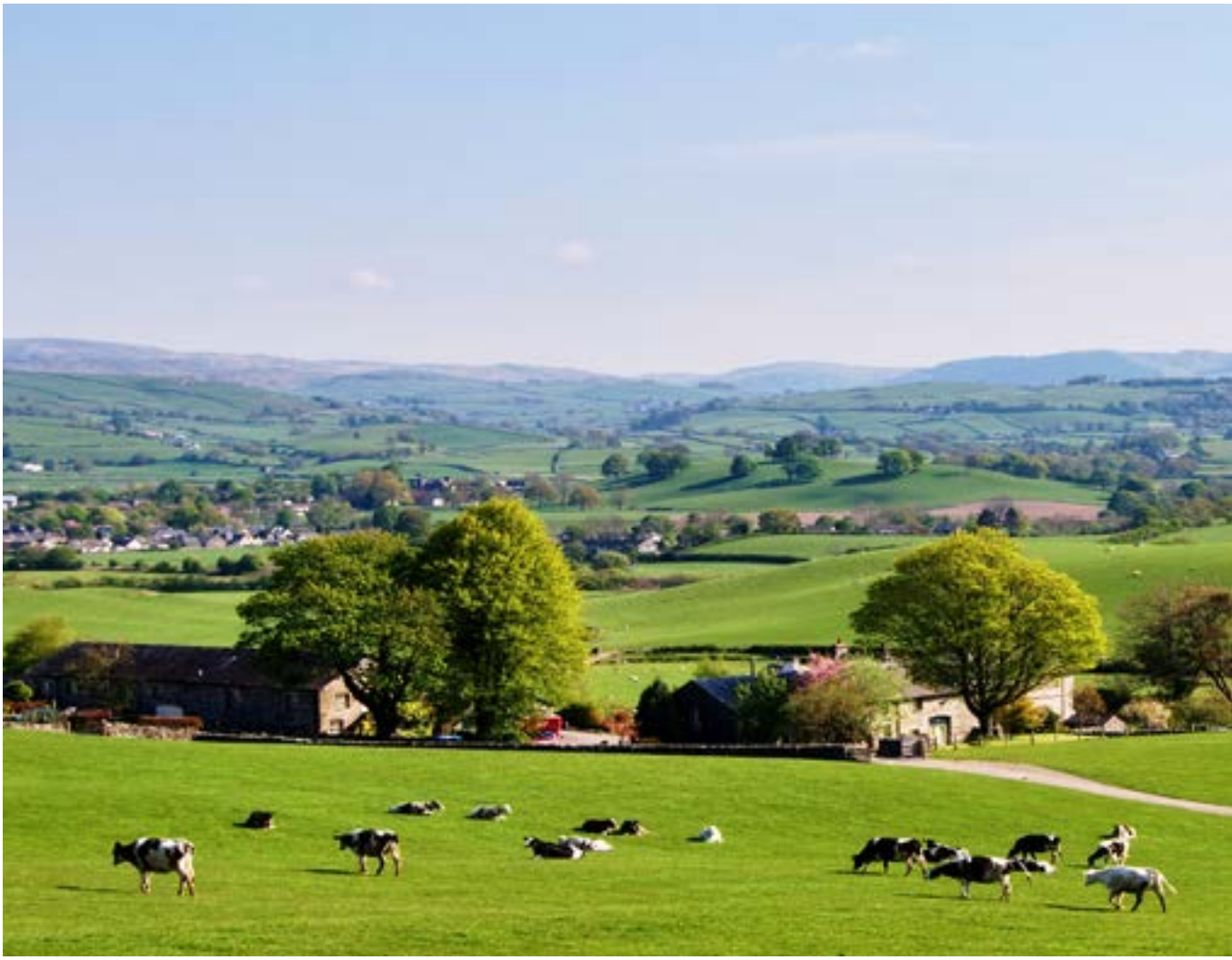
Michelmores
Summer 2020

Agricultural Lore

e-Publication



In this issue:

Welcome to Agricultural Lore

Introduction by Vivienne Williams

Welcome to the Summer Edition of Agricultural Lore.

With the gradual loosening of lockdown across most of the country, I can now look back at the strangest 3 months of my professional experience. I feel fortunate to be part of the agriculture industry which has, in many parts, weathered the worst of the effects of the pandemic reasonably well...or perhaps it is just that farmers are so used to facing catastrophic events (weather, plummeting prices, changes in subsidies etc) that they have learned how to get through them.

Even with coronavirus raging, the Agriculture Bill has continued to make its way through the Houses of Parliament – at the time of writing approaching its committee stage in the House of Lords.

Despite reams of proposed amendments, the only issue which seems to be gaining traction is concern over animal welfare standards and the need to ensure that producers adhering to higher standards of welfare in the UK are not undercut by cheap imports from countries which accept far lower standards.

Even then all attempts to incorporate this into the Bill have been resisted; in response, the Government has instead set up a separate Trade and Agriculture Commission to report on this whole issue, presumably hoping that this will satisfy those arguing for this amendment to the Bill. Although a step forward, the Commission report is only advisory, so it remains to be seen whether the terms of future trade deals with the US and other nations reflect its recommendations.

Although the national media has been saturated with coronavirus, there have been other interesting developments in the law over the past 3 months. So, once again this edition of Agricultural Lore focuses principally on those matters.

Ben Sharples kicks off with a case involving an expert witness, which, in fairly dramatic form, highlights the risks of breaching an expert's duties to the Court.

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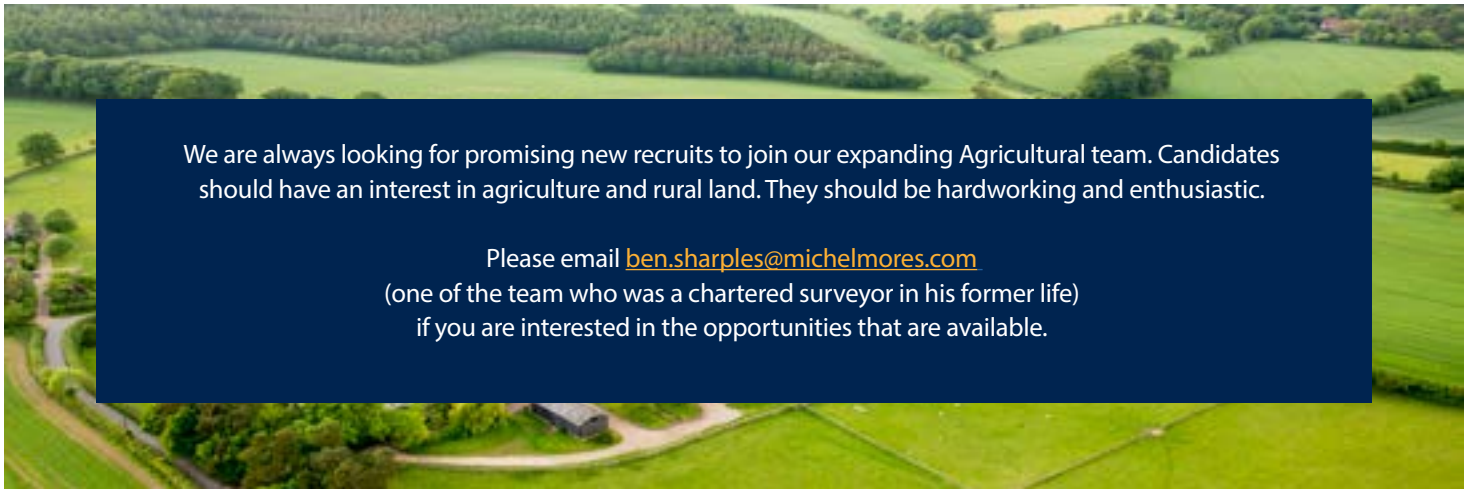
Adam Corbin then explains another new stamp duty land tax case, this time involving an annex to a house, whilst Edward Porter brings us up to date on the inheritance and capital gains tax changes, which look increasingly likely to be brought in as the Chancellor attempts to pay for coronavirus expenditure.

Karen Williams and Rob Bailey consider the impact of the measures, which have just been introduced in the Corporate Insolvency and Governance Act 2020; sadly measures with which we will doubtless become very familiar, as corporate businesses around us fail over the coming months and years.

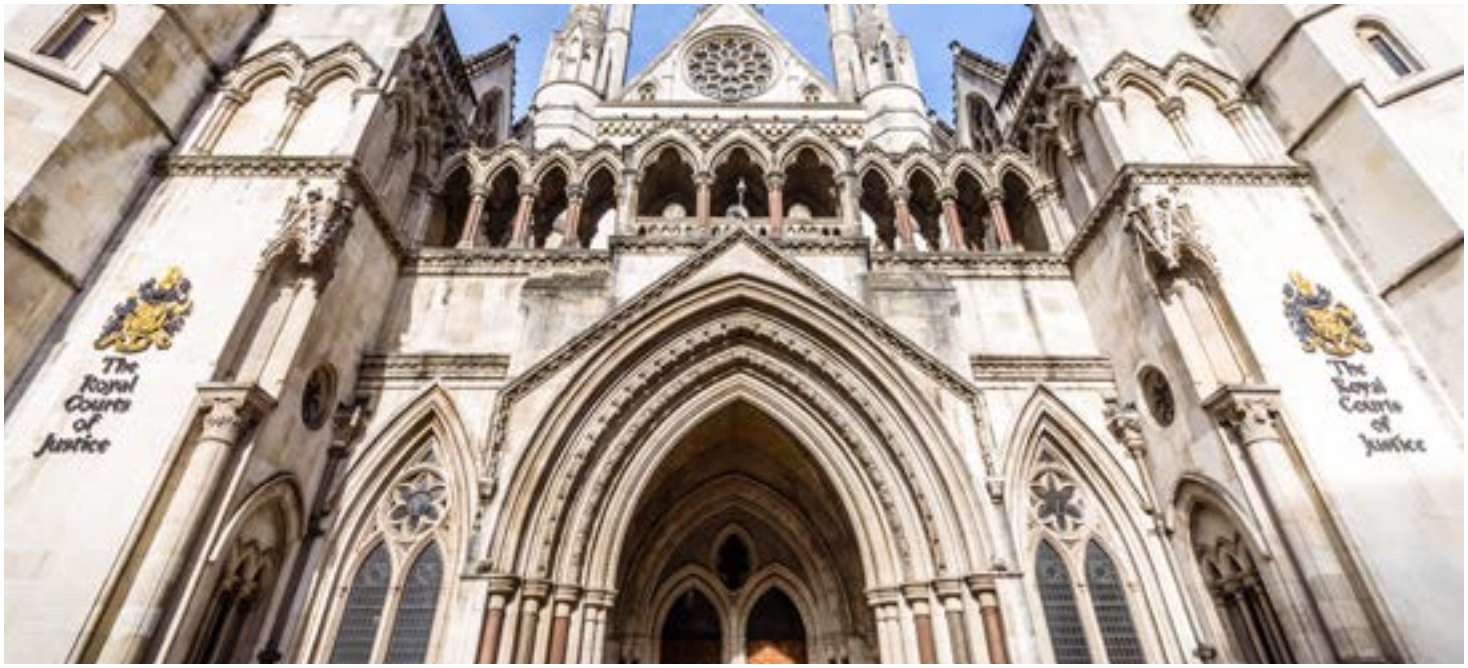
We cover a number of subjects and cases "In Brief" including two residential tenancy cases on gas safety certificates and Airbnb type sub-lettings, an IHT valuation case, ideas for improving a class Q planning consent and a reminder that the Tenant Fees Act now catches existing lettings.

As usual we end with our Summer quiz on adverse possession and prescriptive rights, to relieve the strain of too many zoom calls.



We are always looking for promising new recruits to join our expanding Agricultural team. Candidates should have an interest in agriculture and rural land. They should be hardworking and enthusiastic.

Please email ben.sharples@michelmores.com
(one of the team who was a chartered surveyor in his former life)
if you are interested in the opportunities that are available.



Expert witness report: Contemptuous content

All expert witnesses know that they are bound by an overriding duty to assist the court, which overrides any obligation owed to their client. This fundamental duty is set out in Part 35 of the Civil Procedure Rules, which also contains further requirements as to the content and structure of expert reports.

The report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

All reports must contain statements that an expert understands his core duty to the court, has complied with CPR 35 and that the report is verified by a statement of truth which will be familiar to many:

> "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

The consequences of an expert failing in their duties can vary from a judicial ticking off, a claim in professional negligence, a wasted costs order or a referral by the judge to their relevant professional body. None of these constitutes a good day out, but the ultimate penalty is perhaps not widely known about – contempt of court.

Liverpool Victoria case

It should be made clear that this remedy will only apply in cases where the failure of the expert to comply with their obligations is at the extreme end of the spectrum. Such a situation arose in the case of *Liverpool Victoria Insurance Company Limited v Dr Asef Zafar* [2019] EWCA 392 (Civ).

This case was an appeal from the High Court, which had determined that the expert, Dr Zafar, was in contempt of court. Dr Zafar had a successful medico-legal practice specialising in low value personal injury claims. Using appropriate software he was able to streamline the process and his evidence was that he could examine a patient and produce a report within 15 minutes. Anyone reading this and grappling with a valuation report will perhaps raise an eyebrow at the revelation that Dr Zafar produced about 5,000 reports a year.

This case involved a whiplash claim and Dr Zafar prepared a report on the accident victim, which confirmed that he had made a full recovery. The report contained the usual declarations and a statement of truth.

The accident victim complained to his solicitor that he had told Dr Zafar that he was suffering with ongoing symptoms of neck, shoulder and wrist pain. The solicitor purported to write a letter to Dr Zafar asking him to review his notes and produce an amended report if appropriate. The High Court judge found that this letter was in fact not written on that date and was fabricated much later. There was email correspondence which suggested symptoms at odds with Dr Zafar's record of the examination and asked if full recovery was likely within 6-8 months.

Revised report

Dr Zafar produced a revised report without a further examination taking place. The revised report gave no indication that there had been a previous version and bore the same date as the original. The revised report was substantially different saying that the pain had not improved, analgesia was required and that the symptoms would resolve within 6-8 months.

County Court proceedings were issued claiming damages relying on the revised report. Unfortunately, a paralegal included the original report in the trial bundle by mistake. The Judge adjourned the hearing and gave directions that witness statements should be produced by those involved.

Dr Zafar stated that the original report was the correct version and that the revised version had been produced without his consent. That assertion was later retracted and he said that he had amended the report. Each witness statement was verified by a statement of truth, which obviously could only correctly apply to one of the statements made. Interestingly, the requirements for such statements of truth have recently changed to include a reference to contempt of court as follows:

> "I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

Contempt of Court claim issued

The insurance company subsequently issued a claim for contempt of court against Dr Zafar and the instructing solicitor. The High Court found that Dr Zafar had no proper basis for the amended prognosis and his conduct went beyond negligence. These reckless acts were then compounded by an attempt dishonestly to cover up the mistake and blame someone else, before submitting conflicting witness statements, one of which had to be untrue. Similar findings in respect of untrue witness statements were made in respect of the solicitor.

The High Court Judge (relying on the judgment of *Moses LJ in South Wales Fire and Rescue Service v Smit*h [2011] EWHC 1749 who observed that false evidence causes serious damage to the administration of justice) said:

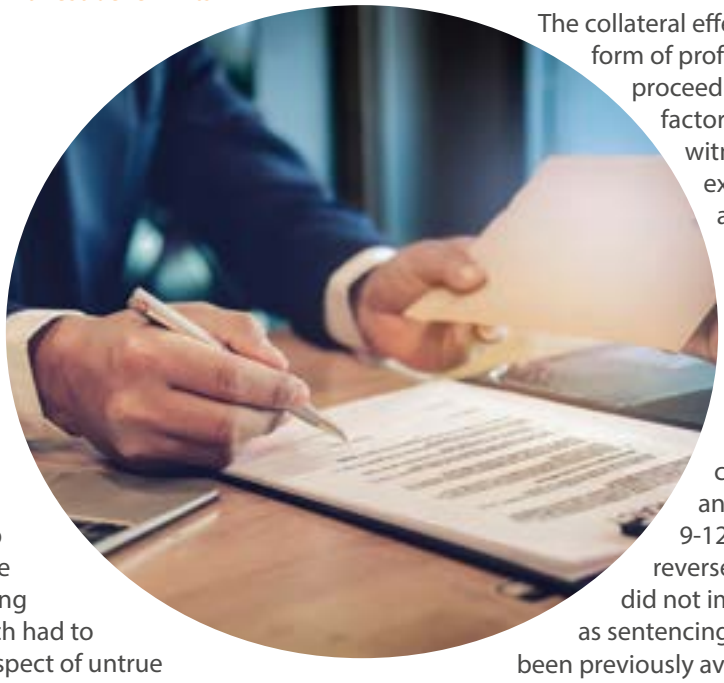
> "Those who make false claims should expect to go to prison. Solicitors and expert witnesses who act dishonestly in the evidence they give to the court, whether in support of such claims or otherwise, must expect a similar outcome."

In sentencing, the High Court concluded that the solicitor's conduct was so serious it justified an immediate custodial sentence of 15 months. Dr Zafar was sentenced to 6 months in prison suspended for 2 years. The insurance company appealed on the grounds that Dr Zafar's sentence was too lenient.

Court of Appeal review sentence

The Court of Appeal observed that sentencing guidelines from the criminal courts provided guidance, but there was no authority on the appropriate sentence for a dishonest expert witness in contempt of court. The observation was made that acting corruptly for payment was bad enough, but it would still be a serious contempt of court, even if the expert witness acts from an indirect financial motive, such as a desire to obtain more work from a solicitor. This is because of the reliance that the court places on expert witnesses.

The view was expressed that this reliance is so important that an expert who recklessly makes a false statement will be almost as culpable as one who acts intentionally.



The collateral effects of conviction in the form of professional ruin or disciplinary proceedings will not act as mitigating factors in the case of an expert witness. This is because an expert is expected to have good character and professional standing in performing that role.

The Court of Appeal decided that a 6 month suspended sentence was unduly lenient – essentially for reasons aired in the High Court hearing. The correct tariff would have been an immediate custodial term of 9-12 months. However, whilst they reversed the High Court decision, they did not impose the more severe sentence, as sentencing guidance in this area had not been previously available. It would, they said, be unfair to impose on Dr Zafar the adverse consequences of that guidance.

Lessons from this case

This is an extreme case, but there is one point of general application, which will apply to experts who don't stray from the path so drastically. Care must always be taken when amending reports, particularly if that results in a change from previously stated opinion. An expert's duty to the relevant tribunal is paramount and should be unaffected by the pressures of litigation and be seen to be so. Any changes must be sufficiently explained and justified, so that any questions, as to the alteration of opinion, can be answered or, hopefully, avoided altogether.

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In Brief: Residential Lettings

Preventing Airbnb type sub-lettings

With the rise in popularity of websites like "Airbnb" and "Booking.com", home owners and occupiers have increasingly taken opportunities to let (or sub-let) out their homes on very short term lets. This has sometimes given rise to noise and anti-social behaviour problems for neighbours, as guests make the most of their stay.

The recent case of *Triplerose Ltd v Beattie* [2020] has provided useful guidance on the extent to which a landlord can use lease covenants to control such activity.

The case

In Triplerose the dwelling was a flat, held on a long term lease, containing a covenant not to use the flat for any purpose other than "as a private dwelling house for occupation by one family at any one time", and not to carry on any trade or business "upon the [p]roperty". The lessees lived in the flat 2-3 days a week, but let it out for short term occupation at other times. A separate company handled advertising, check-ins and laundry.

The First-tier Tribunal found no breach of the lease, but the landlord then appealed. The Upper Tribunal found a breach of one covenant, but not the other as follows:

Private dwelling use

The Tribunal decided the correct approach was to ask whether the occupant of the flat at any given time, was using it for any purpose other than as a private dwelling for occupation by one family at any one time. The individuals who occupied the flat after responding to internet advertisements were not fulfilling this requirement, and thus the lessees were in breach of covenant.

Trade or business prohibition

The Tribunal noted a distinction between using premises as a business resource and carrying on a business upon the premises. The covenant prohibited the lessees from conducting business "upon the property", but the lessees were not doing that. Although they were using the flat for the business of short-term letting, the business was being carried on from elsewhere. The provision of laundry and check in services by the company did not alter this position. The flat itself was being used for short-term residential purposes (albeit as part of a business); no activity was being carried on "upon" the property, which in itself amounted to a business and thus there was no breach of this covenant.

Section.21: No gas safety certificate…no fault?

Landlords (and practitioners) have been eagerly awaiting the Court of Appeal's ruling in *Trecarrell House Limited v Rouncefield* [2020] EWCA Civ 760, on whether a landlord's failure to provide the tenant with a gas safety certificate ("GSC") prior to the tenant's occupation, prevents a landlord permanently from serving a section 21 (no fault eviction) notice to quit.

Gas safety certificates: a reminder

- Landlords must ensure that gas safety checks (GSC) are conducted every 12 months on all gas appliances and flues by a registered Gas Safety Engineer.
- A copy of the resulting certificate must be given to all tenants before they occupy the premises, or for existing tenants, within 28 days of the date of the GSC.
- The cost of the checks must be borne by the landlord.

What did the Court of Appeal decide?

By a 2-1 majority the Court determined that the failure to provide tenants with a GSC prior to occupation does not prevent a landlord serving a section 21 notice, as long as the relevant GSC has been provided before service of the notice. The failure to provide the GSC was considered to be a remediable breach.

However what the Judgment does not consider, is whether the position would be the same if:-

- A landlord did not ensure a GSC was conducted, resulting in there being no GSC before the tenant went into occupation.
- A landlord does not ensure an annual inspection is carried out, also resulting in there being no up to date GSC.

Whilst the decision has provided some relief, it remains the case that prudent landlords should ensure that they continually comply with the various legislative requirements.

Care should be taken by landlords in deciding who should receive a copy of the certificate as required under the gas safety regulations, and in selecting the correct method of service. The issue of method of service will depend on the wording of the relevant tenancy agreement. Hannah Drew explained this issue in her recent article "Learning the Law: Electronic signatures and email" included in the December 2019 edition of Agricultural Lore

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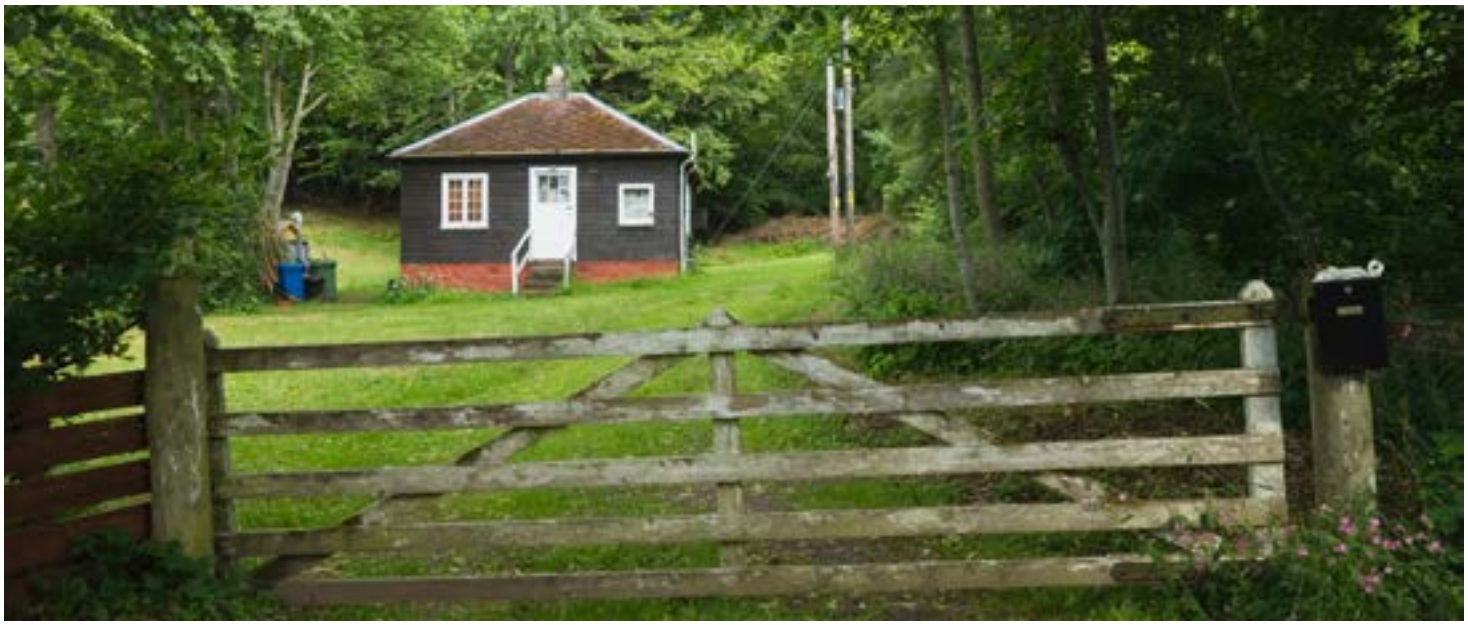


Stamp Duty Land Tax:
Multiple Dwellings Relief case hinges on the lack of a door

In the recent case of *Keith Fiander and Samantha Brower v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKTT 00190 (TC), the First-Tier Tribunal Tax Chamber has considered the availability of Multiple Dwellings Relief (MDR) against Stamp Duty Land Tax (SDLT) where a property is sold with an annex.

The case

Mr Fiander and Ms Brower (the Appellants) purchased Hemingford House, Geddington near Petersfield in April 2016 for £575,000. The Tribunal set out the following features of the property:

- A detached property consisting of: a main house; an annex situated to the rear of the main house and connected by a corridor; a garage; and a summer house.
- The annex comprised a sitting room, a kitchen/utility room, a bedroom and a shower room.
- It could be accessed from the outside via glass "French doors", separating an outside wood "decking" area from the sitting room. It had a flat roof (in contrast to the pitched roof of the main house).
- A corridor connected the main house and the annex. To use it to walk from the main house to the annex, one had to step down a single step, turn left, walk a few steps (about equal to the length of one of the bedrooms), and then turn right and go up one step.
- There were door jambs in place at the point at which one stepped down from the main house into the corridor (but no door).
- The property was unoccupied at the time of purchase and was in some degree of disrepair – the heating was not working (the boiler needed replacing); there were problems with damp such that some of the flooring needed replacing.
- The annex did not have its own separate postbox, council tax bill or utility supply.
- The "rightmove" website described the property as having three bedrooms ("bedroom 1" being in the annex) and two loft rooms. It did not mention the annex as such.
- The local council had sent post addressed to "Geddington annex".

The difference in tax with and without MDR was £10,000.

The Law

The Finance Act 2003 (FA03) at section 55 sets out the amount of SDLT due in respect of chargeable transactions. Schedule 6B sets out the relief available for MDR under section 58D.

MDR only applies if more than one dwelling is acquired, and what counts as a dwelling is set out in schedule 6B:

> "(2) A building or part of a building counts as a dwelling if –
> ((a) it is used or suitable for use as a single dwelling …"

The way in which the relief is calculated is rather complex, but the intention is that those purchasing multiple dwellings are not taxed as if they were buying one large property, but given tax treatment more in line with the purchase of a number of single dwellings separately.

Application to this case

The Tribunal considered whether the main house and annex were, at the time of purchase, each suitable for use as a single dwelling. The Tribunal could not consider actual use, since the property was empty.

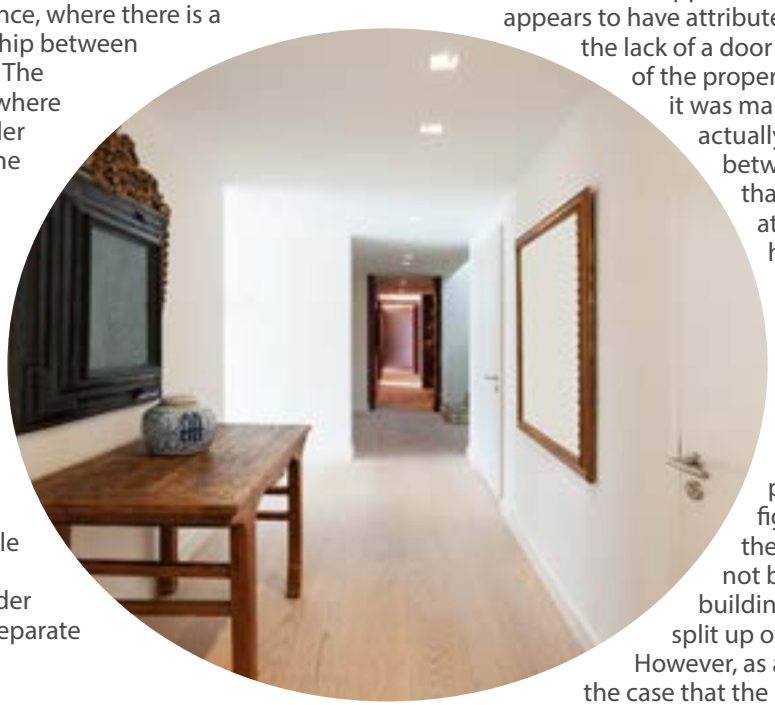
"Suitable for use"

Suitability for use was approached as an objective determination, to be made on the basis of the physical attributes of the property at the relevant time, from the perspective of a reasonable person, observing the physical attributes of the property, at the time of the transaction. The Tribunal noted that the annex adequately accommodated sleeping, eating, cooking, washing and sanitary needs and a place to sit and relax.

The Tribunal also noted that the annex was physically distinct from the rest of the property, enabling an occupant to live there without any loss of privacy, including by having to cross through communal areas.

Distinct separate living

The Tribunal noted that there were circumstances in which it might be possible to have distinct separate living accommodation, despite the lack of any physical secure separation of the two. For instance, where there is a very particular kind of relationship between the occupants of the two parts. The Tribunal hypothesised such as where the annex is occupied by an older relative, grown up children of the occupants of the main house, or a lodger, provided this arrangement gave adequate privacy and security to occupants of both parts of the property, given family or other bonds of trust.



The Tribunal was of the view that these "specific circumstances" would effectively be outside of the remit of the objective reasonable person observing the property, such that they would not consider each part suitable for use as a separate dwelling.

Effect of the corridor

The Tribunal was also of the view that the effect of the corridor, joining the two parts, made them unsuitable for use on a stand-alone basis, and noted that the property was marketed as one single dwelling.

Minor physical adjustments

The Appellants also pursued an argument that with a relatively minor physical adjustment being carried out, the annex could be used separately, even if that was not possible now (in this case, the relatively minor adjustment would be erecting a barrier between main house and annex). As such, given the language of schedule 6B - "used or suitable for use" – the intention of the statute cannot have been to allow HMRC to shut its eyes to such a common sense alternative.

The Tribunal did agree with this line of argument, but not its application. The Tribunal was of the view that new physical features could not be introduced to enable a new and different kind of use, even if the new physical features are relatively easy or quick to install. The (hypothetical) installation of dual locking doors (as in adjoining hotel rooms) was considered not to be easy or quick enough.

The Tribunal was not taken by arguments about the annex having a separate postal address, or no separate services or council tax status, attributing them with little weight.

Conclusions

It appears that it would have taken very little to swing this matter in favour of the Appellants, given that the Tribunal appears to have attributed most of its reasoning to the lack of a door or barrier between the parts of the property, and the manner in which it was marketed. Since a door jamb actually featured in the corridor between the two parts, it may be that a door did actually feature at some point, and it may well have been possible to market the property as two separate parts.

Vendors might consider the tax treatment of property in advance of advertising it for sale, in order to give perspective purchasers a fighting chance of availing themselves of reliefs. It is not being suggested here that building works are undertaken to split up otherwise single dwellings. However, as a minimum, it is certainly the case that the marketing materials have often proved fatal to many appellants against SDLT decisions. Beyond that, simply documenting and recording existing use arrangements is often very helpful, particularly with mixed use claims.

One final point regarding any HMRC challenge is that in most cases HMRC has only 9 months from the date of filing a return to query it. However, buyers are required to retain transaction documents for 6 years, and HMRC has powers to revisit the assessment for up to 20 years, depending on its reasons for doing so. For those who require more finality it is possible to make a voluntary disclosure.

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In Brief:

Inheritance tax and undervaluing property

Where land is sold by personal representatives for less than the probate value within 4 years of the date of death, relief for the loss can be claimed from HMRC by replacing the probate value with the sale value. Where land is sold by personal representatives to an unconnected person at less than the probate value, there should be no issues with making such a claim. However, the recent case of *Estate of Douglas Charles Thomas v HMRC* [2020] highlights the care required when land is sold to a connected person.

The Thomas case

Mr Thomas died on 9 April 2008 owning 8.08 acres of land with development potential. The land was subsequently sold within the four year period to a company owned by the deceased's daughter and son-in-law for £500,000.

Legislation provides that for the purposes of claiming loss relief on the sale, the sale price is taken to be the price for which land is sold, or if greater, the best consideration that could reasonably have been obtained for the land at the time of the sale.

HMRC claimed that the best consideration that could have been obtained on the market was £800,000 and this was the amount on which inheritance tax should be due. The personal representatives subsequently applied to the Upper Tribunal to claim loss relief on the sale.

In considering the evidence put forwards by the parties, the Upper Tribunal considered the best consideration that could reasonable have been obtained as the price which the property might reasonably be expected to fetch if sold in the open market at that time. The Upper Tribunal held that the best value that could have been obtained on the sale was £645,000 and fixed the claim for loss relief at this amount.

Potential penalties for mis-reporting

Personal representatives are under an obligation to report correctly the value of the deceased's estate to HMRC. If a personal representative fails to include property at its open market value, interest will accrue on any additional inheritance tax due and a penalty may be raised. If a personal representative has knowingly misled HMRC then criminal proceedings for fraud may be brought against them.

This case highlights the importance for personal representatives of seeking professional advice when administering an estate to ensure that they correctly report the value of the estate to HMRC.

Tenant Fees Act 2019 catches existing lettings

The Tenant Fees Act 2019 ("Act") came into force on 1 June 2019 and initially applied to tenancies commencing from that date onwards. There was a one year grace period for tenancies that started before 1 June 2019, however, as of 1 June 2020, the prohibitions under the Act now apply to all tenancies falling under the following categories:

- Assured Shorthold Tenancies (except for social housing and long lease tenancies)
- Student lettings
- Licenses to occupy housing

Prohibited payments

The Act sets out certain payments a landlord or letting agent can request from a tenant, their guarantor or person acting on their behalf ("relevant persons" under the Act). Any other payments are deemed "prohibited payments". These include:

- Tenancy set-up fees
- Inventory check fees
- Credit check fees
- Check out fees
- Professional cleaning fees

Landlords and letting agents are also restricted on the amount of deposit and holding deposit they can request and it should be noted that slightly different rules apply depending on whether it is a landlord or letting agent asking a relevant person to make a prohibited payment.

Any term in a tenancy agreement requiring a prohibited payment will not be binding on the tenant, although the rest of the tenancy will still have effect.

Sanctions

The sanctions for breach of this Act are a financial penalty of up to £5000 for each breach (i.e. each request for a prohibited payment). Even more seriously, a criminal offence is committed if the landlord or agent commits a further breach within 5 years of a financial penalty being imposed, or if convicted of an offence for an earlier breach. This is a banning order offence and can carry an unlimited fine.

A landlord in breach of the Act is also prevented from serving a section 21 Notice and using the fast-track termination procedure to regain possession of the dwelling. Landlords and letting agents should check tenancies, which were granted before 1 June 2019 to ensure that any prohibited payments are returned to the tenant and that any new requests for payment comply with the Act.

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Litigation costs: The winner takes it all...or do they?

We have reported previously on the First Tier Tribunal's ("FTT") decision in *Carr v The Trustees of the JPMH Evelyn 1997 Settlement*, where we acted successfully for the tenant, William Carr.

As a reminder, the FTT determined that William was entitled to a succession tenancy of the Holding and dismissed the landlords' application for consent to the operation of the notice to quit on grounds of sound estate management. In April the FTT determined William's application for costs.

Costs in FTT Proceedings

In FTT proceedings, the convention that the loser usually has to pay the winner's costs does not apply. Instead, rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules applies to agricultural land and drainage cases (which includes all Agricultural Holdings Act 1986 cases).

Those rules only provide the FTT with jurisdiction to make an order in respect of costs *"if a person has acted unreasonably in bringing, defending and conducting proceedings."* Therefore, a successful party will often not receive any contribution to their costs from the losing party. That can be a bitter pill to swallow, when the costs of the proceedings have run to (often hundreds of) thousands of pounds.

Three stage approach

When assessing whether to make a costs order, a 3 stage approach should be adopted (as laid down in *Willow Court v Alexander* [2016] UKUT 0290 (LC):

- Has there been unreasonable conduct? That is not a matter of discretion, but requires the FTT to apply an objective standard of conduct. If they do not find that the conduct has been unreasonable, they will not consider whether to exercise the power.
- If there has been unreasonable conduct, the FTT should consider whether to make an order for costs in light of that conduct. Even if the FTT find that there has been unreasonable conduct, they must consider it appropriate to make an order.
- The FTT must determine what the order for costs should be. If the FTT find there has been unreasonable conduct and an order for costs should be made, that does not automatically mean that the losing party is going to be ordered to pay the entirety of the winning party's costs.

1. What will the FTT consider when determining whether there has been unreasonable conduct?

In exercising its discretion, the FTT is not *"inhibited or constrained by the requirement of establishing a strict causal nexus between the unreasonable conduct and the costs said to be recoverable on the ground of that conduct"*.

The FTT must apply *"a principle of relevance"* and must have regard to the *"nature, gravity and effect of the unreasonable conduct"*.

It must be remembered that the relevant conduct is the conduct in bringing the proceedings. Unreasonable conduct before the proceedings started will not be a factor, which the FTT is required to take into account. So it is the motive of the party bringing the proceedings, that may be relevant in determining reasonableness.

A party will not be found to have been unreasonable because it was unsuccessful in the proceedings. The 'acid test' is "whether a reasonable person in the position of the party against whom costs are sought would have conducted himself, or herself, in the manner complained of."

The Objective Standard

In Carr, the FTT said that the objective standard of conduct:

"should not be set at an unrealistically high level… costs ordered should be reserved for the clearest cases. A Tribunal should not be over zealous in detecting unreasonable conduct after the event. In particular… a Tribunal should be careful to guard against hindsight and against the determination of a costs application with the benefit of hindsight and with the ex post facto clarity that accompanies hindsight. Experience shows that that which is apparently obvious following analysis and determination is, often, very much less obvious prior to that determination."

If a party does not have legal representation then the objective standard would be that expected of a party in that position.

Where both parties have legal advice and representation, as was the case in Carr, then the objective standard being applied will have regard to that.

As to the level of costs to be paid, readers may have heard legal professionals refer to costs being assessed on the standard or indemnity basis.

The Standard Basis

The Court will only allow a party to recover costs which are proportionate to the matters in issue. Any doubt as to whether costs have been reasonably incurred or reasonable and proportionate in amount are resolved in favour of the paying party.

The Indemnity Basis

There is no requirement for the receiving party to establish that their costs are proportionate. The Court will resolve any doubt as to whether the costs were reasonably incurred or reasonable in amount in favour of the receiving party.

Indemnity costs inevitably means that the paying party will have to pay a significant amount more.

2. When the FTT establish unreasonable conduct, on what basis should the costs be paid?

Where the FTT finds that there has been unreasonable conduct then the losing party will have to pay the costs on the indemnity basis, where the conduct was not only unreasonable, but unreasonable to a high degree to take the case *"out of the norm"*.

3. What did the FTT determine?

In Carr, the landlord's behaviour was held to be outside the norm. The FTT found that not only was the landlords' application weak or speculative, it was one that should never have been brought, not least when the landlords had experienced legal representation throughout.

The FTT were particularly scathing of the landlords' conduct as regards one of its expert witnesses, who was found not to be truly independent and was a 'hired gun' put forward by the landlords to make their case, with evidence tailored to that purpose. This expert was seen as one of the landlords' team as opposed to a an impartial and independent witness.

The FTT ordered that the landlords should pay 80% of William's costs on the indemnity basis.

The FTT made the point that in a number of cases, where the conduct or lack of independence of an expert has necessitated an indemnity costs order, that does not extend to the entirety of the costs of the proceedings, but is limited to the costs incurred in connection with the expert and their conduct. This FTT did not consider it appropriate in this instance, because the expert's conduct had *"been at the heart"* of the landlord's case.

Conclusion

When advising clients the costs of litigation must always be borne in mind. Clients' must always be forewarned that even if successful in litigation, they will not find themselves in a position where they will recover the entirety of the sums that they spend.

The decision in Carr is an extraordinary one. There have been few, if any cases, in recent years in which a party's conduct and the conduct of their main expert witness has been called into question and criticised so heavily.

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IHT & CGT: Opportunity to plan before wave of reform arrives

Since the start of the pandemic, the emergency measures put in place by the Chancellor have propped up many aspects of the UK economy. The furlough scheme in particular is reported to be supporting approximately a quarter of the UK's workforce and has cost £20bn to date. A similar scheme for self-employed has cost a further £7.5bn to date.

Government borrowing has increased as a result and it appears inevitable that taxes will have to rise as well. Inheritance Tax (IHT) and Capital Gains Tax (CGT) are two personal taxes that the government could reform to raise funds. If you intend to carry out estate planning to reduce your exposure to IHT and CGT, you should consider whether to accelerate those plans.

IHT reforms

Wholesale reform of Inheritance Tax was actually under discussion before the pandemic. Two reports in relatively quick succession set out potential changes. The second in particular contained more radical proposals relating to IHT and lifetime gifts. Were those recommendations to be enacted, tried and tested IHT planning strategies, involving lifetime gifts, would have to be looked at again. Potential changes to Agricultural Property Relief (APR) and Business Property Relief (BPR) should also be a concern.

Last summer the Office of Tax Simplification's (OTS) suggested reforms to three main areas:

- Businesses and farms: to qualify for BPR for IHT the "trading" activities of a business (as opposed to "investment" activities) would increase from 51% to 80% to align with the Entrepreneur's Relief for CGT.
- Interaction of IHT and CGT: there is no CGT on death which can mean that assets which are not subject to IHT are not subject to either tax. The OTS recommended that where IHT is not charged the beneficiary of the estate should inherit the untaxed gain for CGT as well.
- Lifetime gifts: when a person makes a gift it will remain within their estate for IHT purposes for 7 years. The OTS recommended a reduction to 5 years and an increase in the annual allowance of £3,000 but also the removal of various other reliefs that apply to lifetime gifts.

All-Party Parliamentary Group report

The report of the All-Party Parliamentary Group for Inheritance and Intergenerational Fairness (APPG) in February went

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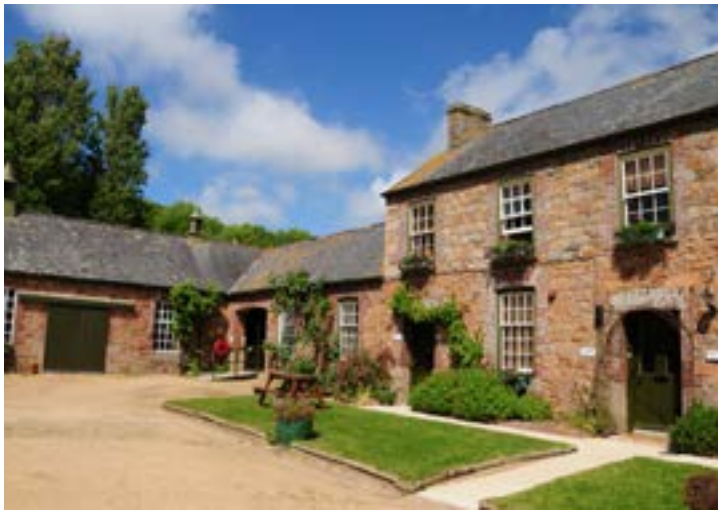


further. It suggested an overhaul of IHT involving a lower rate of IHT, but also significant changes to reliefs in other areas, such as how lifetime gifts are taxed. In particular:

- The rate of IHT would be reduced from 40% to a rate between 10% - 20% with the potential for a higher rate on higher value estates.
- APR and BPR would be abolished.
- Lifetime gifts over an increased annual allowance of £30,000 would be taxed immediately at the new lower rate. It would no longer be possible to make lifetime gifts and survive 7 years, so that the value of the gift is not subject to IHT.
- The current Nil Rate Band of £325,000 or a similar figure per person would remain available on death, but the additional Residence Nil Rate Band, which is currently £175,000 per person, would be abolished.
- Similar provisions relating to CGT and death to those in the OTS report would apply. Assets will not benefit from reliefs to both IHT and CGT at the same time.

Both of these reports cannot be enacted as IHT cannot be both changed in the way suggested by the OTS and also reformed much more widely, as suggested by the APPG, but the two reports suggest that changes may be coming, and that was before the pandemic.

Personal taxation

Reform of personal taxation is one avenue to raise more revenue. On CGT for instance, the current rate is 10% for basic rate taxpayers and 20% for higher rate taxpayers (or 18% and 28% respectively in relation to residential property, other than a main home which is relieved from CGT). This is a low rate by historic standards and could be increased.

Review and plan

It is important both to have an estate planning strategy and to implement it effectively at the right time to achieve the best outcome. With such significant potential changes to the tax system in the near future, land owners should review existing strategies and start planning, if that has not yet been done.

Corporate Insolvency Regime: New Act gives companies more time and protection to pay debts

The Corporate Involvency and Governance Act ("the Act") received royal assent on 25 June 2020. The Act is likely to have a number of implications for rural businesses, which either trade through companies, or who regularly contract with corporate entities.

The Act introduces a number of new measures aimed at preventing a large increase in corporate insolvencies. The key measures are as follows:

- Introduction of a new standalone moratorium on creditor actions;
- Suspension of wrongful trading provisions;
- Introduction of a new restructuring process which binds secured and unsecured creditors; and
- Restrictions on statutory demands and winding up petitions.

In this article we will consider each of these measures in brief.

Moratorium

Where a company is in financial difficulty and is struggling with the competing demands of multiple creditors, the company can benefit from a moratorium (i.e. a stay) on creditor actions in order to sell its business, obtain new funding or restructure. Until now, if a company needed the breathing space afforded by a moratorium, it was forced to enter administration. This is an extreme solution as it usually involves taking control of the company away from the directors and incurring considerable costs in relation to the administrators' fees and expenses.

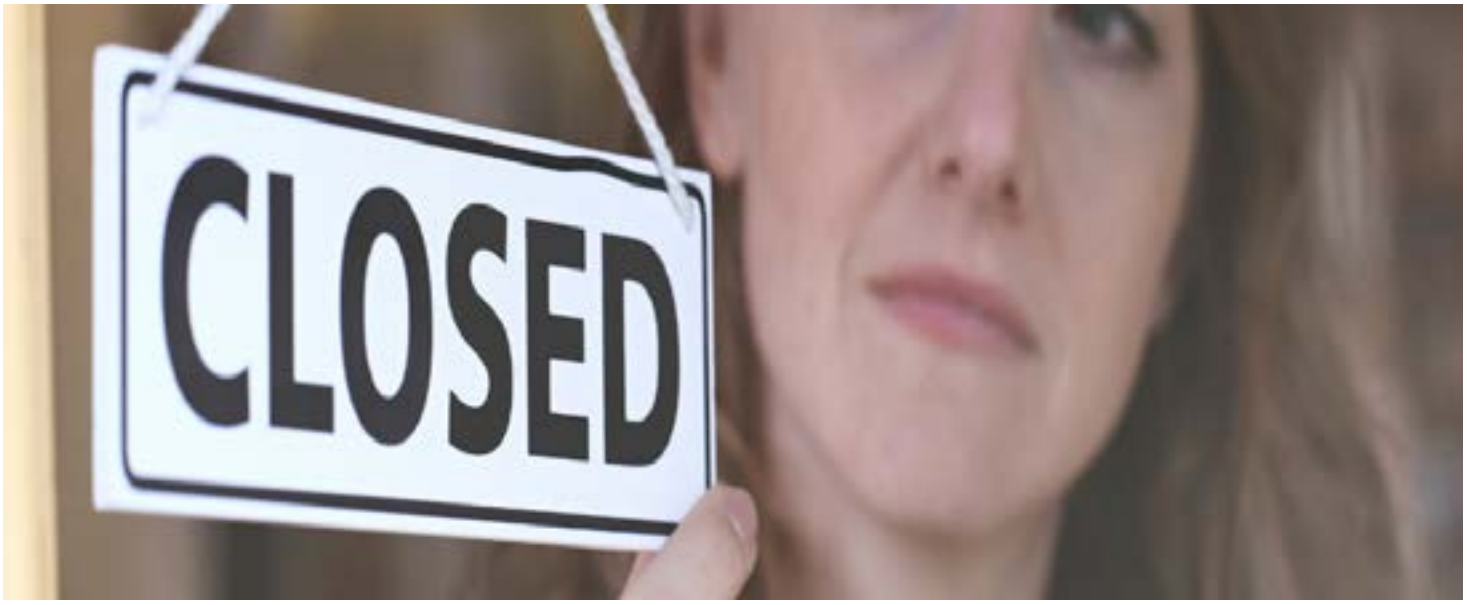
The moratorium introduced by the Act involves an insolvency professional acting as a monitor, with oversight only, leaving directors in control and reducing costs. The moratorium is available to companies who are, or are likely to become, unable to pay their debts, but only if the company can likely be rescued during the moratorium and the company is still able to pay rent, wages and the monitor's fees, as well as any new debts accruing during the moratorium. Other debts will become subject to a payment holiday, and creditor actions in relation to these debts will be extremely limited.

To obtain a moratorium, the directors of the company will generally only need to file the relevant documents at court, including a statement from the monitor that it is likely the company can be rescued during the moratorium. The moratorium comes into force on the date the documents are filed and ends after 20 businesses days, unless extended or brought to an end by the monitor. The monitor can bring the moratorium to an end if they think that the company no longer meets the requirements of the moratorium or if the aim of the moratorium has been achieved. The moratorium can only be extended in certain circumstances and may require the consent of the company's creditors or of the court.

The introduction of the moratorium is good news for struggling businesses, who have a credible and deliverable rescue plan, but need some breathing space to deploy this. On the other hand creditors (other than landlords and employees) relying on payments made from such companies may be dismayed to see the introduction of a further means by which debtors can further delay what could be long overdue payments.

Wrongful trading

Under the current wrongful trading rules, a director of an insolvent company can be liable to make a contribution to a company's assets if, sometime before the commencement of the administration or winding up of the company, that director knew or ought to have known that there was no reasonable prospect of the company avoiding insolvency. The starting point for determining the level of compensation is to consider how much worse off the company is as a result of the wrongful trading.



The Act provides that, in determining the level of contribution as a result of wrongful trading, the court is to assume that the person is not responsible for any worsening of the financial position of the company or its creditors that occurs between 1 March 2020 and 30 September 2020.

Whilst the relaxation of the rules will be welcomed by directors of rural businesses, those at the helm of struggling companies would nonetheless be wise to proceed with caution and take appropriate advice. Directors remain liable for any loss caused by wrongful trading outside of the relevant period and remain subject to a panoply of other fiduciary and statutory duties, which they risk breaching, where the company is on the verge of insolvency.

Restructuring Plan

These measures in the Act provide for a company suffering, or likely to suffer, financial difficulties to enter into a restructuring plan to deal with the effects of those financial difficulties, provided it is approved by 75% by value of each class of creditors. Even if a class of creditors does not provide the necessary approval, the plan can be sanctioned by the court in certain circumstances. Subject to conditions, all creditors and shareholders will be bound by the plan, even if they did not vote for it.

In order to put a restructuring plan in place, an application must be made to the court to summon a meeting of creditors and shareholders to approve the plan. An application must then be made to the court to sanction the plan.

Restrictions on Statutory Demands and Winding Up Petitions

Usually, creditors owed more than £750 by a company, are able to serve a statutory demand requiring payment within 21 days. If the demand goes unsatisfied, the creditor can use this as a basis to put the company into liquidation, by presenting a winding up petition. Statutory demands can therefore be used as a relatively cheap and simple means of exerting considerable pressure on debtors.

The Act provides that no winding up petition can be presented on the basis of a statutory demand served between 1 March 2020 and 30 September 2020. This essentially takes any potency out of statutory demands as a means to put pressure on corporate debtors. No equivalent restriction in relation to individuals has yet been announced.

Whilst winding up petitions can still be presented on grounds, other than that a statutory demand has not been satisfied, such petitions cannot be presented unless the creditor has reasonable grounds for believing that coronavirus has not had a financial effect on the company or that the relevant ground would apply to the debtor, even if coronavirus had no financial effect on the debtor.

These provisions go considerably further than the government announcement of a measure to protect tenants in the retail and hospitality sectors against aggressive landlords. Whilst the measures provide some breathing space for companies struggling to repay debts, it does deprive creditors of a very useful tool in their debt recovery arsenal.

Conclusion

In summary the Act provides some respite and further options for companies struggling with debt, amidst the government lockdown. However, this relief is likely to have a knock-on effect on other businesses, which are relying on payments being made by corporate debtors.

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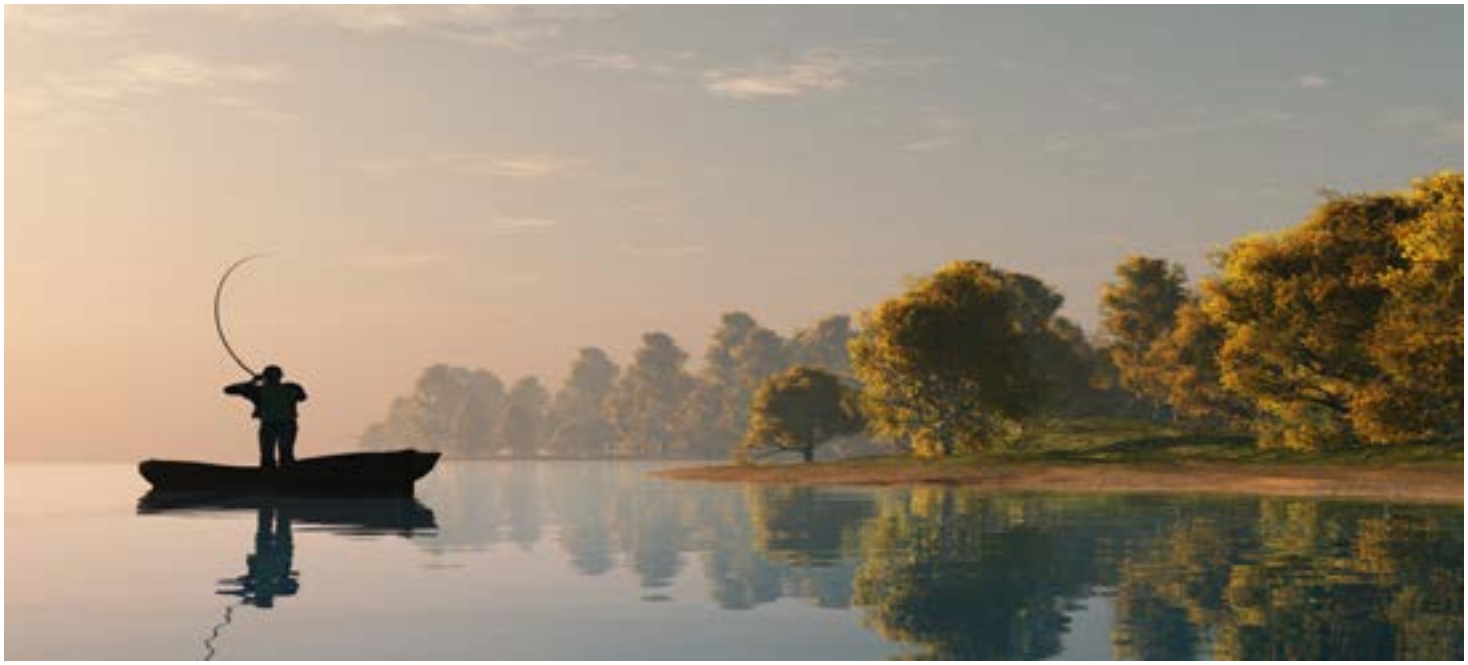

Fixtures: Appeal returns fish to the water

In the December 2019 edition of Agricultural Lore, we highlighted the High Court decision in *Borwick Development Solutions ltd v Clear Water Fisheries Ltd* [2019]. The High Court found that fish stocks in a commercial fishery were subject only to a qualified personal right, which did not attach to the land or pass with the sale of land. In May 2020 the Court of Appeal overturned this decision.

The facts

By way of recap, the facts in Borwick were as follows: Borwick owned a commercial fishery, including a number of lakes and solar panels. A fixed charge receiver sold the fishery to Clear Water. The sale contract did not mention the fish in the lakes or the solar panels. Borwick claimed that these items remained its property. The High Court found that the Solar Panels had passed to Clear Water, but the fish had not. Clear Water appealed the finding in relation to the fish stocks. The finding relating to the solar panels was not challenged.

Court of Appeal

The Court of Appeal did not dispute the High Court's finding that there was no absolute property in a living wild animal or that it was possible to have a qualified property to the fish. However, there was disagreement between the Court of Appeal judges as to whether this right arose in the present case as a result of Borwick's efforts in introducing the fish and isolating them within a closed water system or whether through the mere fact of ownership of the land.

In the event, this question was not necessary to answer as the Court went on to find that these rights could only subsist whilst the fish were in Borwick's possession.

As no rights of access to enable Borwick to take the fish had been retained on the sale of the land, Borwick did not have possession of the fish and their former rights were extinguished.

Consequences of this decision

This case underlines the importance of recording in sale documentation which assets are intended to pass with the sale. The case also demonstrates the importance of reserving fishing, sporting and access rights on a sale or lease, where the land owner intends to maintain any rights over wild animals.

The case also has implications for fixed charge receivers appointed over land containing wild animals. Whilst the Court found that the receivers were correct to conclude that the fish were not subject to the security, it was noted that the security would have included the exclusive fishing rights. In order to comply with their duties, receivers would be wise to factor in the existence of such rights when valuing charged property.

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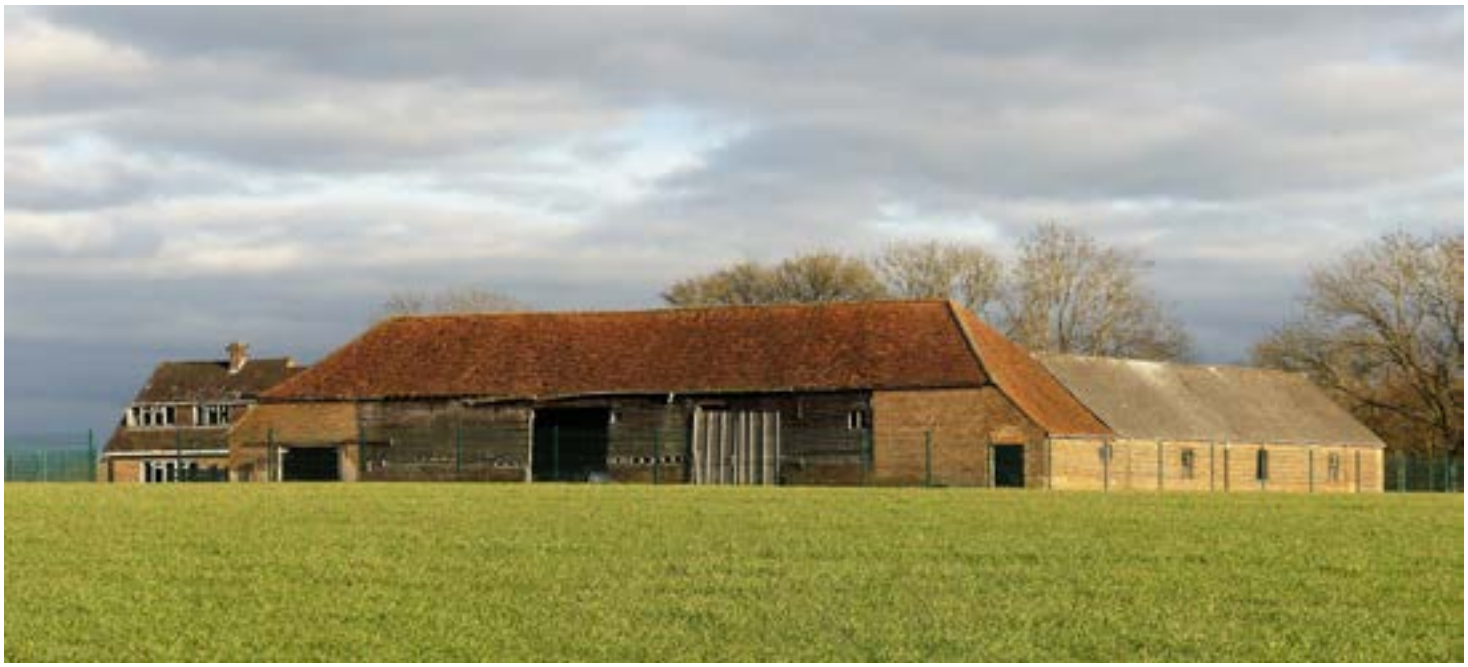

Planning: Improving on a class Q consent

Agricultural buildings tend to be large, utilitarian and positioned for reasons of practicality and their conversion can both result in large and unwieldy houses and leave an unattractive building or group of buildings apparent in the landscape indefinitely. It is possible to make a case to a local authority that there is a better solution and to "trade" the Class Q consent for a better designed and less intrusive building or buildings.

Mansell v Tonbridge & Malling BC

In September 2017, a judgement in the case of *Mansell v Tonbridge & Malling Borough Council* [2017] EWCA Civ 1314 was handed down by the Court of Appeal. The case concerned the grant of planning permission for four houses on land currently occupied by a tired bungalow and a large agricultural building. In granting consent for four replacement houses, the Council took into account the fact that the barn could be converted to three houses under Class Q (agricultural to residential dwelling) of the Town and Country Planning (General Permitted Development)(England) Order 2015 ("Class Q"). The neighbour was unhappy and bought a Judicial Review. The consent was initially quashed by the High Court, but reinstated by the Court of Appeal, who found it was legitimate for the Council to grant the consent, even though no application to convert the barn had been made.

The Court of Appeal held in Mansell, the fact that an agricultural building could be converted (the "fallback position") is a material consideration when considering a proposal for a new house or houses, provided that there is a realistic prospect of such development going ahead.

Where such a consent exists, or could reasonably be granted, then it is possible to design a brand new house and present a case to a Local Authority that there are benefits ("a betterment") in planning terms over and above any generated from the Class Q conversion.

Potential betterments

Such benefits could be:

- A better designed and less visually intrusive house;
- A better and more workable layout for several houses;
- The removal of eyesores;
- Improvements to the setting of a listed farmhouse;

A better and more attractive scheme is likely to add value to a consent in terms of the value of both the building to be converted and any existing nearby houses. Owners of buildings with Class Q consents should give consideration as to whether a better and more valuable planning scheme could be developed.

In the South West, practice varies amongst Planning Authorities and whilst some Councils are readily open to an alternative scheme, others are reluctant to engage in considering alternatives.

Often there is only one chance to push an alternative scheme through and proposals therefore need to be well considered and presented to maximise any chance of success.

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Backpage quiz

The quiz this quarter is a snorter all about adverse possession and prescriptive rights, a real minefield for all of us!

1. What are the three qualities of occupation (or use) 'as of right' for the purposes of a claim to adversely possess land?

2. For the purposes of a claim to adverse possession of registered land, commencing in 2007, how long does the claimant have to have occupied the land?

3. What is the required period of user for adverse possession of an easement?

4. Where land is occupied as part of a tenancy, can a squatter obtain title by adverse possession?

Please email your answers to: adam.corbin@michelmores.com by 31 August 2020.

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!

Backpage quiz answers

Last quarter we had a COVID – 19 special, covering some issues we are commonly encountering at the moment as a result of the COVID-19 pandemic.

Congratulations (again) to the victorious Jeremy Bell, Partner, of Greenslade Taylor Hunt, based in Burnham on Sea (pictured right), who is the recipient of a bottle of English Sparking Wine.

The questions and answers are set out below:

1. If a landlord served a notice pursuant to section 21 of the Housing Act 1988 on 14 April 2020 (and the tenancy agreement contained no express provision on notice periods), what was the minimum amount of notice which could be given?

   The Coronavirus Act 2020, at section 81 and schedule 29, extended the minimum period of notice under section 21 of the Housing Act 1988 to 3 months. The Act came into force on 25 March 2020.

2. Can a landowner or tenant block the use of a public right of way if they provide an alternative route?

   No. The pre-Covid-19 law is unchanged. It is unlawful to obstruct a public right of way. See section 137 of the Highways Act 1980, which provides that it is an offence to obstruct access along a public right of way, and section 14 of the Countryside and Rights of Way Act 2000 which makes it an offence to display a notice that deters public use of a right of way. There is a statutory process for diversions, which cannot be avoided. Of course landowners are welcome to allow people to use their land, bearing in mind their duty to protect visitors, including under the Occupiers Liability Acts.

3. If a solvent business tenant with 4 years left to run on a written tenancy hands back possession of the premises upon the basis that the pandemic has wiped out their business, do they still have to pay their rent for the remainder of the term?

   Yes. There is nothing in the Coronavirus Act 2020 changing the normal position at common law that a tenant remains 'on the hook' for their liabilities to the landlord throughout the term.

4. Does the Coronavirus Act 2020 include any provisions for the relief of AHA or ATA tenants during the pandemic?

   No. The only relief is the suspension of 'possession proceedings' by amendment to the procedural rules of Court, which would mean that a landlord could not progress proceedings for possession of an agricultural holding, where perhaps a tenant was holding over at the end of a fixed term, save in certain limited circumstances.

5. A business tenant continues to fail to pay their rent due on Lady Day, then on 25 April 2020 the tenant seeks a licence to alter their premises. If the landlord grants the licence will that amount to a waiver of the right to forfeit the tenancy (if the tenant continues not to pay the rent in, say, August)?

   No. Section 82 of the Coronavirus Act 2020 prevents a landlord from forfeiting or re-entering a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies for payment of rent during the relevant period (currently from 26 March 2020 until 30 June 2020). Section 82 (2) provides that during that relevant period *"…no conduct by or on behalf of a landlord, other than giving an express waiver in writing, is to be regarded as waiving a right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent."*

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