

A photograph of a pheasant in flight over a field of tall grass, with a dog running in the foreground. The pheasant is in the upper right, wings spread, and the dog is in the lower left, running towards the right. The background is a line of trees under a grey sky.

AHEAD OF THE GAME

*It can be easy to inadvertently fall foul of the rules when running a shoot, warns **Paul Dunlop***

The game shooting season is almost over for another year, and the question of who owns game birds is once again occupying minds across rural parts of this country.

There are also further legal issues regularly encountered by shoots and the neighbouring landowners.

The word 'game' is derived from the Old English word *gamen* meaning 'joy, amusement, sport, merriment'. The Game Act 1831 defines what constitutes game and lists pheasants, partridges, grouse, heath or moor game and black game as 'game birds'.

The Wildlife and Countryside Act 1981 is the primary legislation protecting animals, plants and habitats in the UK. Under this Act, a wild bird is defined as any bird of a species resident in, or a visitor to, the European territory of any member state – in a wild state.

However, game birds are not included in this definition (except to a limited extent) and are covered by the Game Act 1831 (as amended). Pheasants, for example, become wild birds the moment they are released into the countryside and the Code of Good Shooting Guide says this should be at least one month before they are shot.

OPEN SEASON

Game is protected during closed season (and on Sundays and Christmas Day), but can be shot in open season as follows.

- Red grouse (Moor Game): 12 August – 10 December
- Black grouse (Black Game): 20 August – 10 December
- Pheasant: 1 October – 1 February
- Partridge: 1 September – 1 February

As wild birds, game birds provide for some interesting legal anomalies as they are 'ownerless', even though they have been reared by an owner before being placed in the wild.

Under common law, a landowner has the right to hunt any wild animals and birds on their land. In the case of *Pole v Peak* [1998] EG 125 (CS), the Court of Appeal discussed the construction of an express sporting reservation.

Landowners should consider all the com-

mercial interests, including sporting rights, over their land, both at present and in the future. Property lawyers must remember that sporting rights will automatically pass to a tenant, unless the landlord reserves them in the lease.

It is not uncommon for sporting rights to have been sold off separately to the land, with the effect that they are held in different ownership. This can cause issues between the landlord and the shoot, as they have differing objectives and priorities about how the land should be used and maintained; and must be highlighted to incoming purchasers of land where applicable.

Additional complications can arise where the land has been let to one or more tenant farmers – with the shooting rights being owned by another party – because you then have the interest of multiple parties competing for use of the land. Opposing interests often leads to contract, tortious and or criminal disputes.

Where possible, leases and licences must clearly set out what other rights occupiers or users of the land have, to minimise the scope for disputes and uncertainty.

NUISANCE

Private nuisance is usually caused when a person does something on their own land, which they are lawfully entitled to do, but which becomes a nuisance when the consequences of their actions extend to their neighbour's land.

A significant number of pheasants migrate from the shoot's land to adjoining land and highways each year. Because pheasants are classed as wild birds, any damage caused by pheasants to crops, hedgerows or vehicles is not the shoot's responsibility. This means those affected have no legal recourse and so they cannot recover any loss they have suffered by way of damages.

But it is my experience that shoots generally do everything they can to limit such migration; and work with adjoining landowners while planning the position of pheasant pens.

The sound from shooting can be held to be a nuisance if it produces a loud noise within the proximity of neighbours, for a sufficient duration and frequency. It is important for



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shoot contracts and licences to restrict the level of shooting accordingly on certain drives where this might be an issue. This should also be reviewed.

If, for example, a neighbour started running a peace and wellbeing yoga retreat, or a creche on adjoining land, and found that the noise from the shoot was a nuisance – they could bring a claim to stop the nuisance. It does not matter that the shoot has run for years or that it was there first. However, such a claim would not necessarily succeed as the courts look at all the circumstances, such as abnormal sensitivity, the nature of the location, the time and duration of the interference and the conduct of the parties.

Where someone has shooting rights over land which is farmed by another, the parties need to consider whether or not the farming tenant and the sporting tenant have a direct contractual relationship.

If they don't, then the landlord will have to account to the farming tenant for any damage to crops caused by game, even though they may or may not recoup these sums from the sporting tenant. Where they do, the sporting tenant may be liable.

There is a statutory right of compensation for crop damage under section 20 of the Agricultural Holdings Act 1986, subject to a number of conditions. The tenant must give written notice to the landlord of the occurrence of the damage within one month of the tenant becoming aware of the damage; or within one month of when the tenant ought reasonably to have become aware of the damage.

The landlord must then be given a reasonable opportunity to inspect the damage.

TRESPASS

If the gun (the shooter), the beaters (those who flush out the birds), the picker uppers (those who collect the shot birds) or their dogs enter neighbouring property without permission, whether committed in pursuit of game or otherwise, this would amount to a trespass.

If the bird lands on a public right of way or next to or on the authorised shoot land, the gun retains rights to it and can collect it. However, if shot game lands dead on a private highway, it would belong to the owner of that highway and collecting it would amount to trespass.

Such a trespass means the landowner has the right to bring a claim either under the Game Act or under common law trespass to

recover actual and or nominal damages.

Note that spent shot falling on neighbouring land, without permission, will be an act of trespass.

The claimant should be compensated for the harm it has suffered as a result of the trespass. It will be entitled to be restored to the position it would have been in had the tort not been committed (*Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25). However, it is unlikely a claimant will be awarded substantial damages, as there is not normally any lasting effect to the land as a result of a trespass.

That said, I was involved in a case where lead shot was falling onto neighbouring land. It was claimed that the neighbour's fowl was digesting it, causing ill health and premature death and the land had to be decontaminated. A mutual settlement was finally reached.

The claimant has to demonstrate that it has suffered financial losses and/or possible future losses to pursue a damages claim in tort.

Fines can also be imposed under the Game Act. For trespassing that occurs on land during the day in the pursuit of game, the maximum fine is currently £1,000 (up to £2,500 for groups of five or more guns). The claimant is likely to pursue a fine where they cannot demonstrate more significant damages in tort. However, note that a prosecution under the Game Act prevents you from bringing a claim in tort.

TEMPORARY INTERFERENCE

In *Clochfaen Estate Ltd v Bryn Blaen Wind Farm Ltd* [2019] EWHC 1562 (Ch), the High Court considered whether there had been an interference with the reasonable exercise of its sporting rights. The claimant, as lessee, was granted the sole and exclusive shooting rights over some 4,000 acres of land. The first defendant (Bryn Blaen) constructed six wind turbines – with the access roads, temporary compound and associated works being constructed on part of the land.

The works took about a year, with most of the affected land being restored to agricultural use thereafter. *Clochfaen* claimed that the temporary and permanent development of the servient land has and will constitute substantial interference with its rights over it, and sought a declaration, injunctions and damages.

The High Court held that it was not necessary to show actual loss to succeed with a trespass claim. The works as a whole



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constituted a substantial interference with the shooting rights. The nature of the works was industrial and had nothing to do with agriculture. Accordingly, they amounted to a fundamental change in the character of that part of the land.

However, the trespass was of a temporary nature and was an interference where a declaration and nominal damages were sufficient affirmation of the claimant's rights. There was no continuing interference and therefore no further award of damages. The sporting rights had not been exercised for decades over that part of the land; and as such nominal damages of £100 were considered a sufficient remedy.

The case serves as a reminder to practitioners that when granting sporting rights over large areas of land, it may fetter the future use of land and expose the landowner to future claims. Relevant to the success of such claims is how quickly and effectively licensees restore the land and, to a degree, the quality of the sporting rights and the frequency with which they are used. For example, a temporary interference may theoretically expose a landowner to a claim, but any damages would likely be nominal.

Importantly, Clochfaen had not exercised or attempted to exercise its rights over the servient land for more than 60 years. There were constraints on the servient land which reduced its suitability to be used for sporting, including the close proximity to the A470 and the existence of power cables, livestock and residential property. In addition, the servient land provided poor quality shooting and the rights were of low value.

Expert witnesses agreed that it was not surprising that the rights had not been exercised over the servient land for so long because of the poor-quality shooting offered as a result of the nature and location of the land. The servient land also provided little food and little cover for birds.

CRIMINAL OFFENCE

As well as civil claims, it is unsurprising that criminal regulations govern a sport that involves firearms. Section 3 of the Environmental Protection (Restriction on Use of Lead Shot) (England) Regulations 1999 stops shooters from using lead shot over some water courses, in a place of special scientific interest and in relation to certain foul, such as ducks and geese. It is key for those with the sporting rights or running the shoots to know whether any part of the land is protected.

If the gun (the shooter) enters neighbouring property, without permission, carrying a firearm it will be a criminal offence of armed trespass. Where landowners employ gamekeepers to run the shoot, they need to make sure they are sufficiently qualified – briefing the guns before each shoot.

Where landowners themselves are shooting (or inviting friends for rough shooting), they need to be clear where their land ends so as not to accidentally trespass with a gun because of the risk of committing armed trespass.

Shooting is a historic sport but it is divisive. Many see it as barbaric and are willing to protest against it. However, if an individual trespasses with the intent of stopping a shoot, they could be prosecuted under section 68 of the Criminal Justice and Public Order Act 1994.

Even with our rolling countryside, it is highly likely a drive will be within close proximity of a public highway, presenting a further risk of breaking the law. It is an offence under the Highways Act 1980 (as amended) without lawful authority or reasonable excuse to discharge any firearm within fifty feet (about 15 metres) of the centre of a highway, where a user of the carriageway is injured, interrupted or endangered as a result.

It is good practice to include a clause in a shoot agreement or licence limiting where the pegs can be situated and direction of the shot, where you have highways near drives.

BEST PRACTICE

When transferring land, it is best practice to check who owns the shooting rights, even where previous conveyances are silent as to such rights as they may have been sold or gifted away.

Where the seller has rights to shoot, make sure no agreements are in place for someone to run a commercial shoot and no others have been given similar rights to shoot on the land.

If your client is granting sporting rights to a third party, this may fetter the future use of that land. Make sure this is considered and clients are advised accordingly.

No matter who is shooting, beating or picking up – the boundaries of the shoot land must be clear to stop any trespass.

Finally, where possible shoot licences should reiterate the common law duties and allow the landowner to terminate the licence if breaches occur. The landowner will not want a badly-run shoot affecting relationships with neighbours. **SJ**



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