

WELCOME TO THE SPRING 2019 EDITION OF

Agricultural Brief



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Welcome to the spring 2019 edition of *Agricultural Brief*, our newsletter for farmers, landowners and others involved in agriculture.



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Having been away on maternity leave, I expected to return to a changed yet certain political landscape. I could not have been more wrong. We are still in the EU, still receiving BPS payments (which are still late), Theresa May is still hanging on and the property market hasn't crashed (yet). Instead, landowners find themselves worrying about a second year of drought and a ban on controlling certain birds. It is quite clear that challenging times lie ahead, but with careful planning there should also be opportunities.

This edition of *Agricultural Brief* contains some interesting articles written by our ever expanding team of experts.

Our farm health and safety specialist, Julie Gowland, warns us of HSE's recent announcement to place farms under closer scrutiny and what to do to avoid action. Julie's advice and tips were certainly invaluable when my own family's farm was recently inspected!

Marcia Grice, a rights of way specialist, talks about how landowners ought to be aware of the public accessing their land without permission, and steps which can be taken to prevent public rights accumulating.

Edward Bouckley's article on AD Plants is very timely in light of the Extinction Rebellion's attempt to bring the streets of London to a standstill. We might all be looking to sustainable renewable sources before very long.

Finally, Edward Willis gives hope that a restrictive covenant preventing development might not be the end of your chances to develop.

If any of the articles should raise further questions or thoughts please do not hesitate to get in contact with any of our Agriculture and Estates Team who would be pleased to assist.

We have recently launched our new Birketts' PENP Calculator to assist in calculating the amount of any termination payment that should be subject to deductions for tax and NICs. This is a complex calculation and we believe that our PENP Calculator is the first to be developed.
www.birketts.co.uk/penp.

New year... new farm?



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... remember: it's not about mountains of paper, it's about what's happening in reality.

With the HSE announcing that farms will come under closer scrutiny in the latest programme of inspections, being compliant with health and safety is more important than ever.

Agriculture has the poorest record of any industry sector in Britain with 33 fatalities in the year 2017-2018. With that in mind now is a good time to have a look at health and safety in your business and remember: it's not about mountains of paper, it's about what's happening in reality.

Good health and safety management is a fundamental requirement for any farming business and should be regarded as an essential part of farm business management. To ensure, as far as possible, that the organisation is compliant, risk assessments should be carried out for all the real risks related to your farm. Have a plan to manage those risks to protect people from harm, or the risk of harm, and carry out regular inspections/audits.

The introduction of new sentencing guidelines in February 2016 means that an offending organisation can now expect to receive a fine in the hundreds of thousands of pounds as opposed to tens of thousands. Protecting employees and non-employees alike is a serious requirement and should not be taken lightly. Getting it wrong can have fatal consequences, not just for those affected but also for the future of your business.

Inspectors will be ensuring risks are being controlled in the following areas*:

Vehicles and machinery

The majority of farm vehicle fatalities occur as a result of overturns, when working on slopes, or collisions with pedestrians. To ensure that you manage and reduce the risks involved, consider the following:

- safe stop
- safe vehicle
- safe driver
- safe site.

Ensure that power to vehicles is turned off (safe stop), that vehicles are suitable for the work to be performed (safe vehicle), ensure your drivers are properly trained and competent to undertake the work (safe driver), and ensure that traffic routes are maintained and well-lit with proper segregation between vehicles and pedestrians (safe site).



Falls from height

Falls are the second highest cause of deaths in agriculture with at least eight people dying each year. Most incidents can be avoided if risks are identified and managed; always plan the work in advance and make sure everyone knows the precautions to be followed.

Work on fragile roofs is very dangerous and is best avoided if possible; instruct a competent contractor to undertake this work and make sure there is adequate monitoring and supervision.

Many reported incidents occur when loading bales onto a trailer so, particularly in the harvest season, always ensure that trailer floors are in good condition, loads are built to bind themselves, stackers are kept away from the edges, and full loads are secured before leaving the field. Stacking is a skill so ensure stackers are trained, competent people and inspect stacks regularly.

Children

Children should always be supervised to make sure they are kept out of the workplace. If an unsupervised child appears, stop work immediately and take the child somewhere safe. Ensure that children only watch farm work if the task is not inherently dangerous and the person supervising the child is not the same person undertaking the work (this includes taking children/grandchildren for a ride on a tractor).

Ensure that machinery, for example harvesters, spreaders, adult-sized ATVs and other self-propelled machines, are only operated by people over the age of 16.

Livestock

Ensure that you have in place good handling facilities and that workers are fit, well and physically capable of undertaking the work. Do not enter enclosures unless appropriate safeguards are in place, for example the animal has been restrained or segregated.

Where possible select fields without public rights of way for bulls or cattle that have calves. Where this isn't possible ensure that there is adequate signage alerting people and separate animals from the path.

Working in agriculture is high risk but having in place sensible measures allows for that risk to be managed. The HSE's message is clear: pay closer attention to how you manage workplace risk or face serious penalties!

Be proactive in your health and safety management and follow the Birketts safety mantra of:

- say what you do
- do what you say
- have the paperwork to prove it.

At Birketts our team of safety specialists (former HSE Inspectors) can offer practical and realistic expert advice and assistance and have the support of our team of specialist solicitors and barristers.

For further information regarding health and safety and agriculture please contact Julie Gowland or a member of the Health and Safety Team.

** This list is not exhaustive. For more information visit www.hse.gov.uk.*

Public rights of way: landowner protection – A gentle reminder



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Beware of turning a blind eye to the occasional walker who cuts a corner on a footpath or diverts off the public path.

A public right of way can be established through use by the public passing and repassing, from one highway or public place to another on foot, bicycle or horse. That is by trespassing. The trespass or use must be ‘as of right’ that is without permission, force or secrecy. There is no minimum number of people required but the use does need to be sufficient for a landowner to notice and be aware of that use.

Section 31(6) of the Highways Act provides that a way is dedicated ‘...unless there is sufficient evidence that there was no intention during that period to dedicate it.’ Usually after 20 years but in some circumstances it could be less.

Landowners should consider taking steps to let the public know that there is no intention of dedicating any public rights of way. This might be through appropriate signs or fences, although many will admit to such signs being ripped down or there not being enough signs to cover expansive areas of land.

The best way, therefore, to protect land from public rights of way claims is to deposit a statement and map with the appropriate council. The council will then process and hold the statement and map in a register, the register and a copy of the statement and map are then posted on the council’s website.

The statement and map, once deposited, provide protection for 20 years from the date of the deposit, it is not retrospective and does not cover claims for historic unrecorded highways. For the protection to be effective it needs to be renewed prior to the expiry of the 20 years (i.e. within 19 years and 365 days). A deposit will also ensure that if there is permissive access to enhance diversification projects, land is protected from ways becoming permanent and being claimed as public rights of way. There is a cost to do this but this will outweigh costs incurred and the effect on land values if a claim is submitted.

For public rights of way and village green protection, permissive access, advice on refuting public rights of way claims or making a claim, changing the network (for planning and other reasons), highway and highway boundary enquiries, town and village green, common land and other access enquiries including private access please do not hesitate to get in touch with Marcia Grice marcia-grice@birketts.co.uk or one of our Public Rights of Way and Access to Land Team.

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Public rights of way can be established by the public passing or repassing from one highway or public place to another. ... That is by trespassing.

Feedstock supply contracts – The key to a successful AD operation



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Anaerobic Digestion (AD) represents a potentially significant source of carbon neutral energy. Through the fermentation of organic matter, two by-products are produced: biogas and digestate, both of which are valuable commodities in their own right.

Commercial AD plant operators repeatedly turn to purpose grown crops to feed their plants. Feedstocks such as maize, barley or rye have high calorific content and so maximise energy yields. This has given rise to a shift in the agricultural industry towards the production of feedstock which, in turn, benefits from the digestate produced in the AD process.

In this article we look at some of the key issues AD operators and feedstock producers will need to consider to ensure they have not only a viable, but successful, long-term commercial relationship.

Quality

Feedstock quality will ultimately determine the success of any AD plant operation. Operators and producers alike will need to be clear as to the quality criteria feedstock is to meet.

Feedstock quality is often based on its dry matter content, but this is by no means the only measure. Irrespective of the qualitative method chosen, the parties need to be clear as to:

- how quality will be checked
- each party's rights and obligations in the event that feedstock is defective
- how disputes as to quality are resolved.

Clarity on feedstock quality will better enable the parties to work collaboratively to ensure the right quality feedstock is supplied in the first place; which will ultimately benefit both parties.

Price

Consideration will need to be given to pricing, particularly whether quality and price will be linked. Frequently parties will agree a base price, set according to certain quality criteria. A mechanism is then agreed allowing the price to increase or decrease according to whether the base quality criteria is exceeded or missed.



Additionally, it's common for parties to agree a general price review mechanism. However, the interests of the parties are likely to diverge. Producers will want prices to vary according to any increase in production costs. Conversely, operators will want prices to remain stable. Compromise is often reached by agreeing a form of index-linked price review mechanism.

Term

Both parties will probably want any arrangement to be relatively long-term. Producers will benefit from being able to plan investment based on having a secure purchaser. Similarly, (especially where third-party investors are involved) operators will require a secure supply of feedstock. Particularly so with long-term arrangements, the parties need to be clear on termination including:

- whether unilateral rights are to be included
- whether changes in regulation can trigger termination
- what breaches will give rise to a right of termination
- what consequences will flow from termination.

Risk, title and delivery

The party's interests are likely to be at odds over delivery. Regardless of whether the producer or the operator is harvesting the crop, the producer will favour harvest in optimal conditions and delivery as the crop is harvested (day or night!). However, operators will need to be mindful of their capacity to harvest and accept deliveries including any specific site access or storage limitations. It may be that restrictions on delivery can be agreed where producers are reimbursed their reasonable storage costs if they are unable to deliver straight from harvest.

The passing of risk and title in the feedstock could be another bone of contention. Producers will want risk to transfer on delivery but retain title until receipt of payment. Conversely, purchasers will want to stave-off accepting risk, but will want to receive title on delivery.

Additional considerations include agreeing who's to be responsible for putting feedstock in clamp and where liability falls where clamping is defective. Further, delivery and quality (specifically the testing regime) will closely interact. Operators are likely to want to prevent further delivery where quality issues are detected. However,



... it's in both the operators' and producers' interest to ensure any agreement reached is clearly set out in writing.

suspending delivery could materially affect a producer's harvesting schedule. Producers will likely push back against such provisions, favouring quality issues to be dealt with by way of price adjustment.

Sustainability and regulatory compliance

Operators will benefit from one of the various government incentive schemes (Feed-in Tariffs, the Renewables Obligation or Contracts for Difference). Benefitting under these schemes requires compliance with certain sustainability requirements.

Operators need to ensure feedstock is supplied in compliance with the relevant sustainability requirements and that they have appropriate remedies where feedstock doesn't comply. Such remedies often include the producer indemnifying the operator for losses suffered where sustainability criteria are not met. Naturally, producers will want to resist giving such an indemnity. But compromise can be reached if the producers risk is balanced against, for example, an uplift in price where all sustainability requirements are met.

Digestate off-take

Frequently, producers will agree to remove digestate for their own use. However, any agreement will need to be clear as to when digestate is to be removed. Operators will want it removed at regular intervals as required by plant operations. However, producers, especially if located within nitrate vulnerable zones, will want to limit the amount they take during NVZ closed periods.

Moreover, the parties will need to agree terms as to price and whether the operator is able to sell digestate on their own account if the producer is unable, or unwilling to accept any.

The agreement

Finally, it's in both the operators' and producers' interest to ensure any agreement reached is clearly set out in writing. For the AD operation to be successful, operators and producers need to be clear as to their roles, obligations and liabilities.

The process of negotiating and agreeing a form of agreement gives both parties the chance to be clear as to precisely what is being expected of them. This process alone can prevent disputes arising in the future. Further, a well-crafted agreement can save both time and cost being incurred by both parties if things do start to go wrong.

If you have any further questions on this article please contact Edward Bouckley or a member of the Corporate Team.

Dream of diversification



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Not a briefing goes by without there being some mention of the uncertainty facing Britain's landowners in the current political and economic climate.

The importance of diversification has been drummed into us as a means to counter this, and there are very few people who would now look at an estate or holding and not think of ways in which they could make changes to produce additional revenue streams.

One issue that arises with increasing frequency, however, is restrictive covenants listed against the title to land which is intended to be developed. A restrictive covenant is a covenant imposed against a property or parcel of land preventing certain uses of it to preserve the value or amenity of a neighbouring parcel of land. They are commonly used to prevent development and enable a selling party to retain a degree of control over what happens to property or land when they no longer own it.

It follows that there may be times when such a covenant prevents development that the now owner wishes to make. Such covenants can theoretically bind a property or parcel of land forever, but the Law of Property Act 1925 provides a procedure to modify or discharge such covenants, including in circumstances where 'their continued existence would impede a reasonable user of the land'. There is, of course, a delicate balance to be struck between protecting the rights of private individuals who negotiated a covenant in good faith, and the public good in providing additional development to an area – most notably housing in rural areas.

Cases such as these are heard in the Upper Tribunal (Lands Chamber), which is similar to a court, but forms part of the tribunals service. When considering whether an application should be approved to modify or discharge a covenant, the tribunal will look at whether there is a public interest in allowing the covenant to be modified or discharged, and that the person with the benefit of the covenant will not be harmed in doing so. For a landowner to demonstrate this, it is useful to have an approved planning permission in place, together with evidence that it cannot be implemented because of the existence of the covenant in its present form. The tribunal may, in such circumstances, be willing to modify or discharge a covenant in order to allow the planning permission to take place, in turn making provision for compensation to be payable to the other party. Such compensation would generally be calculated based on any loss or disadvantage suffered by that person as a result of the discharge or modification, but does not entitle that person to receive compensation for the loss of the right to use the covenant to prevent development.

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If you are faced with a restrictive covenant on a site which you may wish to develop as part of your diversification plans, you would be well advised to seek legal advice.



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Alternative approaches could include speaking to the people with the benefit of the covenant in order to obtain their consent...

This means that the compensation payable under the tribunal's decision may be modest when compared to the value of the landowner's land after the planning permission has successfully been implemented. The landowner may, however, be asked to pay the objector's costs in bringing the claim, if it was not unreasonable for the objection to be raised.

Two recent cases have confirmed that when considering the benefit of the covenant on an adjoining landowner's land, the tribunal will consider how it benefits the entirety of that person's land, rather than just the area which has the benefit of the covenant. Time will tell whether these decisions will make it more difficult to argue such a claim.

Alternative approaches could include speaking to the people with the benefit of the covenant in order to obtain their consent, which will usually be subject to their being compensated financially or with concessions in the development made. However, the risk here would be that you could not identify all of the people with the benefit of the restrictive covenant, perhaps because the land originally adjoining the property was not well defined or had subsequently been parcelled up and sold to multiple different owners. Obtaining consent from one or more landowners could potentially be very expensive, and is not guaranteed.

You could also consider taking out indemnity insurance against losses suffered as a result of the terms of a restrictive covenant which you have breached being enforced. However, the availability of such policies varies, and you would struggle to obtain insurance in respect of a breach that you have committed.

Equally, if there is a real risk of enforcement of a covenant; perhaps because the people with the benefit of the covenant are known, the premium may be prohibitively expensive (if available at all). There is also a risk that you may not be able to claim under the policy because of a technicality which was overlooked when it was taken out. Indemnity insurance would not be available if you had already approached anyone with the benefit of the covenant.

If you are faced with a restrictive covenant on a site which you may wish to develop as part of your diversification plans, you would be well advised to seek legal advice on the best way to approach it. A solicitor can review the terms of the covenant and advise on the merits of the different courses of action to take to see the development through.

Furthermore, when buying land, landowners should be careful to only agree to such covenants as are strictly necessary, and think long term as to what effect they may have should circumstances change and there is potential for the land use to change.

For advice please contact Edward Willis or a member of the Agriculture and Estates Team.

Key contacts

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Birketts are very good in this area. They have a good presence in the region and the lawyers are all very knowledgeable.

Chambers UK [2019]

Birketts' Agriculture and Estates Team of over 50 advisors operate from our Cambridge, Chelmsford, Ipswich and Norwich offices allowing us to service our UK and overseas clients with ease.

The team encompasses ecclesiastical law, public access issues, aggregates extraction and management, renewable energy projects, structuring family successions and taxation, as well as mainstream agricultural and property law advice linked to sales, purchases, tenancies, options and development.



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