FARRER&Co

Summer 2019

Rural Estates Newsletter

IN THIS ISSUE

James Maxwell

One of the first campaigns of Chairman Mao's Great Leap Forward was to eradicate the Four Pests: rats, flies, mosquitoes...and sparrows.

Sparrows ate rice and grain from the fields and therefore had to be eliminated. Poster campaigns and propaganda enjoined the populace to tear down nests; to bang pots and pans to scare sparrows until they fell exhausted from the sky. Accolades were showered on schools and communities who pursued the policy most energetically. Billions of sparrows were killed. Only, it turned out that sparrows were the sole natural predator of locusts. Soon plagues of locusts swarmed the country, devouring crops, and contributing to the deaths of tens of millions of people in the Great Chinese Famine.

It was an extreme and tragic example of the law of unintended consequences, which bedevils policy making in our country too. Is one unintended consequence of Green Belt policy to make us a nation of commuters with costs for the environment and our quality of life? Will the government's proposed abolition of section 21 notices for ASTs improve the lot of tenants in the private rented sector, or ultimately reduce the supply of rental properties on the market? Will proposals for the future of agricultural tenancies promote beneficial structural change, or simply create further legal complexity and inefficiency in the sector?

Beats me, but as the articles in this newsletter show, complex problems rarely have simple solutions. When we hear politicians and policy wonks loudly certain of what must be done to effect change, we should pause, think critically...and remember the sparrows.

1 – The future of agricultural tenancies

James Maxwell

In April DEFRA published a consultation on the future of agricultural tenancies. It contains proposals to facilitate structural change and to encourage productivity. A similar consultation has been launched in Wales but here we focus on the English proposals.

Structural change

The security of tenure afforded to tenants by the Agricultural Holdings Act 1986 (**1986 Act**), combined with a benign subsidy environment, is widely considered to discourage older farmers from leaving the sector and to be a barrier to new entrants. The figures showing the age profile of farmers are well-rehearsed but still startling. According to DEFRA, in 2016 40 percent of farmers in England were over 65 and only 2 percent under 35. It is DEFRA's hope that tenancy reform will open up opportunities for new entrants when combined with proposals under the Agriculture Bill to decouple direct subsidy payments from the land.

Assignable AHA tenancies

Many of us are familiar with a scenario where an ageing tenant (with inadequate pension provision) has a decreasing motivation to farm energetically and no desire to leave the farmhouse that is his home nor the subsidy to which he is accustomed. Most AHA tenancies prohibit assignment even if the tenant does want to move on. Whilst some landlords buy out AHA tenants with attractive surrender premiums, not all are interested in doing so. The most remarkable proposal in the consultation is to change the 1986 Act to enable tenants to assign the tenancy to a new tenant for a capital sum. The right would be exercisable on one occasion only and the landlord would have a right of pre-emption. Other protections for the landlord would include:

- a right for the landlord to serve an incontestable notice to quit on or after the 25th anniversary of the assignment;
- the rent payable becoming an open market rent;
- succession rights would cease to apply to the tenancy;
- the assignee would have no further right to assign; and
- the landlord's consent to the assignment would be required (not to be unreasonably withheld).

Whilst the financial benefits to the outgoing tenant are obvious, any benefits to the landlord are less clear. Security of tenure under the 1986 Act works by constraining the ability of the landlord to serve notices to quit on what is usually an annual periodic tenancy. There is something very odd, to say the least, about converting this statutory protection into a capital asset for a tenant. Why should the state award this windfall to one group of farmers at the expense of another (or of landlords who exercise the right of pre-emption)? It seems arbitrary to push the cost of curing a perceived social ill onto other tenants/landlords in this way (and they may even have to pay SDLT on the premium for the privilege).

Landlords who might reasonably have expected their land to be returned on retirement or death in the near term instead face the holding being tied up for another 25 years unless they buy it back. In addition, there is huge scope for dispute over principles of valuation and what might comprise a reasonable refusal of consent. More work for professionals and tribunals, but is that what the government wants? All in all, the proposal seems a heavy-handed way to deal with an issue that is to a large degree already being dealt with in more nuanced negotiations between land agents and AHA tenants who want a bespoke exit to suit their individual circumstances (and often a home nearby, not just money).

Other proposals include:

- removing the prohibition on succession applications on retirement being made before the age of 65;
- removing succession rights when the tenant reaches 5 years past the state pension age,
- abolishing the commercial unit test for succession (so productive farmers are not prevented from succeeding to AHA holdings – but why should landlords subsidise successful farmers with AHA rents?);
- modernising the suitability test for succession by replacing it with a new business competence test (but what would that mean in practice?); and
- modernising the definition of close relative for the succession test to include nieces, nephews and grandchildren (and thus perpetuate AHAs for another generation?).

Improving productivity

Another concern identified by the consultation is that user covenants in old form tenancy agreements from the mid-twentieth century often prevent tenants from diversifying out of agriculture. The proposal is to amend the 1986 Act to allow restrictive clauses to be referred to dispute resolution in order to vary them. Whilst this would be moving with the times in one sense, it may be a worry if the scope of the proposal is such that it overrides the express terms as to use which the parties bargained for at the outset.

A welcome proposal is to allow tenants and landlords to enter into improvement finance agreements. The fear that any hope of reform on investment might be lost in the 1986 Act rent review formula is often thought to dissuade landlords from investing in holdings. The proposal is that any agreed return on capital expressly agreed within an improvement finance agreement would have to be disregarded on rent review.

Longer farm business tenancies

Another striking proposal relates to farm business tenancies. Parts of the sector are concerned that FBT tenants often do not enjoy a term sufficient to encourage them to invest in the holding. DEFRA speculates that one reason landlords are reluctant to enter into long term FBTs is the difficulty in obtaining possession in the event of the tenant failing to pay its rent. Landlords are also discouraged from long fixed terms if they harbour plans to develop part of the holding and are concerned about the 12 month statutory minimum notice period for termination. The proposal is therefore to encourage landlords to offer tenancies of over 10 years by providing shorter statutory termination periods for non-payment of rent or where the landlord has planning permission for development.

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In each case, the proposals are reminiscent of the tangled statutory mechanisms for notices to quit under the 1986 Act. Landlords familiar with the complexities of Case B (notice to quit land required for development with the benefit of planning permission) and Case D (notice to pay/quit on non-payment of rent) under the 1986 Act are unlikely to find it an attractive prospect to become enmeshed in similar headaches in relation to FBTs. It must therefore be questionable how effective this proposal will be in encouraging landlords to let for longer periods. Many factors make for landlords favouring shorter lettings (including, for some institutional landlords, the desire to preserve book value), but landlords let on short terms mainly because they can, and because they preserve maximum flexibility by doing so.

Government's response

With the agricultural sector on the cusp of an exciting decade of change heralded by the Agriculture Bill, it is entirely right that the government should be looking afresh at the inherited framework of twentieth century tenancy legislation with a view to making that legislation work with the policy objectives of the new subsidy regime. DEFRA's consultation closed on 2 July. A summary of the consultation responses will be published in the following three months. It will then be for the government (of whatever political colour that may be) to respond.

2 – The demise of section 21?

Shona Ray Ferguson

Landlords were dismayed by the recent news that the government plans to abolish section 21 notices, sometimes known as 'no fault evictions'. This headline-grabbing proposal could be the latest step in the slow erosion of section 21.

Background

Section 21 notices came into effect under the Housing Act 1988 and meant that an assured shorthold tenancy could be terminated by a landlord giving the tenant a minimum of two months' notice without the need to prove any fault.

Prior to 1989, tenants had significantly more security of tenure under the Rent Acts of the 1970s. Landlords were unable to regain possession of their properties unless they could prove the tenant was at fault. Even then, the court often had discretion whether to grant an order for possession. Section 21 therefore created a more dynamic private rental sector, attracting landlords who knew they could take their property back when they needed it.

Consultation

The government's announcement follows their consultation on introducing a standard three-year residential tenancy to increase security of tenure. The main finding was that tenancy duration does not appear to be the main issue, as there was no single term that would suit everyone, so attention has shifted to section 21 notices.

Another finding from the consultation was that landlords rely on section 21 notices because of problems with fault-based evictions under section 8 of the Housing Act 1988. Section 8 notices require the landlord to prove certain grounds, such as non-payment of rent or a breach of the tenancy agreement, but the process is cumbersome and there are delays in the courts. This has prompted the government to propose improvements to the section 8 process, suggesting new grounds for possession – such as the landlord selling the property or moving in – and streamlining the court process through digitisation.

Housing supply

The government stated in its response to the consultation that it does not intend to discourage landlords from providing good quality rental accommodation, but it is very difficult to see how abolishing section 21 can avoid that result. Smaller landlords are already questioning whether renting out their properties is viable, given the recent spate of new regulation and tax changes intended to put people off letting out their properties, and this could be the nail in the coffin for many more. If supply decreases while demand remains stable, rents will increase, so this proposal might not even help the group the government is targeting.

Implementation

The government has promised a further consultation to settle the detail. There have also been reports that this was a personal project for Theresa May, so there is no guarantee that her successor will support it. Add to that current constitutional distractions taking up parliamentary time, and we may be a long way yet from seeing this proposal come to pass.

County court restrictions

Aside from these proposals, there are some very real problems occurring in the county courts, where tenants have been challenging landlords' attempts to terminate tenancies by alleging breaches of tenancy deposit scheme provisions and other requirements.

In particular, some recent cases have held that, where a landlord has not served a gas safety certificate on the tenant before they move in, a section 21 notice can never be valid in relation to that tenancy. This is because the requirement is incapable of being remedied once the tenant takes occupation. This effectively turns an assured shorthold tenancy into an assured tenancy, which cannot have been the intention of Parliament.

County court cases are technically not binding, but they can be persuasive, so landlords should be sure to provide gas safety certificates before new tenancies begin and keep records that they have done so.

Fitness for human habitation

The government's agenda to protect tenants continues with two new pieces of legislation which can affect the operation of section 21.

The first is the Homes (Fitness for Human Habitation) Act 2018 (**2018 Act**), which came into force on 20 March. It implies into certain residential tenancies a landlord's covenant that the property – including any common areas – will be fit for human habitation, both at the start and throughout the term of the tenancy. If there is a breach, the tenant would be able to sue the landlord for compensation or for 'specific performance' (a court order requiring the problem to be remedied).

'Fitness for human habitation' is defined partly by reference to the hazards within the Housing Health and Safety Rating System, under which the local authority can serve notices on a landlord or carry out works if certain problems are identified (set out in government guidance). Added to these hazards are some additional matters: repair, stability, freedom from damp, internal arrangement, space, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and facilities for preparing and cooking food and for water disposal.

In reality, this new legislation does not impose on landlords any greater obligations than they should already be fulfilling as part of good estate management. It could, however, encourage some tenants to use the phrase 'fitness for human habitation' in an emotive way as they pursue the landlord for issues which might previously have been directed solely to the local authority.

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What tenancies does it apply to?
The 2018 Act applies to all tenancies of a dwelling let 'wholly or mainly for human habitation' for less than 7 years, granted in England on or after 20 March 2019 (including renewals and new periodic tenancies, such as those arising after an AST fixed term). This includes assured tenancies, assured shorthold tenancies, Rent Act 1977 tenancies and agricultural occupancies. From 20 March 2020, the 2018 Act will also apply to existing periodic tenancies.

The 2018 Act does not apply to licences or lodger arrangements. The one exception is properties occupied by agricultural workers as part of their employment, even if there is no tenancy in place; the legislation expressly includes these.

Farm business tenancies and Agricultural Holdings Act 1986 tenancies are not affected by the 2018 Act, but residential sub-tenancies out of those leases are.

What does the landlord need to do?
As well as inspecting the property regularly and keeping accurate records of inspections, works and attempts to obtain third party consent (if required), it will be worthwhile engaging constructively with tenants about repair complaints. If a tenant feels that a landlord has not dealt 'adequately' with a complaint, and they also complain to the local authority, the 'retaliatory eviction' legislation could be engaged. This means a section 21 notice to terminate the tenancy could be invalid in certain circumstances.

Tenant fees

From 1 June 2019, the payments that landlords and agents can require from certain tenants will be limited to those permitted by the Tenant Fees Act 2019 (**2019 Act**).

This applies to assured shorthold tenancies, student accommodation and most residential licences, in England only. Initially the 2019 Act will only apply to new and renewal tenancies and licences (excluding periodic tenancies) but after one year it will also apply to all existing periodic tenancies and licences.

The 2019 Act caps deposits at five weeks' rent, unless the annual rent is £50,000 or more in which case it is six weeks' rent. Holding deposits cannot exceed one weeks' rent and must normally be fully repaid. There are other permitted charges, mostly limited to actual or reasonable costs, such as for loss of keys, late payment of rent, early termination and utilities.

Any tenancy terms which breach the restrictions will not bind the tenant or licensee, and there are potential fines (up to £30,000) and criminal offences for landlords. Tenants and licensees will be able to pursue the landlord or agent for any amounts paid (plus interest), and landlords will be unable to serve section 21 notices while they are holding prohibited payments.

Even if section 21 is not abolished, the government's push to restrict its use shows no sign of abating.

3 – CGT changes

James Bromley

In the past, a landowner's liability to UK capital gains tax (**CGT**) on the sale, gift or other transfer of land depended on whether they were tax resident in the UK. As a result, non-UK residents often used offshore property ownership structures to hold UK land and property to keep their capital gains outside the scope of UK tax. This is also a structure commonly used by non-UK domiciled individuals to keep UK property outside the scope of UK Inheritance Tax (**IHT**), and it continues to be effective for this purpose in some circumstances.

In 2015 the CGT regime changed in the context of residential properties. Since April that year all owners (wherever resident) were brought within the scope of CGT on a sale, gift or other transfer of UK residential property. The effect on foreign-owned UK estates was that farmhouses and other dwellings became potentially subject to CGT charges on transfer or sale. However, tax exemption endured for non-UK residents who owned non-residential property, including agricultural land and commercial property. This last CGT advantage was withdrawn in April this year.

Now, almost all disposals of UK property are within the scope of CGT, irrespective of where the owner is resident. In addition, CGT now also applies to certain transactions by non-residents in so-called 'property-rich' companies.

What has changed?

From April this year, a direct charge to CGT generally applies to all disposals of UK land by resident and non-resident owners, whatever the value of the land and irrespective of whether it is used for residential, agricultural or commercial purposes. Further, an indirect charge to CGT now applies to certain disposals of shares in property-rich companies. Broadly, a property-rich company is one which derives 75% or more of its value from UK land and property. There remain some important exceptions from the new CGT charge on shares, which may benefit certain overseas owners of UK land and estates held through companies with agricultural, hospitality or other commercial trades.

A consequence of the changes is that the previous CGT provisions for properties which were subject to the Annual Tax on Enveloped Dwellings became redundant and have been abolished.

What has *not* changed?

The new rules do not affect the IHT position of non-domiciled owners of UK agricultural or commercial property, but existing IHT mitigation structures should be reviewed because the other tax consequences of them may now be undesirable.

Most disposals of UK land held by a UK company, or used by a UK branch or agency of an overseas company, will remain within the charge to corporation tax on capital gains. Companies can, however, continue to transfer land within a corporate group on a no gain/no loss basis.

Individuals who are resident but not domiciled in the UK can continue to claim the remittance basis on any proceeds of the sale of foreign companies, even where the company is property-rich under these new rules.

Non-UK resident individual landowners will still be eligible to claim the annual exempt amount (currently £12,000) to reduce the amount of any gain subject to tax. Disposals of land by overseas pension schemes, sovereign wealth funds and charities will remain exempt from CGT.

What is the CGT charge on shares in property-rich companies?

Many UK estates and agricultural holdings are held by companies, some of which are incorporated overseas (most often where the ultimate owner or investor is non-UK resident). A sale of shares in an overseas company by a non-resident would not normally attract CGT. This has now changed. The following factors determine whether a disposal of shares in such companies will be subject to CGT.

- The share/security type; all shares other than 'restricted preference shares' and all loans other than 'normal commercial loans' are within the charge.
- Whether the company is a property-rich company.
- Whether the person making the disposal held a 25% 'investment' (broadly meaning voting rights, disposal proceeds, rights to assets on a winding up and profit distributions) in the company at any material time in the previous two years.

If the share disposal is within the charge to CGT on the above basis, the entire disposal will attract tax, not just the proportion of value attributable to UK land.

Exceptions to the CGT charge on shares

There are two important exceptions to the CGT charge on disposals of shares in a property-rich company. Where they apply, a non-UK resident may dispose of their shares in a landowning company without incurring a CGT charge.

- The first exception is for a disposal of shares in a company which uses the land for trading purposes.
- The second exception covers a situation where a property-rich company is sold at the same time as another non-property-rich company (or companies). For example, where one company holds the property, and the other carries on a business (such as farming or hospitality). In such a case, the assets of all the companies being sold can be aggregated and if the combined assets do not meet the 75% property-rich threshold, the share sale will not be taxed.

How much tax is payable?

The sweetener to the new measures for non-residents is that, where they apply, only any increase in value since April 2019 will be subject to tax.

Foreign companies holding UK land which become UK tax resident after 2019 can retain the right to this 2019 rebasing if that is advantageous. However, trusts and companies which leave the UK will not acquire the right to this 2019 rebasing.

The table below sets out the relevant CGT rates. It is important to note that disposal by a company can sometimes be attributed to an individual. The rates in brackets apply only to lower rate income tax payers.

Disposal by:	Residential property	Commercial property	Shares
Company	19%	19%	19%
Individual	28% (18%)	20% (10%)	20% (10%)
Trustee	28%	20%	20%

Tax losses of non-resident individuals and trustees are ring-fenced and can only be set off against other non-resident capital gains. Losses arising from a disposal of shares may not be set off to reduce other capital gains.

Where a property disposal would already be taxable under 2015 non-resident CGT rules (because it is residential property), those rules will continue to apply and the rebasing will be calculated by reference to the 2015 value of the property in question.

Reporting and payment

Unless a non-resident individual is already registered for self-assessment in the UK, they must file a tax return within 30 days of the transaction and pay the tax due.

Non-resident companies will now pay corporation tax rather than capital gains tax and the usual corporation tax computation rules will apply. The extension of corporation tax to rental income and the like received by corporate non-resident landlords is scheduled for April 2020.

What action should be taken in the light of these changes?

Non-resident owners of UK land and estates within the remit of the new rules should obtain a market valuation of their property as at 6 April 2019. This will ensure that, following a disposal, the information required to calculate the tax charge is readily available. It is likely to be easier to obtain property valuations for 6 April 2019 now, than several years in the future. It is unfortunate that Brexit uncertainty may have kept values lower than they might otherwise have been, thus mitigating the effectiveness of this April 2019 rebasing.

Where agricultural or commercial property is held by an offshore company or trust, consider whether this arrangement continues to act as a shelter from IHT for non-UK domiciled individuals. Likewise, do shares in an offshore company remain protected from immediate tax because they are held by a shareholder claiming the remittance basis of taxation? If these arrangements still work, it is likely to be beneficial to keep the offshore structure in place.

In other cases, a non-UK company or non-UK trust may no longer serve its original purpose and the vehicle could be brought onshore to the UK if that would reduce running costs and simplify the administration going forward. Onshoring would not affect the right to rebase the property or shares to the 6 April 2019 values.

4 – A case law buffet

Louisa Passmore

Fencing covenants – *Churston Golf Club Ltd v Haddock (2019)*

Many practitioners assume that fencing covenants contained in transfers will be enforceable against successors in title. However, a recent Court of Appeal case has shaken up that view by holding that a fencing covenant did not take effect as an easement. A 1972 conveyance of the land contained a familiarly worded covenant by the purchaser to "maintain and forever after to keep in good repair...stock proof boundary fences walls or hedges along such parts of the land...as are marked T inwards on the plan". This obligation was held to be merely a positive covenant (and not an easement) with the result that it did not bind successors in title. The lesson here is that where it is important that a fencing covenant binds successors, lawyers must include necessary mechanisms.

Occupier's waste

The Environment Agency has successfully prosecuted and fined a landowner whose tenants illegally stockpiled waste wood. This reflects a recent enforcement trend against landowners whose tenants have committed waste-related offences. In this case, the landowner leased part of his site to a tenant who claimed to run a wood recycling business. A large quantity of wood arrived on site, but none ever left, resulting in a stockpile of approximately 10,000 tonnes of wood waste. The tenant did not have an environmental permit and shortly afterwards the tenant was imprisoned for another offence. The business ceased trading and the gates were locked with the wood being left on site. Following the tenant's vacation of the site, the waste wood was destroyed in a fire which burned for five days. The Environment Agency prosecuted the landowner for knowingly permitting the keeping of controlled waste on land where there was no environmental permit in force. The landowner pleaded guilty and was fined.

If a tenant is operating illegally, the risk for landowners is that they may find themselves accused of 'knowingly permitting' those activities. 'Knowingly' means knowing that the waste activity is taking place; it does not matter that the landlord was unaware that the activity was unlawful. There are several steps a landowner can take to minimise this risk. The most important being to carry out due diligence on the occupier and obtain copies of the necessary environmental permits and planning permissions prior to letting them on site. It would also be prudent to check that the business is established and financially solvent. This due diligence should continue throughout the tenant's occupation.

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Water flow rights – *Fearon and another v The Environment Agency (2019)*

The Upper Tribunal has rejected a claim by mill owners for compensation under the Water Resources Act 1991 (**1991 Act**). The actions of the Environment Agency in raising penning boards did not interfere with the mill owners' right to the natural flow of water.

Tickenham Mill spanned a watercourse which divided in two. A sluice (formed of weir and penning boards which can be raised and lowered) was created in 1968 at the mouth of one channel. The EA raised the boards from December to April and lowered them from April to December to manage flooding risks; a practice supported by other interested parties.

The mill owners succeeded in refurbishing an inherited turbine and started generating electricity from the flowing water in September 2015 to take advantage of the Feed in Tariffs Scheme. When the EA raised the penning boards several months later the change in water flow rendered the turbine ineffective.

Both parties agreed that the EA's actions fell within its statutory powers under the 1991 Act. Therefore to gain compensation the mill owners needed to show that, but for the EA's statutory powers, the EA would have been liable in damages at common law for their financial loss.

The Upper Tribunal held the natural state of the water flow was without the penning boards (or with the penning boards raised); the penning boards had only been introduced relatively recently and had regularly been raised each year. The mill owners' rights had not been interfered with and their compensation claim failed.

No right of way for adjoining land – *Parker and another v Roberts (2019)*

A recent Court of Appeal case serves as a useful reminder to beware the complexities of rights of way. Mr Roberts owned a house (**House**) and wished to build a house on immediately adjoining land that he also owned (**Building Land**). However, to do so he needed to establish a right of way for the benefit of the Building Land over a private road owned by his neighbours.

A previous conveyance of the House granted a right of way for all purposes for the benefit of that land over the private road; it did not include the Building Land which was already owned by Mr Roberts' predecessor. Mr Roberts contended for a variety of reasons that the conveyance should be read as also giving the Building Land the benefit of the right of way.

The Court of Appeal allowed the neighbours' appeal. The Building Land did not form part of the conveyance and so did not benefit from the right of way granted notwithstanding that Mr Roberts accessed the Building Land from the House whilst he treated the Building Land as part of the House's garden.

Adverse possession by paving – *Thorpe v Frank (2019)*

A homeowner has successfully claimed title by adverse possession by paving land.

It is settled law that to acquire land by adverse possession the claimant, here Mrs Thorpe, needs to prove uninterrupted factual possession for the necessary period (usually 10 years where the land is registered; 12 where it is not) and an intention to possess during that period. Mrs Thorpe's intention to possess was not disputed but her factual possession was.

To evidence factual possession, the claimant must prove they exercised a sufficient degree of exclusive physical control over the land; this often brings fencing or other acts of enclosure to mind but what is sufficient depends on the nature of the land and how it is used. In this case the Court of Appeal broke new ground by recognising Mrs Thorpe's repaving and altering the surface level of an area of forecourt as sufficient to establish factual possession. That the paper owner continued to pass and repass over the forecourt did not affect this.

5 – Practical thoughts on pre-emption rights

Edmund Fetherston-Dilke

A pre-emption right gives someone the right to be offered the chance to buy land before the landowner offers it to another party. They are often used when an estate owner sells land (perhaps to a family member) but wants to keep his hand in for the future.

Sounds simple enough, but there are a number of points to consider at the outset, not least to avoid them becoming bones of contention between lawyers at a later stage.

How do pre-emption rights work?

A pre-emption right gives rise to a contractual relationship between the parties. If the landowner decides not to sell, the pre-emption right may never be exercised. To ensure that a pre-emption right is more than just a vague promise, the arrangement has to be properly documented and it is essential that it is protected by registration (with a restriction) at the Land Registry.

There are a few broad types of pre-emption right.

- A right of first refusal: this enables the holder of the pre-emption right to acquire an interest at a price proposed by the landowner. If not accepted, the landowner is entitled to sell the property to any other party within a defined time period after non-acceptance of the offer on terms that are no more favourable to another party than those offered.
- A right of last refusal: the holder of the pre-emption has a right to match an offer made by a third party to purchase from the landowner, which the landowner intends to accept.
- A right to acquire the property at a price to be determined by a third party.

When drafting a pre-emption agreement, the parties must make clear how and when the pre-emption right arises and the procedure that must be followed for the right to take effect.

Triggers

What triggers the landowner's obligation to offer the property to the holder of the pre-emption right? This is typically determined by the definition of 'disposal'; the holder of the pre-emption right should take care to ensure that the landowner cannot structure a disposal in a way that avoids triggering the pre-emption right. To alleviate this risk, a blanket prohibition on all dispositions of the property or an exhaustive list of prohibited transactions should be included in the agreement. You may also wish to give thought to how a disposal of part can be accommodated or whether the pre-emption right is still triggered if the landowner intends to make a disposal not for money, for example as a gift or a property exchange.

Timings

A right of pre-emption only arises when the landowner chooses to sell the land during the pre-emption period. Both parties will usually have a timeline in mind and the length of the pre-emption period is a critical issue in negotiations.

Timing provisions should be carefully considered from the point of view of practicality. If the landowner decides to dispose of the property during the pre-emption period, it must serve an offer notice to the holder of the pre-emption right within a specified period. There will then be a period within which the holder of the pre-emption right can serve an acceptance notice.

If the landowner's offer is rejected by the holder of the pre-emption right, either:

- The pre-emption period comes to an end and the landowner can offer to another party; or
- The landowner has a 'disposal period' in which to sell the property to a third party (if the landowner fails to dispose of the property during the disposal period then the landowner again becomes subject to the pre-emption right until they have successfully disposed of the property or the pre-emption period ends).

The holder of the pre-emption right is likely to ask for a reasonable length of time in which to consider and either accept or reject the landowner's offer. This must be balanced against the potential disadvantage to the landowner if the acceptance period is prolonged and the property is exposed to market volatility.

It is important to be clear at what point the obligation to sell/buy at a particular price becomes binding on the parties and this (and other points) are often worth discussing with a solicitor at heads of terms stage.

Additional considerations

If a model involving third party determination of the price has been chosen, you will want to give careful consideration to the valuation assumptions to be used. In particular, should a special purchaser premium be taken into account?

If a right of first refusal has been agreed, it is in the landowner's interest to reserve the right to accept an offer from a third party at slightly less than the original offer made by the holder of the pre-emption right. This will enable the landowner the flexibility to accept an offer by a third party that is, say, 95% of the initial offer, without needing to revert back to the holder of the pre-emption right to give them the opportunity to accept a marginally lower price. Plainly, the holder of the pre-emption right is likely to resist such a provision.

The landowner should be aware that a prospective purchaser may be deterred from investing in due diligence on the land if they are informed that another party has a pre-emption right (which will be obvious from the Land Registry documents). To remedy this, the landowner could provide prospective purchasers with a vendor due diligence report.

In sum, pre-emption rights can be tricky to negotiate but, if clearly and comprehensively drafted, can offer a mutually beneficial arrangement.

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And yet some voices are calling for change; they argue that the Green Belt is not something to celebrate. Instead, they see it as a socially pernicious policy which inflates house prices, increases the cost of living and forces development to intensify within existing settlements.

6 – Very special circumstances: building on the Green Belt

Anthony McNamee

The Green Belt is a planning term for the belt of open space (not necessarily green) surrounding many of our cities and towns. We can trace its birth to the Ministry of Housing and Local Government Circular 42/55: Green Belts, which followed a statement by the Rt Hon. Duncan Sandys MP Minister of Housing and Local Government in the House of Commons on 26 April 1955:

> *I am convinced that, for the well-being of our people and for the preservation of the countryside, we have a clear duty to do all we can to prevent the further unrestricted sprawl of the great cities...I am accordingly asking all planning authorities concerned to give this matter further consideration, with a view to submitting to me proposals for the creation of clearly defined Green Belts.*

The Green Belt is not a legal construct; it is entirely based on planning policy and policy documents. Whilst case law has given us guidance in relation to what can and cannot be done in the Green Belt there is no 'statutory law of the Green Belt'.

Circular 42/55 from 3 August 1955 set out the original Green Belt policy:

> *Inside a Green Belt, approval should not be given, except in very special circumstances for the construction of new buildings or for the change of use of existing buildings for purposes other than agriculture, sport, cemeteries, institutions standing in extensive grounds, and other uses appropriate to a rural area.*

The Green Belt today

Jumping forward to the present day and the successor to Circular 42/55, The National Planning Policy Framework (19 February 2019) (**NPPF**), we find the Green Belt still entrenched in policy and on a similar basis:

> *The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence (Paragraph 133 NPPF).*

Pushing back the Green Belt is actually quite difficult. Paragraph 136 of the NPPF is clear that:

> *Green Belt boundaries should only be altered where exceptional circumstances are fully evidenced and justified, through the preparation or updating of plans.*

The strength of this policy is evidenced by statistics published by the Ministry of Housing Communities & Local Government:

> *Overall there was a decrease of only 5,070 hectares (0.3%) in the area of Green Belt between 31 March 2017 and 31 March 2018.*

And yet some voices are calling for change; they argue that the Green Belt is not something to celebrate. Instead, they see it as a socially pernicious policy which inflates house prices, increases the cost of living and forces development to intensify within existing settlements (pushing people into ever smaller flats). For those who hold this view the context of a 'housing crisis' could create momentum for reform; some cabinet ministers have even called for one million new homes to be built on the Green Belt.

Are all forms of development prohibited in the Green Belt?

No, every planning application is determined on its own merits against the Development Plan which the NPPF sits atop. Appropriate forms of development which have policy support in the Green Belt are set out in Paragraph 145 of the NPPF as being:

- buildings for agriculture and forestry;
- the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it;
- extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
- replacement of a building, provided the new building is in the same use and not materially larger;
- limited infilling in villages; and
- limited affordable housing.

Additionally, Paragraph 146 of the NPPF confirms that certain other forms of development, so long as they preserve the Green Belt's openness and do not conflict with its purposes, are not inappropriate:

- mineral extraction;
- engineering operations;
- local transport infrastructure (which requires a Green Belt location),
- re-use of permanent buildings;
- material changes in land use (to uses for outdoor pursuits, cemeteries and burial grounds); and
- development brought forward under a Community Right to Build Order or Neighbourhood Development Order.

A Community Right to Build Order can be created by a community organisation to grant planning permission for small scale development for community benefit on a specific site or sites within a neighbourhood. The Government's Planning Practice Guidance indicates that such development can include the building of homes, shops, businesses, affordable housing and facilities for the community.

Neighbourhood Development Orders can also grant planning permission for specific types of development in neighbourhood areas such as:

- building operations (eg structural alterations, construction, demolition or other works carried out by a builder);
- material changes of use of land and buildings; and
- engineering operations.

Other forms of development, not listed above, would be considered inappropriate development in the Green Belt.

How can inappropriate development get planning permission in the Green Belt?

Where the potential harm is "clearly outweighed by other considerations" this can justify inappropriate development in the Green Belt (Para 144 NPPF) and represent "very special circumstances". There is no definite list for what will constitute very special circumstances, but the threshold can be high and will turn on the facts and circumstances of the individual application.

That is not to say those wanting to carry out inappropriate development in an existing area of Green Belt should abandon hope. Where other considerations cumulatively outweigh the harm to the Green Belt this can qualify as very special circumstances. For example, different elements of the following have in real cases cumulatively qualified as creating very special circumstances:

- an overall shortfall in housing supply for a particular area;
- local need for residential accommodation of particular types or tenures;
- current and emerging Plans do not make adequate provision for particular types and tenures;
- the development would enable some form of infrastructure needed by a community;
- the proposals make a significant contribution to unmet need;
- the housing proposed meets a specialist need which might release other already constructed housing; and
- emerging Local Plans may include proposals to alter the Green Belt and allocate your site for development.

There may be some factors which alone outweigh the harm to the Green Belt and no accumulation of other facts is needed, but that would be a matter of fact and circumstance for each application. In short, whilst the Green Belt is a barrier to development it is possible to develop within it and we do see examples of housing of different types and tenures leap over that barrier.

7 – Collaboration agreements for development

Paul Krafft

To make the most of a development opportunity sometimes it will be best for a landowner to join forces with another landowner or landowners. With extra land a more ambitious scheme for development can be put forward and there is a bigger pie for the parties to share.

In our Spring 2018 Newsletter, Robert Field examined some of the tax considerations where landowners pool land for development. This article aims to introduce some of the agreements typically encountered when bringing landowners together for development and some of the common issues beyond tax.

Collaboration agreement

The overarching agreement that binds together the landowners is often called a collaboration (or consortium) agreement. Where there is a separate developer or promoter they are sometimes a party, but they tend to have their own independent agreement with the landowners as well.

Collaboration agreements have varying levels of sophistication. Some are short documents with broad aspirations; others contain a comprehensive set of binding obligations. At the very least, the collaboration agreement will sketch out the process to achieve a planning permission and most will contemplate a sale (sometimes with the landowners building themselves or granting a build licence). The agreement tends to envisage equalisation (treating all the land benefiting from a planning permission as equally valuable) and cost sharing between landowners.

Other agreements

The additional documents required tend to depend on tax and whether there is a developer or promoter.

The most common strategies we come across to achieve tax-efficient equalisation are land pool trusts and cross options. Land pool trusts often involve a trust deed (a declaration recording the existence of a trust), a joint ownership agreement (similar to a collaboration agreement and addressing matters such as who owns what shares and how decisions are made) and a Land Registry transfer (transferring the property to the trust). Cross options involve each landowner granting the other landowners an option over their land which is released on receipt of an agreed sum.

At the time of writing it is believed that HMRC have now accepted the principle that equalisation can be achieved in a much simpler form as part of the collaboration documentation. This would obviate the need for complicated land pool trusts or cross options. We anticipate this approach will get considerable publicity in the coming months.

Some landowners are prepared to go it alone without a developer or promoter and appoint architects and other professionals themselves. More often there will be a promotion or other agreement with a developer or promoter to use their expertise to obtain planning and the landowner will then either sell or grant a build licence (and the developer/promoter be paid out of the proceeds).

Project objectives

Collaboration agreements can last for a long time. Generally there will be a period to obtain planning permission, often with a run-off for appeals, and then a period to allow sales to take place. For larger schemes, where development is phased, this can mean a 50 year time frame.

It is difficult to plan so far ahead; particularly when there might not even be a planning allocation at the outset. However, the parties do need to decide what is important to them collectively and individually and expressly set out their objectives (together with a general obligation to act in good faith to achieve the objectives).

Often the parties will be content to maximise value and the area of a planning permission. This can sometimes lead to a conflict if one landowner seeks particular design standards. There is evidence that, over the full course of a development, high design standards can still maximise value. Yet some developers are wary of higher up front construction costs eating into the prospect of making a quick return out of sales.

Some landowners will want to retain houses once built as rental stock and this may involve adjusting landowner shares as no sale proceeds for these houses will go into the pot.

There should always be a minimum sale price or receipt and the parties will need to agree a suitable method of indexation of the minimum sum.

Decision making

Where landowners promote land themselves, all decisions need to be made by the landowners themselves (and this process needs to be well run). If there is a promoter or developer some of the decisions will be made by them, but a structure will still be needed for the more important matters where landowner approval is required.

The parties should agree a procedure for organising meetings (which may involve a project manager) and how decisions are made. Unanimity may be necessary for some key issues (such as tax); otherwise it will often be appropriate for votes to be weighted according to size of landholding. Promoters should not receive a vote in addition to a landowner as that could distort the voting ratios.

A good dispute resolution clause is necessary to ensure (except where unanimity is required) the project can continue in the event of disagreement. Sometimes the landowners will want to agree at the outset a list of experts, although it can be hard to look too far into the future.

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Collaboration agreements are rarely straightforward but the potential upsides of working with other landowners in bringing forward a large development are significant.

Infrastructure

Larger developments include significant infrastructure costs. Roads (sometimes bypasses and motorway junctions) will need to be built and there are likely to be new community facilities such as schools and sports pitches.

Landowners will want to control the negotiation of section 106 agreements so that they reflect how the development will be phased. Landowners will not want to inadvertently trigger a section 106 payment (particularly by laying infrastructure before the first sale) and they will want to ensure that payments are appropriate for each phase. On sale, landowners will want to be able to insist that the purchasing developer gives suitable indemnities and security (which, given the sums involved, might be a bond) so that the landowners do not end up on the hook for payment.

Landowners may want to leave open the possibility that they lay infrastructure themselves. If so, there will need to be some flexibility over who pays for the infrastructure delivery (a third party funder may be required). Tax advice will be needed as laying infrastructure is a trading activity.

Collaboration agreements are rarely straightforward but the potential upsides of working with other landowners in bringing forward a large development are significant. Flexibility is required given all the variables (not least the state of the housing market) and they can be long term agreements. The most successful landowners have clear objectives from the outset.

8 – Telecoms trends

Shona Ray Ferguson

When the Electronic Communications Code was overhauled at the end of 2017, the industry knew to expect significant change: greater rights for operators, lower rents for landowners and a longer delay for developers to remove telecoms equipment. As explained in our Spring 2018 issue, this was all intended to satisfy the government's desire to improve broadband connectivity across the UK, especially in rural areas. Now the new Code has been in force for 18 months, what effect has it had on the market?

Rents are falling

The change in valuation assumptions was perhaps the most controversial aspect of the new regime. The rents that landowners can charge to operators siting equipment on their land are now calculated from the point of view of the landowner, ignoring the fact that the land is required for a telecoms network (the 'no network assumption'). In a recent case, this resulted in a yearly rent of around £2,500 for the use of a rooftop, where the landowner had requested around £10,000-13,000 based on comparables. In fact, the court stated that the Code rights themselves were only worth £50, with approximately £1,000 more being due as a contribution to the maintenance costs of the building. The only reason the court determined the rent at £2,500 was because this was the operator's starting position.

We have yet to see a rural valuation case in court but all indications are that rents there would be similarly lower. Pre-Code comparables will not be relevant. These new valuation criteria aim to put telecoms equipment on the same footing as other utilities such as water and electricity.

Developers are resisting

Landowners planning to develop their properties are resisting the attempts of operators to assess their land for its suitability for telecoms equipment, because it is more difficult to remove. There is an 18 month notice period to end the Code rights followed by a separate (and potentially open ended) process to remove the equipment.

This resistance is not always successful, because operators are responding by being more aggressive in their tactics. A recent case involved Cornerstone applying to court for a temporary Code right to assess a potential site, and the court granted it despite this right not being set out in the Code.

Operators are litigating

Perhaps in response to resistance by developers, operators are more willing to use the full force of the new Code to assert their rights, where previously they would have avoided litigation for fear of bad publicity.

With this bullish approach may come attempts by operators to install upgrades without informing the landowner. Operators are entitled to share or upgrade equipment provided it has either no or a minimal adverse effect on its appearance and does not place any additional burden on the landowner. They need not notify landowners when they install upgrades, but there is a risk that they will stray beyond the restrictions in the Code. The onus will be on landowners to keep records of the equipment on their land to make sure the operators are not installing apparatus that they are not entitled to.

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With operators asserting their rights, and landowners as keen as ever to protect their land and preserve an income stream, negotiating the terms of Code agreements is becoming more difficult.

Agreements are harder to negotiate

With operators asserting their rights, and landowners as keen as ever to protect their land and preserve an income stream, negotiating the terms of Code agreements is becoming more difficult.

As rents reduce, some landowners are trying to ‘rentalise’ anything over and above the basic rights within the Code or suggesting that each right is paid for individually. Operators are likely to resist this.

In the case of wayleaves, operators are pressing even harder to use their own standard form of agreement, which usually confers the widest rights possible because it is intended to be used across all their sites. They are much less willing (if they ever were) to give indemnities for losses suffered by the landowner, even where allowed by the Code, and some are resisting any end date for the Code rights they are granted.

Renewals are in stasis

The uncertainty under the Code is causing a separate problem with renewals.

Agreements which were already in place before 28 December 2017 are treated differently under the new Code compared to new agreements. Some aspects of the previous Code still apply to them such as the ability to restrict sharing, upgrading and assignment by the operator.

In particular, leases of land which were granted solely for Code purposes (such as mast sites) and which also have security of tenure under the Landlord and Tenant Act 1954 (**1954 Act**) appear to be proving difficult. Theoretically these renewals are determined solely under the 1954 Act, outside of the Code, but many seem to be ‘on hold’ at the courts, waiting for the first decisions on Code rents to filter into the market.

For landowners it might be advantageous to hold out for a renewal rather than engage with operators to agree a fresh Code agreement, for two reasons. With rents going down, landowners could benefit from the existing rates for longer than expected. In addition, when granting a 1954 Act renewal the court may to look to the valuation provisions of 1954 Act rather than the ‘no network assumption’ contained in the new Code, potentially resulting in higher rents.

Court cases abound

Many more cases are reaching court than ever did under the old Code, and their decisions often contain rather unusual reasoning. Several appear to be ‘policy decisions’ based on the government’s agenda rather than legal or commercial efficacy.

This highlights the uncertainty around the wording of the Code and the extent of the potential upside for operators. How this situation will settle is anyone’s guess, but the government is not backing down: there are proposals for further rights to be granted to operators to make tenants’ connections and upgrades easier.

9 – Children on the rural estate

Sophia Coles

Do you open the house and garden to the public at times throughout the year? Do under 18s work or volunteer on the estate, for example as beaters, stewards or gardeners? Do you host events in which children participate, such as Easter egg hunts, Christmas markets, summer fetes? Do you organise educational visits? Do you rent out space for corporate events where children may be present?

Child protection (or safeguarding) is much in the news as a result of scandals in schools and religious organisations. Institutions in many sectors are, consequently, looking carefully at how they fulfil their legal responsibilities to children.

The extent and type of interaction that a rural estate or heritage property may have with under 18s will determine what safeguarding arrangements should be put in place, and this will, of course, vary from estate to estate.

Your responsibility

In circumstances where you have interaction with children you need to ensure that the estate (and the activities you host and organise on it) is safe for them. This means ensuring:

- health and safety has been properly considered and appropriate measures taken to protect the physical safety of children when they are on your property or engaged in activities organised or hosted by you;
- any individuals working for you (as employees, contractors or volunteers etc) who come into contact with children are suitable for the work they do and have been subject to the appropriate pre-recruitment checks;
- people working at the estate (in whatever capacity) know what to do if they have concerns about a child's welfare;
- relevant managerial staff (and charity trustees) consider safeguarding at appropriate times, understand their responsibilities and keep policy and practice under review; and
- advice and guidance is sought when necessary, for example an incident occurs on your site or allegations are raised against a member of your staff or a volunteer.

What this means in practice

Health and safety
This is likely an area which you will already have well covered. Whether by virtue of your status as a business, employer or a charity – you will be expected to have a comprehensive health and safety policy in place, which is tailored to what you do, followed in practice and reviewed on a regular basis.

Recruitment
When recruiting anyone who will or may come in contact with children through their work, for example a gamekeeper who will supervise young casual workers, or an outreach manager running events for schools, you should think about building steps into the recruitment process to test candidates' suitability to work with young people.

The Charity Commission requires charities to prevent harm and abuse "with a rigorous recruitment and interview process" and this is good practice even if you are not a registered charity.

Rigorous recruitment should involve interviewing candidates in person and asking for and following up on references from reputable sources, as well as carefully looking at CVs and investigating any gaps in employment history.

You should also consider whether anyone working/volunteering for you or applying for a role is eligible for a Disclosure and Barring Service (**DBS**) check. You can ask for a basic check – which reveals any unspent convictions and conditional cautions – from any of your volunteers and employees. We advise that you ask for a basic check from any individuals who work with children (or vulnerable adults) in any way, and then require the higher levels of DBS check if the individual in question is eligible for one.

The DBS has online guidance documents[1] on eligibility and an online 'eligibility checker'[2] which is a useful starting point, especially for the more clear-cut cases. However, expert advice should be sought in less straightforward cases.

DBS checking should never be treated as the only or central part of a safe recruitment process. It should just be one consideration when assessing whether a candidate is suitable to work with children.

Handling concerns and allegations

All trustees, employees and volunteers should be aware of what abuse is and how to spot it; and there should be a clear system for reporting concerns as soon as abuse is identified or suspected. This is good practice (and a requirement of Charity Commission regulatory guidance).

The simplest and most effective way to do this is to have a safeguarding policy in place, which is shared with all trustees, staff and volunteers. This need not be a long and complex document, but should explain its purpose, identify what abuse is and tell staff what to do should they have concerns about a child's welfare or receive disclosure of any allegations.

You should also have (depending on the size of your team) at least one person who takes responsibility for safeguarding and acts as the main point of contact should any issues or concerns about safeguarding be raised. This person should be trained in how to handle concerns raised about a child and allegations made against staff members/volunteers.

How you should respond will of course depend on the nature of the allegation or concern. In serious cases advice should be taken from the outset. Responses could include some or all of the following; informing the Local Authority Designated Officer (**LADO**) about what has happened (the LADO is the individual/team at the local authority tasked with advising and coordinating responses to allegations against adults working with children), suspending an employee while an investigation is conducted, conducting a risk assessment and putting in place a safety plan.

Governance
An organisation's culture is almost always set and maintained by those who lead it, and it is important for managers, trustees and directors to be involved in establishing a strong safeguarding culture. This is particularly important for charities. The Charity Commission's most recent safeguarding guidance[3] for charities and trustees was published in October 2018. It sets out a clear list of what trustees and charities are expected to do with regards to safeguarding, and includes a summary info-graphic[4] of the "10 actions trustee boards need to take to ensure good safeguarding governance", including, among others, having an adequate safeguarding policy and code of conduct (which is periodically reviewed), ensuring people know how to raise a safeguarding concern and carrying out DBS checks for eligible roles.

Tricky issues
Safeguarding issues are rarely straightforward but should always be handled promptly, thoroughly and sensitively, with the interests of the child at the forefront and in accordance with statutory guidance and expert advice. Safeguarding concerns and allegations crop up in all sorts of organisations, including private estates and heritage property. An organisation or individual is more likely to respond well to a difficult situation if it has been anticipated (so far as possible) and prepared for. Having clear policies, a leadership team that knows its responsibilities and well-recruited staff will all help to reduce the likelihood of incidents arising and increase the chances of responding well if they do.

[1] https://www.gov.uk/government/publications/dbs-guidance-leaflets

[2] https://www.gov.uk/find-out-dbs-check

[3] https://www.gov.uk/guidance/safeguarding-duties-for-charity-trustees

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756636/10_safeguarding_actions_for_charity_trustees_infographic.pdf

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10 – Private placements for rural estates

Marc Glancy

Traditionally, banks have provided financing for rural estates in the form of loan facilities, often secured against property and other assets. Capital and regulatory restrictions on banks introduced in the wake of the financial crisis have resulted in many estates finding that banks are either less willing or unable to lend in the larger sums and on the longer maturities they desire. As a result, alternative sources of finance have emerged and one source which has proved attractive in recent years is the private placement market.

1. What is a private placement?

A private placement is a private debt arrangement between a borrower (**issuer**) and a non-bank lender (**investor**) or a small group of non-bank lenders. The investors on private placements are typically insurance companies and pension funds (historically US based but UK investors are increasingly active) who have long-term fixed liabilities for which they require long-term investments providing a fixed rate of return.

Depending on the financial strength and credit-worthiness of the estate, it is often possible to issue a private placement which is not secured. This is a clear advantage to the bank loan market where security over land and other assets will usually be a fundamental condition to the provision of any loan facilities.

2. What are the key commercial terms of a private placement?

Issuers usually appoint an experienced financial adviser at the outset of the process. Their role includes assisting with the selection of potential investors, preparing marketing materials, facilitating discussions between the issuer and the potential investors and providing guidance on the appropriate commercial terms for the private placement. The commercial terms will be crucial in ensuring both a positive uptake from the investor community and managing the issuer's risk over the life of the private placement.

Key commercial matters for issuers to consider upfront will include the following.

Quantum

Generally, the private placement market will only be open to those issuers looking to raise a minimum of £10 million. The amount that an issuer is able to raise in the private placement market will be linked to their asset base; on a recent transaction for a large landed estate client for whom the firm acted, the estate raised £105 million.

Term and interest

One of the key attractions of a private placement is the combined effect of a long term and a fixed interest rate. Private placements tend to have a longer maturity than ordinary bank loans.

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One of the key attractions of a private placement is the combined effect of a long term and a fixed interest rate.

A term of between 10 and 35 years would be normal (although it is possible for maturities to extend further; we saw a term of 50 years on a recent transaction where we acted for a large landed estate). Interest rates in private placements will generally be fixed and rates of around 3% per annum are commonly obtained by estates. This type of long-term, fixed rate debt can be valuable in enabling finance to be procured for large-scale, long-term capital projects such as new developments, estate activities or visitor attractions.

Repayment

Issuers will need to consider the repayment terms for the debt, both as to the ultimate repayment date and potential amortisations during the life of the debt and options for early redemption and prepayment.

The finances of the estate, both in terms of revenue streams (eg from rental properties, commercial activities, income-producing investments etc) and its balance sheet, will need to be robust enough to sustain payments of interest over the life of the debt as well as repayment of the principal amount of the debt at the end of the private placement's life.

Prepayment fees

Private placements are attractive to issuers because of the length of maturity available. However, investors are also looking for long-term investment and interest revenue. To protect their position, investors will commonly require prepayment fees on an early repayment of the debt (**make-whole provisions**) to ensure they receive their initially expected rate of return. Make-whole provisions can make early repayment costly so estates will need to consider carefully whether they are content for the debt to remain outstanding to scheduled maturity.

Financial covenants

The appropriate level and types of financial covenants will need to be agreed. These will need to provide investors with comfort whilst protecting the issuer's flexibility to manage its day-to-day operations.

Investors may expect to see both an interest cover financial covenant testing the issuer's ability to raise enough operating profit to cover its interest costs and a leverage covenant testing the ratio of the issuer's total debt to the value of its asset base. Other financial covenants might also be required depending on the particular issuer and will be a matter of commercial negotiation. It is key to ensure that financial covenants are set at the right level at the outset of the transaction, as it can be difficult to procure amendments and waivers of covenant breaches at a later stage.

Information undertakings

Investors will require information as to the estate's financial performance and activities. The frequency with which such information will need to be provided will commonly form part of the negotiations. Investors will expect to receive audited annual financial statements and possibly also unaudited semi-annual financial statements, both prepared using generally accepted accounting principles.

US investors

US investors are generally prepared to make sterling private placements available (usually by swapping US dollars for sterling over the period of the private placement). However, they will require an issuer to indemnify them for any losses that they may suffer from breaking or amending such currency swaps as a result of either the transaction not funding on the scheduled funding date or any unscheduled prepayment of the private placement.

3. Legal and practical considerations

Broad market acceptance of well-established model form documentation for private placements ensures that documentary negotiations between the issuer and the investor are minimised.

At the outset of any private placement, the issuer's legal advisers will need to undertake an analysis of the issuer's governing documents to ascertain whether the issuer has the power to borrow money (and, where relevant, grant security). If there is no such power, it may be necessary to amend the relevant governing document, which could take considerable time and have cost implications, depending on the structure of the issuer. This is a particularly significant point for estates constituted as charities or trusts (rather than companies) whose governing and constitutional documentation can often be bespoke and complex.

Many estates only conduct business at meetings of their directors or trustees. These meetings are often infrequent and it is often difficult or impossible to call short notice meetings when directors and trustees are travelling or involved in other projects. This can lead to delays or frustrate timings if not planned for properly.

If the structure is such that individual (and sometimes corporate) trustees are transacting on behalf of the estate, the transaction documentation will need to incorporate appropriate language to limit the recourse of the investor to the assets of the trust from time to time, and note that the trustees are entering into the documentation solely in their capacity as trustees and not in their personal capacity. If appropriate language is not incorporated, there is a risk that the trustees could find themselves personally liable if the payments of interest/principal under the private placement are not paid when due.

Planning and launching a private placement can be an intensive process and estates wishing to make use of the pool of financing available in the private placement market will need to seek out and engage legal counsel and financial advisers who are familiar with market practice and the documentation requirements for private placements.

The use of private placements as a means of raising long-term finance has continued to increase exponentially and the UK market has developed momentum accordingly. Given the continued regulatory climate and imposition of capital controls facing banks, the use of private placements as a financing tool in the UK is likely to expand further. For those estates looking for sizeable long-term finance (whether for new capital projects or to match funding to long-term assets and investments they hold) private placements are likely to remain an attractive alternative option to the usual route of bank financing.

If you require further information on anything covered in this newsletter please contact: **insights@farrer.co.uk**

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