C.E.D.R.

European Council for Agricultural Law
Comité Européen de Droit Rural (C.E.D.R.)
Europäisches Agrarrechtskomitee

XXV European Congress and Colloquium of Agricultural Law
Cambridge – 23 to 26 September 2009

XXVe Congrès et colloque européens de droit rural
Cambridge – 23 au 26 septembre 2009

XXV. Europäischer Agrarrechtskongress mit Kolloquium
Cambridge – 23. bis 26. September 2009

Commission I

National Report – Rapport national – Landesbericht

United Kingdom

Legal incentives and legal obstacles to diversification for farmers – Incitations et obstactles juridiques de la diversification de l'agriculture – Rechtliche Fördermittel und Hindernisse für die bäuerliche Diversifikation

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COMMISSION I
LEGAL INCENTIVES AND LEGAL OBSTACLES TO DIVERSIFICATION FOR FARMERS

United Kingdom

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1. **What is your national statutory definition of diversification?**

   There is no national statutory definition of diversification in the United Kingdom, with the legislature seemingly content to rely on the common English meaning of the word.

2. **If there is no statutory definition, what is understood by the word "diversification" in your country?**

   The starting point for understanding the use of the word "diversification" in all contexts including the legal context would be its dictionary definition. The Shorter Oxford Dictionary definition of diversification is "*the action of enlarging or varying its range of products, field of operations etc. especially to reduce its dependence on a particular market etc.*". A general understanding of what is meant by farm diversification can be gleaned from a number of government policy and research documents. The prospect of farmers diversifying into non-agricultural activities was expressly recognised by the Office of the Deputy Prime Minister[1] in Planning Policy Statement 7: Sustainable Development in Rural Areas (PPG7). In 2001 the Department of Transport, Local Government and Regions (now part of the Department for Communities and Local Government) published a research paper[2], which distinguished between two main categories of farm diversification:

[1] On 5 May 2006 the planning responsibilities of The Office of the Deputy Prime Minister transferred to the Department for Communities and Local Government, PPG7 also transferred at this time.
[2] The Implementation of National Planning Policy Guidance (PPG7) in Relation to the Diversification of Farm Businesses" Department of Transport, Local Government and Regions, October 2001. Available at www.communities.gov.uk

2.1 On-farm diversification which can be sub-divided into:

- On-farm agricultural diversification i.e. the introduction of different methods of agricultural production or the use of new and novel crops, or the adding of value to farm products, and
- On-farm non-agricultural diversification i.e. non-agricultural activities that utilise agricultural land or buildings, such as tourism or providing general storage or the leasing of land or buildings to third parties.

2.2 Off-farm sources of income that support and supplement farm businesses. These may include alternative forms of employment, self-employment and investments outside the holding, the income of which supports the farm.

In 2007 The Department for Environment, Food and Rural Affairs published the Report of a Joint Industry-Government Working Group relating to agricultural diversification[3]. This report defined diversification as:

"*Any activity, excluding mainstream agriculture and external employment by members of the farm family, which makes use of farm assets to generate additional income*"[4].

In the absence of a precise statutory or common law definition, this paper adopts the above definition.

3. What are the legal rules governing diversification?

There is a complex web of legal rights and obligations some statutory and some common law

Discussion

There are legislative rules (both primary and secondary) interpreted by case law and there are also common law and equitable principles and contractual regimes all or some of which, in any particular instance, may constrain or enable diversification. The legislative rules are mainly the current land use, planning and environmental legislative regimes. The common law relating to tort and real property rights is relevant. Obviously, restrictive covenants and the terms of any particular tenancy are material. Legislation for the United Kingdom may be categorised as (i) national – passed by the UK Parliament in Westminster for the whole country and/or for England and Wales or Scotland or Northern Ireland separately in relation to certain matters e.g. landlord and tenant law or European law relating to subsidies (ii) devolved – passed by the Scottish Parliament or the

[3] "Barriers to farm diversification: Report of the Joint Industry-Government Working Group" May 2007 available at www.defra.gov.uk

[4] "Barriers to farm diversification: Report of the Joint Industry-Government Working Group" Page 3, Paragraph 5

Welsh or Northern Irish Assemblies. Legislation is also categorised as primary and secondary. Secondary legislation or regulations derive their force from powers granted by the relevant primary Act of Parliament. There are also Orders in Council which are not legislation but operate by fiat of the Crown through the Privy Council. Common law is the set of legal customs and principles which have evolved since Saxon times in local and Royal courts which customs and principles are applied in specific cases. The application of comon law to the facts of specific cases by individual courts is then utilised by other courts by analogy to provide grounds for decisions in other cases.

The law of contract comprises the common law relating to private bargains overlaid and regulated by legislative material as to the nature and substance of the bargain and/or general principles. Part of the common law is the law of torts. Overlaying the whole is equity which includes not only the law of trusts but also the fundamental equitable principles which are applied throughout the law. It has to be borne in mind that Scottish "common law" differs radically from that of England, Wales and Northern Ireland. However, much of Scottish property and contract law and the law of delict has its near equivalents to that of the other countries within Great Britain

There is no single set of rules governing whether diversification will be allowed in any particular instance. Instead, whether it will be possible for a farmer to diversify his business is subject to a number of complex statutory and regulatory regimes operating within the United Kingdom, as well as remaining subject to a number of common law obligations. The most important of these include:

- Planning Laws
- Environmental Law
- Company and Commercial Law (in instances where either the original farm or the proposed new business is to be run within an incorporated framework, most commonly as a private limited company)
- Contracts between Landlords and Tenant Farmers
- Licensing Laws
- Health and Safety
- Private Property Rights
- The need to avoid liability at common law

3.1 Planning Law

The UK planning regime is grounded in The Town and Country Planning Act 1990 (TCPA), numerous Town and Country Planning Regulations and supporting policy documents. As such this regime is primarily statute based.

Originally farming activities were wholly exempt from the planning regime, with the s.55 TCPA definition of development (for which planning permission is usually required) excluding 'the use of land for the purposes of agriculture or

forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used'[5]. General permitted development rights are also available for certain types of development within an agricultural unit, which are reasonably necessary for the purposes of agriculture within that unit[6]. Since 1900 development not covered by the General Permitted Development Order e.g. erecting buildings for farming purposes does require planning permission but within a relatively benign and permissive regime.

The definition of "Agriculture" for the purposes of the TCPA and its supporting regulations is somewhat limited. S.336 of the TCPA states that:

"*agriculture" 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 the farming of land), the use of land as grazing land, meadow land, osier 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*;"

A large number of potential diversification projects fall outside this definition of agriculture and therefore the farm will become subject to the full force of planning control for the first time.

As anyone can apply for planning permission for a property even if they do not have any property interest in it and as all persons using or occupying land affected by planning control are affected, there is no difference in impact between landlords and tenants. However, tenants rarely find planning applications cost effective in the absence of their landlord's consent and co-operation

3.2 Environmental Law

The UK's environmental regulatory regime is made up of numerous pieces of both primary and secondary legislation, many of which impose legal duties and obligations on landowners and businesses and create specific environmental offences for when those obligations are not met. The following legislation contains specific environmental offences:

- The COMAH Regulations 1999
- Environmental Permitting Regulations 2007
- Part IIA of the Environmental Protection Act 1990
- Water Act 2003
- Water Resources Act 1991
- Wildlife and Countryside Act 1981

[5] s.55 (2)(e) Town and Country Planning Act 1990
[6] Part 6 of The Town and Country Planning (General Permitted Development) Order 1995

New pieces of environmental legislation, containing new environmental offences, are coming into force on a regular basis. On 1 January 2009, the Nitrate Pollution Prevention Regulations 2008 (SI 2008/2349) came into force. These regulations are aimed at protecting all surface and ground water within the UK from nitrate pollution, and breaching any of the provisions of the regulations is an offence punishable by a fine of up to £5000 on summary conviction or an unlimited fine on indictment[7].

On 1 March 2009 the Environmental Damage (Prevention and Remediation) Regulations 2009 (SI 2009/153) came into force. These regulations are intended to allow 'enforcing authorities' (primarily local authorities, the Environment Agency, Natural England and other designated bodies) to identify areas at significant risk of specified types of 'environmental damage' and require those responsible for the damage to take steps to prevent further damage and to undertake remediation measures.

Agricultural activities have always been heavily affected by environmental legislation as many of the inputs used in farming, such as organic manure and artificial fertilisers, are deemed to be potential pollutants. When a farm business decides to move away from more traditional activities it risks running into new or unfamiliar aspects of the UK's environmental protection regulatory regime. The need to consider, research and adopt new standards will be crucial if a farm diversification project is to succeed without infringement.

Whilst some aspects of environmental legislation may affect landowners and tenant farmers differently in some circumstances (for example the rules governing who will be held responsible for conducting or funding remediation works on contaminated land), the majority of the legislative regime does not differentiate in this way. The majority of the UK's environmental legislation, especially the more recent legislative developments, are rooted in EC law and have been enacted in order to implement EC Regulations. As such any conflict between UK and European Law in this arena will be identified and rectified in due course.

3.3 Company and Commercial Law

Any diversification project which involves trading as an independent business (either as an independent UK registered company, or otherwise) will become subject to the laws that govern non-agricultural trading businesses in the United Kingdom. These rules can impact on/ regulate anything from contractual terms to acceptable standards of service, product quality, intellectual property rights and the formation and running of companies. They can be grounded in statute, common law or contract.

The extent to which Company and Commercial law will impact on any particular diversification project depends entirely on what the farmer is proposing to do and

[7] s.48 Nitrate Pollution Prevention Regulations 2008 (SI 2008/2349)

how he intends to implement those plans. As these rules attach to businesses and business activities rather than to land, they tend to apply equally to farmer landowners and tenant farmers.

Given the wide-ranging nature of this area of law, it invariably comes into conflict with areas of European Law that do not impact directly on farm diversification, such as the rules governing competition.

3.4 Contracts between Landowners and Tenant Farmers

A significant number of farms within the UK are occupied and managed by tenant farmers, that is to say that the farmer rents all or a large portion of the land he works on from one or more landowners to whom he pays rent. The level of autonomy a tenant farmer has when deciding what use to make of his farmland is inevitably limited by the terms of his tenancy agreement and the extent to which the landowner retains rights over the land and either exercises them himself or lets them to others.

The tenancy agreement is, of course, a contractual document and as such this area is principally based in the law of contract. This has been varied by statute to a significant extent: The Agricultural Holdings Act 1948 being most favourable to tenant farmers, while subsequent legislation such as the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995 have eroded this position.

The UK government has tried to improve the level of flexibility in tenancy agreements by introducing specialist Farm Business Tenancies under the Agricultural Tenancies Act 1995, which allow for greater diversification under an agricultural tenancy within certain pre-defined criteria, and also through the Reform (Agricultural Tenancies) (England and Wales) Order 2006.

DEFRA has issued a code of good practice for agri-environment schemes and diversification projects within agricultural tenancies, which is aimed at improving landlord's level of approval of diversification projects[8].

As a farm tenancy agreement is a contract between a landowner and his tenant farmer, it will naturally impose differing obligations on the landlord and the tenant; these however are usually negotiated between the parties and it is therefore difficult to categorise them with any certainty. There is no obvious conflict between EU Law and UK law in this sphere.

3.5 Licensing Laws

[8] Code of good practice for agri-environment schemes and diversification projects within agricultural tenancies, available at www.defra.gov.uk

A wide range of activities within the UK require licensing or must be carried out by licensed operators. Should a farmer wish to diversify into an activity which requires licensing, such as operating a riding school or running a boarding kennel, he will have to ensure that he fulfils all of the criteria required to obtain that particular license and pays the relevant fee to the relevant authority.

Obtaining licences can be a prolonged and expensive bureaucratic process. As any individual licence attaches to business activities rather than to land, they tend to apply equally to farmer landowners and tenant farmers.

Depending on the nature of the licence or the activity it regulates, there may well be a conflict between EU standards or regulations and those required by the relevant UK licensing body.

3.6 Health and Safety

The occupational health and safety regime in the UK is grounded in The Health and Safety at Work etc Act 1974 and supporting regulations and statutory instruments. As such this regime is primarily statute based.

Whilst agriculture has always been fairly lightly regulated, different non-agricultural industries attract different levels and types of scrutiny from the Health and Safety Executive. As such any farmer who considers diversifying outside traditional agricultural activities will have to adapt to and successfully adopt a new level of regulation and a much more restrictive regime.

As health and safety obligations attach to businesses and organisations rather than to land there is no substantial difference to these rules when applied to landowners or tenant farmers.

The UK's health and safety regime is informed and influenced by EU Regulations and as such any conflict between UK and European Law in this arena will be rectified in due course.

3.7 Property Rights

The types of farm diversification that a farmer will be able to undertake will necessarily be constrained by any restrictions on, or rights over, the land that they are proposing to use for that project. For example, a farmer would not be able to set up a caravan park or holiday chalets on part of his land if there was a restrictive covenant attached to that land which prevented it from being developed, unless steps were taken to remove or vary the covenant or to insure against the possibility of it being enforced.

The types of property right or restriction that are most likely to affect a potential farm diversification project include:

- Restrictive Covenants
- Easements
- Profits

Restrictive covenants are, in simplest terms, covenants between a person selling an interest in land and the purchaser, which limit or restrict what that purchaser, and their successors in title, can do with that interest. A common example would be a covenant that prevents future development on part of a property, or limits the types of goods that could be sold from it. Unlike a standard contractual agreement, which only binds the parties that made it, restrictive covenants can run with the property that they refer to and will legally bind all subsequent owners who are aware of the covenant at the time of purchase.

Easements are best thought of as "either a right to do something or a right to prevent something"[9] over another property in the local area. For an easement to be valid, the right in question must be over a specified piece of land (the servient tenement) for the benefit of another specified piece of land (the dominant tenement). The dominant and servient tenements must not be owned or occupied by the same person at any one time. If they do fall into the same ownership then the easement will cease to exist. Whilst there is not a definitive list of the types of right that may constitute an easement over land, some of the most common examples include:

- Rights of way and vehicular access, and
- Rights to light, support, drainage or water.

Profits a prendre are in essence "a right to take something off another person's land"[10], more particularly it is the right to remove something which usually forms a part of the land, e.g. minerals or vegetation or the wild animals existing on it, provided that the object is capable of being owned at the time that it was taken. Unlike an easement, whilst a profit may be attached to a piece of land, it does not have to and can instead attach or belong to a person individually or indeed as a right in common with a specified group of people.

As all of the above interests constitute property rights in and of themselves, a person with the benefit of any of these rights will be able to enforce that interest against any person who interferes with it.

3.8 Avoidance of Common Law Liabilities

A farmer's ability to diversify his business will also be constrained by the need to avoid liability at common law. The most notable areas of concern would be in the law of tort, however there is a range of other common law offences that may

[9] Gale, 1-69
[10] Duke of Sutherland v Heathcote [1892] 1 ch.472 at 484

apply. The potential areas of concern for a farmer contemplating a diversification project are numerous, however three of the most likely to be engaged are:

- Private Nuisance (a tort)
- Public Nuisance (a common law offence)
- Liability under the rule in Rylands v Fletcher (a tort)

Private Nuisance is, in essence, "a condition or activity which unduly interferes with the use or enjoyment of land"[11]. A private nuisance can consist of any act or omission which constitutes an interference with or disturbance of a person exercising his ownership or occupation of land, or indeed any right used or enjoyed in connection with land, including easements, and profits such as a right to take game or fish from the land. The act that causes the nuisance may be, and usually often is, caused by somebody carrying out an otherwise lawful activity on his or her own land. The nuisance arises when the consequences of that action spread beyond the boundaries of that land and begin to affect neighbouring land.

There are three broad categories of private nuisance:

1. Encroachment on to neighbouring land – e.g. where over-hanging trees or roots of trees grow on to a neighbouring property.
2. Activities that result in physical damage to neighbouring land and what is on it – e.g. emitting fumes that damage animals or crops on neighbouring land.
3. Activities that interfere with the enjoyment of neighbouring land –e.g. emissions of noise, fumes or dust from neighbouring land or allowing trespassing travellers to gather to the detriment of a neighbouring property.

To be actionable the third type of nuisance must be a substantial interference to anyone occupying the property.

It is possible that some types of farm diversification project, in certain situations, may give rise to claims in private nuisance. For example, a farmer who decides to use part of his land to provide recreational activities such as paintballing or quad biking may face claims from neighbours as a result of noise and any other damage to neighbouring land caused by these activities.

Public Nuisance is a criminal offence at common law and also under statute. A person will be guilty of a public nuisance if they carry out an unlawful act or fail to carry out a legal duty and "the effect of the act or omission is to endanger the health, property or comfort of the public, or to obstruct the public in the exercise of rights common to all Her Majesty's subjects."[12] As such, public nuisance is the interference with rights belonging to an individual as a member of the public.

A farm diversification project is most likely to run the risk of resulting in a public nuisance if, for example, it interferes with a public right of way or causes pollution.

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[11] Clerk & Lindsell on "Torts"
[12] Archbold – "Criminal Pleading and Practice" (2009) para 31-40.

Liability under the rule in *Rylands v Fletcher* The rule in Rylands v Fletcher is a strict liability tort, which arose out of the case that it is named after. Under the rule if a person has bought onto his or her land anything that is likely to cause damage to neighbouring land if it escapes, then they will be liable for all the damage that is caused as a natural consequence of any escape that occurs. This rule is restricted to circumstances where there has been a non-natural use of land, e.g. the storage of large quantities of chemicals or water or soil or stone.

Whether a particular farm diversification project is likely to meet this test, will depend entirely on the nature of the project and whether it is likely to be deemed a non-natural use of land.

Whether a person has committed a particular tort or common law offence is not usually influenced by whether they are a landowner or a tenant. Rather the focus tends to be on the individual who is alleged to have committed the tort or offence in question and whether or not all of the elements of the tort or offence have been met.

4. In respect of diversification

4.1 Who allows farmers to diversify?

The starting point in UK law is always that there is freedom to do anything that is not expressly or by necessary implication forbidden or otherwise controlled by the law whether public or private. Therefore, a freehold owner in possession is more likely to have greater freedom to diversify than a tenant but the activities of both will be restricted by public or private property or contractual rights or by legislation. No one allows farmers to diversify save to the extent that the law expressly or by necessary implication restricts diversification in which case licensing rights will belong to those who are given them by the law

Discussion

Where the farmer is the tenant the person who allows diversification will be the landlord (and/or superior landlord) followed by those statutory bodies, including, primarily, the local planning authority, who have power to control the particular activity proposed on the particular holding

4.2 How far does freedom of contract feature in the negotiations between farmer and landowner?

Where the holding is let under a tenancy agreement or lease the starting point is always contractual as between landlord and tenant but in the context of the material statutory regimes. There are no statutory controls (although there are some statutory default positions) and, therefore, there is complete freedom of contract as to the terms of tenancies and leases respecting use of the holding

Discussion

The terms of the tenancy may limit physical alterations to the holding (including buildings) and may also limit changes to the use (most agricultural tenancies limit user to agriculture which the courts restrictively interpret as "agriculture" as defined by the Agriculture Act 1947, see *Jewell v McGowan* [2002] 3 EGLR 87 where "open farm activities" were prohibited as not being "agriculture") of the holding, either absolutely or subject to the qualification that the landlord's consent is required. The landowner and farmer have complete freedom of contract in choosing the terms of the original tenancy. If the proposed new use is absolutely prohibited by those terms then the tenant will have to attempt to negotiate a licence for the particular use proposed or a permanent variation of the term with a landlord who has absolute discretion to refuse. However, if the proposed new use is prohibited subject to the landlord's consent the question will arise as to whether or not that consent can be unreasonably withheld. Unless there is an express qualification that consent will not be unreasonably withheld the landlord may act entirely capriciously, see *Guardian Assurance co Ltd v Gants Hill Holdings Ltd* [1983] 2 EGLR 36. If the terms of the tenancy require that it cannot be unreasonably withheld then the tenant has a better chance of negotiating a licence or variation because if consent is unreasonably withheld he will be entitled having asked for consent nevertheless to make the change he wants without being subject to remedies for breach of contract. Those remedies include a court order prohibiting breach, damages for breach and/or forfeiture of the tenancy

Where a landlord is withholding consent to an improvement, whether physical or including a change of use there are statutory schemes under both statutory regimes applying to tenancies of agricultural holdings i.e. under the Agricultural Tenancies Act 1996 in respect of farm business tenancies and under the Agricultural Holdings Act 1986 in respect of "old" tenancies. The tenants of business premises which do not fall within either regime (i.e. are not agricultural tenancies as defined) have certain rights in relation to qualified prohibitions on change of use and/or physical improvements under the Landlord and Tenant Act 1927 with which this paper is not concerned. However the effect of diversification may actually result in the regime applicable to the tenancy being changed with a loss of protection as an agricultural holding, and movement either to protection as a business tenancy under Part II of the Landlord and Tenant Act 1954 or loss of statutory protection altogether.

Improvements – the statutory schemes for obtaining approval to changes of use or physical alterations. The statutory schemes are generally directed to the protection of the value of the landlord's interest in the holding on termination of the tenancy and to ensuring that the tenant who expends money on improvements will be compensated for that expenditure within specific limits agreed with the landlord. Diversification itself may be an improvement – including both physical improvements and intangible advantages e.g. unimplemented planning consent including consent to change of use; water abstraction licences; waste management licences; entertainment licences; on or off alcohol licences; licences for residential holiday use. However there is no

statutory compensation for business goodwill. A distinction is to be drawn between "dog" not compensated and "cat" goodwill which attaches to the land which is compensated for under Agricultural Tenancies Act 1995. The regime under the Agricultural Holdings Act 1986 is far less flexible

To assist in the promotion of diversification agreements DEFRA, on the recommendation of TRIG, published a non-statutory Code of good practice for agri-environment schemes and diversification projects within agricultural tenancies in 2005. The following organisations signed up to the Code: Agricultural Law Association, Association of Chief Estates Surveyors and Property Managers in Local Government, Central Asociation of Agricultural Valuers, Country Land and Business Association, Farmers Union of Wales, Local Government Association, National Farmers Union, National Federation of Young Farmers Clubs, Royal Institution of Chartered Surveyors and the Tenant Farmers Association. The Code proposes 5 steps: (i) early consultation between the parties; (ii) an agreed timetable; (iii) preparation of detailed proposals with an information guide; (iv) definition of issues and a requirement for a written landlord's reponse; (v) preparation and completion of a formal agreement. The Code also instituted a publicly funded adjudication scheme but, the scheme not having been utilised at all during its first year of operation DEFRA withdrew funding. The indication is therefore pretty clear. Diversification is either leading to disputes which are resolved by other means or is proceeding without problem

4.3 How far can a farmer diversify without permission of the landowner or other authority?

UK law tends to permit everything unless there is a specific control or prohibition on a particular activity. If the proposed diversification amounts to "development" for planning purposes then the local planning authority will be involved. If there is environmental or health and safety impact then the consent of other public bodies may be statutorily required. Otherwise there is freedom to diversify subject only to the common law. If the farmer is a tenant then it is the landlord's rights under the tenancy agreement to control use of the land which will be paramount. Even where the farmer is himself the freehold owner of the land there may be restrictive covenants limiting the proposed activity or property rights over the land which will be interfered with so that adjoining landowners or their tenants may have rights to control the diversified activity.

Discussion

Where there is serious potential for diversification into non-agricultural use the farmer who is a tenant may well be served with a notice to quit either the material part or the whole farm (depending upon the nature of the development proposed). Many tenancy agreements give the landlord an option to determine the tenancy as to the whole or part on specific or general grounds of future development and Case B is an equivalent ground for repossession of agricultural land under the Agricultural

Holdings Act 1986 the policy being that the landowner should be entitled to development values. However, planning permission must be available and it is at this stage that most such cases are determined. An objection made by the tenant to the planning committee will be a material planning factor but the weight to be given to it is for the committee alone to decide and this can result in hard decisions like *Fowler V SofS* [1993] JPL 365 where an equestrian centre was permitted although the tenant's other land would become impossible to work

Another serious issue for the farmer is whether the extent of his own diversified activity will result in his effective abandonment of agricultural use with consequent loss of statutory protection for the tenancy as an agricultural tenancy, although he may achieve protection under the business tenancy regime provided by Part II of the Landlord and Tenant Act 1954. The proportion of business turnover will be material to the question of whether the business has ceased to be substantially agricultural. It has been held that even 60 per cent non-agricultural turnover was not sufficient in *Short v Greeves* [1988] 1 EGLR 1 and the altered user must have continued for at least two years *Wetherall v Smith* [1980] 2 AER 530

The impact of restrictive covenants, easements, profits a prendre and the common law of nuisance has already been discussed in this paper

4.4 Is there any need for a local authority involvement in respect of planning law?

Planning is the preserve of the local planning authority which will be the local authority for the area. If the diversification amounts to "development" for planning purposes then the local planning authority will inevitably be involved.

Discussion

There are generally permitted development rights for agricultural land relating both to user and some building and engineering operations under sections 55 and 59 Town and Country Planning Act 1990 and article 3 and Schedule 2 Part 6 of the 1995 General Development Order. Prior notification of the local planning authority is nevertheless required. Depending upon the system of local government in the relevent area this is either the district council or the county council or, in an increasing number of areas, the unitary authority

Planning policy favours re-use of rural buildings and, in particular, re-use for commercial rather than residential use. The revisions to PPG 7 made in 1997 introduced changes in planning policy aimed at encouraging developments necessary to underpin farm diversification. Further revisions issued in 2004 took this on with emphasis on the multi-functional role of agriculture in the rural economy and advice to local planning authorities that local development plans should include the criteria to be applied and be supportive of well-conceived schemes that contribute to sustainable development objectives as well as the particular agricultural enterprise and are consistent in scale and with the location. There is encouragement for

diversification even within Green Belt land. Re-use and replacement of existing buildings is preferred. Small scale equine enterprises and, of course, tourism are to be promoted

Use of land and buildings for agriculture has otherwise largely been exempt from development control under the Town and Country Planning Acts since their introduction in 1947, see section 55(2)(e) of the TCPA 1990 and the TCPGPDO 1995 which gives automatic permission for a number of building and other operations on agricultural land. However the introduction of the Environmental Impact Assessment under the Town and Country Planning (EIA) Regulations 1999 have moderated this laissez faire approach in relation to developments which would have a significant environmental impact implementing the EC Directive 85/337/EEC

There are specific limitations e.g. in National Parks or European wildlife sites. In a National Park, and the South Downs have become the newest in 2009, the National Park authority is the planning authority. Environmental protection and conservation e.g. designation as SSSI under the Wildlife and Countryside Act 1981 or management agreements made under the same Act as a nature reserve, an area of outstanding natural beauty or, even, a national park under the National Parks and Access to the Countryside Act 1949 (new South Downs designation) or as an environmentally sensitive area under the Agriculture Act 1986 now being replaced by the "whole farm" environmental stewardship scheme. Protection of wildlife habitats and species and ancient woodlands under the UK Biodiversity Action Plan made pursuant to the Countryside and Rights of Way Act 2000 to be taken into account by LPAs in development plans

5 What are:

5.1 the incentives for a farmer diversifying?

The two principle incentives are: greater profitability (which may in part come from public grant aid or subsidy or from tax advantages) and sustainability both environmental and from energy efficiency

Discussion

Over the last fifty years there has been a decline in income from traditional farming activities. Consumers spend around £130bn on food and drink each year but only £10bn goes directly to farmers. Many uses which are outside normal agricultural activities produce a higher rate of return. According to a survey by the Royal Bank of Scotland, income from diversified enterprises accounts for more than one quarter of farm business income. Diversification also spreads the risk for businesses, so that the farmer is not completely reliant on a food harvest or on his herd of livestock which may suffer from a natural disaster such as inclement weather, or disease. The farmer

can also make use of land which would be too challenging for conventional farming. For instance land which may be steep can often make attractive woodland

Farmers have been encouraged to diversify by a range of policy initiatives including Government schemes under the Farmland and Rural Development Act 1988. There have also been EC sponsored rural development measures. As has already been discussed, part of the impetus for the agricultural tenancy reform introduced by the Agricultural Tenancies Act 1995 was the change to a freely negotiated basis for tenancies which would provide a suitable legal regime for planning and promoting rural diversification away from agriculture. Planning policy has also been relaxed and now stresses the provision of more varied employment and business opportunities in the rural economy, see Planning Policy Statement 7, "Sustainable Development in Rural Areas" (2004) paras. 17, 19 and 28

This political encouragement is reflected in the tax, subsidy and grant regimes

Tax advantages are available for example in respect of woodland taxation. Where a woodland is managed by the occupier on a commercial basis, any monies received from the sale of the trees from that woodland are exempt from Capital Gains Tax. There is also a cash income scheme – under this scheme landowners receive a farm woodland premium for 15 years. Annual payment of £300 per ha for former arable and £260 per ha for other improved land are paid to the landowner for loss of income. Short rotation coppice (perennial crop of tree species planted at high density, the stems of which are harvested above ground level at intervals of less than 10 years) is not classed as woodland.

As to grants and subsidies there is a maze of schemes and initiatives available including organic farming scheme, woodland farming scheme, energy crops scheme, rural enterprise scheme, farm diversification planning advice, farm waste grant scheme and agriculture development scheme to name but a few. There is also the Rural Development Plan for England (RDPE) with each region putting their priorities together in the form of a regional implementation plan involving Natural England, the Forestry Commission, and the appropriate Regional Development Agency. The priority is much more towards collaborative activity rather than individual farms. The development agencies are looking to fund big strategic projects that have a group of farmers working together. Farmers signing up to Higher Level Stewardship Schemes will be encouraged to choose similar environmental activities as their neighbours. Farmers within the same area who undertake similar conservation activities would improve landscapes much more quickly than previous piecemeal approaches. The RDPE consists of 3 axes:

Axis 1 – grants for improving competitiveness of farming and forestry
Axis 2 – grants for improving environment and countryside eg environmental stewardship schemes and woodland grants. For example with the assistance of an environmental stewardship scheme, one farmer in East Sussex flooded 400 acres of drained marshland to return it to its natural beauty and it has become a

tourist attraction. He also converted empty farm buildings into holiday cottages and built a tea room.
Axis 3 – diversification of the rural economy and rural quality of life.

Commercial banks have particular rural enterprise loan facilities e.g. a two year initial repayment freeze to allow new enterprises to start generating funds. Banks can also guarantee and underwrite capital projects. Banks may perceive the collateral of agricultural land as a safe harbour in this difficult economic climate.

Turning to sustainability the important gains are in: energy efficiency; waste recycling; anaerobic digestion and biogas; and water recycling. Energy is a significant expense and diversification may enable a farmer to cut costs and reduce carbon emissions. For example one farmer opened a country store selling countryside clothing, equestrian equipment and shooting gear. He used a biomass boiler fuelled by his crop of miscanthus and waste cardboard to heat his barns (converted into holiday accommodation), the shop and farmhouse. Farm composting provides localised sites for green waste disposal and reduces haulage distances. It greatly improves the productivity of the land. It reduces wear and tear on machinery. Farmers can generate renewable electricity through wind, hydropower, anaerobic digestion, and biomass applications. Rainwater harvesting schemes and grey water recycling.

5.2 the disincentives for a farmer diversifying e.g. tax laws

The principle disincentives are: loss of tax reliefs; the cost of statutory compliance; the potential loss of subsidy; and loss of security of tenure or succession rights

Discussion

Agricultural Property Relief (APR) is a very important tax break for the rural community. It will usually exempt 100% of the agricultural value of property from inheritance tax for active farmers. To qualify for 100% relief the property has to be "agricultural property" as defined in the IHTA 1984, and be occupied for the purposes of agriculture for a minimum period of 2 years or owned for 7 years by a landlord and occupied by someone for agriculture. The rate is 50% typically where the owner is the landlord of property let under a tenancy under which he does not have the right to get vacant possession within 24 months. Agricultural property is defined as agricultural land or pasture, woodlands and buildings used in connection with the intensive rearing of livestock or fish, and such cottages, farm buildings and farmhouses as are of a character appropriate to the other farmland. Having satisfied both of these tests, the amount of relief is then restricted to the agricultural value of the property in question.

The danger is that diversification will result in a change of use of the land/buildings which will mean that they fall outside the definition of agricultural property and therefore the APR is lost. The big advantage which farmers have over other

businessmen (who can claim BPR as defined below) is that APR can be given to the farmhouse, but this has been attracting adverse scrutiny from HMRC, and farmers need to be careful to ensure that the farmhouse is an integral part of the agricultural operation (as well as being of a character appropriate to the farm) to be sure of being able to claim APR.

Business Property Relief (BPR) in relation to which 100 % is given to businesses which trade at a profit, and the qualifying period of ownership is 7 years. The advantage over APR is that BPR is applied to market value rather than agricultural value. A diversified activity may be viewed by HMRC as an investment rather than a trade, and thereby not be eligible for BPR. For instance HMRC is tightening its policy on holiday lets which attract BPR from inheritance tax. Relief will be allowed where lettings are short term and where the owner is substantially involved with holiday makers activities on and from the premises. It will not apply to longer term lettings where owner has little involvement with holiday makers, or where lettings are to friends/family.

VAT is chargeable on the outputs of diversified farm businesses which are being targeted by HMRC for failing to charge VAT. Up to 3 years' back tax can be recovered as well as penalties and interest. Problems are most common where a diversified business is claimed to be separate from the main farming business with a turnover of less than £67k and is therefore not VAT registered. Liability could outweigh any advantages from diversification. Property structure and practices must be in place to show that the new business is indeed run separately. Otherwise HMRC could find that diversification is part of the farm business which is actually VAT registered. Then VAT would be charged on all eligible goods and services not just those of core farming operations. B&B and holiday cottages are the current targets. Shooting, farm contracting, hiring sporting facilities eg golf courses, caravan, camping, open farm admissions are all examples where VAT could be charged.

Rates these are a local tax charged on any business property. A farmer does not have to pay rates on agricultural land and buildings when they are used for agricultural purposes, but such land and buildings do become rateable when they are used for non agricultural activities. There is a farm diversification scheme which has been introduced to provide rate relief in these circumstances. If the farmer meets the conditions of this scheme there is 50% relief on rates provided the net annual value does not exceed £7000

Development taxes result from the enhancement to values resulting from planning permission. Community Infrastructure Levy is a tax (not yet in force) introduced by the Planning Act 2008 which local planning authorities will be able to levy on development in their areas, the aim being to ensure that owners and developers of land will fund the costs incurred in providing infrastructure to support the development. It is unlikely that the regulations required to implement the CIL will be issued before 2010.

Statutory compliance costs can result in the curtailment of initiatives. Even at the most basic level of diversifying to support the sustainability of existing agricultural activities sensible thresholds and appropriate exemptions are needed e.g. in on farm composting and biodiesel production from waste oil. The government claims to support the UK biofuels industry but legislation surrounding its production can be prohibitively expensive for small operators. There has been a call for e.g. exemptions from waste management licensing controls for small scale biofuels processors. A similar situation exists for farm composting enterprises where regulation intended to protect the environment is making it hard for farms to keep their composting financially viable. By not supporting smaller scale plants the Government has overlooked sustainability issues such as how farm scale anaerobic digestion systems could help farmers comply with new slurry storage requirements or provide alternatives to artificial fertiliser e.g. digestate. The Government needs to give more incentives to farm systems.

Single Farm Payment is a subsidy which is heavily and increasingly conditional. There is therefore a real need to be careful that diversification activities do not jeopardise single farm payments. All land which benefits for SFP including that employed in diversification must be kept in good agricultural and environmental condition. Farmers must ensure that any activities beyond crop production or livestock rearing, do not put subsidy payments at risk or must ensure that the diversification activity is financially viable without. Simple and common activities such as motorbike scrambling clearly could cause GEAC problems.

Security of tenure as already discussed earlier in this paper is based upon agricultural business activity. The philosophy of the pre-1995 agricultural tenancy legislation was to protect the reasonably competent farmer practising a suitable system of farming to maintain an efficient agriculture to maximise production e.g. the so-called "rules of good husbandry" breach of which can result in loss of the tenancy as being grounds for possession under either Cases C or D of the Third Schedule to the Agricultural Holdings Act 1986. Security (including generational rights of succession) under the 1986 Act regime will be lost once pure agricultural use has been abandoned. Even under the farm business tenancy regime there is a risk of losing security. There are also risks arising from liability for breach of contract

5.3 What are the obstacles for a farmer diversifying e.g. refusal of landowner to agree to diversification?

The principal obstacles are: statutory town and country planning policies and regulations; the contractual power of the landowner where the farm is held on a tenancy; and want of capital finance and commercial uncertainty

Discussion

The obstacles to diversification presented by the town and country planning regime have already been discussed in this paper.

The attitude of a landlord will depend not only upon personal factors which may be unpredictable and arbitrary but also upon commercial factors such as the landowner's need for certainty. An illustration is the provision for agreement in advance of cap on tenant's compensation for improvements on termination introduced by TRIG reform in 2006. The landlord too must consider the capital tax position particularly in relation to agricultural property relief in respect of Inheritance Tax. A landlord's needs are illustrated by some of the grounds upon which a landlord would be considered justified in withholding consent to diversification set out in Annex 1 to the Code of Practice: (i) substantial interference with landlord's reserved rights over the holding (ii) non-viability of the proposal; (iii) consequential detriment to the sound management of the landlord's estate of which the holding forms part or other land of the landlord; (iv) consequential undue hardship to the landlord e.g. related to his tax position; (v) the use of the holding ceasing to be agricultural; (vi) tenant already notified of existing breach; (vii)

The Agricultural Holdings (Scotland) Act 1991 was amended by section 69 of the Agricultural Holdings (Scotland) Act 2003 to introduce new sections 85(2A) and (2B) so as to provide that environmental or conservation activities by a tenant will not be treated as breaches of the rules of good husbandry if carried out pursuant to an agreement entered into under any enactment by the tenant, or under the conditions of any grant paid out of public funds. Further a tenant can also appeal against a landlord's refusal of consent to diversification, ad the landlord's grounds for refusal are limited by statute. This resolves difficulties in relation to agri-environmental measures but at the cost of the abrogation of the private rights of the parties so that their freedom of contract becomes subject to any change in such measures by the state

6. How is the role of Diversification perceived in the UK?

Diversification is generally considered positively in the UK. It produces new income, creates jobs, and protects the environment. Producing, transporting and consuming food is responsible for nearly a third of our contribution to climate change and many other environmental problems like water pollution. Society is more aware of the need for a balance in life and there is a growing demand for organic, local and sustainable food. It is understood that rural economies must therefore become much more varied. The progressive reduction of rural economic activity to agriculture had increased massively in the UK during the second half of the 20th century.

With unpredictable fossil fuel prices and limited supply people are looking to secure energy supplies and slash the release of planet heating greenhouse gases. Much of the contribution would come from changing the way electricity is generated. A switch to renewable energy would cut dependence on oil and natural gas as national production of both dwindles. The favourites are wind farms and hydro power. Whilst the Government claims that its policies support green energy providers, green rhetoric has soared far above reality. Less than 5% of British electricity comes from renewable energy sources. The Government's ambitious goals of deriving 30-35% of electricity from renewable energy sources are widely considered to be impossible. Britain is allocating just 7% of its fiscal stimulus to green policies. Lower oil prices, sagging demand for energy and hard to get credit are causing many firms to cut back on renewables worldwide. The falling pound has given the UK particular problems for example by increasing the cost of wind turbines which are mostly built in continental Europe. It is possible that the Government may be losing interest in renewables, instead moving swiftly to revive the nuclear industry. Government policy is difficult to predict not least because there may well be a change of direction after the next general election which must take place by June 2010.

Some diversification projects can meet with a lot of local resistance. The UK planning regime is based upon democratic consultation with the public who have rights to object to development proposal. Whilst the public in a particular area may agree generally that environmental projects such as composting, wind farms and aneorobic digesters are a good idea and that there must be diversification of economic activity particular projects may be hotly objected to by those practically affected. NIMBYism may not be a British invention but on a small and crowded island has considerable political influence. There are aesthetic, quality of life, pollution, and health issues.

There is also the countervailing concern that our country needs to be more self sufficient as regards food production, whereas diversification takes land out of production.

Furthermore there is an argument that the production of some biofuels and biomass is no more environmentally friendly than the use of fossil fuels and that neither of these nor other sources of renewable energy can provide a sufficiently large enough supply of energy to replace fossil fuels.

7. <u>How do you think the European Union should deal with these new circumstances?</u>

The legal framework must be kept as simple as possible and the principle of subsidiarity must be applied. The role of the European Union should be in promoting investment, innovation and sustainability by focusing on infrastructure and trading mechanisms which will support local strategies for diversification and on education, research and development. Farmers need remuneration for

environmental services and that could be linked to diversification. Farmers also need the opportunity to expand the production of plant derived renewable energy sources. The European Union should generally pursue balanced economic growth and rural job creation whilst ensuring that the future quality of life and the natural environment of all regions are not jeopardized