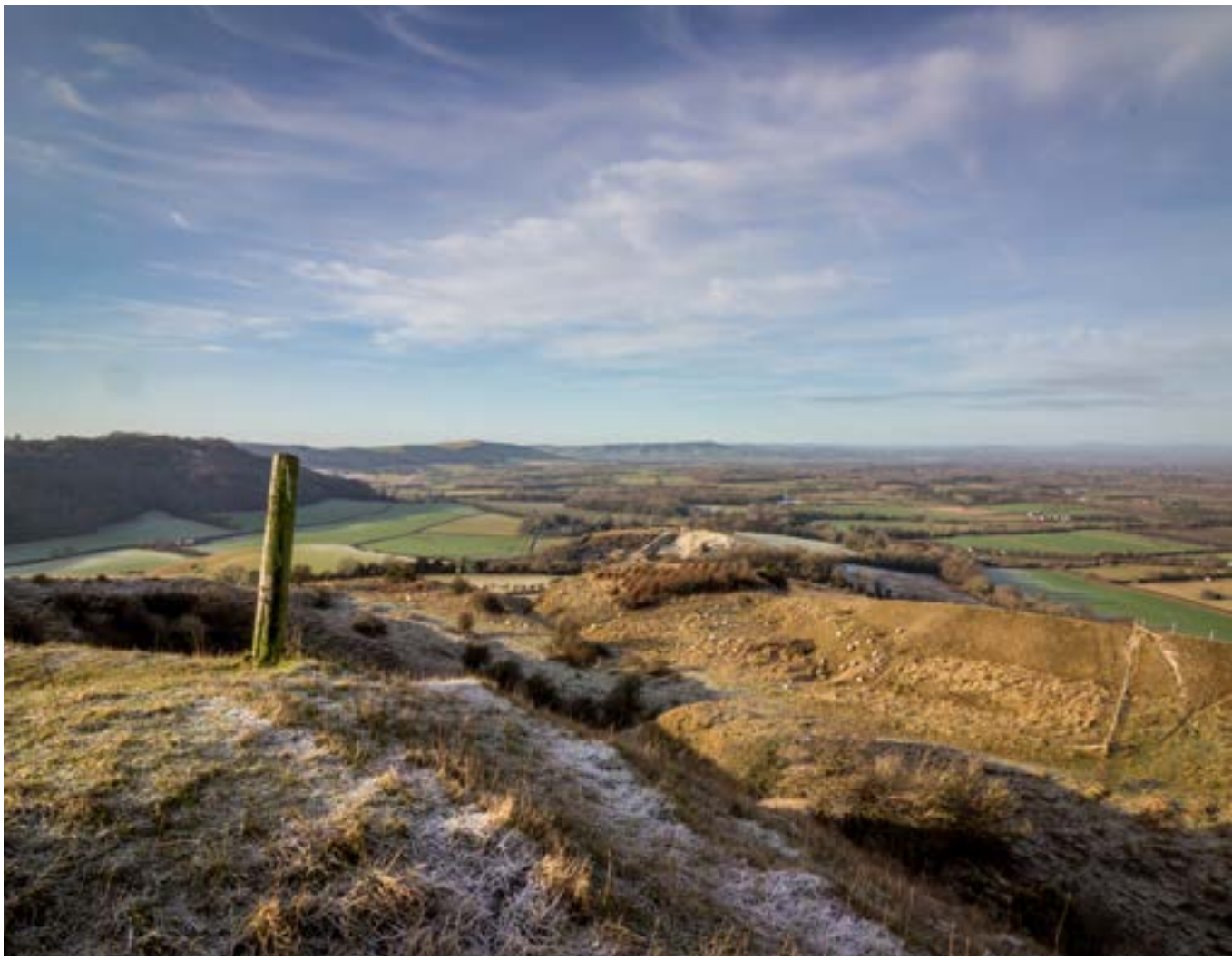
Michelmores
Winter Edition

Agricultural Lore

e-Publication



In this issue:

Welcome to Agricultural Lore

Introduction by Vivienne Williams

Welcome to this Winter edition of Agricultural Lore.

We have progress at last: an Agriculture Bill back on the table with some notable advances; an Environment Bill on its way through the Parliamentary process; and the stagnation of the Brexit decision now behind us. Most welcome are the landlord & tenant proposals, which have been included in this version of the Agriculture Bill, although numerous proposals from the TRIG recommendations of November 2017 remain shelved for the time being. We have also seen a significant step forward with the inclusion of the conservation covenant proposals in the Environment Bill, providing real potential for natural capital arrangements for the future.

The last few months have brought significant achievements for our Michelmores' Agriculture team. Following the great success of our first Sustainable Agriculture Conference in December (see page 5) we were delighted to hear that Rachel O'Connor, who masterminded our conference, has been included in The Lawyer Hot 100 2020 list of the most exciting and innovative professionals practicing law in the UK.

The contributions of Charlotte Razay and Rachel to the legal profession have also been recognised in their nomination by the Women in Law Awards 2020 in the "Litigator of the Year" and the "Outstanding Returner of the Year" categories respectively.

We were delighted to see a number of you at Thatchers Cider for our first Women in Rural Practice Networking event in November.

Our second event takes place on 27 February in Cirencester, where we will be welcoming guest speaker, Nikki Jones, Chair of Avon Needs Trees and Bristol-based writer and activist on energy and climate change. Please contact Charlotte Razay for more information.

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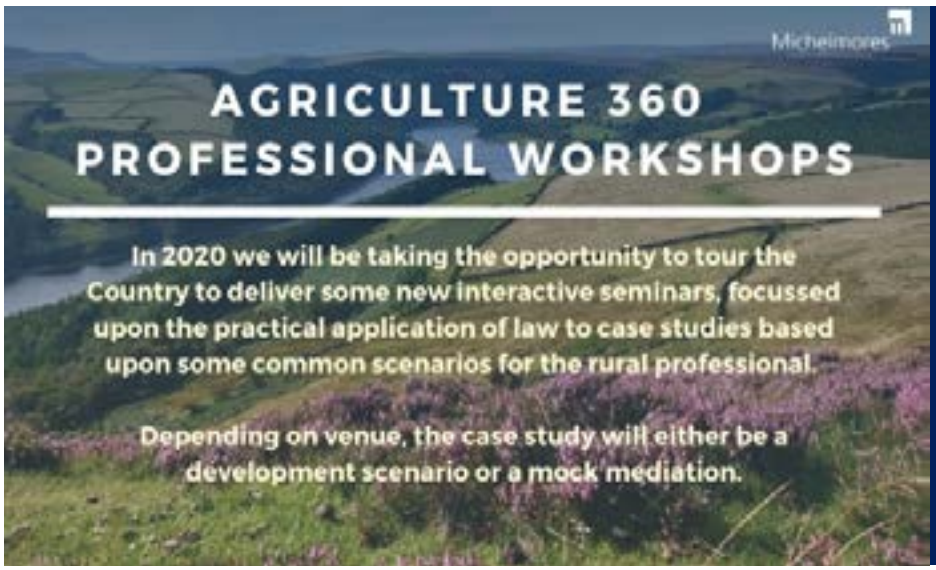
In this edition of Agricultural Lore we highlight a wide range of topics from assets of community value to inheritance and on to electronic telecommunications.

In a particularly fascinating development Rachel O'Connor and Lydia Robinson report (on page 11) on a Dutch climate change case won by a protest group against the Dutch Government for failing to protect its citizens from the dangerous effects of climate change. It will be interesting to see whether this case inspires similar proceedings in other nations. Closer to home Charlotte Razay reports (see page 6) on our own Court of Appeal success in a recent trusts dispute, which serves as a warning to anyone appointed as a trustee.

We also look at the issue of repairs to dwellings from two different angles: Josie Edwards highlights the often overlooked powers of local authorities under the Housing Health and Safety Rating System (see page 8) and Lydia Robinson explains landlord's repairing obligations and a recent case under the Landlord & Tenant Act 1985 section 11 in our Learning the Law slot.

Finally we end with our Winter quiz which this time focuses on common FBT myths.



Click here for details of our Agriculture 360 Professional Workshops

Remaining Dates available:
Cowbridge 25 February
Exeter 11 March
Chester 17 March

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Electronic Communications Code:
Interaction between the Code and the LTA 1954

The Landlord & Tenant Act 1954 ("1954 Act") confers significant security of tenure and many telecommunication masts are let on leases governed by this Act. Section 24 of the 1954 Act allows the lease to continue in certain circumstances and a tenant to remain in occupation beyond the contractual expiry date, but it is possible for the parties to contract out of the security of tenure provisions.

The recent case of *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd* [2019] considers whether Code rights can be imposed in favour of an operator already occupying the site in this way and includes a helpful consideration of the way the Code and the 1954 Act interrelate.

Subsisting Agreement

The issue in this case was how a subsisting agreement, which was already in force when the Code commenced on 28th December 2017, should be treated, in view of the fact that it was governed by the 1954 Act and how the 1954 Act interacted with the Code.

Although the Code does not act retrospectively, transitional provisions mean that any "subsisting agreements" become Code agreements, subject to 2 material modifications, which make the Code more landowner-friendly.

The first change is that operators governed by a subsisting agreement cannot assign them as of right. Part 3 of the Code allows such an assignment, even if the terms of the lease prevent such action. That Code right is removed and operators are similarly prevented from exercising the Code rights of upgrading telecoms apparatus on the site or sharing it with other users.

The second alteration is that Part 5 (termination and modification of agreements) of the Code will not apply to a subsisting 1954 Act lease (whose primary purpose is to confer Code rights on an operator) which is not contracted out of the security of tenure provisions.

Arguments

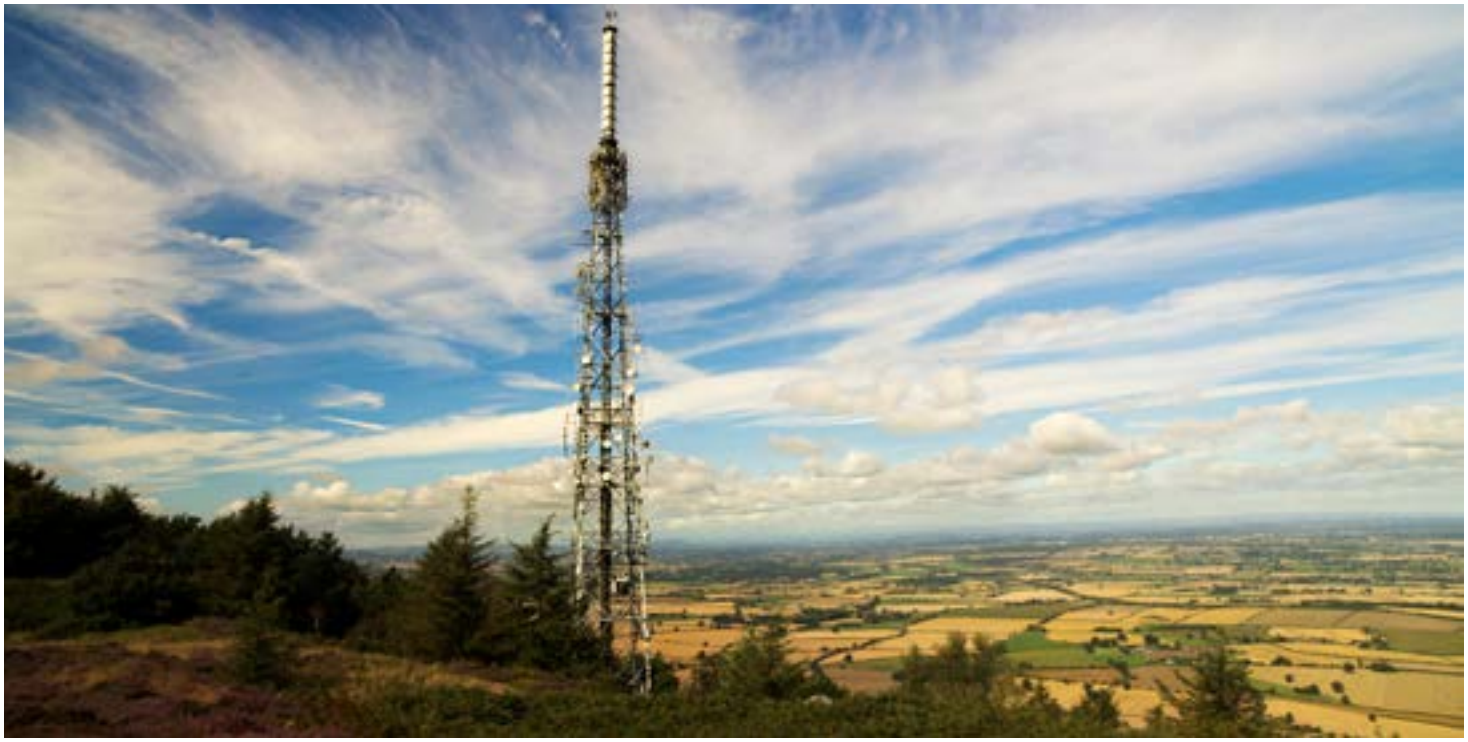
This case concerned a rooftop site. The lessor argued that the operator could not use Part 4 of the Code, as it was already in occupation. It also said that, as the lease was continuing under section 24, any new rights must be sought by applying for a new tenancy in accordance with the 1954 Act.

The operator maintained that it could either seek a new lease using the 1954 Act procedure or that Part 4 of the Code (the procedure for obtaining a new agreement) could be used as an alternative to Part 5.

Decision

The operator's primary argument was that Part 4 is not excluded from applying to a subsisting agreement. The Tribunal ruled that Part 4 is about imposing agreement on landowners and the transitional provisions state that subsisting agreements are equivalent to Code agreements already granted in accordance with Part 2. Therefore, Part 4 does not need to be excluded as it could never apply. Part 4 can only be used for the purpose of obtaining interim or temporary rights.

Although this point was taken as a preliminary issue, the finding that the 1954 Act procedure applies, meant that the County Court procedure applied and the Tribunal had no jurisdiction. This resulted in the whole case being struck out.



The Tribunal also confirmed that Part 5 could not be used by the operator to obtain a new lease and that a new tenancy must be applied for in accordance with the 1954 Act.

Implications

This case dealt with a 1954 Act lease which was not contracted out and which continued as a statutory periodic tenancy. There will be many agreements which are contracted out of the security of tenure provisions. Where the fixed terms of those leases expired before 28 December 2017, the actions of both parties will have to be carefully considered, so that the status of any new agreement can be determined. The terms of that agreement will dictate which route should be adopted when considering its renewal.

Applying the facts of the case, but assuming the fixed term expired after 28 December 2017, the operator would be able to use Part 5 of the Code to apply for a renewal tenancy.

Paragraph 20 notices

Paragraph 20 notices under Part 4 can only be used when operators are seeking new Code rights, which will, in most cases, be in connection with new sites. This procedure cannot be used where renewal of Code rights is sought – as with an operator on an existing site. This means that any existing paragraph 20 notices should be carefully reviewed, as they may well be invalid.

Renewal under the 1954 Act

Subsisting 1954 Act agreements, whose primary purpose is the granting of Code rights, must be renewed under the 1954 Act, where there is no contracting out of the associated security of tenure provisions.

It is therefore important to establish whether this has been done.

This provides significant advantages to a landowner who is able to rely on the open market rent provisions of the 1954 Act, as compared to the "no network" assumptions, which have a marked downward effect on rent under the Code.

Terms of the new lease

Additional benefits are secured by landowners as paragraph 23 of the Code will also be excluded. This provides that a Code agreement must contain such terms as the Court thinks appropriate. In contrast, a 1954 Act agreement would, on renewal, either have its terms fixed by the agreement of the parties or paragraph 34 (12) of Part 5 of the Code. Paragraph 34 (12) states that the Tribunal must have regard to the existing terms of the tenancy when making the appropriate order.

However, it is not all good news for landowners. When any new 1954 Act lease is close enough to its contractual termination date, the operator may give 6 months' notice in accordance with paragraph 33 of the Code and seek renewal in accordance with Part 5. Operators are therefore likely to seek as short a term as possible on any statutory renewals, so they can fall back on the full panoply of Code rights as soon as possible. If the term cannot be agreed then it will be for the Court to decide.

Therefore, any advantages accruing to a landlord or head lessor by virtue of the 1954 Act procedure, may well be short lived.

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Michelmores' Sustainable Agriculture Conference: Innovating Change

On 4 December 2019 we held our fist Sustainable Agriculture conference in Bristol. The event brought together over 150 people including farmers, entrepreneurs, investors, rural professionals, charities, banks and academics, all of whom have a vested interest in shaping the future of our agriculture industry.

We heard about the fascinating and pioneering advances in agricultural technology being driven by Small Robot Company, Lettus Grow and Multibox.

Peter Greig delivered a passionate and captivating talk on his life's work founding and growing Pipers Farm producing 100% grass fed, properly free range meat that is grown in harmony with nature, based on traditional sustainable values.

Professor Stuart Reynolds, who has served on the UK Parliament All- Party Commission on Biodiversity, provided a thought provoking talk on the declining biodiversity on farmland considering the complex causes and consequences.

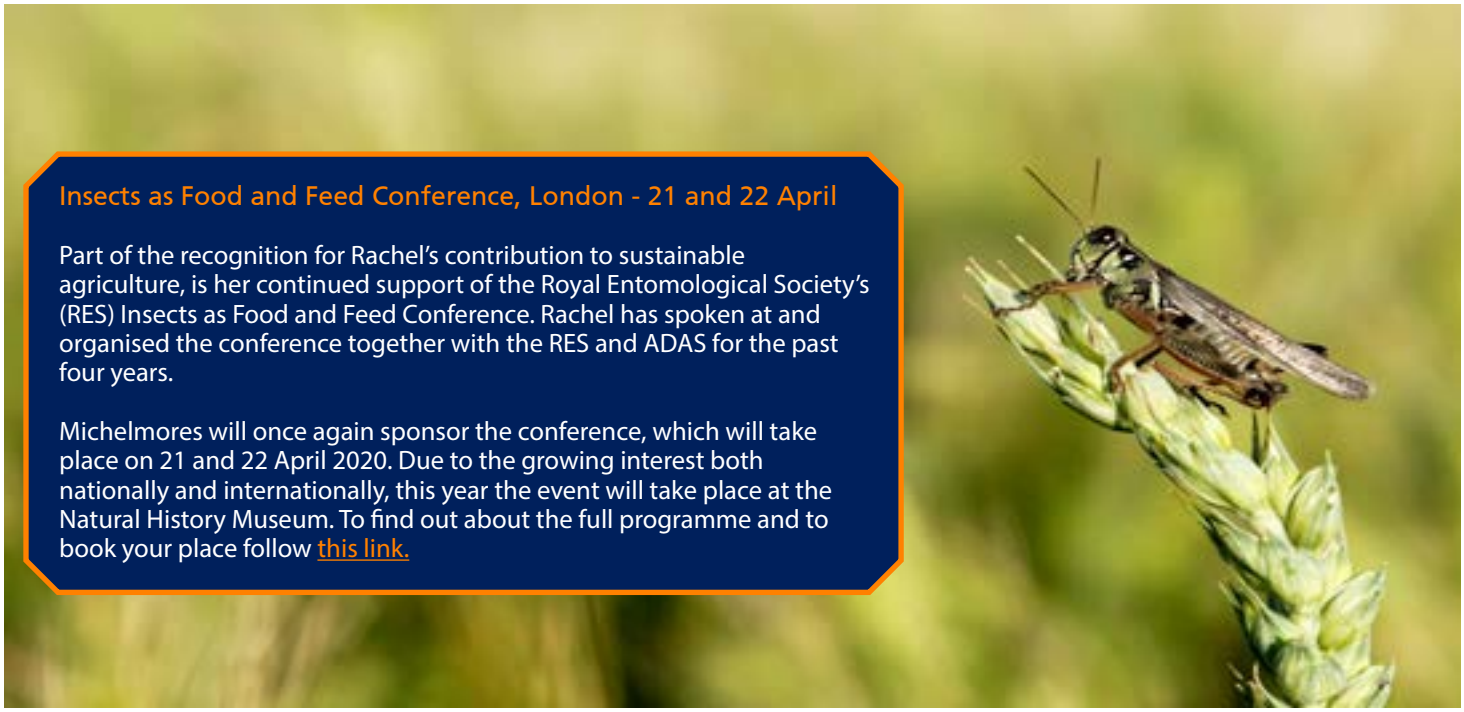
In the afternoon we hosted a series of workshops together with James MacPherson of Anthesis Group and Chris Lyons of Enterprise Europe Network and Innovate UK when we discussed a diverse range of topics linked to the development of sustainable agriculture businesses including: Natural Capital; funding and investment for start-ups; opportunities in sustainable agriculture for estates; and growing a sustainable agriculture business.

The day concluded with a panel discussion which saw an engaging debate about the future of the agriculture industry.

A full write up of the conference will feature in the next edition of our Sustainable Agricultural publication, which will be published in March. If you would like to subscribe please register here.

Thank you to all of those who attended and made the day such a great success. For all of those who were not able to make it this year, watch this space for news of the next Conference!

We are also very excited to share that in recognition of Rachel O'Connor's significant contribution to the Michelmores' sustainable agriculture practice and her support of sustainable businesses in general, Rachel has been included in The Lawyer's Hot 100 listing 2020. A definitive and highly respected list of the most exciting and innovative professionals practicing law in the UK.



Insects as Food and Feed Conference, London - 21 and 22 April

Part of the recognition for Rachel's contribution to sustainable agriculture, is her continued support of the Royal Entomological Society's (RES) Insects as Food and Feed Conference. Rachel has spoken at and organised the conference together with the RES and ADAS for the past four years.

Michelmores will once again sponsor the conference, which will take place on 21 and 22 April 2020. Due to the growing interest both nationally and internationally, this year the event will take place at the Natural History Museum. To find out about the full programme and to book your place follow this link.

Trust disputes: Trustees risk personal liability

In the recent case of P*rice v Saundry & Anor* [2019] EWCA Civ 2261 the Court of Appeal had to consider the circumstances in which trustees are entitled to be indemnified from the trust fund for the costs that they incur in court proceedings.

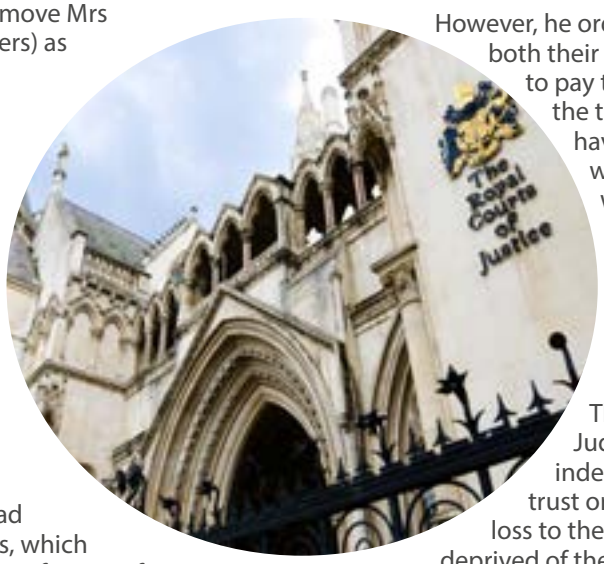
Miles Farren and Charlotte Razay, together with Barrister, Alexander Learmonth, acted for the successful Appellant, Mrs Price in this ground-breaking case.

Background

Mrs Price and Mrs Saundry were the two beneficiaries of a trust comprising a number of buy to let properties in the South West. The trustees were Mrs Saundry (who became the trustee after the death of her late husband) and her brother, Martin Sanders.

Mrs Price's claim began as a claim to remove Mrs Saundry and her late brother (Mr Sanders) as trustees of the trust, for three reasons:

1. In breach of the trust deed Mrs Saundry refused to appoint Mrs Price as a trustee and instead, appointed her brother;
2. Mrs Saundry attempted to buy one of the trust properties at an undervalue; and
3. The trustees had persistently failed to provide Mrs Price with financial and accounting information, in breach of trust.



By the time the matter was ready for trial in September 2017, the trustees had sold the majority of the trust properties, which meant there would shortly be only a pot of money for distribution to the beneficiaries. The application to remove them would then be rendered otiose. It was agreed that instead, the litigation would proceed as an account against the trustees, requiring them to account for the capital and all income and expenditure of the trust since Mrs Saundry became a trustee in 2013.

The Court proceedings

Three attempts were made to provide the account that had been ordered by the Court. Mr Sanders died shortly after service of the first attempt at the account.

Mrs Price disputed the account alleging, amongst other things, that the trustees had made various improper payments. One example was the payment of over £21,000 to Mr Sanders after his appointment as a trustee. As a matter of law, trustees cannot profit from their position. This includes remuneration. This rule also applies to someone who is not legally a trustee, but who holds themselves out to be.

The matter came before HHJ Matthews in February 2019. He determined that the trustees had made a number of improper payments and ordered Mrs Saundry to repay the trust over £52,000 plus interest.

Mrs Price had made two relevant offers to settle her share in the trust fund. One of them was what is known as a Part 36 offer (an offer pursuant to Part 36 of the Civil Procedure Rules). There are significant costs consequences when: (1) a claimant makes a Part 36 offer; (2) the defendant does not accept it; and (3) the claimant beats it at trial. The effect of the determination was that Mrs Price had beaten both offers.

The Judge's decision on costs

The Judge decided that Mrs Saundry should pay Mrs Price her legal costs incurred in connection with the account.

However, he ordered that the trustees could have both their own costs and the costs they had to pay to Mrs Price, indemnified out of the trust fund. The effect of this would have meant that Mrs Price, despite winning the case on the account, would have been financially better off not to have challenged it at all. Unsurprisingly, Mrs Price appealed to the Court of Appeal.

The Court of Appeal Judgment

The Court of Appeal reversed the Judgment on the costs relating to the indemnity. It decided that if a breach of trust or misconduct is established, causing loss to the trust fund, then the trustee can be deprived of their indemnity from the trust. They said that misconduct should be "*construed widely to include not only misconduct in the sense of dishonesty but also misconduct which is unreasonable in the circumstances*". The Court of Appeal made clear that misconduct does not extend to a mistake on the part of a trustee.

Not only did the Court of Appeal consider that the account demonstrated that there had been serious misconduct, but also breaches of trust. The Court of Appeal ordered that Mrs Saundry pay Mrs Price's costs and her own costs of the account personally.

Conclusion

This is a stark warning to those acting as trustees that they cannot embark on litigation, have an adverse costs order made against them, and expect the trust to pay for it. If their conduct is found to be unreasonable, then they are at real risk of losing their indemnity and becoming personally liable. That could be expensive, as Mrs Saundry has no doubt found out.

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In Brief: Assets of community value

The recent case of *Oliver's Battery Ltd v Winchester City Council and Another* (CR/2019/0001) posed a number of interesting questions to the First Tier Tribunal concerning the Asset of community value ("ACV") regime.

ACV regime

Under the Localism Act 2011 ("the LA"), communities are given a right to bid for and buy local land that is considered to have community value.

Land can be listed as an ACV if in the opinion of the local authority:

1. Its actual current use furthers the social well-being or social interests of the local community;

2. The current use in 1) is not "an ancillary use"; and

3. It is realistic to think that there can continue to be non-ancillary use which will further the social wellbeing or social interests of the local community.

When an owner of land listed as an ACV wishes to dispose of the land, the community is given the opportunity to raise funds and make a bid for the land. Whilst the owner is not obliged to accept an offer made by a community group, the LA imposes a 6 month moratorium, during which the owner of an ACV can only accept bids from community groups.

The case

The present case concerned an appeal against the listing of a piece of farmland as an ACV. The land had been left fallow under an EU set aside scheme and was surrounded by public rights of way, which were widely used by the local community. There were no barriers between the public rights of way and the land, and Members of the local community claimed that when the land had been left fallow, many of those using the public rights of way the land as a recreation field. These claims were supported by visible desire lines showing the land had been crossed. Such activities essentially amounted to trespass. The land owner planned to develop the land for housing.

The decision

The Tribunal made the following findings which provide helpful guidance on the operation of the ACV regime in practice:

- The fact the agricultural land was left fallow did not mean that agriculture had ceased to be an actual current use of the land, or that this use was only ancillary;

- The public's recreational use of the land was also an actual current use and this was not ancillary to its use as agricultural land. The recreational use was also not an ancillary use of the public rights of way;

- The fact that the recreational use of the land was unlawful did not prevent it being a use which furthered social well-being or social interests and there was no requirement that the actual use was lawful; and

- Although the land owner was planning to develop the land for housing, this did not mean it was unrealistic to think that the recreational use could continue as it was not certain that planning permission would be granted or that the scheme would go ahead.

Accordingly the appeal was dismissed and the land was listed as an ACV.

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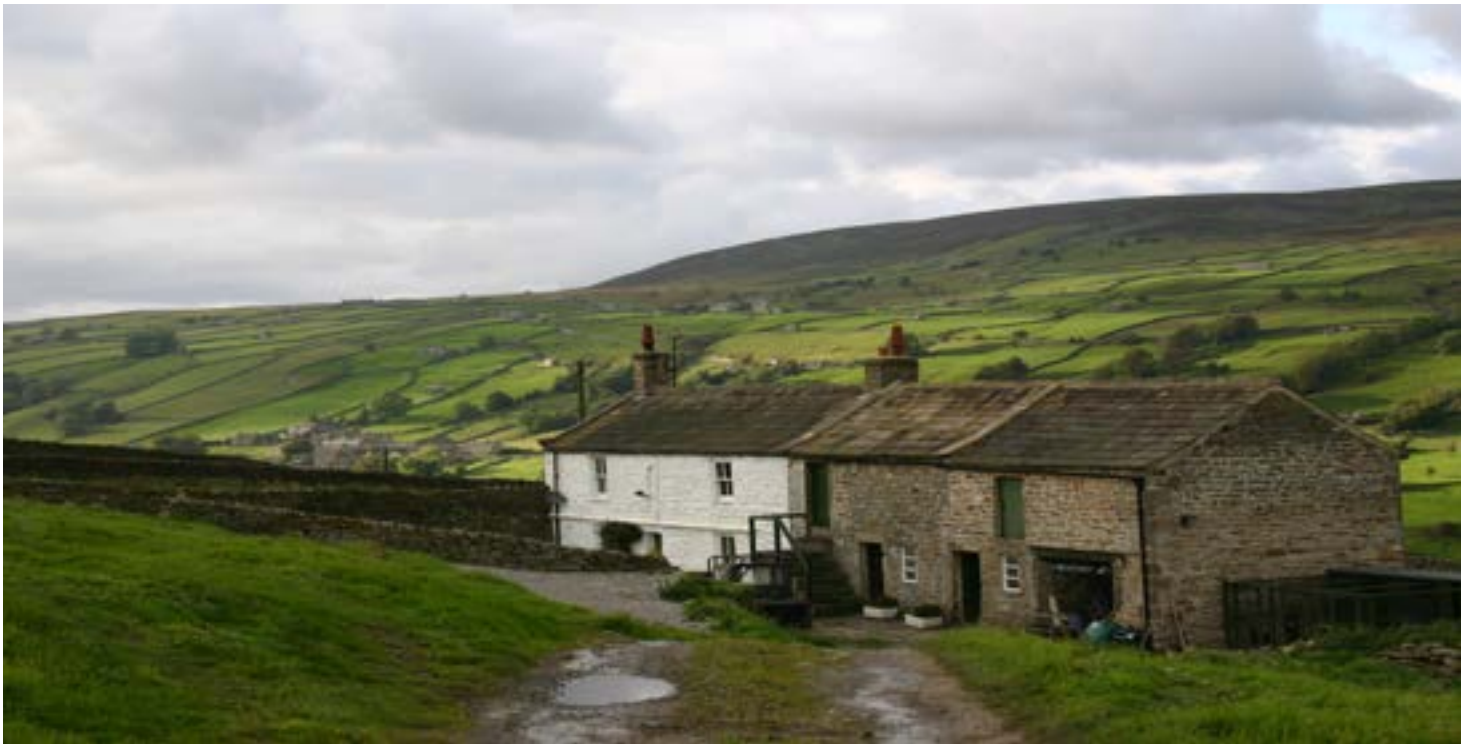

Rural dwellings: The Housing Health and Safety Rating System and agricultural tenancies

Agricultural holdings and Farm Business Tenancies commonly include farm or estate cottages, which are then sub-let by the agricultural tenant to employees or third parties.

Amid increasing regulation in the residential sector, the interaction between the agricultural and residential tenancy regimes can become problematic. In particular, we are often asked to advise on the interaction and applicability of the Housing Health and Safety Rating system ("HHSRS") under the Housing Act 2004 ("HA 2004") to agricultural tenancies.

The HHSRS

The HHSRS applies to the letting of all "dwelling houses" (HA 2004, section 1). There is no exception for agricultural tenancies, and accordingly, the HHSRS applies to AHA tenancies and FBTs in the same way that it applies to assured shorthold and assured tenancies under the Housing Acts. The HHSRS has a reach beyond the Housing Act legislation, into the agricultural tenancy regime.

Under the HHSRS, Local Authorities are placed under an obligation to assess potential health and safety hazards and risks present in residential properties in England and Wales. The focus is on identifying deficiencies in the property which could cause harm. Local Authorities are under a duty to take action if any category 1 hazards are identified and given powers to issue a variety of formal notices to ensure any identified hazards are addressed and removed (e.g. Improvement Notices, Prohibition Orders, Hazard Awareness Notices).

The HHSRS is focused on those areas which are the responsibility of the owner (or landlord), pursuant to section 11 of the Landlord & Tenant Act 1985 ("LTA 1985"), which areas are explained in more detail in Lydia Robinson's article on page 13.

The anomaly in an agricultural context is that the section 11 statutory repairing obligations do not apply to "dwelling houses" comprised within an agricultural tenancy (let under either an AHA or FBT). There is an express exclusion in section 13 of the LTA 1985, enabling the parties to an agricultural tenancy to allocate the obligations between them as they wish. In many cases, the Model Clauses (ie under the Agriculture (Model Clauses for Fixed Equipment) (England) Regulations 2015/950) apply or are utilised.

HHSRS Notice

If a Local Authority serves an HHSRS notice in relation to a dwelling house, statutory obligations are imposed on the recipient, who becomes obliged to carry out the remedial action, specified in the notice, within the deadlines set by the Local Authority.

The recipient

The appropriate recipient is the "person having control of the dwelling" (Schedule 1), which is defined further in section 263 as "the person who receives the rent".

If an HHSRS notice is served in relation to the main farmhouse under an AHA or FBT, the landlord will therefore be the appropriate recipient under the legislation and will be subject to a statutory obligation to comply and at risk of penalties for non-compliance. This remains the case even if, under the terms of the agricultural tenancy agreement, the tenant is responsible for some of the repair items/issues identified by the Local Authority.

This is because the statutory obligations arising under the HHSRS are entirely separate to the contractual obligations, which may have been agreed between the parties under the agricultural tenancy agreement.

Contractual obligations

Accordingly, there is a second, contractual analysis that needs to be undertaken to check whether the landlord, as a matter of private contract, can require the agricultural tenant to undertake or pay for some or all of the works, in reliance on the terms of the tenancy agreement. Section 38 of the HA 2006 expressly preserves all existing contractual rights and remedies. This gives the landlord the ability to pass liability on to the tenant if appropriate.

Liability and defence

However, it should be noted that the landlord remains the liable person under the HHSRS regime and under section 30 of the HA 2004, will be guilty of a criminal offence on summary conviction if he/she fails to comply within the time limits specified in the HHSRS Notice. Alternatively, they may be served with a Civil Penalty Notice under the Housing & Planning Act 2016.

It is worth noting that section 30(4) provides a defence if the recipient can establish a "reasonable excuse" for failing to comply with the Notice. This can be an important provision if the co-operation of a tenant is sought to undertake the necessary remedial works.

Sub-lettings

In situations where a cottage is sub-let on an AST, then the agricultural tenant will be the appropriate recipient under the HHSRS, in his/her capacity as the residential tenant's direct landlord, and any notices should be served accordingly. Indeed, section 11 will apply to the sub-tenancy, so the content of the Notice should properly reflect the landlord's repairing obligations. However, once again, there may need to be a secondary exercise between the agricultural tenant and the head-landlord, to divvy up the required work between them to reflect their contractual liabilities under the head lease.

Homes (Fitness for Human Habitation) Act crossover

Note also that most residential sub-tenancies in England for a term of less than 7 years are now subject to the Homes (Fitness for Human Habitation) Act 2018 ("HFHHA"). The HFHHA automatically imposes an implied term into the tenancy agreement that the property is fit for human habitation throughout the term. This means that the property must be safe, healthy and free from anything that could cause serious harm.

The scope of the HFHHA specifically includes any matter or circumstances amounting to a "hazard" under the HHSRS, so there is significant cross-over between the two regimes.

Where they differ, is that the HFHHA provides tenants with a direct means of forcing landlords to improve their properties to a minimum statutory standard, without relying on the Local Authority to take action. If the landlord fails to resolve issues under the HFHHA, the tenant can pursue matters through the courts and, in certain circumstances, obtain compensation. The HFHHA currently applies to tenancies granted after 20 March 2019 and will apply retrospectively to existing tenancies from 20 March 2020, including assured agricultural occupancies under the Housing Act 1988 and Rent (Agriculture) Act 1976 occupiers.

Managing the HHSRS process

It may be necessary for the party in receipt of an HHSRS Notice to serve formal notices to do work on the other interested party, in order to ensure that liability is passed down (or up) appropriately and the HHSRS recipient is not collared for the whole lot. The interaction between any deadlines imposed by the Local Authority under the HHSRS Notice and the contractual deadlines that may apply, will need to be considered.

We have found Local Authorities to be fairly understanding in an agricultural context, provided the contractual position is explained to them at an early stage and they are able to see that the recipient is taking proactive steps to resolve issues. What they will not accept is being told, "it's not my problem/ responsibility". From the perspective of the HHSRS legislation and the Local Authority, it is!

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Wills and trusts: 10 reasons to get a properly drafted Will

Although an easy task to put off, having a suitable, up to date and tax efficient Will in place is the keystone of estate planning. The Will, of course, provides a means for assets to be passed to future generations at the direction of the person making the Will (the testator), rather than being dictated by the default rules of intestacy that apply, where a person dies without a valid Will.

Accurate drafting

Often a farmer's Will contains specific provisions about how the family farm should be divided between the next generation. Whilst such specific legacies provide certainty for the testator, there are potential drawbacks.

It is common for land to be described without sufficient clarity for executors to administer the Will easily; this can be solved with more accurate drafting. Another problem is that an overly specific Will can be inflexible, as the circumstances of the testator and the beneficiaries change over time. This can be addressed through the use of trusts.

Adult children

Many parents with children who have reached adulthood, and who may well have children of their own, will be happy for them to inherit outright. However, those assets will then form part of the children's estates outright and will potentially be subject to Inheritance Tax at 40% on death, depending on the nature of the assets and the tax reliefs available at the time.

The assets will also be vulnerable to claims by third parties (other than HMRC), such as on divorce or bankruptcy. In contrast, assets put into a trust do not form part of the beneficiaries' (ie the children's) estates. The trustees can still make funds available for use by the beneficiaries and will be guided by a letter of wishes written by the testator, as to how they exercise their discretion and distribute funds.

A Will trust could potentially exist for up to 125 years, but equally could be wound up at any point before that as the trustees decide.

Without the use of a trust structure there is no control over the devolution of the assets flexibly between generations, as part of an estate planning strategy, to preserve and grow the family's wealth.

Accidents

Farm workers in particular might want to consider making sure their Will is up to date. The BBC reported last year that analysis of Health and Safety Executive (HSE) data showed that workers in the agriculture, forestry and dishing sector are more than 20 times more likely to be killed at work than the average for all other sectors combined. Although in total the construction sector accounts for the highest overall number of deaths, farming is the deadliest industry, when taking into account the number of workers in those sectors. About 360,000 people work in agriculture, around 1% of the total workforce, but the sector accounts for 20% of fatal workplace accidents.

Trust registration with HMRC

For trusts already in existence, trustees should be aware of a consultation started in January 2020 on proposals to extend the criteria for which trusts have to register with HMRC.

Trusts which have tax liabilities, already have to be registered with the Trust Registration Service (TRS), but in order to comply with the EU Fifth Anti-Money Laundering Directive, some trusts without tax liabilities are likely to have to register as well. It remains to be seen how wide the new criteria will be, but trustees who have not registered already should review their position when the new legislation is published. The consultation closes on 21 February. Failure to register could result in the trustees being fined for non-compliance.

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Climate Change Litigation:

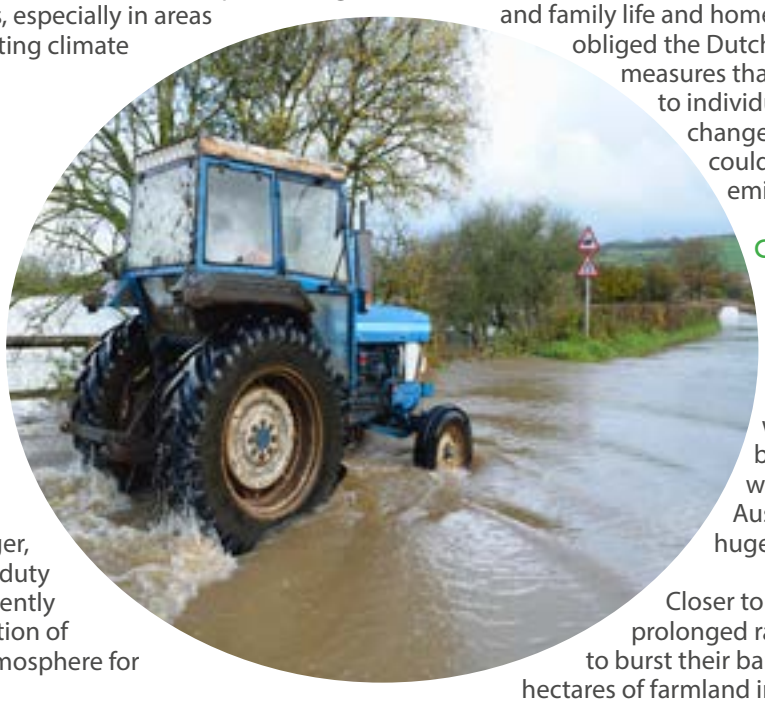
A new era as Dutch Courts lead the way

On 20 December 2019 in a "historic victory for climate justice", the Supreme Court of the Netherlands held that on the basis of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), the Dutch Government has a duty of care to protect its citizens from the dangerous effects of climate change. The ruling in the case of *Urgenda v Dutch State*, requires the Dutch State to take action to reduce its greenhouse gas emissions by at least 25% by the end of 2020, compared to 1990 levels.

This landmark "climate litigation" judgment is likely to inspire individuals of other nationalities to launch similar proceedings against national governments, especially in areas that have been hit by devastating climate events.

Facts

In 2013, the Urgenda Foundation, a Dutch non-governmental organisation with a hybrid name of "Urgent Agenda", initiated a claim against the Dutch State on behalf of 886 Dutch citizens who had been affected by disasters triggered by climate change, notably flooding. Urgenda alleged that the Dutch State exposed their citizens to danger, thereby breaching the State's duty of care, by not setting a sufficiently high target percentage reduction of greenhouse gases into the atmosphere for 2020.



The Dutch State had set a target of 20% reduction by the end of 2020, but amended this to a 14-17% reduction when it realised it was not going to meet the original goal. Urgenda wanted a reduction of 40% emissions, or alternatively a minimum reduction of at least 25% in the same timeframe. Urgenda based this on a report by the Intergovernmental Panel on Climate Change (IPCC), which found that industrialised economies need to reduce their emissions by 25-40% by 2020 compared with 1990, in order to limit global warming to under 2 degrees from the baseline level of 1850.

Proceedings

The Hague District Court found in favour of Urgenda and ordered the State to reduce its greenhouse gas emissions by at least 25% at the end of 2020, compared to 1990 levels. The Dutch State appealed this judgment, first to the Court of Appeal, who found in favour of Urgenda, and then to the Supreme Court, where the verdict of the lower courts was upheld.

The Supreme Court found that the State has a duty of care to citizens, based on Articles 2 and 8 of the EC HR, which provide for the right to life and the right to respect for private and family life and home, respectively. These provisions obliged the Dutch State to take protective measures that mitigate against the risk to individuals from dangerous climate change. The Court found that this could be achieved by limiting the emissions of greenhouse gases.

Consequences

Although this decision applied to Dutch citizens, the verdict is likely to inspire similar proceedings around the world, particularly in areas hit by disasters caused by global warming. Examples include the Australian bushfires, which caused huge loss of property and wildlife.

Closer to home, in Autumn 2019, prolonged rainfall caused watercourses to burst their banks and flood thousands of hectares of farmland in the north of England. DEFRA responded to the crisis by pledging an additional £60 million to the current flooding and coastal erosion fund of £2.6 billion. However, with dramatic and devastating weather events forecast to increase in both frequency and severity as a result of climate change, setting aside funds to help with the repairs may not be enough, as prevention becomes more attractive than cure.

The verdict of the Dutch Supreme Court gives discretion to the Dutch Government to decide what measures are required to reduce their emissions in such a short time scale. It will be interesting to see how the Dutch State meets this target and what effect that has on galvanizing other nations to follow suit.

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Employment:

Staff accommodation and the minimum wage

The National Living Wage ('NLW') came into force in April 2016. Since April 2019, workers aged 25 or above must receive a minimum of £8.21 per hour, or £7.70 for those aged 21 to 24. The NLW is available for anyone above the age of 25, with the National Minimum Wage (NMW) remaining in place for those aged 16-24. The NLW and NMW are expected to rise to £8.72 and £8.20 respectively in April 2020, but the Budget will confirm this on 11th March 2020.

When calculating pay, employers should remember that the policy behind the NMW and NLW is that workers should receive the NMW and NLW in the form of cash, rather than benefits in kind.

Of particular significance, is the effect that the provision of staff accommodation can have on that calculation. It is crucial to ensure that staff who are provided with accommodation as a benefit in kind, or who rent accommodation from the employer, are still receiving the NLW or NMW (as appropriate) in their pay packet.

Capped deduction

Although it would seem logical that the market value of any accommodation provided to a worker could be deducted from their wages (because the individual is making a material saving in living costs), this is not in fact the case. To avoid exploitation of low-level workers by unscrupulous employers, the NMW Regulations introduced a cap on the value that can be attributed to any accommodation provided to a worker. This cap is called the accommodation 'off-set'.

Accommodation 'off-set' allowance

The value of accommodation provided to the worker is calculated by way of the accommodation 'off-set' allowance, currently set at the modest sum of £7.55 per day. This is the case regardless of the market value of the accommodation.

What counts as an accommodation charge?

The 'accommodation charge' includes not just rent itself, but any services provided in connection with the accommodation (e.g. utilities, laundry etc).

What is the effect on the NMW/NLW?

Employers can use the government's online national minimum wage calculator to work out whether a worker is receiving the NMW or NLW, but the basic principles are set out below: The calculations are made by reference to the worker's 'pay period', i.e. the intervals at which they are paid (for example weekly or monthly).

- If the accommodation is free of charge – the employer can add the accommodation 'off-set' to the worker's pay.
- If the employer charges the worker more than the accommodation 'off-set' rate - the excess is deducted from the worker's pay so as to reduce the pay for NMW/ NLW purposes. So the higher the rent charged, the lower a worker's pay will be when calculating the NMW/ NLW.

Paying rent separately

It makes no difference if the cost of the accommodation is taken from the worker's wages beforehand, or if the individual meets the rent after they get paid – the value of the benefit will be limited to the accommodation 'off-set' allowance of £7.55 per day. Any excess will be treated as a deduction and reduces the pay for NMW / NLW purposes.

Although designed to prevent exploitation of vulnerable workers, these rules effectively prevent employers from providing suitable accommodation for staff (perhaps even at a discounted rate) for fear that the rent paid by the worker would need to be accounted for in NMW / NLW calculations.

Penalties for non-compliance

An employer found to be failing to pay the NMW/ NLW can be ordered to pay the arrears to the worker plus a financial penalty of up to 200% up to a maximum penalty of £20,000 per underpaid worker.

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Learning the Law:
Contracting out of repairing obligations for dwellings

The Landlord & Tenant Act 1985 ("LTA 1985") section 11 imposes a number of repairing obligations on landlords of residential tenancies, which cannot simply be overridden by agreement between the parties. The provisions apply in general to lettings of dwelling-houses for a term of less than 7 years, which would include most assured shorthold tenancies and assured tenancies. As highlighted in Josie Edwards' article on page 8, these statutory obligations do not, however, catch tenancies of dwellings, which are let as part of a farm, under the Agricultural Holdings Act 1986 or the Agricultural Tenancies Act 1995.

Section 11 - maintenance and repair

The Section 11 obligations are:

a) *to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes);*

b) *to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity); and*

c) *to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.*

Section 11 also includes the provision, that "*in determining the standard of repair required by the lessor's repairing covenant, regard shall be had to the age, character and prospective life of the dwelling-house and the locality in which it is situated.*"

Under Section 12 contracting out of these provisions is expressly prohibited.

Kerr and another v Maass [2019]

The recent High Court case of *Kerr and another v Maass* [2019] EWHC 95 (Ch), has highlighted the question of contracting out of these statutory obligations. In that case the Court decided that an agreement between landlord and tenant to contract out of the landlord's repairing obligations under section 11 LTA 1985 did not bind the parties. Furthermore, the tenant could not avoid the effect of a notice to quit under section 21 Housing Act 1988, by arguing, by way of an estoppel, that his agreement with the landlord gave him rights over and above those of an Assured Shorthold Tenancy ("AST").

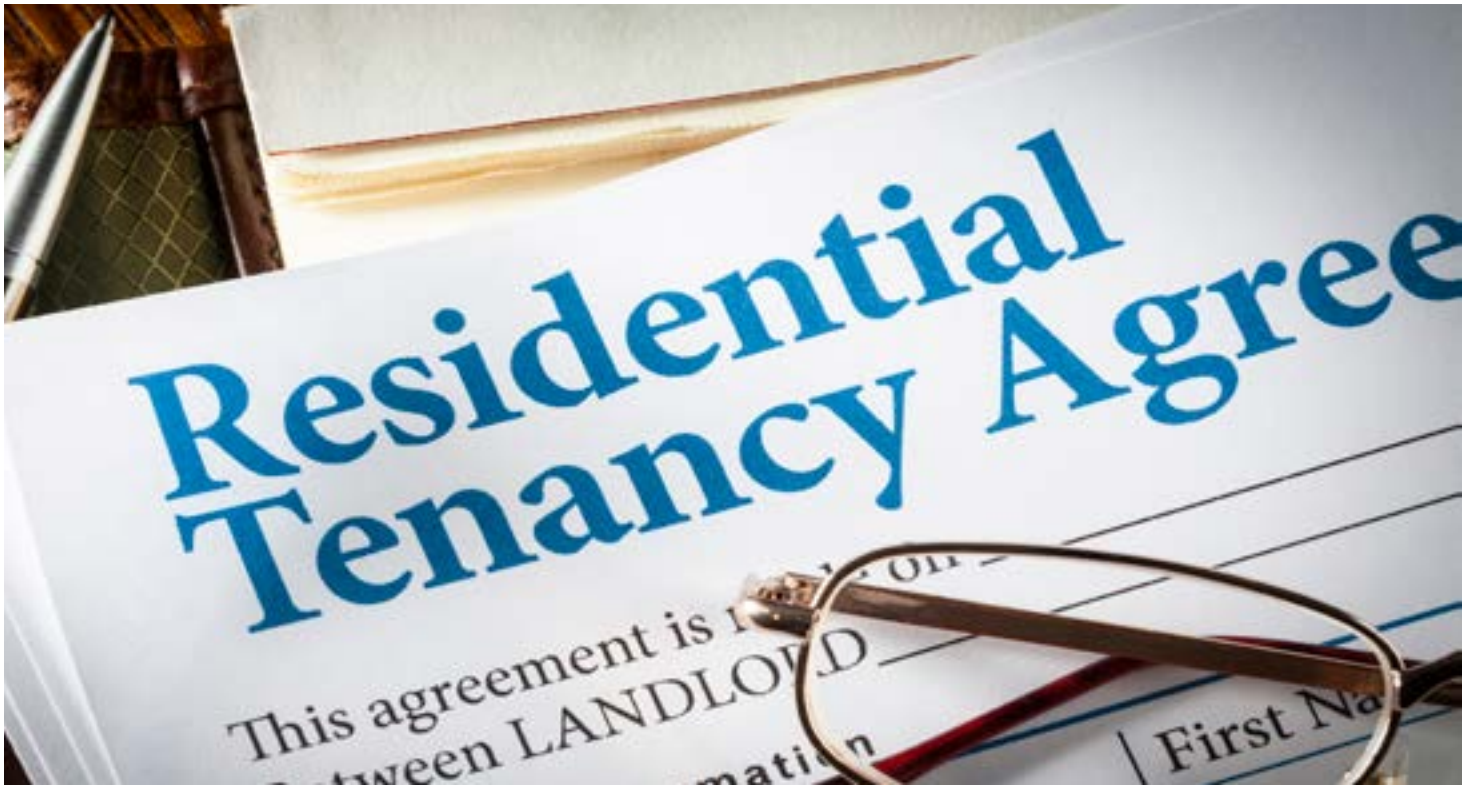
The case

In 1993, the landlord granted an oral tenancy to the tenant, at a significantly reduced monthly rent, in return for the tenant taking on the obligations for maintenance and repair of the property. The tenancy then continued in more or less the same format and at the same rent for 24 years.

After that time, the landlord served a section 21 notice to regain possession of the property after finding that it had fallen into disrepair. The tenant argued that the landlord was not entitled to recover possession due to proprietary estoppel through acquiescence, and also counterclaimed for damages due to the landlord's non-compliance with his repairing obligations under section 11.

Decision on the repairing obligations

This arrangement, regardless of its commerciality or fairness, fell foul of section 12 of the LTA 1985, which imposes an express restriction on contracting out of section 11 obligations, to the extent that any agreement or covenant will be void if it "purports to exclude or limit the obligations of the lessor". The only way to contract out of the repairing obligations is to obtain permission from the Court.



Therefore, despite the approval of both parties and the low rent to reflect the change in obligation, the Court found that it was not possible to contract out of section 11. The landlord was found liable for damages for his failure to repair and maintain the property under Section 11 in the sum of £5,000 and required to pay the tenant's costs in the counterclaim.

Proprietary estoppel by acquiescence

The tenant resisted possession proceedings by arguing that a proprietary right had arisen due to the circumstances of his occupation. He argued that he believed that he had a more substantial and secure right of occupation than under an AST and that the landlord had acquiesced in this belief by agreeing to contract out of the landlord obligations in section 11 of the LTA 1985 (which should otherwise have applied under an AST).

This defence was based on the doctrine of proprietary estoppel by acquiescence. Megarry and Wade (9th Ed.) sets out the principles at 12-0.34 as follows:

1. There must be a mistaken belief by the tenant as to their rights, which causes them to adopt a particular cause of conduct;

2. The landlord must have known of the mistaken belief of the tenant; and

3. The landlord must have failed to correct the tenant by not asserting his own inconsistent right against the tenant's.

If the landlord were to enforce his right and in doing so cause detriment to the tenant, then due to the acquiescence, it would be unconscionable to allow the landlord to assert that right.

Application to this case

In this case, it was established that the landlord was neither told, nor knew of the tenant's belief that he had a more substantial interest in the property than under an AST. There was also no evidence that either party knew that they could not contract out of the Section 11 obligations and instead, they made an "innocent and understandable mistake". As such the Court found the landlord's conduct could not be considered unconscionable and the tenant's defence of proprietary estoppel by acquiescence failed. The section 21 notice was therefore effective in terminating the tenancy.

Conclusion

This decision confirms the orthodox thinking that it is not possible to contract out of section 11 of the 1985 Act without the permission of the Court, even if both parties are willing to agree and the arrangement seems fair and reasonable.

By being ignorant of his legal obligations, a landlord risks facing various causes of action, including proprietary estoppel through conduct, being excluded from regaining possession of a property and/or a claim for damages for breach of section 11 of the LTA 1985.

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Backpage quiz

The quiz this quarter is all about getting to the bottom of some common myths:

1. True or false, where a rent review notice has been served pursuant to Schedule 2 and section 12 of the Agricultural Holdings Act 1986, and the other party has served a counter-notice, can it be with-drawn by the party who served it?

2. True or false, if a tenancy has been granted to a partner of a farming business, and the partnership start to pay the rent, has the tenancy been re-granted to the partnership?

3. True or false, where a lease does not specifically prohibit the tenant from sharing occupation, the tenant will be able to share occupation with their business partners?

4. True or false, if no record of condition is provided or agreed when a tenant takes on premises, the legal presumption is that the premises are in good tenantable repair?

5. True or false, an FBT can provide for the service of notices by text only?

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

Congratulations to Edward Buckland of Edward Buckland Limited in Cornwall (pictured right) who was the winner of the quiz in the last edition. He is the recipient of a bottle of English Sparking Wine. Kate Russell of the CAAV, who was runner up, has been sent a Michelmores pencil.

The questions and answers are set out below:

The quiz this quarter is all about covenants in tenancies, and the questions are true or false, negatively marked (wrong or no answer -1, correct answer +1):

1. True or false: A residential tenancy granted for a fixed term of 6 years can require that the tenant fully repair and insure the premises.

   Answer: False, see Landlord and Tenant Act 1985, section 11.

2. True or false: A covenant in an FBT prohibiting tenant assignment will be read down to read that consent to assignment will not be unreasonably withheld.

   Answer: False. The Landlord and Tenant Act 1927 imposes a statutory duty on the landlord of certain leases not to unreasonably refuse consent at section 19(1)(a); however sub-section(4) excepts tenancies granted under the AHA and ATA.

3. True or false: A covenant by the tenant to reside constantly upon the demised premises will not be breached if the tenant is temporarily accommodated at her majesty's pleasure.

   Answer: False. Such covenants are valid, the object is to ensure that the person responsible for the rent and for performance of the covenants lives on the premises. In Sumnall v. Statt (1985) 49 P. & C.R. 367. 3 the tenant ceased to reside on the premises because of his detention in prison for sixteen months and he was held to be in breach of a covenant to reside constantly at the farmhouse.

4. True or false: A covenant that a tenant is "not to permit games of baccarat, hazard, or roulette to be played on the premises, but to use the same as a private club only, and so to carry on the club as not to contravene any laws of the land for the time being in force" will be breached where the tenant permits games of "chemin de fer" in a club at those premises.

   Answer: True. See Fairtlough v. Whitmore (1895) 64 L.J.Ch. 386, where the Court held that both 'baccarat chemin de fer,' and 'baccarat banque' were absolutely prohibited by the agreement.

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