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Early Spring Edition
2024

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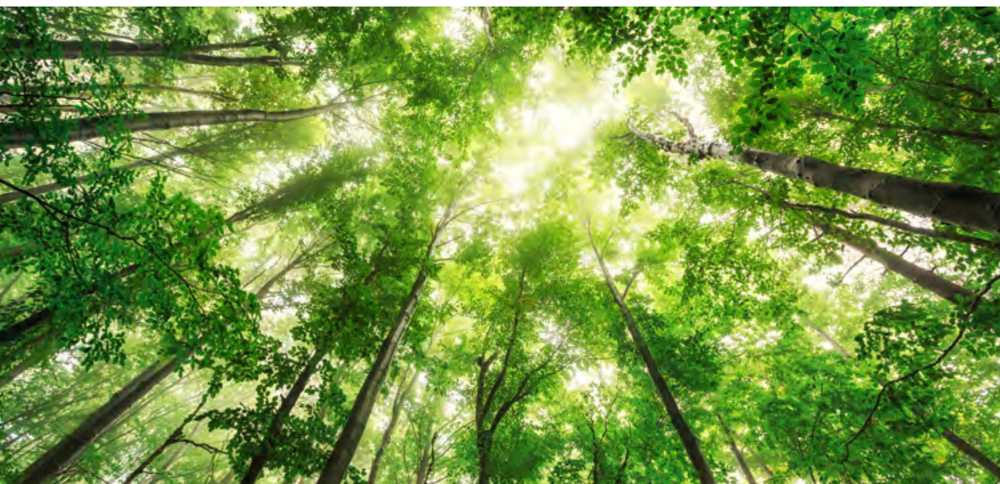

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Early Spring 2024 edition

Welcome to this early Spring edition of Agricultural Lore.

It was great to see so many of you at our five Natural Capital Roadshow events in February in Manchester, Peterborough, Exeter, London and Cheltenham. As natural capital and biodiversity net gain continue to be at the forefront of development across various sectors, not least agriculture, it was very useful to be able to meet other industry players and discuss the new opportunities that these changes bring.

It has already been a busy month for our team as we bade farewell to Broad Quay House, our Bristol home for twelve years, and moved to a new office at 10 Victoria Street. We look forward to welcoming many of you to our new office in future.

Over recent weeks Welsh farmers have been continuing to show their unease around the Senedd's proposed tree planting and habitat requirements under the Sustainable Farming Scheme. At the same time DEFRA's response to the Rock Review gives an indication as to how it intends to provide better support for tenant farmers in England. In light of these developments we continue to consider how our tenancy agreements can fairly balance a landlord's concerns with a tenant's needs to access government funding. More information from the English perspective can be found in Grace Awan's article on page 12. We will await the outcome of the Senedd's consultation on the SFS to see what movement there will be in response to the recent protests in Wales.

We know that diversifying a farming business is one option being considered by many during these uncertain times, and we would draw your attention to the article by Charlotte Coombs on page 7 which discusses the high threshold required to qualify for Business Property Relief when running a wedding business from a converted barn.

Also covered within this issue are case updates highlighting the ability of the courts to require parties to seek alternative dispute resolution as well as considerations to bear in mind around the responsibility for private water supplies and the air space around a property.

Finally, we are looking forward to returning to Cereals in June this year and would love to see many of you there on our stand – more details to follow over the coming weeks.

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In light of the continuing growth in demand for natural capital advice, we are delighted to welcome Rebecca Gliddon as a Senior Associate to our team. Rebecca has a wealth of experience in these areas and will be working alongside Josie Edwards dealing with non-contentious agricultural matters.

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Navigating the skies:
UAVs and air rights over private property

Above the vast patchwork of fields carpeting the UK, a silent revolution is unfolding in the skies. Unmanned Aerial Vehicles (**UAV**s), once confined to military applications and hobbyist pursuits, are being developed for new commercial purposes.

During the coronavirus pandemic, UAVs and drones gained attention for their trialled use by the medical sector, focused on the use of drone technology to deliver medical supplies to patients across Scotland. That organisation has now turned to the development and trial of the UK's first national network of UAV/drone flight corridors, designed to connect hospitals, labs, GP surgeries and distribution centres.

Similar UAV/drone corridors are also under development in other sectors including logistics and agriculture. With the imminent arrival of widespread commercial use of UAV/drone technology, we consider the myriad legal considerations for private landowners.

Who owns the air above land?

Does a landowner have exclusive ownership of airspace rights over their land? Thirteenth century case law provided that a landowner owned their land *"all the way to Heaven and all the way to Hell"*. This very literal interpretation of ownership over the vertical column above one's land cannot persist into the 21st century with the dawn of aircraft, satellites and drones.

The law changed in the 1970s[1] in a case involving an unmanned aircraft deployed to photograph homes with the aim of selling the photographs to homeowners.

The courts determined that landowners' rights extended to such a height as is *"necessary for the ordinary use and enjoyment of their land"*.

Trespass and nuisance

UAV operators must obtain a landowner's permission to land or take off on their land. It is less clear whether the act of flying a UAV over someone's land amounts to trespass or nuisance in and of itself. It will likely depend upon the extent to which peaceable enjoyment of the landowner's property is affected (height and frequency of activity, duration, noise, hovering etc.) having regard to the activity taking place on the ground.

Current legislation indicates that UAV users are exempted from liability where an operator pilots their drone over a person's land in a *reasonable* manner, at a reasonable height, and in compliance with all other relevant laws and regulations (see s.76(1) Civil Aviation Act 1982). Of course, the meaning of *reasonable* is open to interpretation and is yet to be properly tested by the courts.

In addition, all UAVs must be flown in accordance with a general duty not recklessly or negligently to cause or permit them to endanger any person or property.

A landowner is more likely to have an actionable claim where a person causes a UAV to engage in an activity which could be considered a trespass or nuisance, such as landing without permission or causing property damage or personal injury.

Owners or operators of drones will be held to strict liability (liable regardless of one's intention) for any surface damage, personal injury or damage to a person's property caused by a drone[2].

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[1] Bernstein of Leigh v Skyviews & General Ltd [1978] 1 QB 479

[2] Section 76 (2) Civil Aviation Act 1982

Liability is channelled through the owner or operator of the drone and, unless the injury or damage is as a result of the victim's own negligence, the victim must be compensated.

If a person intentionally or recklessly hits someone or their property with a UAV, they could also be liable for a criminal offence such as battery or criminal damage.

The Civil Aviation Authority (**CAA**) is the UK's primary statutory regulator for aviation, including UAVs. Most prosecutions against errant drone operators are conducted by the CAA, although the police have taken an increasingly active role in pursuing prosecutions against individuals.

It should be noted that landowners can also be held responsible for accidents that take place on their land if they have given the drone operator permission to take off or land on their property.

Data protection and privacy

Landowners are also likely to be concerned about the risks UAVs pose to their privacy, particularly those with sophisticated cameras and sensors which process personal data. This may lead to confidentiality and privacy issues if a drone captures footage of, for example, people, vehicles or signage over land.

In the UK, processing of personal data is subject to the GDPR and Data Protection Act 2018. The Information Commissioner's Office (**ICO**) is the UK data protection regulator in charge of enforcing legal requirements. Any drone with a camera should be registered with the CAA. Where a drone operator contravenes data protection rules, the ICO can pursue enforcement action, including fines.

What can landowners do if they are affected by UAVs/ drones?

It can be difficult for landowners to regulate unwanted UAV/drone behaviour. However, there are a number of things they can do. Collecting good records and evidence such as recordings and photos of drone use can be helpful. Reporting incidents to the police and making enquiries of the CAA should also be considered. In more persistent cases, landowners can employ drone tracking technologies. Concerned landowners may also want to register their land as a no-fly zone with the No Fly Drones website.

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Inheritance Tax: Case confirms the high bar to qualify for Business Property Relief

Business Property Relief (**BPR**) from inheritance tax (**IHT**) is a valuable relief for business owners and their families when considering succession planning. Provided the conditions for relief are met, it is possible to claim 100% relief from IHT.

The recent case of *Butler & Others v HMRC* [2023] UKFTT 00872 (TC) provides clarification and guidance on the activities required for a business to be deemed wholly or mainly trading (making it eligible for BPR) as opposed to wholly or mainly holding investments.

Background

Butler concerned a wedding business which was operated from a historic barn. The wedding business formed one of the three activities which were undertaken by a limited liability partnership (**LLP**); the others were farming and commercial letting.

The issue in dispute was whether the LLP's business activities consisted wholly or mainly of holding investments or whether they were wholly or mainly trading. The farming element of the business was clearly a trading activity, and the commercial lettings element was clearly an investment activity. It was the classification of the activities of the wedding business (the most significant aspect of the LLP's overall activities) as either trading or investment which was key in assessing whether the business as a whole would qualify for BPR.

Decision

The First Tier Tribunal (**FTT**) considered that, although amenities and services were provided by the wedding business (including the use of a dance floor and the installation and reconfiguration of furniture and facilities for every ceremony), these did not go beyond the level of activities usually provided for an investment property.

The FTT referred to the spectrum originally described by Carnwath LJ in *HMRC v George* [2004] and later applied to furnished holiday let cases in *PRs of Graham (deceased) v HMRC* [2018] – a bare letting of furnished accommodation would clearly be an investment activity, whereas the provision of "hotel" levels of service would be more indicative of a trading activity.

The FTT described the corresponding spectrum in this context as the hire of *"a village or community hall"* on the one hand (investment), versus *"a fully serviced conference venue"* on the other (trading). The wedding barn venue business was not deemed to have met the level of activity required to be considered trading and, consequently, the LLP as a whole was not entitled to BPR.

Conclusion

Whilst not wholly surprising given HMRC's existing approach to furnished holiday lets Butler is nevertheless another stark reminder of HMRC's high threshold of the facilities and services required to qualify for BPR. The bar remains extremely high.

It also illustrates the importance of undertaking appropriate planning to ensure that a business is structured (and monitored on an ongoing basis) to maximise the chance of securing BPR, particularly where there are a number of different (potentially investment and trading) elements to the business. This is often the case in a landed estates context.

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Partnership:
Five reasons to get a written agreement

A significant number of farming businesses are run through a general partnership structure. Yet how many of those have partnership agreements in place? And how many of those partnership agreements are up to date and fit for purpose?

In the absence of any agreement to the contrary, farming partnerships will be governed by the Partnership Act 1890 (**1890 Act**); legislation that's over 100 years old can hardly be expected to be well suited to 21st century farming businesses.

The situation isn't much better if there is a partnership agreement, but it was drafted many moons ago and no longer reflects how the partnership is run, what the partners want or what the partnership assets are. This issue came to the fore in the 2013 case of *Ham v Ham*, in which the judge observed the cost – both financial and emotional – of having a poorly drafted partnership agreement in place.

Whilst in practice business arrangements are often varied by agreement as and when required, the strict legal position should not be forgotten as it is the only fall back available in the event of dispute.

Below are five key things which happen under the 1890 Act in the absence of express agreement to the contrary:

1. **A partnership may exist, without anyone realising**

   If the definition of 'partnership' under the 1890 Act is met (*"persons carrying on a business in common with a view to profit"*), then a partnership will exist and will be governed by the 19th century legislation. This could have repercussions if the intention was in fact to create an employer/employee relationship or a contracting arrangement, for example.

2. **If any one partner dies or is declared bankrupt, the partnership is automatically dissolved**

   How then are the animals to be fed, or the contractors paid to bring in the harvest, for example? If the business of the partnership is continued by two or more persons, a new partnership is created, and a 'technical dissolution' occurs. This can cause issues such as the bank freezing the old bank account or requesting repayment of outstanding loans.

   The business may also be continued by a single person, acting as a sole trader. In either case, dissolution accounts will need to be prepared so that the outgoing partners' share can be paid to them/their Estate. Until that winding up process is complete, the outgoing partner has a right to a share in the profits of the continuing business or interest on capital. In some circumstances a 'general dissolution' may occur, triggering a final winding up of the business. The legal starting point in that scenario is that any partner can require that all partnership assets are sold.

3. **Any partner can end the partnership at any time**

   In a partnership at will, which is any general partnership for an indefinite term, all that needs to happen to end the partnership is for one partner to notify the other(s) that they no longer want the partnership to continue. This right is subject to any agreement to the contrary – again highlighting the importance of a written document.

4. **No partner can be expelled**

   Unless all the partners have expressly agreed that a majority can expel a partner, for specified reasons – such as misappropriation of partnership money, obstructive behaviour or loss of capacity, no such power exists. The partnership must be dissolved, with dissolution accounts prepared and the non-continuing partner's share in the assets (after payment of debts) paid before the business can continue.

5. **Partners' respective shares in the capital of the partnership are not determined by their contributions**

   The default position under the 1890 Act is that partners are entitled to share equally in the capital and profits of the partnership and must contribute equally towards losses. This might not be an issue, but if, say, one partner has contributed 90% of the capital, it may be that they expect to receive a sum on dissolution that reflects that. Only express agreement can ensure that this expectation will be met.

The best protection is to ensure that up to date written agreements are in place. We know that every farming business is different and has its own unique set of issues to consider.

This is why it's important to involve professional advisers to document bespoke agreements which will best serve the partners and the business now and in the future.

Partnership or company documentation should be reviewed regularly, and at the very least, upon the purchase of new land or significant assets or the introduction of new partners, to ensure it still does what the partners think it does or want it to do.

Look out for future articles about partnership property and lifetime succession planning involving partnerships coming soon.

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Planning:
High court quashes retrospective consent for dairy farm

The High Court recently overturned a retrospective consent for unauthorised alterations to agricultural buildings.

The judge held that the Council unlawfully concluded that the applicant had a "fall-back" position of being able to operate the site as a dairy farm without the unauthorised development.

Background

The applicant acquired agricultural land and set about creating a dairy farm under permitted development rules. However, the applicant altered existing barns by building a concrete yard area and concrete cladding to keep his cows within the confines of the barns. This constituted unauthorised engineering operations.

The applicant sought to regularise the planning position by applying for a retrospective consent. The Council granted consent for the development which was described as fundamental to the dairy operation. A neighbouring resident challenged the decision by judicial review on the following grounds:

- **Ground 1:** that the Council unlawfully concluded that the applicant had a fall-back position of being able to operate the site as a dairy farm without the unauthorised development
- **Ground 2:** that the Council failed to accord great or considerable weight to Natural England's objection in relation to two Sites of Special Scientific Interest (**SSSI**s)
- **Ground 3:** that the Council failed to obtain sufficient information in relation to the odour impacts.

What is the "fall-back position" in planning?

The fall-back position is where development could still take place if a planning application was refused because permitted development rights exist or there is an alternative planning permission. In this case, the applicant sought to establish a permitted development fall-back position of being able to operate the site as a dairy farm without the authorised development and to use it as a lever to gain planning permission due to it being treated as a material consideration.

Judgment

The judge held that the fall-back position was not a real prospect and quashed the consent.

The planning officer described the development as essential for the operation of the dairy farm and the applicant made no attempt to contradict this. The judgement noted the requirement that the planning officer considered not merely what was achievable or "doable" as permitted development, but also whether there was a real prospect that the applicant would have housed cattle in the barns without planning permission – something the available evidence suggested would not have been possible.

The Court also considered that the Council failed properly to consider the impact of development on the SSSIs and the successful challenge on Ground 1 essentially led to success on Grounds 2 and 3.

This decision demonstrates that a fall-back position will be given limited weight if it is unlikely to happen in reality.

Click the link to view the full judgment: [Ward v Torridge District Council [2023] EWHC 2629 (KB).]

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Sustainable Farming Incentive:
Support for tenant farmers and increased collaboration

In October 2022, the Tenancy Working Group (chaired by Baroness Kate Rock) published the Rock Review (**Review**) which highlighted various concerns in the tenant farming sector and made recommendations for DEFRA to address these (see Tenant farming and the Rock Review 2022).

In May 2023, DEFRA published its response to the Review. In The Rock Review: The government's response, we considered how far DEFRA had gone in taking up some of the Review's suggestions including taking any steps to support tenant farmers.

DEFRA has now explained how its commitment to supporting tenant farmers is being actioned. It states that it intends to lower barriers that have previously prevented tenant farmers from accessing environmental schemes and is designing the Sustainable Farming Incentive (**SFI**) with tenant farmers in mind.

Support for tenant farmers

The SFI is currently uncapped for tenants, meaning there is no limit to how much of a holding can be entered into an SFI agreement for certain actions.

In addition, DEFRA has designed the SFI rules so that tenants who expect to have management control of a holding for 3 years can apply for the scheme and access financial assistance. As many FBTs are either on a 2-year fixed term or are on a rolling year-by-year basis, this will widen access for tenants who would not previously have been eligible to enter such schemes.

However, a question remains over whether DEFRA will require tenants to show a landlord's intention to renew the tenancy for the whole three-year period, or whether they will allow tenants to assume that rolling tenancies will continue for at least three years. Current guidance on applying for SFI suggests only that tenants should speak to their landlord if they are unsure whether they will be in management control for the next 3 years.

DEFRA will no longer penalise tenants if they have to exit a scheme early due to their tenancy ending unexpectedly. Nonetheless, issues may arise upon the termination of a scheme partway through its term with the outgoing tenant standing to lose the entirety of that year's payments for any land removed from the scheme (see SFI: The pitfalls of a farm changeover).

The requirement for tenants to be able to say with some certainty that they will have a tenancy for three years poses an interesting dichotomy as, whilst DEFRA are encouraging tenant participation, the introduction of longer-term schemes, more on a landscape scale, has encouraged landlords to consider the management of their estates in a new light. There is evidence that a growing number of landlords are taking land back in hand to allow themselves the maximum opportunity to make the most of these longer-term and wider area schemes.

Collaboration between landlords and tenants

Whilst it is clear that, for SFI at least, DEFRA wants tenants to have the autonomy to make applications, the larger, landscape scale schemes will require more collaboration between landlord and tenant for the application to be successful.

The challenge for DEFRA is finding a way forward that encourages collaboration between landlord and tenant, whilst also looking at the bigger picture, and the benefits for a wider landscape beyond a single tenanted area.

DEFRA has previously legislated in England to allow Agricultural Holdings Act 1986 tenants to override tenancy restrictions which prevent them from claiming "financial assistance" under the Agriculture Act 2020 (i.e. SFI and ELMS). Whilst this does not yet apply to FBT tenants, DEFRA has warned landlords that if they continue to try to exercise control then this legislation will be rolled out for FBTs as well.

Where previous generations of landlords were accustomed to exercising control over their tenants, in this new natural capital era, landlords must look to include more collaborative clauses in their tenancy agreements.

Our recent article FBTs: The natural capital conundrum provides further insight into drafting for this 'middle ground'.

Code of Practice

In response to the Review, a draft Agricultural Landlord and Tenant Code of Practice for England (**Code**) on socially responsible behaviour for landlords, occupiers, and agents has been prepared by a group of representatives of key stakeholders in the sector.

A central aspect of the draft Code is collaboration between landlords and tenants, particularly in relation to their approach to new opportunities, schemes and grants.

The Code makes it clear that this can be facilitated through careful drafting of tenancy agreements. The consultation on the Code closed on 29 February 2024.

DEFRA's approach to SFI and the fact it currently remains uncapped is encouraging for tenants. However, the need to protect the environment must be balanced against the need for food security and sustainable production.

Recent comments from the Farming Minister, Mark Spencer, suggest that this balance will continue to be considered and amended to prevent whole estates being diverted for environmental schemes (either in collaboration with the tenant or by the estate alone).

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Private water supplies:
Responsibility for the supply

It is quite common for areas of rural land to access water privately via a borehole, rather than drawing from the mains. However, the use of a private water supply can come with a wide range of legal pitfalls. Landowners must be mindful of these, particularly where the supply is also used by neighbouring land.

Covenants

For owners of a private water supply, the first step is to consider what rights and obligations exist in relation to the supply. It is worth reviewing the title deeds to check:

- Who has the right to take water from the supply?
- Do they have a right to access land to inspect, maintain and repair the borehole?
- Do they have any obligation to pay anything in relation to the supply?
- Does the owner have a positive obligation to maintain a supply of water from the borehole and / or to maintain the borehole and connecting pipes? Does the person with the benefit of this obligation still own the neighbouring land?[1]
- Are there any restrictive covenants relating to the supply, for example that the owner will not intensify their usage of the land so as to interfere with it?

Once the owner has a clear picture of the rights and obligations relating to the supply, they should ensure these are being complied with appropriately.

Statutory Obligations

An owner or controller of a private water supply also needs to be mindful of the various statutory obligations imposed on them as a private water supplier under the Water Industry Act 1991, the Private Water Supplies (England) Regulations 2016 and the Private Water Supplies (England) (Amendment) Regulations 2018.

Most importantly, under the Water Industry Act 1991, where a private supply is failing, has failed or is likely to fail to provide a supply of wholesome water that is sufficient for domestic purposes to any house it serves, a local authority may serve a notice on the supplier specifying the steps to be taken to ensure a wholesome and sufficient supply of water to the relevant domestic premises. The local authority has the power to ask either the landowner or any of those receiving the water supply to take steps to improve the supply or reduce the demand on the borehole.

Therefore, if a landowner increases the demand on their borehole (for example through intensified agricultural activities) to such a degree that the supply becomes insufficient for the domestic purposes of others using it, the owner should consider seeking additional support from their local water undertaker.

Abstraction Limits

Finally, owners of private water supplies must be aware of the limits of what they can draw from that supply overall.

Up to 20m3 (4,400 gallons, or 20,000 litres) a day can be drawn without an abstraction licence. However, drawing any more than this will require an abstraction licence from the Environment Agency. It is therefore important to consider this if agricultural activities will result in increased drawing from an existing borehole.

[1] Positive covenants do not transfer with land, and so a Deed of Covenant would have to have been entered into on a change of ownership for a positive obligation to be binding.

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Employment:

Changes to holiday pay, TUPE and flexible working

Draft regulations are now in place following last year's government consultation into the reform of holiday pay and entitlement, together with the TUPE (Transfer of Undertakings (Protection of Employment)) regulations. The key information is set out below.

Holiday Pay

All businesses who only employ workers seasonally, or for limited periods in a year (as is often the case in the agricultural sector) will now need to calculate holiday pay for workers who work irregular hours or part of the year as follows:

- 12.07% of earnings in a pay period will amount to their statutory holiday pay entitlement
- for example, if you employ an individual for one month, you may effectively use 'rolled up' holiday pay at the rate of 12.07% of the pay they have received for that month. This, however, only applies to irregular hours workers, part year workers and some agency workers
- all other workers will continue to accrue 1/12th of their statutory entitlement on the first day of each month to be pro-rated thereafter.

This should make the calculation of holiday pay for seasonal / irregular hours workers more straightforward.

TUPE

Following the consultation, the TUPE regulations will change, in our view, beneficially for employers. A business with fewer than 50 employees need not appoint employee representatives in a TUPE situation to carry out consultations but can instead consult directly with the affected employees.

In addition, where there are no existing employee representatives in place and there are, or are likely to be, fewer than 10 employees transferring, businesses of any size will be permitted to consult with the affected employees directly.

These changes seem sensible and pragmatic and will reduce the burden on employers in certain TUPE situations as the need to elect representatives will be avoided.

It is important to ensure thorough consultation processes are completed and necessary statutory timescales met in TUPE situations.

Is your organisation ready for the changes to flexible working?

The new Flexible Working Act is expected to come into force this summer. The key changes to be introduced are as follows:

1. Employees will be able to make two flexible working requests (increased from one) in any 12 month period.
2. There is no longer a requirement for the employee to explain the impact of their requests.
3. Employers must consult with an employee before rejecting their request.
4. Employers must provide a response within 2 months of the request, (reduced from the previous 3 month period), unless a longer time period is agreed by both parties in writing.

ACAS is compiling new guidance for employers in relation to these changes given the likely increase in requests under these new rules.

Next Steps

Businesses should review their current flexible working policy now and/or provide a written policy if they do not already have one. It would also be wise to update managers and consider training as well as being prepared for an increase in requests.

For further assistance, please contact the Michelmores Employment team.

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Disputes:
To mediate or “knot” to mediate?

The Court of Appeal has handed down a unanimous judgment in *Churchill v Merthyr Tydfil County Borough Council* [2023], confirming that the Court can, and will, order:

- parties to engage in non-court dispute resolution (**NCDR**); and/or
- a stay in proceedings to allow NCDR.

This provides long awaited guidance on the Court's power to make such orders, following Lord Justice Dyson's comment in *Halsey v Milton Keynes General NHS Trust* that, *"to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court"*.

The case

Churchill originated as a nuisance claim brought by Mr Churchill against Merthyr Tydfil County Borough Council (**Council**) relating to Japanese knot weed encroaching on his property from a neighbouring Council owned property, causing damage, and loss of value and enjoyment.

The Council queried why Mr Churchill had not used its Corporate Complaints Procedure (**Complaints Procedure**) and warned that if he issued a claim without doing so, they would apply to the Court for a stay and costs. Mr Churchill issued a claim for nuisance in July 2021 and the Council applied for a stay in February 2022.

Attracting the attention of seven intervening parties, including The Law Society, CEDR and CIArb, the Council's application raised a bigger question of high public interest for the Court: can they legally stay proceedings for, or order parties to engage in, NCDR (such as the Complaints Procedure). The Court had to consider whether:

- Dyson LJ's comment in *Halsey* was "*obiter*" (an opinion or remark only, or part of the main reasoning for the decision in that case); and
- if such power exists, whether ordering NCDR breaches Article 6 of the European Court of Human Rights, the right to a fair trial.

Court of Appeal decision

The Court of Appeal allowed the appeal in part, directing that courts can stay proceedings to order NCDR, including mediation, without creating an "*unacceptable obstruction on their right of access to the court*". The comments in *Halsey* were held to be "*obiter*" and not binding on lower courts.

The Court of Appeal did not fix any principles around how or when, in litigation, courts should make such orders, with the Master of the Rolls, Sir Geoffrey Vos stating, "*it would be undesirable to provide a checklist or a score sheet for judges to operate*".

It is therefore not that NCDR will be ordered in every litigation, instead mediation (and other forms of NCDR) will form part of a suite of case management options available to the court. Considering the circumstances of each case, a judge will have to decide when, how and whether it would be appropriate to order some form of NCDR.

Commentary

If used correctly, NCDR can be a highly effective, cost and time efficient dispute resolution tool, which is often less stressful than the litigation process. Whilst a dispute's primary settlement focus may be placed upon the division of finances and/or assets, there are often more sensitive issues at play in family farming disputes, which an independent third party can explore in NCDR. For example, mediation allows for creativity and flexibility within a settlement, allowing the emotional value, or attachment attributed by a party to certain land or property, to be considered.

Flexibility also means intangible items can be included in a settlement, such as an apology, or if there is to be an ongoing relationship between the parties (likely in family farming cases), an agreement as to how future disputes may be dealt with. A court is simply unable to do this.

Moreover, the confidential nature of mediation can preserve family and/or business relationships. This can help prevent irreparable damage by ensuring all parties feel heard, providing them with an opportunity to air grievances (which may or may not be of relevance to the particular dispute) in a private, informal environment.

Churchill should therefore be viewed as a positive decision, which enables judges to compel parties to enter NCDR where they consider creative, flexible and cost-effective resolutions are possible. Moreover, if NCDR is ordered but not successful, this does not prevent the parties from proceeding to trial.

Following *Churchill*, there may be a concern that parties will be forced to engage in NCDR where there is no bona fide desire to settle. This in turn may result in NCDR being pursued as a litigation tactic only, allowing a party to fish for information. Whilst information in mediation is confidential and cannot be used in litigation, this does not prevent a party using it to inform their investigations. The Court of Appeal was silent on what sanctions may be applied, however if a party does not comply with NCDR, they could face adverse costs orders or more serious sanctions.

Conclusion

Churchill brings mediation and the need to consider NCDR to the forefront of parties' minds. Not only could this avoid hefty litigation costs and preserve relationships, but it may also enable the parties to "unknot" issues which would otherwise have remained deeply entangled had the matter proceeded straight to trial.

Churchill may be the catalyst for a surge of mediations and other NCDR methods. This case may also have an impact on the case management of proceedings by directing parties towards settlement at an earlier stage.

Only time will tell.

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Adverse Possession:
New case restricts ability to establish claim

The recent case of *Clapham v Narga* [2023] has cut back on the ability of some parties claiming adverse possession of unregistered land to defeat an alternative registration.

The law

The 'new' rules on adverse possession came into force on 13 October 2003 with the Land Registration Act 2002 (**LRA 2002**). The preceding 21 years have set the scene for an established dual set of rules, based on those new rules from the LRA 2002 and the 'old' regime, under the Limitation Act 1980 and Land Registration Act 1925 (**LRA 1925**). Simply put, the old rules will still apply if you are able to establish 12 years' possession of the land prior to 13 October 2003 or the land is unregistered. The new case of *Clapham v Narga* [2023] EWHC 3337 (Ch), sees a possible shift in these known principles.

The case

In *Clapham v Narga* it was not disputed that the Claimants had been in adverse possession of a strip of land at the end of the Claimants' gardens (the **Strip**) in Thrussington, Leicestershire for a period of at least 12 years before both the registration of the Strip by the Defendant on 18 March 2003 and the enactment of the LRA 2002.

Overriding interest?

It may be assumed therefore that registration in favour of the Claimants would be a formality under the old rules, because the rights acquired would be an automatic "overriding interest" under s.75 of the LRA 1925 (i.e. an interest which takes precedence when the land is registered). This would have the effect that the Defendant was holding the Strip on a bare trust for the Claimants. The Claimants would then be entitled to apply to alter the register of title on the grounds that the Defendant's title had already been extinguished under the Limitation Act 1980 and consequently the registration to the Defendant was a mistake.

Appeal decision

However, Leech J, on appeal, agreed with the trial judge's finding that s.75 of the LRA 1925 had been superseded and it had been accepted that, despite paragraph 18, Schedule 12 of the LRA 2002 not expressly stating as such, there was a three-year long-stop period for the Claimants' rights to be enforced, ending in October 2006. As the Claimants had failed to take any action before the expiry of that three-year period, the effect of section 29(1) of the LRA 2002 was to rank their interests behind the right of the (now registered) freehold owner, unless the Claimants could show that they had an alternative overriding interest under paragraph 2(c) of Schedule 3 of the LRA 2002 i.e. they were in actual occupation. In this case, Leech J considered that the Claimants were not in actual occupation in such a way that would have been obvious on a reasonably careful inspection, because fencing had fallen into disrepair and the ground was not manicured in the same way as the remainder of their gardens, the appeal was dismissed.

Conclusion

This is a significant development because it means that any persons who may have an interest in unregistered land under the old rules must take action before the freehold owners effect registration, or risk losing their rights if they cannot demonstrate actual occupation to a judge.

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Agrilore Quiz
Autumn 2023 Answers:

The quiz last quarter including some ‘heavy’ legal questions in preparation for the CAAV Fellowship Exam.

Congratulations to Ellie Allwood BSc (Hons) LLM FRICS FAAV of Brown & Co. in Lincolnshire, pictured below, with a strong pass! A bottle of English Sparkling is on the way to Ellie.

Thanks all for taking part!

Answers below:

1. **At what net estate value does the Inheritance Tax residence nil-rate band start to taper?**
   A: £2m, see section 8D(5) of the IHTA.

2. **Do tenants pay Capital Gains Tax on statutory compensation paid under section 60 of the Agricultural Holdings Act 1986?**
   A: No. See Davis v Powell (51 TC 492).

3. **Is it possible to use express upwards only rent review clauses in tenancies governed by the Agricultural Tenancies Act 1995?**
   A: No. See section 9(b)(ii) of the Agricultural Tenancies Act 1995.

4. **Do the Crichel Down Rules apply to a water undertaker?**
   A: Strictly no. They are "recommended" to such bodies. See Crichel Down Rules, page 140, para 2 and the annex, however it might be difficult for such a body to defend a judicial review of a decision not to sell, in some circumstances.

5. **How long does a claimant have to appeal a decision by an LPA granting planning permission?**
   A: The form must be filed not later than six weeks after the grounds to make the claim first arose. See Civil Procedure Rule 54.5(5).

Agrilore Quiz
Early Spring 2024 Questions:

This quarter we are trying some gentle natural capital questions!

1. **What is nutrient neutrality?**
   - a) a requirement to offset the contribution of nutrients to watercourses caused by development
   - b) the effect of storm overflows allowed by water companies
   - c) a popular Scandinavian moisturiser.

2. **What is the definition of “additionality”?**
   - a) 'additional or different outcomes and not paying for the same outcome twice'
   - b) 'a real increase in social value that would not have occurred in the absence of the intervention being appraised'
   - c) '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'
   - d) there is no official, across the board definition.

3. **The Biodiversity Net Gain requirement to be set by all LPAs is?**
   - a) 10%
   - b) a minimum of 10%
   - c) any figure which they can justify in policy terms.

4. **What is 'stacking'?**
   - a) a farm tenant also selling BNG credits over their land
   - b) selling multiple natural capital benefits or improvement over the same land
   - c) something which upland farmers do to block grips on moors.

Answers to adam.corbin@michelmores.com.

The winner will receive a bottle of English Sparkling wine.

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