FARRER&Co

February 2024

Rural Estates Newsletter

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James Maxwell
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I remember a Farrers partners' conference many years ago, in some featureless hotel, where the attention of the audience was slowly unfixing from the worthy but dull words of the speaker. All at once a swallow flew in through a window and began frantically circling the room, flashing white and dark iridescence. The unnerving entry of wildness caused a commotion of excitement. Someone level-headed eventually opened a door to create an escape, but the swallow had stolen the show. It was hard not to think of its arrival, after an epic migration across Africa, as a comment on the rather narrow concerns of the conference: how little we know. (Henry Goulding, late of this parish, was amused by how few Farrers partners could even identify our visitor.)

The struggle to avoid being worthy but dull faces article-writers as much as conference speakers. However, whether it is my own offering on habitat banks, Jessica Richards' on restoration bonds or Elizabeth Earle's on "wild" swimmers, we have worked hard in these pages to write something, if not wildly exciting, at least engaging and informative. In these long winter evenings, I hope you will spare some time by the fire to read one or two of them. As you do, by way of idle distraction, I also commend to you the story told by the Venerable Bede in his Ecclesiastical History of England about King Edwin of Northumbria, who called a conference to discuss the arrival of Christianity on these shores. One wise speaker addressed him thus:

The present life of man upon earth, O King, seems to me in comparison with that time which is unknown to us like the swift flight of a sparrow through the mead-hall where you sit at supper in winter, with your ealdormen and thanes, while the fire blazes in the midst and the hall is warmed, but the wintry storms of rain or snow are raging abroad. The sparrow, flying in at one door and immediately out at another, whilst he is within, is safe from the wintry tempest, but after a short space of fair weather, he immediately vanishes out of your sight, passing from winter to winter again. So this life of man appears for a little while, but of what is to follow or what went before we know nothing at all.

1 – Habitat banking: the documents

James Maxwell
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Despite some delays in the implementation of Biodiversity Net Gain (BNG), to a degree we have just been waiting for Parliament to catch up with real life. Whether required by local authorities under their planning policies or voluntarily offered by developers, BNG has been with us in embryonic form for some time now – and certainly well before the official 12 February go-live date.

Now, as a result of the Government's recently published guidance and regulations, the clouds are beginning to part for estates seeking to establish habitat banks with a view to selling offsite biodiversity units to developers who are unable to fulfil BNG requirements on site. Such estates may already have engaged ecologists to carry out a base line habitat survey and will be looking to advance the agreement of a habitat management and monitoring plan (HMMP) with the local planning authority (LPA). The next crucial step will be legally securing the environmental commitments in the HMMP over the required 30-year time span and registering the gain site on the new Biodiversity Gain Site Register operated by Natural England, before sales of biodiversity units can begin. Obviously, following the letter of the regulations is vital to ensure statutory compliance, but on a practical level what are the parties' "wants" and "needs" likely to be?

Section 106 agreement: what the LPA wants

LPAs are using planning obligations in section 106 agreements as the means to bind the land with positive environmental commitments for 30 years. They are attractive to all parties because they are familiar and this should promote ease of agreement with LPA legal teams. The main obligation in the section 106 agreement will be for the landowner to perform the actions for the creation, management and enhancement of the habitat bank. One area to be agreed with the LPA will be how often the estate must provide progress reports on achieving the HMMP objectives and how the LPA will monitor the environmental enhancement on the site.

The LPA will also expect provisions for the registration of the habitat bank on the Biodiversity Gain Site Register and may look for commitments around the sale of biodiversity units by the landowner to ensure compliance with the statutory scheme introduced by the Environment Act 2021 (for example, the LPA may want obligations on the estate to ensure additionality and avoid double-counting). There are also likely to be requirements regarding the allocation of biodiversity units to particular developments (ie the sales of biodiversity units to developers) which also need recording on the Biodiversity Gain Site Register.

Agreement will need to be reached about the requirements for record keeping by the landowner, including details of the number and nature of the biodiversity units sold and the land in the habitat bank to which they are attributable, as well as the conditions on which such records will be made available to the LPA. As ever, there will be discussions about the LPA's costs in connection with the project.

Section 106 agreement: what the landowner wants

As few obligations and as little interference as possible! Whilst it is reasonable for the LPA to expect provisions obliging the landowner to comply with the HMMP, the landowner will want to be sure that its obligations in this respect are not unduly onerous. One aspect of this is to ensure that the landowner's obligations in the HMMP focus on carrying out management actions that promote biodiversity, rather than obliging them to guarantee the delivery of measurable targets: actions, not outcomes. Nature is by definition wildly unpredictable and landowners must ensure that they are not accountable for failures to meet environmental aims caused by flood, pestilence, extreme weather events and other acts of chance beyond the landowner's control.

As with any section 106 agreement, a landowner will want to think carefully about what sort of enforcement mechanisms it can accept, to ensure that these put the landowner in the driving seat for any required remedial measures and limit interference from the LPA.

Whilst accepting some element of reporting to the LPA, landowners will want to preserve their autonomy and discretion in terms of the sale of biodiversity units in the open market, including their ability to stack multiple natural capital offsets onto the same area of land based on additional environmental enhancement.

It is prudent for landowners to hedge against the risk that the expected market in biodiversity units does not take off as is hoped. Is there a mechanism either for bringing the habitat bank land within the 30-year commitment in phases on notice from the landowner or (in the alternative or additionally) a means to remove land from the commitments where biodiversity units are never sold in relation to a particular tranche of the proposed habitat bank?

The sale documents

The other side of the coin is, of course, the sale of biodiversity units to the developers to provide the 10 per cent biodiversity net gain they need to enable their developments. Developers will wish to assure themselves that the underlying section 106 agreement is robust and that the habitat bank is properly registered as a biodiversity gain site. The way should then be open for estates to sell and allocate the biodiversity units to particular developments.

Having established the number and type of biodiversity units required and agreed a price, there may be some direct sales of biodiversity units to developers. However, many developers will seek an option agreement to give them an agreed period of certainty and exclusivity (for a fee) over an agreed number of units, often to mirror the option they will have over the development land itself. The option will set the number (and nature) of the biodiversity units for sale and fix the price (most likely subject to indexation from the heads of terms date). When the purchase is called for by the service of an option notice, the parties then complete the sale deed itself, which will allocate the agreed number of biodiversity units to the development in return for the payment of the sale price. Government guidance is clear that VAT is payable on the sale of biodiversity units and the sale deed will deal with this too.

The sale deed will contain provision for who is then responsible for recording the allocation in the Biodiversity Gain Site Register. The parties will wish to consider how they act together and share information to facilitate that registration and what occurs if the application encounters difficulties or must be appealed.

Developers need to ensure that the documentation gives them what they need to procure sign-off by the LPA of their biodiversity gain plan for the development, but landowners must take care that their obligations to the developer are clearly limited and, in particular, include no contractual obligations to the developer with regard to compliance with the HMMP or the ongoing management, monitoring or enhancement of the habitat bank.

To conclude, we are just at the beginning. The BNG market is in its infancy and the drafting of documentation to underpin it is emergent. Exciting times for land lawyers!

2 – The year in Westminster

Elizabeth Earle
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Another year of sound and fury from Parliament, but what does it all signify for rural estates? Amidst all the hullabaloo about housing targets and reforming the rented sector, there are important takeaways. Here are some of them.

Abolition of section 21

The stop-start progress of the Renters Reform Bill continues. The Bill had its second reading in Parliament on 23 October 2023, but a report by a parliamentary committee identified concerns about the ability of the court system to cope. As a result, "The government will not commence the abolition of section 21 until stronger possession grounds and a new court process is in place". The possibility of a dedicated housing court has been ruled out. A House of Commons select committee has launched a call for evidence on the work of the county court. Abolition of section 21 notices may have been paused for now, but change is coming in the medium term.

Leasehold and Freehold Bill

Another prong of the attack on "the outdated feudal system" of leasehold land tenure (according to Michael Gove). The Bill is squarely aimed at addressing developers' abuse of leasehold tenure, where it is used for new-build houses, to create an ongoing income stream from ground rent. Headline measures include a ban on creating new leasehold houses (new leasehold flats remain possible); existing leaseholds will remain, but it will be easier and cheaper for leaseholders to buy out the freehold; standard lease extensions are set to rise from 90 to 990 years, and the Government will consult on capping existing ground rents.

Planning reform

There is near universal agreement on the need to reform the planning system, which is widely seen as clunky and obstructive. The Levelling Up and Regeneration Act (LURA), which received Royal Assent on 26 October, aims to tackle this in various ways. Developers will need to get on with developing and planning authorities will be able to require commencement notices when development begins. Permissions which remain incomplete can be terminated and developers with a history of not getting on with it may simply be refused permission at the outset.

Planning enforcement

The current enforcement period for breaches of planning control is four years (for unauthorised "operational development", ie work done or change of use to single dwelling) and ten years for all other breaches. LURA proposes changing this to a standard 10-year period, giving authorities longer to enforce. Authorities will also be given the power to issue enforcement warning notices, giving landowners a chance to rectify breaches by seeking retrospective permission where viable.

EPCs and MEES

The requirement for residential let properties to meet an improved minimum energy efficiency standard of an EPC of C or above by 2025 was scrapped in September, much to the relief of estates with old cottages that leak heat. The ban on new fossil fuel heating for off-gas-grid homes has also been delayed by nine years to 2035. EPCs are to be reviewed. But there is now talk of including "decent homes standards" in the Renters Reform Bill: watch this space.

Nutrient neutrality

One bit of LURA that did not make it on to the statute book, thanks to the rebellious Lords. The rule therefore remains that where development is commenced in one of 74 affected local authorities, developers will need to neutralise the effect of the development on local watercourses. They can do this by taking measures on site, and/or buying credits to offset the impact. For rural estates this creates an opportunity for those with spare or low-yielding land, to supply offsite nutrient credits. The Government seems keen to support such schemes.

Holiday cottages

The noose is tightening. LURA proposes the start of a registration scheme, requiring that all residential accommodation being let to guests for payment in the course of a trade or business of the host are to be registered. As with so much of LURA, further detail is to follow in regulations. A consultation was also launched in April 2023 on the creation of a separate use class for holiday lets.

Unlet high street properties

Where high street commercial premises have been vacant for more than one year, councils will be able to arrange auctions to find suitable tenants. Leases of up to five years for "suitable high street use" will then be agreed, contracted out of business security tenure (which itself is under the microscope in a current Law Commission review). A loss of control for landlords, but it may prove a creative solution to a common problem.

Martyn's Law

The Terrorism (Protection of Premises) Bill aims to enhance public protection from terrorism at public venues by placing duties on the owners or operators to take appropriate terrorism mitigation measures, including staff training (which catches unpaid volunteers). Qualifying public events with over 800 attendees are also within scope, making this an important Bill for estates hosting events. That said, after initial publication on 2 May 2023 this went quiet following criticism from a parliamentary committee that the Bill's measures as drafted were disproportionate and unduly onerous on owners of premises. A consultation has just been opened.

BPS (and cross compliance) is dead: long live delinked payments

31 December 2023 saw the end of the basic payment scheme. Farmers' obligation to cross comply also ceased on that date, but only to the extent that the rules are not also set out in statute. The window for transferring reference amount has been announced as 15 February to 10 May 2024, with delinked payments (based on the claimant's reference amount) to be made in two chunks in August and December in this and every year until 2027.

3 – Commercial events on rural estates

Antonia Lyne
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With the reduction in farming subsidies and increasingly tight margins on let property, many rural estates are exploring the commercial earning potential of their physical assets. This may involve turning their space into a venue for a winter light trail, triathlon series, music festival, or film location for shooting the next streaming hit.

The idea may come from an entrepreneurial team within the estate, but often an estate is approached by a third party. In either case, but particularly the latter, although the potential income offered can be (very) attractive, there is risk involved for both parties. For that reason, it is crucial that an appropriate venue hire or location agreement is put in place.

Terms agreed and deals struck will vary hugely depending on the use in question, but there are some fundamental points which will apply in nearly all cases.

1. Is this something the estate should be doing?

Beyond the obvious financial incentives, opening up the estate and its facilities is not without risk. These risks are not just financial: they extend to possible damage to property, liability for personal injury and damage to reputation, to name a few. It is important to give thought to which areas of the estate will be used, how the site(s) will be accessed, and whether this will interfere with the day-to-day functioning of the estate. It is also important to consider the impact on other occupiers and whether they are "on board" with the new venture. One may conclude that these risks outweigh the fee being offered, or that the estate is still keen to proceed, but only for the right fee.

Most estates tend to "undersell" the value of their site, particularly as a film location. If the estate has been approached for a specific reason – perhaps the cantilevered staircase in the main hallway, or acres of open field closely accessible to a major motorway – find out what it is, as it will give the estate a better idea of the value in the hire.

2. What and where?

Make sure that the estate fully understands what it is exposing itself to in exchange for the fee. With a music festival, how many days in advance do the organisers need access to set up, and how long afterwards to clear the site? Will estate infrastructure be used to supply services and, if so, are these charged separately or included in the fee? Who is responsible for reinstatement (always a concern where there is parking in fields)?

The scale of the event, the size of the crew and the degree of "on site" facilities (food trucks, washrooms, toilets, makeup trailers) will be key indicators of the likely impact on the site. A colour coded plan is often useful to show the site which may be used, and how this will be accessed, to avoid ambiguity and potential dispute later. Get these details clear in the agreement to start with, but then also be prepared to police and enforce these constraints on use and access when it comes to the hire itself.

3. Contracting parties

Taking the example of a film location agreement, it is usual for the estate to liaise with a location agent on behalf of the production company (the entity actually coming on site to film). It is therefore vital to identify who the contracting party actually is, not just who you are speaking to: who is "on the hook"? On the flip side, thought needs to be given to what the estate will use as the contracting party. It can often be sensible to ringfence liability within a limited company rather than the landowning entity contracting in its own right, but if a trading subsidiary is being used, make sure that it has the rights it needs to grant the onward licence.

4. Who is in charge?

Not only do the identities of both parties needs to be clear, but a key purpose of the agreement is to make it clear which party is responsible for what and who operationally is running and managing the event. This may sometimes be tricky to pin down in the case of a music festival or sporting event where the landowner may supply the land, existing infrastructure and perhaps also some staff to help. If the organiser then supplies everything else and promotes, manages and runs the event, the estate will have little control over the activities and as such the risk of those activities should not be borne equally. As well as the fact this is important to get right so that everyone knows what they are expected to do (practically speaking), it is crucial in terms of where liability falls if something goes wrong.

5. Damage and liability

Damage to estate property is the most likely risk of this sort of commercial venture and ultimately you know the stresses and strains your land can take. The agreement is your opportunity to help manage the appropriate use of the land. The entity you contract with should always be under an obligation to meet the full costs of reinstating the site (and any other areas of the estate accessed) to the state they were in immediately prior to the hire, and sometimes responsible for arranging those repairs (depending on the degree of control the estate wishes to have). A photographic record of condition prepared immediately prior to the hire can often be useful to refer back to, particularly if it is a large-scale project.

Liability for personal injury is also a key concern and the landowner should expect to receive a full indemnity from any event organiser, particularly where tickets are being made available to the public.

6. Insurance

If the venture is an event open to the public, depending on who is responsible for running this operationally will also dictate who should be responsible for insurance. Where the onus is on the contracting party as the event organiser, the level of insurance to be carried by them (on a "per claim" basis) should reflect the likely loss the estate could suffer if things go wrong. An early conversation with the estate's insurance broker is sensible and can be helpful to assess this figure. Getting this figure right is particularly important as the event organiser will typically want to cap their liability to the level of their insurance (note, however, it is not possible to cap liability for personal injury). If the level of insurance cover is not high enough, this can leave an estate exposed to the "mezzanine" liability above that cap, so understanding the extent of protection the contracting party is offering and the residual liability beyond that is crucial.

Separately, make sure that none of the planned activity falls foul of any of the restrictions in the estate's existing insurance policy (or indeed any other restrictions, such as where buildings are listed). Practically, always ask to see evidence of the required insurance before anyone is allowed on site.

Looking to the future, Martyn's Law (the Terrorism (Protection of Premises) Bill) will, if made law, impose duties and liabilities on "persons responsible for qualifying public events" to take measures to protect the public from terrorist attacks. That responsible person is likely to be the person "who has control of the premises". Although the legislation is still in draft, this is a clear example of why it is important that the agreement is clear about the roles and responsibilities of the parties.

4 – Occupiers' liability: the siren call of open water

Edmund Fetherson-Dilke
View web profile

Elizabeth Earle
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Nearly two centuries and one pandemic after Lord Byron's swim across the Hellespont, open water swimming ("dipping", "wild swimming", call it what you will) has taken off in our cooler waters. An estimated 2.1 million people now swim in open water every year and that is before counting stand-up paddle-boarders, kayakers and wading anglers. There is a profound draw to being near and in natural bodies of water, which is hard to resist.

The dangers of cold-shock, rip tides and underwater objects are well known and advised on by organisations like the Outdoor Swimming Society. They are also an intrinsic part of the attraction – straying outside our comfort zone. Responsible swimmers and other water users will take sensible measures to minimise risk, but accidents happen.

Two Acts

There are two Occupiers Liability Acts. The first from 1957 (1957 Act) provides that landowners owe a duty of care to their lawful visitors. The second from 1984 (1984 Act) provides that landowners also owe a (reduced) duty of care towards trespassers on their land.

The 1957 Act provides that landowners must take such care as is reasonable in all of the circumstances to ensure that visitors will be reasonably safe using the premises, for the purpose for which they are permitted or invited to use them. If you promote your lake as an open water swimming venue, host a triathlon or sell fishing, you are responsible for taking measures to make the lake reasonably safe for that purpose. Measures could include providing kayak safety cover and using non-slip matting to cover entry and exit points. Pontoons and other structures should be in safe repair. Carrying out a water quality test would also be wise.

Although the duty of care is lower, the position for trespassers is considerably more nuanced and will concern landowners, because the situation is harder to control. The 1984 Act states that a landowner owes a duty of care to a trespasser where the landowner:

- is aware of a danger or has reasonable grounds to believe it exists;
- knows or has reasonable grounds to believe that the [trespasser] is in the vicinity of the danger, or may come into the vicinity of it; and
- the risk is one against which, in all the circumstances of the case, the landowner may reasonably be expected to offer the other some protection.

Obvious risks, willingly accepted

The 2003 case of *Tomlinson v Congleton Borough Council* gives some clarity on what this means in practice. Tomlinson was severely injured when he dived into shallow water, striking his head on the sandy bottom of a lake in a country park owned by the Council. The Council, aware of the dangers of the lake, had erected large signs reading "dangerous water: no swimming" and employed rangers telling people not to swim and handing out safety leaflets. Tomlinson alleged the Council breached their duty of care to him as a trespasser under the 1984 Act and claimed damages. On appeal, the House of Lords held that:

"it seems to me that Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous state"

In other words, where there is an obvious risk (it is well known that diving can be dangerous) willingly accepted (Tomlinson ignored the warning signs and rangers) by the trespasser, it will generally be the case that the landowner is not liable.

Nature of premises versus state of premises

How far this duty extends in relation to open land is complicated and there are no hard and fast rules – although the duty is set out in statute, how it is applied is open to interpretation, as case law shows. The question is whether the risk is one against which the landowner, in all of the circumstances, might reasonably be expected to offer some protection. Each case will turn on its facts, but it seems the 1984 Act will not readily impose a duty to guard against risk arising from inherent and natural features of land, where those risks are obvious to members of the public.

A steep stretch of spate river with perilous rapids is naturally, intrinsically dangerous. The danger is in the very nature of the land and obviously there for all to see. It will often be difficult to argue that a landowner should be expected to offer any protection against trespassers choosing to swim in it. By contrast, a footbridge crossing that same stretch of river, which belongs to and should be maintained by the landowner, is a feature that might reasonably be expected to be kept in safe repair by the landowner against the risk that it collapses.

Although it applies only to access land, the Countryside and Rights of Way Act 2000 (CROW) is useful in indicating the direction of thinking. CROW gives the public greater access to the countryside, but amended the 1984 Act to ensure that this increased access did not result in increased liability for landowners. CROW provides that those on access land are treated as trespassers (not visitors) and further limits the landowner's responsibility by distinguishing between man-made and natural hazards. Where a member of the public is on designated access land, no duty is owed by the landowner in respect of risks resulting from natural features of the landscape on that land, nor from any river, stream, ditch or pond, whether or not that is a natural feature.

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> If you promote your lake as an open water swimming venue, host a triathlon or sell fishing, you are responsible for taking measures to make the lake reasonably safe for that purpose."

(Ir)responsible access

In light of the current discussions about increasing "responsible access" to the countryside, the debate about how far landowners need to go to protect those on their land is likely to continue. Ultimately, each case will turn on its facts and the courts must decide where the balance lies between, on the one hand, the duty imposed on landowners and on the other hand, the fact that the trespasser must take responsibility for their own actions where they voluntarily participate in activities which are inherently risky, like open water swimming.

It is impossible to reduce the occupier's risk of a trespasser claiming against them to zero, but it would be prudent to erect warning signs where you are aware of unusual or hidden dangers, or risks unique to that site, that the average visitor may not be aware of – sheer drops, unstable surfaces or submerged objects. Carry out periodic risk assessments and if necessary, fence off sites entirely. Man-made structures, such as footbridges, must be kept in safe repair. Adequate public liability insurance is an essential protection. At best, an incident will never occur, but if it does, you will have evidence that you considered it and took (in the words of the 1984 Act) reasonable steps to offer protection to trespassers. Whether the trespasser takes it, is up to them.

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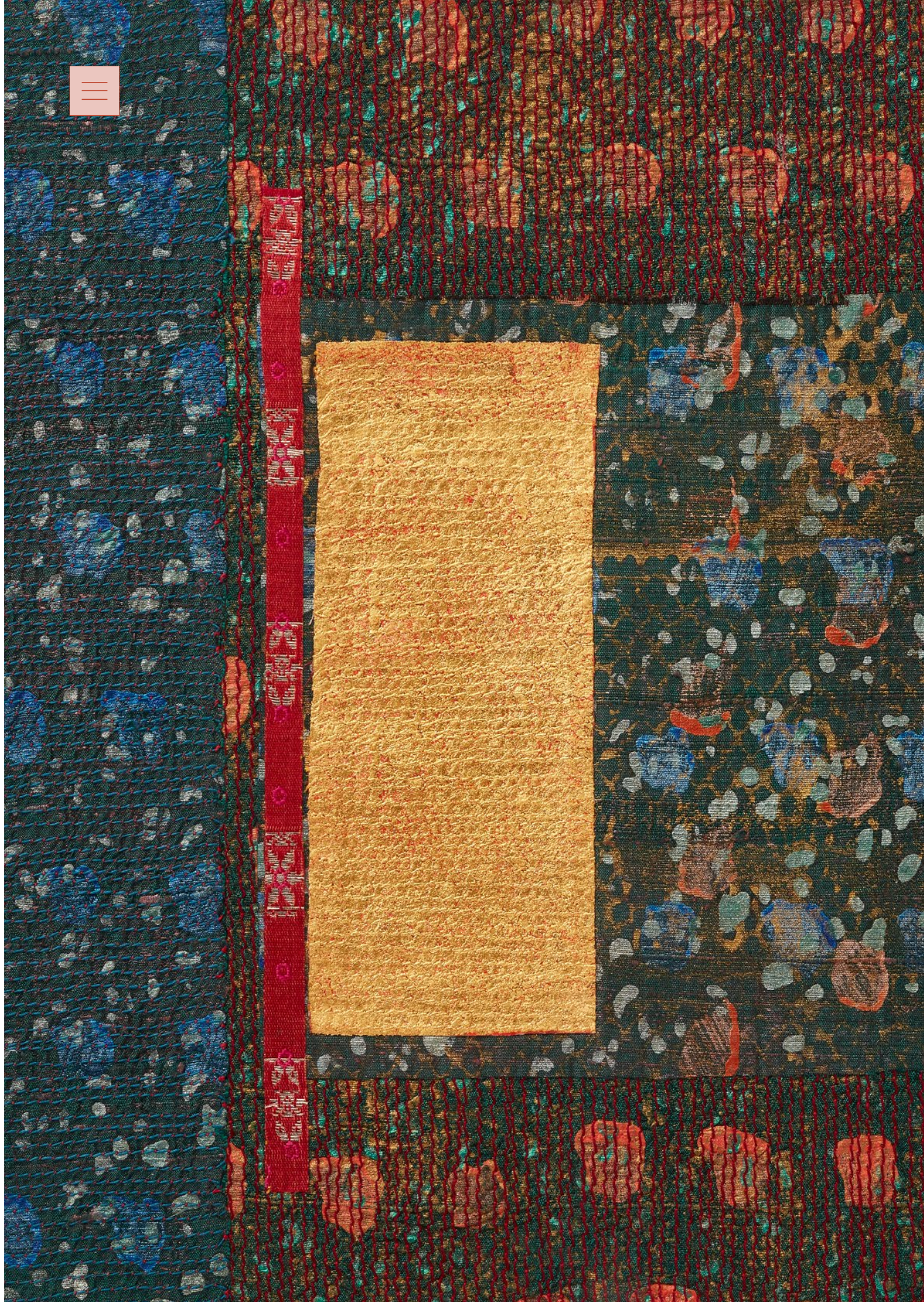

5 – Restoration bonds: escrow arrangements versus bank guarantees

Jessica Richards
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From solar farms to gravel extraction, landowners often want protection from the risk that a tenant will fail to restore the land in accordance with planning conditions. Requiring the tenant to provide a "restoration bond" is the usual solution, so that even if the tenant defaults, the landowner can access funds and carry out the restoration work themselves.

"Restoration bond" is a broad term that can refer either to an escrow arrangement or a bank guarantee – very different beasts. What are their key features and what are the issues?

Escrow arrangement

An escrow arrangement is an arrangement between a landowner and a tenant whereby the tenant deposits funds into a bank account as security for financing the restoration obligations. These funds usually remain in the account until the end of the lease when they will either be returned to the tenant, if they have restored the land to the agreed standard, or to the landowner if not.

Points to consider

- **Who controls the account?** Because neither the landowner, nor tenant, will want the other to have a free hand to dip into the account at any time, it is usual for escrow accounts to be held in joint names. An alternative approach for large restoration bonds is for the parties to appoint a third-party "escrow agent" to deal with the administrative burden and day to day running of the account. Most commonly it will be agreed that, unless and until the tenant is in default under the lease, the escrow agent will need to be jointly instructed by both the tenant and landowner to make a withdrawal.

- **Amount to be held:** usually, prior to the start of the lease, the landowner and tenant will estimate the projected restoration costs to return the land to the agreed standard. This sum (or an agreed proportion of it) will then be deposited into the escrow account on or before the start of the lease. Sometimes, a tenant will argue that the deposit should be postponed to a later date, say year 10 or 15 of the term. A landowner should resist this if possible and insist on a deposit from the outset, so that they have at least some money to call on if the project becomes unviable and the tenant becomes insolvent or they otherwise breach the terms of the lease.

  The escrow arrangement will often also include provisions requiring further deposits to be made throughout the term of the lease, to reflect changes to the estimated restoration costs. A five yearly review cycle is common and, like a rent review, often provides for expert determination if the parties cannot agree any additional sum due between themselves.

- **Releasing funds:** the escrow arrangement will contain a mechanism governing how and when the landowner can use the funds if the tenant defaults, but will also contain provisions about when funds will be returned to the tenant. The tenant may want to use the funds in the escrow account to restore the land, but it is unlikely that a landowner would be comfortable with a tenant having unrestricted access to the funds. These arrangements commonly include conditions that must be met prior to the tenant being put in funds, such as an obligation to provide a budget and / or work schedule to the landowner for approval first.

Advantages

An important advantage of escrow arrangements from a landowner's point of view is that, unlike a bank guarantee, there is real cash in a pot which the landowner has direct rights to access if the tenant defaults. This can offer the landowner greater protection if the tenant becomes insolvent.

Another advantage is that it does not involve any third parties; the landowner only has to deal with the tenant to prove default and access the funds. With a bank guarantee, by contrast, the landowner will have to satisfy the bank that the tenant is in default. Finally, it is arguable that a tenant is more incentivised to fulfil their restoration obligations under an escrow arrangement, because fulfilling those obligations is their only way of recovering their money.

From a tenant's perspective, an escrow arrangement is likely to be cheaper, because it avoids having to bring in a third party, which will charge for its services (escrow agents aside, whose fees are likely to be limited). A bank will probably also require an indemnity from the tenant (or a guarantor) in respect of the guarantee, which is all extra work. That said, there are times when a bank guarantee may be preferred or required.

Bank guarantee

A bank guarantee is a promise made by a lending institution to the landowner to cover a loss incurred by a tenant. Where a tenant defaults on its obligation to restore the land, the landowner can serve notice on the bank requiring them to release funds for the work. Bank guarantees tend to be short documents on the bank's standard terms and there is unlikely to be much scope for negotiation.

Points to consider

- **Liability caps:** a bank is unlikely to agree to an unlimited guarantee and the landowner and the tenant will need to agree the initial restoration figure, which the bank will then guarantee. If the figure needs adjusting further down the line, an updated limit or new guarantee will need to be obtained from the bank.

- **Enforcement:** although the guarantee document itself is likely to be standard, the bank may want input on the trigger provisions in the lease, setting out when the landowner can call on the guarantee. The bank may insist that the guarantee is only enforceable where the tenant has actually failed with their restoration obligations and proof of that failure can be supplied, whether by way of a court judgment or expert opinion, for example. This potentially means a landowner has to incur costs before they can call on the guarantee to remedy matters.

Advantages

The main advantage of using a bank guarantee is that the tenant will not need to provide funds upfront which will then be put beyond use for the duration of the lease. Clearly this can create difficulties with cashflow, if the tenant does not have funds readily available, or wants to use all available funds for the initial development of the project. A guarantee also saves both parties the additional burden of having to manage an escrow account.

Escrow arrangement or bank guarantee? Which one you chose is a case of "horses for courses". Where you have a tenant which is a newly created special purpose vehicle with few or no assets (effectively just a shell company), a guarantee may be the only viable option. Where the tenant is more established, or where the final cost of reinstatement is difficult to quantify at the outset and will require constant review, an escrow account may prove more suitable.

6 – Conditional exemption for historic buildings and outstanding landscapes

Will Cudmore
View web profile

Landowners appreciate the need for careful succession planning to ensure that, as far as possible, the estates they pass on to the next generation are viable for the future.

Much of the guidance on succession planning focuses on Agricultural Relief (APR) and Business Relief (BPR) and it will almost always make sense to apply for APR and BPR, where these reliefs are available because they are absolute: once granted the assets have effectively passed to their new owners free of tax.

Landed estates, however, often have a mansion house and park at their heart, which will not be relievable because they are unlikely to qualify as business assets and are not usually used for agricultural purposes. HMRC recognises the importance of preserving a house and park as the focal point of an estate and offers conditional exemption (CE) as an alternative tax break.

Outstanding land and buildings

As is often discussed, CE is available for artworks and significant cultural assets, but CE is also available for the following:

1. outstanding historic buildings;
2. land essential to protect the character of historic buildings;
3. amenities and objects historically associated with such buildings; and
4. land of outstanding scenic, historic, or scientific interest.

If the mansion house is listed, it will usually qualify for CE under the first category. The gardens and park surrounding an historic house might also be eligible under the second category, particularly if they are essential to preserving the character of the house and any views of it. In addition, an estate village, whether designed at the same time as the house or created over many years, might give the house important scenic context, and may qualify under either the second or third categories.

Some of the house's contents might qualify for CE on their own merits but the rest of the collection (pictures, furniture, porcelain etc) may qualify under the third category if it has been associated with the house for more than fifty years.

The fourth category includes land important for botanical, horticultural, archaeological, or physiographic reasons, as well as ecological features and man-made landscapes. Such land will ordinarily qualify for CE if it is within a National Park, Area of Outstanding Natural Beauty (AONB) or Site of Special Scientific Interest (SSSI), but there may be land that is not designated but will also qualify. Buildings and monuments in outstanding landscapes may qualify on their own merits (under the first category) or because they augment the landscape.

Maintenance and public access

In return for CE, the landowner undertakes to HMRC that it will maintain the land, building or its contents and to permit reasonable public access. Undertakings will be appropriately tailored to each case, but the starting point is an expectation that the owner will preserve the land, building or collection and keep it in good repair.

Landowners are not expected to "enhance" property subject to CE and there is no requirement to, for example, lay new footpaths or restore derelict buildings, but they should take steps to ensure that existing access routes can continue to be used and that the condition of any structures does not deteriorate.

In terms of public access, the starting point will be that it is required for three months every year for outstanding buildings, but this can be reduced if public access would damage the building or increased if owners are already offering public access or if the value of the exemption being sought is significant. Owners are entitled to charge a reasonable entry fee.

> "HMRC recognises the importance of preserving a house and park as the focal point of an estate and offers conditional exemption (CE) as an alternative tax break."

For outstanding landscapes, it might be appropriate to limit public access at certain times of the year (such as shooting or breeding seasons) but otherwise, open access to designated rights of way will be expected. Landowners may also be asked to demonstrate that there is adequate infrastructure for public access, such as car parks, litter bins and bathroom facilities.

Before granting CE of outstanding land, HMRC will usually expect to see a Heritage Management Plan. This demonstrates that the landowner knows what is expected of them and has the resources in place to keep their undertakings. Once agreed, the Heritage Management Plan will be used as the criteria against which CE property is inspected and assessed by the relevant heritage body (for example, Natural England for land or English Heritage for buildings). The relevant body will inspect at least every five years to ensure that the undertakings are being kept.

Maintenance Funds

HMRC recognises the costs involved in preserving CE property and giving the public access to it and allows landowners to set up a Maintenance Fund (a trust to maintain CE property) to help defray them.

Unlike with most new trusts, there is no Inheritance Tax (IHT) or Capital Gains Tax (CGT) on income-generating assets (for example, let residential properties) going into a Maintenance Fund as long as the income will be used to maintain CE property.

If properly managed, Maintenance Funds can shelter income-generating assets from capital taxes and provide an income to maintain the estate. It is beyond the scope of this article to go into further detail, but landowners should note that Maintenance Funds are subject to a series of qualifying conditions that require careful consideration.

Losing conditional exemption

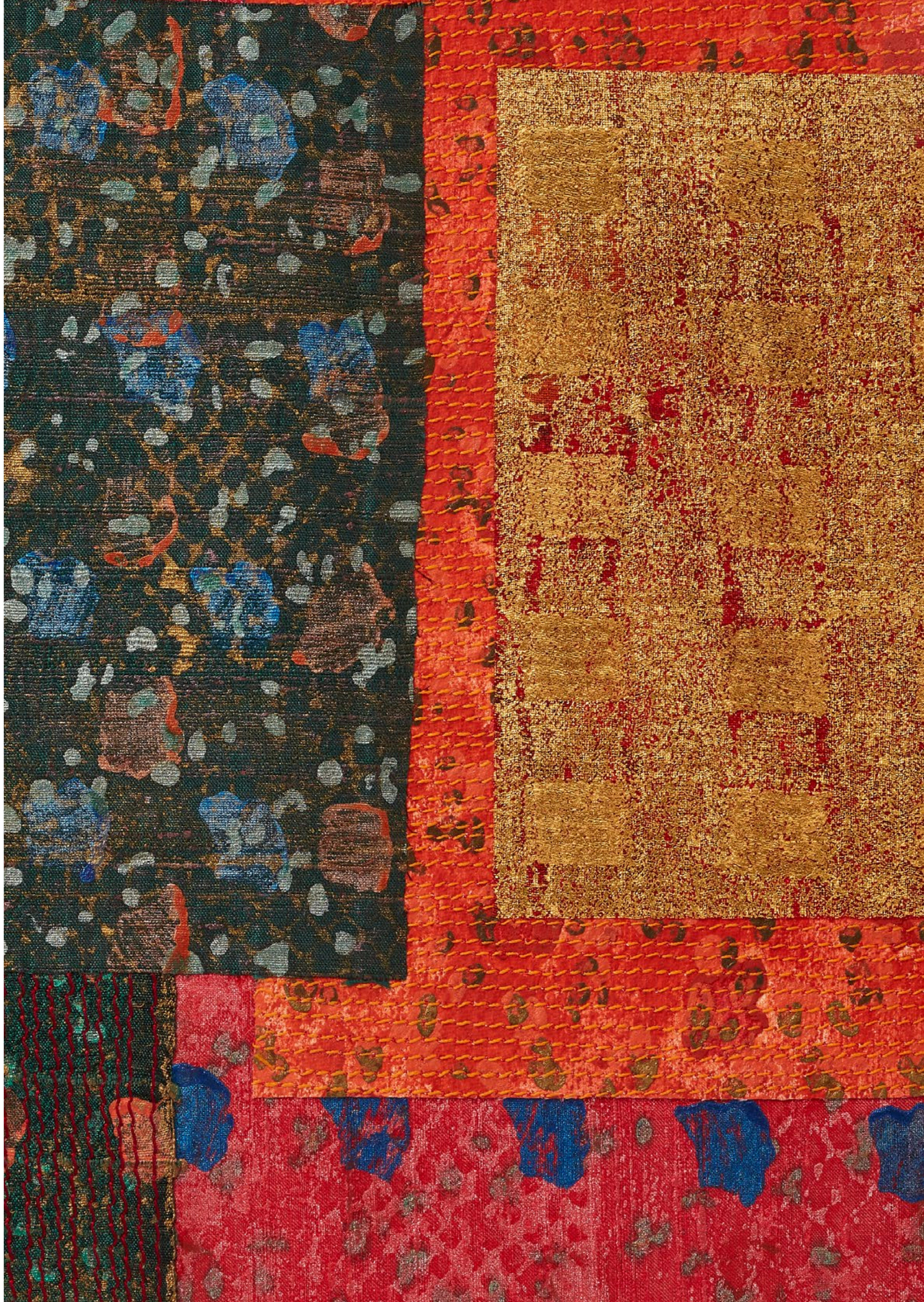
Once CE is granted, it remains in place until the next IHT event (be that a death, a gift, or a periodic charge on a trust fund) when it can be renewed or not, as desired. The exemption will also end if CE property is sold or if the owner breaches their undertakings. For example, if they do not adequately maintain the property or if they are unable to give reasonable public access. When CE ends there is a "recapture charge" and IHT is charged on the then market value of the land or object at the rate that would have been charged when CE was granted.

For this reason, the long-term plan for land and buildings should be considered. If land is given CE and the owner subsequently wants to develop it, the market value for a recapture charge will include "hope value" as well as that of the land itself. CE may also restrict newer environmental land uses, whether under the publicly funded Environmental Land Management Schemes, or provision of statutory offsite biodiversity net gain or private environment schemes. If there are plans to develop or explore innovative environmental schemes, CE may not be appropriate as a recapture charge in due course may be more than the up-front IHT charge.

CE is an important succession planning tool for landowners who are able to meet the conditions of maintenance and giving public access, but it is a long-term commitment, and its implications should be thought through carefully before it is sought.

"

If there are plans to develop or explore innovative environmental schemes, CE may not be appropriate..."



7 – Promoting development opportunities

Paul Krafft
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Emily Zethraeus
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Do you know the Pet Shop Boys' song "Opportunities"? A slightly tweaked version could be a jingle for this article, beginning as it does; "I've got the brains, you've got the looks, let's make lots of money". Swap "brains" for "land", and "looks" for "skills" and you have a musical summary of a promotion agreement. If one were on the hunt for such a thing.

Promotion agreements are one option that can be used where a landowner has land suitable for development but lacks the time or expertise (or inclination) to carry out the development themselves. Their advantage over other options (such as, for example, a sale to a developer conditional on planning) is that the landowner can realise a higher price for the land, because it is sold with the benefit of planning permission.

How it works

Promotion agreements work by providing that the promoter will undertake and pay for preparatory planning work to obtain a planning permission for development, while the landowner retains ownership and control of the land. After planning has been secured, the land is marketed and sold with the benefit of the planning permission. The agreement between the landowner and promoter will set out parameters for how marketing, acceptance of an offer and sale are to be dealt with and will usually specify how sale proceeds will be split between them on completion. The promoter's share typically varies from five to 20 per cent, with the landowner retaining the balance.

By entering into the promotion agreement, the parties commit to the process of applying for planning and then promoting the land for sale for a given time. If a satisfactory planning permission is secured which meets the criteria set out in the agreement and a buyer is found, both within the agreed period of time, the landowner is then obliged to sell in line with the agreed terms. If not, or if the agreed marketing and sale process do not produce a sale that meets the sale agreed criteria, such as any set minimum price, the promotion fails and the agreement ends on its contractual termination date.

Promotion agreements can be advantageous to both parties, incentivising the promoter to use their skill and experience to maximise the sale price (and therefore, their share of it and not to lose the money they have spent on the upfront costs of applying for planning) whilst allowing the landowner to continue using the land during the process and to benefit from an overall higher sale price eventually. There are, however, some common areas of tension that should be given careful thought at the heads of terms stage.

Negotiation points

- Although both sides will want to achieve a sale at a good price, a landowner might be more inclined to wait to try and get the best sale value for their one chance to sell their asset, whereas the nature of the promoter's ongoing commercial operation might mean they would prefer to prioritise securing a sale sooner rather than later, recouping their investment and moving on to the next project. There are also variables beyond the parties' control, which will affect the value of the site over time: the housing market as a whole, associated building costs, the conditions of the planning permission granted and so on. These can make it difficult to know when to sell and what offer to accept. In some cases, the landowner is able to negotiate greater control over the sale process, perhaps with only a requirement to consult with the promoter on offers, on the basis that the lion's share of the proceeds (after deduction of planning costs) will belong to the landowner.
- How much control does the landowner want over the planning application? Retaining an element of control over the design and appearance of the development is important to some estates. This is particularly the case where there are pastoral or legacy considerations on the part of the landowner, or perhaps where they will retain neighbouring land that may come forward for future development. Although promoters may view this as a cumbersome fetter, given the increased value placed on ESG credentials, high quality design and placemaking, such attention to detail may in fact be to the advantage of both parties. With other estates, the focus may be more on maximising financial returns and approving the planning application with that in mind.
- If the landowner wishes to retain built units to add to its own rental stock, a no sale provision and formula will need to be included, so that the promoter is compensated according to what they would have been paid if there had been a sale.
- The promotion agreement usually sets out that after a period of appropriate marketing in line with the marketing strategy, the best financial offer will be accepted. A minimum price or minimum return (the latter allowing for the deduction of any agreed costs) can sometimes be agreed. This can be a prudent provision to include, to ensure the landowner has some security against a downturn in the market: including a minimum price means they will not be forced to sell at a price which is unacceptable to them.
- The agreement will set out which costs are to be reimbursed out of the sale money before the net proceeds are divided. The promoter will want a wide description of deductible costs to recover as much as possible, given that they have paid the upfront costs of applying for planning. The landowner will want to set some boundaries over what those costs might end up being. A suitable compromise on deductions can be agreement that deductible costs are only permitted up to a set limit, and this type of cap is a good idea for any landowner to try and include. Landowners should also generally seek to exclude the promoter's "internal" costs, so that only money actually paid out to third parties can be deducted.
- The landowner will be keen for the planning permission to be in the most advantageous form possible. Along with the buildings / sale plots, there are other components, ancillary to development such as; infrastructure (for example waste treatment systems), roads, communal areas such as bin stores and landscaping or biodiversity areas. Biodiversity Net Gain is another recent aspect that is going to be relevant as a requirement on most sites from this year. Elements like these are necessary to allow the plots to be built and sold, but the more space they take up, the fewer sale plots can be created. Part of the promoter's planning obligations will often therefore be to maximise the high value development areas and minimise the ancillary areas.

"I'm looking for a partner…" Neil Tennant sings. And it is worth bearing in mind a promotion agreement is a relationship that lasts for many years, so landowners need to choose wisely (and check the assignment provisions!).

8 – BNG overage – how will it work?

James Maxwell
View web profile

Landowners are familiar with the concept of imposing overage on land sales in order to capture a fraction of the uplift in value arising from planning permission for development. The advent of Biodiversity Net Gain (BNG) and possibly other environmental schemes, means that in future, significant payments may result from committing land to 30 years of environmental creation or enhancement (to enable development elsewhere), rather than actually building on it. It is possible for sellers to impose overage to tap into such payments, but there is a lot to think about.

Familiar concepts

Like any development overage, an "environmental" overage will be for a defined term. It will be triggered by some events and not others, and there will be a calculation mechanism for the amount due. There will also be provisions to ensure that future owners give direct deeds of covenant with the initial seller to ensure the burden of the overage passes to new owners. So far, so familiar, but what are the differences?

Which schemes to capture?

There is an increasingly wide variety of natural capital schemes, from Environmental Land Management (ELMs) to Woodland Carbon Code, from BNG to nutrient neutrality off-setting. In the context of overage, it is helpful to make a distinction between schemes that enable development elsewhere and those that simply generate revenue from environmentally beneficial land use. This reflects the idea that overage is there to capture windfalls from contingent events that give rise to (usually capital) receipts, not merely increased revenues from the judicious and profitable management of land by the current owner (eg ELMs or other financial assistance under the Agriculture Act 2020).

So, which schemes to capture? Drafting widely to capture a variety of (perhaps as yet unknown) schemes presents challenges. Drafting narrowly to capture payments arising from offsite BNG is much easier, as the arrangement will refer to an established statutory framework. However, in doing so, sellers need to keep their eyes open to the fact that other potentially valuable environmental schemes may come forward in the future that will escape a narrow definition. Landowners may be tempted by such alternatives to BNG if they avoid triggering overage.

When and how much?

As with development overage, there needs to be a trigger event. This can be drafted to cover off whichever is the earlier of receipt of a BNG, completion of the relevant documents (section 106 agreement or conservation covenant) or the commencement of environmental works.

Much more so than planning permission for development, a BNG windfall is not all positive. A 30-year environmental commitment to a habitat management plan carries significant management costs, and there may also be a decrease in the capital value of the land bound by the commitments. The buyer of land (as with development overage) will argue that deductions should be made from the uplift to cover such costs and losses. But the negotiation of such a calculation is likely to be difficult. An attractive alternative may be to keep the overage percentages very low (without any deductions) so that it remains attractive to a landowner to do the BNG deal whilst still allowing the beneficiary of the overage to skim off some cream.

As with development overage, it is much easier for the overage to latch onto one-off capital payments. An uplift realised by an income stream presents considerable drafting and enforcement challenges. The principle of rolling up income payments into a capital equivalent or net present value is a drafting possibility, but is unlikely to be attractive to a buyer (who will not have realised a lump sum to pay the overage payment at the outset).

Another bite of the cherry?

Thought needs to be given to the possibility that the overage might be triggered more than once within the lifetime of the overage period. A subsequent trigger might be a replacement BNG scheme after 30 years, but it might also be a further scheme that is stacked on the same site as the initial scheme. Sellers will want to insist on the overage biting repeatedly to capture this value (a "once only" overage risks being exhausted by a low value scheme).

The problem of enforcement

With development overage, a restriction on the register ensures transmission of the money payment obligation to successors in title. However, with a BNG overage arrangement (unlike development overage), the restriction on the register does not act as a guarantee of compliance with the obligations. Restrictions ensure that no development sale can take place without the consent of an overage beneficiary. However, BNG payments will most likely occur without any change of legal ownership, so how will the overage beneficiary know if the overage has been triggered? Ultimately, this may come down to estates having management systems to monitor activities on the sold land and registrations on the BNG register.

It took decades for development overage to settle into an industry standard approach. The same is likely to be the case with overage for environmental uplift, and we are at square one. However, land sales may come forward of sites with no development potential, but considerable potential as a habitat bank. For the right site, BNG overage should be considered.

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