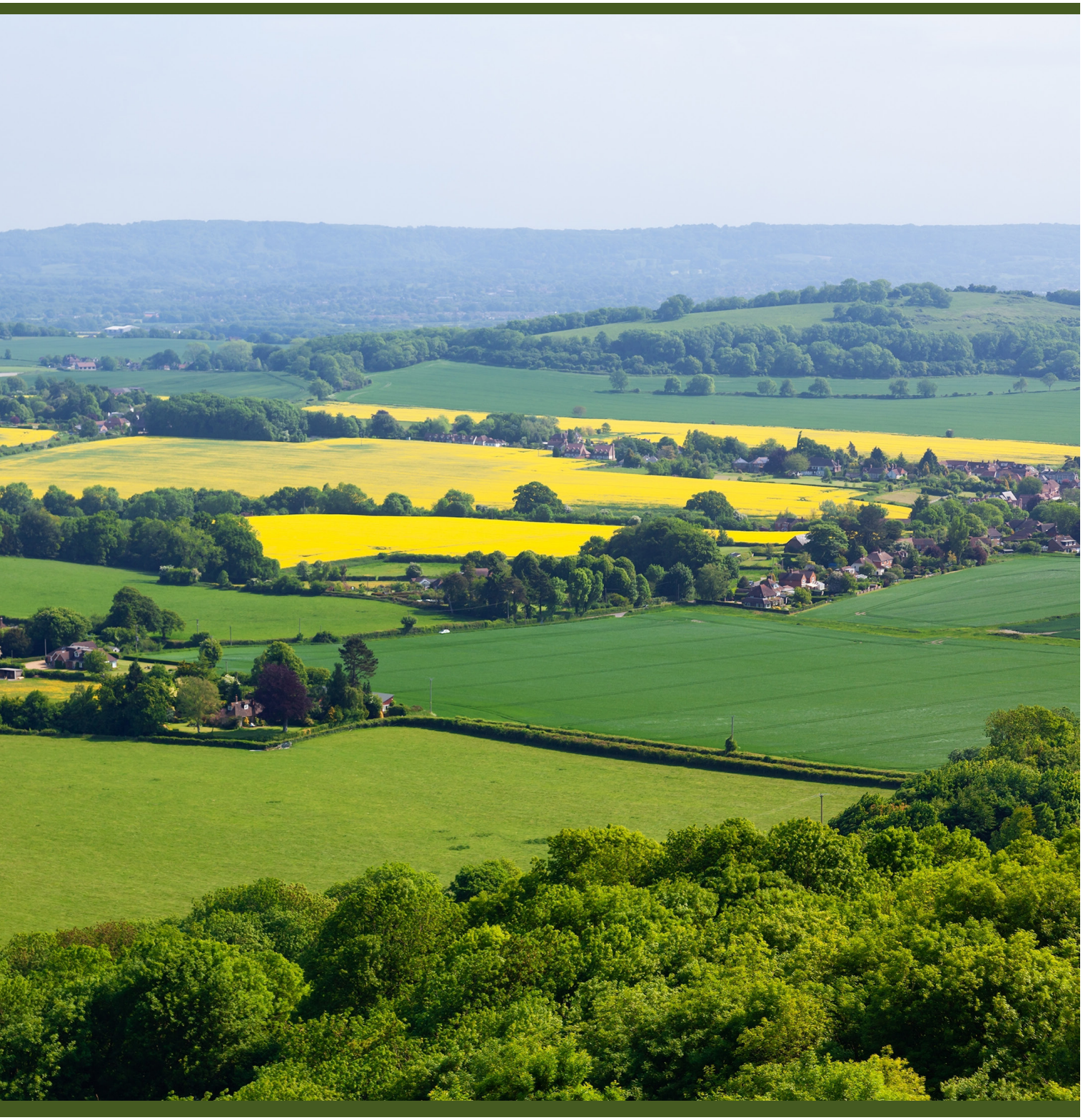
trowers & hamlins

AGRICULTURE AND RURAL ESTATES

Summer 2022



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Foreword

It is an exciting time for the Agriculture & Rural Estates Team as we continue to strengthen the team by welcoming new colleagues and have finally been able to get back to in-person events.

We are delighted to sponsor the Diversification Award at the Devon Farm Business Awards and have had the pleasure of meeting the finalists as part of the judging process, with the winner announced at the Awards night at the end of June.

Farming businesses continue to show their resilience, and many have already started to diversify their business to secure different income streams as part of future proofing. The Awards are an opportunity to share success stories and celebrate the brilliance of farmers in Devon.

Within the specialist Agriculture & Rural Estates Team we also offer expertise advising on equine law, renewable energy and telecoms. This newsletter shares our insight and highlights potential options for diversification – if you have any queries then please do not hesitate to contact us.

Our updated team sheet is at the back of this Newsletter. We hope you come to meet us in person at the Honiton and Okehampton Shows. We are looking forward to working with you over the year ahead, helping you achieve your goals.

Nicola Janus-Harris
Partner, Head of Agriculture & Rural Estates
+44 (0)1392 612304
njanus-harris@trowers.com

Got spare land? How about starting a livery yard?

Offering livery services can be a lucrative way of generating income from otherwise unproductive outbuildings and fields. Understanding the basics and some of the frequently asked legal questions will help you to understand whether livery services would be a viable diversification option for you.

What is a livery?

Livery stables are privately owned stables offered to horse owners as a place to keep their horse in return for a weekly or monthly fee. The size of the fee usually reflects the facilities offered and the main categories of livery are as follows:

Full Livery – A fully managed yard, where horse owners pay a premium for all their horse's needs to be met, including feeding, grooming, mucking out and exercising.

Part livery – A flexible option allowing owners to receive certain aspects of care for their horse, such as feeding, watering and mucking out, whilst they take care of the rest.

DIY livery – Where yard owners provide the grazing and stabling facilities, but the horse owner meets all the other needs of the horse including mucking out, grooming and exercising.

Working livery – Working liveries are usually managed riding stables that offer horse owners a discount on stabling fees in return for allowing their horse to be used in riding lessons.

Will I need planning permission?

As horses are not considered agricultural animals you are likely to require planning permission for a 'change of use' if you are turning agricultural land into a commercial livery yard. In addition, if you are constructing new stables/ facilities or redeveloping existing farm buildings it is likely that there will be planning implications. Our advice is always to discuss the potential planning implications of any diversification project with the relevant authority.

Will I need to pay business rates?

This will largely depend on the relevant local authority and the size and value of the livery operation. Some livery operations will trigger the payment of business rates and our advice is always to discuss the implications with the relevant local authority.

Do I need a written livery agreement?

We would always recommend using written agreements when offering livery services. The advantage of a well drafted written agreement is that it will make clear the rights and responsibilities of each party. This can be particularly important so that everyone is clear on who is responsible for meeting the horse's needs.

Can I keep hold of a horse if an owner does not pay their livery fee?

The concept of retaining a horse (or other item) until a contractual payment is made is known as a lien. The most straightforward way of ensuring you have the right to a lien is to include a term in the livery agreement allowing you to retain the horse until livery fees are paid in full.

Who is responsible if the horse gets injured?

The starting point is that the person in possession of a horse is responsible for keeping it safe. Often that will mean the responsibility is with the livery yard owner. It may be possible to limit liability in certain circumstances by including well drafted clauses in written livery agreements.

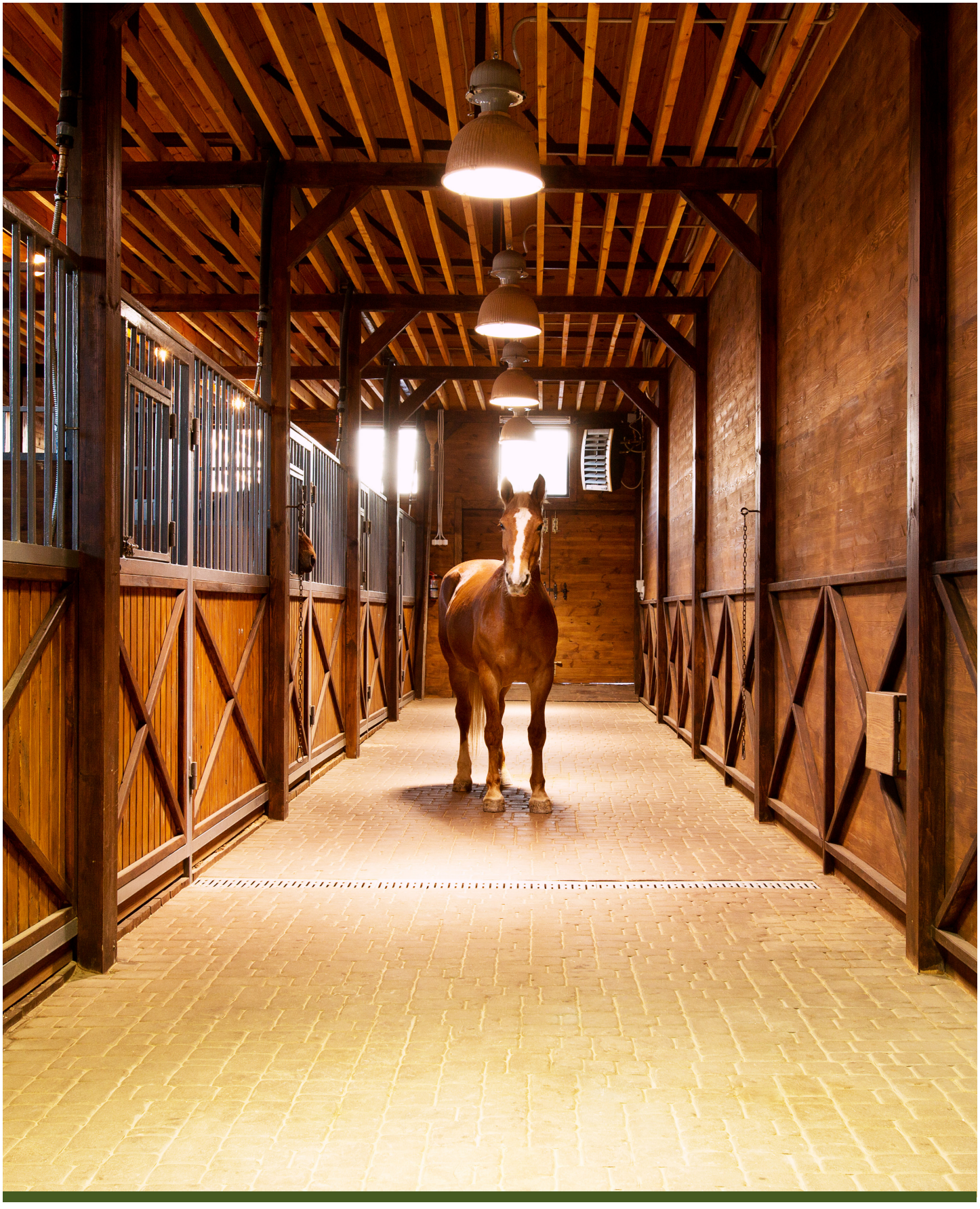
Who is responsible for damage caused by the horse at livery?

Typically, the person in possession of the horse will be responsible for any damage the horse causes to someone else or another horse. A well drafted livery agreement may help to mitigate your responsibility for damage caused and it is always advisable to consider your insurance position.

Will I need insurance?

We would strongly suggest obtaining at least a minimum level of public liability insurance in case of injury or damage to third parties. More comprehensive insurance may be advantageous and anyone considering diversifying into livery services should contact their insurance broker.

Josh O'Neill
Solicitor, Dispute Resolution and Litigation
+44 (0)1392 612638
joneill@trowers.com



Rural Telecoms: The Pippingford Case

For a long time, telecoms infrastructure has generated good income opportunities for farmers and landowners, but recent developments in the legislation mean that valuations have plummeted while telecoms operators have been given more extensive rights. The recent County Court decision in the Pippingford case sheds some light on this evolving area of law.

We teamed up with Declan Oddy, senior surveyor at Fisher German for a run down on the case and what it means for farmers and landowners.

The Electronic Communications Code ("the Code") was implemented on 28 December 2017 and governs the relationship between telecoms operator and site provider. The Code's aim is to assist the rollout of electronic communications networks, in particular 5G, by giving operators certain powers to negotiate access and rights to install apparatus on sites. The Code introduced a new valuation regime which has seen the sums payable by operators for telecoms sites under the new regime reduce significantly.

The Code is weighted more heavily in favour of operators than site providers (the idea being that the rollout of technology is in the public interest), but this often leads to friction between site provider and operator and protracted negotiations.

The market is ever changing with Vodafone and EE decommissioning 3G equipment in favour of a 4G and 5G only network, as well as the proposed Shared Rural Network ("SRN") between the 4 major mobile network operators ("MNOs") in the UK. The SRN aims to extend mobile coverage to 95% of the UK by the end of 2025, and the MNOs anticipate that an additional 280,000 premises and an extra 16,000km will gain coverage.

Legal obligations (subject to OFCOM regulations) have been imposed on the MNOs to ensure that momentum is maintained and these target goals are achieved. Whilst the installation of new masts will have an impact on the rural landscape, the number of masts required is to an extent minimised by each mast being shared by the MNOs. The investment in rural areas will drive productivity, give greater consumer choice and enable rural economies to thrive.

We have also seen a growing trend in recent months in operators and investors approaching farmers and landowners with a view to buying the telecoms compounds in exchange for capital sums. In the right circumstances, this can be a good opportunity to reinvest the capital into diversifying or modernising other parts of the farm or landholding.

We predict that telecoms matters will become increasingly relevant for farmers and owners of rural land. Consideration may increasingly need to be given to ways of diversifying businesses and enterprises given the complex post Brexit market, environmental pressures and changes to the subsidy schemes. Although income from telecoms sites is nominal, the key will be to ensure that sufficient protections are included in any agreement so that landowners and farmers are not restricted in what they can do with their land in the future and so that their costs can be recovered.

The Facts

The telecoms operators (in this case, EE Limited and Hutchison 3G UK Ltd) applied for a new tenancy of the site they occupied on The Pippingford Estate, a private rural estate in the Ashdown Forest.

The estate, like many, has diversified and generates income with its conventional uses plus others such as sporting, equine livery and telecoms from time to time.The estate is also used for military training.

Although the site provider did not oppose the grant of a new tenancy, the parties had not been able to agree all of the lease terms. The key terms in dispute were:

- whether there should be a break clause (i.e. a right to terminate the lease early);
- what rights of access the operators should have to the site;
- and most importantly what rent the operators should pay.

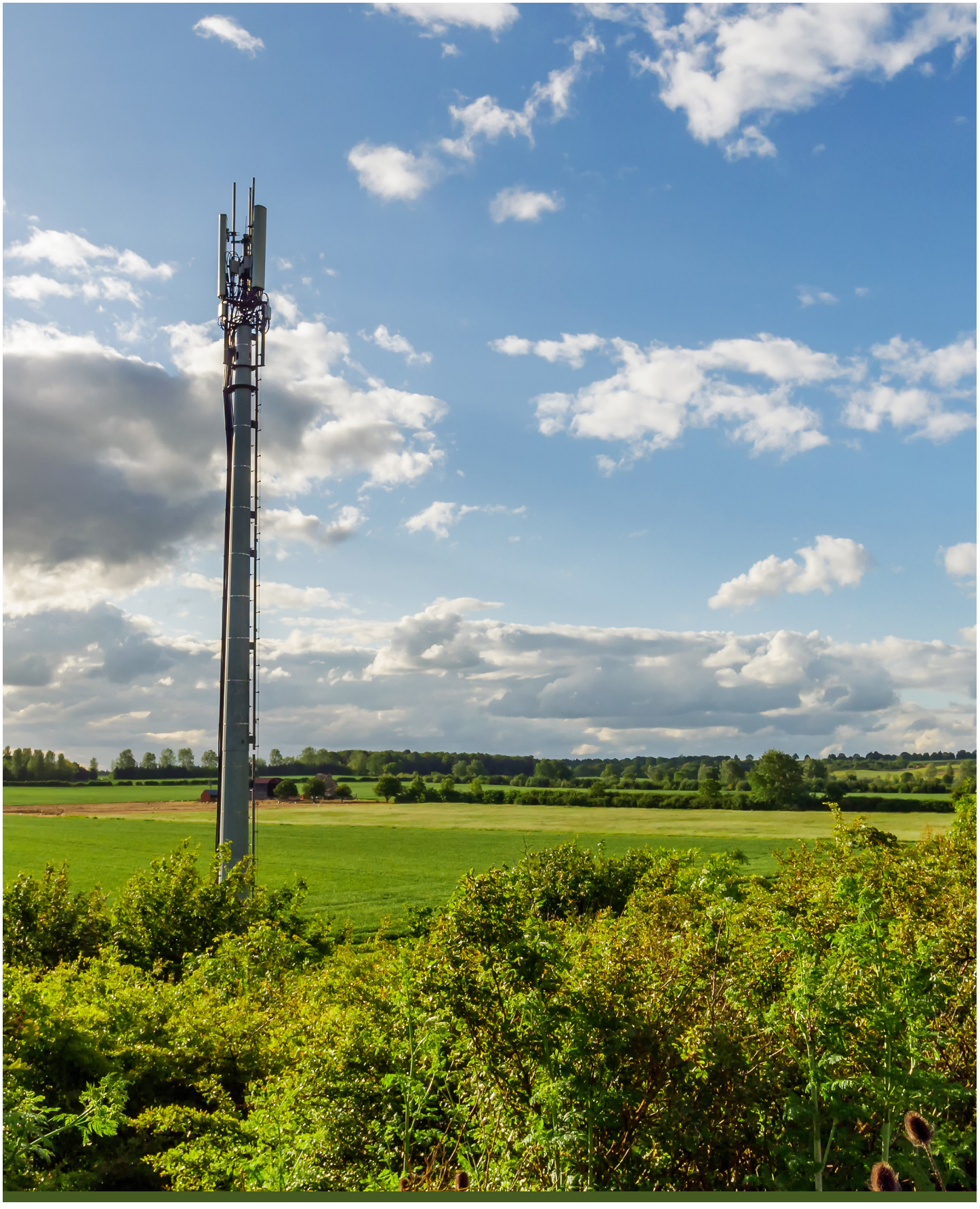
This article will focus on the rental level.

What is the legal framework?

The question for the Court was how rents should be valued in telecoms leases which are renewed under the Landlord & Tenant Act 1954 ("the 1954 Act") and then become subject to the Code.

The valuation process under the 1954 Act (which deals with the obligations between landlord and tenant where the premises is occupied for business purposes) is different to the valuation process set out in the Code and, the Court has previously said that operators cannot cherry pick which procedure is used based on what would best suit their needs.

Instead, the Court has said that if an operator is in occupation under an existing agreement covered by the 1954 Act, it can only renew its lease under the 1954 Act. After that renewal though, the lease will be subject to the Code and any subsequent renewals will be under the new regime.



Generally (although there are some exceptions), rent under the 1954 Act is decided based on what the open market rent would likely be. Expert evidence, and examples of comparable case studies, are therefore crucial in helping the Court to decide what that figure should be.

What did each party say on rent?

As rent could not be agreed, each party obtained expert evidence. Their positions were:

- Operators' expert – rent of £1,200 per annum plus costs;
- Site provider's expert – open market rent of £12,000 per annum;

The operators' expert had provided examples of 33 comparable transactions between December 2019 and December 2020 of 'typical' new sites. 28 of the 33 transactions had rental figures equivalent to £1,750 - £2,500 per annum, including capital payments.

As the parties' experts were so far apart on rent, it fell to the Court to ultimately determine the correct rental figure.

What did the Court decide?

The Court preferred the site provider's expert's valuation process, but ultimately was more persuaded by the operators' expert evidence, deeming the sum in the site provider's valuation to be excessive. The site provider's expert had made adjustments to the comparable evidence which the Court said resulted in his valuation being more than double the average of the comparable rents and 60% higher than the highest of the nine most comparable transactions.

As a result, rent was determined at £3,500 per annum, which included an annual contribution to the site provider's professional costs of £500.

The Court also took into account factors relating to how the Estate was run, including the interference with other more profitable activities on the Estate, general inconvenience and greater than average management time. This consideration justified the increase over and above the 'typical' rural site value.

Overall, whilst the decision on rent was over three times what the operator had proposed, it was almost three times less than the site provider had asked for, and gave greater rights to the operator (access and upgrading rights) than had been contained in their previous lease.

Early Incentive Payments

Another key question for the Court to decide was how incentive payments should be treated.

Early Completion Incentive Payments ("ECIPs") are increasingly being used by operators as a tactic to 'sweeten the deal' and bring landowners to the table where negotiations have otherwise stalled.

Generally, operators are keen for ECIPs to remain secret, and often try and introduce confidentiality clauses so that ECIPs cannot be disclosed.

Here though, the Court decided that when determining the rent, ECIPs should be taken into account. The best way to do this, it said, was for an annual equivalent of the ECIP to be added to the valuation figure.

What does this decision mean for you?

The legislation is extremely complex and decisions coming from the Courts and Tribunal provide guidance on various points which have been in dispute since the Code was introduced on 28 December 2017.

We have discussed the guidance given by the Court on rent in the Pippingford case, but there are also wider issues to consider, such as how any access rights are documented and whether indemnity clauses are required, allowing a party to recover its costs and losses from the other in certain specified circumstances. This is important so that landowners and farmers are not restricted in what they can do with their land in the future and so that costs can be recovered in the event of, for example, damage being caused.

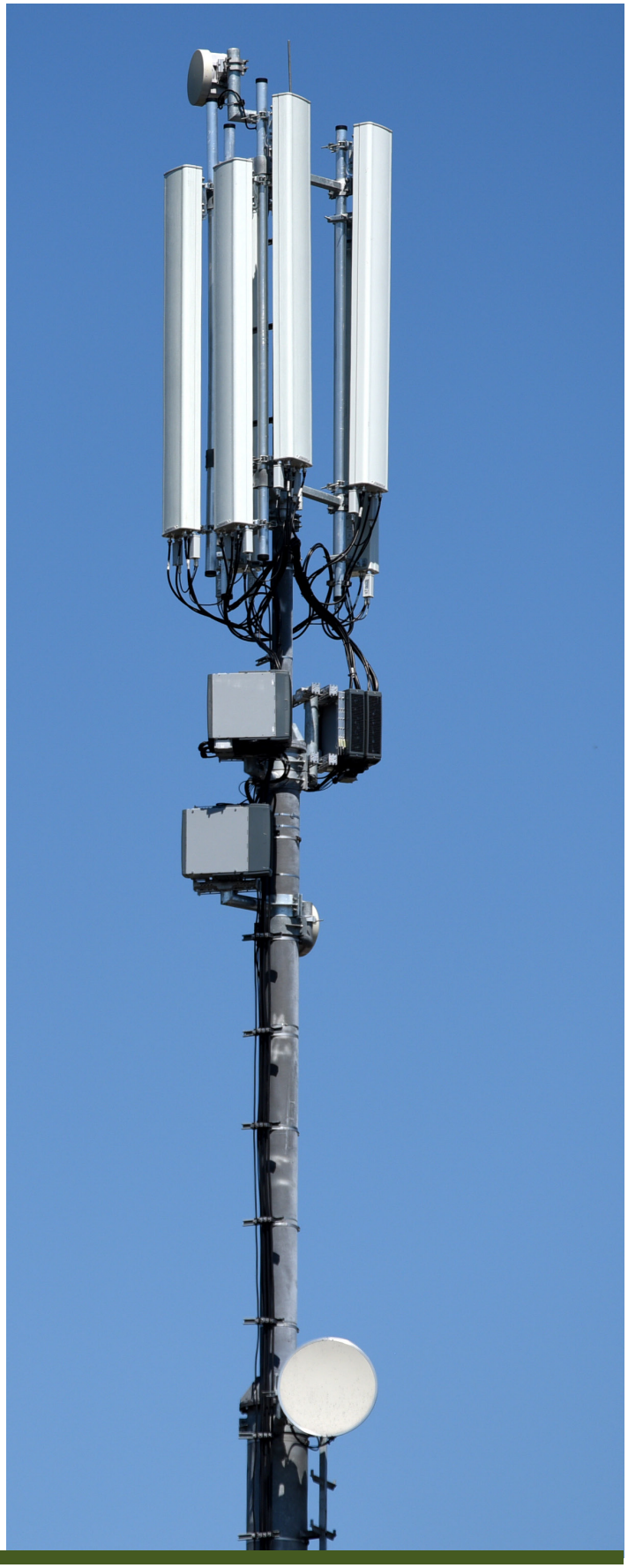
Current and future site-specific circumstances and requirements, as well as terms previously agreed by the parties, should form part of the discussion as to terms at renewal. These requirements will need to be taken into account when rent is being negotiated. Generally, an operator is likely to suggest terms which will provide them with the most flexibility, and there can often be a conflict between the proposed terms and a site provider's property rights. Negotiations will therefore likely come down to balancing each party's competing interests and trying to reach an outcome which attempts to balance both parties' needs.

It has been widely reported that operators are referring to their statutory powers during negotiations as a way of increasing pressure on farmers and landowners to agree to terms that they otherwise would not consider. Therefore, with rents typically reducing on renewal and operators requesting far more extensive property rights, it is more important than ever to take professional advice. The reasonable cost of taking advice from a surveyor and solicitor should be paid by the Operator, although in reality this is often resisted by operators and becomes a negotiation point. Ultimately though, the Court has made clear that the idea that a site provider is left out of pocket is flawed.

Top Tips

- Think about how any adjoining land is currently used (and any practical implications of those uses) so that this can be taken into account when terms are negotiated;
- Consider how the site and/or any adjoining land fits within any wider business plan. If flexibility may be required because plans are yet to be decided or diversification may be on the horizon, it would be sensible to try and include a break clause (i.e. an option to terminate) in any agreement;
- Always question the terms being offered by an operator and think about whether a better deal could be secured;
- Think about taking professional advice at an early stage. Professional advisers can add value by, for example, giving strategic advice, dealing with negotiations and advising on how any proposed terms fit within recent Court decisions;
- Do not be unduly pressured into agreeing anything which you are not comfortable with. Again, professional advice may be appropriate in these circumstances and it is likely that some, if not all of these reasonable costs could be recovered from the operator.
- If any statutory notices are served on you by the operator (i.e. a notice which says it relates to a specific piece of law), professional advice should be obtained as soon as possible so that Court deadlines are not missed.

Charlotte Brasher
Solicitor, Dispute Resolution and Litigation
+44 (0)1392 612432
cbrasher@trowers.com



Diversification in Agriculture – Introduction to Aquaculture in the South West

It has been described as 'the fastest-growing food production sector globally' by the South West Partnership for Environment & Economic Prosperity (SWEEP).

Aquaculture involves the cultivation of aquatic animals and plants for food whilst incorporating a more sustainable and ecologically advantageous methodology than capture fisheries. One such example is the cultivation of shellfish, which feed on naturally occurring plankton whilst also sequestering excess carbon and nitrogen. The industry diversifies to include the propagation of various seaweeds, a crucial component in many fertilisers and cosmetic products.

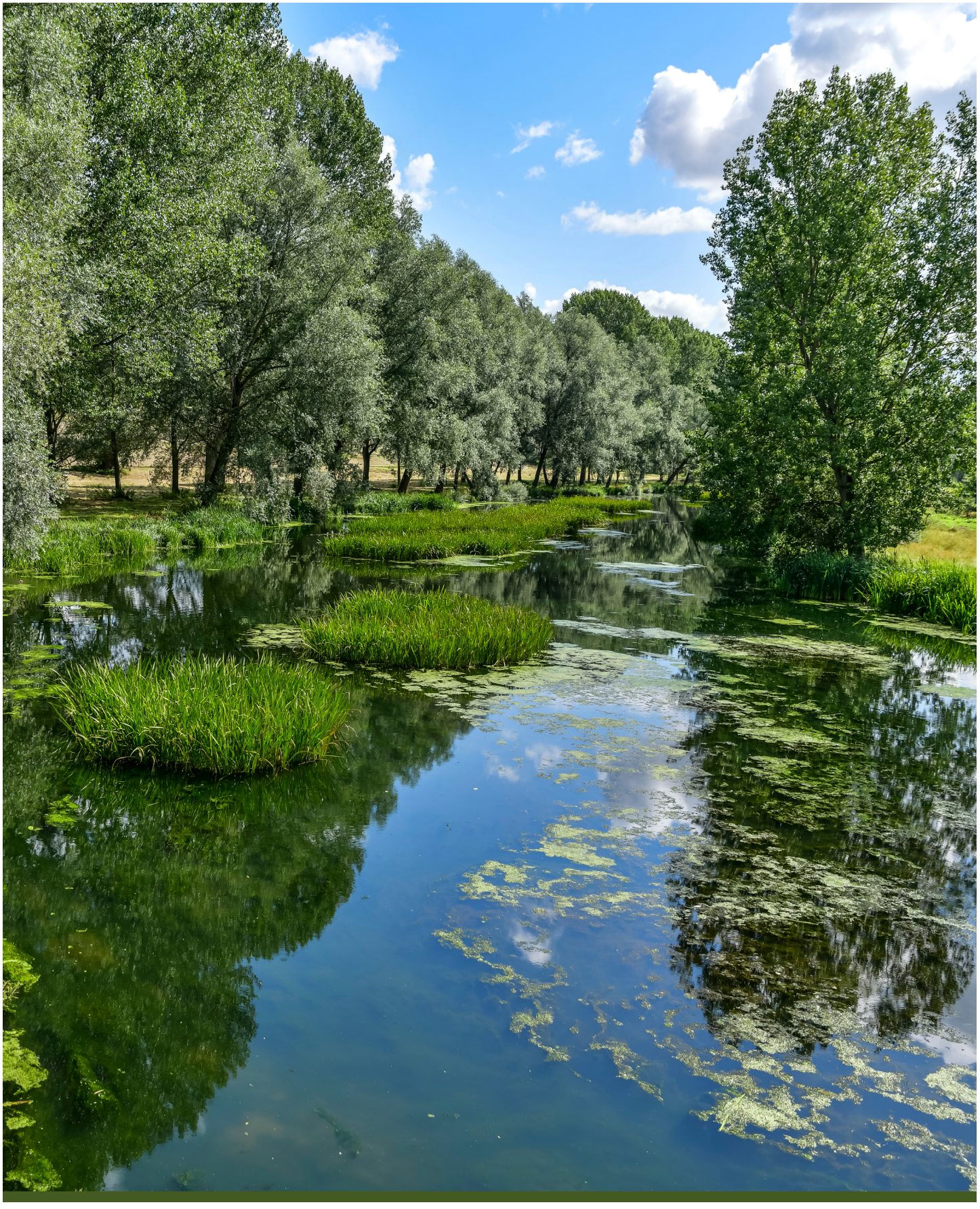
England is uniquely suited for this industry through its natural geology. Slicing diagonally through England from Dorset up into Yorkshire is a band of calcium carbonate – chalk bedrock. On paper it may seem an unremarkable geological feature – hardly a visual spectacle mirroring the crystal caves of Naica. But the chalk's porosity (sponge-like structure) allows water to percolate through it, a process that acts as a form of filtration ultimately producing streams and rivers that are largely free of sediment but rich in minerals and capable of supporting a huge range of wildlife. Chalk rivers are a global rarity with there being only 200 worldwide, with 85% located here in England.

The UK domestic aquaculture industry is undergoing a renaissance as is attested by the fact that the Department of International Trade has deemed Dorset & East Devon a High Potential Opportunity Area for sustainable aquaculture. Hitherto, Scotland has been the hub of UK aquaculture on account of its sheltered fjordic coastline offering favourable breeding conditions free from the mar of urbanisation. Geographically, the English coastline is at a greater disadvantage; being more developed and more exposed to storm damage. However, the industry's technologies have been growing more versatile and environmentally sensitive; opening formerly less-than-ideal areas to aquacultural use. SWEEP does acknowledge that the aquacultural development in the South West is inhibited by the variable water quality levels; induced by wastewater and fertiliser run-off which limit production site use. However, with the assent of the Environment Act 2020 and the proliferation of stringent nitrate restrictions which now affect multiple Local Planning Authorities, there has come a focus on remedying the polluted state of UK waterways. This could prove a key catalyst for the industry's growth.

One concern must remain paramount for any aquacultural aspirant and that is the biosecurity aspect of their project – the need to avoid the spread of infectious diseases and invasive species has been thrown into greater relief by the pandemic. As was shown by the accidental introduction of the Killer and Demon Shrimps (yes, you read that correctly) to the UK approximately a decade ago, presumably as part of tainted commercial shipping, which revealed that, even with modern screening technology, such occurrences remain too common and destructive. In the case of fish, in order to set up a new aquaculture production business, it is necessary to apply to the Fish Health Inspectorate for authorisation and provide a Biosecurity Measures Plan alongside various site inspections.

The Scottish Aquacultural Industry's issues is a useful point of reference for the hurdles the largely nascent south-west will likely encounter. A 2017 review conducted by the Government Office for Science titled 'Trends in Aquaculture' examined the reasons why the then largely Scottish-based industry had not expanded in the same way as many of its European counterparts; one of the primary factors was the regulatory complexity. That said, the industry appears to have expanded significantly in the past five years with more and more organisations successfully navigating the licensing process.

James Hudson
Trainee Solicitor, Planning and Environmental
+44 (0)1392 612546
jhudson@trowers.com



Key Contacts

Nicola Janus-Harris
Partner, Real Estate
t +44 (0)1392 612304
e njanus-harris@trowers.com

Charisse Crawford
Partner, Dispute Resolution and Litigation
t +44 (0)1392 612596
e ccrawford@trowers.com

Donna Duncan
Associate, Real Estate
t +44 (0)1392 612495
e dduncan@trowers.com

Victoria Borrow
Associate, Tax and Private Wealth
t +44 (0)1392 612422
e vborrow@trowers.com

Scott Cann
Associate, Tax and Private Wealth
t +44 (0)1392 612556
e scann@trowers.com

Justyna Peacock
Chartered Legal Executive, Tax and Private Wealth
t +44 (0)1392 612553
e jpeacock@trowers.com

Holly Bryan
Associate, Dispute Resolution and Litigation
t +44 (0)1392 612698
e hbryan@trowers.com

Meadow O'Connor
Solicitor, Dispute Resolution and Litigation
t +44 (0)161 838 2171
e mo'connor@trowers.com

Charlotte Brasher
Solicitor, Dispute Resolution and Litigation
t +44 (0)1392 612432
e cbrasher@trowers.com

Josh O'Neill
Solicitor, Dispute Resolution and Litigation
t +44 (0)1392 612638
e joneill@trowers.com