



Agricultural Estates Newsletter

Spring 2012

FARRER & Co

Contents

		Page Number
	Editorial	2
I	The Localism Act 2011 and draft National Planning Policy Framework	3
II	CAP reform - 2014 and beyond	6
III	The Bribery Act 2010	7
IV	A private client tax update	9
V	De-registering common land	10
VI	The Agency Worker Regulations 2010	12
VII	Liability for accidents caused by trees	13
VIII	What to do with travellers	15
IX	TDS traps	17
X	Heads of terms for overage	19
XI	Estates and Private Property Team	21

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Editorial

Falling from the leaves of this newsletter you will find a flyer for the latest book by Christopher Jessel, long-time partner of this firm and now valued consultant. *A Legal History of the English Landscape* will be enjoyed by anyone with an historical interest in the lie of the land. From Bronze Age ritual landscapes and the Romans, through the dark ages, feudalism, the rise and fall of the monasteries, to parliamentary inclosure, the great landed estates, the industrial revolution and up to the present, Christopher tells the great story of law and the land with a clarity readily accessible to non-lawyers. Attractively (at least for me) the book clocks in at under 200 pages (brevity is a much overlooked virtue in legal writing).

The law affects the landscape today as much as ever. Planning law, which has protected the rural landscape since the early 20th century, may be at a tipping point. This newsletter begins with Joanna Gliddon's update on the Localism Act 2011 and an account of the draft National Planning Policy Framework, a document which (against the trend of most regulation) plans to reduce planning policy to 50 pages. Ah, what a minor miracle that would be. I might even be tempted to read it.

James Maxwell

I The Localism Act 2011 and draft National Planning Policy Framework

The Localism Act 2011

We reported on the Localism Bill (as it then was) in our Spring 2011 newsletter. The Bill received Royal Assent on 15 November and became the Localism Act 2011 (the Act). This article brings you up-to-date on the more significant changes that feature in the final form of the Act as a result of the way the Bill changed as it progressed through Parliament. Some of the provisions introduced by the Act come into force immediately; the majority will come into force during 2012.

Neighbourhood planning

In accordance with the Government's much-reported intentions of giving local people greater say in planning their own neighbourhoods, order-making powers relating to neighbourhood planning provisions are in force immediately. New provisions are inserted into the Town and Country Planning Act 1990, dealing with neighbourhood development orders, neighbourhood forums and neighbourhood development plans. The Government has just completed its consultation on draft regulations which are expected to come into force on 1 April 2012.

For areas where there is no parish council, the local authority can designate an organisation or body as a neighbourhood forum, if it is made up of at least 21 individuals who live or work in the area and has been established for the express purpose of furthering the economic, social and environmental well-being of the area. It can also have as its object the furthering of trade and business in the area, in recognition of the valuable input that chambers of commerce and similar bodies can provide. Indeed, the Act differs from the original Bill as local businesses can now play a leading role in setting up neighbourhood forums and the development of neighbourhood plans. In designating the extent of a neighbourhood, a local authority will have to decide whether it should be specifically designated as a "business neighbourhood", which will have consequences for how referenda are held for the adoption of the neighbourhood development plan or neighbourhood development order.

While in draft form, these provisions were largely residential in approach, giving rise to concerns that this would be nothing more than a Nimby's charter. The enhanced role of business has therefore been welcomed, especially in areas requiring regeneration and rural areas with low employment.

Assets of community value

These provisions introduce a moratorium on the sale of buildings or land of community value, until local interest groups have had sufficient time to express an interest in acquiring the land and have organised themselves to put a bid together. When the Bill was published the draft provisions raised serious concerns that it would cause the break-up of estates, delay sales unnecessarily and work to discourage landowners who were already volunteering land for community or amenity uses.

The general procedure for the moratorium on the sale of assets of community value was set out in our Spring 2011 newsletter. However, changes of note in the Act include the requirement that assets of community value can only be nominated by a parish council (in England) or a voluntary or community body with a local connection. Previously, anyone could nominate an asset.

In addition, while the regime will in general affect disposals of the freehold or leasehold (of more than 25 years) interests with vacant possession, the range of exemptions has been widened to include:

- all disposals by way of gift (including settlement on trust);
- transfers between members of the same family (whether or not for value);
- transfers on inheritance;
- assets forming part of a larger estate transferred as a going concern.

A further range of exempt transfers will be set out in regulations yet to be published.

Regional spatial strategies

The Act gives the Secretary of State power to revoke regional spatial strategies which, for areas outside of London, will end the top down approach of imposing housing targets and a central government agenda and replace it with neighbourhood planning. This will not happen immediately; following extensive litigation throughout 2011 involving Cala Homes, the Secretary of State has just finished consulting on the environmental impacts of revocation.

Community infrastructure levy

The provisions relating to community infrastructure levy (CIL) underwent dramatic changes, as compared with early versions of the Bill. Local councils now have more power over setting their CIL rates. The independent examiner will only have power to determine whether the charging schedules are at a level that does not make development unviable. He can make recommendations to the local authority for amendment, but cannot impose any changes.

CIL can now be applied towards the ongoing running costs of existing infrastructure, as well as towards the provision of new infrastructure. A proportion (yet to be determined) of the CIL that is received must be passed down to the local council (in England, the parish council) in which the development is taking place, as a neighbourhood fund. In areas without a parish council, CIL will stay with the local authority, which will consult on how to spend it, but will not actually pay it over to any neighbourhood forum, which reflects the fact that the latter are not elected bodies.

Consultation on draft amendments to the Community Infrastructure Levy Regulations 2010 took place at the end of 2011 and should be coming into force in April 2012. The consultation sought views on the percentage to be passed to local councils, as well as the thorny issue of whether local councils ought to be able to apply CIL towards the provision of affordable housing. Securing affordable housing under the CIL regime may be a headline issue in the future. Once adopted, CIL rates will be fixed and will not be able to respond to changing economic conditions, such that, where the viability of a development is threatened, it may be affordable housing that gets squeezed.

The draft amendments also set out requirements for online accounting by the local authority, which are intended to increase transparency. However, being a fixed charge, the scope for influencing how it will be spent will inevitably be reduced; unlike with planning obligations, there will be no possibility of refunds.

The National Planning Policy Framework

With the Localism Act now in force, the scene is set for a major shift in planning policy, represented by the similarly revolutionary National Planning Policy Framework (NPPF), the first draft of which was published for consultation in July 2011. The response from consultees was decidedly mixed, ranging from the National Trust's well publicised opposition, to the very positive reception from the British Property Federation. On 21 December 2011, the Communities and Local Government Select Committee published its report (the Report) on the draft NPPF, with 35 specific recommendations which may go some way to allaying fears that it is simply a developers' charter.

The 50 pages of the draft NPPF will replace over a thousand pages of existing national policy. It is intended to be a succinct statement of the Government's policies on topics ranging from housing to the natural and historic environments and open spaces. The Report does not seek to alter the general structure of the document, and indeed applauds its brevity, but at the same time it criticises the lack of clarity and recommends clearer definitions for some of the key terms.

Sustainable development is a key concept within the draft NPPF, and the "presumption in favour of sustainable development" was one that was given substantial attention in the press. Sustainability in this context is defined by reference to prosperity (an economic role), to people (a social role) and to places (an environmental role). Sustainable development means development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The Report, however, recommends that this definition goes further, to ensure that all three aspects of sustainability are achieved, without one being traded off against another. Local councils, it says, should also be given the scope to apply the new definition according to their own circumstances.

The Report broadly accepts the presumption in favour of sustainable development, but recommends that the emphasis on economic growth is removed. One of the core principles of the current draft NPPF is that the default answer to development proposals would be "yes", except where this would compromise the key sustainable development principles set out in the framework. The Report goes so far as to seek the removal of this default position, since it is inconsistent with a plan-led approach, and recommends that consistency with the local plan is expressly drawn into the presumption. If this change is adopted, it should provide substantial comfort for those concerned that the NPPF provides an open door to undesirable development.

A key point to emphasise is that the NPPF is policy only and does not change any existing legislation; nor does it override or water down existing statutory designations, such as SSSIs and AONBs. It does not change the existing legal framework under which local councils must decide an application in accordance with the development plan unless material considerations indicate otherwise. If the development plan is out of date under the current system, this would be a material consideration for any application that is decided now.

Inevitably, though, local councils whose core strategies are up-to-date will stand the best chance of setting the agenda for development, especially since the Report firmly asserts the primacy of the local plan in the presumption of sustainable development. The NPPF says that "*In the absence of an up-to-date and consistent plan, planning applications should be determined in accordance with this Framework, including its presumption in favour of sustainable developments.*"

This policy is not challenged, but the Report does make the following recommendations, in order to clarify the status of local plans and to temper the prospect of this presumption applying to the nearly 50% of councils still without adopted core strategies:

- The interrelationship of local and neighbourhood plans with the NPPF needs to be set out with greater clarity, including which takes precedence when strategic and local priorities conflict.
- Local councils should be reassured that they are still able to take into account in their local plans issues that are not explicitly covered in the NPPF. Whilst the NPPF is a succinct statement of policy on a wide range of topics, its brevity means that there are some gaps. Concerns have been expressed that this leaves interest groups at a disadvantage where specific policies (such as, for example, the importance of theatres in town centres as highlighted in PPS4) are effectively to be deleted. In addition, the NPPF intentionally lacks any spatial element, which means that it is for local councils to fill in specific policies suited to its area in their local plans, which will become longer as a result.
- The status of the vast body of existing government advice and guidance, such as letters to chief planning officers and circular guidance, as distinct from policy, should be clearly stated. This is a fundamental omission in the current draft NPPF, which means that local councils would have to look to drafting their own guidance – on for example, the tests to allow new agricultural dwellings – thus effectively "reinventing the wheel" and adding an extra burden to already overstretched policy teams.
- A timetable for a transition period should be set out, which would ensure that the presumption in favour of sustainable development is not applied where plans are absent, silent or out-of-date, until councils have had a realistic chance of putting such plans in place.

If further consultations are carried out, as the Report recommends, the final version of the NPPF will inevitably be delayed beyond the April 2012 target. While the Report seeks greater clarity, with the effect of moderating the swing of policy in favour of development, the extent to which the Government takes up its recommendations remains to be seen.

Joanna Gliddon

II CAP reform – 2014 and beyond

Most readers of this newsletter will know that the European Commission has published proposals for the replacement of the existing single farm payment scheme. This article identifies some of the more significant proposals and considers how they may affect farmers and landowners. It is important to note, however, that at this stage the Commission's proposals are just that, merely proposals, and the detail of the proposals will almost certainly change.

Eligibility for new Entitlements

The new payment scheme will entirely replace the existing one. The new Entitlements will have no historical element. They will be awarded to those who were in occupation in 2011 and activated Entitlements in that claim year. Inevitably, this will cause complications for farm transfers between 2012 and 2014 (or later if there is slippage in the timetable). The current proposals do provide that sellers will be able to transfer the right to receive Entitlements to *only one* potential new farmer, but that will be of little help where people are proposing to break up large farms into smaller lots. The regulations also anticipate that this transfer will occur at the same time as a sale or lease of the whole or part of the holding. Both of these limitations could present difficulties to those who are proposing to reorganise or dissolve farm businesses prior to the implementation of the new scheme.

Capping

Payments over €150,000 will be progressively reduced and there will be no payments above €300,000. These proposals for capping payments are bound to affect large farmers unless thought is given to rearranging holdings. Landowners doing so would need to take care not to upset any *Balfour* estate planning. Unfortunately, the proposals include anti-avoidance provisions that are likely to scupper attempts to avoid capping.

Environmental conditions

There are important proposals that aim to make a percentage of the payment conditional on compliance with environmental requirements:

- the maintenance of 'set aside' areas (possibly we should call this 'son of set aside');
- the retention of permanent pasture; and
- arable crop diversification.

These may create real constraints for farmers, but it is likely to be some time before the precise form of these requirements takes shape.

Active farmer

Farmers will not be able to claim the new Entitlements unless they are 'active' farmers. To be active, a farmer's direct payments under the new scheme must amount to 5% or over of their total receipts from all non-agricultural activities. In this age of diversification, this may create problems for some mixed estates. It may therefore be worth considering to what extent non-agricultural assets may be ripe for re-allocation down the generations. Institutional investment landlords, who are currently also claiming Entitlements on some in-hand land, may need to consider setting up a separate 'active farmer' company. It is interesting to note that there are currently no anti-avoidance provisions in the draft regulations (unlike for capping); this may afford scope for rearrangement.

Transactions in 2012 and onwards

Landlords will want to consider whether FBTs that are being granted in 2012 and onwards contain appropriate provisions that anticipate the grant of new Entitlements in 2014 (or whenever). Particular care will need to be taken over the wording of a tenant's obligation to transfer the Entitlements back to the landlord (or to the incoming tenant) at the expiry or sooner determination of the term.

Buyers of land with Entitlements will wish to ensure that a contract for sale contains provisions which, as far as possible, address the fact that the buyer will not have been in occupation of the land or able to activate the Entitlements in the 2011 claim year. Unfortunately, on the face of it, a farmer or landowner will be able to effect a transfer *only once*, which obviously creates problems for owners of large holdings. One hopes this is something the Commission will consider further.

As ever, we will all need to keep a watchful eye on the proposals for the new scheme as they develop.

Edmund Fetherston-Dilke

III The Bribery Act 2010

The Bribery Act 2010 (the Act) came into force on 1 July 2011 and has far-reaching implications for all types of organisations, including landed estates.

Will the Act affect us?

Yes. The Act applies to individuals, organisations and businesses in the UK, along with all businesses which have any operations in the UK.

The Act, however, is not an immediate cause for panic; law abiding individuals and organisations who take a sensible approach to managing their relationships should have nothing to fear. The purpose of the Act is to punish those who actively seek to gain an unfair and substantial advantage through deliberate and corrupt means, whilst encouraging organisations to combat the scourge of bribery and corruption through education, prevention and self-policing.

What are the bribery offences?

The Act identifies four bribery related criminal offences which are:

- (i) for a person (ie an individual or a commercial organisation) to offer, promise or give a bribe;
- (ii) for a person to request, agree to receive or accept a bribe;
- (iii) for a person to bribe a foreign public official (although this is not covered in depth in this article); and
- (iv) the failing by a commercial organisation to prevent bribery.

What constitutes a bribe?

Guidance issued by the Ministry of Justice (MoJ) in March 2011 suggested that in order for someone to be convicted for either of the first two of the above offences, it will be necessary for the prosecution to show that, in the eyes of a reasonable person, an advantage "*was intended to induce a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust*".

Assessing where this line is will be the area of most concern to individuals and organisations. It is not the MoJ's intention to prohibit the cementing of relationships between prospective or existing clients in the ordinary course of business. Notwithstanding this, it is an offence to induce a particular piece of work from a client with an act of generosity which is designed to cut across the recipient's impartiality.

Proportionality and timing will be relevant in determining this and the annual golf day or dinner held with land agents and other professionals will be on the correct side of the line. Conversely, flying a potential investor in for an impressive free day's shooting, on the specific understanding and expectation that a particular investment in some form of development project will follow in exchange for the act of generosity, is likely to be an offence. Applying a common sense approach as to whether an inducement looks, feels and smells like a bribe, may be as good a starting point as any until the courts provide further clarity.

What does "failure by a commercial organisation to prevent bribery" mean?

This is a new offence introduced by the Act and has attracted some controversy. An offence is committed where a "relevant commercial organisation" (eg an historic house running a business within its grounds) fails to prevent bribery by a person "associated" with such organisation (eg an employee, contractor or agent).

Is there a defence?

Yes. An offence will not be committed where the commercial organisation can show that on the balance of probabilities "adequate procedures" designed to prevent bribery were in place. In particular the MoJ noted that it was not intended to "*drag well run companies before the courts for every infraction*".

What are "adequate procedures"?

In its guidance, the MoJ has stated that adequate procedures will be based upon six risk-based principles:

- *Proportionate Procedures* - Procedures should be proportionate to the risk faced by the organisation and include bribery prevention policies which are relevant and proportionate to the risk encountered by the organisation. A company with mining operations in Sierra Leone will require very different procedures to a landed estate in Oxfordshire.
- *Top-Level Commitment* - All procedures should encourage a 'top-down', proactive approach to preventing bribery and create an anti-bribery culture within the organisation.
- *Risk Assessment* - Commercial organisations should assess the nature and extent of potential risks of bribery on a regular and proportionate basis, according to the organisation's size and structure and to the nature, scale and location of its activities. The risk assessment should also be documented.

- *Due Diligence* - Proportionate and risk - based due diligence should be carried out upon persons who perform (or will perform) services on behalf of an organisation.
- *Communication (including training)* - Effective communication of an organisation's anti-bribery position (both internally and externally) is regarded as vital in ensuring that adequate procedures are established.
- *Monitoring and Review* - The final principle recommends that commercial organisations should monitor and review procedures regularly and make improvements where necessary.

What does this mean for landed estates?

As can be seen from these principles, it is necessary for any commercial organisation (including a landed estate) to look at areas of its activities where there is a risk of bribery. Upon assessing this, a proportionate policy should be prepared and then communicated to employees and agents as necessary. The policy should be reviewed periodically.

If an estate completes this process, it will assist in providing a defence should any rogue agent, contractor or employee commit bribery in its name. In order to assist with the preparation of such a policy, the MoJ has produced a useful guide which can be downloaded at:

<http://www.justice.gov.uk/guidance/>.

Patrick Tolhurst

IV A private client tax update

The Golding case

The case concerned a successful appeal against a determination by HMRC that Mr Golding's habitual residence was not agricultural property within the context of the Inheritance Act 1984.

The late Mr Golding had died on 4 March 2007, having farmed a smallholding of approximately 16 acres for more than 65 years. In his early years, such farming activity had been intensive, but in his later years it was at a lower level. The farming operation made little profit over the years and much of the fruits of Mr Golding's labours were for his own enjoyment.

On his death APR was claimed by Mr Golding's executors on the farm. HMRC, whilst accepting the claim in respect of land and buildings connected to the farm, did not accept the claim with regard to the farmhouse (a modest three bedroom house described as being in a poor state of repair). HMRC was of the view that the farmhouse was not character appropriate for APR and duly issued a Notice of Determination that it did not qualify for APR.

The Tribunal found for the executors and in so doing confirmed *Antrobus* principles. It also found that in determining whether a property is of a character appropriate, the test is a matter of fact and degree, having regard to a number of factors, not solely on the financial viability of the farming operation.

The case is a helpful reminder that, as old age encroaches upon a farmer, a reduced turnover and profitability do not of themselves necessarily mean that a farmhouse will cease to qualify for APR.

Gifts of pre eminent objects and works of art to the nation

As part of its strategic agenda to encourage philanthropic giving, in the 2011 Budget the Government announced that a consultation would take place on a new scheme that would provide a tax reduction to those who make lifetime gifts to the Nation of art and historical objects of pre-eminent importance. The consultation closed on 21 September 2011 and the Government published its response in December 2011.

The new scheme will augment (and share a budget with) the existing Acceptance in Lieu scheme and will have a total annual limit of £30m. Both individual and corporate donors will be able to participate in the scheme, but it will not be available to personal representatives and trustees.

The scheme provides for relief against income and capital gains tax and will be set at 30% of the value of the object donated for individual donors and 20% for corporates. Individuals using the scheme will be able to spread their income tax reduction over five years from the year of the gift being made.

The Government has stated that draft clauses covering the implementation of the scheme will be included in the Finance Bill 2012, a draft of which is available for comment on HMRC's website. Draft guidance outlining how the scheme will operate will also be published on DCMS' website and anyone wishing to comment on the draft legislation can do so before 10 February 2012.

Charitable gifts on death – lower inheritance tax

In a further effort to boost charitable giving, the Government also announced in the Budget a new incentive for those leaving at least 10% of their net estate (after exemptions, reliefs and the nil rate band) to charity on their death. In such circumstances a lower rate of inheritance tax will apply and the current IHT rate of 40% will be reduced to 36%. Again the relevant draft legislation is on HMRC's website and will be included in the Finance Act 2012.

James Carleton

V De-registering common land

Registration on the Commons Register of land as common land or a town and village green (TVG) has important implications for a landowner. Third parties will have rights: commoners may have the right to graze cattle or exercise other traditional rights of common; the neighbourhood at large may have the right to pursue recreational activities on the village green. Common land is also "access land" open to the public under the Countryside and Rights of Way Act 2000. This public access means the landowner has responsibilities and potential liabilities. Furthermore, there are statutory restrictions on the use of commons and TVGs; in particular, they cannot be developed.

It is important therefore that only land which is properly common or green should be protected by registration. This article explores the right of a landowner to de-register land which has been wrongfully registered.

Background

Rights of common are centuries old. Concern grew in the 1950s that, with changing farming practices and incomplete records, such rights had become difficult to identify. An attempt was made, through the introduction of the Commons Registration Act 1965 (the 1965 Act), to compile a definitive register, "the Commons Register", of all common land, TVGs and rights of common. Common land is defined in the 1965 Act as (a) land subject to rights of common or (b) waste of the manor not subject to rights of common.

Since 1965 various flaws have been identified in the registration system, one of which is that the registers are riddled with mistakes. The scheme relied on an application being made by a cut-off date in 1970, failing which land would lose its status as common land or a TVG and any rights of common would be extinguished. If an objection was received, the merits of the application were scrutinised by a Commons Commissioner. In the absence of an objection, a "provisional" registration became "final" automatically. The result was that a number of rushed, incorrect and unclear applications were made to beat the deadline and many of those applications (which were not publicised well) led to successful registrations simply because no one objected. There are therefore a number of cottages and gardens abutting a common or green, and even fields which were cropped in the 1960s, which appear on the Commons Register.

Commons Act 2006

The 1965 Act gave limited opportunity to rectify the Commons Register. This defect was recognised by the Commons Act 2006 (the 2006 Act) and there is now much more scope to de-register incorrectly registered land and buildings.

As there has been so little Commons Register activity since the first wave of registrations were closed in 1970, councils have been concerned about the level of work resulting from the 2006 Act (it makes other changes as well) and the need for training. The de-registration provisions currently, therefore, only apply to seven pilot authorities: the County Councils of Cornwall, Devon (not Plymouth or Torbay), Hertfordshire, Kent (not Medway) and Lancashire (not Blackpool), the County of Herefordshire District Council, and Blackburn with Darwen Borough Council.

Amendments may be made once a review of the pilot implementation has taken place but, as things stand, the fundamental requirements of a de-registration application are as follows:

1. The land/building was provisionally registered as common land or TVG under the 1965 Act by the 1970 cut-off date. A number of TVGs will fail this test as they were registered later.
2. In the case of just land (ie there are no buildings) no decision was made by a Commons Commissioner under the 1965 Act procedure (so there was no review of the merits at the time).
3. The provisional registration became final (this happened automatically if there was no objection).
4. Where a building has been registered, there was a building on the land on the date of the provisional registration and a building (but not necessarily the same building) has remained on the land ever since.
5. Where land has been registered as a TVG, immediately before its provisional registration it was not common land or a TVG. Land is taken not to have been a TVG if, owing to its physical nature, the land could not have been used by members of the public for lawful sports and pastimes throughout the twenty years before its provisional registration and the land was not (and still is not) allotted under any enactment (such as under an Inclosure Act) as a green or for the purposes of a green.

6. Where land has been registered as common land, immediately before its provisional registration, the land was not any of the following:
- land subject to rights of common;
 - waste land of a manor;
 - a TVG;
 - land of a description specified in Section 11 of the Inclosure Act 1845 (this introduces a slightly broader definition of common land than the one under the 1965 Act (section 11, for example, includes land held and grazed by tenants in common) but the test is otherwise the one in 1965).

Proving 1 - 3 above should be relatively straightforward and the necessary documentation is available from the relevant commons registration authority. Criteria 4 - 6 are factual and involve research into the position in the 1960s. Good estate records and/or a statutory declaration from a former tenant (or relative of the tenant) will be invaluable, but some public bodies may also be able to assist. For example, the National Monuments Record have a number of aerial photographs and the National Archives at Kew hold a Manorial Documents Register.

Conclusion

It should not be thought that a de-registration application is easy to make; it involves a certain amount of investigative work and cost. However, particularly if there are development opportunities, it is worth checking estate records to see if there are anomalies in the Commons Register as the tide has turned (if only for some counties at the moment).

Paul Krafft

VI The Agency Worker Regulations 2010

The Agency Worker Regulations 2010 (the Regulations) came into force on 1 October 2011. The Regulations aim to ensure that agency workers hired through temporary work agencies receive the same basic working and employment conditions as if they had been hired directly by the hiring organisation (the Hirer). More specifically, the Regulations provide a combination of what I refer to below as "day one rights" and "12-week rights".

Day one rights

Agency workers gain some "equal rights" from day one of their assignment. These are the right to be informed of any vacancies within the Hirer's organisation during the period of their assignment to the Hirer, and also the right to no less favourable treatment in connection with access to collective on-site facilities and amenities (such as childcare facilities and parking), except where the decision to deny access is justified.

12-week rights

Agency workers do not gain the right to equal treatment in respect of other rights (such as the right to the same pay, holidays, overtime and rest breaks) until they have undertaken the same role for the same Hirer for 12 continuous calendar weeks (the Qualifying Period).

For the purposes of calculating the Qualifying Period, weeks count in whole or in part. Therefore, an agency worker working one day a week would qualify after 12 weeks (in practice, 12 days) of work. Continuity of the Qualifying Period will only be broken if the agency worker changes to a new assignment which is substantially different (and is notified in writing of the type of work required in the new role) and/or there is a minimum of a six-week break between assignments.

Liability

The Hirer alone will be liable for breaches of the day one rights. Both the Hirer and the relevant temporary work agency may be liable for breaches of the 12-week rights.

It should be noted that the Regulations include strict anti-avoidance measures. The most immediately significant of these is a fine of up to £5,000 where a Hirer terminates an agency worker's assignment just before the Qualifying Period is reached in a deliberate attempt to avoid the agency worker acquiring equal rights.

Unfair dismissal/detriment

Agency workers have a right not to be subjected to any detriment on certain grounds related to their being an agency worker. For example, they have the right not to be subjected to any detriment for giving evidence (in disciplinary proceedings etc) or asserting their rights or bringing proceedings under the Regulations. A claim for unlawful detriment can be brought against either the relevant temporary work agency or the Hirer.

Practical tips

In light of the Regulations:

- Review all existing and potential agency arrangements to ensure you are aware of possible pitfalls – for example, where an agency worker's assignment is likely run for over 12 weeks.
- Ensure that all agency workers have access to vacancy lists and to communal facilities (save to the extent any decision not to allow access can be objectively justified, for example, where parking is very limited).
- Make sure that you have informed any temporary work agencies you use of the basic terms and conditions offered to those of your permanent employees in positions comparable to those of any agency workers who will (or are likely to be) engaged by you for 12 weeks or more.
- Consider getting an indemnity from any temporary work agencies you use to cover breaches of any agency worker rights under the Regulations (they may not agree to this).
- Keep an accurate tally of the number of weeks that agency workers have worked for you, so as to know when those workers obtain 12-week rights.
- Where applicable, keep clear records about why there is no longer a need for agency workers on your site. This will help minimise the risk of opportunistic claims brought by agency workers who may attempt to allege they have been removed in a deliberate attempt by the Hirer to avoid giving them equal rights.

Michal Chudy

VII Liability for accidents caused by trees

Everyone knows not to shelter under a tree during a storm for fear it might be struck by lightning. However, many may think it a sensible step to take shelter in this way in a normal rain shower. This is what a group of children did in 2007 on an outing to the National Trust property, Felbrigg Hall in Norfolk, with disastrous consequences. A large branch split from the tree under which they were sheltering and fell to the ground killing one child and seriously injuring three others. The parents brought a civil claim against the National Trust as owners and the case was heard in July 2011. Also heard in July of this year was a claim against Surrey County Council when a falling branch from one of its trees caused the death of a Mr Imison while he was unloading bicycles from the family car on a public highway.

Before we consider these cases in more detail, here is a reminder of areas of possible liability for owners or custodians of trees.

Civil liability

Negligence

The person who is responsible for a tree owes a duty to those who pass near it to take reasonable steps to ensure their safety. What constitutes 'reasonable' has been the subject of much debate, but it is thought to be the steps taken by a "reasonable and prudent land owner". The duty of care in the tort of negligence closely mirrors the statutory duty owed under the Occupiers' Liability Acts.

Occupiers' liability

Under the Occupiers' Liability Acts of 1957 and 1984 an occupier with control over premises (which can include gardens and woodland) is liable to take such care as is reasonable to see that either the visitor (under the 1957 Act) or trespasser (under the 1984 Act) will be reasonably safe. A higher standard of care is owed for a visitor than for a trespasser and a higher standard still for a child compared with an adult. It is of interest to note that a person accessing property under the Countryside Act 1949 or the Countryside and Rights of Way Act 2000 is not a *visitor* for the purposes of these acts; the standard owed is the lesser standard owed to trespassers (together with any other duties that may apply).

Criminal liability

The Health and Safety at Work etc Act 1974

Sections 2(1) and 3(1) place a duty on employers to ensure, so far as is reasonably practicable, that employees and members of the public (and other persons not employed by the employer) are not put at risk.

The Management of Health and Safety at Work Regulations 1999

Under regulation 3 there is a requirement to make suitable/sufficient risk assessments.

We are not aware of the HSE having brought any criminal proceedings in respect of fatalities caused by falling branches, but they have certainly carried out investigations, including that into the death of a man at Castle Forbes, Aberdeenshire in 2006. Investigations by the HSE can be very lengthy (and costly) and although prosecutions do not always follow, when they do the conviction rate is very high. Furthermore, fines can be considerable and will not be covered by any public liability insurance policy. By way of example, in a case where a small boy fell and was impaled on a tree branch, it was held the nursery responsible for his care was negligent and the Court ordered it to pay a fine of £21,000 (see *Clockwork Day Nursery, case 4080715*). Whilst lesser injuries result in much lower fines (Witham Hall School Trust were ordered to pay £250 when workers contracted dermatitis from contact with trees in 2004), the levels of fines in cases involving fatalities increase sharply and may be in the hundreds of thousands of pounds.

The civil cases below considered whether the respective landowners had done enough to ensure the safety of those on their respective properties.

Harry Bowen & Others -v- The National Trust [2011] (Felbrigg Hall)

As mentioned, here a falling branch killed a child and seriously injured three others. The Court held that the work the National Trust had been doing to assess the risk posed by the trees on its property was sufficiently robust to discharge their duty of care, both under the 1957 Occupiers' Liability Act and the common law duty in negligence.

The woods at Felbrigg extended to over 2,500 trees. At the time of the accident these trees had been reviewed and zoned into three risk categories (this has since increased to five). The categories were determined by assessing how many people passed a particular tree. The tree in question was deemed a "mid risk" tree with an average of around 14 people a day directly passing under it. The tree had been inspected by qualified professionals twice in the six months prior to the accident.

The claimants asserted that those carrying out the inspection of the tree should have recognised the risk that the branch was likely to fall. However, the Court ruled that, given the location of the tree, the visual inspections carried out were adequate and completed with sufficient care and attention by appropriately qualified personnel. It was deemed relevant that the tree was in the mid risk category and that the growth on the tree which may have suggested it was diseased was not easily visible from the ground nor necessarily indicative that the branch would fall. The judgment emphasised the many steps taken by the National Trust to categorise the trees and to ensure they were inspected by specifically trained members of staff.

Joanne Micklewright -v- Surrey County Council [2011]

The circumstances of this case provide a stark contrast with those at Felbrigg Hall. Here, no steps at all were taken to inspect the offending tree. A branch fell from the tree, killing Mr Imison on the public highway. As the debris had been cleared away, there was very little evidence concerning the condition of the tree at the time the branch fell. As a result, the Court was forced to consider hypothetically whether an inspection would have been able to detect that the branch was likely to fall and cause injury.

The Court was mindful that the claimant (who was the deceased's partner) had been disadvantaged by the way the defendant had dealt with the evidence and therefore the claimant's evidence had to be dealt with "benevolently" and the defendant's "critically". Despite this, it was held it would not have been possible for a reasonable inspection to determine that there was a problem with the tree or that a branch was likely to fall. It was therefore held that had the Council taken sufficient steps to discharge their duty of care in negligence (or by association under the Occupiers' Liability Acts) the accident would not have been prevented.

This judgment should give some comfort to landowners with responsibility for trees. It would seem that, even when an inspection has not been carried out, the Court will consider the condition of the tree and the likelihood that any defect would have been visible on a reasonable inspection by an appropriately qualified individual.

Protective measures

The National Tree Safety Group has published draft guidelines detailing the various steps which can be taken by the landowners to ensure that their trees are inspected effectively and any necessary remedial action is taken.

These are available online at:

[http://www.forestry.gov.uk/pdf/NTSGDraftGuidanceDoc.pdf/\\$FILE/NTSGDraftGuidanceDoc.pdf/](http://www.forestry.gov.uk/pdf/NTSGDraftGuidanceDoc.pdf/$FILE/NTSGDraftGuidanceDoc.pdf).

The key steps in tree safety management include:

- **Zoning** – appreciating tree stock in relation to people or property (eg how many people are likely to pass by any given tree);
- **Tree inspection** – assessing any obvious risk of tree defects (the formality of inspection necessary varies with reference to the zoning of the tree);
- **Managing the risk** at an acceptable level – identifying and prioritising safety work according to the level of risk (here the emphasis is on a practical, proportionate response).

Throughout the report the emphasis is on practical, proportionate measures, which will vary depending on the number of trees owned, the proximity to the public and the potential risk posed.

At Felbrigg there were in excess of 2,500 trees. Whilst all trees were checked, only trees considered to be of risk were documented. As it was not thought to pose a risk, the Court did not criticise the National Trust for not having any records relating to the tree which caused the fatal accident. However, should landowners wish to afford themselves maximum protection from litigation (and those on their land maximum protection from falling branches) and should the number of trees on their property be at a manageable level, regular inspections of all trees should be carried out and recorded by appropriately trained members of staff or, where appropriate, external contractors.

James Price and Jo Ord

VIII What to do with travellers

Monday – 'I bought some land today from our local odd job man.'

Tuesday – 'With a few friends I put in some concrete hard-standing and installed water, electricity, and some rudimentary sewage outlets.'

Wednesday – 'Today I had a visit from a man from the Council. Apparently, I had not asked his permission to do these things.'

We all know what happened at Dale Farm in Essex. The big problem for the local Council was that this was not a case of trespass, merely a breach of planning control. As a result, the Council was only able to use enforcement notice procedures under planning legislation.

When trespassers (not necessarily travellers) come onto your land, you, as landowner, will usually be in a stronger position to move them off than the local Council at Dale Farm because you will normally be relying on your rights as landowner.

Prevention

Such trespassers will invariably arrive unannounced and in the middle of the night. However, you can be ready for the invasion if you undertake some simple practical steps well in advance. These could include keeping up-to-date land registry plans, tenancy agreements and grazing agreements in your possession, ready to pass to your solicitor. You should keep in contact with neighbouring landowners, so that you can hear about potential problems. You might fence off your land or be prepared to bar access to it with ditches, boulders or concrete blocks so as to make it unattractive as a place to set up camp. Bear in mind that there are 'fixers' out there who scout areas for potential sites. It is important to be prepared.

As soon as you have found out that travellers or trespassers have moved onto your land (do not invite them in, or give consent in any way to their occupancy) inform the local police, your solicitor and the bailiffs. If appropriate, you could ask the trespassers to leave, but if they become aggressive leave well alone and let the experts do their job. To avoid unnecessary aggravation (which could lead to a breach of the peace) it is best not to take photographs.

Police powers

The police do have powers under Sections 61 and 62 (A)-(E) of the Criminal Justice and Public Order Act 1994. Under Section 61, if the senior police officer present believes that:

- two or more persons have entered land as trespassers with a common intention of residing there for any purpose; and
- reasonable steps have been taken by on or behalf of the occupier to ask them to leave;

and either

- any of them has caused damage to the land or property on the land;
- any of them has used threatening or insulting words or behaviour to the landowner or a member of his family; or
- they have six or more vehicles on the land

he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land.

Section 62 (A) (E) gives a separate power to the police to direct the trespassers to leave land and remove any vehicles and property where they believe there is a suitable alternative site for the trespassers to pitch. In order to exercise that power the police must ensure that:

- at least two people are trespassing on the land and intend to reside there for any period;
- the trespassers have at least one vehicle on the land; and
- they have a caravan in their control and there is a suitable alternative pitch for the caravan or caravans at another pitch.

Both these powers, then, are rather weak and hedged about by conditions. Moreover, they are only powers, not duties. The police are not very willing to exercise these powers and would much prefer landowners to deal with the problem themselves.

Bailiffs

Trying to 'do it yourself' carries the risk of danger to the landowner and the risk that a criminal offence may be committed if too much force is used to move the trespassers. It is therefore much more common for a landowner to engage a certificated bailiff's firm to do that work for him. Bailiffs can be instructed to remove travellers by relying on the landowner's right to use reasonable force. Reputable bailiffs with practical experience in the area have the potential to get this matter resolved quickly and cheaply, rather than leaving you to go to Court to obtain the appropriate possession order.

The trespassers will probably have already been moved on before in the same area by the same bailiffs and may be well known to the bailiffs. Sometimes the bailiff's word in the right ear will mean the trespassers move on within a day or so without dispute.

Naturally, all this will develop on a Friday night before a Bank Holiday and after your solicitors' office has closed. You should therefore always ensure that your local certificated bailiff's telephone number is in your mobile phone directory, so that a quick call can be made to the right person and the matter resolved, thus limiting cost to you and damage to your property.

Dwellings

The bailiffs will be unable to help if trespassers have moved into a building on the land and are occupying it as a residence. Section 6(1) of the Criminal Law Act 1977 provides that it is a criminal offence for any person to use or threaten violence to secure entry to any premises if at any time there is someone present on the premises who is opposed to the entry and the person using or threatening the violence knows that to be the case. Violence includes violence to property, so this includes breaking a window or lock to get in. The section does not apply to "displaced residential occupiers" or "protected intending occupiers" of the premises (broadly speaking, those who live in the premises as a home or are about to), but this will not help with an old barn or stable.

The police also have a power of arrest against a trespasser by virtue of Section 7 Criminal Law Act 1977 (rewritten by Section 73 Criminal Justice and Public Order Act 1994). This criminal offence is committed by a trespasser refusing to leave when required to do so by or on behalf of a displaced residential occupier or a protected intending occupier. However, again, this is no help if the squatter is living in non-residential premises. In such circumstances you may have no choice but to apply to court for a possession order.

On this point, it is commonly felt that the law affords too much protection to squatters and too little to landowners. In response to this, the Ministry of Justice announced on 26 October 2011 that it intends to introduce a new criminal offence of squatting in residential properties, which will be committed where a person:

- is in a residential building as a trespasser having entered it as such;
- knows or ought to know that he/she is a trespasser; and
- is living in the building or intends to live there for any period.

These proposals will not catch:

- commercial premises (although the Government has indicated it may extend the legislation, this will depend on how the current proposals, if enacted, work out in practice);
- legitimate tenants who occupy with permission but have fallen-out with their landlord and refuse to leave;
- people who entered a property in good faith but did not actually have a right to occupy;
- workers or students occupying commercial or academic buildings by way of protest;
- gypsy and traveller encampments on land ancillary to residential buildings (this may change in the future).

The new offence has been labelled as an amendment to the Legal Aid, Sentencing and Punishment of Offenders Bill which reached Committee stage in the House of Lords in December 2011. Royal Assent is expected in Spring 2012, with implementation to follow at a later date.

Kenneth Street

IX TDS traps

It is a requirement of the Housing Act 2004 that a deposit for an assured shorthold tenancy (AST) created on or after 6 April 2007 must be placed within an authorised tenancy deposit scheme (TDS). The purpose of the legislation was to prevent unscrupulous landlords from refusing to return tenants' deposits at the end of a tenancy.

TDS schemes

There are three TDS schemes on the market:

- the Tenancy Deposit Scheme run by the Dispute Service Ltd;
- MyDeposits operated by Tenancy Deposit Solutions Ltd; and
- The Deposit Protection Service run by ComputerShare Investor Services Ltd.

The first two are insurance-backed schemes where the landlord or agent retains the deposit but pays an insurance premium to the scheme administrator to cover the risk of the landlord not returning the deposit. The Deposit Protection Service, on the other hand, runs a custodial scheme where the landlord (or agent) actually pays over the deposit to the scheme administrator.

Prescribed information and initial requirements

The Housing Act 2004 requires that on receipt of a deposit the landlord must within 14 days of receipt:

- provide the 'prescribed information' to the tenant and any other relevant person; and
- comply with the 'initial requirements' of the scheme.

This 14-day period will be extended to 30 days by the Localism Act 2011. A commencement order will bring the change into force later this year (perhaps April). There are important sanctions for non-compliance with these obligations. Not only can no section 21 notice be enforced by a landlord to bring an AST to an end on two months' notice, but a tenant can apply to the court for the return of the deposit on the basis of non-compliance and, if successful, the court must order the landlord to pay a penalty amounting to three times the deposit (this will be changed to a penalty of between one and three times the deposit by the Localism Act 2011).

The prescribed information is set out in the Housing (Tenancy Deposits) (Prescribed Information) Order 2007. Landlords and agents are broadly familiar with the obligation to provide this information and usually have systems in place to ensure compliance. What can cause more difficulty is the

need to comply with the 'initial requirements' imposed by the rules of an individual scheme.

Mandatory clauses

An important initial requirement of the Tenancy Deposit Scheme run by the Dispute Service is the mandatory inclusion of certain clauses in the body of the AST. Failure to include these clauses renders the AST non-compliant and open to the sanctions mentioned above.

A further requirement of the scheme operated by the Dispute Service is that mandatory clauses are included in the terms of business between landlord and agent. It is not entirely clear from the rules of membership of the scheme whether this is an initial requirement of the scheme, but prudent landlords and agents will not take the risk and will amend their terms of engagement accordingly.

The lesson is that landlords and agents must look very carefully at the rules of membership and individual requirements of the TDS that they use. In the case of the Tenancy Deposit Scheme run by the Dispute Service landlords must keep up-to-date with the revisions of 'Prescribed Information and Clauses for Inclusion in Terms of Business, Assured Shorthold Tenancies...' (TDS G), a document published on the Dispute Service website, to make sure ASTs and management agreements are compliant with the rules of the scheme.

It is possible that agents may find this frustrating. The clauses are badly drafted and in a style that may not dovetail with the rest of the document into which they must be shoe-horned. Moreover, the obligation to include these mandatory clauses does little or nothing to further the aims of the legislation; it merely creates a trap for unwary landlords.

Common law tenancies

Members of the Dispute Service scheme also need to watch out for residential tenancies that are not ASTs. In practice, these may be easy to overlook: tenancies where the rent is over the maximum rent threshold of £100,000 per annum; tenancies where the tenant is a company or not using the property as his principal home; tenancies let with over two acres of agricultural land. For these non-ASTs, the Dispute Service requires five pages of prescribed information and mandatory clauses to be included in the tenancy if it is to be compliant with the scheme rules. Failure to comply will not open up a landlord to the sanctions of the Housing Act 2004, because there is no statutory obligation to place a deposit for a common law tenancy in a TDS, but it may lead the Independent Case Examiner for the Dispute Service to refuse to adjudicate a dispute. As there is no obligation to use a TDS with a non-AST, we suggest that landlords may wish to avoid use of a TDS altogether in such circumstances and instead put the deposit on stakeholder with the agents in the old fashioned way.

The Localism Act 2011

Unfortunately for landlords the Localism Act 2011 will close some landlord-friendly loopholes that developed in recent case law. The case of *Tiensia -v- Vision Enterprises Ltd [2010]* found that, notwithstanding the 14-day requirement to provide prescribed information, a landlord could comply with these obligations at any time up to the court hearing date in order to avoid the sanctions for non-compliance. That will no longer be the case. Landlords will need to comply with these obligations within 30 days or potentially face sanctions for non-compliance. The Localism Act also clarifies that a tenant can apply to court on the basis of the landlord's non-compliance after the tenancy has ended (doubt was cast on this by the decision in *Gladehurst Properties Ltd -v- Hashemi*). One change in favour of landlords is clarification that Section 21 notices may be served and enforced with a non-compliant AST where the deposit has been returned to the tenant in full or with such deductions as the tenant will agree.

James Maxwell

X Heads of terms for overage

The complexities of overage arrangements are legion and, indeed, whole books are written on the subject. The aim of this article is to give land agents and landowners some pointers to be considered early in the negotiations leading to heads of terms. The hope is that this will reduce the scope for a transaction to get bogged down at a later stage when the lawyers start disagreeing over details.

Detail

The degree of sophistication and detail required in an overage arrangement will (or certainly should) be proportionate to the likelihood of development taking place. No-one welcomes the idea of sizeable legal fees and anguished negotiations between seller and buyer about an overage arrangement for a development that has little chance of ever happening. The very first point to consider, therefore, is how likely it is that development is going to take place. The more likely it is, the more you go into detail.

Overage period

You need to consider how long the overage arrangement should last. Perhaps counter-intuitively, the more likely it is to occur, the shorter the overage period can be (especially if this is coupled with a positive obligation on the part of the buyer to promote and secure a planning permission – in this scenario beware both the tax considerations (see below) and also the danger of creating a joint venture or partnership); the less likely development is to take place, the longer the overage period might be. There is nothing preventing as long a period as the parties are willing to agree.

Bites of the cherry

Another key issue is whether or not the overage should bite more than once. If it is to bite only once, there is the technical possibility that a developer might "clear off" the overage by first obtaining a low-value planning permission. Once the overage has been paid pursuant to this low-value planning permission, the developer obtains a high-value planning permission, for example for residential development, but the overage does not bite on it. This may of course just be a lawyer's suspicious mind at work and, in practice, such deviousness may not be practical. That said, it remains a possibility and, if the overage is only to bite on the first development, then the seller would be well advised to include a good faith clause in the agreement to ensure that the buyer does not exploit this possible loophole. Another option is to include a de minimis provision whereby the overage would not kick in unless there is an uplift of at least, say, 10%. In this way, there is less chance that a low-

value planning permission will use up the overage. The best position for a seller is, of course, that the overage can bite repeatedly throughout the overage period.

Capital or income overage?

Most overage arrangements seek to claw back a proportion of the capital uplift in a property which arises on a single, discrete occasion, for example the realisation of the value of planning permission for residential development. However, the buyer will not always realise the value of a development as capital and, in these circumstances, the buyer will be reluctant, for obvious cash flow purposes, to pay off the seller with a single capital sum. An example would be where the land is developed as a wind farm. The buyer will be letting the land to a wind farm operator, who will then pay the buyer a turnover rent. In such circumstances, therefore, the parties are going to have to consider more carefully how the overage arrangement should be structured. This might require a lease-back to the seller and a new underlease from the seller back to the buyer, who will then underlet to the operator. In such circumstances, specialist advice should be sought.

Triggers

What will be the trigger for the overage payment? A standard position is for overage to be paid either on the commencement of a development (ie the implementation of a permission) or on the sale of the land with the benefit of a planning permission. A buyer should not accept the grant of planning permission as a trigger since (a) it is of course open to a third party to obtain planning permission over another's land (b) there is no guarantee that the planning permission, once granted, will be implemented and (c) the buyer is unlikely to have arranged its finances to be in a position to pay the overage due at that stage. One concern for a buyer about implementation being a trigger is that the buyer might wish to implement a permission purely to prevent it expiring (an alternative to implementation may be to persuade the seller to accept beneficial occupation as a trigger).

The calculation

As for how the overage is calculated, this really is going to depend on the individual circumstances. Sometimes a very specific development will be in mind and the overage calculation might be quite sophisticated. In other circumstances, where overage is being applied really as a safety measure, the terms might be more broad-brush.

One factor which will, however, figure in all transactions is the extent of the deductible costs which can be deducted from the enhanced value of the land before the overage percentage is applied to the uplift value (ie the difference between the enhanced value and the current value).

For example, it would be usual to see the costs of obtaining the planning permission (including professional costs) as a deductible expense, but would, for example, these costs extend to lobbying, or providing circulars to, the local objectors? Should the deductible costs cover only the irrecoverable VAT? What about the costs of marketing? A buyer might want to consider the inclusion within deductible costs of any "abnormal" costs, being costs needed to bring the land up to a state in which it can be developed. These abnormal costs might cover environmental clean-up costs, infrastructure costs (roads, roundabouts, drainage) or the costs of clearing off any ransom (such as a third party access or a restrictive covenant). A seller will want all deductible costs to be made subject to a test of reasonableness.

A possible area of contention is how the uplift value is assessed. This will often be by reference to open market value or it might be based on real figures actually achieved by the developer. Sometimes the parties will have a clear idea of the likely development and can therefore work out a tailored valuation process. In the absence of that, one very useful shortcut is simply to rely on the definition of "market value" in the Royal Institution of Chartered Surveyors' Red Book. This definition is sufficiently widely drawn for it to provide a reasonable default valuation formula for both parties.

Tax

At the beginning of this article, the word "tax" was mentioned. There is not the space to go into this fully, but the parties are most certainly going to have to consider the tax implications of any overage arrangement and to ensure that it is tax-efficient for that party's purposes. Of particular concern is the danger posed by Section 756 of the Income Tax Act 2007 whereby, if the seller is deemed to be a party to the development, the returns payable under the overage will be subject to income tax, not capital gains tax. This principally arises where the sums due to the seller are based on the sums generated by the buyer. The view is, in that situation, that the seller is joining in with the buyer in the risk of the development (as HMRC puts it in its guidance, the seller is enjoying "a slice of the action"). If, on the other hand, the overage is attributable solely to the value of the land with the benefit of the planning permission, then the overage will be subject to capital gains tax. This is especially important for charities, which are not exempt from the head of income tax into which such uplift would fall but which are exempt from capital gains tax.

Buyers must also be aware that HMRC considers an overage payment to be part of the original purchase price. Stamp Duty Land Tax is therefore payable on the overage payment at the time of the sale that imposes the overage. Of course, at the time of sale that future payment is both contingent and uncertain. The existence of contingent consideration must be declared to HMRC and an application made for the deferral of the obligation to pay SDLT on the overage payment on the basis that the amount payable by the buyer cannot reasonably be ascertained. HMRC will usually grant this, but buyers must remain aware of their obligation to account to HMRC for SDLT if and when the overage payment is ultimately made.

As mentioned above, in many cases overage will be applied simply as a precaution, in which case the parties can take a more relaxed attitude towards the overage provisions and not get too bound up in the details. It will always be sensible to include a good faith provision together with an obligation on the buyer to disclose all relevant information at all material times. In other cases, however, where development of the land is a real possibility, more detailed and sophisticated arrangements will be required and agents and landowners would do well to consult their lawyers from the outset and before heads of terms are finalised.

Henry Goulding

XI Estates and Private Property Team

The members of our Estates and Private Property team deal with all aspects of agricultural law and estate management including:

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