SUMMARY OF LEGAL ADVICE IN RESPECT OF THE HIGH COURT DECISION RELATING TO TUESLEY FARM, NR GODALMING, SURREY

Introduction

1. I am asked to advise in connection with the law relating to Polytunnels as it now stands in light of the judgement of Mr Justice Sullivan in the case of Hall Hunter Partnership v the Secretary of State (1), Waverley Borough Council (2) and Tuesley Farm Campaign Residents Group (3).

2. Judgement was handed down on 15 December 2006 and related to Tuesley Farm, near Godalming, Surrey.

Background

3. The law relating to Spanish polytunnels has been hitherto somewhat indistinct. There has previously been no binding legal authority.

4. The Cardiff Rating case (1948) was a case which considered whether a mobile furnace could amount to a rateable hereditament. Mr Justice Denning (as he then was) indicated that such issues as the method of attachment to the ground, size and so forth were material in determining whether or not the furnace in question was a building and therefore liable to rates. This was not a planning case. In the case of Skerrits of Nottingham, the Planning Inspector held that a marquee erected alongside a hotel (at an identical location for around two-thirds of each year) was a development and required planning permission. In the case of Brinkman, table top growing of crops under a polytunnel was held to be development requiring planning permission.

5. Until the Tuesley Farm decision, the law was open to interpretation. Herefordshire Council under its successive voluntary codes of practice had determined that where soil-grown crops were to be propagated under polytunnels, then provided the tunnels were moved after two years (and other conditions also applying) then planning consent need not be sought for the polytunnels in question. That was an entirely sensible and proper course to adopt within the meaning of the law, as it then stood.

The Tuesley Judgement

6. The Tuesley judgement was an appeal to High Court under Section 289 of the Town and Country Planning Act by the Hall Hunter Partnership in respect of a planning inspector dismissing two appeals lodged by the grower with regard to enforcement notices which had been served by Waverley District Council. The first enforcement notice related to the stationing of caravans without planning permission, to accommodate around 650 crop pickers. The second enforcement notice was against the construction of 40 hectares (99 acres) of polytunnels.

7. Tim Straker QC appeared on behalf of the grower and contended that either polytunnels were not "development" within the meaning of Section 55 (1) of the Town and Country Planning Act or in his fall back position if they were development, then they were permitted development within Class A in Part 4 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 [hereinafter referred to GPDO]. With regard to the first ground that the polytunnels were not "development", the learned judge considered the historic cases of Cardiff Rating Authority and Skerrits. The judge noted that the polytunnels would take around 45 man hours to erect around one acre using heavy machinery that bent the upright frames into a hoop design and buried their ends into the ground to a depth of about a metre. The judge concluded "*as a matter of fact and degree the polytunnels have a substantial degree of physical attachment to the ground which enables them to remain in place for whatever term is necessary to serve the purpose for which they are designed*". The judge commented that to move the polytunnels, they would need to be taken to pieces, rather than moved in one piece. They would take around 32 man hours per acre to dismantle. The judge concluded that this would amount to a demolition and by definition a building operation.

8. The judge concluded that as in the Skerrits case, the structure was not "*transient, ephemeral or fleeting*". The judge further concluded that polytunnels in this case were also not transient, ephemeral or fleeting. The learned judge stated that the polytunnels were in consequence development. The fall back advocated by the grower was that the erection of polytunnels was permitted by the GPDO. Clearly, certain operational development for agricultural purposes is permitted by GPDO. Part 4 of Schedule 2 to the GPDO grants deemed permission for certain "temporary buildings and uses" Class A permits the provision on land of "*buildings, movable structures, works, plants or machinery required temporarily in connection with and for the duration of operations being carried on, in, under or over the land* …". However the judge was astute to point out that development is permitted development under Class A if planning permission is not required for these operations. The judge concluded that the Inspector had properly directed himself there was as a matter of fact and degree the existence of blocks of polytunnels up to nine months of the year within a single planning unit of the farm could not reasonably be regarded as "*required temporarily*" for the purpose of Class A in Part 4 of the Regulations and dismissed the appeal.

Conclusions and Recommendation

9. The law relating to polytunnels has now crystallised. There is nothing within the judgement that makes the ruling within the case site-specific to Tuesley Farm. The judge has given a clear indication that polytunnels of the magnitude within that case are development requiring planning permission. I have been informed that the grower is not seeking to further pursue the litigation to the Court of Appeal. The judgement therefore stands.

10. I therefore recommend that full cognizance is taken of the judgement within the context of the Polytunnel Review Working Group's forthcoming work programme. It would seem clear that all *new* polytunnel developments within the county (be they for soil grown crops or table top growing or otherwise howsoever) be treated as development requiring planning consent. The usual application form will need to be completed in those circumstances.

11. The Polytunnel Review Working Group have been advised of several classes of polytunnel development within the County, which includes:-

- polytunnels which have, hitherto, fallen within the terms of the Code of Practice, and therefore have not been the subject of planning applications, and

- polytunnels which are known to require express planning permission irrespective of the Code of Practice and for which applications have already been invited, and

- polytunnels which are currently the subject of enforcement proceedings

12. As a result of the current review of the Code of Practice it is anticipated that, where polytunnels satisfy the "Tuesley" test of development which requires planning permission, growers will be invited to submit planning applications in the future. There can be a lot of work required to support such planning applications, going a long way beyond the mere identifying of the land of which the polytunnels are expected to be erected and/or remain. In many cases there may need to a wildlife survey, which typically needs to be done in the summer months, and there may be other needs such as flood risk assessments, economic impact assessments, landscape assessments and, in a limited number of cases, a full Environmental Impact Assessment. It is not, therefore, reasonable to expect all growers to submit planning applications within a week or two of being advised of the need for a planning application.

13. Where polytunnels are erected without the necessary express grant of planning permission then the local authority has the option of pursuing planning enforcement proceedings. This could, for example, take the form of an Enforcement Notice which required the removal of the polytunnels from the land and its reinstatement as open agricultural fields. Before serving such a notice the local authority needs to consider the expediency of such action. This entails a number of judgements:

    - has the grower been afforded a reasonable amount of time to make a planning application?

    - Is the development immune from enforcement action anyway?

    - Is long-term damage being done to acknowledged planning interests?

    - Would planning permission be likely to be granted anyway?

14. The "Four year rule" is germane to the second point above. Where built development has been in place for over four years it becomes immune from enforcement action. Thus, in cases where growers are known to be actively preparing a planning application (e.g., an agent has confirmed that he has been instructed and a timetable for submission agreed) and the polytunnels are still within the four year period, then it might not be expedient to pursue enforcement action straight away. In cases where planning permission would be likely to be granted the role of a planning application may be merely to impose certain conditions on the development and, therefore, in those cases an Enforcement Notice may not be required in the short term. However, where it appears that the four year period is close to being completed and there are clear planning interests at stake it is important to get an enforcement notice served before the four year period expires.

15. In the light of the above it is suggested that enforcement proceedings be continued and/or initiated in accordance with the priorities below:

(a) Enforcement proceedings to be continued in respect of those sites where notices have already been served and/or are in preparation

(b) Enforcement proceedings to be initiated during the growing season of 2007 in all cases where polytunnels are already known, or are suspected, to be outside the Code of Practice, there is a threat to acknowledged planning interests, and are approaching four years in situ

(c) Enforcement proceedings to be initiated after the end of growing season 2007 in all other cases where planning applications have not, by then, been submitted and there is a threat to acknowledged planning interests.

POLYTUNNEL UPDATE FOR ENVIRONMENT SCRUTINY COMMITTEE – 12 MARCH 2007

E & J PRICE, OAKCHURCH FARM, STAUNTON-ON-WYE, HEREFORDSHIRE, HR4 7NE

- Polytunnel checklist submitted 2003, 2004 and 2005
- Enforcement investigations revealed non-rotation of polytunnels occurring
- Agent confirmed that planning applications will be submitted

MR A DAVISON, HAYGROVE FARM, FALCON LANE, LEDBURY, HR8 2JL

Site: Haygrove Farm

- Polytunnel checklists submitted 2004, 2005
- DNE2005/3587/U – Existing use for polytunnels – Refused 14/12/05 due to insufficient evidence
- Application for planning permission or new lawful development certificate expected to be submitted

Site: Whitehouse Farm, How Caple, HR1 4SR

- Polytunnel checklist returned 2005 and 2006

EC DRUMMOND AND SON, THE HOMME, HOM GREEN, ROSS-ON-WYE, HR9 7TF

- Polytunnel checklists submitted 2003, 2004, 2005 and 2006

MR R OAKELEY, BIDDLESTONE ORCHARDS, LLANGROVE, HR9 6NT

- Polytunnel checklists submitted 2003, 2004, 2005 and 2006

MR A SNELL, PENCOYD COURT FARM, HAREWOOD END, HR2 8JY

- Polytunnel checklists submitted 2003, 2004, 2005, 2006
- Application for planning permission to be invited for site with non-rotational crops

MR M SAVIDGE, ROCK FARM, LEA, ROSS-ON-WYE, HR9 7JZ

- Polytunnel checklists submitted 2004, 2005 and 2006

MR J DAVIES, BROOK FARM, MARDEN, HEREFORD, HR1 3ET

Site: Nine Wells West

- DCCW2004/0804/F – Proposed erection of permanent polytunnels – Application withdrawn
- DCDW2005/0698/F – Siting of polytunnels in connection with raised bed strawberry production – Application withdrawn 18/08/05
- DCCW2006/2543/F – Siting of polytunnels in connection with raised bed strawberry production – Application refused 18th October 2006
- Planning enforcement notice served on 28th February 2007.

Site: Nine Wells East

- Polytunnel checklist submitted 2006
- Blackberries/Raspberries being grown in grow bags, divorced from the ground with hoops, no polythene in place
- Letter sent requesting planning application
- Agent confirmed planning application will be submitted
- Scoping opinion undertaken – not EIA development

Site: Brook Farm – Field 2274

- Polytunnel checklist submitted 2006
- Blackberries/Raspberries being grown in grow bags, divorced from the ground with hoops and polythene in place
- Letter sent requesting planning application
- Agent confirmed planning application will be submitted
- Scoping opinion undertaken – not EIA development

Site: Brook Farm – Field 3155

- Polytunnel checklist submitted 2006
- Operating in accordance with the code of practice

Site: The Wymm, Marden

- Polytunnel checklist submitted 2006
- Operating in accordance with the code of practice
- Part of site failed – clarification being sought as to which area failed

Site: Drakeley Farm, Marden

- Polytunnel checklist submitted 2005 and 2006
- Monitor removal of polytunnels in 2007

Site: Brierley Court, Leominster

- Polytunnels on site in excess of terms of code, some have recently been removed but those near to ancient monument remain. Need to monitor whether others have been retained.

Site: Wharton Court, Leominster

- Polytunnel checklist submitted 2005 and 2006
- All tunnels removed.

Site: Wickton Court, Leominster

- Polytunnel checklist submitted 2005 and 2006
- Now operating parts of site beyond terms of code.

Site: Ivington Court, Leominster

- Polytunnel checklist submitted 2007
- Applicant advised planning permission required

Site: Tarrington/Stoke Edith

- Ground currently being prepared with ground plastic
- Polytunnel checklist submitted 2006

Site: Land between A49 and Haywood Industrial Park

- Polytunnel checklist submitted 2007 – indicated tunnels in excess of two years.
- Agent has confirmed polythene will be phased over tunnels in order to comply with code of practice

Site: Stretton Court Farm

- Polytunnel checklist submitted 2007 – indicated tunnels in excess of two years.
- Agent has confirmed polythene will be phased over tunnels in order to comply with code of practice

S.D WELLS, LOWER HOPE LIVESTOCK AND FRUIT LTD, ULLINGSWICK, HR1 3JF

- Polytunnel checklists submitted 2005 and 2006.

MR V POWELL, BRICK HOUSE FARM, CANON PYON, HEREFORD, HR4 8PH

- Polytunnel checklist submitted 2005 and 2006 for an area of temporary polytunnels
- DCCW2003/2321/F – Erection of 1.62 Hectare of Spanish polytunnels (23 tunnels in total) – tabletop growing – Granted 29/10/03
- DCCW2004/4212/F – Erection of 2.59 hectares of Spanish polytunnels to use in soft fruit growing (table top method) – Granted 09/03/05
- DCCW2005/2947/F – Removal of condition 12 from planning permission DCCW2004/4212/F to allow the retention of two Spanish polytunnels approved under planning permission DCCW2003/2321/F – Refused 24/10/05 – Refusal subject to an appeal
- Appeal upheld 10/07/06 – Condition removed
- Monitor removal of polytunnels under checklist returns in 2007

MR N COCKBURN, PENNOXSTONE COURT FARM, KINGS CAPLE, HEREFORD, HR1 4TX

Pennoxstone Court & Poulstone Court

- Polytunnel checklists submitted 2003, 2004 and 2005. No checklist submitted for 2006. Site investigations have revealed that fields have been used in excess of the terms of the code.
- Enforcement notice served on 18th November 2005 on field containing raspberries – Enforcement notice subject to appeal – Withdrawn
- Planning application submitted 11th October 2006 for erection of polytunnels to be rotated around fields as required by crops under cultivation.
- Report to Southern Area Planning Sub-committee 20th December 2006 recommending refusal.

- Application withdrawn by applicant 19th December 2006 with a view to submitting a new planning application and Certificate of Lawfulness.
- Planning Enforcement notice served on the whole farm on 26th February 2007.

MR G LEEDS, LOWER WITHERS FRUIT FARM, WELLINGTON HEATH

- Retrospective planning application requested to be submitted for:

  - Amenity building, including kitchen and washing facilities

  - Propagation Unit

  - Permanent polytunnels – Tabletop growing

- Agent has confirmed planning application will be submitted