MOORE BLATCH

RURAL NEWS

Edition seven

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WELCOME TO THE LATEST EDITION OF RURAL NEWS

I am delighted to announce that following my appointment as managing partner of Moore Blatch, I have appointed Philip Whitcomb to the position of partner and head of rural private client and Sarah Jordan to the position of partner and head of rural property.

Sarah and Philip will be working jointly to support the needs of our growing rural services team and are both acknowledged experts within their fields. This does not mean that I will disappear from the rural team as I will still be working closely with my colleagues on matters that require my input. I look forward to handing over the reins to Sarah and Philip in the next edition of rural news.

In this edition of rural news, we feature an article on the £16,000 fine for breach of Work at Height Regulations received by a Somerset farming company and our private client team highlight why every farmer should have a Lasting Power of Attorney. We introduce Steven Watts, from our land development team whilst Bernard Ralph answers a clients question on rural legal issues. Kerry Dovey's next Commoner's Corner focuses on New Forest rights, whilst Simon Beetham discusses boundary disputes and encroachments.

To keep up-to-date with our news follow us on Twitter @MBruralservices or visit our Moore Blatch rural services showcase page from the Moore Blatch LinkedIn page.

I welcome any comments on this newsletter or any queries which you may have on it.

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SOMERSET FARMING COMPANY FINED £16,000

BREACH OF WORK AT HEIGHT REGULATIONS

Evercreech Park Farms Ltd was recently fined £16,000 and ordered to pay legal costs of just under £3,500 for a breach of the Work at Height Regulations 2005.

The case involved a contract herdsman working for Evercreech Park Farms, who on the 16 May 2016 fell from a silage clamp and spent four days in intensive care. He suffered significant nerve damage as well as two fractured vertebrae in his neck and back.

The Health and Safety Executive conducted an investigation and found that insufficient health and safety procedures had been put in place.

Specifically, the company had failed to implement a risk assessment for working at height and had failed to implement a safe system of work.

The Health and Safety Executive also concluded that safer methods of carrying out the work with which the contractor had been tasked were available, such as the use of a mobile elevating platform.

This case serves as a reminder that every employer must ensure that work at height is properly planned, appropriately supervised and, as far as possible, carried out in a safe manner.

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BOUNDARY DISPUTES AND ENCROACHMENTS

Rural and agricultural properties and Estates often have boundaries that are not clearly demarcated by physical boundary structures.

Disputes arise when landowners seek to clarify their boundaries or to understand the precise extent of land for which they are liable.

In one obvious example a landowner might want to sell some or all of their land. In a more complex scenario, questions might be raised over ownership when land is discovered to be polluted, having been used for illegal dumping, with the costs of cleaning the contamination stretching into the hundreds of thousands of pounds.

To determine the precise position of a property's boundaries, people will often look to their title plan - either as registered at the Land Registry if the property is registered or found within the title deeds to the property if it is not.

In the case of registered properties, where the boundaries are not stated in the title register to be "determined", they will be general boundaries only. This means that the red line on the title plan marking the boundaries of the property is for general guidance purposes only and is not determinative of the precise position of the boundaries. This is therefore where disputes arise, as the red line on title plans can – subject to the scale of the title plan – upon a formal survey of the boundaries appear to be several metres wide: not a helpful outcome if seeking certainty as to the position of one's boundaries.

In these circumstances, to determine the precise (or as precise as can be ascertained) boundaries require consideration of the following (as well as other pieces of evidence which might be available):

- historic evidence of the boundaries of the property;
- surveying evidence of the position of the boundaries;
- the title register of the property and accompanying filed documents; and
- the current physical boundary features.

Specific to agricultural and rural properties, the hedge and ditch rule is important to consider when the boundary in dispute is demarcated – or alleged to be – by a hedge and ditch. The rule was established in 1810 and the Judge who established the principle held that in circumstances where a hedge and ditch mark the boundary, there are two presumptions which if satisfied may be determinative of the boundary: (1) that it was reasonable to presume that a farmer digging a ditch would do so at the 'furthest extremity' of his land after the boundary has been established; and (2) that same farmer would pile the soil on his side of the boundary to create a bank on which a hedge might be planted. Therefore, creating a presumption that the outer edge of the ditch would be the edge of the property boundary. The hedge and ditch rule has been challenged and successfully upheld on numerous occasions since 1810.

Remedying boundary disputes

Remedying boundary disputes will often require the involvement of both legal and surveying expertise. The issues involved go beyond purely legal arguments and the process of determining the boundary is not always a simple plan and ground survey based exercise, therefore expert surveying input is usually required.

Whether or not the dispute reaches the Courts or First Tier Tribunal (Property Chamber) ("the Tribunal"), it is likely expert surveying evidence from a specialist boundary surveyor will be necessary. Their expert report can be used as evidence in proceedings, as a tool in a negotiation or to adjudicate determination of the dispute – if both parties agree to be bound by the boundary the expert surveyor establishes.

The principle means of resolving boundary disputes are:

Alternative Dispute Resolution

This would typically involve mediation, without prejudice meetings or expert adjudication. Similarly, the parties could resolve the dispute between themselves and terms of a boundary or settlement agreement be agreed.

Land Registry Determination

This option is available only to registered land and is briefly described by the Land Registry itself in its Practice Guide 40 and will be most appropriate where either: the parties are agreed on where exactly a boundary lies; or where the parties jointly instruct an expert boundary surveyor to determine the boundary. With the outcome of either of those, the party whose boundary is to be determined can then apply to the Land Registry to have its boundary recorded as such.

Claim for determination by the Court

This process would involve submitting evidence of your claimed boundary to the Court for a Judge to ultimately decide where the legal boundary lies. This exercise will require historic as well as contemporaneous evidence. The process can – as with all litigation – be costly, time-consuming, stressful and include an element of risk.

Application to the Tribunal for them to determine the boundary

This process runs very similarly to the Court process and the costs, time and risk are similar. The Tribunal process, however, can either be commenced by one of the parties independently, or upon one of the parties applying to the Land Registry to have the boundary determined and the other party then contesting that application; at which time the Land Registry will refer the matter to the Tribunal.

Moore Blatch's rural and real estate litigation teams have significant experience in advising upon and assisting landowners in resolving boundary disputes. We work closely with boundary surveyors and other professional advisers when these disputes arise, to seek a swift and cost-proportionate resolution.

Simon Beetham is a property litigator specialising in agricultural disputes. Should you have any contentious property related queries please do not hesitate to make contact.

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EVERY FARMER SHOULD HAVE A LASTING POWER OF ATTORNEY

A property & financial affairs lasting power of attorney (LPA) can prove essential in helping to protect a farm should the farmer become unable to take an active role in its day-to-day activities, through old age, accident or mental/physical illness.

Without an LPA, a farm can very quickly face significant disruption to farming operations and extra costs, all of which would have to be borne by the farming business.

If a farmer suffers either mental or physical incapacity, and if financial assets such as bank accounts or credit cards cannot be accessed by anyone else, suppliers' invoices cannot be met, employees will not receive their wages and loan/mortgage payments will fall into arrears, all of which can have a profound emotional impact on the farmer and their loved ones.

An LPA allows the farmer to appoint up to four attorneys whom they trust implicitly, and who have the necessary skills and experience to legally manage the financial and business affairs of the farm. Attorneys can be family members, friends or professionals as they see fit.

Attorneys can carry out their duties either on a short-term basis, typically after illness or an accident, or longer term if the illness or accident has resulted in a fundamental change in the farmer's ability to manage the farm.

Attorneys can also be given the authority and requirement to act jointly or be given authority to make both joint and individual decisions. This latter option offers a great degree of flexibility. If one of your attorneys cannot be party to a decision (for example if they have either predeceased or are on holiday), the others can continue to make decisions. If an attorney is nominated on a joint basis only, then should an attorney die, the LPA cannot be used.

As a farm can be a dynamic and fast-moving operation where financial decisions need to be made quickly, the use of a single attorney or the requirement to act jointly should be avoided unless your situation is such that joint decisions are essential.

Due to the nature of a farming business, many farmers never formally retire but continue to be involved with the farm, having a management, financial or emotional connection. As such, mental capacity may become an issue due to old age or infirmity.

Farming can be a hazardous environment and having an LPA in place to sit alongside relevant insurance policies should be considered as essential in order to ensure uninterrupted running of a farm. It ensures that should the farmer be unable to fulfil his or her professional responsibilities, the people they trust can act on their specific requests or even independently should the need arise.

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QUESTIONS AND ANSWERS REGARDING RURAL LEGAL ISSUES

Welcome to a new question and answer feature from the rural team. We are adding a Q&A section with which to respond to the many interesting enquiries we receive. We look forward to making this a regular feature and sharing our thoughts with you.

Q: My client has a cottage on his farm subject to an agricultural tie, which limits occupation at the cottage to someone working in "agriculture or forestry." We are looking to lift the tie, and as part of this process, to prove to the local authority that there is no market for the cottage subject to the tie, it has been marketed for sale. An interested buyer has come forward to purchase the cottage, stating that he is employed as a tree surgeon and would satisfy the agricultural tie. Would a tree surgeon satisfy the 'forestry' condition? My client's preference would be to offer the cottage for sale at an open market price with the agricultural tie lifted.

Alastair Wilson, BCM

A: Ties are intended to provide affordable housing to agricultural or forestry workers living in rural areas that include agricultural or forestry operations. The question that arises is, does a tree surgeon fall within the general definition of "forestry" under the relevant planning legislation for agricultural ties?

As with many legal issues, it is a matter of interpretation. The definition of 'agriculture' is quite clear as it is defined in s336(1) of the Town & Country Act 1990. It includes "horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in farming of land), market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and "agricultural" shall be construed accordingly."

However, "Forestry" is not defined within planning legislation or policy. The ordinary (dictionary) meaning suggests that it is "the science or practice of planting, managing, and caring for forests".

The ordinary (dictionary) meaning of "Tree Surgeon" is a person who prunes and treats old or damaged trees in order to preserve them. Although those activities might be involved within forestry, they are not the extent of forestry nor are they limited to forestry only. A tree surgeon may, for example, prune or treat trees in urban areas and would probably not plant, manage and maintain areas of forest - they could be considered similar to a groundsman at a golf club. Although they might complete activities that overlap with those within Forestry (planting grass and pruning trees), they could not be considered a worker within forestry.

Therefore, it could be argued, that depending on the wording of the planning condition or obligation restricting the property, the activities of a tree surgeon are so limited to the extent that they do not fall within the definitions of agriculture or forestry. This is because a tree surgeon does not exclusively work within agriculture or forestry.

Obviously, my answer is intended for information purposes only and specific legal advice should be obtained on the nature and wording of the agricultural tie before any action is taken.

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AHA TENANCY LOOPHOLE

We all work in the rural sector so the basics of AHA tenancies under the Agricultural Holdings Act 1986 (AHA) should be familiar territory.

Many of us can think of contacts or clients with AHA tenancies or AHA tenants. While AHA tenancy agreements are still a common occurrence in the agricultural sector, they are still a very specialist area of law. Many of us can also think of contacts, clients or AHA tenants with undocumented AHA tenancies.

It is likely that if someone has occupied land for agricultural purposes since before 31 August 1995, they have an AHA tenancy, with or without succession rights (up to two generations), whether or not that tenancy is documented in written form.

Poorly drafted or undocumented AHA tenancies do not contain a 'non-assignment' clause. Notices that should have been served on a tenant at the start of an AHA tenancy confirming the tenancy granted was to be in accordance with the AHA 1986 are unlikely to have been served either. Legally, this means that an individual tenant under the AHA is free to assign his or her tenancy to whoever they please.

A savvy tenant could take advice from a solicitor specialising in agricultural tenancies and a savvy solicitor would advise that tenant to assign the AHA tenancy to a company pronto, thereby making the term of the tenancy indefinite for as long as the company remains in existence.

Where a non-assignment clause is expressly included in a documented AHA tenancy, that tenancy would terminate (if not before) at the death of the named AHA tenant (either on the first death if no succession rights apply or on the third death being the second generation tenant of the holding).

Assignment to a company is a very scary prospect for a landowner who would have no option but to negotiate an often substantial financial settlement for a company AHA tenant to surrender its tenancy of the holding, as a company AHA tenant holds far more value in its tenancy due to its indefinite term than an individual AHA tenant. This does happen regularly when landowners are considering the promotion of land subject to AHA tenancies for development and cannot rely upon grounds for possession under the AHA.

Savvy landowners, their agents and lawyers may be able to divert such a scenario by serving a Section 6 Notice under the AHA on any individual tenants who farm holdings as described above before they have the opportunity or inclination to take advice and assign their tenancy to a company. Such a notice is binding on the tenant and requires the tenancy to be documented in writing if it has not already been done.

The moral of this story for landowners and their managing agents, is to give your agricultural tenancy property portfolio a thorough MOT and involve your solicitor from an early stage. Your solicitor can assist with protecting what rights you do have under the AHA.

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INTRODUCING OUR LAND DEVELOPMENT EXPERT

Steven Watts is an Associate Solicitor in our rural services team specialising in land development work.

His expertise includes acting for landowners on the promotion and disposal of land for development and he regularly advises clients in connection with option agreements, conditional contracts and land promotion agreements.

We often encounter large scale developments involving multiple landowners and Steven is able to advise on the complexities which inevitably arise and how to set up the most appropriate form of collaboration agreement between the landowners.

You will notice Steven contributing to future editions of Rural News with articles on the typical issues landowners encounter when becoming involved in land development. In the meantime, if you have any topics you would like Steven to address in our next Rural News please let him know. If you are considering developing your land or selling your land for development, Steven would be delighted to discuss this with you.

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COMMONER'S CORNER

NEW FOREST RIGHTS – DOES YOUR PROPERTY BENEFIT?

The New Forest was designated a national park in 2005 and is one of the most visited National Parks in the UK.

The New Forest was originally a royal hunting forest. At that time forest rights were granted to commoners of the forest who occupied the land. These rights continue to the present day.

Anyone living in the New Forest with an interest in knowing whether they have these rights can find out from the Atlas of Forest Rights, which can be inspected by appointment at the Clerk of the Verderers. More information is available at: http://www.verderers.org.uk/contact.html

Anybody buying land and property within the Forest should ask their solicitor to check if their property benefits from any Forest rights, as these rights are not recorded on the Land Registry entries.

Even if you have no interest in taking up your rights, it is always interesting to know what they are. The following provides a summary:

- Common of pasture: for commonable animals being ponies, cattle, donkeys and mules to graze the Forest
- Common of pasture: for sheep
- Common of mast: the right to turn pigs on to the Forest in the autumn to eat acorns, which are poisonous to cattle and ponies
- Estovers: the free supply of firewood
- Common of marl: the right to dig clay to improve agricultural land
- Common of turbary: the right to cut peat turves for the Commoner's personal use.

The right of common of pasture is the most important right and the one most frequently exercised by landowners. It is also vital in maintaining the internationally important habitats of the New Forest.

For more information on searches of New Forest property or buying, leasing and selling land in this area, please contact Kerry Dovey in our Lymington Office.

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