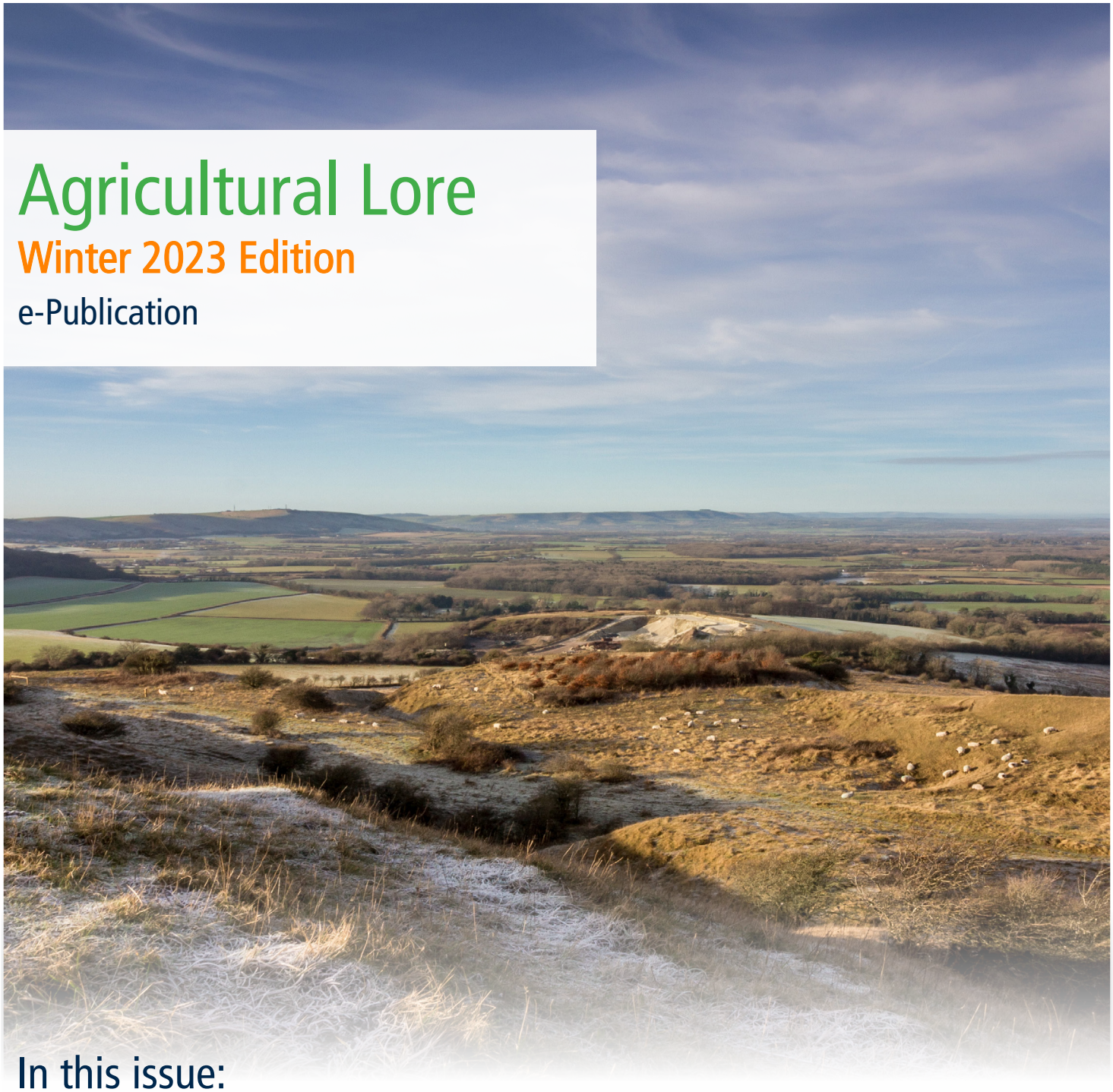

Agricultural Lore

Winter 2023 Edition

e-Publication

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Welcome to Agricultural Lore

Winter Edition 2023

As we start the third year of the Agricultural Transition Period, moving from direct payments (essentially the Basic Payment Scheme) to payments for public goods, it is interesting to reflect on how this major change is developing and where we have got to. The easy part (the scaling back of BPS payments) is well underway, however DEFRA is obviously finding the challenge of encouraging take up of its new environmentally focussed schemes more difficult.

With a slow start to the Sustainable Farming Incentive (SFI) last year, we now see new tweaks and further roll out to that scheme, the successful Countryside Stewardship (CS) scheme brought under the ELMS umbrella to replace the local nature recovery second tier and additional funding to the tune of a 10% increase for revenue claims and a 48% raise for capital payments within SFI and CS.

Alongside this, applications under the Lump Sum Exit Scheme in 2022 were not insignificant, however it remains to be seen how many applications progress to pay-out and result in the intended succession to the younger generation.

So, whilst progress is underway in the subsidy transition, there is still much to be done with other priorities outlined in the Agriculture Act 2020, including fairness in the supply chain, which in turn, it has been argued, would allow farmers to become more resilient to provide public goods.

We are delighted to announce the arrival of property specialist Julie Sharpe, who joins us as a partner and will be working closely with our Agriculture team – see separate box for further details.

In this bumper edition of Agriculture Lore we cover a wide range of topics, from the latest measures on forestry and biodiversity introduced under the Environment Act 2021 to the new National Planning Policy Framework and the Levelling Up and Regeneration Bill.

I consider round 2 of the Morton partnership dispute case and highlight a potential cost to partners, which is easy to overlook. Katharine Everett-Nunns summarises the Rock Review published in the Autumn and Hannah Drew reminds us of the basic rules on Case G notices to quit under the Agricultural Holdings Act 1986.

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With recent movement on the issue of nutrient neutrality unblocking the logjam in progress for developments Lucy Smallwood and Julie Sharpe explain the contract options for landowners considering opportunities for developing their land.

We then have a focus on allotments, so often overlooked, but which can end up being of critical importance if development is in the offing.

We end as usual with our Winter quiz which is another popular picture round.

We are delighted to announce the arrival at Michelmores of Julie Sharpe. Julie is a highly regarded lawyer whose work has a particular focus on complex residential development and the strategic land sector. She works for both private landowners and developers and regularly deals with promotions, collaboration agreements, pre-emptions, phased development management agreements, title issues, options, overage and other complex land agreements. Julie explains more about these structures on page 5.

Julie joins us as a partner and will be working closely with our Agriculture and Landed Estates teams.

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Biodiversity & woodland: Latest legal steps towards net zero

The turn of the New Year saw the coming into force of another tranche of the Environment Act 2021 ("EA 2021") by the passing of the Environment Act 2021 (Commencement No.5 and Transitional Provisions) Regulations 2022/1266. The provisions place new obligations on public authorities in respect of conserving biodiversity and introduce new powers to crack down on illegal tree felling.

Public authorities and biodiversity

Sections 102 and 103 EA 2021 amend section 40 and insert a new paragraph 40A to the Natural Environment and Rural Communities Act 2006.

The key changes are:-

1. Public authorities have a duty to have regard to conservation of biodiversity when delivering their functions – they have to assess how they are going to conserve and enhance biodiversity and then action it.

2. Local authorities and local planning authorities must produce biodiversity reports setting out:

    - what action they have taken over the period of the report;
    - their plans for the 5 years following the report; and
    - quantitative data and other appropriate information to include in the report.

3. The first report must not cover a period of more than 3 years. Subsequent reports must cover no more than a 5-year period and run consecutively.

4. The report must be published within 12 weeks of the last day of the report.

5. The Secretary of State has the power to designate other public authorities that are required to report and can specify the quantitative data to be included.

Tree Felling

Illegal tree felling has caused irreparable harm to woodland and wildlife habitats; it goes completely against the grain in terms of this country's aim to achieve net zero, where our woodland is a key asset for efficient and effective carbon capture.

Sections 114 and Schedule 16 EA 2021 amend Part II of the Forestry Act 1967, providing tougher sanctions with longer-lasting effect where illegal tree felling has taken place. The key changes are:

- Forestry Commission Enforcement Notices and Court ordered Restocking Notices (requiring replanting of illegally felled trees) for failing to comply with an Enforcement Notice can be registered as a Local Land Charge.

- An unlimited fine can be imposed on those who fell trees without a felling licence where one was required. Cf. with the previous sanctions where the penalty limit was set at £2,500 or twice the value of the felled trees.

- Failure to comply with a Restocking Notice and/or and Enforcement Notice is now punishable by imprisonment or an unlimited fine.

The robust sanctions mean that long gone are the days where landowners/occupiers could fell trees without a licence, for a commercial benefit, where they were content to take the meagre fine if caught.

Now, not only is there the risk of jail time and significant financial consequences, but there is the question mark over whether Enforcement/Restocking Notices are going to impact on the value of land if registered as a Local Land Charge. These will be discoverable by the public and will inevitably be flagged by a purchaser's solicitor when they carry out pre-contract searches. Are prospective buyers going to want to purchase property subject to an Enforcement Notice that is going to be binding on them?

Landowners will be subject to greater reporting requirements. The Forestry Commission now has the authority to compel landowners to provide information regarding those who may have an interest in the land which would not always be discoverable by review of the legal title i.e. tenants of leases of less than 7 years.

Conclusion

What is plain to see is that the introduction of the latest regulations places a much tighter rein on both public authorities and the wider public in order to protect the environment moving forward and to meet the UK's net zero ambitions.

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Partnership disputes: A sting in the tail following death of a partner

A recent decision from the High Court has highlighted the process which occurs when a partner in a family farming partnership dies. For those families who do not have a written partnership agreement this case shows that there can be some unexpected and nasty surprises in store as the deceased's partnership share is settled.

What happens on death?

In family farming partnerships, where there is no written partnership agreement, the partnership technically comes to an end when a partner dies. In reality, the farm cannot stop overnight and so the remaining partners continue the business. At some future point there is a settling up with the estate of the deceased partner ("Estate").

The date of death is treated as the date the partner exited the business. However, given the delay before the Estate is paid, Section 42 of the Partnership Act 1890 acts as an incentive on the remaining partners. It gives the Estate an option to elect to receive either:

1. a share of the profits of the ongoing business, such share being attributed to the use of the Estate's share of the partnership assets; or
2. interest at 5% per annum on the Estate's share of the assets.

The parties can agree other terms in any Partnership Agreement. Section 42(2) states that if the Partnership Agreement contains an option for the remaining partners to purchase the share of the Estate and that is exercised properly, the Estate is not entitled to any further share of the profits.

The Estate is in control

There are a number of points to note about this provision. First, the election is made by the Estate. It can decide what is in its best interests. Second, the election does not have to be made until all the facts are known. The Estate can wait and see what the accounts look like first.

This means the position for the Estate is always a positive one. There is no requirement to share in the losses as the Estate is no longer in business together with the other partners. It is a positive sum that is due, either as a profit share or interest payment.

Morton v Morton

Section 42 was recently analysed by the court in *Morton v Morton* [2022], a family farming partnership dispute in Staffordshire. This followed the death of the mother, Jennifer. Her daughter, Julie, as executrix of her estate claimed against the remaining partners (Julie's brother Simon and his wife), under Section 42 for a payment of interest.

The Morton family had already been in front of the courts in 2022 as Simon had brought a claim in proprietary estoppel, claiming that his mother had promised him the farms in their entirety. The argument had been whether Simon was bound by the partnership agreement, which gave him an option to purchase his mother's share.

Simon was successful in his estoppel claim and the remedy in the final order included an option to purchase the estate's share. However, since it was not the exercise of the option to purchase contained in the written partnership agreement, the Judge in the second round of litigation held that the Estate was still entitled to the election under Section 42 either for interest or a share of the profits of the ongoing business.

Section 42 claim often forgotten

Families who have fallen out often lose sight of the claim under section 42. The Estate doesn't need to take any steps to notify the remaining partners within a certain timescale that they intend to bring the claim, so it can come as a nasty surprise. The remaining partners have the ability to make a claim for managing the business during the relevant period in order to reduce the sums payable, but they should factor the potential section 42 claim into the overall calculation of what is due to the Estate.

Written partnership agreement

As highlighted above, it is possible to include provisions in a partnership agreement that mean that section 42 does not apply. So, the best way forward for any family farming partnership is to ensure that they have an up-to-date written agreement in place.

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Selling land for development: getting the deal structure right

There are various deal structures that may be used when selling land with development potential. Which structure best suits the transaction may be driven by a number of factors and ultimately comes down to the degree of risk, control and flexibility required by the parties. We provide a summary of the main deal structures below. Each has its merits and landowners may wish to remain flexible to attract a greater level of interest following which terms can be compared.

Option Agreement

The landowner offloads the risk and the developer seeks to secure a satisfactory planning consent for development within a specified period of time, taking on the associated costs. In return, the Developer has the exclusive right to purchase the land once planning is secured either at a pre-agreed fixed price or at a discounted sale price, usually a percentage of open market value between 75%-90% depending on the degree of risk and return. The costs of promoting the land and securing planning are usually deductible from the land value, however, these are often capped at an agreed amount to give the landowner more certainty. An upfront option premium may also be paid by the developer to the landowner.

An option is a binding agreement and, if not exercised by the developer, will come to an end. They are generally preferred by developers to other strategic land sale structures and more common where sites are likely to take longer than two or three years to achieve planning consent.

A conflict of interest between the landowner and developer may arise when negotiating the ultimate sale price which is not tested on the open market (unlike a promotion agreement). To protect the landowner's position a minimum price return and a cap on costs may be included.

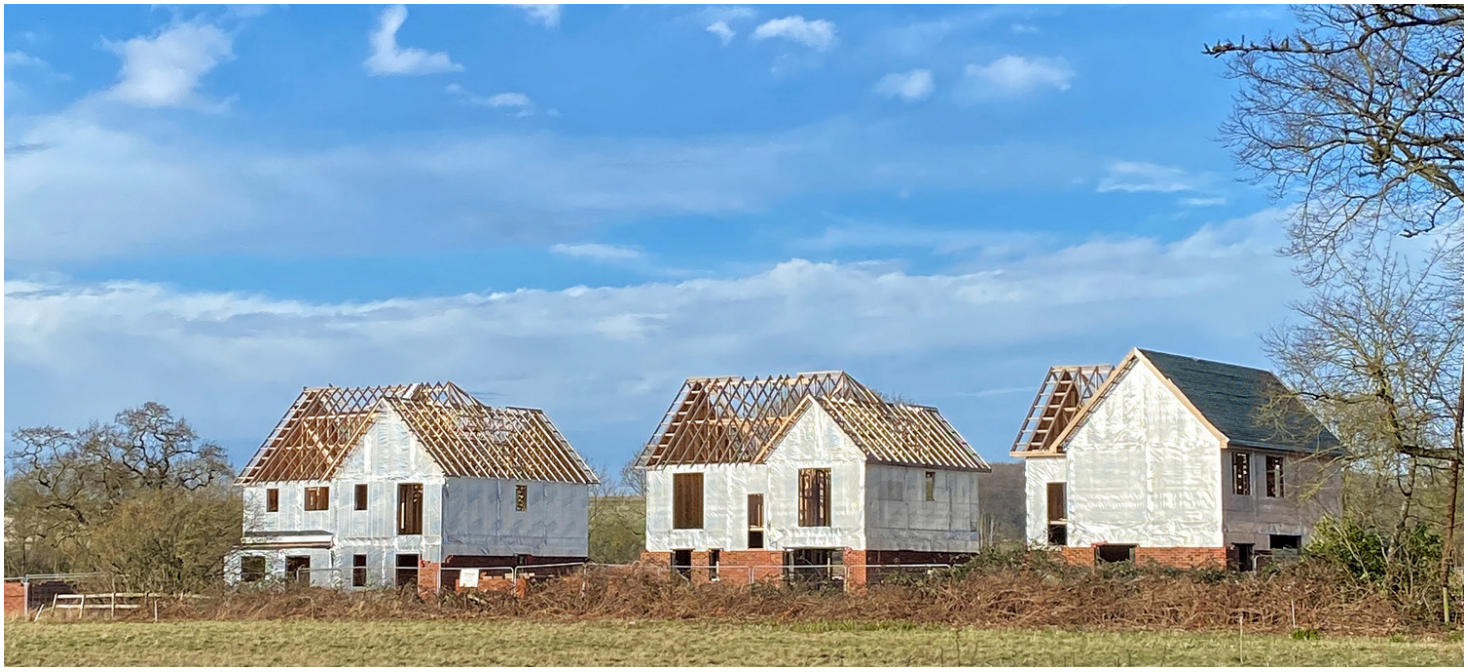
Promotion Agreement

The landowner enters into an agreement with a specialist promoter and, similar to an option agreement, the promoter uses reasonable endeavours to obtain planning consent for development at its own risk and cost. The difference from an option is that when consent is secured the land is sold in the open market (rather than to the promoter) and the promoter shares in the net sale proceeds after planning costs have been deducted and reimbursed to the promoter. The promotor typically receives a promotion fee on the sale of 10-25% sale price after deductions.

Promotion agreements are often preferred by landowners as the sale price is market tested and the open market value may be higher in the open market without being restricted by assumptions in calculating market value included in an option which may be disputed. The Promoter will make a profit without having to finance the acquisition or development and its interests remain broadly aligned with the landowner's interests throughout the process.

Hybrid Agreement

Hybrid agreements offer a blended approach. The landowner grants the developer an option with the ability to elect to sell the land or parts of the land to a third party and share the sale proceeds with the landowner. Similar to a standard option, the Developer may acquire part of the site on securing planning consent for a discount of market value, however, a hybrid agreement may require the remainder of the site to be marketed and sold to the highest open market bidder, akin to a promotion agreement. The sale price for the part that is sold on the open market may then be used as the basis for calculating 'market value' in the option element of the agreement. This avoids the price being determined on the basis of an RICS Red Book valuation, which may result in a lower land value as mentioned above.



A hybrid agreement is often most suitable for larger sites where there is sufficient land to be sold in phases. The advantage to the landowner with the hybrid structure is removal of the conflict of interest in agreeing the sale price. A complexity that can arise is over who builds the initial roads and services where the land is being sold in phases.

Conditional Contract

A conditional contract is a binding agreement on pre-agreed terms. Unlike an option or promotion agreement, the terms are identified and agreed at the outset. This usually includes the price, extent of development and the parameters for fulfilling any condition The parties must proceed with the sale and purchase on these agreed terms once the condition is satisfied and within the stated timescales.

In relation to the sale of land for development, the condition would usually be the buyer obtaining a satisfactory planning permission. The buyer must use reasonable endeavours to procure satisfaction of the condition within the specified timescale. Once satisfied, the contract becomes unconditional and the sale completes. If the condition is not satisfied by the stated date, then the contract will terminate.

A contract conditional on planning is usually more suited to sites which are allocated in the relevant local plan for development, or where there is already outline planning permission and it is agreed that the contract shall be conditional on the grant of a reserved matters consent. They may not be appropriate where there are other uncertainties in addition to planning.

Unconditional Contract with Overage

Another option on selling development land may be to agree an unconditional sale, with or without full planning consent, for an agreed price but retaining the right to receive a further payment should planning/ further planning consent be secured or the site be developed more than an agreed threshold. This clawback of future value can be agreed by way of an overage agreement. The additional sum of money payable to the seller landowner may be triggered on achieving planning permission, a change of use, development of an additional area or additional dwellings, or the sale of dwellings at a price which exceeds an agreed threshold.

The benefit of this arrangement for the landowner is the immediate receipt of capital monies, however, the overage payment is entirely contingent on future events outside the control of the landowner and is therefore at risk. The risk associated with the overage payment may be reflected in the commercial terms of the overage that are negotiated.

Best fit

Landowners are often advised that a promotion agreement would be in their best interests and realise the greatest land value, mainly due to the sale price being market tested. A developer may, however, offer very competitive terms for an option agreement where it wants to build out the site. Ultimately which structure is the best fit will depend on the circumstances and terms offered and landowners are well advised to consult an agent and solicitor with experience in this complex area in order to plan early.

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Planning: Proposed reforms would change the planning landscape

There are two major sets of planning reforms currently being considered, both of which could affect rural landowners in England in various ways, if they are enacted or policy is brought in.

The Levelling Up and Regeneration Bill

The first reform is the Levelling Up and Regeneration Bill, which is in the House of Lords for its second reading. Its remit goes well beyond just planning, as it aims to advance the Government's levelling up agenda, by spreading economic opportunity and better living standards across the country, including reducing environmental disparities.

Additional powers are to be given both to new combined county authorities and to local communities, with the aims of bringing about regeneration, including through a planning system which places beauty, democracy, adopted local plans, the environment and neighbourhoods at its heart. The Bill does not contain the detail on how these changes would happen in practice; we will have to wait for secondary legislation (and also consider proposed changes to the National Planning Policy Framework ("NPPF"), as outlined below).

The Bill looks at replacing the existing EU environmental systems of Environmental Impact Assessments and Strategic Environmental Assessments with Environmental Outcome Reports, but again, the detail is to be left to secondary legislation.

The countryside does not currently feature in the Bill, as many rural action groups had hoped. Such groups are lobbying for rural areas and countryside designations to be given additional protections in the future law, rather than to be left (often in vague terms) to the NPPF and other policies.

National Planning Policy Framework

The second set of reforms, which will be of more relevance and interest to the readers of Agricultural Lore, are those proposed to the NPPF.

A consultation document was issued just before Christmas, which looked at both the above Bill and current and future changes to the NPPF. Alongside this consultation a tracked change version of the NPPF was published, manifesting what the Government considers to be the initial, quick fix, policy amendments.

One of the most important changes to some rural estates will be the proposal for food security provisions to be factored into decisions affecting farmland. More detail and ways of strengthening this are being discussed.

Housing requirements relaxed

Landowners considering selling land for development will also be interested in the proposed changes to weaken and make more flexible the existing housing needs requirements. This includes greater flexibility over green belts, which will not need to be reviewed, even if meeting the identified local housing need would then be impossible. It seems that the Government's aspirations of meeting housing needs targets will be kicked into the long grass. This, together with the proposed changes to the 5-year housing supply and the Housing Delivery test are likely to slow down the delivery of new homes. This is rather ironic, as the Government seems intent on penalising developers, who have been or try to build out sites too slowly.

Biodiversity Net Gain measures

Other relevant amendments proposed to the NPPF now include a warning against any developers trying to "game" the Biodiversity Net Gain system by clearing sites before the connected application is submitted.

Procedural changes

Changes of a procedural nature, which would affect all landowners, may follow after a further round of consultation on the new National Development Management Policies. These centralised policies would contain planning considerations, which apply regularly in decision making – the first round of consultation would be on how the policies would work and then additional consultations would be carried out on each new policy. The current wording in the NPPF in these policy areas would be the starting point for consultation and would be followed by consultations on each new policy itself. The future NPPF would then be focused on the principles of plan making.

The proposals cover a wide range of topics and landowners are encouraged to read the consultation document and respond by 11.45 pm on 2 March.

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Agricultural tenancies: Tenant farming and the Rock Review 2022

In October 2022, an independent report by the Tenancy Working Group (chaired by Baroness Kate Rock), was published - the Rock Review (the Review). It sets out various concerns in the tenanted sector and makes recommendations for action by Defra to try to address these. The government is yet to respond.

The Review highlights the need to balance the rights of tenant farmers and landlords. Its primary take-away message is that "collaboration and communication between all parties is the foundation of the way forward."

What issues did the Rock Review cover?

- Relationships between landlords and tenant farmers, including Landlord-Tenant Agreements
- Growth and viability of businesses in the tenanted sector, including preventing bankruptcies
- Loss of land from the tenanted sector (e.g. to natural capital markets)
- Complexity of financial schemes and whether these are flexible and accessible
- Public support for permanent land use changes such as tree planting and creation of habitats

What were the Rock Review recommendations?

The Review made "recommendations to deliver a more resilient tenanted sector that can deliver sustainable food production, meet the challenges of climate change [and] deliver improvement and enhancement of biodiversity."

These were structured into recommendations requiring immediate action from Defra[1] and those requiring action over a longer timeframe[2]. Over 70 recommendations were made within 18 "headline" recommendations[3].

The first headline recommendation requiring immediate action was that all Environmental Land Management (ELM) schemes and Productivity schemes must be designed to be accessible and open to tenant farmers.

One key element here is tenant farmer autonomy. The Review suggests that tenant farmers should be able to enter tenanted land into schemes without landlord consent, and conversely, that landlords should not be able to do the same without the tenant's consent.

Provision of access to these schemes was also a concern noted in the House of Lords Select Committee Report on Land Use in England (December 2022). The government is due to respond to that report on 13 February 2023 and Defra's policy paper Government food strategy (June 2022) suggests that the awaited Land Use Framework for England will be published at the same time[4].

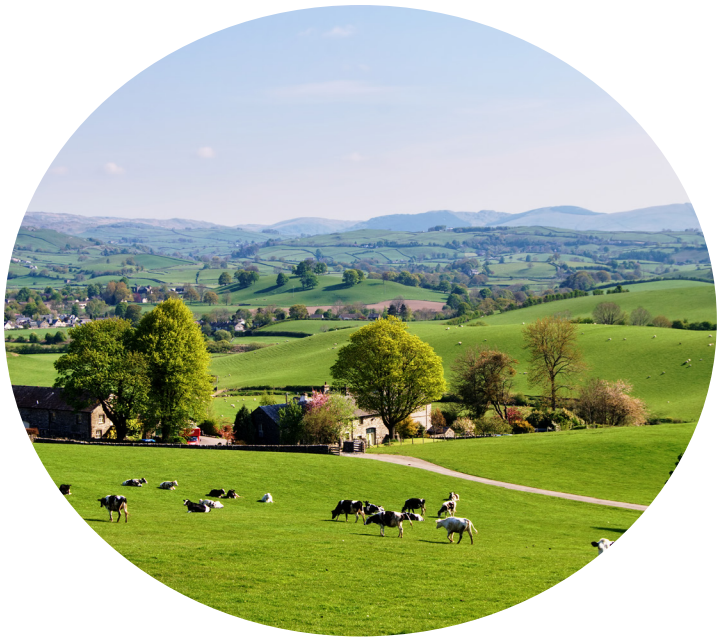
The recent Defra update on Environmental Land Management explains that some progress has been made in relation to accessibility of schemes but further detail is expected as the government responds to the Review.

What does the Rock Review say about Landlord-Tenant agreements?

The Review has recommended that the Law Commission is instructed to review the law on agricultural tenancies and land use in England. It wants legislative changes to "open up the ability for tenants to diversify their businesses without the landlord unreasonably refusing consent" (and in defining what is unreasonable, for consideration to be given to "how the diversification impacts the landlord's tax status, land value, and estate management plans"). It also wants some of the existing protections afforded to Agricultural Holdings Act 1986 tenants to be extended to FBT tenants.

The Review recommended that there should be a broad consultation on tenancy reform in 2023 and wants part of this to address "why FBT agreements are not making use of the flexibility available within the Agricultural Tenancies Act 1995". The Review notes that many tenants "argued that the FBTs legislated for in the 1995 Act are no longer fit for purpose."

Further, the Review recommended that Defra appoints a Tenant Farmer Commissioner whose remit should include examining and strengthening dispute resolution processes.



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1 E.g. recommendations relating to various financial schemes, incentives, and investment issues.
2 E.g. recommendations relating to proposed steps towards legislative reform, and how land agents are licensed to improve accountability.
3 See the full list at pp.17-21 of the Review.
4 Government food strategy at 1.2.3. This is expected to reflect the government's objectives for "English Agriculture, the environment and net zero".

Proprietary Estoppel: How recent cases fit together

Proprietary estoppel is commonly referred to as the "golden ticket" to the family farm, with claimants sometimes being heralded as the "cowshed Cinderella". Ironically, the costly and protracted legal proceedings rarely mean the parties live happily ever after.

The key elements of a claim are well established; an assurance must be made that has been relied upon to one's detriment. There is a tendency to assume that if the threshold tests for each core ingredient can be met, your client may be home and dry. Recent cases, however, show otherwise.

Following a long line of cases over the last 5 years or so, some of which appear contradictory, we thought a summary of where things have got to would help clarify the position.

1. ASSURANCE

A mere statement of present intention or an assurance?

"One day my son, all this will be yours": a well-versed phrase all too familiar amongst farming families. It can be argued that, even if the parent has said they intend to leave the farm to their child upon their death, that statement was merely a statement of their present intention, rather than a promise to leave them the farm. But what differentiates the two?

In *James v James* [2018], the father had, on one occasion, told the son that he intended to leave the land in question to him on his death. This was held to be a mere statement of the father's then present testamentary intention, rather than a promise which the father intended the son to act upon. In *Habberfield v Habberfield* [2018], the promises had been made repeatedly and were such that the parents intended the daughter to act upon. Consequently, the argument that the promise was merely a statement of present intention failed.

Nevertheless, frequency is not the sole consideration. In *Gee v Gee* [2018], it was accepted that representations were made and, although not frequently repeated, they were a material consideration in the son staying on the farm.

Is evidence required for the assurance to be sufficiently clear?

In *Thompson v Thompson* [2018], sufficiently clear representations were made, even though the claimant could not give detailed evidence of a specific promise. Given the informal nature of farming family relationships, this is not unusual and illustrates that the inability to give details of the making of the promise is not fatal to the claim.

Was the assurance made by only co-owner?

Here lies another common scenario where only one co-owner (typically the father) made the assurance without the other owner of the farm (usually the mother).

In *Fielden v Christie-Miller* [2015], it was insufficient for a representation to be made by only one of the trustees. Consequently, a claim can only arise if the representation was either made by the trustees unanimously or, alternatively, made by one of them but with the authority of the others.

In *Preedy v Dunne* [2015], the Judge confirmed what would happen if the trustees were also the beneficiaries. In this situation, if A alone makes a representation, even if A made the representation without B's authority, the estoppel would be binding on A's beneficial share. This would not be binding on B's one-half beneficial share as the representation was made without B's knowledge. This was unsuccessfully argued in *Habberfield v Habberfield* [2019].

2. RELIANCE

Is evidence required to show a causal link between the assurance given and detriment suffered?

The test for reliance centres around what would have happened if the claimant was told that the assurance had been withdrawn. If the claimant would have simply continued in the same way, reliance is not established. The claimant would need to show that, had the assurance been withdrawn, they would have altered their behaviour in some way. The courts have applied this in varying levels of strictness.

In *James*, a strict approach was taken. The claimant had to prove on the evidence that he would have gone away and made his fortune elsewhere, had the assurance been withdrawn. In contrast, a relaxed approach was taken in *Habberfield* [2019].

As the Judge was unable to "recreate an alternative life….in a world without the assurances", evidence was not required.

As H*abberfield* [2019] was made at Court of Appeal level, it may be difficult to show that a claim is fatally flawed merely because the claimant cannot product specific evidence of what they would have done, had the assurance been withdrawn.

3. DETRIMENT

Has the claimant enjoyed countervailing benefits which outweigh any detriment suffered?

In *Horsford,* this was held to be a potentially fatal flaw in the claim. The Court must weigh the detriment against the benefits, and it is only if there is a net benefit, rather than burden, that a defence to the claim will succeed.

4. REMEDIES

The Court's extremely wide discretion causes difficulty when advising clients in terms of the likely outcome insofar as quantum is concerned, although a clean break approach is favoured.

In *Guest v Guest* [2022], the Supreme Court held that the parents had a choice in the remedy; either to hold the farm on trust for the son such that he would inherit either on their death or its sale or, alternatively, a discounted lump sum could be paid to reflect that the son was essentially receiving his inheritance during their lifetime.

Nevertheless, remedies are not set in stone. The case of *Moore v Moore* [2018] demonstrates that a remedy can be successfully appealed, if it can be shown that certain factors were not fully considered.

5. PARTNERSHIPS

Is the entering of a partnership deed by the parties after the assurances a bar to a claim?

Here, we have conflicting decisions. In *Horsford*, entering a partnership deed after the assurances were made was found to be a bar, whereas in *Morton v Morton* [2022], this was not the case.

Nevertheless, the partnership deed in Horsford contained an entire agreement clause, which was fatal. It was held that the claimant was entitled to no more than his rights as partner in accordance with the deed, as the deed expressly overrode any earlier agreements. In *Morton* however, there was no such clause.

CONCLUSION

What is abundantly clear from this long line of cases is that proprietary estoppel claims are fundamentally uncertain and difficult to predict. So much depends on the actual conversations and actions which occur and the credibility of the relevant parties. That said the court decisions do provide a framework and applying the various principles explained in the judgments allows experienced practitioners to assess the likelihood of success.

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Agricultural tenancies: Case G - the basics

When a tenant of an Agricultural Holdings Act 1986 ('AHA 1986') tenancy dies, both the landlord and any potential successors to the tenancy need to consider their options carefully.

A landlord is likely to want to serve a Case G notice to quit ('Case G NTQ') on the deceased tenant's personal representatives. The death of a tenant is one of the few occasions on which a landlord of an AHA 1986 tenancy can serve a notice to quit and a landlord should not pass up this opportunity by failing to serve one correctly.

The procedure in the AHA 1986 in relation to Case G is strict in nature and the time limits imposed are not flexible. It is crucial that landlords and their advisers are aware of the relevant deadlines.

The following example timeline sets out a situation which is frequently seen in practice.

1. Tenant dies

2. The personal representatives of the tenant inform the landlord of the tenant's death.

   Written notification of the tenant's death needs to be given to the landlord by the personal representatives. The landlord does not always know the identity of the personal representatives at the time the notice is served, and therefore landlords should err on the side of caution when considering whether the notice informing them of the death of the tenant was given correctly.

3. Time starts running on receipt of this notice for the landlord to serve a Case G NTQ.

   The landlord must serve a Case G NTQ within 3 months of receiving the written notification of the tenant's death - Schedule 3, Part 1 AHA 1986.

   Alternatively, the 3 months will start running when the landlord receives a notice of an application for succession from the Tribunal if no formal written notification of death was received. If both are received by the landlord, time will start running from whichever notice is received first.

   The landlord does not have to wait to receive the written notification of the tenant's death to serve a Case G NTQ.

What happens if the deadline for serving the Case G NTQ is missed?

The landlord will lose the chance to serve a Case G NTQ. If a Case G NTQ is not served within that 3 month period, the tenancy will then vest in the deceased tenant's personal representatives.

Who does the notice need to be served on?

- The personal representatives of the deceased tenant.
- The person responsible for the control of the management/ farming of the holding.

If there is any doubt over whether the personal representatives are executors or alternatively administrators of the deceased tenant's estate, a copy of the notice should also be lodged with the Public Trustee.

Landlords need to be aware that a Case G NTQ cannot be served on a tenant if the tenant is a company. Also, if there are joint tenants, a Case G NTQ can only be served upon the death of the sole surviving tenant.

Correct service of the Case G NTQ is very important. The procedure for serving the Case G NTQ runs alongside that of a potential successor to the tenancy applying to the tribunal for a succession tenancy. Our team regularly deals with the service of Case G NTQ and succession applications. Please contact us to find out more.

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FOCUS ON ALLOTMENTS:

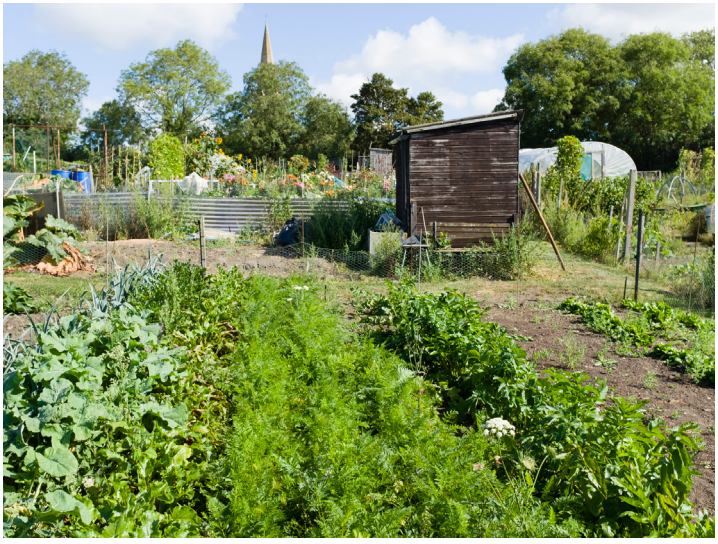
Allotments: what are they and why does it matter?

There is no comprehensive statutory definition of 'allotment'. The many different types of allotment in existence make this a complicated area legally, as explained below.

What is an allotment?

Garden allotment, field garden, fuel allotment, charitable allotment, privately let allotment, smallholding, cottage holding, market garden . . . all allotments, right? Wrong. Smallholdings and market gardens aren't allotments at all, and actually, an allotment is only technically an allotment if it was land allotted to someone as a result of an enclosure award.

There are different rules for different types of 'allotments', and, confusingly, different statues define different types in different ways for different purposes. And with 'allotments' dating back to Anglo-Saxon times, there is a long history of case law,



too. So, understanding exactly what you're dealing with is crucial to determining what you can and can't do with your 'allotment' from a legal point of view. Whether it's setting the rent, understanding restrictions on use, seeking to rely on the termination rights as either a landlord or a tenant, calculating compensation on termination or considering planning permission, it may not be straightforward.

Garden Allotments

The most common type of allotment is a 'garden allotment', which is defined in section 22(1) of the Allotments Act 1922 (the "1922 Act"), as being (for the purposes of that specific Act):

> *"an allotment not exceeding forty poles in extent which is wholly or mainly cultivated by the occupier for the production of vegetable or fruit crops for consumption by himself or his family."*

While an allotment could potentially be subject to the Agricultural Holdings Act 1986, a garden allotment could never be, as by definition the produce is grown for personal consumption.

Armsby v Pointalls Allotments Ltd

The recently appealed case of *Armsby & Price v Pointalls Allotments Ltd* [2022] EWHC 2803 (Ch) concerned whether notices to quit served by the defendant company (the landlord) on two of the garden allotment tenants, were valid. After a five-day trial, the judge at first instance concluded that the notices served on the basis of the tenants' anti-social behaviour – in breach of the terms of their tenancies – were invalid, but that the notices served in accordance with the 1922 Act giving the tenants a year to vacate, were valid. Both the claimants and the defendant appealed, but their arguments were dismissed by the High Court in October last year.

The key points to take away from this case are:

- A landlord's right to serve a notice to quit of 12 months pursuant to section 1(1)(a) of the 1922 Act is unqualified: no reason is required and motive is irrelevant;
- A landlord's ability to serve short notice of three months depends on there being a clause to that effect in the tenancy; and
- Crucially, the ability of a landlord to forfeit a tenancy immediately because of a breach of its terms also depends on there being a clause to that effect in the tenancy, even though that is not set out in the statute. Regardless of what the clause in the tenancy says in this respect, the landlord must also comply with section 146 of the Law of Property Act 1925 to forfeit the lease.

Conclusion

Despite having been around so long, or perhaps because of that very fact, the law concerning allotments is complex and nuanced. Understanding what kind of allotment you have is crucial to the correct interpretation of the law and the rights and obligations of the parties.

Much development land is located on the fringes of towns and villages and is the very land often used for allotments. Thus, ascertaining the type of allotment for existing arrangements and getting a good allotment agreement in place at the outset for new arrangements is critical. This affects, in particular, the ability of landlords to recover possession of their land at a time of their choosing, as the recent appeal in the matter of *Armsby v Pointalls Allotments Ltd* demonstrates.

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FOCUS ON ALLOTMENTS:

Allotments: is planning consent needed to create an allotment?

A recent planning decision has provided useful guidance on the issue of whether planning consent is required to create an allotment out of land that has historically been used for agricultural purposes. The issue turns on whether allotment uses fall within the definition of "Agriculture" set out in Section 336 of the Town and County Planning Act 1990 ("TCPA 1990"). If they do, then planning permission is not required. If they do not, the use of land for allotments would probably be classed as residential and would require planning consent.

Definition of Agriculture

Agriculture is defined in Section 336 TCPA 1990 as:

> *"including but not necessarily being limited to a list of activities - horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and "agricultural" shall be construed accordingly."*

Brief facts

The Appeal concerned a rectangular piece of land to the rear of the appellant's property in South Staffordshire. The appellant's intention was to use the land as an allotment to grow fruit and vegetables.

The Council saw the appellants proposed use of land as a 'material change' from agriculture to residential due to the low intensity and low cultivation of fruit and vegetable. They considered that this change constituted a development, which required planning permission.

Importantly, the Act expressly states in Section 55(2)(e) that the use of land for agriculture does not involve 'development', so if the use of a piece of land falls within the definition of agriculture, planning permission should not be required.

In the first instance, the Council refused the appellant a certificate of lawful use. This led to the appellants appealing against this decision.

The Decision

The definition of agriculture alongside the decision of *Crowborough Parish Council v SSE & Wealden DC* [1981] was considered by the Inspectorate.

The Planning Inspectorate decided that allotments do fall within the definition of agriculture because in the Crowborough case the court's view was that allotment activities tend to be "horticulture", "fruit growing", even "seed growing". In addition, the Appellant is growing and cultivating fruit and vegetables, and areas left unplanted and unmown could be considered to be meadow land.

The Planning Inspectorate also made a comparison to land used for residential purposes, characterised by, *"for example, a maintained lawn and flower beds, formal or informal seating areas, areas for drying laundry, patios/decking, play equipment and ornamental features."*

Therefore, it was decided that allotments do fall within the definition of "Agriculture" and a certificate of lawful use was granted.

This decision provides useful clarification for landowners that planning permission is not required when creating a private allotment out of traditional agricultural land.

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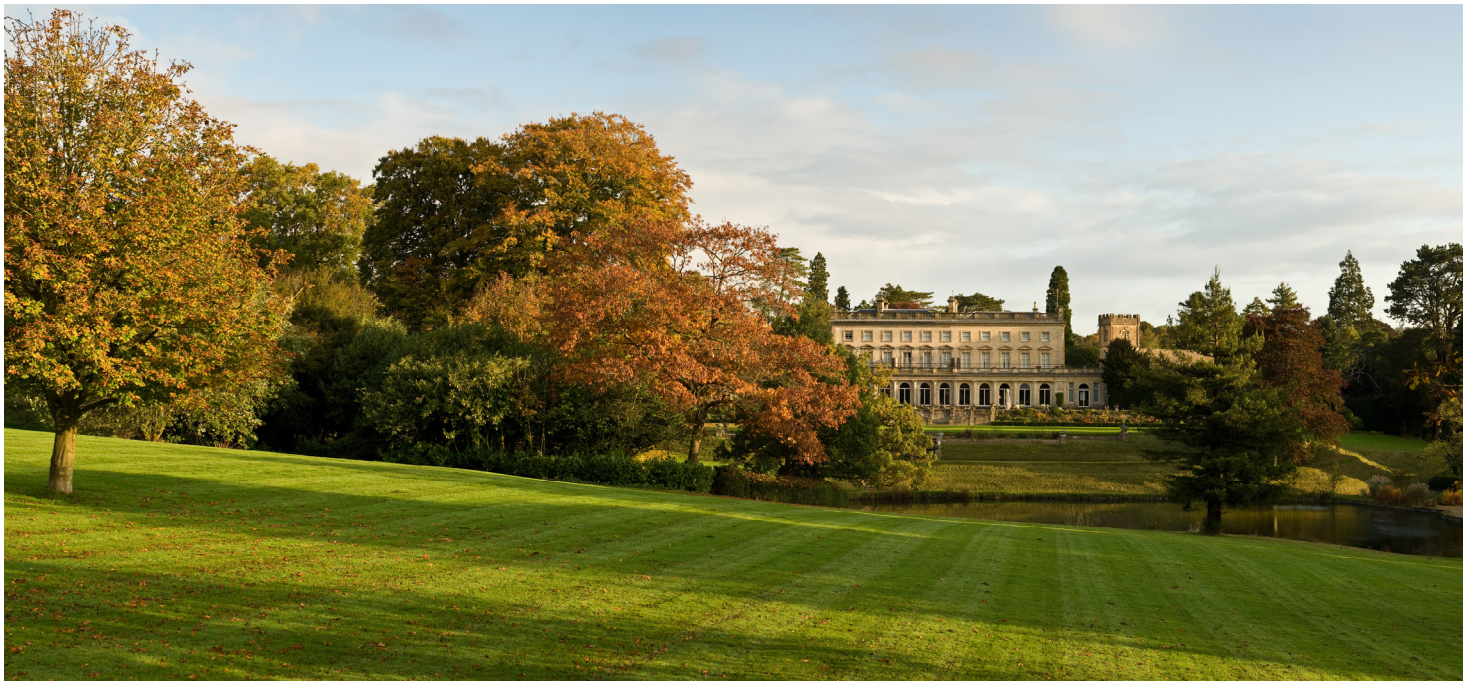

Stamp Duty Land Tax: The latest cases on mixed use & "garden and grounds"

When buying land and property in England, Stamp Duty Land Tax (SDLT) may be payable on the purchase depending on numerous factors, including the type of property in question, the amount of "consideration" (ie money or other benefit) being provided, and the nature of the transaction taking place. A separate Land Transaction Tax regime applies when purchasing land and property in Wales, which is not covered in this article.

Different rates of SDLT will apply depending on whether the property is classed as a "residential", "non-residential" or "mixed-use" property. Higher rates apply to residential transactions, than to non-residential/mixed use transactions. Calculating the SDLT payable on purchases of anything other than wholly residential (e.g. a terraced house with a small garden) or wholly commercial property (e.g. an office block with parking) has become complex.

Thresholds

The current nil-rate threshold for residential property is £250,000 and £150,000 for non-residential and mixed-use property. Any consideration provided over and above those thresholds will be liable to tax. The nil-rate thresholds are subject to change, as we have seen recently with the temporary increase to the residential threshold (which has been increased from £125,000 between 23 September 2022 to 31 March 2025) in an attempt by the Government to support the housing market.

Classification of property

Purchasers of houses with land (e.g. paddocks or woodland), country houses, landed estates etc. will need to consider carefully how the property is classified in order to calculate and pay the correct amount of SDLT, and to avoid challenges by HMRC following completion of the purchase.

Even where there are fields, paddocks or woodland included within the extent of the property, if those areas are deemed to form part of the "garden and grounds" of a residential dwelling, they are likely to be classed as "residential" in nature, so the residential rates will apply. There is no definition of "garden and grounds" in the relevant legislation, however HMRC guidance states that the dictionary definitions of garden and grounds (along with judicial authority in non-SDLT contexts) may be helpful in determining what is classed as "garden and grounds"- for a further explanation of this term see Stamp Duty Land Tax and mixed use premises: "grounds with house for sale?"

There have been two recent cases in the First-tier Tax Tribunal in which HMRC has challenged the classification of the property and therefore the amount of tax payable. These highlight the need for careful consideration of all of the circumstances of a transaction, looking beyond the figures involved and to establish some level of commerciality for the land to be classed as non-residential.

Woodlands and grazing land – not classed as "grounds" of a dwelling

The first case (*Withers v HMRC* [2-22] UKFTT 433 (TC)) deals with woodlands and grazing land which the First-tier Tribunal has ruled did not form part of the "grounds" of a dwelling for SDLT purposes and which were therefore able to attract the lower "mixed-use" rates in respect of those non-residential parts of the property being purchased.

The tribunal held in an earlier case (*Myles-Till v HMRC* [2020] UKFTT 0127) that mere common ownership of land with a dwelling was not sufficient to make the land residential, noting in the Withers case that the "self-standing" function of the grazing land was commercial, and the woodland was for improving the environment and rewilding. As these were non-residential uses, neither of these areas were deemed to form part of the garden or grounds of the property.

It is worth noting that both the woodlands and grazing land were subject to agreements relating to their use – the woodland had been designated for ecological purposes and the grazing land was subject to a grazing licence. However, this does not mean that every area of woodland or grazing will benefit from the non-residential rates, as it will depend on the circumstances in each transaction.

The Tribunal in the Withers case differentiated between there being a few grazing horses (as has been seen in other recent challenges) and grazing a flock of sheep. Where there is no evidence of a grazing and/or a woodland agreement (or Farm Business Tenancy for example), it will be very difficult to argue that the arrangement is a commercial one that would allow for the non-residential rates to be applied.

This is the first case in which evidence of separate non-residential use has been sufficient for the land to be classed as non-residential by HMRC. Numerous similar arguments have been raised by taxpayers, which have until now been unsuccessful. Whether or not the Withers case marks a turning point for these types of cases remains to be seen.

Public right of way – Not classed as "mixed use" for SDLT

The second case of *Averdieck and another v HMRC* [2022] UKFTT 374 (TC) concerned a public right of way (a lane) running along the taxpayer's property to a commercial farm, which the Tribunal held did not render the property mixed-use for SDLT purposes. The public lane was deemed to form part of the grounds of the dwelling.

In this case, the purchasers had initially paid SDLT on the basis of the residential rates, however they later amended their SDLT return, indicating that the property should have been classed as mixed-use and therefore subject to the lower non-residential rate of SDLT.

The access lane not only provided access to the property being purchased, it also provided access to five residential homes and a farm beyond. The purchasers argued that this restricted their use and enjoyment of the property, and along with it being used to access a farm (a separate commercial purpose) they felt that the non-residential rates should apply, as it did not constitute the grounds of their residence.

The Tribunal accepted that the neighbouring farming business was a commercial operation, however the commercial operation was not being conducted on the access lane. The land therefore did not constitute a commercial use of the purchaser's property, and it therefore formed part of the grounds of the property and the residential rates applied.

Conclusion

There have been many recent cases, where purchasers have tried to argue that their property is mixed-use, to benefit from the lower rates of SDLT. More often than not, these cases have been unsuccessful, and the purchasers have had to pay the higher residential rates, because the land with their dwelling is classed as falling within the "garden and grounds" of the dwelling (as was seen in the Averdieck case). However, the Withers case highlights that where there are agreements in respect of land being purchased with a dwelling, with some element of commerciality to them, HMRC may accept that the lower non-residential rates apply.

As a practical point, the SDLT return must be submitted to HMRC and the SDLT must be paid within 14 days of completion. The SDLT position should therefore be considered at the start of a transaction, so that the correct amount can be calculated, and the costs implications can be considered.

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Winter 2023 Quiz

Last time the quiz consisted of pictures of stately homes. Apparently a popular topic, with five winners each scoring full marks. The Answers were given in the Autumn 2022 edition, though listed below are the winners who will receive a bottle of English Sparkling wine for their trouble:

- Ivor Mann of John Coad & Son in Cornwall
- Martin Swan of Hornseys in York
- Thomas Lockton of Strutt & Parker in Exeter
- Kate Russell of Tellus Natural Capital in Gloucestershire
- Tom Barrow of Knight Frank in London

Since a picture round has proved the most popular yet, for the Winter Quiz we have decided to attempt to tax you all further with famous landscapes.

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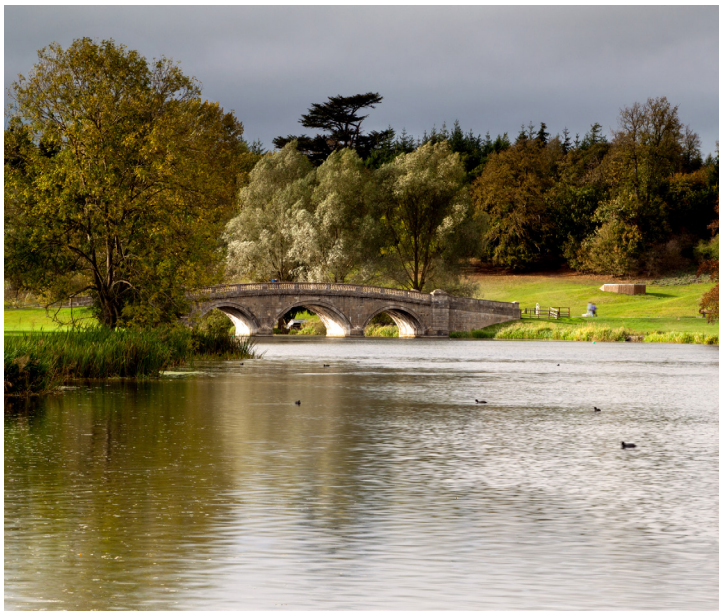

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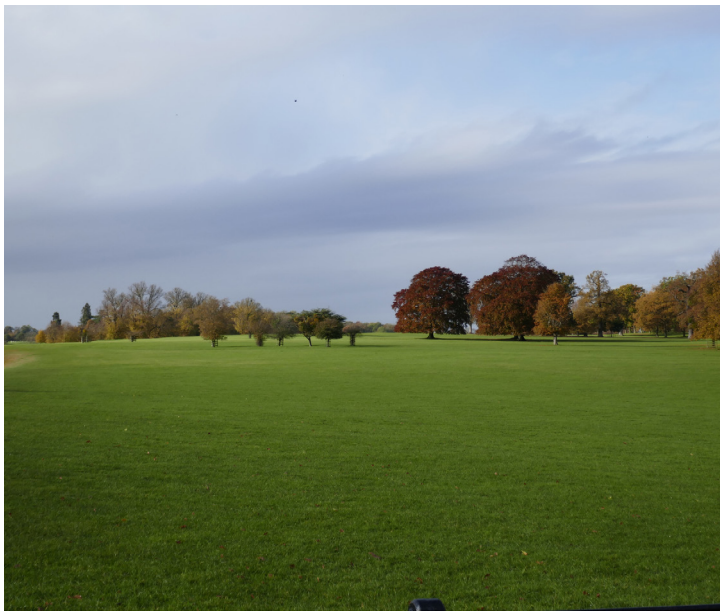

Winter 2023 Quiz

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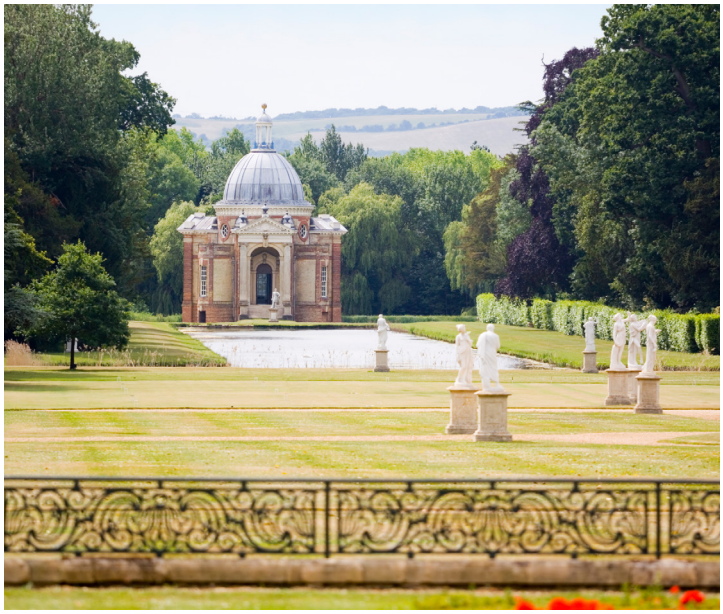

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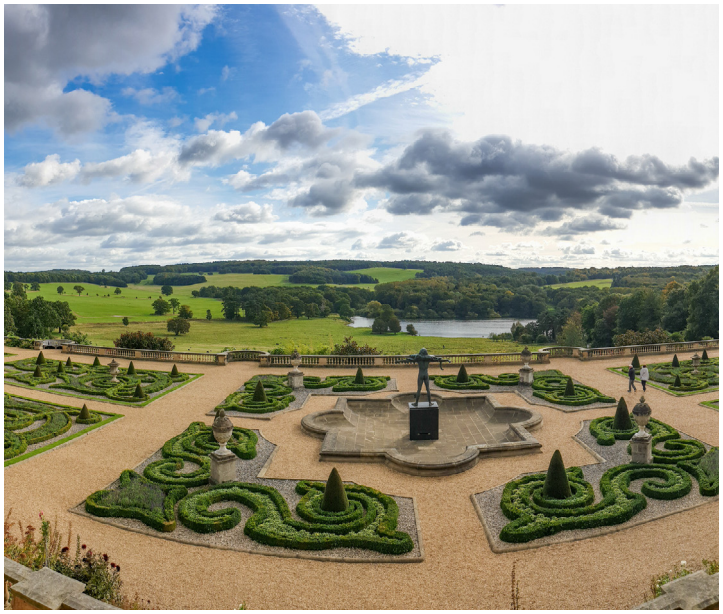

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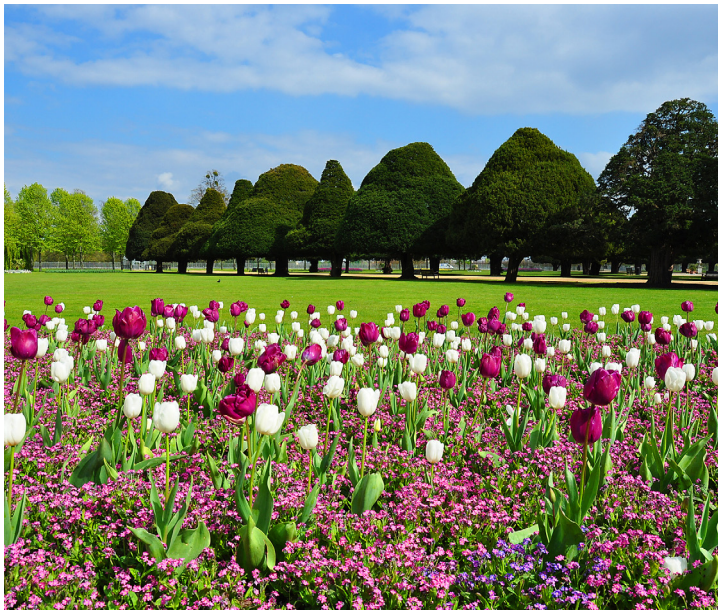

Please email your answers to: adam.corbin@michelmores.com by 31 March 2023.

Everyone who submits the correct answers will be included in a prize draw to win a bottle of sparkling wine.

The answers will be provided and the winners announced in the next edition. Good luck!

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