


rural-law

THE NEWSLETTER OF NAPTHENS' RURAL DEPARTMENT

FEBRUARY 2020
ISSUE TWENTY SEVEN

Common Rights



Common land is usually privately owned (for example historically by the Lord of the Manor) but subject to rights for others (commoners) to use the land for certain purposes, for example, the grazing of cattle, sheep or horses.

Commons Registers were created under the Commons Registration Act 1965 to record common land and the rights of commoners. The county councils maintain these registers. The Commons Act 2006 brought in further legislation, in particular the potential to mend the registers where there were initial mistakes such as land incorrectly registered as common land.

The registers usually provide a description of the common land (with plan), details of the rights relating to that land, the name of the holder of the rights and whether the rights are held in gross or attached to land.

Where rights are held in gross, these are held separately from any land ownership and can be gifted, sold or leased as the owner of the right sees fit.

Where rights are attached to land, since June 28, 2005, those rights can only be gifted or sold together with the land to which they are attached and can generally (subject to an exception of a lease for no more than two years) only be leased with the land to which they are attached.

Where part of land to which rights are attached is transferred, there would be a pro rata per acreage

calculation of the number of rights which would pass with that land.

It is important that the Commons Register is updated following an inheritance, gift or a purchase of land to which rights are attached and also where rights in gross are inherited, gifted or purchased. We often find the Commons Registers are not up to date and do not correctly identify the current holder of the rights.

This can create delays and issues where you are looking to transfer land with attached common rights, or rights held in gross and similarly, where you may be trying to claim on such rights under the Basic Payment Scheme.

Note: Cumbria County Council suggest, in all, 30 per cent of England's common land is situated in Cumbria. (from its website)



Your contact

Melissa Haigh
melissa.haigh@napthens.co.uk
01539 767013

Welcome

Welcome to 2020's
Winter edition of a new
look Rural Law.



Andrew Holden
andrew.holden@napthens.co.uk
01254 686216

In this edition we are looking at a range of topics from common land and the importance of the Commons Register, to the rights of landowners when it comes to drainage ditches.

We have a guest article from Simon Haley, rural business adviser at SRH Agribusiness Ltd, who looks at the importance of de-risking a business.

Then we feature a reminder of what Napthens' own Farm Future package can offer and how it can be accessed through the NFU's Legal Health Check Scheme.

Brexit has finally been given the green light and should have legally taken place by the time you read this. The importance of now ensuring you have fully assessed your property, business and family needs is highlighted further and we are happy to meet you on a without obligation basis to assist you with this.

As 2020 unfolds, I hope you have a successful start to the new year, and as always, if you have any queries do contact us to find out how Napthens can help.

GUEST ARTICLE

A business mind-set

A guest article from Simon Haley, rural business adviser at SRH Agribusiness Limited

For the rural industry, 2019 has been characterised by ongoing political uncertainty and irregular and destructive weather patterns.

With a renewed impetus for the UK leaving the EU as a result of the General Election, it brings into focus what the next decade will mean for farming and rural businesses.

Not only for the future of subsidies, but also the importance of other rural development grants, as well as the fundamental aspect of resilience against factors including weather, politics and other issues requiring businesses to be reactive.

Having a business mind-set is crucial. This will provide context to future decisions, helping you be proactive and to consider challenges as opportunities.

The industry will see the introduction of both the Environment Bill and the Agriculture Bill over the next couple of years. These will set the tone for our new domestic agricultural policy and any rural development and environmental focused grants central to this.

A shakeup of the direct subsidy support available under the Basic Payment Scheme is undoubtedly coming. Current proposals are that this and the Countryside Stewardship (CS) schemes will be replaced by an overarching New Environmental Land Management Scheme (NELMS) from 2024/25.

For land managers there is still time to benefit from existing grant schemes under EU programmes and to secure funding up until the introduction of new schemes. The Government has committed that any grant

funding contract signed by December 31, 2020 will be funded for the lifetime of its agreement.

Grant funding can form a vital part of enabling long-term farm and estate management strategies and will be a critical income stream to draw upon under the new policy framework.

De-risking your business through awareness of the above is highly topical and pre-emptive to setting other resilience strategies. Being able to refer to a business plan and knowing the impact of factors on your cashflow forecasts will start to become commonplace.

Get ahead of the competition now. There is no time like the present to ensure you have a sustainable, viable business, and that it achieves the objectives you have set and want from it. This may be a certain level of profitability, or it may be to reinvest in machinery, land or livestock, or to integrate another family member.

But have a plan and monitor against it religiously. As the saying goes, 'if you don't measure it, you can't manage it.' Business management plans will be required evermore for justifying decisions, whether from your bank or the RPA – and 2020 is the perfect time to adopt more of a business mind-set across your enterprises.

If you would like more information, feel free to contact me. I'm always keen for a brew and a chat.



Simon Haley
simon@srhagribusiness.co.uk
07783 103951
www.srhagribusiness.co.uk

Drainage Ditches

What is a drainage ditch?

A drainage ditch is a narrow channel which is dug at the side of a field to drain water away. The water is often drained via land drainage pipes in the field that are two to three feet below ground. These drains empty into the ditch which then connects to a larger ditch, stream or river and eventually to the sea.

Rights

If the drainage ditch is owned by the adjoining landowner, there will often be express rights granted within the deeds to allow the land to drain into that ditch. However, this is not always the case - as we often see, many land matters are not documented and only come to light at a later date when transactions need to happen with the land.

If there are no express rights, then it may be that a prescriptive right can be relied upon. A prescriptive right is generated through use over time, the time period being a minimum of 20 years. So, if land has been draining into a ditch which is not owned with that land, but has been draining into it for a period of more than 20 years, then a prescriptive easement may have been generated.

However, each case must be considered on its own merits. If a prescriptive right has been generated, then you may want to document this, which can be done by completing a statement of truth detailing the use and possibly backed by an indemnity policy. Alternatively, an application to the Land Registry to note the right on the title may be made.

In the event that either a prescriptive easement has not been generated or a new right is required, an alternative to a prescriptive easement is to enter into a formal Deed of Easement that grants express rights for drainage into the ditch.

As this is a deed, it must be agreed between the owner of the ditch and the person seeking the right to drain into it. Once completed, the deeds can be registered with the Land Registry and the right is therefore noted for the benefit of your land for all future matters.

The hedge and ditch boundary presumption

There are frequently cases where the ditch is not registered with the Land Registry and the owners of the land on either side of it are unable to evidence their ownership of the ditch. In these situations, the hedge and ditch presumption can be sought.

This presumption is outlined in a classic statement: "No man, making a ditch, can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on top of it." *Vowles v Miller* (1810).

This boundary presumption applies only to agricultural land. The presumption means that if the hedge is on your side of the ditch, then the boundary of your land will be the opposite side of the ditch from where the hedge is.

This is based on the principle that the owner would have stood on the boundary facing toward his own land, dug the ditch on his own land, piled the spoil on his home side to form a bank, and planted a hedge on the bank.




Your contact

Diane France
diane.france@napthens.co.uk
01254 686207



NFU Legal Health Check Scheme

As an NFU member, you may be able to benefit from a contribution from the NFU's Legal Health Check Scheme if you subscribe to the Legal Assistance Scheme.



The contribution can be used towards the cost of Napthens' Farm Future package. Our Farm Future service entails a review of your current farming arrangements and a discussion of future plans, with the aim of safeguarding the farming business for future generations and ensuring that it can adapt to changing conditions.

Under the NFU's Legal Health Check, you may qualify for up to £500 towards two elements of our Farm Future package (being £250 for each element) which is broadly divided into three categories:

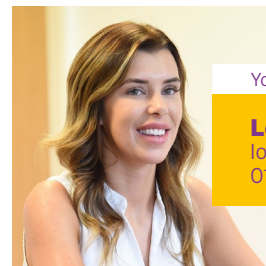
1. The first category looks at your property interests. We undertake an audit to establish the ownership of your land and how it is held. We also look at whether it is charged to the bank, whether it is registered or unregistered, if there are any tenancies or licences affecting the land, and whether there are any other potential issues. The audit can assist with tax planning and can be used as a tool to plan for the future by highlighting any potential development and land diversification opportunities. In the case of tenant farmers, we can use the audit to establish the type of tenancy you hold and also review the terms of the tenancy.
2. The second category looks at the farming business. If you are farming in partnership, it is important to ensure that a written partnership agreement is in place to set out the terms of the partnership and avoid any potential future issues. For example, ensuring the partnership does not automatically dissolve on the death

of a partner and that any agreements with third parties such as banks can continue. Similarly, if you are farming under a different business structure, such as a limited company, it is important to make sure that the relevant documents are in place and up to date. If there is no agreement in place, you may be eligible for a contribution from the NFU's Legal Health Check Scheme to put one in place.

3. The third and final category looks at family issues, such as Wills and Lasting Powers of Attorney. It is important to ensure that Wills are kept up to date to help with tax planning and ensure that your wishes are taken into account in relation to the future of the farm.

If you wish to check whether you are eligible for a contribution under the Legal Health Check, please contact CallFirst on 0370 845 8458. Please note that the contribution is discretionary and is therefore not guaranteed.

If you would like to find out more about Napthens Farm Future service please ask a member of the team.



Your contact

Lorna Kelly
lorna.kelly@napthens.co.uk
01254 686244

Offices across the North West

To find your nearest, visit napthens.co.uk

Email farmfuture@napthens.co.uk

or call **0345 671 0276**

Napthens LLP, registered office: 7 Winckley Square, Preston, Lancashire PR1 3JD.

Napthens LLP is a limited liability partnership registered in England and Wales: OC325775.

Napthens ® is a registered trade mark of Napthens LLP. The term "Partner" indicates a member of Napthens LLP who is not in partnership for the purpose of the Partnership Act 1890. A list of members is available from our registered office.

If you do not wish to receive future copies of **rural:law**, or wish to receive further copies, please contact Marketing@napthens.co.uk

Information given in this publication is intended for guidance only and is not in any way a substitute for full and independent legal advice. Please contact us if you need advice on any specific legal problem. No liability is accepted by the author(s) or by Napthens LLP for any loss arising from reliance upon the information given here, which is believed to be accurate and up to date at the time of publication.