HENMANS LLP

Henmans Rural newsletter

October 2011

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'Huntin', shootin', fishin'... developin'

Tamsin Hyland looks at the consequences of rural diversification and the potential for interference with sporting rights.

Increasingly, landowners and farmers look to rural diversification to maximise income; whether that be by energy generation, access/tourism initiatives or the development of agricultural buildings into commercial/residential dwellings. By comparison, however, landowners have historically paid less attention to sporting rights over their land. As a result, the ultimate use is often far removed from the rights and obligations enshrined in historic deeds or title records.

Yet, landowners ignoring these historic rights, in favour of rural diversification, may do so at their peril. Indeed, the Courts have frequently recognised the inherent possibility for conflict between rural commercial initiative and hallowed gaming traditions and we anticipate an increase in the number of disputes arising out of these competing interests.

Sporting Rights

The right to hunt, kill and take away game arises from the ownership of land. As such, these rights are capable of being transferred. However, landowners who decide to pursue diversification or development of land, which is subject to a reservation of gaming rights, should consider carefully the extent to which both are compatible. Diversification that "substantially alters the character" of the land could lead easily to unintended and costly consequences.

This particular issue came before the court in *Well Barn Farming Ltd v Shackleton [2003]*. The case involved a protracted history of hostile relations between a large land owning estate and a Mr Shackleton, its prior tenant of Warren Farm (a modest 300 acre holding).

Upon the sale of Warren Farm to Mr Shackleton, the Estate reserved to itself full sporting rights over the Farm. Mr Shackleton subsequently secured planning permission to develop the Farm. However, the Estate (by this time with new owners) had decided to promote itself as a commercial shoot. Despite occupying a small area of the overall shoot, the Farm's buildings were situated on a crucial partridge drive. The Estate was concerned that the proposed development would critically interfere with the shoot during the September to February season and further that conflict was likely to arise between the Estate and the ultimate residents of the finished development.

The Estate went to Court for a declaration to curtail the development. At first instance the Court agreed that construction work and the possibility of residential fencing around Warren Farm could give rise to a "substantial interference". However, with necessary undertakings by Mr Shackleton, to restrict work, this could be obviated. The Court therefore made a declaration that the development would not interfere with the Estate's rights. The judgment was a practical solution to a thorny issue.

The Estate appealed. It claimed that even with restrictions on Mr Shackleton the Court could not be satisfied that the development could proceed without significant interference given the contentious history. The declaration was certainly unusual in so far as it made a determination in respect of events and/or actions yet to take place. However, in dismissing the appeal the Court said that provided the lower court was satisfied that the declaration it was making was not "a recipe for substantial dispute in future" it was an appropriate response and exercise of its discretion given issues of practicality and utility. Further, that a court should not refrain from making such a declaration unless the opportunity for dispute could be discounted altogether.

In short, Well Barn Farming shows that the court may be prepared to extend the usual parameters upon which declarations are given, if it is considered appropriate to "find a practical solution, rather than risk a development being frustrated by legal uncertainty".

Conclusions

Landowners and their advisers should consider carefully the potential for dispute where land subject to sporting rights is ear marked for development. This is obviously best considered at the time of any transfer of such rights, or the land itself. As the case of Well Barn Farming illustrates, it is crucial to look beyond the immediate interests of the current owners of the land, to consider future intentions and the potential for new conflicts, if land or rights are sold on again.

Where a dispute or potential for conflict arises, the Courts are likely to look to the parties to navigate a practical resolution if at all possible. If it is not, parties need to be aware that the Courts may well be prepared to determine the issues before the event, especially if it will neatly avoid a return to court after development work has been done and damage suffered.

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The horse box

When is a mobile field shelter not a mobile field shelter? The obvious answer is of course: 'when it doesn't move'. There will be plenty of horse owners out there who have constructed a shelter which, while technically moveable, has remained in the same position for a long time.

The recent case of Andrew Redman, who has been fined £1,230 by Carmarthenshire County Council for failing to move his field shelter, highlights the need for anyone who has constructed shelters or stables to ensure they understand how planning legislation applies to them.

Mr Redman believed the structure, which sat on stone foundations, did not require planning permission due to its temporary nature. It was not disputed that the shelter in question was designed to be moved, being constructed on skids and with hooks to enable it to be relocated.

Nevertheless, the Council judged it to be a permanent structure, on the basis that it never had, in practice, been moved since construction and had been placed on hard-standing. The Council gave Mr Redman several opportunities to move the shelter, to demonstrate its temporary nature, but he did not. Mr Redman duly found himself facing a significant fine, and was served with a notice obliging him to move the shelter within 28 days.

Mr Redman's case may come as a surprise to many. While in practice few such cases have been pursued by planning authorities, all those who have constructed stables or field shelters cannot assume that simply because they can in theory be moved, they are outside the scope of planning law. From a planning perspective, use of land for agricultural purposes does not include 'horsiculture', attractive though it may be from a landowner's point of view. Shelters or stables which are placed on skids may amount to a material change of use of the land, as well as being vulnerable to attack on the basis that they constitute development. Whether planning permission is required will depend upon their size and method of construction, as well as the intended degree of permanence and how they are physically attached to the land.

There will inevitably be differences in approach between different planning authorities, not all of which may pursue cases like Mr Redman's as vigorously, or indeed at all, particularly given current budget constraints. Good pasture management often requires shelters to be moved when grazing is rotated, in any event. Nevertheless, when constructing a shelter or stable, it is always prudent to seek advice to ensure you do not fall foul of the planning regime.

Esther Stirling is an associate in the dispute resolution team. For more information please contact Esther by email on esther.stirling@henmansllp.co.uk.

Esther Stirling, associate

Compulsory registration of septic tanks - Environment Agency review

Following the Government's announcement earlier this year that all sewage discharges in England and Wales must be registered with the Environment Agency, it has just been announced that a review of this policy is to be carried out. During the review period, which might last up to the end of December 2012, small domestic sewage systems will not have to be registered as long as they comply with the following conditions:

- they discharge 2000 litres (or less) per day to the ground, and
- they discharge 5000 litres (or less) per day to surface water, and
- the sewage is only domestic, and
- the sewage system is maintained in accordance with the manufacturer's instructions (or, where not available, in accordance with the British Water Codes of Practice and Technical Guides), and
- any discharge does not cause the pollution of surface water or ground water.

In the meantime, the existing system will be kept in place. Should you wish to register now (perhaps because you need the registration to enable a house sale) then you will be able to do so but you are under no obligation to do so during the review period.

For further information and advice on this review, please contact Sarah Duffy in our agricultural property team on 01865 781147.

Debate on use of the whip in horseracing

On 2 November 2011, 5.45pm, Henmans LLP are hosting a panel and audience debate discussing the controversial new regulations and what the future holds. Please see the attached flyer for further details.

There is no charge for attending. However, places are limited so please email seminars@henmansllp.co.uk or contact Lucy Habgood on 01865 781000 to reserve your place.