DIVERSIFICATION OF USE:

SOME LEGAL IMPLICATIONS

1. As I struggled to find an appropriate subject upon which to address the Agricultural Law Association, it proved rather difficult to identify any areas of recent substantive development in agricultural law of suitable interest and importance. Perhaps the increasing application of the Agricultural Tenancies Act 1995 with the significantly decreased security of tenure for farm business tenants thereunder has, in giving landlords greater power of control over their agricultural land, had the effect of reducing the type and number of circumstances in which disputes end up in court. Perhaps, in addition, the present straitened circumstances of many farmers and others in the agricultural world has limited the number of disputes under both the 1995 Act and the Agricultural Holdings Act 1986 which - although there is no doubt that they continue to exist - are actively pursued to resolution in court. Whatever the reasons, significant developments in agricultural law under its two governing statutes appear few and far between.

2. In the absence of questions arising as to "land used for agriculture" – to borrow a phrase from the draftsmen of the 1986 Act (and their predecessors) – the courts have however had to consider in various contexts questions arising out of other uses of agricultural land. Increasingly, it seems, it is use made of agricultural land other than agriculture itself which is giving rise to contested litigation.

3. One consequence of the difficulties facing farmers in recent years has been the expansion of farming enterprises – and the supplement of farming income – by compatible non-agricultural uses of farms. Examples of this are numerous.[1] A certain amount of such diversification appears to have been contemplated by the 1995 Act. Although the Act does not define or refer expressly to diversification, its terms permit a significant degree of such wider use of land, even as to affect the character of the tenancy; while nevertheless permitting the character of that tenancy to be still regarded as agricultural within the protection of the statute.

4. The agriculture condition of the 1995 Act requires the character of the tenancy to be "primarily or wholly agricultural". In this regard, attention is directed at the tenancy terms, the use of the land and the nature of commercial activities carried on that land: section 1(3). The exercise is similar to that required under for the purposes of section 1(2) of the Agricultural Holdings Act 1986: but the test, under each statute, is different. The 1986 Act requires determination of whether non-agricultural uses "do not substantially affect the character of the tenancy". Such uses as the provision of bed and breakfast accommodation or the development of a retail enterprise may well "substantially affect the character of the tenancy" so as exclude that tenancy from the protection of the 1986 Act: but conceivably would not prevent it being "primarily agricultural" in nature for the purposes of the 1995 Act.

[1] The sale of farm produce; provision of bed and breakfast accommodation; breeding of novelty animals; nature trails; even pick-your-own enterprises.

5. Satisfaction of the agriculture condition is, in any event, an alternative to the satisfaction of the notice conditions.[2]

6. In contrast to the agriculture condition, which requires a *current* demonstration of primarily agricultural character, the notice conditions relate to the primarily agricultural character of the tenancy, and the intention of the parties, *at the outset*. The notice conditions may therefore be relied upon where, at the date of investigation, the primacy of the agricultural use has been displaced by other uses.

7. In either case the tenancy must satisfy the business condition.[3] This requires that "all or part of" the land comprised in the tenancy is farmed for the purposes of a trade or business, and that all or part of the land has been so farmed since the beginning of the tenancy. Farming is defined by section 38(2) to include "the carrying on in relation to land of any agricultural activity". A farm business tenancy must, then, be able to demonstrate *some* agricultural use: but the conditions allow, it seems, an opportunity for very substantial diversification to take place.

8. The question of the degree of diversification permitted by the 1986 Act was recently considered by the Court of Appeal: in the context of a claim

[2] Set out at section 1(4) of the Act, these require: "(a) that, on or before the relevant day, the landlord and the tenant each gave the other a written notice (i) identifying (by name or otherwise) the land to be comprised in the tenancy or proposed tenancy, and (ii) containing a statement to the effect that the tenancy or proposed tenancy is to be, and remain, a farm business tenancy, and (b) that, at the beginning of the tenancy, having regard to the terms of the tenancy and any other relevant circumstances, the character of the tenancy was primarily or wholly agricultural."

[3] At section 1(2).

made against a farming tenant who had turned his agricultural holding into an "open farm".

9. The background to the dispute in Jewell v. McGowan [2002] EWCA Civ 145, lay in a disagreement between the tenant, the farmer of some 110 acres of land in Gloucester, and his landlords, as to whether the farm should be sold with a view to development: although it is not clear from the judgment whether it was the farmer or the landowner who was in favour of such a move. Since about 1988, when he had had to reduce his dairy herd as a result of European agricultural policy, the tenant had begun to use the farm for "open farm activities". While continuing to farm the land as an organic dairy farm, he provided facilities for the public to view the farming activities, and invited and encouraged visits to the farm, from school children and others, for educational and recreational purposes. His purpose, the court was told, was twofold: firstly to educate the children and public generally with regard to agricultural and dairy farming and to promote the farm and its produce; and secondly to increase his income from the farm so as to be able to put more money into farm improvements.[4]

10. As the tenant's venture flourished, a shop, tea room and toilet facilities were provided, partly on the demised land and partly on the tenant's own adjoining land. Visitors were permitted to park on the demised land, and to walk around by means of a farm trail to observe the farm and look at the

[4] The tenant had apparently been disappointed by the failure of the landlords, his brother and cousins, on a previous sale of some land, to put the money earned back into the continuing farm.

crops and animals. After a few years the open farm activities were so successful that the farm received up to 10,000 visitors a year, about half of whom were children from schools in Gloucestershire and Avon, the remainder members of the public. The venture had the support of the National Farms Union and was featured on several television programmes. At his height, the venture provided approximately one third of the farm's income. The remaining two thirds came from the dairy farm operation carried out at the working farm, as observed by the public.

11. The dispute turned upon a particular clause in the tenancy agreement of the farm: in which, at clause 22, the tenant agreed with the landlord that he would use the holding "for agricultural purposes only". The landlord complained that the creation of a new farm access road for visitors to the open farm, the use of part of the demised land as a car park for visitors, and the creation of a farm trail over the land allowing visitors to roam and look at the crops and animals about the farm would constitute a breach of the terms of clause 22. The tenant contended that all activities on the farm should be viewed as a whole, and that so viewed would continue to be for agricultural purposes when the proposed activities were carried out; alternatively that even if it was right to view the individual activities separately, the proposed open farm activities would constitute "use for agricultural purposes" within the clause.[5]

[5] The open farming activities commenced in 1988 had in fact ceased in about 1997, following a threat by the landlord to serve notice to quit. The proceedings heard in 2002 were aimed at establishing a right to resume the activities along the lines proposed.

12. The Court of Appeal considered the definition of an "agricultural holding" in the 1948 Act and the 1986 Act, section 11. It was common ground that under section 1 of the 1986 Act a tenancy would be protected as an agricultural holding if it was in substance a tenancy of agricultural land.[6] It was accepted before, and by, the Court of Appeal that the present tenancy was, and even with the proposed open farm activities would remain, a tenancy of an agricultural holding within the meaning of both these Acts. The farm would continue, and the open farm activities would not affect the farming of the land; or barely so, since the only land which it would take would be the parking lot, a small part of the whole. In short, the open farm activities would be either supplementary or additional activities.

13. At first instance, the judge had reasoned that the provisions of clause 22 of the tenancy agreement mirrored the effect of the Acts; and accordingly must be taken to permit, within an essentially agricultural use, exceptions, provided that they did not substantially affect the agricultural character of the tenancy. The primary use of the land would on any view continue to be for agricultural purposes, and the open farm activities would be ancillary to that principal activity. On that basis, the judge had concluded that the character of the tenancy remained agricultural for the purposes of the lease.

14. He added that he would if necessary also have held that the proposed open farm activities could be described as “use for agricultural purposes”.

[6] As set out in Howkins v. Jardine [1951] 1 KB 614, in the context of the 1948 Act, and clarified in section 1 of the 1986 Act. Hodson J. in Howkins formulated the question as "whether or not a substantial part of the holding is being used for non-agricultural purposes", at page 630-1.

Clearly with an eye on the state of farming of the whole, he commented that the "concept of agriculture is not fixed in a time warp", and that the proposed open farming activities, related to a continuing working farm, were "essential to make farms profitable so that farming can continue and so the young and the public can learn about farming".

15. Upon appeal, the landlord invoked a broad spectrum of principles derived from planning and rating legislation authority, as well as from the agricultural statutes. He contrasted the position under planning law - where use for the purposes of agriculture is not development, and in which connection there is no requirement that use should be solely or only for agriculture, with the consequence that a farmer may undertake an activity such as the sale of his produce which has both agriculture and retail purposes, without requiring permission - with the position under rating law where legislation which referred to use "solely in connection with agricultural operations" had been said to make rateable just such a produce shop.[7] The landlord contended that applying the approach adopted in the rating cases, the use of the word "only" with reference to agricultural in clause 22 effectively excluded the proposed open farm activities.

16. The Court of Appeal did not like the second argument: the effect of which would be to prohibit use for any agricultural purposes if such use

[7] The court was referred to a decision in Millington v. Secretary of State for the Environment [2000] JPL 297, 308-311, in which a butcher's shop on the farm selling the farmer's fat stock had fallen outside that definition.

could be said also to have another concurrent purpose. Nor, however, did the Court of Appeal agree with the reasoning of the judge at first instance.

17. The court held that the fact that the tenancy agreement clearly had in mind the provisions of the relevant statute did not mean that there was any necessary equation between, on the one hand, the scope of potential application of the statute and, on the other hand, the scope of activity permitted by clause 22 of the tenancy agreement. The court considered that to use the land "in substance" for particular purposes gave a greater freedom than the requirement to use it "only" for those purposes.[8]

18. It was emphasised, however, that the conclusion that the judge was wrong did not mean that a requirement to use the holding "for agricultural purposes only" was to be read in any extreme or unreasonable sense. The court confirmed that there were clearly other things which a farmer may still do on land which will fall to be regarded peripheral or minimal, and do not mean that he is using the land for non-agricultural purposes. The example given was that of the farmer or his family or friends walking, picnicking, sketching or fishing on his land for pleasure. It was also contemplated that the use of a field for one day in a year for an agricultural show would be regarded as de minimis. However, the present tenant's proposed open farm activities, which were intended to attract many thousands of visitors and to contribute up to one third of the farm's income, clearly fell into a quite different category.

[8] In addition, the court rejected the contention that clause 22 was aimed at nothing more than preventing other activities which affected or interfered with the agricultural use: this, it was said, failed to give natural effect to the word "only".

19. On the question whether the proposed open farm activities fell within the category of agricultural purposes to which use of the land was restricted, the judge had found in the tenant's favour. He identified as relevant factors that the land would continue to be used primarily for dairy farming if the proposed open farm activities were undertaken; that the only open farm activities to be undertaken on the demised land (which did not include the shop or the tea room but included the parking and the roaming) would relate directly to the agricultural use of the land and indeed would depend upon the continued use of that land as a working farm. It was re-stated before the Court of Appeal that the open farming activities depended entirely upon the continuation of the dairy farming activities. The Court of Appeal did not, however, consider this to be decisive. Mance LJ commented that activities which relate directly to and depend on the existence of a working farm may not necessarily themselves be agricultural in either character or purpose. He gave the example that if land was used for a working farm, and also for making films for educational and commercial purposes about farming, the dependent relationship between the working farm and the film activity would not mean that the latter activity was being conducted for agricultural purposes.

20. In the view of the Court of Appeal the proposed open farm activities would be conducted for the purpose of an enterprise which was distinct in character and purpose from the agricultural enterprise. The education of children and the public generally about agricultural and dairy farming was not considered to be a purpose that was agricultural, even if of indirect

benefit to the farmer in making it more likely that the public would buy organic produce; and the undertaking of open farm activities to make profits which could benefit the farm was equally not an activity undertaken for agricultural purposes, even though the profits made would be devoted to the benefit of the agricultural enterprise. "It is a separate commercial activity, for purposes of profit, and its character or purpose cannot be derived from the fact that [the tenant] may choose to devote its profits to the farm."

21. Mance LJ acknowledged the problems which had been faced by small farmers for some years; and clearly felt considerable sympathy for the tenant. However he rejected the comment of the judge at first instance that open farm activities such as those proposed were essential to resolve these problems; and even if they were, that did not mean that these other activities were to be characterised as having agricultural purposes. Although they may be carried on by a tenant within the scope of the 1986 Act, the terms of the particular tenancy agreement in that case did not permit of such additional activities.

22. On the one hand, this decision acknowledged the breadth of the definition of 'agricultural holding' for the purposes of the 1986 Act, and gave an element of guidance as to its application. If it is correct that the terms of the 1995 Act permit of more flexible interpretation, the possibilities for diversification by farm business tenants are greater still. In practical terms, however, these possibilities may be severely restricted by the terms of the tenancy itself. Notwithstanding an degree of obvious sympathy, the Court of Appeal set its face firmly against any recognition of the plight of

agricultural tenants bearing upon the proper construction of their rights and obligations.

23. A tenant who does find his activities tightly restricted by the terms of his tenancy may, of course, attempt to agree a relaxation of these restrictions directly with his landlord. The limited security of a farm business tenant may be a considerable disincentive in this respect, particularly if the contemplated diversification requires any significant financial outlay: as a tenant making the initial investment may find himself obliged to give up the tenancy on twelve month's notice. The risk is qualified, however, by the terms of the 1995 Act: which make specific provision for compensation, on termination of a farm business tenancy, to deal with the benefit of a planning permission.[9] This may be particularly important where a tenant has spotted a business opportunity which the landlord may, having recovered the land, subsequently exploit himself. These provisions are perhaps further evidence of the apparent intention of the 1995 Act to allow within its scope uses of land diverse from agriculture.

24. The termination of a farm business tenancy need not be in order for the landlord himself to make use of the land. He may choose instead to sell some or all of his agricultural land for development by another. The sale and development of agricultural land may itself have particular implications for

[9] Section 18. For this section to operate, the landlord must have given his consent in writing to the tenant making an application for planning permission, and expressly for the purpose of enabling the tenant to provide a specific physical improvement, or lawfully to effect a specified change of use. The provision further demonstrates the contemplation in the Act of uses diverse from agricultural use alone; although compensation is only available under section 18 for as long as the change of use has not been effected by the tenant.

the owner, or adjoining landowners: as was the case in Attwood v. Bovis Homes Limited [2000] 3 EGLR 139.

25. In that case the defendant, Bovis Homes, had acquired an area of agricultural land for the development of around 1000 houses, together with a shopping centre, community facilities, hospital and school and associated infrastructure. Up to the date of its acquisition, the land had been used for agricultural purposes. It was common ground that while the land had been so used, it had had the benefit of a prescriptive right to drain through the claimants' adjoining land. The claimants, part of whose land was still farmed for arable purposes and part the subject of a conservation agreement, contended that the development of the neighbouring land prevented the drainage easement from being exercised for the purpose of draining that land as developed. It was submitted that the easement, having been acquired by prescription, could not be exercised following radical alteration (from fields to substantial residential and other development) of the dominant tenement, even where the alterations would have no material effect upon the volume or rate of discharge of water over the claimants' servient land.

26. The claimants' contentions were said to be supported by a number of cases dealing with easements of way. The courts have previously appeared to accept that a substantial change in the nature of the use of the dominant tenement would result in the right to use a way, obtained by prescription, being either destroyed or impermissible. A right of way to and from a field in its ordinary use as a field could not, for example, be used for access to and

egress from a factory built upon the field;[10] nor could a prescriptive right to access a small dwelling house be used as access for a large hotel built on the same site.[11]

27. All the cases relied upon in Attwood were based on the assumption that the changes to the dominant tenement - from a field to a factory, from a house to a hotel - would involve an increase in the quantum of user and/or a change in the nature of the user of the way as a result of the change in the use of the dominant tenement. ("Quantum" in that context meaning frequency of usage, and "nature" meaning user by, for example, lorries, tractors, cars, bicycles, pedestrians etc.) What was not clear from the cases was whether it was this assumed significant increase in the quantum or nature of use of the right of way which resulted in the right being lost; or whether it was the radical alteration in the use or nature of the dominant tenement which *in itself* put an end to or rendered impermissible any use of the right of way, irrespective of the extent, if any, of the increase of the burden on the servient land.

28. The latter principle was referred to by Neuberger J, giving judgment, as the "strict rule". The advantages of this rule were twofold. Firstly, it led to a relative degree of certainty: avoiding the need to attempt to predict the extent of the future likely use of the way following a change of use of a dominant tenement. Secondly, it was consistent with the proposition that a prescriptive right of way involved a fictional grant. It was logical that the

[10] Williams v. James [1867] LR 2 CP 577.
[11] British Railways Board v. Glass [1965] Ch. 538.

fictional grant should be related to, indeed limited to, the type of use to which the dominant tenement was put at the time the right was acquired.

29. On the other hand, the advantage of the former, "flexible" rule was that it accorded with commercial common sense. Why, the judge asked, should the owner of the servient tenement care about a change of use to the dominant tenement, however radical, if it can be shown that it makes no difference to the quantum or nature of the use of the way? It could be said to be contrary to common sense that if a right of way has been obtained by prescription in favour of the building being used as a hotel, the right to use the way would be lost if the owner of the dominant tenement changed the use to a house, and could demonstrate that it was inconceivable that anything other than a diminution in the quantum of the use would arise and that there would be no change in the nature of the use.

30. The judge concluded that which rule applied in any particular case would depend upon the nature of the easement under consideration. In relation to an easement of support for a building, acquired by prescription against an adjoining building, the change of use of the dominant building, however radical and far-reaching a change, could not in the judge's view result in the easement being lost, at least in the absence of very special facts. In such a case, he considered, one would expect the right of support to continue to be exercisable, at least unless there was a change in the structure or use of the building on the dominant tenement that substantially increased

the burden on the servient tenement. A number of authorities relating to such easements, and referred to by the judge, supported that proposition.[12]

31. In the particular case, the change of use of the agricultural land to housing would not increase the quantum of water coming onto the dominant tenement; and would not therefore automatically be expected to alter the quantum of water passing from that land onto the servient farmland. Nor would it alter the nature of what passed from the dominant land to the servient land. Moreover, to the extent that the amount of water discharging from the dominant land over the servient land could increase by reason of the fact that less water would be soaked up and would have been soaked up by the agricultural land, it would be fairly easy to ensure that the new drainage scheme to be installed in the development was effective to offset this increase. There, in the judge's view, lay the difference between an easement of drainage and an easement of way. With the right of way, the extent of the future likely use of the way following a change of use of the dominant land would be difficult to predict. Future intensification of the changed use of the dominant land could further increase or vary the nature or quantum of user. By contrast, the water coming onto the dominant land here would not be affected by the development; and the effect of the development on the soakup could be established with the assistance of mechanical work and expert evidence. Hence insofar as the strict rules applicable to rights of way, it need not be applied to the easement presently under consideration, of drainage.

[12] Lloyds Bank Limited v. Dalton [1942] Ch. 466; Ray v. Fairway Motors (Barnstaple) Limited [1968] 20 P&CR 261.

32. The judge also dealt with the second perceived justification for the strict rule: the fictional grant. There was, he said, no reason to think that the express (fictional) grant of a right to drain water was normally limited by reference to a specific use of the dominant tenement. The reason why the grantor of a right of *way* might be presumed to limit the purpose for which it was granted because a change in the use of the dominant tenement could result in a change in the use of the right of way, quite possibly beyond recognition. By contrast, that would not be the case in relation to the right to drain surface water: where the amount of water actually received by the dominant tenement cannot be altered by any change in the use of the dominant tenement, or by any development of it (although the quantum of absorption could be affected).

33. For these reasons the judge concluded in favour of the developer that the easement of drainage would be unaffected by the development. As is apparent from the reasoning in the case, the position in relation to a right of way to agricultural land to be the subject of development may well be very different; and any developers or vendors of agricultural land are well advised to have this in mind at the early stages of the proposed development or sale.

34. Another trap for the unwary vendor or purchaser of agricultural land, especially in circumstances where land has lain unfarmed or unused for some time, arises from the law of adverse possession: which has recently exercised the Court of Appeal in J A Pye (Oxford) Ltd v. Graham [2001] EWCA Civ 117. The claimant in that case was a property development company; the

disputed farm land had been acquired by the company in the late 1970's, the farm sold off, and the land retained because of its perceived development potential.

35. The defendants, adjoining landowners, had been granted a grazing licence of the land in 1983. The following year they had bought, and cut, the crop of grass on the land. Thereafter, and despite the initial refusal followed by lack of response by the landowner to their requests, in the early years, for a renewal of the grazing licence, the defendants had until at least 1997 grazed the land with cattle, spread dung, sown and maintained the land.

36. The judge at first instance, Neuberger J, found that each of the three requirements to establish title to land by adverse possession – factual possession of the land; the requisite intention to possess; and the adverse nature of the possession – had been satisfied for the relevant period of at least 12 years. He dismissed the developers claim to possession of the land.

37. Factual possession was dealt with relatively shortly. Apart from the defendants, no one else had physically done anything on or in relation to the disputed land between January 1984 and 1997. Throughout that period, the defendants had maintained and controlled the fences and gates enclosing the land; grazed it; harrowed, rolled and fertilised it. They had treated it just as they had treated their own adjoining farm land.

38. The dispute focussed on the question of the necessary intention to possess: and in particular, on the effect of the period shortly after the expiry

of the grazing licence during which the defendants were expecting, or certainly hoping for, the grant of a further licence by the landowner. The judge upheld the general proposition that an oral communication by a squatter of a willingness to take a licence or tenancy of the land he occupied was not necessarily inconsistent with the squatter having the requisite intention to possess: it simply acknowledged the ability of the owner to reclaim possession if he chose.[13] Such a willingness may, however, depending on the circumstances, show that the squatter lacked the necessary intention.[14]

39. Under the heading "Did [the defendants] have the necessary animus possidendi?" the judge examined 7 different factors which, taken together, led him to conclude that there was indeed clear evidence of the necessary intention to possess. These included the actual activities carried out on the land (grazing use, maintenance); the nature and history of the land (it was, the judge said, difficult to see what any occupying owner of the pasture land would have done, over and above what the defendants had done on the land); the enclosure of the land by the occupiers; and the defendants' owner-like attitude to the land. In addition, the judge considered the circumstances in which the adverse possession had begun. Following the emphatic refusal of their initial request for a further licence, there was never any suggestion of

[13] The nature of the concept for possession in these circumstances, he reasoned, was consistent with this conclusion. The squatter has to intend to exclude everyone including the owner "so far as is reasonably practicable and so far as the processes of the law will allow" (*Powell v. McFarlane* 38 P&CR 452): a squatter who is still clocking up his twelve years will appreciate that his ability to exclude the owner from the land will be limited until the period has expired.

[14] See, for example, *Lodge v. Wakefield Metropolitan City Council* [1995] 2 EGLR 124.

any reconsideration of that decision. In his view that factor dissipated any assistance that the landowner could otherwise have derived from the fact that the occupiers had previously enjoyed – and sought to continue to enjoy – a licence of the land.

40. This issue was the subject of an appeal by the landowner to the Court of Appeal.[15] On appeal, the judge's decision was overturned. The court did not disagree that the evidence of a squatter that he would have been willing to pay rent to the paper owner during the relevant period did not necessarily constitute admissions by him that he lacked the necessary intention to possess: but concluded that, in the case before it, the occupier's own account of his state of mind was not that of a person who was using the land with the intention of possessing it to the exclusion of the owner. The problem lay in the occupier's evidence that on the expiry of the licence he simply intended "to carry on using the land for grazing until [he] was requested not to"; and that thereafter he had continued to farm the land in the same fashion as he had during the licence period. In the view of the Court of Appeal this was a person who, far from intending to possess the land, had simply continued to use it in the same manner to which agreement had been obtained in the past, in the hope that in the future the owner would again be willing to accede to his requests to a further agreement authorising such use. Crucially, there was no evidence of change of intention from that which had governed the initial use: the limited right to graze.

[15] This, and the question whether the provisions of the Human Rights Act 1998 had any impact on the acquisition of title to real property by adverse possession. The Court of Appeal concluded they did not.

41. Thus the acts of the occupier after the expiry of the grazing licence were treated by the Court of Appeal, in effect, as referable directly to the licence. Because the acts of possession did not change following that expiry nor, the court concluded, had the occupier's intention. The difficulty with this approach is that had there never been any licence the same acts by the occupier would almost certainly – given the nature of the land – have been sufficient evidence of the necessary intention to possess. It seems odd that the fact of a single grazing licence, granted for a period of less than a year, should be fatal to a claim of adverse possession in circumstances where, had there never been any licence at all, such a claim would surely have succeeded.

42. A further appeal on this issue went to the House of Lords in March of this year. My optimistic anticipation, in choosing a lecture topic, that judgment would certainly be available before May, proved illfounded. Those of you with clients with agricultural land lying unused will have to keep your heads down a little longer.