36 BEDFORD ROW

36 Agriculture

Spring 2015

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Foreword

by **James Petts**

This is the first edition of the 36 Bedford Row agriculture newsletter; we hope that you will find it useful. It is the first in what we hope will be a series of newsletters aimed specifically at the agricultural sector, covering a range of topics that may be quite disparate in legal terms, but all of which are particularly relevant to agriculture and the people involved in it. We have articles from Felicity Gerry Q.C., a leading member of the criminal Bar, writing about the draconian nature of the law regarding people in possession of firearms, even those lawfully used by another, without a licence; from Paul Infield, a highly experienced family barrister, on the ups and downs of matrimonial finance on divorce where agricultural property is involved; an article by one of the foremost experts in planning, David Altaras, on development in the countryside; my own article on possession claims in the context of probate, which can be an issue for family farms as much as agricultural workers' cottages; an article on the ever troublesome issue of proprietary estoppel from senior chancery practitioner Philippa Daniels; and, reminding us that this is 2015, an article from Michael Coley, a member of chambers with particular interest in aviation, on the regulation of agricultural unmanned aerial vehicles ("drones").

We are always happy to have feedback on the articles or on any subject that you would like to see covered in the next edition of our newsletter, for which purpose, I, the editor, can be contacted at jpetts@36bedfordrow.co.uk.

36 BEDFORD ROW

36 Bedford Row
London
WC1R 4JH
DX: **LDE 360**
Tel: **0207 421 8000**
Fax: **0207 421 8035**
www.36bedfordrow.co.uk
Twitter: **@36BedfordRow**

Removing the Agricultural Occupancy Condition

by **David Altaras**

It must be acknowledged that the countryside cannot accommodate unlimited forms of development without detriment. Building in the open countryside, away from existing settlements, needs to be strictly controlled. However, there may be some cases where the demands of farming and forestry work make it essential for one or more farm or forestry employees to live at or very close to the site of their work. That in turn may give rise to a need for an isolated residential dwelling in the countryside to accommodate the farm worker or workers. The key question in such a case is this: is the farm a viable enterprise that genuinely needs that worker or those workers on site? That has lead central government and planning authorities (certainly in the past) to apply what were known as the functional and financial tests. The hurdle is set high to prevent any abuses to the concession. Even if the hurdle is overcome, the planning authority is likely to impose a condition on the dwelling limiting its occupation to bona fide agricultural workers or their dependants. If the dwelling is no longer required for agricultural workers, can the condition be removed? What is the position if the house is occupied in breach of the occupancy condition?

Present policy as regards agricultural workers' dwellings

Guidance relating to agricultural and forestry workers' dwellings in the open countryside was unchanged for almost 20 years until Planning Policy Guidance Note 7 ("PPG7") was issued in 1992, followed by Planning Policy Statement 7 ("PPS7") entitled "Sustainable Development in Rural Areas"

The recently issued (online on 6th March 2014) National Planning Policy Framework ("NPPF") repealed PPS7. Paragraph 55 of the NPPF simply advises that:

"Local planning authorities should avoid new isolated homes in the countryside unless there are special circumstances such as: the essential need for a rural worker to live permanently at or near their place of work in the countryside…."

Note that the advice is no longer limited simply to agricultural workers and farms but extends to all rural workers.

The associated Planning Practice Guidance under the rubric "Rural Housing" takes the matter no further. It remains to be seen whether planning authorities and the courts will continue to follow the former advice given in Annex A to PPS 7 that permission for an isolated dwelling in the countryside will generally be permitted if the applicant can meet the functional and financial viability tests. It is probable that such tests will continue to be applied, possibly with more flexibility than in the past: see *Petter & Harris v Secretary of State for the Environment, Transport and the Regions.* [1]

The Condition

The usual form of a modern-day agricultural occupancy condition is as follows:

"The occupation of the dwelling shall be limited to a person solely or mainly working, or last working, in the locality in agriculture or in forestry, or the widow or widower of such a person, and to any resident dependants": see Model Condition 45 of Circular 11/95.

Over the years there has been widespread criticism of the agricultural occupancy condition. For example, do the words mean that no one is entitled to live in the property unless he or she comes within the condition? If so, then theoretically there would be a breach of condition if a farm worker's non-dependent daughter, who was earning a salary as a secretary for the local authority, lived in the property. Alternatively, do the words mean that it is sufficient if the council tax payer falls within the condition? If so, the agricultural worker could take as lodgers industrial or office workers from the nearby town, which would surely make nonsense of the rationale behind the condition. And what does the word "locality" mean? How tightly or loosely need the radius be drawn? Is a person "mainly" employed in agriculture if he spends over 50% of his working week in agriculture or must over 50% of his weekly wage be earned in agriculture?

[1] (2000) 79 P&CR 214, where the Court of Appeal allowed an appeal by a subsidence farmer against an inspector's refusal to permit the siting of a mobile home on his smallholding. The Court held that a rigid application of the financial viability test was inappropriate to establish the genuineness and probable continuation of an agricultural holding that was manifestly not run on a commercial basis.

In an early case, an owner challenged root and branch the validity of an agricultural occupation condition on the ground, inter alia, that it was void for uncertainty. He failed in the Court of Appeal and in the House of Lords: see *Fawcett Properties –v- Buckingham CC*[2]. Similarly, in *Alderson –v- Secretary of State for the Environment*[3], the Court of Appeal rejected an argument that the word "locally" rendered the condition bad for uncertainty. The Court held that "locally" had an intelligible meaning, it being for the court to decide in doubtful cases whether such a condition had been breached.

What to do about the condition

A. Apply for the condition to be removed

Changes in the scale and nature of agriculture whether locally, nationally, regionally or globally may well affect the requirement for a dwelling or dwellings for occupation by agricultural or forestry workers. It makes no sense, particularly in this day and age, to keep such dwellings vacant simply because the planning condition limiting their occupation has outlived its usefulness. In those circumstances, consideration should be given to applying to the local planning authority to remove the condition under section 73 of the Town and Country Planning Act 1990[4].

What are the principles upon which the local planning authority will act? The essential issue is this: is there a continuing need for the dwelling to be available to agricultural workers in the area as a whole rather than on the particular holding? If there is, then removal of the condition will lead to pressure for further agricultural workers dwellings in that vicinity in the future and hence the application should be refused: see paragraph 105 of Circular 11/95[5].

That has lead local planning authorities to require owners to market their property for sale at a price appropriate to a house subject to an agricultural occupancy condition. An offer to buy will demonstrate that there is still a need for such a dwelling: no offer will demonstrate the absence of such need. Not surprisingly many owners find this approach unsatisfactory for two principal reasons. First, there is the difficulty in assessing the proper market value of a property discounted as a result of the occupancy condition. That in turn might involve the additional costs of a specialist valuer. The rule of thumb appears to be that a discount of 10%-30% is appropriate. Second, it inevitably appears to the owner that the resulting value is too low. There is a consequential fear that there may be a speculative purchase at undervalue on the basis that the occupancy condition may subsequently be lifted sometime in the future.

Other factors that have been taken into account in determining whether the occupancy condition has outlived its usefulness are:

- whether other applications have been made for dwellings in the vicinity for agricultural workers;
- evidence of demand for agricultural dwellings from the Council's housing waiting list;
- the extent to which local agricultural holdings are already served by dwellings;
- whether there are vacant agricultural dwellings in the neighbourhood.

An appeal may be made to the Secretary of State against any adverse decision by the local planning authority: see section 79(4) of the Act.

B. Apply for a CLEUD (certificate of lawfulness of existing use or development)

If the dwelling has been occupied in breach of the agricultural occupation condition for a certain period of time, the use is immune from enforcement action and becomes lawful by virtue of the provisions of section 191(2) of the Act. What is the appropriate period? Before the repeal of the old section 172 of the Act, there was some argument as to whether the four or ten year period applied[6]. However, it is now clear that a breach of planning control consisting of a breach of condition falls within "any other breach of planning control"

[2] (1961) 12 P&CR 1

[3] (1985) 49 P&CR 307

[4] Although the section is entitled "Determination of applications to develop land without compliance with conditions previously attached", it is, in effect, a power to discharge or amend planning conditions.

[5] In *Millbank (Execs) –v- Secretary of State for the EnvironmentOE & Rochford DC* (1991) 61 P&CR 11, where the Court of Appeal held that the right test, set out in the Circulars, was whether there was a continuing need for the condition. "The condition will remain in force unless or until the local authority or an inspector is of the opinion that the condition no longer serves a useful purpose": per Bingham LJ at 16.

[6] See for example *Newbury DC –v- Secretary of State for the Environment* (1994), 67 P&CR 68.

under section 171B (3) of the Act and is therefore subject to the ten year rule[7].

At the expiry of the ten year period, an application can be made to the local planning authority for a certificate of lawfulness of existing use: see section 191(1) (c) of the Act. The relevant time for determining whether the time for enforcement action has expired is when the application for a CLEUD is made. Where the alleged breach is a failure to comply with a planning condition, it is necessary to find a continuous breach over the 10 year period. If, for example, a house with an agricultural occupancy condition was left unoccupied, there would be no breach of condition during that period. If the house was thereafter occupied in by someone not employed in agriculture, then there would be a fresh breach and time would begin to run anew. Hence, an application for a CLEUD can be made only if non-compliance exists at the time of the application: see *North Devon DC –v- Secretary of State of the Environment*[8].

There is a right of appeal to the Secretary of State against the local planning authority's refusal to grant a CLEUD: see section 195 of the Act. The issue for the Secretary of State is whether the local planning authority's refusal was "well-founded".

Enforcement

If there is a breach of an agricultural occupancy condition, the local planning authority may consider it expedient to take enforcement action. Theoretically, it could issue a breach of condition notice, requiring the recipient, within a specified period (not less than 28 days), to discontinue occupation of the dwelling by persons neither solely nor mainly employed in agriculture. Failure to take the specified steps within the specified time would render the recipient liable to prosecution. However, this particular procedure tends to be unpopular with local planning authorities. As the editors of the Encyclopaedia of Planning say: "The simple design of the procedures disguises a potential maze of complexity and it is likely that local planning authorities will wish to resort to these powers only in the clearest cases of breach"[9].

It is thus more likely that the planning authority would issue an enforcement notice under section 172 of the Act, in respect of which there is a right of appeal to the Secretary of State. One of the grounds of appeal is that the condition concerned ought to be discharged: see section 174 (2) (a) of the Act. It should be noted that, whether or not ground (a) is expressly invoked, there is deemed to be an application under that ground on lodging an appeal. Thus, the Inspector hearing the enforcement notice appeal would in any event need to consider whether the occupancy condition has outlived its usefulness.

If an enforcement notice becomes effective, either because the recipient has not lodged an appeal or if he has done so because the appeal has been dismissed and if the recipient fails to comply with the notice, then there are further enforcement powers open to the local planning authority. It may prosecute the offender. Breach of an enforcement notice is an "either way" offence, so the offender can either stand his trial before the magistrates or elect to be tried by judge and jury in the Crown Court. More likely, the local planning authority will apply to the High Court for an injunction restraining the breach pursuant to section 187B of the Act. Breach of an injunction amounts to contempt of court and penal sanctions can be applied by way of imprisonment or sequestration of goods.

Conclusion

Obtaining planning permission for an isolated dwelling in the countryside is a problem. If such permission is granted on the grounds that an agricultural worker is genuinely required to reside on or near the farm because, for example there are animals or agricultural processes that are likely to need essential care at short notice, then an occupancy condition will almost invariably be imposed. Removing such a condition is often quite difficult.

[7] For the meaning of "breach of planning control" see section 171A (1) of the Act

[8] [1998] EGCS 72 and see also B*asingstoke and Deane Borough Council v Secretary of State for Communities & Local Government* [2009] EWHC 1012 (Admin), an interesting case from another aspect since Collins J held that, as the original occupancy condition had not been imposed for a proper planning purpose, it was invalid.

[9] Vol 2 para P187A.05, Sweet & Maxwell

Common Law Judges and Firearms Injustice

by **Felicity Gerry Q.C.**

There are many legitimate uses of firearms in agriculture, but the law relating to those who possess them without the appropriate licence, even carelessly or unwittingly, can be extremely strict. This article, which explores some of the consequences of that strictness, first appeared in the Criminal Law & Justice Weekly 'blog on the 18th of October 2014, and is reproduced with permission of the author.

The current judiciary is not particularly radical but, if recent speeches are anything to go by, they want common law control wrested back from Europe. If that's right then they may have to radically change their approach to fairness and rights and start staying a few Draconian indictments and overturning apparently mandatory sentences. The public interest in prohibiting possession of fatal weapons is reflected in Draconian legislation but there is rising concern over miscarriages of justice in this context. Many thought that the Danny Nightingale case was a charging error. Has perspective been lost when it comes to guns?

Not every firearms case is sympathetic but the rule of law must be applied properly. In *R. v. Coloquhoun and others* [2014] EWCA Crim 1972, the four appellants successfully appealed against consecutive sentences imposed for conspiring to sell a prohibited weapon and other firearms offences. The items had been in the same bag. The court held that the statutory maximum for firearms offences should not have been circumvented and the sentences imposed for all the offences were ordered to run concurrently. Contrast the recent case of a 17-year-old defendant convicted of possession of a firearm in a sports bag, where that gun was thought to have been planted by another. Apparently the Judge told the jury, "if you find the defendants were in possession then you need not find knowledge and plant is not a defence, you should return a verdict of guilty". On returning a verdict of guilty, members of the jury were crying, one looked at the defendant and mimed "I am really sorry". I'm told it was obvious that the jury felt they had no choice but to mechanically return a verdict of guilty. Aside from other concerns over police investigation and CPS disclosure, there is real concern that an unduly strict application of law has created a miscarriage of justice. Questions have also arisen over whether the law can be circumvented and what role Judges can play in checking overzealous prosecutions.

By s.5 of the Firearms Act 1968, a person commits an offence if, without the written authority of the Defence Council, he has in his possession any of the prohibited weapons and ammunition listed in s.5(1). The stakes are high. The maximum penalty is 10 years for all s.5(1) offences. On conviction, a 17-year-old faces a minimum three year sentence. In *R. v. Bradish* [1990] QB 981, it was held that s.5 creates an offence of strict liability. It is no defence for a defendant in possession of a prohibited weapon to say he did not know or suspect that it was a prohibited weapon. In *R. v. Nasir Zahid* [2010] EWCA Crim 2158, it was held that an offender had no defence to possession of ammunition on the basis that he believed he was carrying an innocent object. In that case, the defendant admitted possession of a brown paper package which he said was left on his doorstep but asserted he did not know or suspect it contained ammunition. In holding that strict liability applied, the court commented as follows:

"The essence of the defendant's argument is: 'I did not know that the object in my possession was a firearm'. The reasons which this court has given for concluding that such an argument should not afford a defence are equally applicable whether the defendant's case is that he did not know what was in the bag or that he thought what was in the bag was an innocent object".

But, what of the defendant who doesn't know he has an object in his sports bag at all? In *Warner v. Metropolitan Police Commr.* [1969] 2 AC 256, the House of Lords discussed absolute offences and intention to possess in the context of drugs possession. A distinction was drawn between mere physical custody of an object and its possession. Lord Pearce said, "I think the term possession is satisfied by knowledge only of the existence of the thing itself".

Approaching firearms possession in the same way should mean that a properly directed jury can sort those who know they are gun running from those who do not. However, if a suspect is the victim of plant, is there any point in a prosecution? Judges have no direct power to stop criminal prosecutions on the basis of public interest. Judicial review procedures are so limited as to be pointless. Applications to dismiss will depend on inferences from the prosecution case without regard to the circumstances of the offender. However, the common law can be used to step in where a trial is vexatious and oppressive: it worked for Tulisa on entrapment.

Even if all that fails, on sentencing, the value of the ECHR comes into play as there may be an art.5 argument. While the ECHR is very reluctant to engage on sentencing, arbitrariness under art.5 may arise from mandatory sentences that do not take into account the circumstances of the individual (see *Partington v. UK*).

The underlying principle may be argued to apply, perhaps with all the more force, where the law provides mandatory sentences in circumstances where the offences are so broadly cast to include situations where there is little or no meaningful contribution to the offence, yet sentencing does not take into account the very different levels of knowledge/contribution.

It will take a brave Judge but a just one to deal with such issues at common law – here's hoping there's one in the Court of Appeal.

Possession claims in the context of probate

by **James Petts**

When a person dies, her or his most valuable possessions usually takes the form of land, whether a house, a farm or multiple properties, sometimes overseas. For those who are beneficiaries in a will or entitled under an intestacy to realise their inheritance, whether by living in the house or farming the land, or simply by selling the property, it is often necessary to obtain possession of the land from some living person who is currently in occupation of it. Sometimes, this is straightforward, but there are certain particular issues in the context of the administration of a deceased person's estate that can arise from time to time. This article seeks to give an overview of a few of the more important issues.

The basics

The normal course of events should always be to seek first to obtain possession consensually without the need for court proceedings. It should be noted, however, that, in order to obtain possession of land from a person who occupies the land as a residence who does not give it up voluntarily, it is necessary to obtain a court order: seeking forcibly to evict a residential occupier otherwise than with a court order is a criminal offence under the Protection from Eviction Act 1977, and this includes withholding services or interfering with the occupier's comfort with the intention of causing her or him to give up occupation (S. 1(3), ibid.). Simply writing to the occupier and threatening to bring proceedings for possession (and pointing out the costs consequences of doing so), however, is permissible.

In order to bring possession proceedings, it is necessary to obtain a grant of probate or letters of administration. Without this, the court will not be able to be satisfied that the claimant is entitled to possession against the defendant(s). The claim should be brought by the person or persons who have obtained the grant of representation. A mere beneficiary under a will or intestacy cannot bring a possession claim against a third party. It will also be necessary, for registered land, to produce office copy entries of the register showing the deceased as a person with a superior right of possession (usually as a freeholder or leaseholder). In cases where the deceased's right of occupation derived from a short tenancy agreement that does not require registration, this document should be obtained. For unregistered land, the title deeds should be used. All of these documents should be appended to and referred to in the particulars of claim for possession.

Before commencing possession proceedings, however, checks should be made to ensure that the deceased's interest in the land did not pass by survivorship to a joint tenant (either of a freehold or leasehold estate).

An additional matter to consider is whether an administrator or an executor should, before commencing any litigation against a third party, apply for a *Beddoe* order (In *Re: Beddoe, Downes and Cottham* [1893] 1 Ch. 547). This is an order by the court to the effect that the costs of the litigation be paid out of the estate rather than by the executor or administrator personally. Applying for such an order is not compulsory, but, if there is no order before the start of litigation, the executor or administrator might have to meet the costs of the litigation personally unless he or she can convince the court after the event that it was reasonable to have embarked upon the litigation. Such an order is not appropriate, however, where the dispute is internal to the estate, as where the defendants are themselves beneficiaries.

Landlord and tenant cases: the deceased was the landlord

These are conceptually the most straightforward, as the death of the deceased does not (unless the terms of the lease provide otherwise, and then subject to statutory regulation as to the circumstances in which possession can be recovered) change the position of the tenant. The person entitled to the grant of representation becomes the tenant's landlord and recovers rent for the benefit of the estate. Possession can be obtained against the tenant on any of the usual grounds for possession (including a S. 21 notice in the case of an assured shorthold tenancy), but the personal representative does not have any more right to terminate the tenancy than the deceased had immediately before her or his death. The lease or tenancy agreement itself may contain express provision as to what should happen on the landlord's death, so this document should always be checked carefully.

Indeed, there may be some cases where the death of the deceased removes a potential ground for possession in residential cases, as where the deceased, but not the

personal representative, previously occupied the premises as her or his only or principal home or the premises were required for the deceased's immediate occupation before her or his death (Ground 1 in Schedule 2 of the Housing Act 1988), providing that the notice was served at the requisite time or the Court thinks it just and equitable to dispense with notice. However, there may also be cases in which the deceased's demise allows a claim under Ground 1 where it would not otherwise be possible, as where a solely entitled beneficiary needs the premises for her or his immediate occupation where this was not the case for the deceased her or himself. In such cases, there may be some benefit to distributing the estate before obtaining possession, although this should be considered carefully.

If the tenant of residential premises has been a tenant for a very long time (since before the 15th of January 1989), he or she is likely to be protected either under the Rent Act 1977 or the Rent (Agriculture) Act 1976, as applicable. Obtaining possession in these cases is less straightforward than for more recent residential tenancies. The relevant Act should be consulted in such cases, which are likely to be increasingly rare as time passes.

As to the service of notices (e.g., a notice to quit) upon deceased landlords, see below in respect of tenants.

Landlord and tenant cases: the deceased was the tenant

The death of a tenant does not determine the tenancy, as a tenancy is a proprietary, not a personal right. The interest in the tenancy passes to the deceased's personal representatives: see Section 1(3) and 3(1) of the Administration of Estates Act 1925. This means both that the personal representatives of the deceased can bring proceedings for possession against third parties such as sub-tenants and trespassers, and that the landlord is not released from her or his obligations as such by virtue of the deceased's death.

In some cases, especially in commercial leases, there will be express provision as to what is to occur upon the tenant's death, very often giving the landlord a right to forfeit. (The right of forfeiture is greatly restricted in residential cases). However, even in commercial cases, a Section 146 notice is required.

Validly to serve a S. 146 notice, a notice to quit, a S. 21 notice or any other notice upon a tenant who has died requires the position in respect of the deceased's estate to be ascertained carefully. If there has been a grant of representation, the notice should be served upon the personal representative. Where no grant has been obtained, notice should be given to the Public Trustee (and, where there is no will providing for executors, also served on the deceased's last known residence addressed to the "personal representatives" of the deceased, giving the deceased's name). Notices by the tenant to the landlord can properly be given by the personal representative of the deceased tenant.

In the case of periodic assured shorthold tenancies, however, the death of the tenant in some cases gives rise to a right by the landlord to obtain possession against a tenant under Ground 7 of Schedule 2 to the Housing Act 1988. The landlord must begin possession proceedings within 12 months of death, and acceptance of rent from a new person does not by itself give rise to a new tenancy. Ground 7 does not apply, however, where a joint tenancy passes by survivorship to another joint tenant, or where the spouse or civil partner of the deceased was living with the deceased sole tenant immediately before her or his death (unless the spouse tenant her or himself was such a successor).

An assured agricultural occupancy under the Housing Act 1988 can pass to a "qualifying surviving partner" or a "qualifying family member of the previous qualifying occupier's family": see Schedule 3, Para. 3 (1) of the 1988 Act. A qualifying surviving partner is a widow, widower or surviving civil partner and a "qualifying family member" (which applies only where there is no qualifying partner) is a "member of the family [who] was residing in the dwelling-house with the previous qualifying occupier at the time of, and for the period of two years before, his death". Where there are multiple qualifying family members, they may agree as to who is to take occupation, and, if they cannot agree, the County Court is empowered to decide for them. As with assured shorthold tenancies, multiple succession is not permitted. Older tenancies under the Rent (Agriculture) Act 1976 become new assured agricultural occupancies upon succession (S. 39(8) of the Housing Act 1988).

Licence cases: the deceased was the licensor

A common situation is where a person resides with the deceased as a bare licencee before the deceased's death. This person may have been a dear friend or close relative diligently looking after the deceased in her or his final years, or an unwelcome presence hoping for an unmerited share of the deceased's inheritance whom the deceased was too frail to demand leave. Alternatively,

the licencee and the deceased may have been an unmarried cohabiting couple.

The general rule is that a revocable licence to remain upon premises is terminated automatically by the licensor's death, as, unlike a tenancy, it is a purely personal right: *Terunnase v. Terunnase* [1968] A. C. 1086. It will be prudent, however, for the personal representative seeking to recover possession, formally to send a written notice to a licencee making clear that the licence has come to an end. For a bare licence, no formality is required. For a periodic licence, S. 5 (1A) of the Protection from Eviction Act 1977 provides that the notice must be in writing, given at least four weeks before it takes effect and contain such information as is provided for by the Notice to Quit (Prescribed Information, etc.) Regulations 1988. An irrevocable licence, however, binds the licensor's personal representatives and beneficiaries of her or his estate: *Errington and Errington v. Woods* [1952] 1 K. B. 290. A contractual licence can be terminated in accordance with the terms of the contract, which will vary depending on the individual circumstances.

A number of particular issues can arise with licencees. Proceedings against a licencee who is a child or protected party can only be brought by a litigation friend, who must be appointed after service of the particulars of claim but before any other steps in the proceedings: CPR R. 21.3. This situation can arise where the deceased was looking after a child or protected party before her or his death.

Licencees, especially those who were the unmarried cohabitant of the deceased in cases where no will was left, but also in many other cases, may well have a good claim under the Inheritance (Provision for Family and Dependants) Act 1975. A claim under the 1975 Act is not a defence to possession proceedings, but, in proceedings against a mere licencee, the court has a broad discretion to adjourn proceedings that it does not enjoy in landlord and tenant cases involving mandatory grounds, and it can adjourn the possession proceedings until after the 1975 Act proceedings. If the Inheritance Act claim is contested, and especially in cases where it is weak (as in the example of the unwanted guest given above), it may be worthwhile seeking to persuade the court to require security from the occupier as a condition of permitting the possession proceedings to be adjourned under the rule in *Olatawura v Abiloye* [2003] 1 WLR 275, although a court is only likely to accede to such an application in relatively clear cases. That should at least help to prevent totally unmeritous claims from allowing a person to remain rent free in a valuable asset for a considerable period of time, however.

It can sometimes happen that a licencee has brought, or is preparing to bring, a probate claim or an administration claim in respect of the deceased's will or the administration of her or his estate. Indeed, from the occupier's perspective, identifying the possibility of doing so and entering a caveat to prevent a grant in common form being made at an early stage is highly desirable given the necessity to obtain a grant before commencing possession proceedings. From the perspective of the prospective personal representatives, where a person has entered a caveat and intends to contest the will, possession may well have to be delayed until the probate proceedings have been concluded, although in urgent cases, the Court will have the power to make such orders as are necessary to preserve the property pending the resolution of the claim. Where a grant has already been obtained and there is a claim to revoke the grant, this will not, until the court actually revokes it, be a defence to possession proceedings, but may engage the court's discretion to adjourn proceedings. The claimant in the revocation claim is likely to have to show both a reasonable prospect of success in those proceedings and a good reason why that should delay possession, however, before a court is likely to adjourn, as the normal course of events will be assumed to be that the property will be sold and the proceeds divided among the beneficiaries. If, for example, a family farm is at stake, evidence of this should be put before the court at the initial possession appointment to persuade it to adjourn, and likewise, such issues should be anticipated by a claimant in a possession claim, and dealt with in the evidence in support of the claim (but briefly so as to avoid the court adjourning the matter through lack of time properly to read the evidence in the 5 minute possession list).

Similarly, the existence of an administration claim does not by itself provide a defence to possession proceedings, but might give the court reason to adjourn them if there is a real prospect that the outcome of the administration proceedings will be that possession of the property can remain with the current occupier in the long term (such as where the current occupier ought to be the sole beneficiary, or is entitled under a will to receive the property outright). In cases where there is are real grounds for believing that the personal representative is acting improperly and there is a real risk that the property will be sold and assets dissipated contrary to the requirements of the will or rules on intestacy, a freezing order may be the safest course of action,

although in principle, good evidence to this effect could also be deployed in support of an application to adjourn possession proceedings pending an administration claim.

Licence cases: the deceased was the licencee

This is relatively straightforward: in the case of a bare licence, the licence is terminated by the deceased's death: the licence, not being property, does not pass with the deceased's estate. The position in respect of a contractual licence is similar, as a contractual right is purely personal, unless the Contract (Rights of Third Parties) Act 1999 applies so as to give effect to an express term in the contract permitting a third person to benefit from the deceased's contractual rights upon her or his death. This will generally depend on the express terms of the contract and not pass with the deceased's estate.

Trespass cases

The position with trespassers is relatively straightforward: a deceased's personal representatives can bring trespass proceedings against third parties as with any other person entitled to land.

Where there is a caveat preventing a grant of administration in common form, an injunction may be more appropriate than proceedings for possession, as the court can grant an injunction preventing people who are trespassers from continuing to trespass upon premises without having to decide who among a limited class of persons claiming to be beneficially entitled is so entitled. Where the trespassers are strangers to the probate dispute, there may be some element of co-operation between otherwise warring factions in the obtainment of an injunction. Where the (alleged) trespassers are some of the disputants themselves, it is likely to be more appropriate for the court in the probate claim itself to make such orders regarding the interim occupation of the premises as is appropriate, although urgent injunctions can be obtained if, for example, serious damage to the property is threatened.

In some cases, there will be people who have been in occupation of land belonging to the deceased for a considerable time before and/or after the deceased's death without any tenancy agreement. If they had no contractual licence, they will strictly be trespassers as a bare licence is revoked upon the deceased's death (see above). In some circumstances, they might have acquired the land by adverse possession, although they will have to have been in adverse occupation for at least 12 years, and, in the case of registered land, will have had, if the right to adverse possession accrued after the coming into effect of the Land Registration Act 2002, to have complied with the requisite formalities under that Act.

If trespassers have purported to grant tenancies to third persons, those tenancies will only be valid against the persons who grant them, and will not bind the true owners of the land. However, the Protection from Eviction Act 1977 will still apply in residential cases, so a court order will be necessary to evict anyone who does not leave voluntarily. If such purported tenancies have been granted, the deceased's estate should in principle be able to recover any rents paid under the tenancies as money had and received to the use of the deceased. Ascertaining the amounts may not be straightforward, but the court may well be prepared to make assumptions and draw inferences in the absence of disclosure. Against trespassers, including former licencees, it will in principle be possible to claim mesne profits (that is, use and occupation charges for the land).

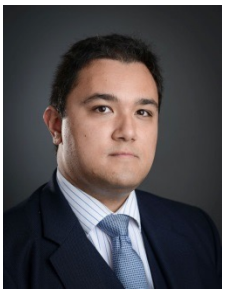
Any money claims by the deceased's estate against trespassers who are also beneficiaries of the estate can be set off by the executor or administrator against any amount payable to that person from the deceased's estate. This often makes money claims against otherwise impecunious persons worth litigating when otherwise they would not be.

Overseas properties

The general rule is that the law relating to real property is the law of the country in which that property is situated. Whatever the position in respect of the law of probate, therefore, possession proceedings in respect of overseas property will be governed by the jurisdiction in which the property is situated, and a legal professional of that jurisdiction consulted if possession issues arise.

Conclusion

The circumstances of possession proceedings in the context of a death are too numerous to explore exhaustively, but hopefully this article gives at least a reasonable overview of some particular issues that are likely to arise in practice and how, in general terms, to deal with them.



Regulation of Unmanned Aerial Vehicles in the Agricultural Sector

by **Michael Coley**

Use of civilian unmanned aerial vehicles (UAVs) has increased dramatically in the last couple of years. The Civil Aviation Authority (CAA), which is responsible for regulating the use of commercial UAVs, granted 30 licences in January 2013; in February 2014, it granted 300. The agricultural sector is one which is beginning to embrace the use of UAVs as a means of increasing productivity and profit. However, the increase in their use has created new regulatory challenges for users and regulators alike.

UAVs have obvious advantages for farmers and agronomists, offering a relatively cheap and efficient way to monitor crop performance. Equipped with sensors or cameras, they can capture up to 200ha of data per flight. However, operators need to be aware of the restrictions on their use and the potential for complaints from neighbouring landowners, particularly as the number of UAVs vying for airspace increases.

In the main, civilian UAVs are limited to a maximum weight of 20kgs. They must remain 150m from large assemblies or events, and 50m from a person or building. They must also remain within line of sight of the operator (500m horizontally and 400ft vertically) unless special permission is obtained from the CAA. They can be flown commercially only with a licence issued by the CAA.

The current maximum weight for UAVs acts as a limit to the payloads they can carry. At the moment, cameras and sensors represent the upper boundary of that limit. However, it is likely that pressure from the industry will eventually lead to the 20kg restriction being increased or lifted. This will increase the potential applications in the agricultural field, but will also lead to the need for more specialised regulation.

Potential claims in nuisance, harassment, and trespass are a likely result of increased UAV activity in the countryside, either by way of civil claims or criminal prosecutions. At the moment, however, it is unclear how well prepared the police, CPS, and CAA might be for an increase in complaints from those affected by UAV use. Currently, UAV flights are not monitored or documented in the same way as manned flights, and one has to ask how regulators propose to keep track of large numbers of small craft carrying out large numbers of relatively short flights. Enforcement is likely to be piecemeal and reliant on evidence gathered by aggrieved parties. Alternatively, redress may lie in a private civil claim, but this brings the difficulties of evidence-gathering and funding.

Where camera-equipped UAVs are used, further considerations apply in respect to the data collected, and operators will have to be careful to avoid allegations of breaches of privacy of data protection law.

Currently, regulation of UAVs in this jurisdiction has been more incremental than in the USA, where the Federal Aviation Authority (FAA) is implementing a roadmap for the legislative integration of drones, with a deadline of 2015. Nonetheless, the CAA has been proactive in regulating this emerging field of aviation, and in April 2014 secured the first-ever criminal conviction concerning the use of a UAV.

Overall, those in the agricultural sector have good reason to be excited about the potential applications of this new technology, but should also keep a close eye on the changing regulatory landscape - for new opportunities as well as pitfalls.

Proprietary Estoppel in an Agricultural Context

by **Philippa Daniels**

Family farms are frequently asset rich and cash poor. As they are also labour intensive it is sometimes the case that a family member or other connection is induced by the owner to work for long hours over many years, or to make other sacrifices by the implied or express promise that the farm or a part of it will one day be theirs. Since there is usually no enforceable contract the promisee, who has usually spent long periods working for little or no reward on the basis of their trust in the promisor's assurance that they will acquire an interest in the property, must rely on the equitable remedy of proprietary estoppel if the promisor subsequently rescinds the promise.

The facts of cases of this kind can often be complex, involving many years of effort by one party, or alternatively difficult questions as to what sacrifices were actually made. There is also often conflicting evidence as to whether promises were in fact made and whether they amounted to sufficient assurance. Since the assurances are usually given verbally there will be conflicts of recollection as to what was said and what the claimant reasonably understood it to mean. In addition, the farm usually provides a home for at least one of the parties and this can make the proceedings particularly traumatic.

In *Thorner v Major* [2009] UKHL 18[1] at paragraph 29 Lord Walker distilled the principles to be applied into three elements:

- a representation or assurance made to the claimant;
- reliance on it by the claimant; and
- detriment to the claimant in consequence of his (reasonable) reliance.

The modern approach to the doctrine of proprietary estoppel was formulated by Robert Walker LJ (as he then was) in *Gillett v Holt* [2001] Ch 210. The headnote to the report reads:

"The fundamental principle that equity was concerned to prevent unconscionable conduct permeated all the elements of the doctrine of proprietary estoppel; that although the element of detriment was an essential ingredient of proprietary estoppel, the requirement was to be approached as part of a broad inquiry as to whether repudiation of an assurance was unconscionable in all the circumstances; that, where assurances given were intended to be relied on, and were in fact relied on, it was not necessary to look for an irrevocable promise since it was the other party's detrimental reliance on the promise which made it irrevocable; that, when ascertaining whether promises and assurances repeated over a period of many years as to future rights over property were sufficient to found a successful claim for equitable relief, it was necessary to stand back and look at the claim in the round."

Gillett v Holt was a case where the plaintiff had relied on a number of promises made at family events that the defendant would leave a farming business together with the farmhouse in which the plaintiff and his family lived, to him by will. In reliance on those promises the plaintiff had devoted the whole of his working life to the success of the farm. After almost thirty years of service the defendant made a will leaving the farm to a third party, and purported to terminate the plaintiff's employment amid accusations of dishonesty.

Robert Walker LJ reviewed the authorities and distilled the following principles:

- There must have been an assurance or assurances made by the Defendant to the Claimant;
- The Claimant must have reasonably relied on those assurances; and
- The Claimant must have incurred some detriment as a result;
- Detriment is not a narrow or technical concept, and the issue of detriment is to be judged at the moment when the person who gave the assurances seeks to go back on them;
- The Court will examine the 'minimum equity to do justice to the plaintiff';

In *Thorner v Major* the House of Lords considered a claim of proprietary estoppel arising out of a very similar situation. David Thorner worked for fifteen years on his father's first cousin's farm without pay. Peter Thorner had made a will leaving the farm to

[1]Also reported at [2009] UKHL 18; [2009] 1 W.L.R. 776; [2009] 3 All E.R. 945; [2009] 2 F.L.R. 405; [2009] 3 F.C.R. 123; [2009] 2 P. & C.R. 24; [2009] 2 E.G.L.R. 111; [2009] W.T.L.R. 713; (2009-10) 12 I.T.E.L.R. 62; [2009] Fam. Law 583; [2009] 13 E.G. 142 (C.S.); (2009) 159 N.L.J. 514; (2009) 153(12) S.J.L.B. 30; [2009] N.P.C. 50; [2009] 2 P. & C.R. DG2; Times, March 26, 2009; Official Transcript

David, but at some time had taken the will back from his solicitor, and, the court held, had, in all likelihood destroyed it, meaning that he died intestate. Peter had given David a number of assurances though that the farm would be his. A feature of these assurances was that they were never made expressly but were a matter of implication and inference. On one occasion, early on, Peter had handed David an insurance policy bonus notice with the words 'that's for my death duties'. There were other oblique remarks on subsequent occasions indicating that Peter intended David to inherit the farm. Over the course of the time when David had worked on the farm it had changed in that some land had been sold and other land bought. The House of Lords nevertheless held that the promises were sufficiently clear, and the subject matter of the promises (being the farm) was sufficiently certain, that equity required the transfer of the farm to David.

Davies v Davies [2014] EWCA Civ 568 was a case where one of three daughters had worked for many years at low pay on her parents' farm. The parents appealed against the Judge's order that the daughter had acquired a beneficial interest in the farm. Their appeal was based on suggestions that there was no substantial detriment suffered in reliance on representations, and the suggestion that the daughter had not in fact relied on what she had been told. The appeal succeeded only on a narrow issue as to the extent of the equity which the daughter had acquired, which was to be determined at a subsequent hearing. The case is notable for the Court of Appeal's disapproval of the parties' approach to case management – Floyd LJ commented that proprietary estoppel cases should not generally be dealt with as split trials. He reiterated Robert Walker LJ's comments in *Gillett v Holt* that the court should take a holistic approach to the claim in order to ensure that the fundamental principle that equity is concerned to prevent unconscionable conduct (which permeates all the elements of the doctrine) is upheld. The court is required to look at the matter in the round.

In *Seward v Seward* (unreported 20 June 2014) the Claimant's counsel argued the claim on the basis of promissory estoppel, a doctrine which applies, usually as a defence, where a promise has been made and acted upon to the promisee's detriment. Simon Monty QC sitting as a High Court judge held however that the appropriate doctrine was proprietary estoppel and held that the Claimant had acted in reliance on his parents' promise to leave him their farm when he transferred his half share in a second farm to his brother.

While the principles are now clear, disputes over the ownership of a farm and farming business are seldom straightforward. They often occur between family members or close friends, involve incidents and recollections of events and statements made over many decades, and frequently the parties have to continue living side by side even after the claim is resolved. For this reason they are often suitable for mediation, a process which avoids the costs and delay of a full trial. Even where mediation fails however, it will often succeed in narrowing the issues and clarifying what the matters in dispute really consist of.

Whether a dispute is resolved by trial or by mediation however, comprehensive advice at an early stage will almost always assist in the resolution of the dispute and the saving of costs.

Inherited Farms and Valuation on Divorce

by **Paul Infield**

For matrimonial lawyers farms present something of a problem. For they are not simply a business, and therefore the source of the family income: they also often include the family home, are more a way of life than an occupation, and, very often, they are assets which have been in one party's family for generations.

Of course, section 25 of the Matrimonial Causes Act 1973 applies to farming cases as it does to all other cases of divorce or dissolution. The court has to take into account the raft of considerations under s.25(2) and balance them so as to try to achieve certain objectives including equality of assets. In farming cases, however, it is often more difficult to achieve some of those aims.

In this article I look at two of those problems: inherited farms and valuation.

The problem of inherited property

One of the problems is caused by dynastic farms – in other words farms which have been owned by the same family for generations. Where a farm has been in the family for generations, in the expectation that it will be handed down intact to future offspring, the courts have held that that is a factor of some importance that may lead to a significant departure from equality. *P v P (Inherited Property)* [2005] 1 FLR 576, for instance, Munby J, involved a 19-year marriage producing children. The husband was allowed to keep the hill farm in Cumbria where he was born, that had been in his family for four generations, and which was 'his whole life'. The wife was given a lump sum of £575,000 (representing some 25% of the family assets) in return for a clean break, on the footing that the husband paid maintenance of £4,000 pa per child and school fees. That case was expressly approved in Miller[1].

However, any reluctance to realise such land has to be kept within bounds, particularly where the children do not wish to follow their father (who is invariably the parent who owns the farm and runs its business) into farming. That reluctance has also been less marked in more recent years now that farm assets can increasingly be put to other uses, such as residential conversion, caravan storage, wind farming and the like. In *N v. N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 at 80 Coleridge J (whilst straining several farming metaphors almost to breaking point, said this):

"There is no doubt that had this case been heard before the *White* decision last year, the court would have strained to prevent a disruption of the husband's business and professional activities except to the minimum extent necessary to meet the wife's needs.

However, I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market for sale, but if it is necessary to sell her it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed."

And even in *P v. P*[2] Munby J. (as he then was) struck a note of caution about over-reliance on the sentiment of inherited property:

[37] "...There is inherited property and inherited property. Sometimes, as in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 itself, the fact that certain property was inherited will count for little: see the observations of Lord Nicholls of Birkenhead at 611 and 995 respectively and of Lord Cooke of Thorndon at 615 and 998 respectively. On other occasions the fact may be of the greatest significance. Fairness may require quite a different approach if the inheritance is a pecuniary legacy that accrues during the marriage than if the inheritance is a landed estate that has been within one spouse's family for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations.

[38] That said, the reluctance to realise landed property must be kept within limits. After all, there is, sentiment apart, little economic difference between a spouse's inherited wealth tied up in the long-established family

[1] See [2006] UKHL 24, [2006] 1 FLR 1186, at para 20 per Lord Nicholls and at para 148 per Baroness Hale

[2] See above

company and a spouse's inherited wealth tied up in the long-held family estates."

That reluctance will be even more marked when parties actually spend a large proportion of the inheritance, pleas to 'keep it in the family' are likely to fall on deaf ears. That was precisely what happened in *Robson v Robson* [2011] 1 FLR 751, CA in which a Cotswold estate and magnificent grade II listed country house with a park by Capability Brown was ordered to be sold.

Valuing the farm and its business

Valuing business is never easy and, as the courts have repeatedly said, not an exact science. That is certainly the case with farms, which include not only land (some of which may be tenanted or held on an old agricultural holding) and machinery but also animals. The business may also include contracting. In addition, it is important to consider whether planning consent is available (or already obtained) for the farm or any of its buildings, either for residential or other business uses such as caravan sites or wind farms. The instruction of a valuer who is familiar with such issues will often be essential.

That valuation will often not be conclusive, however. For it is important to bear in mind the warning that Coleridge J uttered in the context of the valuation of a company in *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 at p.70:

"As is glaringly apparent from this case, the theory behind *White* is one thing. But the actual practicalities involved in valuing, dividing up, and/or realising certain species of assets make the attaining of the *White* objective sometimes either impossible or only achievable at a cost which may not overall be in the family's best interests. In this regard of one thing I am convinced. I am sure the House of Lords did not intend courts to exercise their far-reaching powers to achieve equality on paper if in doing so they, Samson-like, brought down or crippled the whole family's financial edifice to the ultimate detriment of the children (whose interests, of course, remain the top priority in this and every case). More than ever in the new climate, especially where the facts are similar to the present (where the award is likely to be larger than before *White*), the court, in my judgment, must be creative and sensitive to achieve an orderly redistribution of wealth, particularly where this involves the realisation of assets owned by either of the parties."

That creativity and sensitivity has, in some cases, involved discounting the valuation. In others, the owner of the company or farm has been given time to pay by instalments, or to obtain loans against the property. Ultimately, however, the reported cases indicate that, in the post-White climate, courts invariably do not regard farms as assets which cannot be touched on divorce.

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