Agricultural Lore

Autumn 2022 Edition

e-Publication

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Welcome to Agricultural Lore

Autumn Edition 2022

This Autumn has brought with it significant financial constraints as the UK faces the cost of Covid as well as the war in Ukraine. With a review of new environmental schemes underway by the new administration, it remains to be seen how the Government will balance the challenges of food security and protection of the environment.

Whilst progress in England is paused, Wales is finally pushing ahead with its Agriculture Bill and plans for a new Sustainable Farming Scheme. Alongside that development, Wales is also moving on with reform of residential tenancies, adopting a slightly more tenant-protective scheme, which applies retrospectively to almost all tenancies of dwellings. It will be interesting to see whether England follows suit, following the Governments recent assurance that it intends plans to push ahead with plans to abolish no fault evictions.

Our Agriculture team is as busy as ever, with projects increasingly demanding cross-team collaboration in topics such as natural capital, ESG and energy. We are also delighted that the Agriculture team has been recognised for the first time within the London listings for Legal 500 Clients' guide to the best law firms.

With so many cases and other developments affecting rural businesses, this is a bumper edition of Agricultural Lore. We start with a 25th year review of the Arbitration Act 1996, which is intended to ensure that this process remains fit for purpose for the next 25 years.

We then consider a new notice to quit decision which appears to go against the recent Procter case – Jake Rostron highlights the differences and explains how this affects tenancies held by joint tenants.

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Rajvinder Kaur provides insight into a recent proprietary estoppel case in which Michelmores was instructed by the successful defendants.

We have a spotlight on Wales, in which Josie Edwards addresses both the residential and agricultural developments highlighted above.

Despite leaving the EU in 2020, we then learn that the Habitats directive survives Brexit and is enforceable in the UK in a case involving water abstraction. We cover several other topics ranging from the problem of lost title deeds to odour from a cattle farm and from stamp duty land tax changes to restrictive covenant cases.

With our quiz-master away on holiday, there is no quiz for this edition, although the answers to the Summer stately homes quiz are on page 19. We had 4 winning entries from that quiz and so are considering a difficult tie breaker. We will be in touch with all those involved.

A legal guide to Biodiversity Net Gain Webinar - Watch Here

Biodiversity net gain (BNG) is the hot topic in the world of property development and forms part of a wider direction of travel to put environmental matters and sustainability front and centre of the property sector. This offers up new opportunities for landowners to deliver the net gain needed for commercial and residential developments, by providing biodiversity units on their land, which could be sold to developments unable to deliver BNG on-site.

In this webinar Ben Sharples and other Real Estate and Planning specialists at Michelmores explain the current state of play of BNG requirements to help landowners navigate this area.

Speakers on the webinar:

Helen Hutton – Partner, Planning & Environmental team
Ben Sharples – Partner, Agricultural team
Richard Walford – Partner, Transactional Real Estate team
Emma Honey – Partner, Head of the Real Estate team

Arbitration: A 25th year review of the Arbitration Act 1996

The Arbitration Act 1996 ("the Act") is 25 years old. It provides an important framework for dispute resolution in an agricultural context. The Law Commission has launched a consultation document to review certain parts of the Act to ensure it remains at the cutting edge.

The specific areas that are addressed are confidentiality, independence of arbitrators and disclosure, discrimination, immunity of arbitrators and interim measures ordered by the court. The consultation also looks at three more topics which are examined at length in this article, namely:-

- Summary disposal of issues which lack merit;
- Jurisdictional challenges against awards under section 67; and
- Appeals on a point of law under section 69.

Summary disposal of issues which lack merit

Unlike the procedural rules which govern court proceedings, there is no power under the Act for an Arbitrator to dispose of issues early on if they lack merit. In court proceedings this is known as an application for summary judgment and can be a useful tool to save time and costs. The court can give summary judgment when an issue has no real prospect of success and there is no other compelling issue why it should be disposed of at a trial.

Although section 33 of the Act gives an arbitrator power to decide procedural matters, subject to the right of the parties to agree any matter, there is no express power to adopt a summary process. Section 33 is arguably wide enough to confer that power on an arbitrator. However the consultation document expresses a reluctance by arbitrators to adopt such a procedure, mindful of the fact that there is also a duty under section 33 to act fairly and to give each party a reasonable opportunity to put their case.

The Law Commission proposes that a summary procedure could be introduced if there was a proper process to adopt and a threshold to be met. This may be a welcome development to improve efficiency and to reduce costs; wide-ranging arbitrations can be crippling in terms of the costs involved.

Jurisdictional challenges

Section 30 gives an arbitrator power to rule on his own jurisdiction, unless otherwise agreed by the parties. A party who wishes to challenge the arbitrator's jurisdiction must do so early.

If an arbitrator makes an award, it can be challenged under section 67 on the basis that the arbitrator lacked jurisdiction. Currently the case law indicates that such a challenge is a full rehearing of all the evidence and arguments.

The proposal is that a challenge under section 67 should be an appeal, rather than a rehearing, so that the court would not hear oral evidence or new evidence. It would be limited to a review of the arbitrator's ruling, allowing the appeal only where the arbitrator's ruling was wrong. The concern is that without this change, for those litigants who intend to "take it all the way", the hearing in front of the arbitrator is nothing more than a dress rehearsal.

Although jurisdictional challenges in rural arbitrations are rare, they do arise and often bring with them complex and challenging issues to navigate. Any proposal to limit delay and additional cost must be a welcome development.

Appeals on a point of law

Section 69 allows a party to appeal an award to the court in limited circumstances. It is a high threshold, requiring a dissatisfied party to show that an Arbitrator's decision was not only wrong, but that it was obviously wrong. Perhaps surprisingly, the Law Commission does not propose any reform to that section, although invites comments on that position as part of the consultation.

The Law Commission recognises some of the current confusion that exists concerning appeals, whether of a jurisdictional, procedural or legal nature. The Act states that any appeal must be brought within 28 days of the award. However, it goes on to say at section 70 that any challenger must first make use of the recourse available under section 57, to ask the Arbitrator to correct or clarify the award. That can often take longer than 28 days. The suggestion that the time for any appeal starts to run from the date a party is notified of the result of their request under section 57 would be a welcome clarification.

Conclusion

Dispute resolution clauses, whereby the parties agree to refer their differences to arbitration, are commonly found in supply contracts, contracting or share farming agreements and partnership agreements. Arbitration remains the primary dispute resolution forum for landlord and tenant issues.

Given the importance of this framework, it is no wonder that the Law Commission is seeking to ensure that it remains best in class. The consultation is open for comments until 15 December 2022.

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Tenancies: Joint tenant unilaterally ends tenancies

During the Summer the High Court decided in *Procter v Procter* [2022] that one joint tenant cannot take steps unilaterally to end a tenancy, on behalf of two or more joint tenants, where fiduciary duties are owed (eg within a partnership).

Just two months after that judgment, we now have a different decision based on similar facts from the High Court in Birmingham. This is the decision of *Pile v Pile* [2022] and it was heard as an appeal from the Birmingham County Court. We consider this new decision and explain the difference.

Background

Frank Pile and his brother, Simon, were joint tenants of an agricultural tenancy of Fir Tree Farm near Banbury protected by the Agricultural Holdings Act 1986. They were also joint tenants of a commercial tenancy at Fir Tree Farm, which was protected with a right to renewal under Part II Landlord and Tenant Act 1954. John Stranks was the landlord.

In March 2021, Frank Pile, John Stranks and a company of which Frank and his wife were the sole directors and shareholders, FN Pile and Sons Limited, entered into an agreement under which:

1. Frank would serve notice to quit the agricultural tenancy.
2. John Stranks would serve notice to terminate the commercial tenancy, and Frank agreed not to serve a counter-notice to challenge the notice to quit.
3. John Stranks would then grant the company tenancies of both the agricultural and the commercial land.

Simon Pile was excluded from the new tenancies.

Following a telephone conversation between Simon and John Stranks, in which Mr Stranks explained the plan, Simon issued proceedings for an injunction preventing Frank from entering into the new tenancy agreements.

The claim

Simon argued that Frank's actual or threatened conduct constituted a breach of trust in the relationship of joint tenants between them because Frank was seeking to profit at his brother's expense by obtaining a new lease without involving his brother.

Simon also contended that Frank had a conflict of interest between himself and his duties as trustee of the joint tenancy and that he was seeking to profit from his trusteeship.

In the County Court HHJ Rawlings decided that the test for an injunction had been met. There was a serious issue to be tried to decide whether Frank was acting in breach of trust.

The Appeal

Frank appealed HHJ Rawling's decision to the High Court and it was heard in July of this year. Since the County Court's decision, the High Court had released its decision in *Procter v Procter* [2022]. This was explained in our earlier article, Notices to quit: Court decision provides useful guidance.

In Proctor, the Court found that one joint tenant could not terminate the tenancy on behalf of other joint tenants, where the tenancy was held on trust for a partnership. This was because the joint tenant had a fiduciary duty to act in the best interests of the partnership, for no collateral purpose and to preserve the trust property.

In the Pile appeal, the Judge considered the Procter decision and found that the present case was distinguishable from Procter because there were no fiduciary duties in Pile. Simon and Frank were not in partnership together, nor were they holding the tenancy as trustees on behalf of a trust. They simply held the tenancies on behalf of themselves on a bare trust.

A trustee is obliged to hold an asset on behalf of the underlying trust and a trustee would be duty bound to obtain a renewal tenancy for the benefit of the trust.

The Judge found that where a party is a trustee, only by reason of their co-ownership with another joint tenant of a periodic tenancy, the arrangement only exists as a bare trust. In bare trusts there are no underlying obligations or duties, such as those between a trustee and a beneficiary or between partners in a partnership. In these circumstances a joint tenant is neither precluded from serving a notice to quit, nor acquiring a new lease to benefit themselves. The Judge concluded that there was no serious issue to be tried and that Judge Rawlings had erred, but understandably so, given that he was not referred to a number of authorities.

Comment

This decision could have a substantial impact on disputes concerning tenancies of all types, held by more than one person. Where there is no overarching partnership between joint tenants, this case gives freedom for one joint tenant to act unilaterally for their own benefit in terminating the tenancy, without reference to their fellow joint tenant. In view of this, those holding a tenancy jointly should review their position, take advice and consider whether further action would be wise.

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Proprietary estoppel and partnership assets: New case provides useful guidance

Dealing with family farms following death can be a complex task. The recent case of a South Walian farming family, *Williams v Williams and Others* [2022] was no exception. In this case the High Court had to address questions concerning the existence of a partnership, whether the farms were partnership assets and whether promises were made as to who should inherit. Like many small family farms, three out of four siblings worked on the farm, but it was the Claimant, Dorian Williams, who brought the case, claiming on the grounds of proprietary estoppel that he had been promised the farms.

The facts

Following the death of their parents, Catherine and Lloyd, a dispute arose between Dorian and two of his siblings, Gerwyn and Susan, over the beneficial ownership of two family farms, Cefn Coed Farm and Crythan Farm.

Both farms had been farmed by the family for many years. In 1985, a partnership was formally set up and recorded in a written partnership agreement made between Lloyd, Catherine, and Dorian. Crythan Farm was purchased in 1985 in the names of Lloyd and Catherine only, and Cefn Coed Farm was purchased in the names of Lloyd, Catherine and Dorian in 1986.

Lloyd and Catherine gifted Crythan Farm to Susan in 1991, Catherine died in 2013, leaving her estate to Lloyd.

When Lloyd died, his will gave Dorian the option to take certain actions, such as taking Gerwyn into partnership with him, but since Dorian chose not to do any of these things within the 6 month time period specified in the will, the default provisions stated that Lloyd's share in both farm houses would vest in Gerwyn and Susan in equal shares, and his interests in the remainder of Cefn Coed Farm and the Partnership would pass to Gerwyn.

Proceedings

Dorian was unhappy with the terms of Lloyd's will, and brought a claim that:

a. both farms were assets of the Partnership that had been set up in 1985 between Dorian, Catherine and Lloyd, and that upon Lloyd and Catherine's deaths both farms and the Partnership enured to Dorian as the surviving partner; and

b. in the alternative, a proprietary estoppel had arisen as a result of promises made by Catherine and Lloyd to Dorian, that Cefn Coed Farm and the Partnership would be his solely after they died.

Gerwyn and Susan, represented by Michelmores LLP, defended Dorian's claims, and Gerwyn brought his own counterclaim for proprietary estoppel on the basis that he had also been promised a share of Cefn Coed Farm and the Partnership by his parents, and had acted to his detriment as a consequence.

After a 4-day trial before His Honour Judge Jarman, the Court found that Dorian had failed to make out his proprietary estoppel claim, and also, that neither farm was a partnership asset.

Proprietary Estoppel claim

In relation to the proprietary estoppel claim, the Court viewed Lloyd and Catherine's wills as strong evidence that they had wanted to be fair to Gerwyn, Susan and Dorian (rather than wanting Dorian to inherit the entirety of their assets as he claimed).

This appeared to have been the case for a very long time; in two previous wills made by Lloyd and Catherine in 1988, they had made provision for Susan, Gerwyn and Dorian (who were all working on the farms at the time). At this time, Gerwyn had stopped carrying out work he had been doing for a third party and was spending more time on the farms.

It is notable that Lloyd and Catherine made no provision in their wills for their fourth child, because she had not worked on the farms like her other siblings.

The Court accepted that a promise had likely been made to Dorian that he would inherit the entirety of Cefn Coed Farm, if Gerwyn carried on working for the third party on the motorways. However, the Judge found that *"that was not an assurance that this was what would happen come what may".*

Shortly after that promise was made, Gerwyn came back to the farms, and although he pursued other business activities from time to time, the Judge found that Gerwyn had carried out substantial work for the partnership business and had contributed a vast amount of money to it.

The Court, however, did not accept Dorian's evidence that the promises had continued to be made to him over the years in the same terms. As a result, the Judge concluded that Dorian could not reasonably have relied on that indication, throughout the subsequent years, to believe that he would inherit the farm. Moreover, in 2003 Dorian had been told expressly by his father that a share would be left to Gerwyn.

Were the farms partnership assets?

The Judge cited in detail the established legal principles that apply when considering whether property comprises assets of a partnership. Whilst both farms were included within the Partnership accounts, the Judge reiterated that the inclusion of an asset within the partnership accounts is an indication that it is a partnership asset but is not conclusive.

He then conducted a careful balancing exercise between the factors indicating that the farms were partnership assets and those indicating that they were not.

In relation to Crythan Farm, the factors suggesting that it was a partnership asset included that some funds from the Partnership account had been used towards the purchase price, and the proceeds of a sale of a field at Crythan Farm had been dealt with as partnership property.

However, the Judge felt that they were outweighed "by some margin" by other factors; namely, that the vast majority of the purchase price was provided by Lloyd and Catherine (with contributions from three of their children), that it was conveyed to Lloyd and Catherine as beneficial joint tenants, and that Dorian's own case was that he was not aware that Crythan Farm was a partnership asset.

The Judge felt that the inclusion of Crythan Farm in the accounts was not a strong indication that it was a partnership asset, particularly because the accountant had given evidence in the case that Crythan Farm had been included within the Partnership accounts to assist with future borrowing by the Partnership if needed, and that it was included within the Partnership accounts without instructions.

As to Cefn Coed Farm, whilst there were factors indicating that it was a partnership asset e.g. that the mortgage for that farm was paid out of the Partnership account, the Judge felt that other factors weighed more strongly in favour of it not being a partnership asset. These were that approximately half of the total purchase monies for Cefn Coed Farm were paid by Lloyd and Catherine from their personal funds, and that it was evident from their wills that they considered that they had the ability to deal with their shares in Cefn Coed Farm as they wished.

Conclusion

This was a complex dispute, and a further reminder of the importance of tackling succession and partnership issues head on during the life of all parties concerned.

Failure to address these issues promptly can result in lengthy, complex and expensive litigation further down the line.

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SPOTLIGHT ON WALES:

Welsh residential tenancy reform: Agricultural workers and service occupiers

The legislation governing the housing of agricultural workers in Wales is due to change significantly with the implementation of the *Renting Homes (Wales) Act 2016* (RHWA) on 1 December 2022.

We now focus on agricultural workers and consider how both existing and new arrangements will operate under the new regime.

Existing Assured Agricultural Occupancies

The current protections enjoyed by existing assured agricultural occupiers will be maintained. On 1 December 2022 all existing assured agricultural occupancies (AAOs) will convert to **standard occupation contracts** under the RHWA **provided**:

- a rent or other consideration is paid (note there is no minimum rent threshold); and
- the contract-holder (agricultural worker) continues to occupy the dwelling as **their only or principal home**.

Assured agricultural occupancies will be treated the same way as assured tenancies, meaning that they will convert and become subject to the RHWA provisions, **but** the security of tenure currently enjoyed by assured agricultural occupiers will endure.

Landlords will not have the ability to serve a no-fault s.173 notice under the RHWA. Schedule 12 of the RHWA effectively maintains the existing Housing Act 1988 Schedule 2 possession grounds.

New arrangements granted to agricultural workers after 1 December 2022

After 1 December 2022 it will not be possible to create any new AAOs in Wales. Nor will there be any specific rights or form of contract granted to agricultural workers under the RHWA. The RHWA will apply to arrangements granted to agricultural workers in the same way as it applies to all contracts relating to residential dwellings. All new tenancies or licences entered into after 1 December 2022 will be standard occupation contracts provided the arrangement satisfies the *RHWA 'Section 7' test*.

Contract-holders will benefit from a 6 minimum month notice period for no-fault evictions, and there will be a restriction on serving any such no-fault notice within the first six months of occupation. No additional rights or protections will be enjoyed by agricultural workers.

Rent (Agriculture) Act 1976

Schedule 2 of RHWA confirms that occupiers protected under the *Rent (Agriculture) Act 1976* will not be affected by the RHWA. Their occupation will continue to be governed by the previous regime.

As ever, care should therefore be taken before any notices are served on agricultural workers if they have been occupying a dwelling for a long time, to check whether their occupation started **before 15 January 1989**. If it did, they remain subject to the *Rent (Agriculture) Act 1976*.

Service Occupancies

Service occupiers (i.e. employees who are required to occupy the dwelling as part of their employment contract for the better performance of their duties) will fall within the RHWA, unless their occupation contract does not satisfy the section 7 test.

Service occupiers have historically been given a licence to occupy the dwelling only for so long as they are employed by the employer.

Under RHWA termination will not be automatic or immediate when the employment contract ends, but Schedules 8A, 9B, 9C give landlords the ability to terminate standard contracts relating to service occupiers (both periodic and fixed term) on two months' written notice. There is also no prohibition on serving notice within the first six months of occupation.

These provisions will apply to converted and new occupation contracts.

Conclusion

Those employing agricultural workers in Wales or making accommodation available to them will no longer need to consider the 'agricultural worker' angle when entering into new arrangements. The risk of inadvertently granting a form of secure 'assured' tenancy to agricultural workers will no longer arise.

It is perhaps surprising that the RHWA, which aims to improve occupier's rights and protections, reduces the security of tenure available to this specific type of occupier.

The change in approach means that the historic protection afforded to agricultural workers, which did not extend to any other employee, will no longer exist in Wales.

Indeed, it is anticipated that in many cases, agricultural workers will now be classed as service occupiers. As a result, they will be granted less security of tenure than standard contract-holders and will enjoy very significantly less security than those who held assured agricultural occupancies on 1 December 2022. They will also have less security than their English counterparts, for the time being at least. Full details of the Renters' Reform Bill in England are awaited at the time of writing.

For further Information on the RHWA see Welsh residential tenancy reform: How will new lettings operate? and Welsh residential tenancy reform: How will it affect existing tenancies and licences?

In addition, Senedd Cymru / the Welsh Government has a dedicated landing page (Renting Homes: housing law is changing) containing links to various guidance notes, standard form documents, prescribed form notices and the relevant legislation.

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SPOTLIGHT ON WALES:

The Agriculture (Wales) Bill: Developing the Welsh agriculture policy

With the publication of the Agriculture (Wales) Bill (the **Bill**) on 26 September 2022, further details are beginning to emerge of the Senedd Cymru / Welsh Government's proposed approach to post-Brexit agricultural support. A copy of the Bill is available. It contains the legislative basis for the Senedd's Sustainable Farming Scheme (SFS) the proposals for which were published in draft in July 2022: see Sustainable Farming Scheme: outline proposals for 2025.

Sustainable Land Management

The Bill establishes four **'Sustainable Land Management' (SLM) objectives**, which will form the overarching framework for future farm support in Wales. SFS is the proposed delivery mechanism for SLM.

Draft Sustainable Farming Scheme (SFS)

SFS aims to reward farmers for providing 'public goods' from the land in an 'actions based' approach. Farmers will be rewarded for actions beyond a baseline of **National Minimum Standards**. These are currently TBC but are expected to mirror previous CAP cross-compliance rules.

SFS will comprise three tiers of payment, operating on a five-year rolling programme:

1. **Universal actions:** farms that deliver a set of 'universal actions' will qualify for the basic SFS payment;
2. **Optional actions:** these higher-level actions will be more complex / tailored to each farm. Farmers will have greater flexibility about what they do and how in return for these additional payments;
3. **Collaborative actions:** an optional 'top-tier' envisaging co-ordinated action by multiple farmers or land managers at landscape or catchment scale. The concept is similar to DEFRA's proposed Landscape Recovery Scheme in England.

Payment Rates

Payment rates for SFS are still TBC. The Senedd is currently undertaking modelling and proposed rates are expected to be published for consultation in 2023.

Eligibility

The draft SFS proposes that to qualify an applicant must:

- Be a farmer undertaking agricultural activities;
- Be able to actively perform the universal actions to agricultural land in Wales throughout the duration of the contract;
- Farm a minimum of 3 hectares of eligible agricultural land;

Timetable

(a) BPS and Glastir will continue in their current form and at current funding levels **until 31 December 2023**.

(b) **During 2023** there will be a consultation on the final SFS proposals, including detailed plans for the transition period e.g. stability payments (see below).

(c) A Piloting process will run in **2023 and 2024**.

(d) SFS is expected to open to applications on **1 January 2025**.

(e) Wales will then enter a transition period **between 1 April 2025 – 31 March 2029** as the BPS regime / payments are phased out:

(i) A 'stability payment' will be available for farmers during these years, to avoid a cliff edge in funding support as Wales moves away from BPS.

(ii) The stability payment is likely to be available even if farmers choose not to participate in SFS but will likely reduce over the transition period with incentives given to farmers to join the SFS instead.

Conclusion

Farmers and stakeholders currently have an opportunity to feedback on the proposals contained in the draft SFS document as part of Welsh Government's commitment to 'co-design' the Scheme. The deadline for completing the survey / providing feedback is 31 October 2022: see Sustainable Farming Scheme.

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Title Deeds: A perfect storm waiting to happen?

In our digital age and 30 years on from compulsory registration across the whole UK, one might expect title deeds to be a thing of the past. But unfortunately, a combination of issues has caused title deeds to be lost or destroyed and it is often not until a transaction or development is gathering pace that the problems emerge, with the potential to delay or wreck a deal.

We explain the relevant issues and possible answers.

Unregistered and registered land

Before compulsory registration of land started in the 1980s, ownership of property was evidenced through original historic title deeds dating back at least 15 years, with earlier documents required if referred to in the later ones.

From the 1980s certain transactions triggered compulsory registration of legal title at H M Land Registry. Once registered, the legal title was evidenced initially by an HM Land Registry paper certificate, and later by the property being logged on HM Land Registry's computerised registers and by providing an official copy of register. Original title deeds were still relevant, but less important, as copies were available from HM Land Registry or relevant sections were copied onto the register of title. Now all that is required for transactions is the up-to-date copies of the official copy of the register of title.

The perfect storm

Over the last few years a perfect storm for unregistered land (and sometimes even registered land) has developed. Landowners of unregistered land have to produce original title deeds to sell, borrow or let out their land, but increasingly, finding unregistered deeds or pre-registration documents can be challenging.

There are a number of factors that have led to this situation:

- Most land is now registered so unregistered land is less commonplace.
- Fewer conveyancers and lawyers are familiar with handling unregistered land or who understand the importance of retaining original title deeds.
- Banks and law firms, who traditionally looked after title deeds, have to comply with new data protection laws requiring that customer data and documents are not retained for any longer than is necessary. They have also sought to reduce their costs of secure storage.
- HM Land Registry has embarked on a dematerialisation policy since 2003 - it no longer retains any original title deeds. All relevant deeds are either copied or summarised onto the computerized register, and then destroyed.
- Society has moved on-line. Records, archives and documentation for all aspects of life are increasingly digital rather than paper based.
- Recycling of paper has become regarded as the socially responsible thing to do.

As a result it is becoming increasingly commonplace for title deeds to have become lost, following their return to their owners or because they have been handed over to third parties in the course of a transaction, when they should have been retained (e.g on a sale of part). Alternatively, they may have been destroyed, erroneously, along with any information which has been deemed surplus past a given date.

So why is this a problem?

When unregistered property title deeds are lost it becomes more difficult for the owner to prove their legal title. The answer is often to apply to HM Land Registry for "possessory title" which after 12 years can be upgraded to "title absolute".

Possessory title is recorded at HM Land Registry, but it is not the same as full legal title or "title absolute". If an owner wishes to convey, lease or mortgage a property with only a possessory title, they will usually have to purchase a title indemnity insurance policy for a one-off premium payment.

The problem for development land is that the importance of evidencing title and understanding full detail of all rights and covenants binding the property is much greater. Developers and lenders are more exposed to third party challenges and adverse rights when planning or carrying out new developments. The result is that many developers and lenders are not prepared to develop or lend on land with only possessory title.

Furthermore, title indemnity insurers may not be prepared to grant defective title indemnity insurance on property, intended for development.

As a result, landowners can be left unable to bring land forward for development or raise development finance over it until title absolute is obtained.

What can be done to avoid this perfect storm?

First and foremost landowners should locate and keep all unregistered title deeds in safe storage. Ideally, certified and electronic copies of the title deeds should also be made and stored safely.

Secondly, landowners should consider applying for voluntary first registration of their property, well in advance of any transaction.

Voluntary registration takes up to around 2 years to complete and often involves answering numerous title questions raised by HM Land Registry. But it is far better to sort these issues out in advance, so they do not then derail a future transaction. Voluntary registration is also cheaper than an application triggered by a transaction.

Action to deal with lost title deeds

If title deeds are lost, various steps that can be taken to track them down, or even recreate them via alternative investigations and resources. This process will include considering who was responsible for the original deeds and to what extent they should be liable for resolving the problem.

Registered land – what if pre-registration deeds are missing?

For registered property, the situation is much easier. HM Land Registry should have a record of the legal ownership and all registerable rights and obligations affecting the property. In most cases this should be good enough to prove and transact legal title to the property.

However, in some cases, we find HM Land Registry has failed to take a copy of a relevant pre-registration deed, containing rights or burdens affecting the property. Alternatively the register may contain an error or omission. There may also be some rights and obligations affecting the property which are not recorded on the register or are merely noted that they exist (but with no detail); for example licences, leases of up to 7 years and wayleaves are not noted on the register.

So it is still a good idea for the landowner to keep the original pre-registration deeds and documents, which do not form part of the legal title, but which may need to be produced on any transaction (eg planning documents, surveys, environmental permits and licences, construction documentation etc).

Local history

For those landowners with an interest in family or local history, original title deeds can also provide a valuable source of insight and information. Public record offices and local historical societies may be interested in acquiring or looking after old deeds.

How Michelmores can help?

Our agricultural land and development teams have many years' experience of dealing with unregistered land, including tracking down missing deeds, dealing with lost titles, as well as voluntary first registrations of development land. Any landowners, and especially those with potential development land would be well advised to have their deeds and registered titles checked to make sure everything is in order well in advance of any transaction.

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IN BRIEF:

Planning: Odour from cattle

The recent case of *R. (on the application of Cathie) v Cheshire West and Chester Borough Council* [2022] provided some interesting insight into judicial consideration of the National Planning Policy Framework.

Background

The Claimant resides in a property which was part of a farm owned by the current farmers ("Interested Parties") until 1987. In April 2020, the Defendant, Cheshire West and Chester Borough Council, granted retrospective conditional planning permission for a reception (slurry) pit and slatted yard at the farm. Odour from the slurry pit had been a continuous source of contention between the Claimants and the Interested Parties. Condition 2 of the retrospective conditional planning permission required the Interested Parties to submit an odour management plan ("OMP") within a month of grant of the permission. In early November 2021, the Defendant discharged Condition 2, which the Claimant subsequently challenged.

His Honour Judge Bird found for the Defendant on all grounds.

Consideration

The National Planning Policy Framework states that *"planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects"* (emphasis added). The Court's approach is that planning conditions should be interpreted "so as to impose no more than "reasonable" obligations on the Interested Parties".

For example, Condition 2 required decisions to empty the slurry pit to be "informed" by the weather. It was found that the need to demonstrate *"best practice"* in respect of *"all measures to be employed to minimise odorous emissions from the reception pit…"* cannot be read in a way that imposes unreasonable requirements on the interested parties such as to **only** empty the slurry pit when wind conditions are favourable. Therefore, other factors can properly be considered when making that decision.

His Honour Judge Bird found that the OMP proposed a "satisfactory" solution to the impact of the farming operations on the Claimant's property, and that a satisfactory solution does not need to be an ideal solution. He also noted that imposing any additional obligations on the Interested Parties, as was the claimant's position, would have placed an unjustifiable or disproportionate financial burden upon them.

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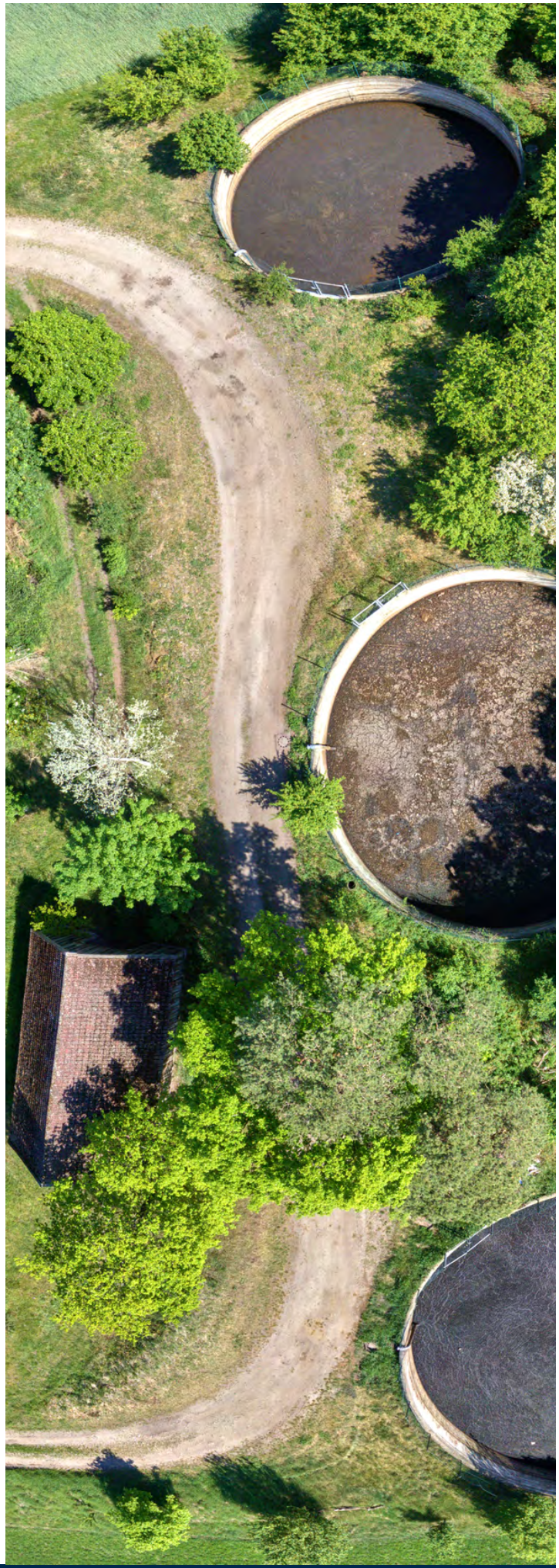

Conservation: Habitats directive survives Brexit

A recent High Court decision *(R(Harris) v Environment Agency & Natural England* [2022]) has confirmed that European conservation laws remain enforceable despite Brexit.

The case

The claimants sought to challenge by judicial review both the legality and rationality of a decision taken by the Environment Agency in relation to its management of water abstraction licences in the Norfolk Broads.

The EA has a duty to promote the conservation of flora and fauna that are dependent on an aquatic environment. It is also responsible for granting, revoking and varying licences for the abstraction of water; in the Broads, such licences are chiefly for agriculture. The Broads is one of the driest parts of the country, and the claimants – themselves farmers on the Broads – were concerned that water abstraction was causing irremediable damage to the environment, including to ecosystems that were legally protected under European Law.

Specifically, this case was brought against the EA's decision to limit a programme undertaken to review the impact of water abstraction on the Broads to just 3 of the 28 individual SSSIs which together make up The Broads Special Area of Conservation ("SAC").

The claimants' case also applied to the 25 SSSIs which make up the Broadlands Special Protection Area for birds and the Broadland Ramsar site, both of which are also protected under article 6 of the EU Habitats Directive (92/43/EEC) ("Habitats Directive"), but the Judge determined that it was sufficient to focus on the SAC to resolve the claim.

The disputed programme – known as the Restoring Sustainable Abstraction Programme – began in 1999, and was intended to identify, investigate and resolve environmental damage caused by unsustainable water abstraction.

By 2012, approximately 500 sites had been identified across the country as being at risk, at which point the EA decided to close the programme to new sites to enable it to take action.

Key points

The key points in dispute included:

1. The meaning of the obligation under regulation 9(3) of The Conservation of Habitats and Species Regulations 2017("Habitats Regulations"), to "have regard" to the requirements of the Habitats Directive; and

2. Whether article 6(2) of the Habitats Directive was otherwise enforceable by the UK courts.

In summary, where an activity is known to pose a risk to the environment, article 6(2) imposes a requirement for proactive measures to be taken to prevent harm occurring.

Duty to "have regard"

The Judge (Johnson J) did not agree with the claimants' argument that the obligation to 'have regard' to the Habitats Directive mandated compliance with article 6(2) of the Habitats Directive. The duty to have regard was differentiated from a duty to act in a specified way, for example. Johnson J agreed with the EA that by considering article 6(2) in its programme, it had satisfied the obligation to have regard to it.

Enforceability of EU Directives in UK Courts

The Habitats Regulations are retained EU law under the European Union (Withdrawal) Act 2018. In contrast, the Habitats Directive is not direct EU legislation, and so the obligations imposed under it only continue to be applicable in UK law if they were either recognised in domestic law or 'of a kind' recognised by the CJEU or any court or tribunal in the UK before 31 December 2020.

Article 6(2) has not been recognised by the courts as having direct effect in domestic law, but the claimants' case was that the obligation it imposed was of a kind, which had been so recognised. Johnson J agreed: article 6(3) had been found to have direct effect in national courts by the European Court of Justice in 2005, and there is a close relationship between that article and article 6(2). Article 6(2) therefore continues to be recognised and is enforceable in domestic law post Brexit.

How the EA was in breach of Article 6(2)

The EA's programme was not intended to be a comprehensive analysis of the impact of abstraction across every SSSI within the Broads. However, the EA accepted that the environmental risks from abstraction were not limited to the 3 sites it focused on. Johnson J found that whilst further studies of the other sites had not been ruled out, that was not adequate to discharge the duty imposed by article 6(2) to take proactive remedial steps in light of the accepted knowledge that water abstraction posed a risk of damage to the environment across the whole of the SAC.

Johnson J did not accept the EA's case that its lack of resources provided a justification for its failure to take any proactive activity in relation to the other SSSIs, stating:

> *"Resources may be relevant to the decision as to how to discharge the article 6(2)/regulation 9(3) obligations, but they are not relevant to the question of whether to discharge those obligations [104]".*

Irrationality

Johnson J found that the EA had acted irrationally by not expanding the programme: the EA had committed to comply with article 6(2), yet in limiting the programme as it did, compliance was impossible. A rational course of action to ensure compliance with article 6(2) would have been either to expand the programme or to undertake further work.

Conclusion

This case reaffirms the importance of the precautionary principle underlying environmental law; it is the starting point for the interpretation of legislation. More broadly though, whether provisions in EU directives are 'of a kind' that have been recognised in UK courts will depend on the specific provisions in question, when taken in context.

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IN BRIEF:
SDLT & TRS: Update

In his Mini Budget, the former Chancellor announced a number of changes most of which have been reversed by the new Chancellor. One of the few to survive is a reduction in Stamp Duty Land Tax (SDLT) payable on property transactions in the UK. The new SDLT rates came into immediate effect on 23rd September 2022.

When purchasing property, SDLT is paid on top of the sale price.

The previous rates were:

- 0% up to £125,000;
- 2% on the next £125,000 (the portion between £125,001 and £250,000);
- 5% on the next £675,000 (the portion between £250,001 and £925,000);
- 10% on the next £575,000 (the portion between £925,001 and £1.5m);
- 12% on the remaining amount over £1.5m

Under the new rules, the nil threshold for SDLT has risen from £125,000 to £250,000 (removing the 2% bracket).

The new rates are:

- 0% up to £250,000;
- 5% on the next £675,000 (the portion between £250,001 and £925,000);
- 10% on the next £575,000 (the portion between £925,001 and £1.5m);
- 12% on the remaining amount over £1.5m

For example, if a property worth £500,000 was purchased before 23rd September 2022, SDLT would be 0% on the first £125,000, 2% on the next £125,000 and 5% on the remaining £250,000, which totals £15,000. Under the new rules, SDLT would be 0% on the first £250,000 and 5% on the remaining £250,000, which totals £12,500.

SDLT benefits for first-time buyers

The nil threshold for first-time buyers has increased from £300,000 to £425,000.

The maximum price that a first-time buyer can pay and continue to be eligible for the first-time buyer relief has increased from £500,000 to £625,000.

SDLT - second homes and buy-to-lets

Second home or buy-to-let property purchases are subject to higher rates. However, these will also benefit from the change in rates.

The new rates for second homes are:

- 3% up to £250,000;
- 8% on the next £675,000 (the portion between £250,001-£925,000);
- 13% on the next £575,000 (the portion between £925,001 - £1.5m);
- 15% on the remaining amount over £1.5m

Non-resident buyers purchasing residential property in England and Northern Ireland remain subject to an SDLT surcharge of 2%.

For those involved in the process of moving house, our Private Property and Landed Estates team will be happy to provide further advice on these recent changes.

Trust Registration Service (TRS)

A reminder that since 1st September 2022, all UK express trusts must be registered with the TRS unless they are excluded. Please read Trust Registration Service: The new registration requirements for a detailed explanation of the new requirements.

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Restrictive Covenants: Two recent cases

FIRST: MODIFICATION OF RESTRICTION

In the recent case of *Mill Strand Developments Ltd -v - James & Susan Tapp and others* [2022] before the Upper Tribunal (Lands Chamber), the Tribunal considered the factors for and against granting an application to modify a restriction under section 84 Law of Property Act 1925 ("**1925 Act**").

The case

The case involved a 1.24 acre patch of land adjoining the village of Lower Moor, Pershore in Worcestershire ("**Site**"). In 1972, the Site was conveyed with a restrictive covenant in favour of the adjoining landowner, the Defendants' predecessor in title. The restrictive covenant prevented: (1) the construction of buildings on the Site which were not of an agricultural nature and (2) the commission of activity which would be a nuisance to the adjoining landowners or lead to the depreciation in the value of their land.

The applicant, a developer who had secured an option over the Site, was granted outline planning consent in December 2016 for the construction of five detached dwellings on the Site and land to the south of the Site. The applicant's proposals were objected to by five adjoining landowners.

The agricultural use of the Site had reduced significantly over the years due to increasing residential development in the surrounding area and access issues to the Site.

Although there were five objectors, the judgment considered the owners of No.4 Old Manor Close to be the only owner substantially affected by the application.

Legal test

The developer brought its application primarily under the grounds set out in section 84(1)(aa) and (c) of the 1925 Act. These were alternative grounds. Under s.84(1)(aa), the Tribunal may order the modification of a restriction if it is satisfied that:

1. The continued existence of the restriction would impede a reasonable use of the Site for public or private purposes or would do so unless it was modified;
2. The restriction did not secure any practical benefits 'of substantial value or advantage' to the adjoining landowner or, alternatively, was contrary to the public interest. To determine this, the Tribunal shall consider *"the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the relevant areas as well as the period at which and context in which the restriction was created or imposed and any other material circumstances"* (s.84(1B) of 1925 Act); and
3. Money was adequate compensation for the modification of the restriction.

Under s.84(1)(c), the Tribunal would need to ensure that a modification would not injure the restriction's beneficiary.

Tribunal's decision

The Tribunal held that the applicant had satisfied s.84(1)(aa). First, the proposed use of the Site was a reasonable one and the planning proposals had been subjected to scrutiny through the planning process. All parties had agreed that the restriction would impede the development.

Secondly, although the restriction did secure practical benefits for the owners of No.4 as it protected the setting of No.4 on the edge of the village and prevented the property from being surrounded by residential development, these benefits were not assessed to be 'substantial'. The Site had changed over the years to 'scrubby grassland' and was likely to remain 'essentially redundant' for the purposes of agriculture.

Thirdly, money was likely to be adequate compensation and the Tribunal held that £25,000 should cover any disadvantage to the owners of No.4.

Fourthly, the Tribunal noted the practical context. The restrictive covenant was entered into 50 years ago when an agricultural use was still ongoing and when the planning policy framework would have been different. The Tribunal acknowledged the importance of considerations of housing supply and sustainable development on the policies of local authorities.

However, the alternative ground brought by the developer under section 84(1)(c) was not made out. S.84(1)(c) was not satisfied as the modification would cause injury to the owners of No.4. In this case, this had no effect on the final ruling of the Court as the developer had already been successful in establishing that the modification should be made under section 84(1)(aa).

Points for the future

This case provides useful guidance to parties with an interest in open areas of agricultural land adjoining residential settlements who are considering either making or opposing an application for modification of a restrictive covenant on residential development.

S.84(1)(aa) requires the Tribunal to consider the factual context. In particular, issues of local policy, the current use of the land and the pattern of the grant/refusal of planning permissions in the locality will need to be considered.

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Restrictive Covenants: Two recent cases

SECOND: THE REASONABLENESS OF CONSENT

The recent High Court case of *Davies-Gilbert v Goacher* [2022] EWHC 969 (Ch) sets out the general principles to be followed when determining whether the refusal of consent by a landowner whose land benefits from a restrictive covenant is unreasonable.

The Facts

The claimant owned a significant area of land in East Sussex (the "**Estate**"), part (but not all) of which benefitted from a restrictive covenant ("**Covenant**"). The defendants' land was burdened by the Covenant.

The Covenant provided as follows:

> *"… NOT to erect upon any part of the property hereby conveyed any other messuage erection building or wall whatsoever without such previous written licence as aforesaid such licence not to be unreasonably withheld" (emphasis added).*

The part of the Estate which benefitted from the Covenant is shown in yellow on the plan below with the defendants' land shown in blue.

The defendants wanted to construct two detached dwellings on their land. However, the claimant refused to consent to this for 2 reasons, namely that if the development were to proceed:

1. it would have a detrimental impact on the amenity value of the Estate; and
2. it could threaten the future use and commercial value of the neighbouring land.

A number of **considerations** contributed to the claimant's reasons including the:-

- impact of the proposal on his neighbouring land;
- impact on future anticipated use and value of that land;
- impact on the amenity value of the Estate in the locality as a whole; and
- effect on boundary treatment and maintenance.

Despite the claimant's refusal to consent to the proposal, the defendants proceeded to commence works in the belief that the claimant's refusal was unreasonable.

The Issue

The main issue in the case for the Court to decide was whether the claimant's refusal to consent was indeed unreasonable. In arguing that it was not, the defendants essentially claimed (amongst other matters) that the claimant's decision-making process was flawed for taking into account irrelevant considerations.

Reasonableness - General Principles

In reaching a decision, the Court helpfully distilled a number of general legal principles which can be applied in any given case where the reasonableness of consent under a restrictive covenant is in question.

In summary:-

1. There is no authority to support the proposition that a refusal will be automatically unreasonable if is based on a concern which could be neutralised by imposing a condition.
2. Where a refusal is based on aesthetic grounds, it is insufficient for the proposal to simply not be to one's taste.
3. The primary finding of fact the Court must make in a case like this is the actual reason or reasons (at the time of the refusal) which resulted in the covenantee refusing consent.
4. There was no magic in use of the word "reasons" in case law. However, reasons and considerations were not the same thing. The latter category is potentially a broader category than the former.
5. The process of reaching a decision and the reason itself must be reasonable applying the two-limb test comprised in the "*Wednesbury principle*".
6. It will be unreasonable for a covenantee to refuse consent for the purpose of achieving a collateral or uncovenanted advantage.
7. As part of a reasonable decision-making process, a decision maker must exclude extraneous/irrelevant considerations whilst taking into account relevant considerations. However, not all decisions will be automatically rendered unreasonable as a result of an irrelevant consideration being taken into account. That will depend on whether the consideration contributed to/influenced the reason – as considerations can be given a "zero-weighting".
8. Where there is a refusal for a mixture of good and bad reasons, the refusal would still be reasonable if there was at least one "free-standing" good reason and the decision would have been the same absent the bad reasons.

Reasonableness – the Claimant's refusal

Applying those principles to the claimant's refusal, the Court held:

- The first reason for refusal of consent was not reasonable.

  Amongst other matters, it took into account the impact of the proposal on the Estate (which included non-benefitted land) – an irrelevant consideration. Covenantees are not entitled to take account of matters that did not affect the benefitted land. Applying the above legal principles, as irrelevant **considerations** contributed to the first **reason**, that reason was **unreasonable** (or a "bad" decision).

- The second reason was, however, reasonable.

  That reason considered the effect of the scheme on the future use and commercial value of *neighbouring land* (which **did** benefit from the Covenant). That was a "free standing" **reason** not influenced by any irrelevant **considerations**. The Court concluded the claimant had followed a reasonable decision-making process and reached a reasonable conclusion (i.e. a "good" decision).

Overall, therefore, the claimant's refusal of consent was reasonable. The claimant was awarded a declaration to that effect and injunctive relief (or such undertaking in lieu).

Comment

This case serves not only as a useful summary of the existing legal principles applicable to qualified covenants and dealing with reasonable decision-making - it also helpfully clarifies the approach to be taken with the concept of "irrelevant considerations" in the field of restrictive covenants.

For anyone advising in connection with applications for consent under covenants, this case emphasises the importance of scrutinising not only the principle headline reasons for a refusal, but also the underlying considerations which may have influenced those. If challenged, those considerations will be of utmost importance for determining whether a decision is reasonable. It is therefore better to grapple with those at the outset. A refusal will still be reasonable provided there is one "good" free-standing reason. From a practical perspective, the case therefore also highlights the benefit of giving several reasons for refusal.

The Judge in this case particularly welcomed the opportunity to undertake a site visit which the Judge comments had inevitably influenced the Court's findings. Those advising in this area might also seek to introduce the same where appropriate to give greater context to the subject matter.

The principles in the case are likely to be relevant whether dealing with freehold or leasehold property.

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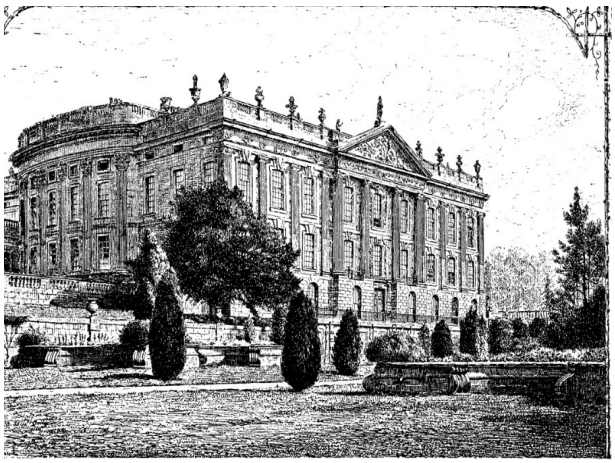
Answers to Summer 2022 Quiz

Due to our quiz master being away on holiday, there is no quiz this time. We also have 4 winning entries from the Summer edition quiz and so are considering a difficult tie breaker - we will contact those involved.

Here are the answers to the question *"Identify and name the stately homes depicted below"*.

1



Answer: Chatsworth House

2

Answer: Blenheim Palace

3

Answer: Highclere Castle

4

Answer: Wentworth Woodhouse

5

Answer: Castle Howard

6

Answer: Blickling Hall

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