Rollits LLP

Agricultural Law Update

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Introduction

The farming community remains in a period of uncertainty with agriculture being one of sectors most likely to be affected by Brexit. With Brexit still looming, and the possibility of a "no-deal Brexit" the industry remains poised to see what effect it will have across a range of issues including, trade, tariffs and regulation. Only time will tell but hopefully, farmers will, as is often the case, show determination and resilience to whatever may come their way.

A round up of recent cases and decisions…

Was a vacant plant nursery with glasshouses designated as "previously developed land"?

The Planning Inspectorate has recently considered an appeal against the refusal of outline planning permission.

The basis of the application was for re-development of a commercial nursery/ garden centre concerning demolition of buildings and erection of dwellings. The site was located within the Green Belt and one of the main issues was whether the property was classed as "previously developed land" (PDL).

The National Planning Policy Framework (NPPF) includes exceptions to inappropriate development of the Green Belt, one being the "partial or complete redevelopment of PDL"… "which would… not have a greater impact on the openness of the green belt than the existing development". PDL does not include land "that is or was last occupied by agricultural buildings" and the council's interpretation was that the property was agricultural whereas the applicant considered it to be a commercial garden centre and therefore, not excluded from the NPPF.

The Planning Inspectorate held that the property was agricultural and therefore, not PDL and accordingly the proposal was inappropriate development.

Could a person being a divorcee of an agricultural worker enjoy statutory protection under the Rent (Agriculture) Act 1976 (R(A)A1976)?

A recent decision of the Upper Tribunal (Lands Chamber) (UT) offers guidance on who may be classed as a qualifying worker under the R(A)A1976.

In 1975, husband (P1) and wife (P2) moved into a cottage provided by P1's employer as part of his job as a farm worker. P1 and P2 subsequently divorced and P2 remained in occupation of the cottage. Around 5 years later, P1's ex-employers asked P2 to move to another cottage and pay rent. P1 duly moved and paid rent and some time later was also asked to move to a third property, again paying rent.

The UT found that P1 was a qualifying worker but when he left the property, this licence came to an end. Whilst possible, no order was made for the statutory tenancy to be transferred to P2 and P2 could not enjoy statutory protection in her own right as she had never been a qualifying worker. Accordingly, the UT held that P2 had a periodic assured tenancy.

This case offers a useful recap that the R(A)A 1976 only protects an agricultural worker whilst they occupy the property and such rights will end when the worker vacates.

Gareth Orriss

It's just sensible housekeeping…

Regular listeners of The Archers will be aware of the latest Tom and Natasha Archer storyline introduced during the last couple of weeks. Tom and Natasha have had what could best be described as a whirlwind relationship to date. Within a matter of weeks of Natasha visiting Tom in Ambridge, she moves in with him; the next we know is that they have matching tattoos; then Tom pops the question, Natasha says "yes"; there is a last minute cancellation at the Register Office – why wait – and they are married!

Pat and Tony Archer have an ambitious daughter in law who seems to be able to do no wrong in the eyes of their smitten son. Tom has even abandoned his pig business, to focus on developing Natasha's new business ideas for his family's farm.

Over the last few months small snippets of concern have been dropped into the story line – Natasha remains in contact with her previous long term boyfriend; she seems to have credit card debts; at one point there was even a suggestion that Tony and Pat could move out of the farmhouse. Then she disappears – upset that Tom had organised a low cost honeymoon, that he had challenged her spending, that he wasn't being supportive and she couldn't live in the goldfish bowl that is Ambridge.

Tom is devastated and for a long time is unable to tell his family that Natasha has left him. Pat has always had concerns about Natasha's influence over her son, but Tony comes to Tom's rescue by ringing Natasha and much to Tom's delight, she returns and to prove his devotion a belated honeymoon in Cuba is arranged. For avid listeners the alarm bells are ringing loud and clear – they are also ringing for Pat who has now dropped the bomb shell or "sensible housekeeping" suggestion as she describes it to Tony – that although it's too late for a Pre Nuptial Agreement there could be a Post Nuptial Agreement. She wants to ensure that the farm, Helen, her three grandsons as well as their own and Tom's interests are protected. Natasha has her own business interests surely she will want to protect them as well? Tony is not so sure it is a good thing to raise the issue but he knows that when Pat has a bee in her bonnet he simply needs to go along with it.

So Pat invites Tom and Natasha to a meeting at the farm – Tony hovers muttering in the background but Pat goes straight to the point – she tells Tom and Natasha that she thinks they should sign a Post Nuptial Agreement. It's just a form of housekeeping and it means everyone knows where they stand. Silence is a powerful tool in drama. The pause and then the eruption from Tom who is appalled by the suggestion and considers their marriage and his wife are being insulted storms off; Tony starts to wobble – Pat, I told you it wasn't a good idea to mention it. And then Natasha plays her master stroke – I think it's very sensible and leave Tom to me I'll bring him round to the idea. How the Tom and Natasha storyline is going to end for the Archer family will probably take at least a year to pan out, but the warning signs would suggest that there is likely to be a very rocky road ahead.

This is one more pertinent family law story lines that the producers of The Archers have run in recent years. Where love and marriage is concerned we appear to have an aversion to being sensible and yet the implications and consequences of a separation or divorce for many families, particularly farming families where the whole family's home and livelihood may be affected, can be huge. Why do we find it hard to be sensible? Many people believe that Marital Agreements – both Pre Nuptial and Post Nuptial are aimed at stopping people getting what they are entitled to – in reality they are about ensuring that if there is a problem at some point in the future then everyone will have a share that meets their needs and feel there is a sense of fairness. Needs and fairness change as life events happen during a marriage so Marital Agreements also evolve over time – agreements are reviewed in the same way that we review provision in our Wills on a regular basis. When a marriage breaks down everyone in the family is upset – things are said and done that are later regretted – a Marital Agreement that the separating couple considered fair when they wanted the best for each other and the wider family can provide a degree of comfort in the turmoil.

Sheridan Ball

Promises, promises… the repercussions

In May 2019 the Court of Appeal determined yet another case of Proprietary Estoppel. The facts are a stark reminder that if you want to avoid the risk of litigation and the destruction of family relationships, it is essential to discuss, agree and document family business arrangements. If you want to find out more about the Habberfield family and why the mother had to sell the farmhouse and move away from the Farm, please refer to our website at rollits.com for full details.

The Health & Safety Executive are coming knocking

The Health and Safety Executive ("HSE") are now well into their programme of inspections reviewing safety standards on farms across the country. The programme is part of the implementation of the HSE's Agricultural Sector Intervention Strategy published in September 2017.

As set out in our previous newsletter, the strategy was devised in response to the findings of the HSE when it reviewed fatal injuries in agriculture, forestry and fishing for 2017/2018. The review identified 33 deaths during the period concerned. Seven of those deaths were in the Yorkshire and Humber region. This is the highest number of deaths in any one region during the review period. Whilst that statistic may have no influence on the allocation of the HSE's resources, the region is likely to be high on the HSE's agenda for its programme of unannounced visits.

The HSE have indicated that they will regard any breaches of health and safety law that they find very seriously.

It is also, of course, well known that if the HSE visits a workplace and finds a "material breach" of health and safety law, the owner and/or occupier of the site will have to pay for the time it takes the HSE to identify what is wrong and to help put things right. That is called the Fee for Intervention ("FFI"). Currently the FFI is £154.00 per hour.

So how can farms prepare themselves if the HSE come knocking?

The HSE has a guide on its website that can be printed called "*What a good farm looks like*". The link to the guide is hse.gov.uk/agriculture/resources/good-farm.htm. The guide sets out requirements and good practice in relation to vehicles and machines, preventing falls from height and managing falling objects, children on the farm, overhead power lines, cattle management, avoiding drowning and asphyxiation and a whole range of other topics. Knowledge of the guide and being in a position to evidence that the farm follows the HSE's guidance is a good starting point.

In more general terms the HSE inspectors are likely to want to review the health and safety policy for the farm, consider risk assessments, be provided with a list of machinery on site and review the maintenance records for that machinery. The HSE inspectors will also want to see records of accidents that have occurred on the farm and training records for those working on the farm. They will undoubtedly request to walk around the farm and undertake a visual inspection of machinery and any potential risks.

The HSE have indicated that they are not looking to catch farmers out; however, it is clear that there has never been a better time for farms to review safety procedures and check that potential risks to farm workers are being correctly managed.

Jennifer Sewell

Diversification: opportunities and challenges

Adversity is a word well known to the agricultural sector; and farming businesses often find themselves in the position of having to adapt to ever changing challenges and overcome threats. The last 20 years have been fraught with difficult times, from the Foot and Mouth outbreak in 2001, to global imports undercutting domestic prices and declines in farming subsidies. Diversification away from traditional agricultural practices represents an opportunity to future-proof agricultural businesses and build in economic resilience yet farmers need to be aware of some of the challenges and pitfalls they may face.

The recent Diversification Report from NFU Mutual identifies that approximately 62% of farming businesses have diversified in some form or other – with activities such as letting commercial and residential property, renewable energy schemes, opening farm shops and cafes all providing vital extra income. Over 90% of these businesses claim that diversification has been financially successful.

Before embarking on diversification activities it is essential that farmers are aware of the potential legal risks. Whilst there will be various issues relevant to different diversification activities, here is a selection of some of the key considerations from the outset of any new project.

Agricultural letting. Tenant farmers generally have protection from either the Agricultural Holdings Act 1986 (AHA 1986) or the Agricultural Tenancies Act (ATA 1995). To continue to benefit from these protections the tenant farmer must ensure that any diversification activities are not so wide as to alter the character of the agricultural tenancy. The definition of agricultural tenancy under section 1(2) of the AHA 1986 requires the whole of the land (subject to certain exceptions) to be used for agricultural purposes, although case law has indicated that if a tenancy has commenced as an agricultural tenancy it will take reasonably substantial changes to alter that status. Under the ATA 1995, which requires the holding to be "primarily or wholly agricultural", agricultural tenants must be careful to comply with notice provisions and confirm to the landlord that the nature of the holding will remain the same upon diversification and to obtain permission. These Acts do offer protection to farmers with diversified businesses, but these important formalities must still be considered from the outset.

Farm tenancies themselves may also contain onerous requirements, such as constraints in user clauses. User clauses serve to restrict what a tenant can and cannot do with the land, for example it is not uncommon to see a lease term restricting the use of the land

to agricultural purposes only. A tenant breaching such a covenant may find itself on the wrong end of a Notice to Remedy or a Notice to Quit, thereby seriously jeopardising its proposed diversification activities. Prudent farmers should take advice from the outset and resist the word "only" being inserted into such clauses. If the tenant has already been entered into a lease it may be possible to negotiate a release from the covenant with its landlord, often for a cost.

A tenant farmer who has increased the value of the land through its diversification activities (such as building a shop upon the land) will also need to consider the impact this could have at a rent review. The rent could be increased due to the non-agricultural use, though the lease will identify whether such improvements should be disregarded at a rent review.

The lease will also contain clauses about alienation – which might prohibit a tenant farmer from sharing or parting with possession. A conceivable situation where this might arise could be a farmer who sub-lets or licenses part of its premises to another individual or business, such as letting a field to a local interest group for sporting events once a month.

Planning and development constraints will also be crucial to diversification schemes, especially where there is to be any development carried out upon the land. "Development" is given a wide meaning, and in a diversification context could include operations such as constructing or altering buildings or installing energy plants or turbines.

Regulation. Finally, farmers must be aware of increased regulation which might affect its proposed diversification activities. Farmers seeking to expand into renewable energy (the most popular diversification activity, representing 29% of all agricultural diversification) will need to consider at the outset the impact which such a scheme could have on the environment as part of its planning application, and will also be under an ongoing duty to comply with statutory regulations governing aspects such as health & safety, habitats & wildlife, land contamination, environmental compliance and pollution.

Diversification represents a viable and popular option for farmers to generate additional income. The East Riding of Yorkshire Local Plan indicates that the Council will support countryside development which provides jobs and promotes tourism, and it also places an emphasis on the potential that energy development schemes can have in the area. Farmers should consider embracing these opportunities, but be aware of some of the potential risks which will need to be considered beforehand.

Casper Hammond

A refresher on permitted development rights on agricultural land

On 1 May 2019 The Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments) (England) Regulations 2019 ("the 2019 Order") came into force which introduced a number of changes to the permitted development rights which are available in England.

Planning permission is required for the carrying out of any "development" on land, which is defined in the relevant legislation as the "carrying out of building, engineering, mining or other operations in, on, over or under the land or the making of any material change in the use of any buildings or other land".

However, an express application for planning permission is not required if planning permission is deemed to be granted under the permitted development rights, which automatically grant deemed planning permission for specified changes of use and building works and there are a number of permitted development rights which specifically relate to agriculture.

The permitted development rights are set out in various classes in the Town and Country Planning (General permitted Development) (England) Order 2015 ("the Order") and this Order is varied on a yearly basis to include new permitted development rights and vary existing permitted development rights.

This year, there are very few changes to the permitted development rights relating to agricultural development and so we have set out below a refresher on the existing permitted development rights available for agricultural land and buildings.

As a general rule planning permission is not required for the use of land or buildings for agriculture or forestry. However, the definition of agriculture is very specific under the relevant legislation (being defined as including horticulture, fruit growing, seed growing,

dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes) and so we receive many queries regarding what uses and works do amount to agriculture.

Part 6 to Schedule 2 of the Order gives permitted development rights for the following three Classes of Development for agricultural land and buildings:

1. Class A – development of an agricultural unit of five hectares or more.

2. Class B – development of an agricultural unit of between 0.4 and five hectares.

3. Class C – mineral working for agricultural purposes.

The development rights permitted under class A of Part 6 to Schedule 2 above apply only to building operations 'reasonably necessary for agriculture within that unit' and for a building to be permitted development, it has to be designed for the purposes of agriculture.

It should be noted that under both Class A and B it may be necessary, before exercising permitted development rights, to first apply to the local planning authority for a determination as to whether the LPA's prior approval is required for certain details of the development proposed. In particular, the provisions for prior notification apply where it is proposed to erect, extend, or alter an agricultural building.

Further, development under Classes A and B is not permitted by the Order if it involves the provision of accommodation for livestock or the storage of slurry and sewage sludge within 400m of the curtilage of a 'protected building' (e.g. residential accommodation).

If you would like to develop your agricultural land and buildings to a use other than agriculture, then you may also be able to do so under permitted development rights.

Part 3 to Schedule 2 of the Order grants permitted development rights for the following three Classes of development for commercial development:

4. Class Q – change of use of an agricultural building and any land within its curtilage to dwelling house(s). This class also permits any building works reasonably necessary to convert the building into a dwelling house(s). Note there are restrictions on the number of dwellinghouses which can be built and the floor space of such dwellings. Further, prior to exercising the rights an application must be made to the local planning authority for a determination as to whether their prior approval is required for transport and highway impacts, noise impacts, contamination, flood risks, design and appearance and whether the location or siting of the building makes it impractical or undesirable for the building to change from agricultural to a dwelling house. The 2019 Order has amended this permitted development right to make it clear that any dwelling house erected cannot exceed 465 square metres.

5. Class R – change of use of an agricultural building and any land within its curtilage to various commercial uses, including shops, financial and professional services, restaurants and cafes, business, storage and distribution, hotels and assembly and leisure. There are floorspace restrictions of 500 sq. metres for any development under Class R.

6. Class S – change of use of an agricultural building and any land within its curtilage to a state-funded school or registered nursery.

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A refresher on permitted development rights on agricultural land (continued)

In addition to some of the restrictions mentioned above, each of the permitted development rights for both agricultural and commercial development have exceptions, whereby the permitted development right will not apply, and conditions which must be complied with when exercising the right. Accordingly, before exercising any permitted development right, it is imperative that these exceptions and conditions are carefully considered to ensure that the right is indeed available and that any development is carried out in accordance with the various conditions, otherwise enforcement action could be taken for any breach.

When seeking to rely on a permitted development right, it is important to check that the permitted development right in question has not been withdrawn by the local planning authority by an Article 4 Direction. If an Article 4 Direction is in place, then deemed planning permission is no longer granted and an express planning application must be made. It is also important to check whether the property in question is listed, as if so the permitted development rights may not apply. Further, any historical planning consents must be considered to ensure that the permitted development rights have not been restricted by way of a planning condition.

If planning permission is not required, building regulations approval will still be required for any building works and it is vital to check whether any other consent is required for any works, such as the consent of a lender or consent of an adjoining landowner pursuant to a restrictive covenant.

If you have any queries regarding the availability of any of the above permitted development rights then Rollits has an experienced and knowledgeable planning and development team who would be happy to assist and answer any queries you may have.

Libby Clarkson

Information

If you have any queries on any issues raised in this newsletter, or any agricultural matters in general please contact:

Neil Franklin on 01482 337250 or email neil.franklin@rollits.com

The law is stated as at 1 July 2019.

Hull Office
Citadel House, 58 High Street,
Hull HU1 1QE
Tel +44 (0)1482 323239

York Office
Forsyth House, Alpha Court,
Monks Cross, York YO32 9WN
Tel +44 (0)1904 625790

rollits.com