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Agricultural Write News

Offering clear, pragmatic legal advice to the rural business community

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Tied to the Field - Agricultural Occupancy Conditions - When to Challenge?

The reservation of certain property for use by those employed in the agricultural sector has long been a foundation stone of planning law in England and Wales.

Originally introduced to assist those employed in agriculture find suitable housing and to preserve the character and amenity of agricultural areas, such restrictions have become a very important tool used by planning authorities to preserve agricultural communities over the decades.

Although undoubtedly a useful planning tool, there are inevitably downsides to the use of such restrictions (the main being the potentially negative impact on the value of rural property caused by such conditions and in particular the restrictions they impose on development), and they are increasingly being challenged. Case law in this area has been developing steadily over a number of years; however, some recent cases have cast light on how and in what circumstances agricultural occupancy conditions can be successfully challenged.

Background

The current guidance for agricultural occupancy conditions is set out in Appendix A of the Department of Environment Circular 11-95 (Condition 45):

"The occupation of the dwelling shall be limited to a person solely or mainly working, or last working, in the locality in agriculture or forestry, or a widow or widower of such a person and to any resident dependants"

Further guidance is provided elsewhere in the Circular:

"[agricultural occupancy conditions] should only be used where special planning grounds can be demonstrated and where the alternative would normally be a refusal of permission"

Agricultural occupancy conditions are intended for use (mainly in rural areas) to stem a proliferation of residential housing in open countryside and where it is clear that, unless there is a special need for a house for an agricultural or forestry worker, permission would normally be refused.

It should also be noted that an agricultural occupancy condition can extend beyond the actual dwelling itself to cover such things as barn conversions or extensions. In a recent case where permission was granted for a barn conversion at a farm (the grant of which may have helped the sale of the original farmhouse), the Secretary of State considered it justifiable to impose an agricultural occupancy condition not only on the new dwelling (built out of the original barn), but also on the original farmhouse.

When can a challenge be made?

Applications for the discharge of an agricultural occupancy condition are quite common and can be made by applying for a planning permission under Section 73A of the Town & Country Planning Act 1990.

Department of the Environment guidance states that, where an agricultural occupancy condition has been properly imposed, it will not normally be appropriate to remove it: *"unless it is shown that the long term need for dwellings for agricultural workers in the locality no longer warrants reserving the house for that purpose".*

Another important consideration that will be taken into account is an inability to sell at a reasonable price (because of the condition). In one appeal decision, the agricultural occupancy condition was discharged where there was no significant response by potential purchasers to an offer for sale of a bungalow because of the agricultural occupancy condition. It should be noted however that a realistic and thorough marketing exercise must always be carried out beforehand, as the authorities are ever keen to 'sniff out' sham marketing exercises when considering whether to discharge an occupancy condition.

The Court of Appeal held that agricultural occupancy conditions and any application for their removal must 'be considered on the basis of the realistic assessments of the continuing need for them' and should only be discharged where there is no clear evidence to show that the condition has any usefulness.

Procedure for challenge

An application can be made at first instance to the Local Planning Authority. The application must show that, despite a rigorous marketing exercise, there is no local demand for such a dwelling.
Alternatively, an application can be made for a 'Certificate of Lawful Development' if it can be shown that the property has been used in breach of the agricultural occupancy condition continuously for 10 years or more.

The test

The case of Newbury District Council versus Secretary of State for the Environment established that for an agricultural occupancy condition to be valid, it must comply with the following three-fold test:

- It must be **imposed for proper planning purposes** (and not an ulterior motive, such as tax avoidance);
- It must fairly and **reasonably relate to the development** permitted; and
- It must **not be so unreasonable that no reasonable authority could have imposed** it.

Recent cases

In the recent case of Basingstoke and Deane Borough Council versus The Secretary of State for Communities and Local Government, the interested party, S, applied to the local planning authority for a Certificate of Lawful Development in relation to the use of premises on a farm, near Basingstoke, as a house (but not one limited to occupation by an agricultural worker). The authority refused to grant the certificate citing (amongst other things), a planning permission which had been granted in 1950.

The 1950 permission had been obtained for the erection of a pair of agricultural workers' cottages at the farm, and included a condition that the cottages be occupied only by persons engaged in an agricultural occupation.

On appeal, an inspector was appointed to consider the merits of the case. The inspector concluded that the condition in the 1950 permission had not been imposed for a proper planning purpose (and had been applied for the purpose of avoiding a relevant development tax on the property) and could therefore be overturned. The Local Planning Authority appealed.

The High Court took the view that the appeal be dismissed. In the circumstances, the agricultural occupancy condition had not been properly imposed at the time and was not (and never had been), enforceable. Accordingly, the inspector had been correct to conclude that the agricultural occupancy condition was invalid.

In another recent case, Ellis versus Secretary of State for Communities and Local Government, further light was shed on the minimum period required to successfully establish a subsisting breach of an agricultural occupancy condition (10 years). The court also held in this case that the breach must be **continuous for a minimum of ten years and must be subsisting at the time of the application**.

Time to challenge?

Recent cases have emphasised that agricultural occupancy conditions can be challenged; an application can be made to the Local Planning Authority for the condition to be discharged or, alternatively, an application be made for a 'Certificate of Lawful Use' where it can be shown that the property is and has been used in breach of the agricultural occupancy condition for a continuous period of 10 years or more.

Each case is however to be assessed on its own merits and it is therefore prudent to seek professional advice on such matters when considering what approach to take.

Tax & Inheritance update

Recent cases have highlighted issues which may affect the Inheritance tax on farmers and landowners and the distribution of their estates on death.

This article focuses on the tax treatment of agricultural assets and the thorny issue of inheriting a property that has been promised to someone else.

When is a farmhouse not a farmhouse?

The answer is, 'when assessed for Agricultural Property Relief (APR)'. APR applies to 'agricultural property' including land, agricultural buildings, cottages and farmhouses occupied for the purposes of agriculture and land and property used for the breeding of horses.

Subject to ownership qualifications the relief is available at 100% if you have vacant possession (i.e. not rented to another), or would have vacant possession within 12 months, and at 50% if it is tenanted.

HMRC are likely to apply the following tests when assessing APR on farmhouses;

- Is the character of the house appropriate to the farm? Is it a farmhouse for the farm rather than a large house with some land
- What is the local practice? Is it normal for that type of house to be used with that area of land?
- Is this farm being run a business like manner? This is not a test of strict economic viability, but will show that it is a commercial operation and not farming as a hobby.

These factors have to be assessed in a balanced way which has been colloquially referred to as the 'elephant test' - hard to describe but you know it when you see it!

If HMRC agree that APR applies to the farmhouse they then assess how far it applies. APR only applies to the Agricultural value of the farmhouse, which is not necessarily the same as the open market value. In a case known as *Antrobus*, a Lands Tribunal ruled that the agricultural value was 30% less than the open market value, leaving 30% of the value of the farmhouse liable to Inheritance tax at 40%. Although each case should be considered on its own merits, it appears that a 30% difference between the agricultural and open market value is becoming the norm when district valuers report to HMRC.

Key points

- Agricultural property may attract 100% APR
- HMRC may not accept a property as a farmhouse
- APR may not apply to the whole value of the farmhouse

Be careful what you promise

A tax efficient Will should be made to record your wishes for the distribution of your property on death, but a Will is not necessarily the final word. If a claim is made against your estate the courts may order that your property is distributed in a different manner. The House of Lords case of Thorner v Majors has recently reviewed one method of challenging a Will.

David Thorner worked unpaid on his cousin Peter's farm, believing from at least 1990 that he would eventually inherit the farm. David received nothing from the deceased and turned down other opportunities for paid work. When Peter died without making a Will, David's entitlement to the farm was challenged.

For David to claim the farm he had to show he had a right to it on the basis of Proprietary Estoppel which says that a person may have a claim against another's estate if;

- they believe they are, or will become, entitled to another's property,
- have acted, to their detriment, on that belief,
- and if the other person knows of and has encouraged that belief.

Although Peter was described as a man of few words who hardly ever spoke in direct terms, the court held that 'oblique statements and gestures' were enough to assure David that he would inherit.

If a proprietary estoppel claim is successful the court might not award the person with everything they were promised. The award has to be proportionate to what the claimant lost and there have been cases where although the claimant was promised 'everything' or 'the house', the court has awarded less.

It is important to carefully review your Will and any promises you have made to assess whether anyone would challenge your estate to enforce your promise.

Key points

- If someone acts, to their detriment and with your knowledge, on a promise made by you, they may be able to claim against your estate.
- Your Will should be assessed to see if it may be challenged after your death.

Agency Workers

This article looks at the role of agency workers and the proposals to change the law relating to agency workers in order to provide more equality and fairness in the workplace.

It is important for any employer using agency workers to be aware of these changes and the potential impact they will have.

The current position

Agency workers (or "temps" as they are more commonly know) sign up to an agency and undertake work for that agency's clients (also known as the "end-users"). The work is often for a specified time hence the reference to "temps" and so agency workers are commonly found in the agricultural industry, being used for temporary seasonal work.

Whilst agency workers are provided with some rights under various pieces of employment legislation, they are not given the same rights and protection afforded to employees. This tends to mean that agency workers are treated with much inequality in the workplace when compared to employees.

Future changes

Due to this limited protection, the European Union ("EU") felt it necessary to protect vulnerable, often low paid agency workers from organisations who take advantage of their status to avoid certain legal obligations. The aim is to provide agency workers with the same basic working conditions and benefits as permanently employed workers, to prevent disadvantage.

This protection now looks set to be implemented through the Agency Workers Directive ("the Directive"). The EU agreed the Directive in 2008 and the final version was published on 5 December 2008. All Member States now have until 5 December 2011 to implement the Directive and ensure that their own laws comply with it.

Once implemented, the Directive will introduce:

- Agency workers rights to equal basic working and employment conditions with comparable permanent employees (known as the equal treatment principle) relating to the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay. This will also include equal access to on-site facilities such as transport services and child care and improved protection for expectant mothers such as the right to reasonable time off to attend ante-natal appointments;
- Information to Agency workers about any vacant posts in the business in which they are working to ensure agency workers are given the same opportunity as other workers to find permanent employment in that business;
- A requirement for practices to review any restrictions or prohibitions on the use of temporary agency work in order to verify whether such restrictions are justified (and to potentially offer more opportunities for agency workers if they are not justified); and
- Penalties for any non-compliance by either the agency or the end-user with the new obligations.

However, the UK Government has agreed a concession with the EU so that an agency worker must be working for the employer for at least 12 weeks before they are given such equal treatment with comparable permanent employees. The Association of Recruitment Consultancies has further proposed to the Government that the qualifying period should only apply to "vulnerable" workers and that a period of 12 months should be applied to non-vulnerable workers (i.e. those who earn one and a half times the national minimum wage). It remains to be seen how this will be implemented but agency workers will certainly have to pass the 12 week qualifying period to gain these rights.

The consultation on the draft regulations sets out the Government's proposed approach to implementation of the Directive and this will run until 11 December 2009. The response to this consultation may mean that there are further amendments made before final implementation.

The potential impact

Whilst agency workers will undoubtedly benefit from the protections (after the 12 week qualifying period), there have been concerns that such workers will no longer be as flexible and cost effective as before. This may mean that agency workers become less attractive to potential employers, which will have a negative effect on the labour market.

It is therefore unsurprising that the Government has announced a delay in the implementation of the Directive until October or December 2011 (being very close to the deadline). Gordon Brown had previously proposed that implementation would occur in the coming months. This delay should now give businesses time to adjust to the regulations and keep the labour market as flexible as possible slowing the potential increase in unemployment.

Whilst it may appear that the Directive is a long way off implementation, it will happen by December 2011 at the latest. Therefore those employing agency workers should keep upto date on these issues and be mindful of the impending changes.

Key Contacts

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