FARRER&Co

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Rural Estates Newsletter

IN THIS ISSUE

James Maxwell

When I take my morning lockdown exercise, I run through the churchyard of St Michael's in St Albans. The path to the Ladies Gate cuts deep through the soil, worn down by generations of churchgoers.

Around, the epitaphs on gravestones ('Beloved daughter, wife and mother') remind me not to miss what really matters. But there is a further story. An English churchyard in May tells of two types of time: the linear time of a life, end-stopped with a stone; but also the cyclical time of the seasons, of the generations, which circle and return, sure as the swifts in spring.

This May, two long and eminent careers drew towards their close at Farrers, as James Furber and Rhoddy Voremberg retired from the partnership. James, sometime editor of this newsletter and long-time Solicitor to the Duchy of Cornwall, joined the firm in 1976 and rose to be our senior partner. Rhoddy, a pre-eminent trusted adviser to rural estates, followed a distinguished career at Wilsons by leading our private client practice for many years. His swansong for this newsletter (Capital taxation – all change?) suggests much that was true in 1980 remains so today. From the renewed interest in woodland as an investment (see David Gubbay on The tax appeal of trees) or the way in which the private rented sector is reverting to a former era (Louisa Passmore on The Tenant Fees Act revisited) there is a dim sense of having been here before. This is a time of great change, but for rural estates the 'news' carries echoes of older stories.

The old order changeth, yielding place to new...

1 – Capital taxation – all change?

Rhoddy Voremberg

Rhoddy Voremberg considers 40 years of change to capital taxation and looks to the future and what proposed reform may mean for rural estates.

When I qualified as a solicitor in 1980, farmland was worth about £2,000 an acre with vacant possession and £1,000 tenanted. Capital transfer tax (**CTT**) was a cumulative tax with progressively higher rates applying to both lifetime gifts and transfers on death, the top rate being 75 per cent. After coming to power in 1979, Margaret Thatcher's government started to draw some of the teeth of this tax and by 1984 the top rate was down to 60 per cent and the cumulation period for gifts was 10 years. Agricultural property relief (**APR**) was at 50 per cent only, but the Holy Grail was to achieve the 'double discount' whereby this relief could be applied to the tenanted value.

I advised many landowners back then who wished to pass their farms intact to their children. A lifetime gift was taxable at a rate of 20-30 per cent and, if the double discount could be achieved, this resulted in a charge of about £200 an acre, payable by the donee by 10 annual instalments – equivalent to about one per cent a year of the vacant possession capital value. Rebasing of assets for capital gains tax (**CGT**) in 1982, coupled with indexation allowance, meant that for at least a decade disposals of farm land were effectively free of CGT.

In 1986, CTT became inheritance tax (**IHT**), the potentially exempt transfer was born, and APR was increased to 100 per cent for in hand land. Never once did I hear a client who was paying off their lifetime CTT instalments from an earlier gift say they wished they had waited.

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Anyone who has structured their estate so that it currently qualifies for BPR on the 'Balfour' principles should certainly be considering now whether there is action they could take to 'bank' the relief.

IHT Reform

IHT has been with us for 34 years and there is a growing feeling that it is ripe for reform. In July 2019, the Office of Tax Simplification (**OTS**) published the second part of its review 'Simplifying the Design of Inheritance Tax', and in January this year the All-Party Parliamentary Group (**APPG**) published their report 'Inheritance and Inter-generational Fairness'. Both made recommendations for reform including the interrelationship between IHT and CGT on death, and reform of APR and business property relief (**BPR**). A sweeping change to IHT, if it comes, will be a major undertaking for the government and the Treasury. If reform does come, in the current economic climate it is almost inconceivable they will reduce the revenue-raising power of capital taxation on succession to wealth, and there is every reason to believe that they will wish to both increase and simplify it.

What is proposed?

In 2019, both the OTS and the APPG (in their interim recommendations) put forward a number of recommendations for the simplification of several of the technical complexities of IHT, but the APPG's 2020 report is much more radical and recommends that the current IHT regime should be replaced by a tax on all lifetime and death transfers of wealth, with very few reliefs (APR and BPR would be abolished), a higher annual exemption (they suggest £30,000) and a lower flat rate of tax, likely between 10-20 per cent. They also propose (amongst other things) the CGT-free death uplift should be abolished, domicile should be replaced by a specific number of years of residence as the connecting factor for IHT, and gifts to trusts should be treated the same as to individuals, but all trusts should pay an annual fixed rate with no nil rate band.

The two most significant changes proposed by the OTS in their 2019 report are:

1. The test for BPR whereby the business has to be more than 50 per cent trading (as opposed to investment) should probably be moved to 80 per cent, thus aligning it with the definition of trading for CGT. This would make it much more difficult for the estate which is structured as a single composite business, including both trading enterprises and the receipt of rents from let property, to qualify for BPR.
2. Where relief from IHT applies on death, the uplift of asset values for CGT should not, and instead the recipient of the asset should be treated as receiving it at the historic base cost of the person who has died. As mentioned above, this recommendation is made by both OTS and APPG, and it is suggested that it should also apply where spouse relief is claimed on death, as it does on a lifetime transfer between spouses.

What might this mean for the rural estate?

If they are implemented, these recommendations could have major implications for some landowning families' succession strategies. Anyone who has structured their estate so that it currently qualifies for BPR on the 'Balfour' principles should certainly be considering now whether there is action they could take to 'bank' the relief.

Throughout my career the advice I have always given on IHT planning has broadly been:

> " *Do whatever you are able and willing to, as and when you are able and willing to do it; and do the best you can within the tax regime of the time.*

So, as in the 1980s, if you can make a gift now which 'works' for you and your family, we would suggest you do it. You are unlikely to look back if and when the tax regime changes and regret it. At the same time, we would also caution against letting tax planning decisions distort what you believe to be best for your family and your business, because these you probably will look back on and regret. The tail should not wag the dog.

2 – Coronavirus and rural estates

Shona Ray Ferguson

Patrick Hammond

With one story dominating all our lives at the moment, how does coronavirus affect rural estates? Here are some aspects we have encountered and some guidance to help.

Tenant arrears

Landlords are facing unprecedented requests from tenants for rent concessions, and the courts are pausing housing possession claims. James Maxwell's article provides a summary of the options to consider in the face of residential and commercial tenants being unable to pay their rent. Guidance on a wider range of landlord and tenant issues has also been issued by the government.

Employee assistance schemes

The government's Job Retention Scheme, designed to prevent mass redundancies, went live on 20 April with more than 140,000 applications on the first day. David Hunt, from our employment team, has summarised the key points of the scheme.

Landlord safety checks

The requirements for landlords' safety checks, for example gas appliances and smoke and carbon monoxide alarms, have not been relaxed, but landlords could be facing difficulties accessing properties. In addition, the new electrical safety regulations come into force for new tenancies from 1 July 2020. Landlords can avoid liability if they can show they took 'all reasonable steps' to comply with their duties. The Gas Safe Register website has published some examples of what those steps might be in the case of gas safety, and similar principles could be used in relation to other essential safety checks.

Energy efficiency

The Minimum Energy Efficiency Standards (MEES), requiring a minimum EPC rating of E, came into force for domestic properties let under certain tenancies from 1 April 2020. This legislation is not being relaxed, since it has been expected for many years. Government guidance on MEES generally – which has not changed for coronavirus – is available here.

Relaxation of right to rent checks

The government has released guidance permitting checks to be carried out over videocalls, for tenants to provide copies of documents by email and, as ever, the Landlord's Checking Service remains available if a prospective or existing tenant cannot provide any of the required documents.

Relaxation of public access requirements

In relation to heritage property, HMRC has relaxed public access requirements for conditionally exempt buildings and chattels for the period of the coronavirus lockdown. Catherine McAleavey and Isabel Paintin have reported on the guidance.

Transaction delays

The lockdown has affected every facet of our daily lives and property transactions are no different. Some of the difficulties include search result delays and problems with document signing and witnessing. From 13 May, the government has allowed the housing market to open up again, so previous delays with EPCs and valuations might ease. Parties to transactions will need to be flexible and consider how to make arrangements within the requirements of the lockdown, or otherwise agree a delay.

The government's earlier guidance on EPCs is here. For residential sales, the government has issued guidance on moving home.

E-signatures

We are often asked whether documents can be signed electronically, particularly where the post is slow, home printers run out of ink and witnesses are socially distancing. The answer is (as so often) it depends. For agreements for sale, short leases (less than three years), licences, or other simple agreements, an electronic signature may be sufficient but should be agreed between the parties.

Save in certain limited circumstances, deeds cannot be executed electronically. As ever, the benefit of any reduced informality must be weighed against the increased risk of mistakes or fraud. Patience is a virtue.

3 – Biodiversity net gain – opportunities for rural landowners

Paul Krafft

Anthony McNamee

The government reintroduced the Environment Bill to Parliament in January 2020 as one of the measures to deliver on the aim in its 25 Year Environment Plan to "leave the environment in a better state than we found it". The Bill has a wide scope but one of the most interesting potential opportunities for landowners is 'biodiversity net gain'.

What is biodiversity net gain?

The concept will not be new to rural estates. The government's National Planning Policy Framework already requires local planning authorities to encourage developers to incorporate biodiversity improvements in and around developments, but there has been no standard approach.

The Environment Bill will make biodiversity net gain a requirement of planning and require development to deliver at least a 10 per cent improvement in 'biodiversity value'. To calculate the gain, the 'pre-development biodiversity value' as at the date of the planning application will be deducted from the estimated 'post-development biodiversity value'. Biodiversity value will be measured according to metrics produced by DEFRA.

Although there are likely to be exceptions (such as development authorised under permitted development rights), the requirement for a 10 per cent biodiversity gain is set to apply to all planning permissions. Whether you are converting offices in central London or building homes on fields in Herefordshire, you will need to provide biodiversity enhancements. The enhancements will be contained in a 'biodiversity net gain plan' which is agreed with the planning authority as part of the planning process.

How will biodiversity net gain be provided?

Biodiversity net gain can be delivered in three ways (either individually or together).

1. Onsite habitat improvements

The traditional way to provide habitat improvements is to incorporate them within the red line of the planning permission. This will remain possible. An architect will still be able to consider the layout of the site as a whole and where best to incorporate within the development, for example, a nature reserve.

The Bill requires that onsite biodiversity improvements are maintained for 30 years. Maintenance will be secured by a planning condition, a planning obligation or a conservation covenant.

2. Offsite habitat improvements

Biodiversity gain does not have to be provided onsite. The gain can be 'allocated' elsewhere if the offsite area is recorded on a 'biodiversity gain site' register administered by the Secretary of State. To qualify as a biodiversity gain site, there must be a commitment under a conservation covenant or planning obligation to carry out agreed habitat enhancement works and maintain the works for 30 years.

Landowners are being given the opportunity to offer land to developers for biodiversity improvement purposes even when they do not own land immediately adjacent to a proposed development. There are no proximity requirements under the Bill, but we suspect that planning authorities will seek land within their jurisdiction, particularly if section 106 agreements become the accepted vehicle for works and maintenance obligations. Planning authorities are likely to prefer a single authority as the contracting party.

The offering of land for offsite habitat purposes will raise questions for landowners. What, for example, are the implications of giving up poor yielding farmland for the planting of trees to facilitate someone else's development? Will the landowner's tax position change (will agricultural property relief be lost if trees are planted – see David Gubbay's article in this Newsletter)? What happens at the end of the 30 year maintenance period (will the landowner be able to retain timber income for trees felled in year 40)? Will the landowner still be able to claim subsidies (what is the interaction with schemes such as the Woodland Carbon Guarantee scheme)? What legal structure should be put in place with the developer? We consider it unlikely that developers will want any ongoing interest. They are likely to want to pay a fixed sum to the landowner responsible for the habitat and make a clean break.

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Whether you are converting offices in central London or building homes on fields in Herefordshire, you will need to provide biodiversity enhancements.

3. Purchase of biodiversity credits
The third option is to purchase biodiversity credits for the development. Credits will be sold by the Secretary of State and have an assigned biodiversity value. We cannot tell at this stage how much credits will be promoted by the Secretary of State and how attractive they will be for developers. The Secretary of State must be transparent and publish annual reports on the biodiversity credit system and how the credits have been spent. This will involve some administration.

Landowners may benefit from the credits system. If it becomes well established, landowners may see it as another possible source of funds for biodiversity projects in the same way as the grant regime.

It is more likely that the credit system could work against landowners, if it becomes the norm and a scale similar to CIL evolves. Where a development is on their own land it could simply be treated as an additional development cost which is deducted from the landowner's share. If a landowner is able to offer offsite land for habitat purposes, there could end up being no market for this if the default position for developers is to purchase credits.

Groundwork

The ability to market land for offsite biodiversity net gain is an exciting opportunity for landowners if the Environment Bill becomes law. Landowners should consider carrying out an audit of their available landholdings, in particular areas not being put to productive use or where biodiversity gain is easy to achieve. If you have works planned for those areas, it may be you will wish to put them on hold to ensure that the bar for achieving biodiversity net gain is kept as low as possible.

Where landowners already have advanced plans for a planning application, they should consider submitting now before the requirement to show 10 per cent biodiversity net gain comes into force.

4 – The tax appeal of trees

David Gubbay

People invest in trees for a number of reasons: for amenity and sporting purposes, the commercial production of timber, or for environmental purposes. Government schemes such as the Woodland Carbon Guarantee fund are making trees interesting again to investors, but trees also retain a basic tax appeal.

UK taxpayers investing in commercial forests and woodlands in the UK can benefit from several tax advantages which can enhance the underlying returns from timber and add to the appeal of forestry investment. The tax position can be complicated, especially where the woodland is used as part of farming operations.

Commercial woodlands

The various tax exemptions mentioned below apply to woodland or forestry in the UK which is occupied commercially. The legislation does not provide much guidance on what the term 'commercial woodlands' means although for income tax purposes it must be occupied "on a commercial basis" with "a view to the realisation of profits". Generally, one must be occupying the woodlands commercially for the long-term sustainable production of raw timber and an investor should be able to show there is a proper business plan designed around planting, managing, and ultimately harvesting and selling the timber at a commercial profit.

Inheritance tax

Commercially managed woodland can qualify for 100 per cent inheritance tax (**IHT**) business property relief (**BPR**) after two years of ownership; the value transferred is reduced by 100 per cent so no IHT liability ensues. If owned at death, no IHT is paid on the total value of both land and standing timber or plantations. If there is any capital gains tax liability (see below) which has been held over or rolled over, the liability will be cancelled on death. In some cases, especially where the woodland is being used as part of farming operations, agricultural property relief (**APR**) may apply rather than BPR.

If commercial forestry is gifted, the donee should retain it as commercial woodland for the lifetime of the donor or seven years, whichever is the shorter period, to ensure it does not come into charge. If the donee sells the asset but invests the entire proceeds in another qualifying asset within a short time 100 per cent BPR should remain available.

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It is important to demonstrate that the property has been managed as a commercial investment to qualify for this CGT relief and to take professional advice on apportioning the value between the forestry and the underlying land.

There is also a special 'woodland relief' provision for transfers by individuals on death for the deferment of tax on timber growing in the UK which does not qualify for BPR or APR, generally because it is non-commercial woodland. An election to defer tax on growing timber may be made by the deceased's personal representatives within two years of death, provided that the deceased was beneficially entitled throughout the period of five years preceding death or became so entitled by gift or inheritance.

Capital gains tax

Where forest and woodland are managed on a commercial basis, capital gains tax (**CGT**) is not payable on any increase in the value of the asset which is attributable to the standing or felled timber during the period of ownership. The increase in the value of the underlying land may be liable for CGT but capital works on the land (for example on roads, fences and drains) incurred during ownership can reduce the gain. It is important to demonstrate that the property has been managed as a commercial investment to qualify for this CGT relief and to take professional advice on apportioning the value between the forestry and the underlying land.

Woodlands which are not managed on a commercial basis are subject to the normal CGT rules. If a commercial activity is conducted within the woodland such as paintballing, camping or off-road driving then CGT will arise on gains on sale but reliefs such as holdover relief, rollover relief and entrepreneur's relief should be available.

An individual with a CGT liability arising from the sale of a business asset can take advantage of rollover relief. If the person reinvests the proceeds in commercial forestry land, in the period of twelve months before and three years after the sale, rollover relief should be available; the gain on the disposal of business assets can be deferred until the forestry land is disposed of.

Holdover relief on gifts of business assets is also available where land containing commercial woodland is gifted if the appropriate election is made; CGT is deferred until the gift is subsequently sold by the transferee.

Tax on income

Income derived from the occupation of commercial woodlands such as the sale of timber is not subject to income or corporation tax. However, other income arising from the ownership of the land, such as renting the woodland for camping, shooting, or other recreational activity is subject to income tax. The corollary is that no income tax relief is available for expenditure incurred in commercial woodlands such as on development costs or interest payments. However, if the land is predominantly occupied for farming and not commercial woodland any timber sale receipts may not be exempt from income tax.

VAT

Commercial woodlands are not exempt from VAT registration and woodland sales can constitute a taxable supply. Where the level of taxable supplies is less than the mandatory registration limit (currently £85,000) then voluntary registration is possible if there is an intention to make taxable supplies in the future and this will enable VAT on expenditure to be recovered. A sale of land with standing timber is exempt from VAT unless the land has been opted.

5 – Farm subsidies – delinking direct payments

James Maxwell

The government intends to phase out direct farm subsidy payments in England over the 7 year agricultural transition period between 2021-2027, but it is the plan to delink direct payments from the requirement to occupy land that will give landlords pause for thought and prompt them to consider the drafting of their FBT precedents.

Farming for the future

The government's policy paper, Farming for the Future, begins to flesh out the government's skeleton proposals for delinking. It looks like the new scheme will entirely replace the existing Basic Payment Scheme (**BPS**) and will be mandatory for all farmers. As the paper states:

> " *Once we have delinked payments, recipients will no longer have to farm in order to receive payments during the agricultural transition. There will be no need to have land or payment entitlements.*

The introduction of the new subsidy scheme will not be before 2022 and may well be later.

How will it work?

In a move familiar from the inception of other subsidy schemes in the past, eligibility for payments will be based on a farmer's eligibility to make claims under the BPS in a previous reference period. The details of that reference period remain to be decided following consultation.

Farming for the Future is clear in its expectation that it will be tenants who claimed BPS payments during the reference period who will be eligible to receive the new delinked payments. Indeed, it is in part the desire to address the perception that BPS payments inflate farm rents that is one of the underlying purposes of delinking:

> " *Which removes the link between the value of the payment and [the] area of land for which it was previously claimed.*

Another purpose is, of course, to facilitate the retirement of older farmers: the intention is that the delinked payments will continue if a farmer reduces operations or stops farming entirely.

Drafting decisions for landlords

The near certainty of the creation of a new subsidy regime, in the next few years, which no longer requires the recipient to occupy land, means landlords need to be looking at the drafting of the subsidy provisions in FBTs that are being granted now. The definitional structure of subsidy provisions in existing precedents is likely to be predicated on occupation of the land by the tenant. The wording of these provisions may need to be reconsidered.

Very often, the contractual arrangement set out in a precedent will assume the existence of 'Landlord's Entitlements': a right to receive payments under the BPS which is made available to the tenant for the period of the tenancy (and which the FBT may state the tenant holds 'on trust' for the landlord). The FBT is likely to include provisions for the return of this asset to the landlord at the termination of the tenancy (or its assignment to a nominee at the landlord's discretion) for nil or nominal value. There may also be provision for compensation if statute intervenes to prevent this.

Again, all this drafting will need to be reconsidered with the advent of a new subsidy scheme that awards replacement rights to previous recipients of BPS subsidy without any direct requirement for the occupation of land.

Decisions will need to be made now as to the extent to which FBTs seek to draft 'against the grain' of the direction of public policy. Well drafted FBTs will already contain clauses that seek to capture for the landlord replacement entitlements, under future subsidy schemes, which are allocated to a tenant without charge. Should these clauses be given up, or strengthened, in light of the likelihood that future legislation may contain anti-avoidance provisions?

Roll up! Roll up!

The government is also looking at offering tenants the right to roll up their direct payments (whether under the existing scheme or a new delinked regime) into one-off lump sums. Again, the hope is that this will enable farmers wishing to leave the industry to do so more easily, although whether the relatively insubstantial sums that are likely to be on offer will prove much of a stimulus is open to doubt. Another drafting point for landlords granting FBTs now is the extent to which a landlord might expect to have a part in that decision, especially for as long as Landlord's Entitlements under the existing BPS remain linked to the land.

More generally, landlords must now look forward to a future where the asset on their books known as Landlord's Entitlements is likely to convert overnight into an asset the tenant can roll up into a capital sum.

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Drafting in the dark

With so much detail undecided, those drafting new FBTs will to some extent be 'drafting in the dark'. Much remains opaque, including how land management and husbandry standards will be enforced if tenants have retired but continue to receive payments or have rolled them up. As in the past, when practitioners have drafted in the face of uncertainty about the shape of future EU legislation, the best course is to be clear about the intentions of the parties and to draft widely to capture different possible outcomes.

6 – SDLT and rural property – where did it all go wrong?

James Bromley

Stamp Duty Land Tax (**SDLT**) is still a relatively new tax; its seventeenth birthday is later this year. Whilst many would agree that it is largely an improvement over its stamp duty predecessor, SDLT has developed a whole catalogue of its own issues, as many teenagers are liable to do.

How then did a tax that was intended to be accessible and straightforward become so complicated? More practically, what are the main SDLT issues facing rural estates and what can be done to navigate around these?

Where did it all go wrong?

In 2003, not long before SDLT was introduced, the Parliamentary Select Committee on Economic Affairs heard that:

> " *Accessibility has been a long-standing problem with stamp duty. SDLT is a vast improvement – it will be easily understood by both professionals and the public…*

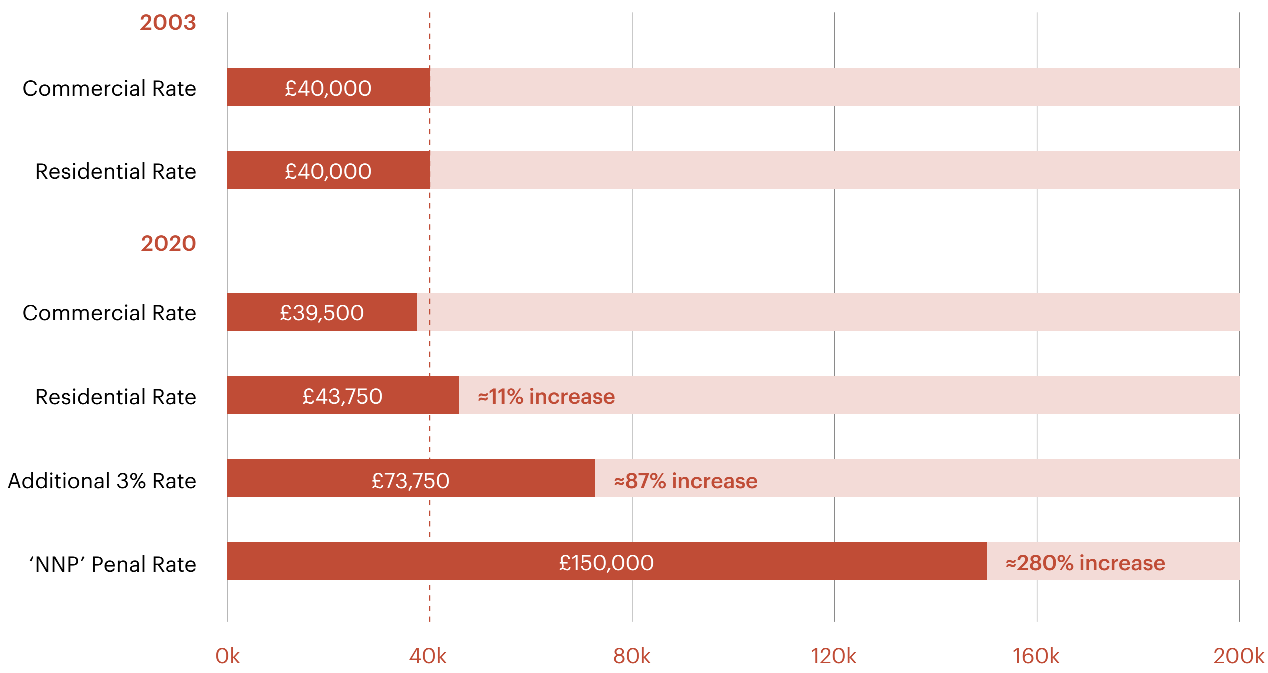
With the benefit of hindsight, that ambition now seems naïve (to put it mildly) but SDLT did start its life as a largely straightforward and accessible tax for most rural landowners and property professionals.

Take the example of a property purchased for £1m just after SDLT was introduced in 2003. The purchaser's conveyancer or agent would have checked the relevant tax rates and rightly deduced that the purchaser should pay £40,000 of SDLT. The purchaser's circumstances did not influence the tax payable and nor did the nature of the property in the vast majority of cases. There was not much need for detailed analysis of some of the terminology in the legislation as there were no real tax consequences.

If that same purchaser was to make another £1m purchase in 2020, the SDLT payable would depend on a huge range of nuanced factors that were mostly irrelevant in 2003. Depending on how these factors turn, the purchaser may now be liable for tax at any one of five different tax rates, or six if the purchase price was low enough for first-time buyer rates (and soon to be seven with the introduction of the new non-resident surcharge described below).

The difference in the tax currently payable on a £1m purchase is as much as £110,500, with the highest rates being around 280 per cent more expensive than the lowest. The amount of tax payable can now turn on the meaning of terminology in SDLT legislation that was never designed to be analysed in such detail. The slightest variation in the factual matrix can now have a huge impact on the tax payable and, of course, the potential liability of professionals.

Comparison of SDLT rates for a £1m property



Where are the main problem areas?

The factor which most influences the tax cost for many rural purchases is often whether the property is residential or not for SDLT.

In some cases, this is an easy call to make – compare a commercial farm building to a farmhouse or manor house for example. But the distinction between residential and non-residential (or mixed use) properties can be far less clear in many cases, particularly in the context of rural land.

Take, for example, a property consisting of a farmhouse with a self-contained annexe, woodland, paddocks and some grazing land. The SDLT treatment of such a property can differ significantly from one purchase to the next, depending on its exact makeup and use at the time of completion. Each case turns on its own facts, but it is important to remember that as a general principle, a property is only residential for SDLT where it consists entirely of dwellings and their accompanying land. Fields let on farm business tenancies and genuine commercial grazing licences to third parties can often indicate that the land is mixed use or non-residential, potentially leading to a significant SDLT saving.

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The amount of tax payable can now turn on the meaning of terminology in SDLT legislation that was never designed to be analysed in such detail.

Unfortunately, the mischief of SDLT legislation is not limited to the distinction between residential and non-residential property. As many rural estates professionals will know, the SDLT cost of acquiring property now also depends on a range of other factors too, including:

- the number of dwellings being acquired (multiple dwellings relief can sometimes reduce the SDLT payable).
- whether the purchaser and any spouse/civil partner owns any other properties (which can add an additional 3 per cent to the SDLT rate).
- the legal character of the purchaser as an individual, partnership, trust or company ('Non-Natural Persons' such as companies can be liable to a penal flat SDLT rate of 15 per cent and only individuals are eligible for the lowest residential SDLT rates, so it will rarely make sense to acquire residential property in a corporate vehicle except for a genuine commercial enterprise).

And that is all before getting to the fearsome scope of SDLT's dedicated anti-avoidance rule (known as section 75A).

Solutions?

HMRC does recognise the complexity of today's SDLT system and many of the shortcomings of the legislation; they have to wrestle with the same system after all. However, there do not seem to be any plans on the horizon to simplify SDLT. On the contrary, the latest developments suggest the system will become yet more complicated.

To give one example, HMRC has introduced a new dedicated clearance process, for purchasers to obtain HMRC's view on whether the SDLT anti-avoidance rule would apply to them before they make a purchase. That is welcome in principle, but in practice many of HMRC's responses to clearance applications so far have been unhelpful in some cases and just plain wrong in others. As a result, purchasers are often driven away from engaging with HMRC and instead fall back on specialist professional advice, which does of course come at a cost.

The introduction of a new surcharge for non-residents, anticipated in April 2021, seems set to further complicate the position. Whilst the finer detail on these rates is still awaited, they are expected to impose a further 2 per cent surcharge in addition to current rates for all non-resident buyers (whether individual, trust, company or partnership). The government's consultation on the surcharge suggests that a person's residence for these SDLT purposes will be determined by yet another new set of rules entirely separate from the UK's existing tax residence tests, placing a further burden on advisers and further costs on affected buyers.

If there is a silver lining for those looking to acquire rural property, it is that dedicated professional expertise has developed in tandem with the increasing complexity of SDLT. With the right advice, there are opportunities to make significant SDLT savings on certain purchases and to mitigate risks in uncertain cases.

7 – The Tenant Fees Act revisited

Louisa Passmore

In the years after the Housing Act 1996, which made assured shorthold tenancies (**ASTs**) the default form of tenancy in the private rented sector, rural estates enjoyed what in retrospect was the high-water mark of landlord control over the tenancy document.

Not only did section 21 notices allow possession on two months' notice as of right, but ASTs themselves were usually heavily weighted in the landlord's favour. The power of section 21 notices has been eroded in recent years (and may even have gone for good); as a result of the Tenant Fees Act 2019 (**TFA**) the drafting of ASTs must also now adapt to the shifts in public policy.

31 May 2020 marks the end of the transition period for the TFA. Landlords and their agents can no longer request any prohibited fees for ASTs of 21 years or under or any statutory tenancy arising thereafter (see our Summer 2019 Newsletter for an overview). Nor can they require the tenant to enter into a third party contract for services or insurance (subject to limited exceptions). Any terms requiring prohibited payments are invalid. Applying these legislative 'one size fits all' parameters to rural estates raises some interesting drafting points for ASTs.

AST clauses under the spotlight

The TFA received considerable publicity for removing a landlord's ability to charge an inventory fee at the beginning of a term and professional cleaning fees at the end. But many more potential charges, often found in a standard rural AST, fall foul of the new regime. Third party charges such as chimney sweeping or burglar alarm services can no longer be laid at the tenant's door. A landlord cannot require a tenant to insure their own possessions, merely recommend the prudence of doing so. Costs of removal and storage for tenant possessions left behind at the end of the tenancy cannot automatically be recharged to a tenant.

A mainstay of an AST for a rural cottage with a shared access road will have been the ability of a landlord to collect a fair proportion of the maintenance and repair costs of the access road from each tenant. No longer permitted, landlords must consider likely costs at the outset and rentalise them. A shared septic tank is just as likely in a rural context, in which case a well drafted clause should allow a landlord to recover shared maintenance costs during the tenancy because recharging reasonably incurred sewerage costs is permitted.

The catch-all tenant indemnity (beloved by landlords) is now outlawed, but the TFA still permits a payment of damages by a tenant for breach of the tenancy agreement. Thus an appropriately drafted rural AST can provide some protection for a landlord and certainty of obligation for a tenant, for example, a requirement to yield up the property in a tidy condition and cleaned to a professional standard (this does not require professional cleaning as the tenant may undertake the cleaning themselves). Should the tenant breach their obligation, the landlord may seek damages.

A replacement key charge can be made but only if expressly provided for in the AST and, as the cost must be reasonable, written evidence should be kept. Whilst interest for late payment of rent, and only rent, is permitted, careful attention must be paid to how it is calculated.

Pitfalls with historic ASTs

Landlords and agents well versed in post-TFA AST drafting will also need to consider their interpretation of pre-TFA ASTs. Each payment clause for each property will need to be assessed; not only must landlords and agents ensure they do not *claim* prohibited payments from a tenant but also that unsolicited prohibited payments are not *received* from a tenant who has grown accustomed to paying them. The TFA allows only a small grace period for return of payments for pre-1 June 2019 ASTs.

The value of any AST deposit must now comply with the TFA save for one exception. The tenancy deposit cap does not apply to a periodic tenant who is holding over pursuant to a fixed term tenancy which was entered into, and the deposit obtained, before 1 June 2019. However, it is unclear whether such a periodic tenancy commencing on or after 1 June 2020 would fall within this exception as the periodic tenancy might be held to be a new tenancy. The safest course of action in this scenario is to return any excess.

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Not only must landlords and agents ensure they do not claim prohibited payments from a tenant but also that unsolicited prohibited payments are not received from a tenant who has grown accustomed to paying them.

Reasons for change

Continuing the public policy trend to prevent use of section 21 when a landlord is at fault, the TFA prevents use of a section 21 notice until any unlawfully charged fees or an unlawfully retained holding deposit have been returned. It is widely anticipated, of course, that section 21 may be permanently abolished, which means rural estates may be stuck with ASTs in their existing form for many years. Perhaps now is a good time to review their drafting.

8 – Creating a legacy in rural residential development

Henry Stevens

There is an ever growing desire on the part of both landowners and developers to build 'legacy developments'. This approach is of particular interest to rural landowners, who will very often continue to live cheek by jowl with the consequences of their development decisions for years to come.

Appropriate legal structures are vital to secure the landowner's fundamental project principles for a legacy scheme, based on high quality master planning, design, and construction. They underpin the aspiration to ensure that the project promotes and enhances reputation, as well as delivering the desired financial and social returns.

For landowners promoting legacy developments, and in particular design control, there are two key stages that require effective legal structure.

Design and construction stage
During this stage the landowner, working with a developer or contractor, will be seeking appropriate control over the design and construction of the works. Their objective will be that the project accords with the design specification (including the development's original master plan, planning permission, and subsequent design material specifying the detailed nature of the materials and works) at all relevant stages.

Estate management stage
The post-construction estate management period requires the establishment of an effective management regime that secures a lasting and positive legacy. One size does not fit all and there are many ways to implement this. Central to the approach will be the extent to which the landowner wishes to be involved with daily management and whether they have the resources to play such a role.

Before and during construction

To ensure the project is delivered in accordance with the landowner's fundamental principles, the landowner will wish to have a sufficient degree of control over the design specification, including the all-important application for detailed planning permission and working drawings. It is essential for the landowner to think about (and agree with the developer) the extent to which, and at what stages, the landowner's approval of these elements will be required and on what grounds the landlord can withhold approval. By setting out a roadmap of the sign off process for the various stages from pre-planning to development, both parties can work together to ensure that the scheme is one that the landowner is expecting and one that the developer can undertake.

The developer, for their part, will be concerned about being fettered by the landowner's discretion on these points. There are devices which may give a degree of certainty to the developer, such as referring to 'common aspiration documents' or 'benchmark schemes', particularly with their guidance as to materials, layout, signage, and public spaces. Agreement over a specific role for the landowner's architect in the delivery of the design and the works may also allow for some certainty regarding the operation of the approvals process.

Projects always look good in the architect's drawings but what about when they are built? A landowner may wish to exert control in the construction stage as well. One way of doing this is for the landowner to retain ownership through the construction phase and for the development to be carried out under a building licence or lease to the developer. The landowner retains the right to 'sign off' the completed units by providing a completion certificate before the units can be sold. This allows the landowner to maintain quality control.

A more favourable structure for developers may be where the land is transferred prior to completion of the work, but then only in phases, and with the landowner retaining Land Registry restrictions on sale until such time as the landowner certifies the satisfactory completion of the works.

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After construction

After construction, when people move in and begin to live their lives, the rural estate will wish to ensure that standards do not slip. There are a number of ways of doing this:

- a design and community code, which importantly records and imposes the achieved design/works standard.
- legal obligations, which are part of the legal title to the development, its dwellings and commercial units.
- a general obligation to comply with the code, especially in relation to alterations, works, and a process for securing consent for works.
- stipulations on use, for example protecting the concept of private residential dwellings as single households or limiting the use of commercial units.
- planning agreements and local development orders – community stakeholder covenants may be imposed.

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After construction, when people move in and begin to live their lives, the rural estate will wish to ensure that standards do not slip.

How does the rural estate maintain control?

Restrictive covenants are the traditional method of imposing obligations on land where there is nearby, identifiable core estate which demonstrably benefits from the covenants. However, they cannot be used to impose positive obligations and are not always suitable for modern developments. There can also be technical issues in enforcing them.

Also, the covenants tend to be buried away in a lengthy and detailed Land Registry document – not the most readily available or understandable source for workable estate management.

Building schemes are an alternative. A properly constituted building scheme imposes a clear set of obligations (including the design and community code and title obligations) which are enforceable by all owners against other owners. However, building schemes also give rise to technical issues and need well-considered provisions, particularly as they are based on fairly limited principles from an historic legal case (a number of recent cases have challenged their operation where there is lack of clarity).

A third option is for the landowner to retain a controlling share known as a 'golden share' in a management company set up to oversee the ongoing management and operation of larger residential developments after they have been developed. A representative of the landowner would sit on the board of the management company and hold a golden share, enabling the estate to block any motion or initiative that cuts across the estate's immediate and longer-term principles and objectives. Essentially, no resolution can be passed by the directors of a management company unless the holder of a golden share has agreed to that resolution.

Different developments will require different solutions. But the issues must be considered to work out the best way to maintain standards and the legacy of the development for future generations.

9 – Developing charity land

Philip Reed

Charities with valuable land often think about whether and how they might turn it to profit. That is even more the case in uncertain times when trustees are looking to secure their charity's future. When schools, universities, religious orders or other charities look to develop their land, they will have to grapple with their title, the planning system and the developers just like any other landowner, but there are additional considerations specific to charities.

Do we have the power to sell?

Very often the first step will be to check the charity's governing document, whether that is a Royal Charter, a set of articles of association, a trust deed... the list goes on, but there will always be some type of legal instrument. If it is not obvious whether this allows your charity to sell (or otherwise dispose of) your land, it could be worth getting some early advice.

Alongside this, you will need to think about whether any particular requirements or restrictions affect the land, in a way that might affect the *power* to dispose of it. For example, with older charities one often finds that trusts adhere to parcels of land, reflecting the terms on which they originally came into the charity's possession. These might stipulate that land is held as 'permanent endowment' meaning it should be held on a permanent basis, either as an investment (generating a return for the charity by way of rent) or as 'functional permanent endowment' or 'specie' land, where it must be applied for certain of the charity's purposes (for example, as a school, or perhaps playing fields). These types of restrictions can sometimes be worked around with the right advice – and usually involving the Charity Commission – but they do need to be treated with due respect.

Has anyone seen the title deeds?

Any landowner looking to develop needs to do a title audit to look for restrictive covenants and other impediments to what is planned. It is particularly important for charities to do this early in the process. The ownership and management of a land asset is very often not a primary focus of concern for a charity. Consequently, it is common to find that a charity's land is unregistered at the Land Registry, that title deeds are missing, or the title has never been transferred by some previous incarnation of the charity. Where the land is registered, sometimes the title register bears the names of long deceased charity trustees. Either way, this can cause problems later in the development process and needs to be addressed early.

But won't there be tax to pay?

Well, it depends... sometimes, a sale of land by a charity can constitute 'non-primary purpose trading', resulting in a tax charge. That is, 'trading' activity that does not directly advance the charity's objects; the tax charge can arise even though the trading is intended to, and does, raise funds for the charity that can then be deployed in advancing the objects. This is in contrast to, say, a country house museum and park charging an entry fee which is 'primary purpose trading' in that it directly advances the objects, and no tax charge results.

So, trustees need to be careful about how they structure their land projects. Just selling land in itself, even with the benefit of planning permission, will often be fine; in many cases it is really just liquidating an investment (gains on which will, broadly, be exempt from capital gains tax or corporation tax, depending on your charity's structure, provided they are applied for the appropriate charitable purpose).

But developing land for sale at a profit is not something that a charity can really do, and neither is an overage arrangement with a 'slice of the action' element, that is, one whereby the charity stands to take a portion of the developer's profit if and when the site is developed. What can sometimes be acceptable is extra cash being paid to the charity if the buyer gains a more beneficial planning permission than that with which the land was sold (this payment constituting a capital receipt rather than trading income). This is an area where charities need to take care, and specialist advice, as the tax risk of getting this wrong is very real.

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If the arrangements just have to be structured with a tax risk – say, if a slice of the action overage deal is just too good to miss – this can potentially be achieved by routing the transaction through a non-charitable trading subsidiary.

If the arrangements just have to be structured with a tax risk – say, if a slice of the action overage deal is just too good to miss – this can potentially be achieved by routing the transaction through a non-charitable trading subsidiary. The relationship between a charity and its non-charitable subsidiary must always be conducted at arm's length, with any conflicts of interest being managed, and without any subsidy flowing from the charity. This would not be as simple as the charity just giving the land to the subsidiary and waiting for profit to flow back at some future date. Instead, the site would need to be sold to the subsidiary for full value, potentially with the charity providing the purchase funds by way of repayable loan, at a market rate. The subsidiary would then do the deal, reap the rewards, and (in addition to repaying the loan) donate its distributable profits to its parent charity with the benefit of corporate gift aid.

What about the Charities Act?

Whether land is sold to a third party developer or the charity's own subsidiary, you will need to consider this. But the detail of what is required will depend on exactly what the deal is. For example, a disposal to a subsidiary will (as it is a 'connected party') need to be authorised by the Charity Commission.

The more 'standard' requirements under the Act, that would apply in either case, are (broadly) that the disposing charity's trustees must before selling (a) obtain and consider a written report from a qualified surveyor instructed by them and acting exclusively for the charity, (b) advertise the proposed sale as advised unless the surveyor says it would not be in the charity's best interests to advertise at all, and (c) decide they are satisfied, having considered the surveyor's report, that the terms are the best that can reasonably be obtained. The report needs to hit certain notes that are specified by regulations, so this is another point where legal advice is sometimes needed, but most decent surveyors' practices will be very familiar with the requirements.

We'll need to keep our wits about us...

That's right. Charities with valuable land are usually very able to take the full benefit of it, but they do need to be much more careful in certain areas than other landowners would be. There can be significant tax risks, and sometimes a bit of careful corporate structuring is needed. Getting it wrong can mean serious consequences but getting it right can mean big sums being released for deployment for your charitable purposes. Happily, the paths we have described here are all well-trodden.

10 – Is a vase 'a building'?

Karen Phull

Owners of listed buildings must take care before removing vases, urns or statues from their gardens, in case they form part of a listing. The Supreme Court recently handed down an important judgment in *Dill v Secretary of State for Housing, Communities and Local Government* (2020). It is a significant judgment at this level on issues relating to listing and works of art and has potential relevance for many country houses.

The facts

The case concerned Mr Dill, who had inherited a pair of early 18th century lead urns, each resting on a limestone pedestal. The urns were originally in the gardens of Wrest Park from approximately 1735 until they were removed in 1939. The urns were moved a number of times before ending up at Idlicote House in 1973. The house was designated as a Grade II listed building in 1966. The urns were listed in their own right in 1986, but there was no evidence of the owners being consulted and there was an unexplained delay in the appearance of this listing on the local land charges register.

Mr Dill removed the urns in 2009. At that time he was not aware they were listed and it was not until 2015 that the local planning authority wrote to Mr Dill confirming that listed building consent had been required for their removal. The retrospective application for listed building consent was refused in 2016 and swiftly followed by a listed building enforcement notice that required the reinstatement of the urns at Idlicote House. Mr Dill appealed the refusal of listed building consent and the enforcement notice on a number of grounds, including that the urns were not a 'building' for the purposes of the listing.

The key issues

A planning inspector dismissed both appeals and considered that he was unable to revisit the status of the urns as buildings, as this was established by the listing. The High Court and the Court of Appeal upheld the inspector's decision. On appeal to the Supreme Court there were two key issues. First, whether an inspector considering an appeal of a refusal of listed building consent, or a listed building enforcement notice, can consider whether or not something included in the list is a building. In other words, could an existing listing be revised on this basis?

The second issue before the court was to clarify the relevant criteria in determining what is a building. There are two dominant concepts, one relying on property law, namely the extent and purpose of a structure's annexation, and the other familiar to the planning regime: the tests set out in *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2)* (2000), namely size, permanence and degree of annexation.

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If there is any doubt whether an object or structure is protected by the listed building regime, it is essential that the position is clarified before the object is removed to prevent a criminal offence from being committed.

The decision

On the first issue, the Supreme Court held that the inspector was not precluded from considering Mr Dill's argument that the urns were not a building and therefore not caught by section 9 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (**Planning Act**), which creates the offence of carrying out works without listed building consent. Notably the court considered that it would be inequitable to prevent the appellants from raising the issue, particularly in view of the hardship when one considers that contravening listed building control is a criminal offence. In comparison, the High Court and Court of Appeal judgments had focused on the integrity of the list as being conclusive. As a result, the enforcement notice appeal will have to be redetermined by the Secretary of State.

On the second issue, the court favoured the *Skerritts* criteria in the context of the listed building regime but did not go on to apply the tests on the facts of this case. The court felt that this would be best dealt with by a planning inspector in the redetermination of the enforcement appeal.

A salutary reminder

Whilst the judgment is an example of the court coming to the rescue of owners, who through no fault of their own are unaware of particular objects or structures being listed, it is also a reminder of the need to take care on this issue. Objects and structures can be listed either in their own right, because they benefit from a separate listing (as was the case in *Dill*), or because they are considered to be 'curtilage listed' by virtue of the definition in section 1(5) of the Planning Act.

If there is any doubt whether an object or structure is protected by the listed building regime, it is essential that the position is clarified before the object is removed to prevent a criminal offence from being committed.

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

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