

Briefing
Winter 09
Clarke Willmott
Agricultural Law



*Country Houses: High speed deals and gazumping are back!

The last few months have seen a return to the heady days of 2006 with country houses selling like hot cakes. Despite the ongoing economic difficulties across the UK, valuable country properties are now selling well, but at breakneck speed and often with several buyers competing to outbid each other at the last minute.

Whilst this is all good news for sellers, the competition between buyers and the speed of the transaction demands the very greatest experience and the very best legal and negotiating skills on the part of the lawyers acting for either buyer or seller. Without those skills a promising deal can very often fall apart and leave the seller either without a buyer or with a buyer at a greatly reduced price!

The Rural Property team at Clarke Willmott are delighted to have been joined by Guy Hurst, an expert in rural property, who arrives with many years experience acting for sellers and buyers of country houses and estates all over the UK. "Since I arrived at Clarke Willmott in September, it has been non-stop sales and purchases, almost all exchanged within 24-48 hours of the deal being struck, with gazumping and renegotiations at the last minute being the norm".

Guy recalls one deal in the South West, which was already under offer to a third party. His client put in a much higher offer on Sunday and it exchanged from scratch 24 hours later. Another property, with an asking price of £7 million was eventually bought successfully by Guy's client for £8.1 million after a frenzy of activity. Yet another country house was under offer at £2.5 million. Guy met the clients at the property on Saturday, they put in a bid at £3 million on Sunday, achieving exchange on Monday!

The key to success in these cases is, first, to be ready and available to travel anywhere,

anytime, to pick up the case and make the deal happen. Secondly, lawyers acting for either sellers or buyers need extensive experience so they can identify instantly likely potential problems and sort them out before they cause a delay. Guy is clear on this point, "It's all very well exchanging contracts quickly, but if that leaves a buyer with access problems or an unidentified water supply problem he is not going to be best pleased!"

Thirdly, neither sellers nor buyers like unsolved problems! "My approach is always to explain the issue and its impact and provide the various answers all in one go, which allows the deal to proceed. Clients do not want to hear the expression "we have a problem" unless it is accompanied by "and here is the solution" ".

Finally, in a market as unpredictable and frenzied as the current one, the lawyer's negotiation skills in the hours leading up to exchange are absolutely critical. Once again Guy is clear on this point, "You need to know the tricks of the trade, be able to identify your client's strengths and know when to walk away and when to take a view".



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Welcome to the Winter edition of our Agricultural Law Briefing

2009 has been a relatively strong year for the agriculture industry, which has been a fairly bright light shining through the fog of the recession. Agricultural land prices have remained firm, lending to farming businesses has continued and more recently country house prices and sales have risen dramatically. Whilst there has been less good news in the dairy sector, the overall trend has been positive.



In contrast to this growth, farmers have faced all manner of challenges this year from the EU. Almost every month there are new regulations and requirements imposed on employers (see the latest change on holidays on p4) and farmers are even now facing sheep EID, the new pesticide restrictions and NVZ changes, to name but a few.

Within the agriculture team at CW we have had an immensely busy and exciting year. Amongst the many highlights has been our ongoing relationship with the CAAV and its members, whose events we supported through the year and we look forward to attending the CAAV Centenary Ball in January.

We hope you enjoy this edition of Fieldtalk. As ever, please do contact us for a no-obligation discussion if you need further advice.

Tim Russ

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*Telecoms: Farmers beware the wolf in sheep's clothing!

It may seem good estate management to maximise income on a farm or estate, but there is one area where the gift horse's mouth should be looked in very carefully: the area of telecoms.

A telecoms mast or equipment may provide welcome additional income for little outlay, but the difficulty comes if a development opportunity arises in due course. Whilst the rent you may receive for the equipment may be a few thousand pounds, the costs of removing it can run into tens of thousands.

This is because of the operation of the Telecoms Code, which operates outside and in addition to the usual rules regarding security of tenure for business tenants. So where a telecoms operator has exclusive possession of an area, they may be protected in two ways: both as business tenants; and as telecoms operators. If a landowner wants to obtain vacant possession, they may need to go through the procedures for removal both under the Landlord and Tenant Act 1954 and under the Telecoms Code. Where a telecoms operator does not have exclusive possession of any area, the landowner will just have to comply with the Code, although this is very onerous.

To remove a Code protected telecoms operator, the first step under the Code, is to serve a notice in one of two particular forms: either the one for redevelopment; or the other, for cases where the term has expired. In both cases the telecoms operator can serve a counter notice within 28 days and then a court order has to be obtained for removal. In redevelopment cases, there are provisions for compensation to the operator for removal costs, which can run to well over £100,000.

The court does not always have to order possession, even if the landowner can prove a genuine scheme to redevelop, if the removal of the equipment will impact adversely on the telecoms system and the service provided and there is no other site available. So if the

landowner wishes to remove a code protected operator he will have to engage an expert in this field to review the alternative sites. There are only a few good and knowledgeable experts in this area and they are relatively expensive to instruct. Success is not guaranteed if the telecoms expert puts forward a case that there is no alternative site and the court favours that view.

At the moment there are few court cases concerning the Code, as the operators tend to leave voluntarily, but not until all the right notices have been served, proceedings issued and there has been considerable discussion between the experts. As sites become more scarce it is envisaged that the opposition to removal is likely to become tougher and the telecoms operators may be forced to resort to their code powers, including refusing to leave and fighting a court order to go.

So, the moral of the story, as a landowner is, do not think short term when dealing with the telecoms operators. If you have no intention or need to remove the equipment in the longer term then the income is welcome. However, if there is a possibility that you will need the site back for your own use or redevelopment in the longer term think very carefully before letting a code protected telecoms operator onto the site.



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*Planning: A whole lot more than a needle in a haystack!

The fascinating agricultural planning case of the house built under a straw stack has just been heard in the High Court and at the time of going to press we await the judgement.

Mr. Fidler wanted to build himself a new house, but because his land was in the green belt, he knew that he was unlikely to get planning permission. He therefore hit on the ingenious idea of building his dream dwelling inside a stack of straw bales covered in blue tarpaulin.

Mr. Fidler is a forage merchant dealing in straw and hay, so neither the council's planning officers, nor the inspector who visited the site in connection with enforcement action on other matters, thought that there was anything strange about a large stack of straw bales on his land covered in a blue tarpaulin.

Mr. Fidler completed his house and after 4 years of living inside the stack, removed the bales to reveal his masterpiece. The council was not happy with what he had done and took enforcement action.

Mr. Fidler argued that the house had been completed more than four years before the enforcement notice was served and therefore was immune from enforcement action. The inspector appointed to decide his appeal did not agree and held that the building works had not been completed until the straw bales were removed.



Photos: Keith Waller.

Mr. Fidler appealed against that decision and his case has just been heard. If the judge decides that the inspector was correct and upholds the enforcement notice, Mr. Fidler will have to demolish his house. If however the judge finds in his favour Mr. Fidler will use the four-year rule to avoid enforcement action. The judgement is expected before Christmas so watch this space!



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*Case Notes SPS, share farming and agricultural use

The National Trust has had a busy time in court recently with 2 significant cases:

National Trust v Fleming – housing migrant agricultural workers

This case concerned the use of part of a farm for caravans for housing migrant workers needed to grow salad crops on the farm. A 1966 deed of covenant affecting the farm gave the National Trust the benefit of covenants preventing development of the land. They were, however, subject to a proviso that the covenants would not prevent the cultivation of the land "in the ordinary course of agriculture or husbandry in accordance with the custom of the country".

When the caravan site was constructed the National Trust argued that a custom (ie housing migrant

workers on the farm) that did not prevent cultivation, but merely made it less convenient or more expensive, was not within the scope of the proviso.

An arbitrator found in favour of the farmer and on appeal, the High Court agreed, dismissing the National Trust's claim. It found that the phrase in the proviso should arguably include any ancillary activities or uses of the land that were necessary for cultivation of the land. The use of part of the farm to house migrant workers was an ancillary use of that nature and therefore fell within the scope of the proviso.

National Trust v Birden

In this case the National Trust was claiming a portion of the historic element of payment entitlements, allocated under the single payment scheme (SPS), to a farmer, with whom the National Trust had had a share farming arrangement. Mr Birden had sharefarmed a National Trust holding for the period from July 1995 to April 2004. He then moved to another farm, where he was allocated payment entitlements in 2005, which took into account the previous claims he had made when farming the National Trust land.

When claiming part of the historic value of the entitlements the National Trust sought to rely on clauses in the sharefarming agreement requiring Mr Birden to transfer back premium quota rights at the end of the share farming contract. The High Court rejected this claim finding that the clauses did not apply under the new and very different single payment scheme. The Court also rejected claims that the clauses caught a share of the single farm payments themselves and claims that the entitlements and payments under the new SPS should be split in accordance with the profits under the sharefarming contract.

SPS used to protect footpaths

In a recent case a farmer challenged the use of the cross compliance obligations under the SPS to enforce maintenance of public rights of way. Currently a farmer in England risks losing payments if he interferes with or fails to restore or maintain stiles and gates across visible footpaths and bridleways. The same rules do not apply elsewhere in the EU, including Wales and Scotland.

The European Court of Justice was asked for a preliminary ruling on whether the English regulations were "discriminatory" in that they put English farmers at a competitive disadvantage. The Court rejected the claim, finding that the adoption of different standards within the separate devolved administrations did not constitute discrimination contrary to Community law.

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*Wills: Undue influence over inheritance of farm

The case of *Gill v RSPCA, Woodall and another*, which was decided on 9 October 2009, received extensive coverage in the national press.

It concerned a claim by Dr Christine Gill to set aside her mother's will that had left the family farm (worth about £2 million) to the RSPCA. Christine was successful and so inherits the whole farm.

At the time of writing the RSPCA is still considering whether to appeal the judgment.

Of all of the disputes involving wills, a significant proportion of the higher value cases involve farms. This is because farming businesses are usually family concerns, involving different generations working together. Very often ownership of the farm itself is vested in the older generation, whilst the main farming is carried out by adult children, or even grandchildren. The potential for tension is clear.

We still do not have a clear report of this case from the court, but from what has been said about the case by the parties so far, it seems to have been decided by an unusual principle in the circumstances. The claim was that Mr Gill (Christine's father) exercised an undue influence on Joyce Gill (his wife, Christine's mother) to make mutual wills, whereby they would leave the whole of their estate to each other on the death of the first of them, then to the RSPCA on the death

of their survivor. If one party coerces another into doing something by the exercise of an undue influence, that can result in the suspect transaction being set aside.

John Gill was able to dominate Joyce to such an extent that he could compel her to leave Christine out of her will. John Gill, however, died 7 years before Joyce. In that 7 year period Joyce still felt compelled to leave Christine out of her will, as a consequence of the domination exerted by John. This is very unusual. Undue influence is a frequent claim in these cases, but it lasting for such a long time after the death of the dominant person is rare. It is perhaps for this reason that this case involved extensive medical evidence as to Joyce's state of mind, given that she suffered a severe anxiety disorder. It may be this that leads to the RSPCA appealing the judgment.



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*Sickness on holiday: An employer's headache

In the recent case of *Perida v Madrid Mavilidad SA* the European Court has ruled that workers who go sick whilst on prebooked leave are entitled to reschedule their holiday and even potentially carry it forward to the next leave year.

This is likely to cause further headaches for employers still grappling with how to deal with the Working Time Holiday Entitlement of workers on long-term sick leave following a recent House of Lords decision.

In this European Court Case Mr Perida worked for a company removing wrongly parked cars from public highways. He was required to take 11 days holiday during the summer. However, before his leave began he was injured and as a result he only had two days leave where he was not simultaneously ill. When he returned to work he asked to take an additional nine days as annual leave. His employers turned down his request and he took proceedings against them which were referred to the European Court to determine. This decision implies that all workers will be deemed to be able to make this choice if they are sick during a period of booked holiday regardless of the nature or severity of the illness. They can insist on holiday leave being reclassified as sick leave to ensure they have reserved their full Working Time Holiday Entitlement.

Our advice however is that employers can ask workers to produce convincing evidence of their illness before they agree to a request to reallocate holiday.

Do you have up to date contracts of employment for your workers? Do you have holiday policies or suitable holiday clauses in that contract? Be aware that any of your employees or workers (so that could include all self-employed workers such as herdsman or farm managers), could now claim what appears to be 'extra' holiday if they are ill. We can provide a free audit of your terms and conditions of employment and advise you on this or any other employment issues.



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*Cow Attacks: Farmer's liability

Following a summer which saw four separate attacks on walkers by cattle and a farmer held liable to pay £250,000 plus costs for a similar attack in 2003, what can cattle owners do to reduce the risk of such an attack and to limit their liability?

The law – Animals Act 1971

Liability for damage and injury caused by animals is currently imposed on owners under the Animals Act 1971, as developed by the 2003 case of *Mirvahedy v Henly*. That case established that a keeper of animals who had taken all reasonable precautions to prevent damage occurring, was still strictly liable for that damage even though he was not at fault.

There are defences under the Act; first, that the claimant has voluntarily assumed the risk; and secondly, that the damage is wholly due to the fault of the claimant. Equally, any reward can be reduced under the provisions of the Law Reform (Contributory Negligence) Act 1945, if it can be shown that the claimant was partly to blame.

As highlighted in the summer edition of Fieldtalk, the Government has been consulting on a reform of the law, which, if accepted, would reduce the liability to damage caused by "unusual" or "conditional" characteristics of the animal.

The Law – Occupier's Liability Acts

A duty of care is also imposed under the Occupier Liability Acts 1957 and 1984. If this duty is breached by an occupier, he will be liable for damage or injury under the law of negligence.

The 1957 Act imposes a duty of care in respect of visitors invited onto the land. The 1984 Act extends the duty to trespassers, although it only applies to hazards and there are a number of defences available to occupiers.

There are defences against such a negligence claim: that the claimant voluntarily assumed the risk or negligently contributed to the damage or injury.

The Law – Wildlife and Countryside Act 1981

Section 59 of this Act bans bulls of certain breeds from being left in fields crossed by public rights of way. Bulls of other breeds are also banned unless accompanied by cows or heifers.

So what can farmers do?

- Make an assessment of potential risks posed by cattle in a field, especially if crossed by a public right of way or used by visitors to the farm
- Take sensible practical steps to minimise the risk of an attack – consider location of feeding and water troughs, use of temporary fencing etc
- Remove any individual animal or any breeds which have shown a tendency towards aggressive behaviour towards people or dogs

Putting up signs is also a good idea, although care should be taken with the wording. Warning people that there are cattle in the field and to keep dogs under control is fine, but indicating danger or risk in some way, could be interpreted as an admission of liability. Signs should also not deter walkers from using public rights of way, as this is an offence under the Countryside and Rights of Way Act 2000.

The 1957 Act expressly states a warning sign to visitors will not, of itself, absolve the occupier of liability. A sign will however be relevant to the question of whether the occupier has breached his duty.



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If you would like to receive future editions of **Field Talk** by email please email martha.harley@clarkewillmott.com

The articles in this briefing are not intended to be definitive statements of the law but instead provide general guidance.

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