ALA Bulletin

Issue 53 – Summer 2008

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RURAL PROFESSIONALS

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

PUBLIC LIABILITY

Extent of responsibility for roadside trees

Katharine Oliver, Legal Adviser, Country Land & Business Association

The consultation on the proposed new British Standard BS 8516 Recommendations for Tree Safety Inspection has once again raised the profile of liability for damage and injury caused by trees.

Despite the relatively small number of incidents (five or six people a year are killed by trees falling on them, a risk that falls within the Health & Safety Executive's category of 'broadly acceptable' risk) the consequences of such an event are such that there is inevitable concern over the allocation of risk. In this risk-averse climate, it is worth reviewing the legal responsibilities and potential liabilities involved in tree ownership.

Responsibility for a tree lies with whoever occupies the land and has control of the tree. Trees are considered to be part of the land on which they grow, and if the owner grants a lease of the land the trees will form part of the demise, unless they are specifically excluded. Therefore, in the case of a Farm Business Tenancy or one under the Agricultural Holdings Act 1986, the trees are likely to be the responsibility of the tenant and insurance requirements will be governed by the terms of the tenancy. If the land is owner-occupied, the trees will remain the responsibility of the freeholder.

Cause by act or omission

In certain cases there may be more than one 'occupier' but the question will be: who has sufficient control of the tree?[1] Many trees next to highways – for example on footways and verges – will be the responsibility of the highway authority.[2] Highway authorities can also use their powers under s.154 Highways Act 1980 to require landowners to control trees considered to be threatening the safe use of the highway.

A person responsible for a tree has a common law duty to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to cause harm.

If a tree (or part of it) causes injury to person or property, the person responsible for it will be liable if they caused the problem, either by action (such as undermining the roots) or inaction (such as failing to inspect on a reasonably regular basis or not remedying a problem that has been brought to their attention). Presumably that person would be unlikely to be held liable for injury or damage if, for example, a healthy tree were to fall in very severe weather conditions.

Trees will also form part of 'premises' for the purposes of the Occupiers' Liability Acts 1957 and 1984, although those exercising the 'right to roam' under the Countryside and Rights of Way Act 2000 are not protected under the 1984 Act in relation to risks resulting from the existence of any natural feature of the landscape, including trees.

Employers and the self-employed conducting an 'undertaking' could also be liable under s.3 Health and Safety at Work Act 1974, which requires the undertaking to be conducted, "in such a way as to ensure, so far as is reasonably practicable, that persons who may be affected thereby are not thereby exposed to risks to their health and safety".

What is it reasonable to do?

Concern amongst tree owners and managers increased following the High Court's decision in *Poll v Bartholomew,*[3] a case of a tree branch that had fallen across the road on which Mr. Poll was travelling on his motorbike. The resulting collision left Mr. Poll with serious injuries and a claim was brought against the landowner.

There had been 'drive-past' inspection of these roadside trees by a generalist forestry contractor (a Level 1 inspector), but the experts agreed that the nature of the tree merited a check by a Level 2 inspector, who, the court found, would have identified the problem that led to the fall of the branch. The landowners were therefore found to be in breach of their duty of care.

Raising the bar?

Although the case was decided on its own facts and arguably sets down no principle, the decision caused understandable alarm, and was taken by many as raising the bar of inspection.

Given the huge range of trees and locations, the frequency and the level of inspection required must depend on the circumstances.

For example, it is likely to be reasonable to inspect a tree growing in the middle of private land less frequently than one next to a highway or footpath. Inspections may also be required, or instance, after a storm, or if nearby works have taken place that may have undermined a tree's roots.

In some cases, such as trees which present a low risk due to their location, checks by the landowner or tenant may be sufficient. However, if that person is not able or qualified to identify symptoms of disease or other indicators of potential danger, it is likely to be prudent to involve a specialist, particularly if the tree is in a high risk location such as close to a highway.

Records should be kept of inspections made and the result, as well as the reason for choosing a particular level of inspection.

If a problem is identified, it is likely to be reasonable to take steps to remedy it, and to follow any specialist advice. As usual, before felling or carrying out works to a tree, it is important to check whether any consents are required, for example if the tree is subject to a Tree Preservation Order, is greater than $5m^3$ in total volume,[4] or may be of particular importance to wildlife.

Consents may not be required if the tree is so dangerous that immediate action is needed.

Observation and inspection

The draft British Standard proposes that tree owners should carry out regular observation and/or annual inspection of their trees, with more detailed inspection by trained persons every 1-3 years depending on the site, and expert examination at least every five years for trees where a 'target' is or may be present.

> "The Compensation Act allows a court to take into account whether particular steps might have prevented a desirable activity"

A target is defined as "persons or objects, the latter having variable value and vulnerability, present, perhaps temporarily, within falling distance (or impact radius) of a tree or its branches".

Where defects are identified that are considered to pose an 'unacceptable risk', the standard suggests consideration should be given to modifying the target, including for example the erection of barriers around the tree, re-routing paths and moving benches. Not cheap or easy options for a tree owner.

A desirable activity

The understandable reaction of many tree owners could be to cut down a tree, as a far cheaper option than carrying out expensive ongoing remedial work. Tree professionals could also be forgiven for erring on the side of caution in recommending works to a tree, picturing themselves in court attempting to defend a decision.

However, in deciding how to tackle a tree it is worth bearing in mind s.1 Compensation Act 2006, which allows a court considering whether a defendant has been negligent or in breach of a statutory duty of care to take into account whether particular steps they could have taken might have prevented a desirable activity from being undertaken.

Given the considerable environmental and aesthetic benefits of trees alone, growing trees could certainly be seen as a 'desirable activity' and a landowner could therefore seek to argue a decision to retain a tree was reasonable.

It should be noted that the Compensation Act does not affect the duty under the Health and Safety and Work etc. Act 1974, arguably resulting in a higher duty under this Act than under civil law.

Risk and natural organisms

Unfortunately, tragic accidents will happen even when there is an acceptable inspection regime in place, as in the case of the schoolboy killed by a falling branch on National Trust property at Felbrigg in Norfolk, where a verdict of accidental death was returned by the coroner in June of this year.

Trees being natural organisms, it is impossible to eliminate risk. Tree owners previously unaware of their potential liability may well be alarmed at what it seems they are expected to do.

However, although it is important to be aware of responsibilities, to carry out appropriate inspections and to implement safety measures, any steps taken must surely be proportionate to the risk.

It must be in everyone's interests to guard against an overreaction that could lead to the loss of trees far out of proportion to the risk they pose to person and property.

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1 *Wheat v Lacon* [1966] AC 552
2 *Hurst v Hampshire CC* [1997] EWCA Civ 1901
3 (aka *Poll v Asquith*) [2006] EWHC 4BS50384
4 Forestry Act 1967, s.9

Conference papers

ALA's Spring Day Conference in London in May proved a popular affair with, as usual, some excellent speakers and interesting and thought-provoking subject matter.

First on the bill were Hugh Mercer QC and Paddy Kelly, who performed a splendid Mutt & Jeff act on the behaviour of supermarkets. As luck would have it, the Competition Commission's report on that subject had been published only the previous day, and they showed commendably that they had taken the time to work on it so as to be bang up to date.

A series of three talks then worked through some tax issues surrounding trusts and business structures. Carlton Collister and Nigel Roots in turn dealt with lifetime and will trusts in the context of the Inheritance Tax provisions on inter vivos arrangements which came in a couple of years ago, and the new rules on transferable nil rate bands. Entrepreneurs' Relief from CGT was also covered.

Nick Dee then went on to talk about the various comparative benefits and detriments of different business structures – sole trader, partnership, company, etc. – and the tax considerations which play on decision makers, always being careful not to allow the tax tail to wag the commerical dog.

After lunch, Magnus Willatts reviewed the law as it affects pollution and other environmental considerations in land transactions, with reference to the facilities which now assist due diligence in those cases.

Ted Mercer spoke most entertainingly and cogently on the traps which face landowners allowing telecoms equipment on their land, and Carl Atkin rounded off the day with a full examination of the recently approved Rural Development Programme for England, focusing on what schemes are now available and how they differ from what went before.

A pack containing the speakers' materials and transcripts of the talks and discussion is now available at a cost of £70+VAT (£82.25). Please send a cheque, payable to 'Agricultural Law Association', to Geoff Whittaker (address per page 2) along with your email address. The pack will be sent electronically.

Coastal access

I expect that those of you with businesses and/or clients near the coast will already be alert to the draft Marine Bill which was published in April.

The Bill proposes the creation of a footpath – or a trail, as Natural England (NE) prefers to call it – around the entire English coast, subject to certain limited exceptions.

Of course, there are large coastal paths already in existence. In my part of the world, it is possible to walk almost the entire coastline from the Thames estuary to near Kings Lynn. (Ironically, one of the few stretches not open to the public bounds the Stansgate Estate, family home of the current Secretary of State at DEFRA!) Nevertheless, more is wanted by the Bill's proponents.

There are proposed to be insertions into the National Parks and Access to the Countryside Act 1949 and the Countryside and Rights of Way (CRoW) Act 2000. These will vest in NE a duty to create the path after taking into account public and private interests and ensure that the current range of exceptions in sch.1 of the CRoW Act apply in this context also.

Land to the seaward side of the designated route would be access land – "spreading room", in the words of the Bill – unless already covered by public access agreements of the sort set out in s.15 CRoW or covered by sch.1. This would except cultivated land – land which is or has within the previous 12 months been disturbed by ploughing or drilling – but not grazing land.

The spreading room would be extended inland also, by reference to recognisable physical features, such as walls and fences.

NE, in considering the line of the path, is to be enjoined to consider not only the safety and convenience of those using the route but also the desirability that it should so far as possible be sited to afford sea views. No mention in this of the effect on landowners and farmers, beyond a promise that NE will work with land managers to minimise inconvenience.

As to health and safety, the policy paper accompanying the Bill notes that the coast is a dangerous environment, but states a belief that "the public ... should be allowed to make their own judgement on the level of risk" and "take responsibility for their own safety". In that light, the occupier's liability, already limited by CRoW, will be limited further by excluding damage caused by physical features. This would not, however, except any duties owed by employers to public safety under the health and safety legislation.

Discussions are already well under way over the precise terms in which the final legislation will be couched. I know that Both CLA and NFU have loudly questioned both the need for the project at all and the level of benefits it might deliver and are working hard on it.

The question of compensation for damage and loss arising as a result of the presence of the trail simply isn't addressed in the Bill. Given that arguments on the point failed to achieve satisfaction when access land was designated under CRoW, one cannot be too optimistic that they will succeed this time.

Nevertheless, one tires of seeing rural landowners – including but not limited to farmers – required to do this, that or the other for the benefit of Joe Public entirely at their own expense. If Joe Public wants such facilities made available to him, surely he should put his hand in his pocket?

One wishes all involved in the debate well in their endeavours.

Fellowship

Many thanks to all of you who repsonded to my circular asking for feedback on the Fellowship proposals back in March. The response really was most encouraging.

You may recall that we were talking in terms of a two-phase process, the first to include some classroom learning on a variety of germane subjects as they apply in the rural environment, as distinct from elsewhere, and the second to provide an opportunity for further study, for which a number of options were presented.

The responses were divided, roughly in the same proportion as is the membership as a whole, between lawyers and other professionals. Even those of you who thought that this might not be for them offered constructive criticism and support, for which we are all most grateful.

The criticisms have caused us once more to put on our thinking caps and we are in the process of revising the programme to be (a) slightly less costly in terms of time out of the office and (b) no less practical but rather more focused on cognitive skills and problem-solving.

We still hope to start it next year if at all possible and I will keep you all informed of progress.

Responses on the second phase of study have led us to the conclusion that the way to proceed will be to have a number of separate study modules, one of which would be on a subject of a candidate's own choosing, on each of which an essay would be submitted to demonstrate the required abilities.

With a view, again, to reducing the amount of office time lost, we are investigating means of making materials available via the website. This will require quite some investment in new software and so forth, but we are optimistic at this point that it can be achieved.

We will need to run the first phase at least once, possibly twice, before we could open the second phase, but the intention, all other things being equal, is that the second phase would begin in 2010.

Rules change

We last changed the Rules of the Association just over six years ago, at which time we were envisaging a sea change in the way ALA was administered and operated. Now, in light of experience, we have carried out a review and think it appropriate to make some small changes.

There has been such an expansion in ALA's work – more even than we foresaw in 2001/02 – that there is now a need to permit Council to co-opt members for particular roles or projects, which power does not currently exist.

Also, it is becoming apparent that the maximum of three consecutive terms of three years without a break for Council Members and Officers is perhaps a little too long.

Council has therefore redrafted those and other consequential provisions in the Rules, and the amendments will be put to a Special General Meeting during the Autumn Day Conference in London on 17th September. I will circulate formal notice along with a copy of the draft amended Rules in due course, but if anyone would like a copy in advance, please let me know.

I should also be pleased if you would let me know if you would like to put yourself forward for election to Council in the coming years. It is important for our continued development that we have full representation from all professions, regions and points of view, as well as, from time to time, fresh minds and fresh ideas.

ENVIRONMENTAL

Pollution liability for farms and estates

Magnus Willatts, Renaissance Regeneration Ltd., Bury St. Edmunds

The occurrence of pollution is usually associated with our well-documented and oft-cited industrial heritage. The Midlands, the Potteries and Tyneside dockyards may all get a mention in discussions about environmental contamination. Less well documented is the prospect of these issues affecting rural or agricultural areas.

Agricultural land and estates cover nearly three quarters of the total land area of the UK, but there is little information about the proportion of this which may be affected by pollution from past or present activities.

Since the appearance of the Law Society Warning Card in 2001, it is de rigueur for legal professionals to undertake environmental due diligence assessments for all commercial property transfers. However, for agricultural property this process is still often thought to be something of a luxury due to high costs and the low perceived risk.

The mood may now be changing. As I and my colleagues know from having participated as expert witnesses, there are increasing numbers of cases in which solicitors have been sued for failing to carry out environmental searches whilst conveying agricultural properties. The availability of affordable and dedicated assessment for large areas of land means that there is now no need for this exposure.

This article briefly explains the background to contamination risk in an agricultural context, the legislative framework and the availability of advice.

Sources of pollution

Pollution is generated either through contemporary agricultural practices or through historic land use patterns.

Operational practices may result in diffuse or localised contamination. Diffuse contamination involves low concentrations over large areas and is mainly caused by high volume fertiliser, pesticide and herbicide use. Recent research suggests that, in addition to the immediate impact on the soil, the main effect of this type of contamination is on the surface water features near to the property.

Localised contamination tends to be more diverse: perhaps oil or diesel spills, the presence of sheep dip facilities, leaks from silage/slurry storage or poor practice at buildings let to industrial entities within the farm environs.

From a historic perspective, the landfilling of pits or depressions is by far the most common cause of contamination. Historic analysis of farmland will almost always reveal a surprisingly frantic level of activity.

Throughout the 19th and early 20th centuries it was extremely common to quarry materials such as gravel, sand, clay or chalk. This was often done on a small scale to service local requirements, as long distance transportation was difficult.

These small pits were often filled in the mid or late 19th century to bring them back into productive agricultural use, and sometimes as a source of income from waste disposal fees. Prior to farm waste regulation in 2007, the landowner was at liberty to dispose of any agricultural waste generated on the farm at any location they chose (within the farm confines).

Needless to say, under this casual criterion, such filled areas should be viewed with considerable scepticism from the point of view of potential contamination.

On larger estates evidence of gas and power production, tanneries, and brick and tile works servicing the local community are common occurrences, during these early periods. These activities were, of course, unregulated and regularly persisted for many years in the same place, which left a legacy of serious heavy metal, hydrocarbon and inorganic contamination.

A final aspect which is often overlooked is the development of the farm itself. When demolition or redevelopment work was undertaken, farm owners would quite naturally look inward to source and dispose of the spoils of these activities.

Again, it is common to see the disappearance of an old barn or some animal sheds at the same time as a pit is filled nearby. Marshy ground was also often raised using rubble, which can hinder the future cultivation of sometimes large areas of land.

Impact of pollution

As mentioned above, the main impact of diffuse contamination is to the soil itself and watercourses near to the subject property. Localised contamination tends to enter either an aquifer (underground water resource) or watercourse, where it can both pollute the water itself and travel laterally to cause harm elsewhere.

The impact of pollution may be seen on the crops grown on the farm, the animals grazing there, local residents and the wider environment (for example, coastlines, rivers, ecological habitats, etc.).

Within the farm area, chemical contamination and landfill gas (such as methane or carbon dioxide) can significantly reduce crop yields and can negatively influence land use management decisions. The same is true for inert obstructions within the soil, such as rubble from land-raising or foundation from former buildings.

When pollution leaves the farm, it can lead to both regulatory involvement and litigation by neighbouring properties. The landowner may be fined, may have to pay to remedy all damage caused and may have their land officially determined as contaminated. They could then be compelled to remediate the soil or groundwater, which can be extremely expensive and disruptive.

Legislative framework

Commercial practices involving the generation and disposal of waste have remained unchecked for the larger part of the industrial history of the UK. Only really in the last 30 years has legislation been implemented to introduce accountability to many of these activities.

Under the Environmental Protection Act 1990 and, to an equal degree, through public interest, environmental issues have risen quite rapidly to prevalence in recent years. Local Authorities are now tasked with the job of identifying polluted areas within their jurisdiction and have the power to demand remedial measures to make good the problems.

Some of the main areas of concern relate to the contamination of water resources and the consequences of landfilling – both of which are particularly pertinent to agricultural practices, as discussed above.

Quite naturally, as they supply the majority of our drinking water, aquifers are tightly controlled by various legislative instruments. Water abstractions used for public water supplies are protected by Source Protection Zones (in

which the acceptable concentration of certain compounds is low) and the vast majority of the rural landscape throughout the UK is designated as being vulnerable to nitrate build-up from fertiliser usage.

Somewhat surprisingly, full control of landfill practices on agricultural property was only introduced in 2007, despite commercial activity of this type having being controlled since 1974, initially by the Local Authorities and, more recently, the Environment Agency.

In 2000 MAFF (now DEFRA) issued guidelines to local authorities to aid them in the implementation of their contaminated land obligations as they apply to agricultural property. The updated document can be viewed as CLAN 4/04 on the DEFRA website[1].

The government department is also a statutory consultee for the contaminated land inspection strategies undertaken by the authorities.

Pointers within the guidelines refer particularly to the concentrations of heavy metals, organic and inorganic chemicals in the soil with respect to phytotoxicity, the health of livestock and ultimately the path to the human food chain.

Limits are now imposed on the concentration of contaminants in food and animal feeds, and local authorities and the Environment Agency have the power to order remedial action in respect to localised pollution hazards where a linkage to a vulnerable receptor can be demonstrated (not too difficult in an agricultural context).

When a property is procured, unless contract wording explicitly excludes it (or under certain other conditions involving identification of the original polluter), the liability for contamination is inherited along with the property.

It is therefore strongly recommended that assessment is conducted at an early stage to evaluate the likely exposure to environmental risk.

Availability of due diligence

When buying agricultural land, common sense would suggest that enquiries be made with the vendor in respect of any prosecutions, notices or advice from regulatory bodies. Additionally, any knowledge of land filling, dumping and discharge of effluent or waste should be supplied.

The last 10 years has seen a swift rise in the availability of standard desktop tools for environmental assessment to service the now-standard, commercial due diligence requirement. These reports are generally designed around small commercial entities and can be both off-target and extremely expensive when scaled up to cover large land areas.

To make matters worse, they are almost exclusively computer generated in the first instance, which leads to a lack of flexibility to comment in any meaningful way on issues affecting agricultural concerns.

Several companies have been supplying desktop reports and allied consultancy services for commercial property for several years. I am pleased to say that my company was the first to offer a tailored product for agricultural and large estate property in 2004, and is now the market leader in this field.

Our Farm Risk Review offers a manually produced assessment of agricultural land of almost any size at a very affordable rate[2].

The reports are based on the fullest historic and current environmental data, supplied by Landmark Information Group, and manually written by IEMA qualified consultants. As well as the typical coverage of a desktop assessment regarding liability risk, the reports comment specifically on agricultural land use, water resources, and rights of way, where relevant. Where the latter is of concern, a special Rights of Way report is available as an addendum to the main product.

Summary

The risk of pollution affecting agricultural land is significantly lower than the risk associated with more mainstream commercial and industrial premises. This is as true now as it has ever been; but a shift in the legislation and clients' expectations, reflected in recent cases, is showing that risks do exist and should be qualified during the property procurement process.

Until recently there has been an understandable resistance to the adoption of standard environmental due diligence practices for farms and land, driven by a false impression of actual risk, the indigestible cost and a lack of relevant assistance.

The process of obtaining information is now streamlined through new products and can offer the required level of protection for all parties at an affordable cost.

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1 *www.defra.gov.uk/environment/land/contaminated/pdf/clan4-04.pdf*

2 Less than £500 for an estate of over 1,000 acres, for example

Tougher fly-tipping enforcement

Against the background of the 2007 Waste Strategy, devised to tackle the increasing problems of fly-tipping, which cost the taxpayers £74m to remedy in 2006/07, DEFRA is consulting on two proposals under the title *Controls on the Handling, Transfer and Transport of Waste*. The measures are targeted at specific sectors such as waste brokers and dealers, rogues among whom are responsible for many of the worst offences.

The first paper deals with the duty of care, waste carriers and brokers, and proposes changes to the licensing system. The current three-year licences costing £149 initially and £99 for each renewal, would be replaced by an annual licence, at a cost of £60 for the 'upper tier' and £45 for the 'lower tier'.

Broadly speaking, brokers and dealers would be in the upper tier, which would require a compliance inspection as well as registration; those who cart their own and, specifically, agricultural waste would be in the lower tier, exempt from the compliance inspection.

The second paper deal with questions of enforcement, specifically the search and seizure of vehicles. Powers already exist to seize a vehicle if an officer has reasonable grounds to suspect the illegal deposit, treatment or disposal of waste, but the purpose is limited to discovering who was using the vehicle when the offence was committed. New powers would widen those powers.

The vehicle could be retained for up to 14 days, after which the owner would be notified of his right to collect it. Failure to do so within seven days would result in the vehicle's lawful destruction.

The first consultation is open until 8th September, the second until 5th September.

What's in it for you?

Helen Gough, Lodders LLP, Stratford upon Avon

Membership of ALA now stands at over 1,100. With that many professionals across the country all committed to rural business, the networking opportunities are vast and the combined knowledge and experience of the Members is immense.

Through developing my own interest and involvement in ALA, I have already experienced so many benefits and am eager to encourage other young professionals to get more involved so they too can take advantage of the opportunities available.

Behind the setting up of the 'The Next Generation' (TNG) lies another very real and serious concern that had to be addressed. Nothing lasts forever so they say, and it's true.

Those currently occupying the positions of office within the ALA will – although not for a few years – come to the end of their service periods. Under the Rules, these individuals will not be eligible for re-election, or will be retiring from their roles. This means that the ALA needs to be looking now to those within TNG who are willing to show the extra commitment to this invaluable forum to keep it going and develop it even further.

TNG, although still very much in its infancy, is gathering momentum and gaining strength, as will be clear from these columns. With other like-minded, keen individuals getting involved and developing their links with other professionals it's a chance for anybody interested to not only improve their knowledge and professional skills but create stronger professional relationships in doing so.

Several events have already been held in different parts of the country. Members in the North East, led by Jonathan Thompson from Ward Hadaway in Newcastle-upon-Tyne and others, have formed their own sub-committee and are successfully moving the TNG forward in their area.

Rachel McKillop from Roythorne & Co in Newmarket is also heavily involved and has, with the likes of Jack Royall of Birketts, Norwich, held a couple of events in that region which have been well received.

A small group led by Felicity Wyatt of Hewitsons, Northampton, Mike Holland of King West, Market Harborough and Matt Hawkins from Arnold Thomson in Towcester have been flying the flag in the East Midlands. Other groups are springing up as word gets around.

Slowly but surely TNG is growing and getting stronger and, if you're not already, you too could be involved in organising events for your region or join those of us who have already started – the more the merrier!

The first West Midlands TNG event

I knew that I wanted to do something in my region. After speaking with Geoff Whittaker, I teamed up with James Leyland from Wright Hassall LLP in Leamington Spa and together we organised the first TNG event in the West Midlands which was held at the Warwickshire Golf and Country Club in Leek Wootton on 17th April 2008. I'm pleased to report it was a great success!

Our initial concern was that we had to make the event something that would be attractive for as many people as possible to attend. As the idea behind the TNG is to attract not only the 'younger professionals' from the different sectors who are already Members of the ALA but also to attract new Members, we needed a subject which appealed to and affected us all ... and let's face it there's no getting away from taxes, now, is there?

Carlton Collister from Grant Thornton kindly agreed to be our speaker and put together an hour's presentation on numerous tax issues including the VAT election to tax on land generally, tax considerations on diversification projects and the changes in the position regarding charging VAT on entitlements, CGT and SDLT on entitlement transfers. Although it was a vast area to cover the presentation was ideal, it was pitched at exactly the right level for the 30 attendees, a cross section of rural business advisers.

Our invitation list was compiled from a list of members for the region that Geoff kindly provided, as well as including personal contacts that we already had and general invitations were extended to others locally who have agricultural interests that we thought may be interested.

After the seminar, of course, there was a buffet and drinks and the chance to do some all-important mingling and networking. The atmosphere was very relaxed and informal and the general consensus, I'm pleased to add, was that it had been a very beneficial and enjoyable event and many were keen to know when the next event will be and how they could get involved.

Significant it was that, having started at six o'clock, there were still people chatting away at nine.

What next?

There are discussions taking place for the next West Midlands event to be held sometime in September and then for them to continue on a regular basis, with others getting involved setting up additional meetings in other parts of the region, with the aim of combining them with more informal activities and also incorporate some social events with a bit more added fun.

So, what is in it for you?

The opportunity to expand your links with other professionals involved in the industry, to develop your own knowledge, experience and understanding of current agricultural issues and the industry as a whole, which in turn will aid you professionally to serve your clients more efficiently and effectively and to enjoy yourself doing it. Sounds good to me!

How can you get involved?

If you are interested in organising your own event or joining those that have already been set up then you can direct queries to any of us listed in the contacts section who will be more than happy to help.

Down on the farm ... TNG al fresco

George Dodds (left) and Robert Sullivan explain to ALA:TNG delegates some of the finer points of farming for conservation and profit

The wind and rain did its best to put off delegates to TNG's Farm Walk in Northumberland, but it didn't succeed. And, in an admission of defeat, it turned on the sunshine just as it was time to go in for the barbecue!

We were privileged to visit Harry and Caroline Chrisp's Longbank Farm, near Alnwick. Harry, from Dickinson Dees LLP in Newcastle, as well as being a solicitor, is also the second generation tenant of the Duke of Northumberland and was kind enough let a few fellow professionals wander around his conservation prize-winning land.

George Dodds, FWAG officer in Northumberland, illustrated various examples of conservation farming techniques: the six-metre CSS field margins; pond creation; wildlife-friendly hedgerows and environmental set-aside – i.e. fallow ground sown with mixed cereal and grass seed crops for winter bird feeding and as cover for game birds.

The farm's agronomist, Robert Sullivan from Strutt & Parker's Morpeth office, looked at some of the science of crop production and rotation; the logic of fertiliser and pesticide application; the effect on yield of variations in rotations.

Interestingly, in times when the press is banging on about farmers coining it in on the back of high crop prices, Robert produced some comparative figures for 2006 as against expectations for 2009, taking into account both rising product markets but also increasing fertiliser, pesticide and fuel costs. The improvement was but marginal!

Opinion from all present was pretty clear on the falling in of the current round of Countryside Stewardship Scheme agreements, which will come to an end in three or four years' time. The inflexibility of current agreements seems likely to inhibit farmers from wanting to continue. The authorities need to be encouraged to introduce more flexibility and better financial incentives in the new round.

If they do not, they risk losing at a stroke the not inconsiderable benefits that have been achieved, at a cost of millions of pounds of public money, over the last 15 years or so.

Thanks for an excellent afternoon of education and fellowship go to George and to Robert, and especially to Harry and Caroline and to Dickinson Dees, who kindly sponsored the event. **GDW**

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EUROPEAN FOCUS

CAP Health Check in full swing

Geoff Whittaker, West Mersea

The draft legislation to give effect to the CAP Health Check reforms was published by the EU Commission on 20th May. The opera is now in full swing: the Fat Lady may be warming up in the wings warming up, but the lady at centre stage, Commissioner Mariann Fischer Boel, has put her weight behind the package of measures intended to remove restrictions on farmers to help them respond to increasing demand for food.

The headlines show the end of partial decoupling, set-aside and much of market intervention. Milk quotas will be around until 2015, but they will be increased to enable farmers to prepare for their abolition.

Agriculture ministers have given a "broadly positive response". As always, however, the devil is in the detail and there will be a need for a Commission regulation on the mechanical processes before we will know exactly how they will work.

A new horizontal regulation

There is to be a new horizontal regulation to consolidate and amend Council Regulation 1782/2003. Additionally, there are draft regulations to amend those dealing with the common organisations of markets and with rural development, as well as a proposal for a new Council Decision to amend the rural development strategy.

The initial communication of the Health Check proposals last November indicated that the Commission had moved its position from supporting the historical basis of allocation of entitlements, as in Scotland and Wales, to favour the area basis, which will be the position in England come 2012.

The 2003 regulation does not permit a Member State to change its basis of implementation once it has made its initial decision, so the means are introduced here for it to do so.

Capping replaced by progressive modulation

Modulation is to increase from next year. The initial proposals for greater compulsory modulation plus capping of payments at higher levels have been combined into a 'progressive modulation'. The details of the new rates are shown in the table below.

The voluntary modulation regulation (Council Regulation 378/2007) will be amended so that the combined maximum that may be modulated by compulsory EU and voluntary national modulation remains at 20%.

Exanded Pillar 2

The Commission intends that this will aid Member States to meet the "new challenges" of climate change, renewable energies, water management and preservation of biodiversity, and an amending regulation is proposed to widen the range of operations and focus the spending of the modulated funds. The Rural Development Regulation (Council Regulation 1698/2005) is to be amended to oblige Member States to provide in their rural development plans from 2010 onwards for operations having those new challenges as their priority.

Bands (€)	2009	2010	2011	2012
1-5,000	0	0	0	0
5,001-99,999	2	4	6	8
100,000-199,999	5	7	9	11
200,000-299,999	8	10	12	14
>300,000	11	13	15	17

Modulation – additional percentage deduction by size of claim

A new Annexe to the regulation contains a list of possibilities. Improving fertiliser efficiency, manure storage, extensification and afforestation are suggested to address climate change. Anaerobic digestion plants, perennial energy crops and biomass production might promote renewable energy. And investment in water saving technologies, wetland restoration and soil management could improve water management.

Focus on genuine farmers

It has been noted that an unacceptably large number of claimants do not have farming as their main objective. A new power is therefore proposed to exclude companies or firms "whose principal … objects do not consist of exercising an agricultural activity".

Further, almost half of claimants across the EU receive less than €500. To reduce the numbers of tiny claims, it is proposed that a minimum threshold be applied of either €250 or 1ha, at the option of the Member State.

Partial decoupling was permitted under the 2003 regulations but within the first year some 90% of all SPS payments throughout the Union had been decoupled. Partial decoupling is therefore to be phased out by 2010 for all sectors except suckler cows, sheep and goats.

The so-called Article 69 measures, on the other hand, will be extended. Article 69 of Regulation 1782/2003 permits Member States to retain up to 10% of their national ceiling for specific application to a sector or sectors for the protection or enhancement of the environment or the improvement of quality and marketing of agricultural products. In the UK, only Scotland has taken advantage of this, with the Scottish Beef Calf Scheme.

Relaxations are proposed which would expand the uses to which such funds could be put. It appears unlikely that there is the political will, at least at present, to take advantage of the new flexibility in the UK, but hill farmers can be expected to campaign to change that view.

Market intervention measures to go

As widely heralded, set-aside is to be abolished from 2009. Set-aside entitlements as a type will also be abolished and they will be converted to normal entitlements.

Concern was loudly expressed by environmental and wildlife organisations that abolishing set-aside would lead to the loss of benefits built up over the 16 years since it was introduced. The Commission is steadfast that set-aside, as a market intervention tool designed to curb production, has had its day. However, it has noted the concerns and has introduced additional provisions into the cross compliance regime in an attempt to address them.

Other forms of market intervention are similarly criticised and are likewise set to be reduced to the level of a basic safety net.

Milk quotas are not directly addressed in the Health Check, because they are committed until 2015. The general consensus is against their being renewed at that time and the present focus is, as it has been since the Health Check debate began early in 2007, on achieving a 'soft landing' for dairy farmers come that date.

Quotas were increased for 2008/09 by 2%, and the proposal is to increase them by a further 1% per annum from 2009 to 2013.

A final report on the future of the scheme will be published before the end of June 2011. It is likely that its conclusions will not be radically different from the present position.

Cross compliance changes

Cross compliance has been reviewed. As noted above, certain environmental benefits of set-aside are sought to be replicated by the addition of two standards under Good Agricultural and Environmental Condition. Breach of a water abstraction licence will become a ground for withholding single farm payment, as will failure to maintain buffer strips along watercourses.

On the positive side, certain of the provisions under the Wild Birds and Habitats Directives (SMRs 1 and 5) are to be removed, as is the identification and registration of bovine animals (SMR 7). However, SMR 8, which covers largely the same ground as SMR 7, remains.

National Reserve restrictions lifted

There are minor but potentially significant changes to the technical provisions relating to entitlements.

From 2009, the prohibition on transfer of entitlements allocated from the National Reserve within five years of their allocation, and the requirement to claim against them in each of those five years, will be removed.

So also will the restriction on transferring entitlements without land unless 80% or more have been activated (except in those of the new Member States who are moving from the Single Area Payment Scheme to the SPS).

The Commission's proposals might have been generally well received, but that does not, of course, mean that there will not be further changes before they pass into law. It ain't over till it's over, and there is much that could still happen.

The Irish referendum on the Treaty of Lisbon may have distracted the attention of some, but not the DG AGRI. The intention is to have the Health Check settled by the end of the year, so that discussions on the Budget for the EU for 2013 onwards can take place as planned in an atmosphere of certainty.

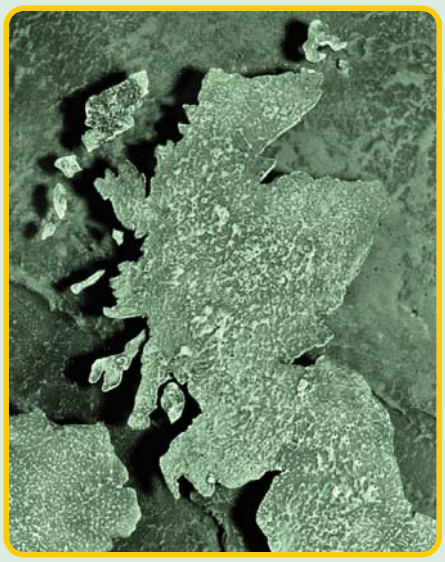
Health Check proposals in a nutshell

- Set aside is to be abolished and set-aside entitlements will be transmuted into normal entitlements.
- Other intervention mechanisms in relation to, for example, dairy products will be reduced to the level of a true safety net or abolished.
- The rule whereby entitlements allocated from the National Reserve may not be transferred within five years of allocation, and must be used in each of those five years is to be abolished.
- Restriction of sale of entitlements without land to those cases where at least 80% have been activated is to be removed
- Minor support schemes such as hemp*, durum wheat, protein crops*, dried fodder*, rice, starch potatoes and nuts* (only those asterisked are relevant to the UK and then only to a very minor degree) will be decoupled and subsumed into the SPS.
- The energy crop premium will be abolished from 2010.
- Changes will be made to the cross compliance requirements of good agricultural and environmental condition, and to the conditions attaching to certain payments under the Rural Development (RD) programmes, to address environmental concerns arising from the abolition of set aside.
- The provisions allowing Member States to allocate up to 10% of their national budget for the SPS in a given sector to schemes for environmental benefit or improved marketing and quality of agricultural products will be extended to permit such funds to be used to support farmers in certain livestock sectors, or to enhance the value of entitlements in areas being restructured or redeveloped under formal political programmes.
- Member States will be given the opportunity to revisit the basis of their establishment of the SPS with a view to reducing the impact of the historical basis and moving to a regional payment.
- Modulation of funds from the single farm payment to RD will increase. The first €5,000 of any claim will continue to be exempt from modulation. Basic compulsory modulation will remain at 5%, but there will be additional compulsory modulation of 2% in 2009, rising in steps of 2% per year to 8% in 2012. Further additional modulation will apply at increasing levels in bands according to the amount received by the claimant: those receiving €100,000 to €199,999 will lose a further 3% to 9%, on the same basis; those receiving €200,000 to €299,999 a further 6% to 12%; and those over €300,000 a further 9% to 15% (see table, bottom left).
- The voluntary modulation regulation (Council Regulation 378/2007) will be amended so that the combined maximum that may be modulated by compulsory EU and voluntary national modulation remains at 20%.
- Member States will be required to introduce a minimum level of acceptable claim, either in value at €250 or in area at 1ha.
- Member States will be at liberty not to grant payments to farmers who do not have as a "principal object" the carrying on of an agricultural activity.

SCOTTISH PERSPECTIVE

An Englishman's home is his castle…

Alex Buchan, Brodies LLP, Edinburgh



So the saying goes. However, can the same be said of a Scotsman's home following the recent "right to roam" decisions at Stirling Sheriff Court in the *Snowie* and *Ross* cases? These cases ran in tandem with the same judgement reached in each instance and this article shall simply refer to the *Snowie* case.

The legal position

The Land Reform (Scotland) Act 2003 permits responsible pedestrian access to all land except certain categories which are excluded. One such category is houses where there is to be excluded "sufficient adjacent land to enable persons living there to have reasonable measures of privacy in that house … and to ensure that their enjoyment of that house … is not unreasonably disturbed".

What exactly does that mean? Some guidance is provided whereby "among the factors" used to determine the extent of such land there is to be considered "the location and characteristics of the house…".

This is vague and raises all sorts of questions as to what may be considered within the meaning of 'location' and 'characteristics' and what other factors may be worthy of consideration.

It is easy to sympathise with the legislative draftsman who clearly recognised that this was not a 'one size fits all' test and would hinge on the particular facts and circumstances of each case. A good example of the difficulties encountered in attempting to codify the common law – and a recipe for litigation.

In passing, it is worth noting that one of the other restrictions on access is in relation to land in which crops have been sown or are growing. The definition of crops does not include grass unless it has reached a suitable height to be used for hay and silage.

> "This goes a long way to redressing the balance of media reports that the land reform legislation had failed"

The background

Mr. and Mrs. Snowie, the owners of Boquhan Estate in Stirlingshire, had restricted pedestrian access by means of making vehicular entry gates electronically controlled and locking the adjoining pedestrian access gate. Various complaints were received by the Snowies from aggrieved parties seeking pedestrian access and this culminated in Stirling Council serving a notice on the Snowies alleging a breach of their obligations in respect of permitting access.

Mr. and Mrs. Snowie applied to the court for a declaration that the land specified in their application (an extensive area which included driveways leading from the main public road) was not land in respect of which access rights were exercisable. The case was defended by the Council and The Ramblers' Association.

The test

In his judgement the Sheriff made frequent references to the *Gloag* case. That case was successfully brought by Ann Gloag (of *Stagecoach* fame) in relation to her property at Kinfauns Castle in Perthshire with the court granting declarator that the disputed land was not subject to access rights.

In the *Gloag* case the court considered whether the test of reasonableness in relation to privacy and enjoyment was objective or subjective.

The Sheriff followed the *Gloag* case in assessing that it was an objective test and therefore the identity of the person actually residing in the house was not relevant:

> "It seems to me that the Court is obliged … to determine what a reasonable person living in a property of the type under consideration would require to have to enjoy reasonable measures of privacy and to ensure enjoyment of the house was not unreasonably disturbed. That is an objective test."

This has to be the correct approach. It is possible to set up a convincing argument that, for example, the Beckhams would require a larger area around their house than, say, a low profile businessman due to security risks, press intrusion and other such factors. However, this would be inoperable in law.

A situation would be created where the extent of the excluded land could alter every time the house changed hands depending on matters such as the occupiers' public profile, family circumstances, character and expectations/fears.

Accordingly, it seems that if you are a wealthy, high profile individual with security and privacy concerns beyond that of the ordinary person, you should acquire an impressive house with extensive grounds which should result in sufficient adjacent land being excluded to provide reasonable measures of privacy. If, on the other hand, you are high profile but not wealthy enough to acquire such a property then it would seem you have limited recourse through the operation of the objective test.

The decision

The Snowies' application was unsuccessful. A reading of the judgement discloses a variety of matters that compounded to substantially weaken their case.

Amongst such matters were the fact that access had been taken frequently by members of the public for a period of years for the purposes of recreational and dog walking and the locking of the pedestrian gate did not ensure the security of the estate as access could be taken through a neighbouring farm, by means of another driveway or by simply entering through breaks in fences or hedges.

Additionally, the residents of the other six houses on the estate and their families and friends, people using equestrian facilities or stabling horses and the adjoining farm workers all had rights of access over the estate.

However, one issue, which plays a part in all court hearings but is particularly noticeable in this case, is the 'preferred evidence' of the defenders.

The Sheriff judged that, whilst Mr. Snowie's concerns about privacy and security were genuine, his desire to restrict access informed his evidence so as to render some of it unhelpful.

Interestingly, the reason that Mr. and Mrs. Ross were brought into the litigation was due to the disclosure that the offending gates were the subject of a lease between the Snowies and the Rosses.

No satisfactory explanation was provided for this strange arrangement and it could certainly be seen as an attempt to defeat the notice served by the Council on the Snowies. Not the best of starts.

Further, Mr. Snowie prided himself on his ability to assess whether an individual was a genuine walker or up to no good. He described an incident when he had met a couple with a torch and baton.

It seemed to be accepted by Mr. Snowie that, in fact, a stick was being carried and that it may have been in the nature of a walking stick. A security report had been prepared for Mr. Snowie by a former police Chief Superintendent and he gave evidence to the effect that the term 'baton' was neutral and did not infer that it was a weapon – a strange assertion, particularly from someone who has been in the police service.

The security report was considered to lack the objectivity of a report by a purportedly independent expert and the evidence of the former policeman appears to have been particularly damaging to the case.

It was submitted that Mr. Snowie was "wholly unreliable". The Sheriff appeared to disagree, but does state that "in general his evidence was characterised by an almost instinctive reluctance to accept that any access taker could be genuine, or indeed to say anything that might not wholly suit his case".

The outcome was that the Snowies lost their case although the Sheriff did grant declarator in respect of a considerably smaller area of ground around the house which he considered appropriate to be excluded from public access.

Needless to say, the gate was to be unlocked to allow access to the driveways.

Conclusion

What conclusions can be drawn? In trying to predict what might be the outcome of any future case of this type, the straight answer is 'very little'.

The case so clearly depended on its own unique facts and circumstances from the type and location of the property (which, as in the *Gloag* case, the Sheriff visited) to the extent of the area of ground sought to be excluded to the evidence led and the credibility of the witnesses involved. It is therefore difficult to see how a decision of this type can be in any way a precedent or inform any future case beyond an analysis of the applicable law.

One important point is, of course, that the Snowies did not obtain the declarator which they sought.

After the *Gloag* case, there were press and media reports and a general feeling among certain sectors that the land reform legislation had failed and was potentially fundamentally flawed. This decision goes a long way to redressing that balance.

In the final analysis there is a significant issue which can only lead to more litigation. It may, of course, be the case that the Snowies, buoyed up by the *Gloag* decision, expected their application to be successful.

However, it may well be that a tactical decision was made to apply for exclusion of an area that was "far too much" on the basis that it would be reduced to an acceptable (and potentially even larger than acceptable) area – if the Sheriff is going to ultimately decide the area then why not start high? Expect more litigation.

SINGLE PAYMENT SCHEME

Scissions and schisms – partnership law meets the Single Payment Scheme

Michael Johnstone, Loxley Legal Services, Wotton under Edge

The allocation of single payment entitlements in 2005 will now be a distant memory to many, but for some the chaos of allocation still goes on as the RPA struggles to address outstanding issues.

One of the features of the RPA's approach to allocation has been its staunch refusal to get embroiled in debates between farmers as to quite who was entitled to what.

Instead the RPA has taken the view that it was for the parties to resolve any arguments. One such argument arose in *Smith v Hillend Court Partnership*[1].

The facts

Very briefly the facts were these:

- Until 31st July 2000 Robin Smith farmed in partnership with his parents. There was no written partnership agreement. It was a partnership at will.
- The partnership farmed various blocks of land, some owned by Robin Smith, some by his parents and some rented in. The partnership owned live and dead stock which it used in the farming business and employed one farm worker. The partnership claimed subsidies (both arable area aid and livestock subsidies) in its name and sold the crops and livestock.
- With effect from 31st July 2000 Robin Smith agreed with his parents that they would go their separate ways and from that date his parents continued to trade in the name Hillend Court Partnership whilst Robin Smith trades in his own name. The land holdings were split between them, as was the live and dead stock. The one employee of the partnership followed Robin Smith.
- In 2003 that was all documented by a deed which in its recitals referred to the partnership having "dissolved on the 31st July 2000 when Robin retired".

All of that pre-dated the discussions leading to the change over to the Single Payment

Scheme. Consequently no one at the time considered the future consequences in terms of the allocation of entitlements under the Single Payment Scheme.

The issue that arose related to the treatment of the claims' history associated with that land occupied by Robin Smith after 3rd July 2000. (For the purposes of this article reference has been made only to the claims' history being associated with the relevant land. However, as a consequence of the definition of 'production units' within art.2, Commission Regulation 795/2004, a farmer's claims' history can also be associated with livestock that gave rise to the receipt of direct payments.)

The claims' history associated with that land for the two years 2001 and 2002 was unarguably his, but his parents maintained that they were the continuing business of the partnership and they were entitled to the claims' history associated with that land for 2000.

Robin Smith argued that on 31st July 2000 there had been a scission within the meaning of Council Regulation 1782/2003, art.33(3), and Commission Regulation 795/2004, art.15(2) – which underpin the Single Payment Scheme – and that he was entitled to the claims' history for the land he had taken with him.

The RPA declined to enter into the fray and, unable to settle their differences, the parties were forced to go to court to seek a declaration. The issues came before His Honour Judge McCahill QC in October 2007.

The agruments

Robin Smith's parents argued that:

- Before 31st July 2000 the partnership traded as the Hillend Court Partnership. After 31st July 2000 they continued to trade as the Hillend Court Partnership. There was no formal winding up of the partnership's affairs and no disposal of all of its assets. The original partnership had accordingly continued with them. Robin Smith had simply left (by retiring) and set up in business on his own. There was no scission or division of the partnership.
- The partnership was not itself a farmer, but a farm management business supplying machinery and manpower to the various landowners/occupiers in their personal capacities.
- Robin Smith fell within the definition of a "farmer commencing an agricultural activity" and accordingly could (and should) have made an application on the basis that he was a new entrant.

Robin Smith argued that:

- Up to 31st July 2000 the partnership had been a classic example of an English farming partnership, occupying and farming the various blocks of land, selling the produce in its own name and claiming the subsidy associated with that farming for its own benefit. The fact that it had no formal right to occupy any part of the land was neither here nor there, it being well established that a farming partnership could occupy land on an informal basis in this way.
- There was nothing to suggest the partnership was merely providing farm management services to the individual partners. In particular there was no invoicing to suggest the provision of such services between the partnership and the individual partners.
- As a matter of law the effect of Robin Smith's retirement on 31st July 2000 was to dissolve the partnership on that date. There was no inconsistency between the concepts of retirement and dissolution. Indeed, retirement was recognised as one route to dissolution (this being a partnership at will).
- In any event, it did not matter whether there had been a dissolution or a retirement without a dissolution – both events were capable of falling within the scission provisions of the Single Payment Scheme and thus entitling Robin Smith to the benefit of the 2000 claims' history associated with the land that followed him.

The decision

In a detailed judgment His Honour Judge McCahill QC came to the following conclusions, some of which have consequences far beyond the narrow issue of scission and the allocation and value of entitlements:

- Up to 31st July 2000 the Hillend Court Partnership was a farming partnership and a farmer for the purposes of the Single Payment Scheme. All three partners were farmers within the meaning of the Single Payment Scheme to 31st July 2000 and continued as farmers after that date.
- It followed that as a partner in that business and subsequently trading on his own account, Robin Smith was at all material times exercising an agricultural activity and producing agricultural products in his own name and at his own risk. He could not therefore be treated as a farmer commencing an agricultural business on 1st August 2000.
- As a matter of English partnership law the effect of the agreement between the parties was the dissolution of the partnership on Robin Smith's retirement on 31st July 2000. Accordingly on 1st August 2000 a new farming partnership came into existence between Robin Smith's parents, albeit trading under the same name and with the same tax reference and SBI number as the old partnership.
- The parties agreed to a split in the partnership in specie amongst themselves.
- It was debateable to what extent the subtleties of English partnership law were relevant to the application of the European Regulations establishing the Single Payment Scheme. On the facts there had been a scission within the meaning of the Regulations and as such Robin Smith was entitled to the claims' history associated with the land he continued to occupy after 31st July 2000.
- The first limb of Commission Regulation 795/2004, art.15(2), was apposite to cover both dissolution of a partnership and a retirement without dissolution. The second limb of art.15(2) was apposite to cover a retirement without dissolution.

On the narrow issue of the meaning of 'scission' within the Single Payment Scheme the decision may now be somewhat academic. However, the issues of English partnership law and its inter-relationship with European law, the wider interpretation of the word 'scission' and perhaps most particularly the treatment of a partner in a farming partnership as being a farmer in his own right and as having an agricultural activity in his own name and at his own risk, will be of continuing significance.

Comment

It is impossible to predict with any precision what the future may hold in terms of the Single Payment Scheme itself and other subsidy, support and regulatory schemes for agriculture.

The prospect of capping substantial payments to larger farming businesses – in one form or another – remains on the agenda and the treatment of a partner in an earlier business which may or may not have continued in its own right after the partner's departure may have ramifications within that context.

Similarly the modification or replacement of the Single Payment Scheme in years to come is likely to replicate the mechanisms under the original scheme for allowing for business splits during qualifying/assessment periods.

For a copy of the judgement in *Robin Smith v Hillend Court Partnership* email the author at *michael.johnstone@loxleylegal.com*

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1 [2007] Bristol County Court, unreported

Reviewing the rent

Gareth Williams & Felicity Wyatt, Hewitsons, Northampton

With the recent rise in the price of agricultural produce, rent reviews for agricultural holdings (something that has been neglected for the last 10 years or so) are back on the agenda.

Some more far-sighted landlords with Lady Day tenancies may have carried out rent reviews in March. Anecdotal evidence suggests a large number of landlords have served notices for reviews in September or October this year.

It is to be hoped that the majority of the reviews can be settled by negotiation between the parties, since a contested review can do serious damage to the landlord and tenant relationship.

However, with the rapid rise in the cost of both outputs and inputs, there is no doubt room for differences in opinion between landlords and tenants as to the correct rent.

AGRICULTURAL HOLDINGS ACT TENANCIES

The rent review process for Agricultural Holdings Act 1986 (AHA86) tenancies is governed by the procedural code of s.12 and sch.2. Section 12 gives either party the right to initiate a rent review by serving notice in writing on the other demanding that the rent payable from the next termination date be referred to arbitration provided that this is not more frequent than on three-yearly cycles. Schedule 2 contains valuation formulae which supplement s.12.

These are the rules for timing of the rent review process in the case of severed reversions, new holdings, etc. (para.5), rules for adjustment of boundaries (para.6), or the new rules inserted by Regulatory Reform (Agricultural Tenancies) (England & Wales) Order 2006 (RRO2006) dealing with new s.4(1)(g) tenancies under the Agricultural Tenancies Act 1995 (ATA95) (para.7) (as to which see later).

'Next termination date'

'The next termination date' is the earliest date when the tenancy could have been terminated by notice to quit, i.e. the next contractual term date following the expiry of twelve months. For example, a notice by 28th September 2008 for rent to be reviewed from 29th September 2009.

Form of the section 12 notice

There is no prescribed form for the notice but the leading practitioners' texts on agricultural law have useful guiding precedents.

Statutory intention and 'rent properly payable'

As has been confirmed by case law,[1] neither party can withdraw unilaterally a notice they have given; the intention of the AHA86 is that a notice, once given, acts as a trigger starting the statutory process.

The arbitrator must determine the 'rent properly payable' for the holding in accordance with the statutory rental formula, and his decision could be that the rent go up, go down, or stay the same.

The 'rent properly payable' is defined in sch.2, para.1, as the rent at which the holding might reasonably be expected to be let by a prudent and willing landlord to a prudent and willing tenant.

'Best before' and 'Use by' dates

Section 12(3) confirms (emphasis added) that "a demand for arbitration … shall cease to be effective … **on** the next termination date following service of demand unless **before** the said termination date –

"(a) **an arbitrator has been appointed by agreement** by the parties, or

"(b) **an application has been made to the President of the RICS** for the appointment of an arbitrator by him."

There are statutory forms for the appointment of an arbitrator by agreement (Form AA2) and for the application to the RICS (Form AA4). Again, leading practitioners' texts contain precedents, or the latter is available as prescribed form DR53, available from the RICS Dispute Resolution Service together with explanatory notes (*www.rics.org/services/disputeresolution*).

Valuation for rent review: comparables and disregards

Scammell & Densham, 9th edition, helpfully tells us:

> "Rent assessment on review is essentially an exercise in valuation rather than the strict application of legally defined principles."

There are however RICS/CAAV Guidance Notes (at *www.caav.org.uk*) and case law in *J.W. Childers Trustees v Anker.*[2]

The arbitrator is guided by sch.2, paras.1-3, to take into account in every case:

- the terms of the tenancy;
- the character and situation of the holding, including the locality;
- the productive capacity (defined at sch.2, para.1(2)(a)) of the holding and its related earnings capacity (defined at sch.2, para.1(2)(b)); and
- current levels of rent for comparable lettings.

However, he must not take into account:

- 'scarcity', 'marriage' or 'premium' value;
- tenant's improvements;
- tenant's fixtures;
- the grant-aided element of landlord's improvements;
- 'high farming';
- the fact that the tenant is in occupation; or
- any tenant's dilapidations and the like.

Arbitration under AHA86

Arbitration has always been the 'fall back position' for the AHA86 and its predecessors where the

> "There is room for differences in opinion between landlords and tenants"

the RICS "Red Book" than the rent review under the AHA86. Therefore guidance can be obtained from principles governing commercial and other rent reviews conducted under the "Red Book".

Arbitral process

Rent arbitrations under the ATA95, however arising, are conducted in accordance with the Arbitration Act 1996, the principles of which are set out above.

There are additional provisions in the ATA95 set out in s.30. As for AHA86 rent review arbitrations, the arbitration is to be conducted by one arbitrator only, the application for whose appointment must be made in writing to the President of the RICS accompanied by the appropriate fee.

If an arbitrator dies or becomes incapable of acting the parties are to agree the appointment of a new arbitrator. If they do not agree, either may apply to President for a new arbitrator.

CONCLUSION

The climate of British agriculture over the last ten or fifteen years means that rent reviews have become rare, and many farmers are paying the rents that were determined in the early 1990s.

There are therefore many practitioners for whom rent review is a rusty, if not totally unfamiliar, subject. In addition, with the advent of the AA96 for arbitrations commenced on or after 19th October 2006, many more senior practitioners may need to revisit their knowledge.

It seems that 2008 onwards will see a revival of this area of agricultural holdings law.

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1 *Buckinghamshire County Council v Gordon* [1986] 2 EGLR 8

2 [1986] 1 EGLR 1, CA

Rent review guidance

As mentioned in the adjacent article, the Royal Institution of Chartered Surveyors and the Central Association of Agricultural Valuers have produced some timely guidance on the practical issues facing valuers and others dealing with rent reviews. In a climate where reviews under tenancies of whichever hue have been fairly static for several years, practitioners with fewer than six or seven years PQE may never have met one in the flesh, and even some more experienced brethren will need to polish off their skills.

There are two publications in the CAAV Numbered Publication series – Nos.190 & 191– the first of which doubles also as an RICS Rural Faculty Briefing Paper.

No.190 deals with tenancies under the 1986 Act. It covers the process from the very beginning with an assessment of the circumstances in which the usual three-yearly cycle does not apply. Assuming a notice may be served, there are considerations on drafting and a specimen notice, coupled with the sage advice to ensure that the notice is properly and accurately drafted. "The courts might uphold a notice with minor errors but it is best not to have the problem". Amen.

A major question begged by the legislation concerns the "relevant factors" that an arbitrator must take into account. Here, the guide goes into detail regarding the terms of the tenancy, and the need sometimes to look beyond the mere agreement itself to the conduct of the parties and other extraneous factors. There is guidance, too, on how to assess the 'productive capacity' and 'related earning capacity', fundamentals in the process of arriving at a rent.

The effect of non-agricultural income, increasingly relevant on diversified farms, is also discussed.

There is a chapter devoted to "problem areas", such as dwellings, uneconomic subsidies, agri-environment payments and the ubiquitous Single Payment Scheme.

Publication No.191 – why did RICS not involve itself in this one also? – covers similar ground in relation to farm business tenancy rents. The basis of an open market rent is the statutory default, of course, and applies only if the parties have specifically adopted it and have not made other arrangements. Various alternative bases of assessment are described and discussed.

Where the Act is left to apply, the guide considers the mechanics of the review process per s.10 and the valuation issues arising under s.13. As with the AHA guide, the 'relevant factors' are examined one by one: attributes of the holding, comparables, budgets, etc. This is followed by a single-page chapter headed "Forming a View", a bullet-point summary of what evidence should have been accumulated (and what disregarded) and how it should together be considered.

As usual, these guides are well-researched, cogently written and practically focused. They are available to non-members of CAAV from the CAAV website at *www.caav.org.uk*. **GDW**

STATUTORY INSTRUMENTS to 31st May 2008

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

SI2008/576 = Agriculture and Horticulture Development Board Order 2008 – dissolves British Potato Council; Home-Grown Cereals Authority; Horticultural Development Council; Meat and Livestock Commission; Milk Development Council and establishes Agriculture and Horticulture Development Board – 1st April 2008

SI2008/618 = Brucellosis (England) (Amendment) Order 2008 – amends Brucellosis (England) Order 2000 (SI2000/2055) to correct erroneous reference – 6th April 2008

SI2008/638 = Gangmasters (Licensing Conditions) (No.2) (Amendment) Rules 2008 – amend the Gangmasters (Licensing Conditions) (No.2) Rules 2006 (SI2006/2373) to clarify the basis of calculation of licence fee – 6th April 2008

SI2008/646 = Farriers' Qualifications (European Recognition) Regulations 2008 – amend Farriers (Registration) Act 1975 to implement, in part, Directive 2005/36/EC on the recognition of professional qualifications – 31st March 2008

SI2008/647 = Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2008 – amend Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (SI2007/991, amended by SI2007/1669 & 2007/3302) as regards various requirements related to EPCs and recommendation reports – 6th April 2008

SI2008/652 = Diseases of Animals (Approved Disinfectants) (Fees) (England) Order 2008 – revokes and replaces Diseases of Animals (Approved Disinfectants) (Fees) (England) Order 2007 (SI2007/2203) – 6th April 2008

SI2008/665 = Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (England and Wales) (Amendment) Regulations 2008 – amend Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (England and Wales) Regulations 2005 (SI2005/3286) to transpose Commission Directive 2007/73/EC – 9th April 2008, except reg.4: 15th June 2008; and reg.5: 15th September 2008

SI2008/675(W72) = Dairy Produce Quotas (Wales) (Amendment) Regulations 2008 – amend Dairy Produce Quotas (Wales) Regulations 2005 (SI2005/537(W47)) – 1st April 2008

SI2008/789(W83) = Transport of Animals (Cleansing and Disinfection) (Wales) (No.3) (Amendment) Order 2008 – relaxes certain requirements of Transport of Animals (Cleansing and Disinfection) (Wales) (No.3) Order 2003 (SI2003/1968(W213)) – 15th April 2008

SI2008/944 = Specified Animal Pathogens Order 2008 – revokes and re-enacts with amendments Specified Animal Pathogens Order 1998 (SI1998/463) – 28th April 2008

SI2008/962 = Bluetongue Regulations 2008 – implement Council Directive 2000/75/EC laying down specific provisions for the control and eradication of bluetongue and enforce Commission Regulation 1266/2007; revoke and remake with changes Bluetongue (No.2) Order 2007 – England only – 26th April 2008

SI2008/1066 = Disease Control (England) (Amendment) Order 2008 – amends Disease Control (England) Order 2003 (SI2003/1729) to remove unnecessary definition, make clarification and replace incorrect reference – 12th May 2008

SI2008/1081(W115) = Heather and Grass etc. Burning (Wales) Regulations 2008 – revoke and replace Heather and Grass etc. (Burning) Regulations 1986 (SI1986/428, amended by SIs 1987/1208, 2003/1615) in Wales – 6th May 2008

BRUSSELS UPDATE to 31st May 2008

Council Regulation 247/2008 amending Regulation 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)

Council Regulation 248/2008 amending Regulation 1234/2007 as regards the national quotas for milk

Council Regulation 361/2008 amending Regulation 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)

Commission Directive 2008/39 amending Directive 2002/72 relating to plastic materials and articles intended to come into contact with food

Commission Regulation 149/2008 amending Regulation 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto

Commission Regulation 228/2008 amending Regulation 595/2004 with regard to intensity of controls on deliveries and direct sales of milk

Commission Regulation 246/2008 amending Regulation 1043/2005 implementing Council Regulation 3448/93 as regards the system of granting export refunds on certain agricultural products exported in the form of goods not covered by Annex I to the Treaty, and the criteria for fixing the amount of such refunds

Commission Regulation 259/2008 laying down detailed rules for the application of Council Regulation 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD)

Commission Regulation 273/2008 laying down detailed rules for the application of Council Regulation 1255/1999 as regards methods for the analysis and quality evaluation of milk and milk products

Commission Regulation 289/2008 amending Regulation 1266/2007 on implementing rules for Council Directive 2000/75 as regards the control, monitoring, surveillance and restrictions on movements of certain animals of susceptible species in relation to bluetongue

Commission Regulation 319/2008 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, and 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

Commission Regulation 345/2008 laying down detailed rules for implementing the arrangements for imports from third countries provided for in Council Regulation 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs

Commission Regulation 357/2008 amending Annex V to Regulation 999/2001 of the European Parliament and of the Council laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies

Commission Regulation 376/2008 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products

Commission Regulation 384/2008 amending Regulation 1266/2007 as regards the conditions for exempting pregnant animals from the exit ban provided for in Council Directive 2000/75

Commission Regulation 394/2008 amending Regulation 1266/2007 as regards the conditions

SI2008/1090(W116) = Bluetongue (Wales) Regulations 2008 – Welsh equivalent of SI2008/962 (*q.v.*) – 26th April 2008

SI2008/1139 = Common Agricultural Policy Single Payment and Support Schemes (Amendment) Regulations 2008 – amend the Common Agricultural Policy Single Payment and Support Schemes Regulations 2005 (SI2005/219) to replace 10-month rule and remove provisions re. FVP – 14th May 2008

SI2008/1180 = Transmissible Spongiform Encephalopathies (No.2) (Amendment) Regulations 2008 – amend Transmissible Spongiform Encephalopathies (No.2) Regulations 2006 (SI2006/1228, as amended by SI2007/1998) – 26th April 2008

SI2008/1182(W119) = Transmissible Spongiform Encephalopathies (Wales) (Amendment) Regulations 2008 – amend Transmissible Spongiform Encephalopathies (Wales) Regulations 2006 (SI2006/1226(W117) as amended by SI2007/2244 (W176)) – 26th April 2008

SI2008/1266 = Home Information Pack (Amendment)(No.2) Regulations 2008 – amend the Home Information Pack (No.2) Regulations 2007 (SI2007/1667 as amended by SIs 2007/3301 & 2008/572) to delay implementation of stated provisions – 1st June 2008

SI2008/1270(W129) = Specified Animal Pathogens (Wales) Order 2008 – Welsh equivalent of SI2008/944 (*q.v.*) – 10th May 2008

SI2008/1275(W132) = Products of Animal Origin (Disease Control) (Wales) Regulations 2008 – transpose in Wales arts.3 & 4 of Council Directive 2002/99 laying down animal health rules governing production, processing, distribution and introduction of products of animal origin for human consumption – 3rd June 2008

SI2008/1314(W136) = Disease Control (Wales) (Amendment) Order 2008 – Welsh equivalent of SI2008/1066 (*q.v.*) – 6th June 2008

SI2008/1317 = Drinking Milk (England) Regulations 2008 – revoke eponymous regulations and make provision for the enforcement of art.114(2) of and Annex XIII to the Single CMO Regulation (Council Reg.1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products) – 1st July 2008

SI2008/1426 = Mutilations (Permitted Procedures) (England) (Amendment) Regulations 2008 – amend Mutilations (Permitted Procedures) (England) Regulations 2007 (SI2007/1100) by inserting new permitted procedures and related requirements – 2nd June 2008

for exempting certain animals of susceptible species from the exit ban provided for in Council Directive 2000/75

Commission Regulation 415/2008 on the division between 'deliveries' and 'direct sales' of national reference quantities fixed for 2007/08 in Annex I to Council Regulation 1788/2003

Commission Decision 2008/185 on additional guarantees in intra-Community trade of pigs relating to Aujeszky's disease and criteria to provide information on this disease

Commission Decision 2008/233 amending Decision 2004/558/EC implementing Council Directive 64/432 as regards additional guarantees for intra-Community trade in bovine animals relating to infectious bovine rhinotracheitis and the approval of the eradication programme presented by certain Member States

Commission Decision 2008/37 amending Decision 2006/968/EC implementing Council Regulation 21/2004 as regards guidelines and procedures for the electronic identification of ovine and caprine animals

Commission Decision 2008/341 laying down Community criteria for national programmes for the eradication, control and monitoring of certain animal diseases and zoonoses

Commission Decision 2008/350 on the rules of England, Wales, Northern Ireland and Scotland concerning permit exemptions for undertakings and establishments recovering hazardous waste under art.3 Council Directive 91/689

Commission Decision 2008/396 on the clearance of the accounts of the paying agencies of Member States concerning expenditure financed by the European Agricultural Guarantee Fund (EAGF) for the 2007 financial year

Commission Decision 2008/397 on the clearance of the accounts of the paying agencies of Member States concerning expenditure financed by the European Agricultural Fund for Rural Development (EAFRD) for the 2007 financial year

Directive 2008/27 of the European Parliament and of the Council amending Directive 2001/18 on the deliberate release into the environment of genetically modified organisms, as regards the implementing powers conferred on the Commission

Directive 2008/52 of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters

Common Position 3/2008 adopted by the Council with a view to adopting a Directive of the European Parliament and of the Council on environmental quality standards in the field of water policy and amending Directives 82/176, 83/513, 84/156, 84/491, 86/280 & 2000/60

Common Position 4/2008 adopted by the Council with a view to adopting a Directive of the European Parliament and of the Council on waste and repealing certain Directives

Decisions of the EEA Joint Committee 133, 135, 136, 138 & 148-151/2007 amending Annex I (Veterinary and phytosanitary matters) to the EEA Agreement

Decisions of the EEA Joint Committee 134 & 137/2007 amending Annex I (Veterinary and phytosanitary matters) and Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement

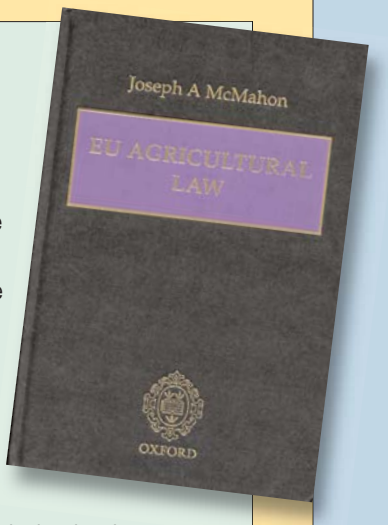
Decisions of the EEA Joint Committee 146, 168 & 169/2007 amending Annex XX (Environment) to the EEA Agreement

See also the following Official Journals for information regarding cases before the ECJ and the Court of First Instance: C64 (8.3.08); C79 (29.3.08); C92 (12.4.08); C107 (26.4.08); C116 (9.5.08); C128 (24.5.08)

See also the following Official Journals for information regarding cases before the EFTA Court: C74 (20.3.08); C113 (8.5.08)

EU Agricultural Law

Joseph A. McMahon, published by OUP, 387pp. plus Index, price £115.00 + p&p



Whether you support the UK's membership of the European Union or prefer the idea of withdrawal, so long as we are members its systems of government will affect everything that happens in this country, *pace* those who think that they need only pay heed to Westminster.

Of course, the largest EU common policy – for a long time it was the only one – is the Common Agricultural Policy, which exercises us in this Association almost daily.

This book by Joseph McMahon, Professor of Commercial Law at University College, Dublin, is a descriptive account of the CAP and the various influences upon it from its foundation in 1958 under the Treaty of Rome of the previous year.

The material is presented as a chronological narrative of the events and legal instruments which have shaped the CAP as we know it today. Only one steeped in the affairs of the EU – his PhD thesis twenty years ago was on European Trade in Agricultural Products – would know of the relevance of the Spaak Report which set out the problems which the CAP, as established in the Treaty, was intended to counter.

From this point there is analysis of the Treaty itself, the Stresa Conference in 1958 which added some flesh to the bones, and the initial common market organisations which began the process of breaking down trade barriers.

History explains the present and should inform the future. In that light, the solid historical analysis of the first 40 years of the Policy provides the groundwork for the sections on the Agenda 2000 reforms and, latterly, the Single Payment Scheme.

Not only does Prof. McMahon go into purely European law, he also sets it in context with the international influence of the World Trade Organisation, as it now is. Discussions of particular cases on market access, domestic tariffs and support and export competition help elaborate, as does the work on the General Agreement on Tariffs and Trade (GATT) and the Sanitary and Phytosanitary Agreement (referred to as the SPS Agreement, which may confuse some modern readers).

Many current professionals will want to go straight to Chapter 5, Section B, *The Mid-Term Review*. This would be unwise, because some of the commentary is not immediately receivable unless one first has knowledge from earlier chapters of what has gone before. The description of the Commission's 2002 communication setting out the proposals and of the documentary interchange which led to what we now know as the Single Payment Scheme (SPS) is thorough. So is the step-by-step consideration of each of the elements of the reform package.

Published as it was last year, the book can but hint at what is to come, but it does look forward, so far as it can, to the events in the ongoing Doha Round of the WTO and to the Commission's proposals for technical and political simplification of the CAP. It concludes with the prophetic words: "The policy will continue to evolve".

This is a very rich meal, too rich to be taken at one sitting and better served with a glass of one's favourite something to wash it down.

If the book has a weakness, it is in a relative shortage of critical analysis or synthesis. Much attention, quite rightly, is devoted to the when, what and how of the legal and regulatory changes, but, in my humble opinion, there is not enough of the why.

The next edition would benefit from more commentary on the political and agricultural context in which they are set, which in this edition is sometimes hard to find. One is left with the feeling of having consumed a plate of flour, eggs, butter and sugar and been invited to believe one has eaten a sponge cake. **GDW**

Forthcoming events...

ALA:TNG Hereford, Worcester & Shropshire

17th July 2008

Feathers Hotel, Ludlow

ALA Autumn Day Conference

17th September 2008

Copthorne Tara Hotel, London

AGM & Annual Dinner 2009

27th February 2009

Royal Over-Seas League, London

ALA/WS Society 12th Annual Joint Seminar on Agriculture

5th June 2009

Signet Library, Edinburgh

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