

Agricultural Write News

Offering clear, pragmatic legal advice to the rural
business community

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Agricultural Property Relief

We have written about this before and readers will be aware that HMRC are taking the view that a “farmhouse” means a house in which a working (and profitable) farmer is living, and nothing else. This works particularly harshly where the farmhouse is occupied by a farmer who has had to retire because of ill health. Readers will therefore be pleased to read of a case, *Atkinson v HMRC*, where the farmer was living in a nursing home but his bungalow still qualified for agricultural property relief (“APR”).

The facts of this case are, in truth, a little unusual. Mr Atkinson bought his farm in 1957. The farmhouse was occupied by his son and daughter-in-law, and he lived in a separate bungalow on the farm. In 1996, after his son died, Mr Atkinson entered into partnership with his daughter-in-law and grandson and the farm as a whole was leased to the partnership. There was no separate arrangement for the bungalow. The farming records were kept there and partnership meetings were often held there.

In 2002, Mr Atkinson fell ill and eventually he moved into a nursing home. His things remained in the bungalow, which he visited from time to time, but he did not live there again. However, he continued to be involved in the farming partnership, talking things over with his daughter-in-law and grandson. He died in 2006.

HMRC refused his estate's claim for APR, stating that the bungalow had not been “occupied for the purposes of agriculture” throughout the necessary period. The executors appealed to the Tax Tribunal.

The Tribunal held that the farm as a whole was occupied by the farming partnership. Providing accommodation for someone involved in the work of the farm was a valid agricultural purpose. There was no doubt that Mr Atkinson continued to be involved in the work of the farm. Although he was not in actual occupation of the bungalow, his things were still there and it remained set aside for his needs. Accordingly, APR should apply.

What was unusual in this case was that the bungalow formed part of the tenancy of the farm as a whole. If it had been let separately to Mr Atkinson, then the “occupation” test would have been failed. In addition, if Mr Atkinson had suffered from dementia, so that he had not been involved in the farming partnership, again the relief would not have applied.

Undaunted, HMRC made another attack on APR in the case of *Golding v HMRC*. Mr Golding worked on his farm (originally owned by his parents) from 1940 until his death in 2005. The farm was a typical smallholding of 18.64 acres, and at its peak supported pigs, chickens and a small dairy herd as well as being used for fruit trees and arable crops. However, by the time Mr Golding died at the age of 81, his farming activities had diminished considerably; he had got rid of the animals apart from some chickens and he only grew arable crops. HMRC challenged the claim for APR on the farmhouse, claiming that it was not “character appropriate” for the smallholding. In essence, their claim was based on the sole ground that the land was not able to support the house. Therefore the house was not a genuine farmhouse (perhaps being only suitable for “hobby farmers”) and could not attract APR.

First, the Tax Tribunal rejected HMRC's claim that the land could not support the house. It might not be very profitable, but farmers have a vocation and were often prepared to accept a standard of living different from that in the non-farming community. Then, the Tribunal reminded HMRC that the profitability or otherwise of the farm was not the only factor; there are a whole series of matters to be borne in mind, including the history of the farm and the land.

It is surprising that HMRC took this case so far, since their factual case was weak. Mr Golding was working on his farm until a few days before his death and he lived off the small income farming brought him. It seems they were influenced by the fact that the size and location of the farm meant it was likely to be purchased by a non-farmer. However, that is not relevant for the purposes of APR.

What these cases show is that HMRC are using anything they can think of to challenge a claim for APR on a farmhouse; they also show that if the property really was a farmhouse, it is worth at least taking the matter to the Tax Tribunal since they are quite prepared to give HMRC a bloody nose.

Stop Press

The Upper Tier of the Tax Tribunal has overruled the decision in *Atkinson*. Last week, the Upper Tier declared that residential property could only qualify for APR if there was some “objective connection between the occupation and the relevant agricultural activities”. It was not in dispute that the bungalow was occupied by the farming partnership; but the actual purposes of the occupation – storing Mr Atkinson's possessions – had lost any connection with agricultural activities.

Earth, Wind and Fire – Is now the time to embrace the renewables agenda?

Summary

2010 and 2011 marked a distinct change in the approach of the Government towards renewable energy and heat generation and a number of significant developments have taken place that present opportunities for those in the agricultural and rural services sector (on both small and large scale) to diversity into this sector and to take advantage of the incentives available.

The purpose of this article is to have a brief look at the new legislation and to explore how new ways of approaching heat and electricity generation can be embraced at a time of record gas, oil and electricity prices.

Turning green – the new agenda

Over the last few years both domestic and commercial users have been hit hard by soaring energy prices. With increased global demand, (particularly in developing countries), together with a finite supply of fossil fuels, it would appear that oil and gas prices are likely to go nowhere other than on an upwards trajectory.

With this in mind (and the increasing concern about global greenhouse gas emissions and the much publicised problems of climate change), the UK Government and the European Union have brought forward a number of proposals to incentivise both domestic and commercial generation of heat and electricity from renewable sources.

Feed-in tariffs ("FIT's")

Feed-in Tariffs provide a per kilowatt hour support payment for surplus electricity generated from renewable sources.

The tariffs were introduced following legislation in April 2009 by the European Union requiring that the UK increase its proportion of electricity generation from renewable sources by 2020. The FIT scheme came into force on 1 April 2010.

FITs are open to anyone: individuals, businesses, landlords or local authorities.

The payments are initially available for the generation of renewable electricity from installations with generating capacity of up to 5 megawatts and are available for electricity generated from the following sources:

- wind;
- Solar photo-voltaic (or "solar PV");
- hydroelectric generation;
- anaerobic digesters;
- micro combined heat and power.

Generators eligible for FITs receive two types of payment:

- (i) a fixed payment for every kilowatt hour generated (the "generation tariff"); and
- (ii) a guaranteed minimum supplementary payment (over and above the generation tariff) for every kilowatt hour exported to the wider electricity market.

The level of the FIT is set annually and adjusted each year in line with RPI. Ofgem publish the fixed payment rate table for the coming year on or before 1 March.

Renewable Heat Incentive ("RHI")

Following on from the introduction of the FIT scheme the Government had intended to roll out the Renewable Heat Incentive ("RHI") from 30 September this year. Due to delays (which the Government blamed on European Commission intervention into the level of subsidies), the scheme is still not yet fully up and running, however, the Government has promised that it will go on-stream shortly.

The RHI scheme is intended to provide non-domestic generators (and in particular farmers and landowners), with an opportunity to invest in renewable heat generation technologies and is the first of its kind in the world. The intention is to provide £860 million of subsidies between 2011 and 2015 (more than double the amount of funding allocated to the FIT scheme).

In its first phase, long-term tariff support will be targeted at the non-domestic sectors (in particular at the big heat users in the industrial, agricultural, business and public sectors, who, between them contribute 38% of the UK's total carbon emissions). Under this phase, there will also be support of around £50 million for households (through the Renewable Heat Premium Payment).

The second phase of the RHI scheme known as the “Green Deal” will be expanded to include an increasing number of technologies and increased support for households and is intended to be rolled out in the autumn of 2012. Under the RHI scheme, incentives are paid on the basis of metered heat produced by eligible installations. It is anticipated that returns of 15% to 20% may be achievable (depending on type of technology and heat usage). As with Feed-In Tariffs, incentive rates are adjusted annually in accordance with the UK RPI and will continue for up to 20 years from the date of accreditation.

In order to gain accreditation (and receive support under the RHI scheme), an applicant will need to demonstrate that the proposed installation meets various eligibility criteria. These include:

- during phase 1, only non-domestic installations will be supported;
- installations must be completed (and must have been first commissioned) on or after 15 July 2009;
- heat must be a usable, useful heat used for space, water or process heating;
- RHI participants are also required to meet a number of on-going obligations, including maintaining equipment, providing information to Ofgem and allowing installations to be inspected.

Hot air, or just hot air?

There have been publicised delays in the roll-out of the Government's green incentives and recent delays to the roll-out of the RHI have been criticised (coming at an important time of the year in terms of heat generation and usage). The scale of the Feed-In Tariff scheme has also been criticised due to the reduction in the proposed incentives for large-scale producers (particularly useful for those in the agricultural sector).

It is clear however that the Coalition Government (pushed along by the European Union) are keen to promote the increasing use of micro generation technology on both a large and small scale.

The long awaited ‘banding review’ of the Renewables obligation payment rules published in September was widely welcomed as a step in the right direction. Whilst some see the current emphasis as a little skewed to domestic generation (at the expense of agricultural and industrial exploitation), there remain opportunities and it is hoped that the banding review and roll out of the RHI in 2012 will encourage larger scale take up of the incentives available.

Stop Press

On 31 October the Government announced plans to slash the amount of Feed in tariffs available for solar PV installations with an eligibility date on or after 12 December 2011, much to the dismay of many in the sector. The DECC are due to publish the results of a separate consultation of the FIT scheme around the end of this year and many in the sector are bracing themselves for further changes – we'll keep you posted!



Time to bale?

Property Casebook: Robert Fidler -v- Secretary of State for Communities and Local Government and another [2010] (High Court).

There have been many memorable attempts by members of the rural community to sidestep what is often perceived to be our somewhat cumbersome and time-consuming planning system. Even the Coalition Government have recognised that the current system needs an overhaul, however, one of the more memorable efforts at side-stepping the current regime was considered by the High Court in the case of Fidler -v- Secretary of State.

Background

The case concerned a breathtakingly simple approach to avoid the need to obtain planning permission for the construction of a house.

The defendant, Mr Fidler, constructed a house on part of his existing yard. By summer of 2002, the house was completed and the defendant and his family were living in it. Nothing wrong with that you might think; however Mr Fidler was mindful that it was highly unlikely that the Local Planning Authority ("LPA") would grant planning permission for the house so, in an effort to avoid detection, he had built the entire thing behind a screen of straw bales and then covered the lot with a tarpaulin!

Playing the waiting game

Under current planning rules any enforcement action by the LPA would need to have started within four years of substantial completion of the works in question. This four-year enforcement period also applies in relation to a change of use of a building (or any part of it) to use as a single dwelling (although beware, a breach of an agricultural occupancy condition carries a ten-year enforcement period).

Coming out

In July 2006 some four years after Mr Fidler and his family had moved into the house and, somewhat coincidentally, just at the expiry of the four-year planning enforcement period, the defendant removed the straw bales and tarpaulin to reveal the house.

In February 2007, the LPA issued an enforcement notice (on the basis that the house had been constructed without the required permission and substantially completed less than four years before the date of the enforcement notice). The LPA argued that the removal of the straw bales formed an indivisible part of the construction of the house and, as a consequence, the house was not "substantially completed" until the straw bales had been removed (which had occurred less than four years before the enforcement notice was served).

Mr Fidler appealed, arguing that any breach related to the construction of the house (completed in 2002 and therefore outside the enforcement period).

The Court's view

The matter was finally resolved at the High Court last year. The court felt that there were a number of "ancillary activities" that routinely take place on a construction site. Such activities, if considered in isolation, would not form part of a building operation, but when considered in the whole (and when contemplated and intended to form an integral part of building operations) would form an indivisible part of the construction process.

The fact that Mr Fidler had known that planning permission for the house was highly unlikely and, as a consequence had shielded the house with straw bales (only removed after the expiry of four years) led the court to take the view that the placing of the bales and tarpaulin were a deliberate act and an integral part of the "building operations" (intended to deceive the LPA and to achieve, by deception, lawful status as a dwelling house). The court therefore found in favour of the LPA.

Conclusion

The case represents a novel approach at avoiding the requirement for planning permission. However, it does show that the authorities take very seriously all attempts at avoidance of the planning rules.

Agricultural/Rural Business Team - Key Contacts



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Chris joined the firm in 2004 having trained in the City of London. He is an experienced property lawyer and deals with a variety of work (both agricultural and non-agricultural). Chris has particular experience of development work, site acquisitions and disposals as well as landlord and tenant work.

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Amanda has many years' experience of dealing with a wide range of private client matters and is a member of the Society of Trust and Estate Practitioners (STEP). She has particular experience in dealing with wills and inheritance tax planning including the use of Business and Agricultural Property Reliefs, the administration of estates and trusts, powers of attorney.

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John Morris

John has worked as a specialist employment lawyer since he qualified in 2005. He studied Law at Cardiff University and then worked at national law firms DLA Piper and Beachcroft before joining Neil Myerson in 2008. John's extended family have been involved in farming for generations and, as such, John has a keen interest in agricultural and countryside issues.

His experience includes advising clients on employment and business immigration matters, including Employment Tribunal claims and advising on a full range of employment related issues. John regularly provides training to our clients in order to keep them up to date on what is a fast developing area of the law.

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