

# Field Talk

Agricultural Law Briefing • Spring 2022

Photo by Stephen Clarke

## Smoothing out the long and bumpy road to development

**Landowners are increasingly looking to develop their land, but the process can be extremely protracted.**

In our experience, this is often down to several factors which haven't been considered or dealt with by clients in the early planning stages of the development and often before we are instructed.

With a little more proactive planning, landowners can easily overcome some of the hurdles along the way and even identify some opportunities to optimise their development plans. If you are thinking about development, then here are some of our top tips on how to achieve this.

### 1. Protecting your location

Local Planning Authorities set development boundaries in their local plans and so anything outside of those boundaries is much more difficult to develop. However, if the land falls outside of the development boundary but is close to an existing settlement with good public transport links, it might still be worth pursuing this if the local highway network can accommodate new development and safe access is achievable.

It's wise to ensure that the land is protected from any third party applications which may frustrate development. Take advice early on before anyone gets wind of your intentions to develop and put a strategy in place to mitigate any such risks. For example, if people use the land to walk their dogs, pick blackberries or other similar activities, it might be prudent to take early steps to protect against the land being registered as a town or

village green – one of the many common tactics used by objectors in these situations.

### 2. Seek advice and get involved where appropriate

Sound professional advice is key. Whilst you may have used your usual land agent for years, establish whether they are the best person to deal with the development. Having a good planning consultant to manage the process can be invaluable so consider this appointment carefully.

Get involved in every stage of the forward planning process. All planning decisions must be made in accordance with the development plan unless material considerations indicate otherwise. Therefore, promoting your land through the Local Plan will make obtaining planning permission much easier in the long run.

Whether you promote your site through the Local Plan or try a speculative application, be prepared for delays. Taking a site through a local plan process takes years; even once an application has been submitted, planning is not a quick process. Applications are rarely determined in the statutory timescales and if the application is refused at the local level, an appeal to the Inspectorate is taking an average of between 9-12 months.

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## Welcome to the Spring 2022 edition of Field Talk



Welcome to the Spring 2022 edition of Field Talk, our agricultural law newsletter.

As we move through the second quarter of 2022, our teams remain busier than ever. The land and property markets continue to be very buoyant with many of us poised to expect a downwards adjustment 'just around the corner' (although we have been saying this for some time). Talking of expectations, we still await the Supreme Court's final judgment as to the equity due under proprietary estoppel case, *Guest v Guest*. You will find a brief update in this edition.

With the pandemic restrictions now eased, we are delighted to have been able to renew our support of the agricultural industry in terms of our sponsorship of and presence at South West agricultural events. We have already enjoyed many local point-to-points and are looking forward to attending major events such as the Devon County Show and the Bath & West Show later this year.

Otherwise, whilst business continues as usual alongside the changing and challenging agricultural landscape (particularly the increased market volatility due to the war in Ukraine) we have expertise in developing markets such as carbon trading and biodiversity net gains.

In this edition of Field Talk, we bring you a wide spectrum of topics from farming succession to property fraud and provide you with an update from the NFU on the hot topic of the Lump Sum Exit Scheme.

We hope you enjoy reading it, and as ever please do not hesitate to get in touch to see if we can help you or your business.

**Esther Woolford, May 2022**



## Smoothing out the long and bumpy road... *continued*

It is also important not to overlook Neighbourhood Plans. Neighbourhood Plans (which are generally brought forward by the Parish Council) have less stringent conditions that need to be met before they can be adopted. However, they can override the terms of the Local Plan. A negative Neighbourhood Plan could be a long-term nail in the coffin of your development aspirations, whereas, an allocation in the Neighbourhood Plan could be a fast-track ticket to success. Therefore, engage with the Parish Council as early as possible to try to get them on board.

Consider running consultations with local residents; genuinely listening to and taking account of local views will usually reduce the level of objections and often results in a better form of development for everyone. It is also worth engaging with your local ward Councillors; if they are happy with the proposal, it is more likely to succeed should the application go to Committee.

Successful planning has a lot to do with the personalities involved so having a positive collaborative relationship with the Council, Parish Council and local residents can really make a difference. If you know you're not a people person, be honest with yourself and get someone involved who is.

### 3. Money factors

Many landowners think that developing their land is a quick route to riches. However, in order to meet planning application validation requirements, you will need several professional reports with each one costing thousands of pounds so be prepared for the costs.

Given the substantial cost involved, it is not surprising that many landowners partner up with a developer or land promoter who will front up the cash for the planning process. However, it is essential that you receive robust legal advice before signing any agreements. For example, a poorly worded option agreement or contract with a bad developer/promoter can often sterilise land from being developed for years.

Finally, be realistic about the amount of money you are likely to make. The cost of obtaining planning permission and complying with planning obligations can often make a significant dent in landowner returns.

### 4. Nutrient mitigation

Planning policy is constantly evolving with new requirements and issues cropping up regularly, for example, many developments are currently stalled whilst developers work out solutions to the current nitrates/phosphates issues that are affecting several authorities around the country. In addition to this, new developments are now required to demonstrate a net gain in biodiversity.

Whilst these kinds of issues are a thorn in the side for many developers, they can also present an opportunity. Many landowners are choosing to offer their land as off-site mitigation, arrangements which allow developers to purchase "credits" to satisfy nutrient off-setting or Biodiversity Net Gain

requirements. The Estates Gazette recently reported that managing land for nutrient mitigation could generate land values in the region of £66,383 per hectare so if your land is not in the sort of location which would usually be thought of as having development potential, these arrangements could provide a further route from which to generate value.

### 5. Third party occupiers

If you have an agricultural tenant on the land, you should consider and plan as to how you will recover possession once you have obtained planning permission, factoring in the relevant notice periods.

Before 1 September 1995, Government policy prioritised food production and security and so tenants of agricultural land enjoyed security of tenure and succession rights, making it much more difficult to recover possession. In contrast, tenancies granted after 1 September 1995 give landlords greater ability to regain possession of land and usually only one year's notice is required to terminate the tenancy. In short, you should seek advice early as to how to terminate the tenancy to try to avoid any unpleasant surprises.

If your tenant has a tenancy which arose prior to 1 September 1995, a Case B notice will likely be needed to terminate the tenancy. This will be on the grounds that the land is required for a use other than for agriculture. Despite being referred to as "incontestable", a tenant can challenge a case B notice via arbitration. Ultimately, however, if Case B is applicable and the landlord genuinely intends to develop land for a non-agricultural use, whilst the tenant can delay matters, possession should be granted, with statutory compensation payable to the tenant.

A landlord should approach service of a Case B notice (and indeed any notice) with care, making sure that the grounds for the notice are well-founded and that the notice has been drafted and served correctly (as these can also be challenged by the tenant).

**To summarise, good advice, a well thought out strategy, early involvement and the right team can make all the difference and so it's important to have all your ducks in a row from the outset.**

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# Supreme Court Judgment...

## awaited on proprietary estoppel claim by farmer's son (Guest v Guest & Guest)

**In December 2021, Daniel Gill, Polly Ridgway and Lara Williamson represented Andrew Guest in the Supreme Court in the leading authority case of *Guest and Guest v Guest*.**

The appeal before the Supreme Court, brought by Andrew's parents, raised important issues on the proper approach to crafting a remedy under the doctrine of proprietary estoppel including if a successful claimant's expectation of inheritance is the appropriate starting point.

Clarke Willmott successfully acted for Andrew Guest in both the High Court and Court of Appeal proceedings. The background and outcome of these decisions can be found here: <https://www.clarkewillmott.com/blog/farming-families-and-inheritance-disputes/>

The Supreme Court's decision is hotly anticipated and will provide legal precedent on how the court should approach the question of what remedy to award once the claimant's equity is established.

You can sign up to Clarke Willmott's Field Talk mailing list for the outcome and commentary on the Supreme Court's decision when judgment

is handed down. Please email [harriet.whitfield@clarkewillmott.com](mailto:harriet.whitfield@clarkewillmott.com) to subscribe.

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# Gifts of agricultural property:

## Three tips

**The growth in property and land values in recent years, and concern about the long term availability of inheritance tax (IHT) agricultural property relief, may have encouraged farmers to consider making gifts to the younger generation.**

This is a major life decision and there are a number of factors to consider covering both tax and other considerations. This article looks at just three tax factors your farming clients should bear in mind:

1. Capital gains tax implications: there may be substantial unrealised gains on the property to be given away. A disposal of any asset by way of a gift is a chargeable disposal for capital gains tax (CGT) purposes which could potentially give rise to a CGT bill. This is not an immediate problem as "holdover" relief can often be claimed on agricultural property deferring any CGT bill until the recipient of the land disposes of it. However, as the law currently stands, on the death of an asset holder the value for calculating any CGT payable on future disposals is increased to the asset's value at the date of death. This is known as "the CGT uplift". If the land to be given away is likely to stay in the family, the loss of the CGT uplift will not be an issue, but if a disposal is likely it should be factored into the decision making process.
2. There are likely to be no immediate IHT issues on the gift of agricultural property provided it's occupied for agricultural purposes and has been owned for the requisite period to qualify for agricultural property relief (APR) (for example, two years for vacant possession property). However, if a gift is made and the recipient disposes of the property before the donor's death, APR will be "clawed back", meaning that APR is no longer

available. Consequently, if the donor has died within seven years of the gift IHT will be potentially payable.

The clawback problem can be avoided by making the gift to a trust rather than to an individual. The trustees then control the disposal of the land given and can ensure that no disposal takes place until the donor has survived the gift for seven years when clawback will no longer be an issue.

There is a second advantage of a gift to a trust compared to a gift to an individual in these circumstances. Clawback will apply if death occurs within seven years of the gift. However, if the value of the gift is within the IHT nil rate band in force at the date of the donor's death, not only will there be no lifetime charge to IHT, but the gift will not be deductible from the donor's IHT nil rate band available on their death.

**Example:** George makes a gift of farmland valued at £300,000 to a trust in 2020; in 2024 he dies. Clawback applies but there is no additional tax on the farmland as the gift is within the IHT nil rate band (£325,000) in force at George's death. The value of the gift remains at nil for cumulation purposes and so a full IHT nil rate band will be available to deduct against George's death estate. By comparison, if the gift of the farmland had been to an individual, clawback would also have applied, no IHT would be payable on the gift itself, but it would use £300,000 of George's nil rate band leaving only £25,000 for the death estate.

3. Finally, in contemplating a gift of agricultural assets it is essential to consider the effect the gift will have on the ability to claim IHT relief on the retained assets. For example, a gift of a substantial acreage of land used for agricultural purposes may affect the APR that could be claimed on the retained farmhouse. This would arise if HMRC decided that the farmhouse was no longer "of a character appropriate" to the surrounding retained farmland and denied APR on its value.

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# Safeguarding at risk properties against title fraud

**Whilst the notion of someone stealing your home from under your feet sounds far-fetched, property title fraud is a real risk for owners of certain types of “at risk” properties.**

This type of fraud usually involves a scammer targeting a vulnerable property and stealing the identity of the legal proprietor in order to sell or mortgage it.

Like any type of scam, many owners of these vulnerable properties do not realise that they are a victim until it is too late. But what is this phenomenon and what can be done to safeguard against it?

The most common type of vulnerable property is one that is unoccupied for long periods of time especially if the owner is based overseas or is working away – as in the case of the Reverend Mike Hall whose experience of title fraud was recently highlighted in the media.

Mr Hall purchased a house in Luton in the 1990s and the property was registered in his name at HM Land Registry. Mr Hall was working away from his home when he was contacted by neighbours who had observed some activity in his unoccupied house and were checking to establish whether he had sold it or rented it out. Mr Hall travelled down to Luton the following day to find that the locks to the property had been changed and when he was eventually let in, he learnt that the property had been bought by the current occupants in July. A search of the property title deeds registered at HM Land Registry confirmed that the occupants were indeed the legal owners.

It later transpired that Mr Hall's property was sold to the current occupants by someone who had obtained a copy of Mr Hall's driving licence in order to impersonate him as the registered legal owner of the property. The fraudster then sold the house and banked the proceeds and the purchasers (who had purchased the house in good faith) became the new legal owners of the property. There was nothing Mike could do to undo the transaction and reclaim legal title to the property; as a victim of identity theft his only recourse was to report it to the police and to make a legal claim for fraud through HM Land Registry which would entitle him to financial compensation.

So, what measures can owners of “at risk” or vulnerable properties take to prevent the unthinkable from happening?

1. Ensure that the property is registered at HM Land Registry. Since 1990, land registration has been compulsory on any purchase, sale or mortgage of property but approximately 15% of land is still unregistered in England and Wales. The advantage of registering your property with HM Land Registry is that the system is state guaranteed and compensation may be payable in the event of any title fraud.
2. Ensure that HM Land Registry has your current contact details; this is imperative for overseas landlords and those owners who spend long periods of time away from their property.
3. Sign up to the free HM Land Registry alert service which can monitor up to 10 registered properties and which alerts owners to any significant activity that has occurred in respect of any of the monitored properties such as a change of ownership or mortgage.
4. Submit an application to HM Land Registry to register a restriction on the title of your property. The Land Registry fee is £40 and once in place, no-one can deal with your property without your express consent.

With identity theft on the rise, now is the time to take every conceivable step possible to safeguard any vulnerable property you own against the unthinkable. Whilst many of the measures outlined above are effective to alerting property owners to activity, the only one which will forestall fraudulent activity is registering a restriction.

For more information on this subject or on property matters generally, please contact:



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# A Q and A with...

**Richard Williamson, Senior MD of Trinity AgTech**

Interview written  
and conducted by  
**Lara Williamson,**  
Trainee Solicitor SQE



**Following his graduation from the Royal Agricultural College, Richard Williamson joined Velcourt's Management Training Scheme and rapidly progressed through the company to become Farms Director for the South and South West of England.**

From here, Richard joined Dyson Farming Limited as Managing Director in November 2014.

In 2021, Richard was appointed Senior Managing Director of Trinity AgTech, guiding the launch of the first in a suite of software that elevates farmers to the heart of the food and farming ecosystem.

Richard has a genuine passion for sustainable agriculture and a comprehensive understanding of farming practices.

**1. You are the Senior MD of Trinity AgTech, which has developed a software called Sandy, enabling farmers to accurately measure their businesses' sustainability. Has the company seen an increase in demand from farmers seeking to work more independently?**

Farming independence has been suppressed to a degree for the last 30 years. EU support for farming has reduced innovation and resulted in a lack of investment in technology. This has led to a reduction in productivity and more importantly made the farmer more reliant on direct support and less market focussed. The removal of the Basic Payment will hopefully precipitate a mindset change amongst farmers, making them more independent and encouraging them to consider more sustainable business models. They will likely focus on enterprise profitability, net zero production or receive value for their natural capital assets.

**2. How is 'Sandy' different to other biodiversity measurement tools?**

Sandy provides the farmer with an opportunity to measure profitability and sustainability together, recognising that new income streams from either net zero produce or the trading of carbon credits are not directly correlated with traditional farming income streams. Previously, all agricultural produce pricing was linked to either the value of oil or soft commodities with fertiliser prices and agro chemicals priced accordingly. In that sense, the market was mature. Carbon and biodiversity credit values will be influenced by macro-economics not just parochial rural incomes. The loss of the Basic Payment will mean that the management of farms will be more dynamic with the business reacting more adroitly.

**3. Not only are you the Senior MD of Trinity Agtech, but you also act as a strategic advisor to a number of farming, food and agricultural technology businesses. How did you get into the agriculture sector and diversify into agricultural technology?**

I grew up around agriculture. My Grandad was a farmer in North Yorkshire and I used to spend a lot of time working with him on the farm. My first job in agriculture was working for Velcourt, a farm management company, which was and still is "cutting edge" within the farming sector. Velcourt looks at ways to improve farms and their returns whilst trying to use the best and most efficient technology.

I was then approached to head up Dyson Farming. During my time there I became increasingly aware that the Basic Payment Scheme was going



to disappear and felt that it was now more important to look after farms from a financial, environmental and marketable aspect. More specifically, I recognised that digitalisation - the use of digital technology in agricultural production - is becoming increasingly important in bridging the gap between farmer and consumer.

**4. Sandy provides a complete profile of the provenance of the food to the plate. Do you think this will help to connect the consumer to the farmer?**

Most consumers are now three generations away from a connection to farming and therefore it is not surprising that farmers have lost connection with their consumers. Retailers and intermediaries hold a huge amount of power. Digitisation will allow the connection between the farmer to be re-established. At a simple level, this will mean consumers will be able to see how a farm works through QR codes on produce which will give a greater understanding on how food is produced. At a more complex level, and in time, it will allow consumers to have complete visibility of inputs, farming practices, provenance and the environmental profile of the food they are buying.

**5. What attracts you to the agricultural industry?**

The people. The farming industry encourages integrity as well as the sharing of ideas because ultimately everyone has a common goal.

I also respect the fact that farmers, and those involved in the agriculture sector, are able to manage a lot of complex risks.

**6. Climate change is a hot topic at present. With the introduction of the new Environmental Land Management Scheme (ELMS) which pays farmers "public money for delivering public goods" in place of the existing BPS payments, do you think this will be one of the drivers for reversing the impact that agriculture has and continues to have on climate change?**

In part yes. The purpose of ELMS is well founded and aims to encourage changes in farming practice and greater protection of the environment, but my instinct is that the payments farmers will receive from ELMS are likely to be insufficient to generate wholesale land usage change. ELMS is likely to pay farmers at a value equivalent to what they would receive from conventional agricultural practices; however, this does not recognise the increasing levels of volatility in agriculture, both from climate change and increased global markets. Agriculture has an opportunity now to have a positive impact on the environment but the new scheme will require the support of private sector funding if real and meaningful change is to happen.





### 7. What support has Trinity AgTech and its technologies received from key industry organisations such as the NFU?

Organisations representing farmers and land owners are aware of Sandy and recognise it as a tool to help farmers make better decisions and improve both the economics and environmental profile of their business.

### 8. How farmer friendly is the Sandy technology?

We aim to make the software as usable and farmer friendly as possible and if farming is to increase its profitability over time then the industry as a whole must be successful. Sandy aims to leave 'nobody behind'.

### 9. What do you think will be the biggest change to the agricultural sector in the next 10 years?

Historically some farms have operated on 'more of the same' from year to year but going forward farmers will need to have the ability to cope with increased volatility and will need to embrace dynamic decision making. Without the stabilising effect of the Basic Payment, enterprises will need to be economic in their own right, whilst at the same time meeting increasingly stringent environmental sustainability criteria. Digitisation in agriculture is currently at a low level but, it has the potential to transform the industry creating a closer connection between those who consume food and those who produce it.

### 10. The Sandy technology measures natural capital. What is Trinity AgTech's definition of natural capital?

The woodland, hedgerows and field margins, the wild bird cover, low input pasture and pollen and nectar strips. There's also the carbon you capture in

the fields, water you care for as it passes through, air you help to clean. The landscape value and the enjoyment of the thousands of people who walk through your farm every year

### 11. The 'Back British Farming' movement has become increasingly influential. What do you attribute this to and can you identify the single biggest factor driving this demand?

Increasingly consumers are inquisitive about how food is produced whereas previously there was a degree of ambivalence. An enquiring consumer is the friend of the farmer and these consumers rightly wish to understand more about how the food is produced. Information and digitisation equip us all to know more about everything.

For more information about Trinity AgTech visit <https://www.trinityagtech.com/about-us>



# Notes from the NFU

## On 12 April 2022, the Rural Payments Agency opened its application window for the Lump Sum Exit Scheme.



This scheme is available to BPS applicants in England who wish to leave farming, either to retire or take up a different occupation. The application window closes on 30 September 2022.

Agricultural land, BPS entitlements and business activity in Northern Ireland, Scotland and Wales are not affected.

Once a lump sum payment is made under the scheme, the retiring farmer will no longer be eligible for BPS payments or delinked payments (which will begin in 2024) in England.

### What is the NFU's position?

NFU Vice President David Exwood said: *"With the rollout of the first domestic agricultural policy for more than 40 years currently taking place, farmers across the country will be making difficult decisions about the future of their farm business."*

*"For those thinking of leaving the industry, the opening of the scheme today gives them the opportunity to do so. Farming is a job like no other and deciding to leave the industry will be deeply subjective to each person."*

*"I would encourage anyone considering this to take advantage of the free and confidential business advice being funded by Defra."*

*"We will also continue working with Defra on the crucial New Entrants Scheme which we hope will provide a pipeline for new talent to enter the industry."*

### How the NFU can help you

Members requiring legal advice on the Lump Sum Exit Scheme payment or broader succession planning will be entitled to take advantage of the NFU Legal Health Check service which is delivered through our Legal Panel Firms. Clarke Willmott is the NFU Legal Panel Firm for Somerset, Wiltshire, Dorset and Gloucestershire.

The service (available to all Farmer & Grower members) aims to help identify any concerns, gaps or other legal matters members need to address to help secure their farming, growing and diversified businesses.

It can also significantly help underpin business resilience during these uncertain times. It covers various topics including estate planning, reviewing business structures, lasting powers of attorney, partnership agreements, succession planning and many more.

It can also be used by members when considering whether to apply for the Lump Sum Exit Scheme payments, as well as general plans for the future implementation of Defra's post CAP support framework under the Agricultural Transition Plan and ELMs.

### Financial assistance

In addition, all Farmer & Grower members who subscribe to the LAS (Legal Assistance Scheme) can apply for financial assistance of up to a maximum of £1000 for four sets of instructions (at £250 each) generated by the Legal Health Check carried out by the NFU Legal Panel Firms.

We hope members will take advantage of this service to determine whether it is possible and how to gain access to these payments in support of their families and businesses.

For further information or guidance on the Lump Sum Exit Scheme, please visit the DEFRA website. The NFU website also contains lots of information about this scheme and the services available to its members.

**If you are not an NFU member and would like more information about the benefits of Farmer & Grower membership then call the South West Regional Office on 01392 440700.**

If you would like to receive future editions of **Field Talk** or if you have any comments or suggestions for the newsletter please contact our editor, **Harriet Whitfield**: [harriet.whitfield@clarkewillmott.com](mailto:harriet.whitfield@clarkewillmott.com)