presented by the Member States for the year 2007


Commission Decision 2007/21 amending Decision 2005/760 as regards certain protection measures in relation to highly pathogenic avian influenza and imports of birds other than poultry into the Community

Commission Decision 2007/22 amending Decision 2006/875 approving programmes for the eradication and monitoring of animal diseases, of certain TSEs, and for the prevention of zoonoses presented by the Member States for the year 2007

Commission Decision 2007/24 approving contingency plans for the control of avian influenza and Newcastle disease

Commission Decision 2007/25 as regards certain protection measures in relation to highly pathogenic avian influenza and movements of pet birds accompanying their owners into the Community

Commission Decision 2007/83 amending Decision 2006/415 concerning certain protection measures in relation to highly pathogenic avian influenza of the subtype H5N1 in poultry in the UK

Commission Decision 2007/128 amending Decision 2006/415 concerning certain protection measures in relation to highly pathogenic avian influenza of the subtype H5N1 in poultry in Hungary and the UK

Commission Regulation 1847/2006 adapting certain horizontal Regulations in the common agricultural policy by reason of the accession of Bulgaria and Romania to the European Union

Commission Regulation 1848/2006 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Council Regulation 595/91

Commission Regulation 1854/2006 publishing, for 2007, the agricultural product nomenclature for export refunds introduced by Regulation 3846/87

Commission Regulation 1854/2006 publishing, for 2007, the agricultural product nomenclature for export refunds introduced by Regulation 3846/87

Commission Regulation 1913/2006 laying down detailed rules for the application of the agrimontary system for the euro in agriculture and amending certain regulations

Commission Regulation 1919/2006 adapting several Regulations concerning the common organisation of the milk and milk products market by reason of the accession of Bulgaria and Romania to the European Union

Council Regulation 1944/2006 amending Regulation 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)


Council Regulation 1975/2006 laying down detailed rules for the implementation of Council Regulation 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures

Commission Regulation 1998/2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid

Commission Regulation 2002/2006 amending Regulation 795/2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers

Commission Regulation 2025/2006 amending Regulation 796/2004 laying down detailed rules for the implementation of cross compliance, modulation and the integrated administration and control system provided for in Council Regulation 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers


Commission Regulation 163/2007 fixing, for the 2005/06 marketing year, the amounts to be paid by sugar manufacturers to beet sellers in respect of the difference between the maximum amount of the base levy and the amount of that levy to be charged

Commission Regulation 164/2007 fixing the production levies in the sugar sector for the 2005/06 marketing year

Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007 to 2013 (2006/C 319/01)

Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community (C321E/1)

The following instruments amend others by reason of the accession of Bulgaria and Romania:


See also the following Official Journals for information regarding cases before the ECJ and the Court of First Instance: C294 (2.12.06); C310 (16.12.06); C326 (30.12.06); C331 (30.12.06); C20 (27.1.07); C33 (15.2.07); and C42 (24.2.07)
Funding agreed but RDPs remain works in progress

Following agreement in Brussels on the vexed question of voluntary modulation (see Page 6), the shape of the Rural Development Programmes (RDPs) for England, Scotland and Wales is slowly becoming apparent, although there remains a long way to go.

The several authorities in the UK reacted differently to the crisis precipitated when the European Parliament refused last November to agree the proposal for Member States to be permitted to modulate further funds from the Single Farm Payment to rural development, subject to an overall ceiling of 20%. The stand-off that has been going on since then has meant that no firm programmes can be created, still less lodged with and approved by Brussels.

The Scots put in place a temporary plan, with a derogation from the EC Commission, for payments of £40m to be made available. The Welsh, in contrast, announced a £14m cut in the budget for Tyr Mynydd.

DEFRA closed the schemes running under the previous RDP – Rural Enterprise, Processing & Marketing, Vocational Training and Energy Crops – last June. The agri-environment schemes established under the 2003 CAP reform at Entry Level and Higher Level remained open to new applications, but with varying commentary on the likelihood of acceptance and contracts that were only provisional (and thus pretty useless) pending resolution of the problems.

Now that the political problems have been resolved – and the UK got pretty much what it wanted – more detail is beginning to emerge.

Wales and Scotland have not yet confirmed the amounts to be raised by voluntary modulation, but in England it will begin at a rate of 12% this year, rising next year to 13% and in 2009-12 to 14%.

The Scottish Executive has produced a Q&A sheet showing the funds available taking no account of voluntary modulation. The absence of that information in Scotland and Wales means that little of any substance can be said about how much will be available for the various rural development schemes in those regions and, thus, how the schemes will proceed from here.

The position is little better in England. DEFRA has announced a budget for the seven-year period of £3.9bn of which £3.3bn will be allocated to agri-environment and land management schemes within the scope of Axis 2 of the Rural Development Regulation (1698/2005). The balance will be available for schemes to make agriculture and forestry more competitive (Axis 1) and to enhance opportunity in rural areas (Axis 3).

Some of the Axis 1 funds will be devoted to a scheme aimed at assisting the livestock industry to tackle its own particular environmental challenges.

The funds allocated to Axis 2, which account for 80% of the total voluntarily modulated, will be co-financed by the Treasury, so that for each £60 voluntarily modulated to that end the government will contribute a further £40.

The net result is that the overall budget is almost twice as high as it was for the period 2000-06. However, only £750m of the £3.9bn comes from money directly allocated from the European Agricultural Fund for Rural Development. The balance is made up primarily of co-financing (£1.55bn, including some state-aid funding) and the additional funds taken from the Single Farm Payment (£1.4bn). Early indications are that Pillar 1 payments to English farmers will be around 14% lower than those to other EU farmers as a result of the additional modulation.

More information will be published on the DEFRA website (www.defra.gov.uk/erdp/) and those of the devolved authorities (www.scotland.gov.uk/Topics/Rural/RDR/introduction and new.wales.gov.uk/topics/environmentcountryside/countryside_policy/rural_development/rdp0713/) GDW

Forthcoming events...

AGM & ANNUAL DINNER 2008
29th February 2008
Royal Overseas League, London

ALA: THE NEXT GENERATION
26th April 2007
University Law School, Newcastle

ALA: THE NEXT GENERATION
4th June 2007
Angel Hotel, Market Harborough

ALA/WS SOCIETY 10TH ANNUAL JOINT SEMINAR ON AGRICULTURE
15th June 2007
Signet Library, Edinburgh

Full details of all meetings and other events are posted on the Calendar of Events on the website, or Members may contact Geoff Whittaker on (01206)383521 or email meetings@ala.org.uk