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Spring 2023

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In this edition

Welcome to AgriLore

Spring Edition 2023

As we enter this spring season many farmers are having their first proper taste of the Sustainable Farming Incentive. With numerous standards and rules to negotiate, the reality of this being the final year of the mainstream Basic Payment Scheme is beginning to hit home.

At this crossroads between old and new schemes the challenge of selecting the best way forward is greater than ever. On the one hand never has environmental protection been given greater prominence in our industry, with biodiversity net gain and nutrient neutrality now being given priority in the planning process and new opportunities developing for the monetisation of natural capital assets. On the other hand, just this Spring we have seen salad crop and vegetable shortages, which show us all too clearly the dangers of being too reliant on imports.

So as farmers and land-owners choose how to manage their acres, the industry faces a dilemma over how far we should go in encouraging land to be turned over to new habitats, when our own food security could be compromised? It's easy with marginal unproductive land, but with growing demand for lucrative long-term carbon, BNG and nutrient neutrality credits, we will doubtless find that pressure to turn over far more productive land increases.

For our Agriculture team natural capital issues are now mainstream and affecting almost all the cases on which we advise in some manner or other. We plan to consider these issues, amongst many others in detail in our upcoming series of May articles and podcasts – see page 4 for more details.

As natural capital issues develop, we are delighted to announce that two members of our team, Josie Edwards and Chloe Vernon-Shore with particular expertise in natural capital matters have been promoted to Partner - see separate box for further details.

A highlight of April has been our involvement in the 2023 Insects as Food and Feed Conference in Bristol - Michelmores continues to lead the way in advising on the use of insects as food and feed, and we were delighted to partner with the Royal Entomological Society in holding this event.

A further notable event this Spring has been the launch of Michelmores' new strategy and brand and we are delighted to share this with you in this new rebranded edition of AgriLore as well as our **new video**.

In this issue of AgriLore, we consider both new issues and old, with articles ranging from gene editing to proprietary estoppel and from private nuisance "overlooking" to wayleave damage and much more.....

Finally, we are excited to be exhibiting at Cereals 2023 on 13th and 14th June, located at Stand 210 – please do come and say hello.

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Partner promotions

We are delighted that Josie Edwards and Chloe Vernon-Shore have been promoted to partner.

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Josie is a non-contentious agricultural lawyer, specialising in arrangements relating to the letting and management of rural land, and farming business structures. She also has a growing practice in natural capital and the management of land for environmental gains.

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Chloe is a non-contentious commercial lawyer with a specialism in innovative tech-based businesses.

She frequently applies her commercial expertise to the natural capital sector and the commoditisation of natural capital and, with Josie, is growing her practice in this essential and exciting space.

May articles and podcasts

Look out for our special article and podcast series released in the lead up to Cereals 2023:

- Navigating new opportunities in Agricultural Landlord and Tenant relationships with Caroline Baines, Charles Courtenay and Josie Edwards
- How to avoid greenwashing with Iain Connor and David Thompson
- The future of insect farming with Rachel O'Connor and Chloe Vernon-Shore
- Succession planning for rural businesses with Vivienne Williams and Iwan Williams
- Understanding Green Finance with Alex Watson and Ben Sharples
- Negotiating and documenting BNG deals with Richard Walford and Ben Sharples

Nature markets framework:
Private finance & public benefit

Delivering net zero and nature recovery comes at a cost and the public purse isn't big enough. The government has therefore set out how it hopes to encourage the scaling up of private investment in these areas in the **Nature markets** framework ("Framework"). This article reviews the proposals which aim to reverse decades of failure to realistically value the impact of development on nature and the benefits that the natural environment provide to us all. It will also consider the speed bumps threatening to hinder the acceleration of the natural capital markets and how these can be flattened.

The main aims of the Framework appear to be to provide investors with the confidence to engage with these new markets and to ensure that tangible environmental benefits are delivered. Participants in any natural capital scheme must be prepared for scrutiny and we have already seen objectors target nutrient neutrality measures (see **Nutrient neutrality – *Wyatt v Fareham Borough Council***) as a means to delay development. Similar challenges to BNG schemes will inevitably follow.

Main market drivers

The market is growing all the time with the main drivers being regulatory (BNG and nutrient neutrality) or voluntary with companies looking to improve their ESG credentials. The Framework recognises that nature markets can be further accelerated through the introduction of policy which allows land managers to combine such private income with public funding (see **Environmental land management schemes: overview**) that replaces the previous agricultural subsidy regime.

Governance

Investing in nature markets is not like buying Government Gilts and investors will require, as a minimum, standards, rules and governance to provide the necessary confidence. There are already considerable risks in investing in the living, natural world which is susceptible to climate change and other threats, so a clear understanding of rights and obligations is crucial.

The key to unlocking the opportunities that nature markets represent is the sound underwriting of the "credit" by real environmental improvement which can be quantified and validated. Without that linkage the credit is worthless and confidence in such systems will collapse. The slightest hint of double counting or of greenwashing will be fatal.

Additionality

As such, a number of principles have been identified in order to ensure such market integrity and the key one is additionality. This is a phrase which is often encountered and it is probably worth taking some time to properly understand the issues. We see it very simply as ensuring that Mother Nature gets her money's worth. That is, money invested in natural capital inputs must lead directly to environmental improvement.

There are various additionality tests which have arisen through the operation of market schemes or from the various consultations that have taken place.

For example, the Woodland Carbon Code assesses additionality with a legal and investment test. Any new planting must not be required by way of an existing legal obligation and must be uneconomic without the carbon credit income.

The Green Book

Referenced in the BNG Consultation **Consultation on Biodiversity Net Gain Regulations and Implementation_January2022.pdf**, the Treasury Green Book **The Green Book** defines additionality as:

"a real increase in social value that would not have occurred in the absence of the intervention being appraised"

British Standard on BNG

The British Standard on BNG is more restrictive in that the Green Book would encompass benefits outside the ambit of BNG whereas

here the definition is:

"Property of measures to achieve biodiversity net gain, where the conservation outcomes it delivers are demonstrably new and additional and would not have resulted without it."

BNG consultation

The BNG Consultation is clear that any nature based interventions which are already required by law or agreement cannot be used to support claims for BNG or other emerging markets.

Using an example to illustrate these points, if a landowner of Whiteacre has been required to plant trees to replace others felled due to development those trees cannot be used to claim carbon credits because they were required to be there as a result of a planning obligation. There is no additional benefit in the form of increased carbon sequestration hence no carbon credits.

Under the Green Book definition, a different landowner of Blackacre might take land out of agricultural production and claim nutrient neutrality credits as a result. The recent **Government response and summary of responses** to the BNG Consultation has indicated that BNG and nutrient neutrality credits may be sold from the same nature based intervention. This means that if habitat is created on the former agricultural land then both those types of credits can be generated and sold. However, a landowner would not be able to claim soil carbon credits on the same area of land.

However, the same landowner could then plant trees on Blackacre (already being utilised for BNG and nutrient neutrality credits) and claim carbon credits as long as the trees are not required to contribute to the metric calculation for BNG purposes or are factored into the nutrient neutrality calculation as increasing phosphate or nitrogen uptake. If those criteria are satisfied then the trees are a new and additional nature based intervention and so the additionality rules are satisfied.

Such principles then need to be implemented which requires rules, standards and governance.

The rules bring together the three most important factors for nature markets to succeed:

- Stacking and bundling;
- Additionality; and
- Blending of public and private finance.

Stacking

The Framework refers to "more than one type of separate credit or unit is issued from the same activity on the same parcel of land" but with respect to the draftsman I don't think this is right.

In my view, stacking is where different types of credits are derived from one or more activities on the same piece of land. Using the example above, you could stack BNG, nutrient neutrality and carbon credits on Blackacre but the activities are different. The land is the constant on which the credits are stacked and there is no requirement that they emanate from the same nature based intervention. Land managers will still need to navigate the stacking rules of individual schemes.

Bundling

Bundling is where several different environmental benefits are combined in a single credit. The bundle may be explicit in that the separate benefits are identified and quantified or it may be implicit in that only one benefit is identified with everything else thrown in as part of the deal.

An example of an implicit bundle is the offering under the UK Woodland Carbon Code where the wider benefits of woodland creation are sold along with the carbon. It seems doubtful that such generous terms will continue much longer.

The Framework commits to greater use of stacking and explicit bundling as it encourages efficient land use and environmental improvement. The additionality risks inherent in stacking and bundling are identified in that

subsequent habitat improvement must be delivered on top of an initial activity – as I set out above in the Blackacre example. As that shows, the greatest jeopardy lies in the mixing of regulatory and voluntary markets and this aspect will be kept under review.

Additionality

I have set out the existing additionality rules above and the Framework states that a move might be made to a single financial additionality test which could be applied across multiple nature markets. It appears that the concept of regulatory 2+2=5 which allows BNG and nutrient neutrality to be claimed from the same intervention will remain.

Blending Public and Private Finance

The pressure on public finances means this is something of an open goal as long as double counting is avoided. The principle of additionality is also important here.

Using the example of peatland restoration, grant funding may have been received for the blocking up of ditches and grips so as to encourage re-wetting and the increased sequestration of carbon as a result. The current rules would prevent BNG credits being sold as a result of those grant funded works and additional habitat enhancement works would be required in order to achieve that.

ELMS

The ELM principles are that participants can blend public and private income so long as they are "compatible, pay for different or additional outcomes and do not pay for the same outcome twice."

In practice, this will mean that the environmental benefits achieved by ELMS participation will have to be assessed and baselined so that the stacking on top of private schemes can be shown to be different and additional.

Some leeway is to be granted in that the entry level ELM scheme (Sustainable Farming Incentive) land can be used for private schemes providing any such scheme rules are adhered to. At the other end of the ELM pyramid, Landscape Recovery is seen as tailor made to admit private finance and the team at Michelmores has advised several projects on this aspect in the last few months.

The Framework also confirms that a pipeline of investment standards for nature markets will be expedited, although governance is likely to be left to the industry itself. One area of governance focus is the secondary market in credits and the need for transparent systems to avoid double counting.

A lot of ground is covered in the Framework and it highlights the lack of secondary legislation in this area. There is an urgent requirement for this guidance and the nature markets cannot progress without it.

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Gene editing: The Genetic Technology (Precision Breeding) Bill passes into law

In our previous article, **Gene Editing: New Bill takes the GM debate to the next stage**, we commented on the Genetic Technology (Precision Breeding) Bill (**"Bill"**) which was then passing through Parliament. On the 23 March 2022, the Bill received Royal assent and was formally passed into law – becoming the **Genetic Technology (Precision Breeding) Act 2023 (GTPBA 2023)**.

The GTPBA 2023 applies to "precision bred organisms" (**PBO**) developed through techniques such as gene editing. PBOs continue to be defined in section 1 of the GTPBA 2023 as broadly any plant or animal (as defined by the Act) if any feature of its genome results from the application of modern biotechnology, if such feature is stable, and if every feature of its genome could have resulted from traditional processes or incurred naturally. Its genome must also not contain any features resulting from artificial modification techniques other than "modern biotechnology".

PBOs differ from genetically modified organisms, which instead feature foreign DNA of other organisms inserted by modern technologies (and which could not have occurred naturally or through traditional breeding methods).

For more information on gene editing more generally, see our earlier article **Gene editing – UK government announces post-Brexit consultation**

In broadest summary, The GTPBA 2023 makes provision for the release and marketing of PBOs, and risk assessments relating to PBOs. It further addresses the regulation of placing food and feed produced from such plants and animals on the market. Readers are encouraged to consider the detailed provisions of the Act but DEFRA summarise the key features of the GTPBA 2023 as follows:-

- "Remove plants and animals in [sic] produced through precision breeding technologies from regulatory requirements applicable in England to the environmental release and marketing of GMOs (Genetically Modified Organisms).
- Introduce two notification systems; one for precision bred organisms used for research purposes and the other for marketing purposes. The information collected will be published on a public register on GOV.UK.
- Establish a proportionate regulatory system for precision bred animals to ensure animal welfare is safeguarded. We will not be introducing changes to the regulations for animals until this system is in place.
- Establish a new science-based authorisation process for food and feed products derived from using precision bred plants and animals."

DEFRA considers the GTPBA 2023 will introduce a new "science-based" and "streamlined" regulatory system which will facilitate greater innovation and research.

It should be noted that the government is seemingly taking a cautious approach and phasing the introduction of the new framework. For example, the use of precision breeding technologies with plants shall be enabled first and animals later. This is with a view to ensuring animal welfare is safeguarded.

The GTPBA 2023 in large currently applies in England only.

Comment

The bringing into law of the GTPBA 2023 is certainly welcomed by scientists, farmers and others across various industries. It continues to be hailed for the many benefits envisaged; including helping to improve UK food security, contributing to the war on climate change, creating more disease resistant crops and other health, environmental and commercial benefits. We have discussed the potential benefits of gene editing at more length in our earlier articles.

There is, however, still a considerable degree of doubt and concern amongst some; quoting issues like animal welfare issues, food testing and safety problems and issues with traceability and food labelling.

It is safe to say, therefore, that views on the GTPBA 2023 remain split.

The Act introduces various powers to create further regulations, which will inevitably include the finer details of how the GTPBA 2023 will operate in practice. This includes in relation to the marketing of PBOs in England. Indeed, it is understood that the Food Standards Agency is currently in the process of considering this. So, although the passing of the GTPBA 2023 is a welcome step forward, there remain many unknowns, and the industry awaits further regulations and guidance.

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Wayleaves: Informal tenancy muddles claim for damage

The recent case of *Kirby v Electricity North West Ltd* [2023] EWHC 75 (TCC) provides an important reminder about the importance of documenting tenancy arrangements. It also alerts utility companies to the need to ensure their contractors understand the extent of any agreed wayleaves before entering land to carry out works.

The case

In November 2017 Electricity North West's (the defendant) contractors entered a field to replace an underground cable, in accordance with rights granted under two deeds of grant.

Under an informal tenancy agreement with the landowner, Kirby (the claimant) had exclusive possession of the field. The claimant also had an agreement with a potato dealer (B) that if B provided potato seeds, fertiliser and pesticides, the claimant would provide/prepare the land, and plant and harvest the crop. B would then have the first option to purchase the crop at market value.

The claimant was unable to grow potatoes on the land as planned since the defendant's contractors caused such damage when carrying out their works. The claimant therefore brought a trespass claim against the defendant for the resulting loss.

The defendant argued that the claimant could not bring a claim for trespass as he was not a tenant; the landowner claimed BPS payments from 2015-2022, under which they declared the field was at their disposal.

However, the landowner gave evidence that they had an informal landlord/tenant relationship with the claimant. This allowed the landowner to claim the BPS payments, but under the informal tenancy agreement, the claimant had exclusive possession of the land, or at the very least, a degree of control and possession which allowed him to bring a claim for trespass.

Decision

The court found that the defendant's contractors went outside the wayleave area permitted by the deeds of grant and caused severe damage to the centre of the field, exceeding the damage envisioned in the deeds of grant. This enabled the claimant to succeed in his trespass claim.

The court also held that the defendant owed the claimant a duty to take reasonable care not to damage the field physically during the works and/or to ensure that any unavoidable damage was repaired in a reasonable manner, so as to avoid a total or partial loss of crop.

The court awarded £54,652.40 to the claimant in damages, covering loss of profit for the potato crop and spring barley yield.

Lessons from this case

The case reminds landowners and tenants to document arrangements relating to land. Whilst here, the court was satisfied by informal arrangements, this is not guaranteed. Having documented arrangements will avoid unnecessary hurdles in court.

Utility companies should also ensure their contractors are properly briefed on their responsibilities when entering land to carry out works.

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in brief

Casual worker claims unfair dismissal

A recent tribunal case (*Mr A Brown v Nodewell Farm Partners:* 1401723/2022) highlights the need to agree and document a worker's status clearly.

The Claimant, Mr Brown, had worked for Nodewell Farm Partners (a sheep farm) as a casual worker for 25 years during lambing season.

Following a restructure, the Claimant was told in January 2022 that his services would no longer be required, and his employment would terminate on 28 January 2022. The Claimant did not work after 21 January claiming that he felt too anxious and was paid up until 21 January, his last day of work.

The Claimant brought a claim for unfair dismissal including £9,650 made up of lost earnings, loss of statutory rights, unpaid holiday, redundancy pay, and unpaid notice pay. He asserted that he was an employee rather than a worker.

Nodewell Farm Partners argued that the Claimant had never been employed by them but worked on a casual basis only. This, therefore, was likely to become a significant dispute regarding the Claimant's employment status.

Unfortunately, for future clarity, the claim was dismissed on the basis that the Claimant had brought his claim one day outside the claim period.

Whilst this frustratingly does not provide clarity on the employment status of farm workers, it is an important reminder to farm businesses to be clear about the status of all individuals working on the farm. Where an individual is expected to be an employee of the farm, this should be clearly set out and documented. The individual should receive the benefits of an employee, such as holiday entitlement and sick leave. However, if the intention is that the individual is simply a casual worker (such as a zero hours' worker or even a contractor), then there are certain steps that can be taken to reduce the likelihood of the individual being classed as a worker. These steps include:

- Allowing the worker to work for others and reject work offered by the farm business instead;
- Allowing the worker to set their own rates or fees;
- Requiring the worker to use their own equipment; and
- Providing a substitute to carry out the work when the worker is not available.

If you have any concerns or questions regarding the employment status of your workers, please get in touch.

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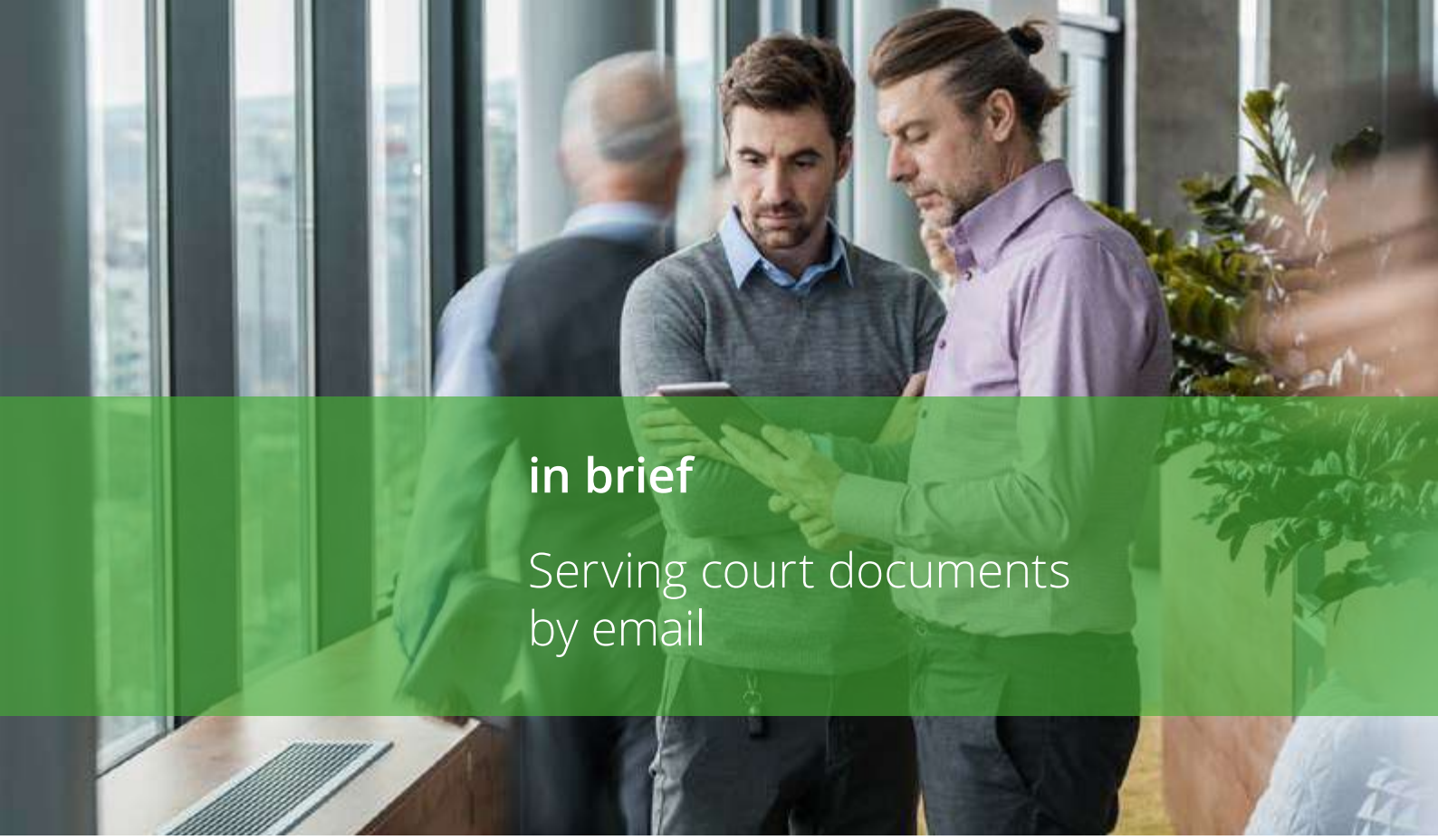

in brief

Serving court documents by email

Two cases at the end of last year have clarified the rules around service of court documents by email.

Court documents can be validly served by email, providing the receiving party has indicated in writing that this is acceptable. The relevant rules are set out in Practice Direction 6A of the Civil Procedure Rules.

A decision in the Administrative Court in October 2022 caused some concern amongst practitioners when it was held that service of a claim form by email was valid only if the recipient nominated a single email address rather than multiple addresses. In that case (***R (Tax Returned Ltd & Ors v Commissioners for HMRC [2022] EWHC 2515 (Admin)***), the receiving party had provided two email addresses, so service of the claim form was ineffective.

Two months later, in the case of ***Entertainment One UK Ltd & Anor v Sconnect Co Ltd & Ors*** [2022] EWHC 3295 (Ch), the opposite conclusion was reached. This decision from the High Court's Chancery Division was that service of the claim form was valid even though the defendants' solicitors had provided more than one email address.

The confusion caused by these two cases was noted by the Civil Procedure Rules Committee and an amendment made to the rules to clarify the position. The amendment came into force on 6 April 2023 and confirms that, as per the decision in Entertainment One UK, multiple email addresses can be provided. However, where multiple email addresses are provided by the receiving party, service will be effective when the document is sent to any two of the email addresses.

As the judge in **Entertainment One UK** noted, providing more than one email address for service is often a sensible option, in case one recipient isn't working or is unavoidably unable to access their emails, or one email address just doesn't work on the day.

The other issue considered in **Entertainment One UK** was whether serving parties had to check for any limitations on what recipients could receive by email before service could validly be effected. The judge again took a pragmatic approach, concluding that unless a solicitor stated at the outset that there were limitations, it was fair to assume that there were none.

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International relocation with children:
Lessons from The Archers

As fans of the long-running rural radio programme "The Archers" will know Helen Archer's partner, Lee, has two pre-teen girls. His ex-wife (mother of his daughters), has been offered a job in the USA and has moved permanently with them. Despite this initially upsetting Lee, he decided to agree to the move and hopes the girls will come to stay with him during holidays.

More recently Helen's former husband, the controlling Rob Titchener has returned to the UK from the US and we currently wait to hear whether he will try again to abduct his son Jack.

From a Family Law perspective, there is a lot for Lee and Helen to consider. It is important that both understand their legal rights and responsibilities in each scenario. Before Lee allowed his children to emigrate, he needed proper legal advice; without this, issues such as when the children will spend time with him and where, can be difficult to resolve, if things go wrong in the future. Getting Jack back from another country, if Rob takes him without Helen's consent, could again potentially be very problematic and, depending on how the storyline develops, there may be protective steps that Helen should be taking quickly.

Moving abroad - is permission needed?

If a parent is considering moving overseas with their child, they must gain the other parent's consent, (ideally written).

If there is scope for parents to reach an agreement, then mediation, discussions with solicitors and roundtable meetings are all helpful ways to firm up arrangements.

However, if there is no agreement, then the parent wishing to move can apply to court for permission to permanently relocate the child abroad. Likewise, the parent seeking to stop the move could apply to prevent this.

If a parent removes a child under 16 from England and Wales without the other parent's consent, this may give rise to criminal proceedings for child abduction and an order may be made here and/or abroad for return of the child to this country.

If there is a Child Arrangements Order already in place, then neither parent may remove the child from the country without written consent from all who hold parental responsibility without permission of the court. However, if that person is named in the order as the person the child lives with (a "lives-with" order), they may take the child abroad for up to 28 days without the other parent's permission (but must return at the end of that period).

How does the court make a decision?

When considering whether an order for permission to permanently relocate abroad should be made, the court will follow the criteria in the Welfare Checklist (s.1(3) Children Act 1989):

1. The ascertainable wishes and feelings of the child concerned (in light of his age and understanding);
2. His physical, emotional and educational needs;
3. The likely effect on him of any change in his circumstances;
4. His age, sex, background and any characteristics of his which the court considers relevant;

5. Any harm which he has suffered or is at risk of suffering;
6. How capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; and
7. The range of powers available to the court under this Act in the proceedings in question.

In addition, in the case of *Re K (A Child)* [2020], Williams J suggested the court should follow these points when considering the likely effect on the child:

- changes to housing, schooling and relationships if they remain in England;
- how likely it is for the plan to be implemented as conceived;
- any positive effects in relation to the removing parent's ability to care for the child;
- positives and negatives about the proposed destination - environment, education, and links with family;
- the impact on the child's relationship with the left behind parent and other extended family and how that may be offset by on-going contact;
- how parents are currently meeting the child's needs;
- whether the application is wholly or partly motivated by a desire to exclude or limit the left behind parent's role;
- whether the left behind parent's opposition to the move is genuine;
- whether the parent is better able to care for the child in the new country; and
- the role that the left behind parent can play in the future.

Comment

Agreements over taking children abroad can be difficult and both separated parents should take early legal advice and start conversations straight away. These discussions can take time and a court decision, without agreement, can take many months.

If an agreement is reached, it should be reflected in an agreed court order with details about the time that the child will spend with the parent left behind following the move.

It remains to be seen how Helen's and Lee's scenarios play out – if Lee did not get a written agreement, will holiday time with the girls turn out to be problematic and if Rob abducts Jack, how will Helen rescue him? We wait with baited breath.....

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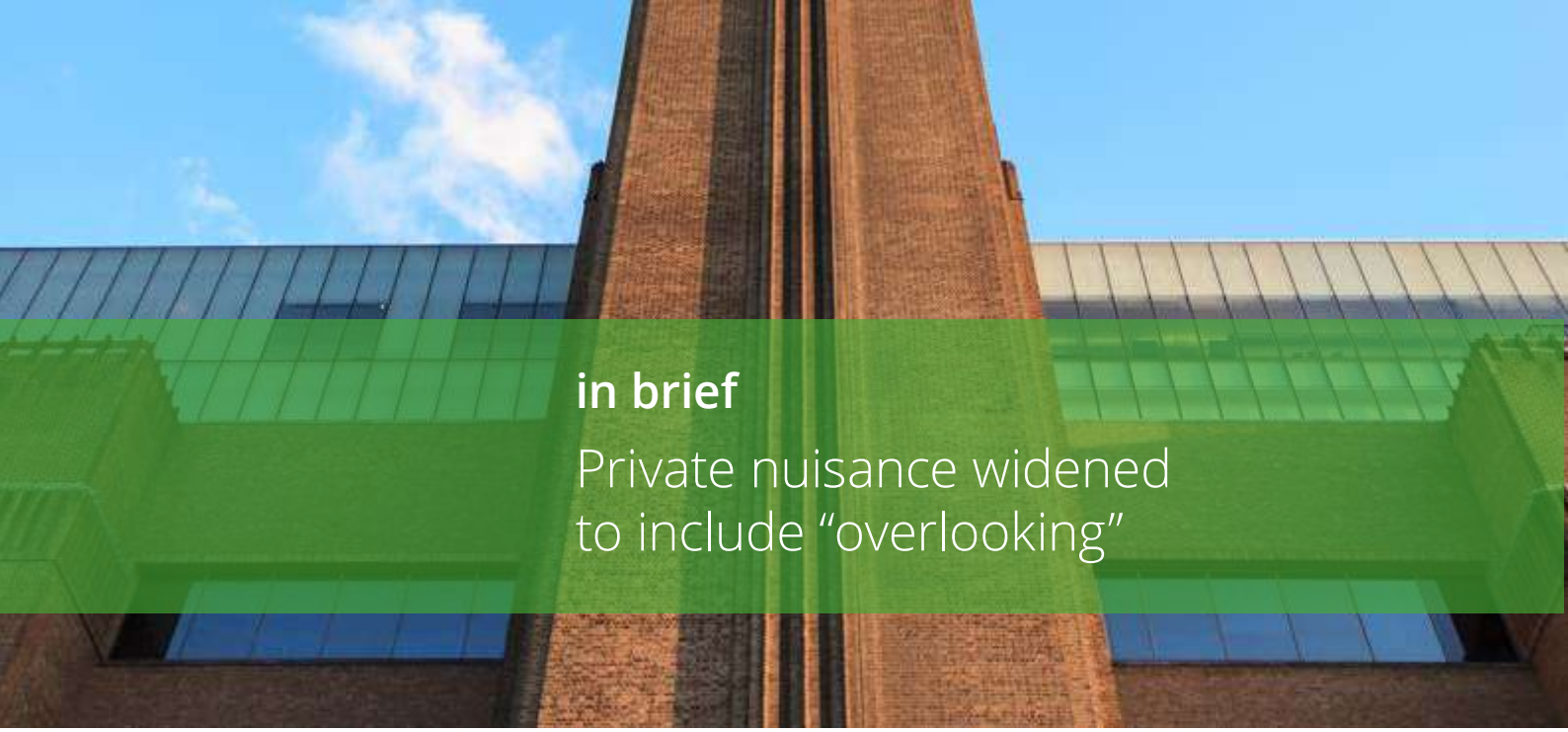

in brief

Private nuisance widened to include "overlooking"

The recent Supreme Court decision in *Fearn & Ors v Board of Trustees of the Tate Gallery:* [2023] reaffirmed the principles of private nuisance and found that "visual intrusion" may give rise to liability.

Background

The Blatvatnik building, part of the Tate Modern Art Museum ("the Tate"), boasts 360-degree panoramic views from its viewing gallery. Residents in a local development ("the Claimants") complained that Tate visitors had a direct view from the viewing gallery into their living area.

Trial

The trial judge, Mann J, found that:

1. the extent of the viewing into the Claimants' flats was a material intrusion into the privacy of their living accommodation; and
2. intrusive viewing from a neighbouring property can in principle give rise to a claim for nuisance.

However, he concluded that the intrusion experienced by the Claimants did not amount to a nuisance, as the Tate's use of the top floor as a public viewing gallery was reasonable. As such, the Claimants were responsible for their own misfortune, as they:

1. bought properties with glass walls; and,
2. could take measures to protect their privacy (for example, lowering their blinds or installing net curtains).

Appeal

The Court of Appeal found that the principles of nuisance were incorrectly applied to the facts of this case and that the claim should have succeeded. However, the appeal was dismissed on the ground that "overlooking", no matter how oppressive, cannot count as a nuisance.

Supreme Court Decision

In addition to restating the principles of private nuisance (which, although helpful, we shall not go into here), the Supreme Court overturned the Court of Appeal's decision, finding that "visual intrusion" can count as an actionable nuisance.

Lord Leggatt found that Mann J had used the wrong test as to the use of the viewing platform. The correct test was not whether the use of the platform was unreasonable, but whether it was common and ordinary. He distinguished this case from a normal overlooking case, stating that the "unusually intrusive degree of visual overlooking of the claimants' flats by large numbers of people" is an intense visual intrusion, and such is an actionable nuisance.

Lord Leggatt found it unreasonable for the Claimants to have to take steps to protect their own privacy.

The development of "visual intrusion" as a nuisance is one to watch, particularly in relation to overlooking cases between neighbours in less high-profile circumstances.

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in brief

Unjust enrichment v proprietary estoppel

The recent case of *Mate v Mate* [2023] has demonstrated that the law of unjust enrichment and the remedy of restitution can sometimes help, where a claim of proprietary estoppel fails.

In this case Julie Mate pursued both claims simultaneously against her mother (Shirley) and two brothers (Robert and Andrew).

Proprietary Estoppel Claim

On the death of Julie's father, the family farm was left to Shirley and Julie's two brothers, with the three daughters receiving a small sum. Julie identified a piece of the farmland which she considered could be sold for housing development. With the knowledge and encouragement of Shirley, she worked over a number of years to achieve this, and the land was sold for development at an £8.7 million uplift.

In doing so, Julie relied on the promises from her mother that, "if any farmland were to be sold, the money would be shared with the girls" and "the girls would be looked after". Nevertheless, Julie failed to establish proprietary estoppel since the promises did not hold sufficient clarity in the promise or assurance.

Unjust Enrichment Claim

Julie, however, was successful in her alternative claim that her mother and brothers had been unjustly enriched by the time (approximately 550 hours within a 10-year span) and money (nearly £6,000 in planning consultant fees) she had spent promoting the land. They had sought to retain the entirety of the benefit, namely the total uplift in value, when the land was sold.

Julie was not a professional land promoter, there was no formal contract, and she did not take part in the final stages when planning permission was achieved. Consequently, the judge awarded Julie 7.5% of the uplift on the basis that she had provided services akin to a land promoter and should be paid on a commission basis, albeit this was discounted due to the reasons listed above.

Conclusion

This case demonstrates how a claim of unjust enrichment can succeed in relation to land and further in relation to an individual giving up their time and effort. It could set a trend for more people to bring an argument of unjust enrichment as a possible alternative to a claim of proprietary estoppel.

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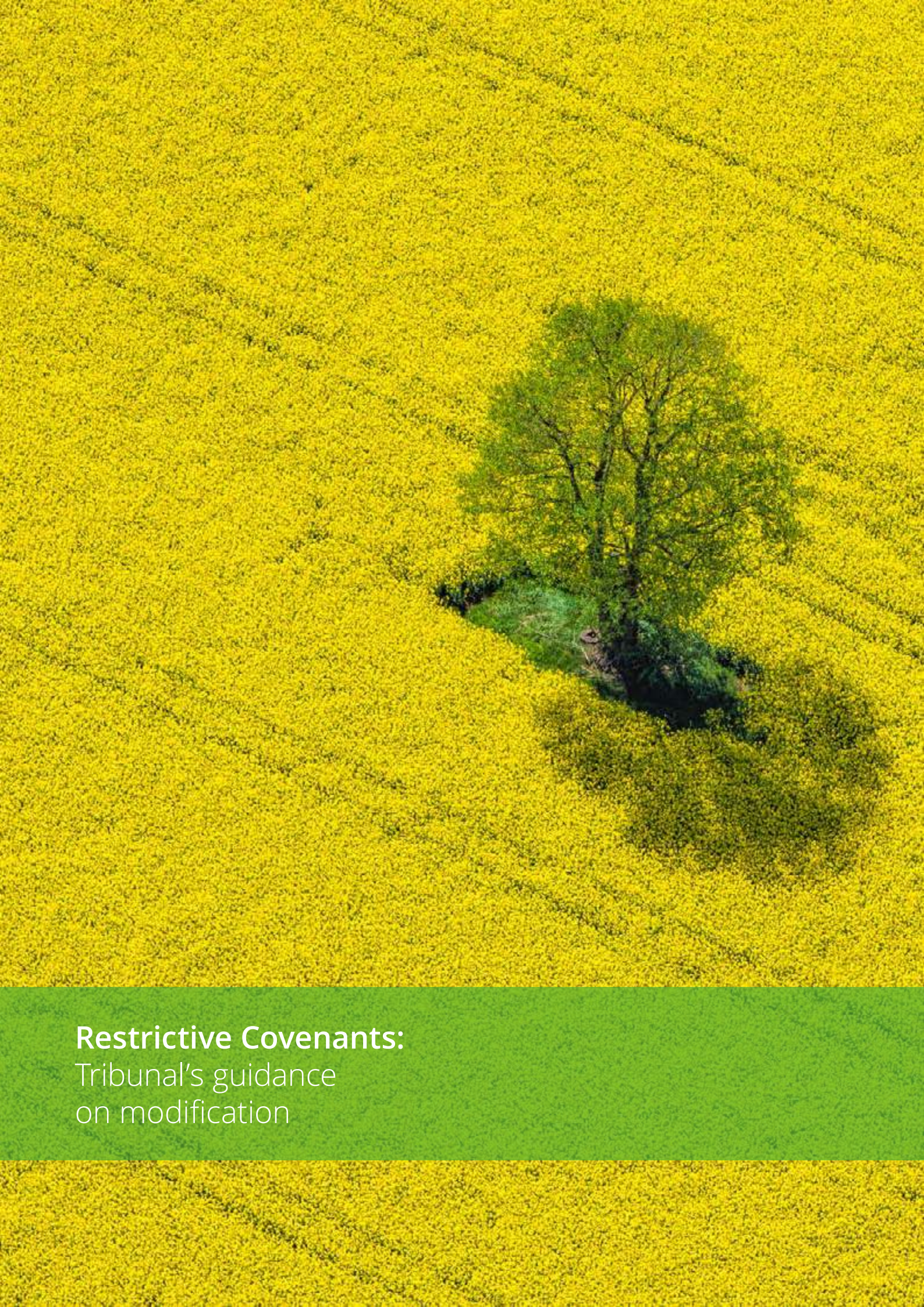

Restrictive Covenants: Tribunal's guidance on modification

The recent tribunal case of *Hodgson v Cook & Holden* [2023] UKUT 41 (LC) has provided useful guidance on the modifying of restrictive covenants, an issue which often affects rural properties. This case involved a dispute between neighbours on a residential estate as to whether a restrictive covenant contained in a property's transfer should be modified.

The restrictive covenant prevented any trade, business or profession from being carried out on the property and prohibited its use for any purpose other than as one private dwelling. The same restrictive covenant affected all the other properties on the estate.

The case

The applicants, Mr and Mrs Hodgson, owned one of the houses on a residential estate located near to Hull. The objectors were the owners of two of the neighbouring properties on the estate.

Since April 2021, Mrs Hodgson had run a beauty therapy business out of a cabin situated in the back garden of the property. They had applied for retrospective planning permission which had been granted in October 2021.

The applicants were seeking to modify the restrictive covenant on the basis that:

(1) Its continued existence restricted what was a 'reasonable user' of the land and did not secure to the beneficiaries of the covenant (i.e. the other neighbours) "any practical benefits of substantial value or advantage to them" (section 84(1)(aa) Law of Property Act 1925 (LPA 1925).
(2) The modification would not be contrary to the public interest as it provided health benefits to the public, provided a source of income to the applicants, and was consistent with government guidance on working from home during the COVID-19 pandemic (section 84(1)(aa) LPA 1925)
(3) Modification would not injure the objectors (section 84(1)(c) LPA 1925)

The objectors disputed the application stating that the planned commercial use was not reasonable and that the restrictive covenant secured to them practical benefits of substantial value and advantage. They also pointed to the factual position of increased parking in the estate and the negative impact this had had on the amenity and value of their properties.

Decision

The Upper Tribunal determined that the application should be refused.

The Tribunal accepted that the business use could be considered as reasonable in planning terms. However, it recognised that, in considering the effect of the use of the land on the amenities of the area, it needed to look beyond considerations of planning policy and to consider the purpose and intention of the restrictive covenant.

The Tribunal held the primary purpose of the covenant to have been the securing of "effective estate management by restricting changes to the use and appearance of the properties" (paragraph 57 of the judgment). To allow the modification would remove the sense of certainty that

residents would feel about what types of potential development could be permitted on the estate in the future. The covenant's prevention of activities which could impinge on the residents' right to quiet enjoyment preserved "aspects of the estate that should be maintained" and the covenant could therefore be said to be guaranteeing a practical benefit of significant value or advantage. So the Tribunal held the requirements of section 84(1)(aa) were not fulfilled and it therefore did not have jurisdiction to modify the covenant.

The Tribunal also made the following observations:

- The restrictive covenant was entered into only 10 years previously and by the applicants themselves. The Tribunal found that "the more recently a restriction has been imposed, the stronger the case for modification must be".
- It would require a significant public benefit to outweigh the arguments in favour of maintaining the public interest of ensuring the continued effect of restrictive covenants recently and voluntarily agreed. The applicants had not met this threshold.
- In view of these findings, it would be contradictory to determine that modification of the covenant would not injure the objectors entitled to the benefit of the covenant.

Lessons from this case

This case indicates that tribunals are likely to adopt a pragmatic approach towards applications to modify a restrictive covenant and to take into account factual considerations. Such factors could include: the original purpose of the restrictive covenant, the date it was entered into, the type of the development and its effect on the immediate environment, and the practical interests of the beneficiaries to the covenant. It also presents a cautionary tale for property owners who have already obtained planning permission for a development.

This case illustrates that it is not guaranteed that the Tribunal will take the same view as the authority considering the planning aspects of the development.

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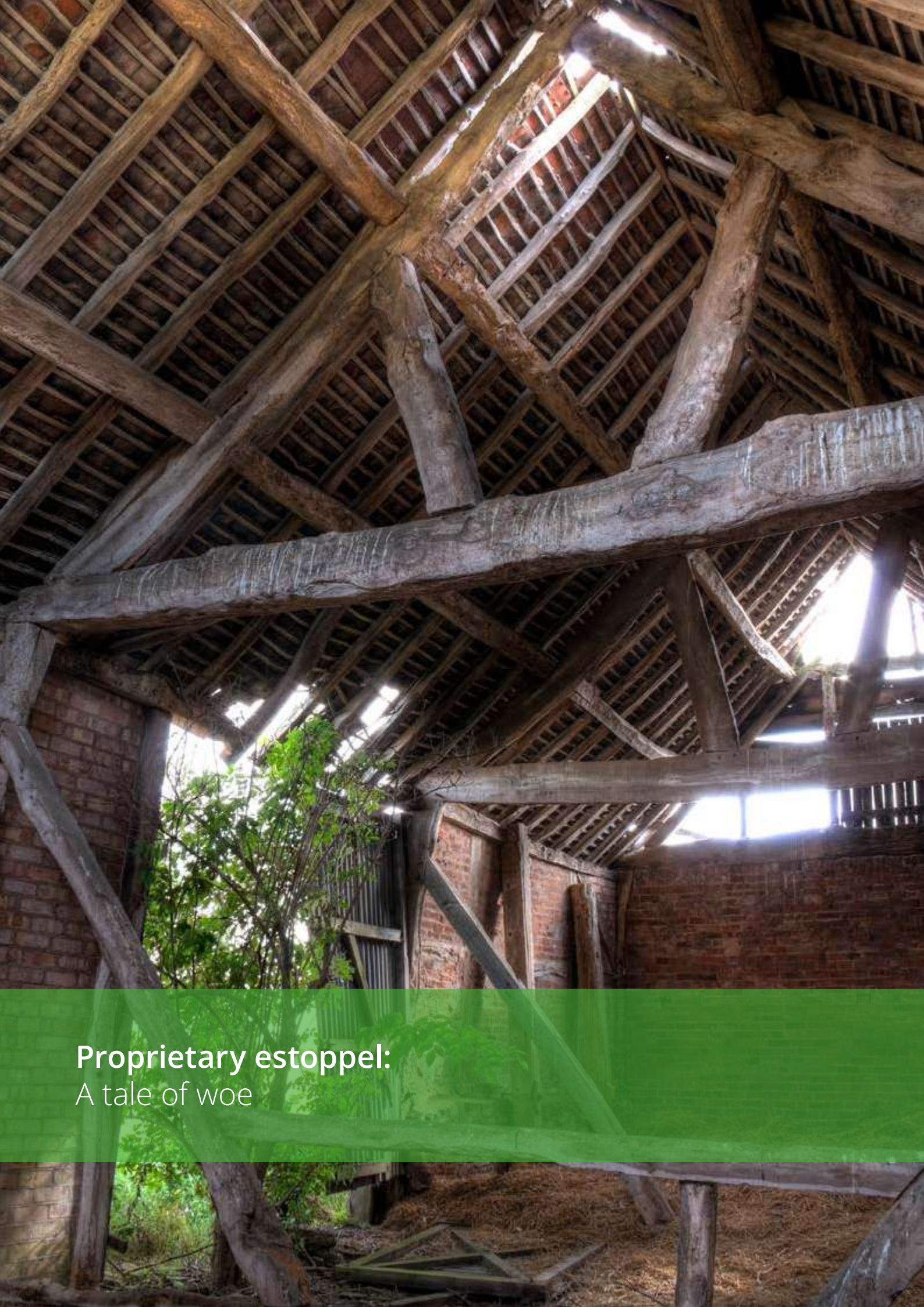

Proprietary estoppel:
A tale of woe

Branded by a High Court Judge as "one of the most regrettable pieces of litigation that I have ever come across", the recent case of *Teasdale v Carter* [2023] is an example of how not to conduct a family farming dispute.

The case stemmed from circumstances, already sad in their own right, namely divorce proceedings, and was one of profound consequence, both emotionally and financially. Not only did the astronomical legal costs expended by the parties (over £1 million) far exceed the value of the property in question (£245,000), the family relationship was fractured as a result.

This case provides important guidance on proprietary estoppel, separate representation and costs orders.

Background

The case primarily concerned the beneficial ownership of Cow House; a property on the family farm held in the joint names of Mr Teasdale (**"Father"**) and Mrs Teasdale (**"Mother"**) and subject to financial remedy proceedings on divorce. As an ancillary matter to the substantive proceedings, the daughter (**"Rebecca"**), sought a declaration that the beneficial interest in Cow House rested in her by virtue of proprietary estoppel.

Leeds Family Court

Rebecca's claim was founded on expenditure of £200,000 (predominantly raised through a mortgage which she paid) and associated labour in renovating a former barn into her 'forever' family home. This was in reliance of the Father's repeated promises (known to the Mother) that the property would be hers, which he did not contest. The Mother asserted that Rebecca's payments amounted to no more than her putting her 'stamp' on Cow House, which she occupied as tenant.

HHJ Shelton found that estoppel was made out and that the 'minimum award necessary' to do justice was the transfer of Cow House to Rebecca upon discharge by her of the outstanding mortgage.

As Rebecca and her father were separately represented, the Mother was ordered to pay one half of their respective costs.

Appeal

The Mother appealed on four grounds, which were all subsequently dismissed.

Ground 1 – findings of fact

The finding of proprietary estoppel was upheld as it was enough that the Mother had been aware of the promise and authorised it. Reliance and detriment were demonstrated by Rebecca's exclusive occupation, significant financial contribution to the property's construction and payment of the mortgage.

Ground 2 – minimum equity to do justice

The Mother argued that the judge should have awarded a lump sum to Rebecca, rather than transfer Cow House into her sole name.

The court differentiated between situations where (a) a party has lived in a property for many years and was intimately involved in its construction, and (b) where a party merely has a right to reside in the property. In the former, where proprietary estoppel is established, the correct remedy is the transfer of the property as promised, as opposed to a lump sum in order to achieve a clean break. Being mere financial compensation, this may be viewed as a form of compulsory purchase against the wishes of the beneficial owner, which is not an equitable remedy.

Ground 3 – costs order in favour of Rebecca

The Mother appealed on the basis that this did not adequately reflect that Rebecca had been unsuccessful on other parts of her case.

This was dismissed as Rebecca was successful on the issue of Cow House, being the central part of the litigation, which the costs reflected. The costs order properly reflected the level of success achieved.

Ground 4 – costs order in favour of the Father

It was further appealed that it was not reasonably necessary for the Father to be separately represented. Instead, he should have shared representation with Rebecca.

The court found that the Father was entitled to separate legal representation, as this case was ancillary to financial remedy proceedings for divorce, which raised issues of conflict of interest and legal professional privilege. A costs order was therefore justified against the Mother in favour of both the Father and Rebecca.

Practical Considerations

In summary, key takeaways from this case are as follows:

1. **Proprietary Estoppel:** Although the grounds on which proprietary estoppel is established are fact specific, exclusive occupation coupled with financial contributions to a property's construction and payments discharging the mortgage are likely to suffice as reliance and detriment. In these circumstances, the transfer of property is the correct remedy, as opposed to a clean break.

2. **Costs and Separate Representation:** If an estoppel claim is ancillary to financial remedy proceedings for divorce, which raises issues of conflict of interest and legal professional privilege, a costs order can be made in favour of multiple persons who are separately represented.

In future claims, the judge suggested that the parties could obtain a preliminary ruling to determine whether costs would be recoverable, which would enable them to make an informed choice as to whether they should be separately represented. The clarification of their potential exposure to costs orders would no doubt help obviate the type of argument raised in this case.

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AgriLore quiz

The quiz last quarter was all about famous landscapes.

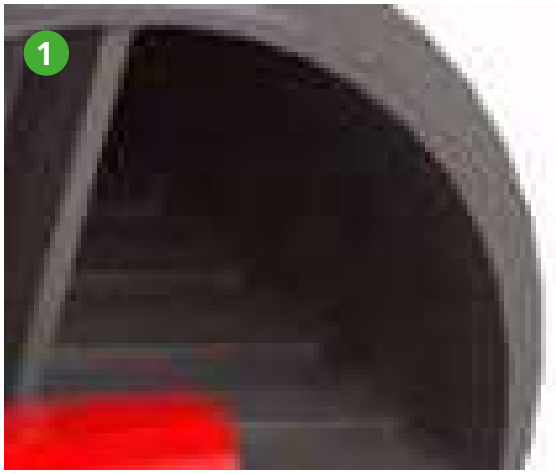
The winner was Paul Smith BSc FRICS FAAV of Acland Bracewell Surveyors in Lancashire, with full marks. A bottle of English Sparkling wine is on its way to him.

Answers below.

The Spring 2023 Quiz:

This quarter, in preparation for the Cereals Event in June (where the Michelmores Team will be exhibiting) it is a machinery identification round. A notable Western Counties CAAV Local Association member will be co-opted in to Judge in the event there are any disputes!

Identify the machinery depicted below. Extra points available for identifying manufacturer and model! Send your answers to adam.corbin@michelmores.com. The winner will receive a bottle of English Sparking wine.



Answers from last time:
1. Bridge over water in Blenheim Palace garden
2. The grotto surrounded by green vegetation. Stowe, Buckinghamshire, England.
3. Parkland at Burghley House
4. Trentham Gardens
5. Wrest Park is a country estate located near Silsoe, Bedfordshire
6. Harewood House Harrogate
7. Hampton Court

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