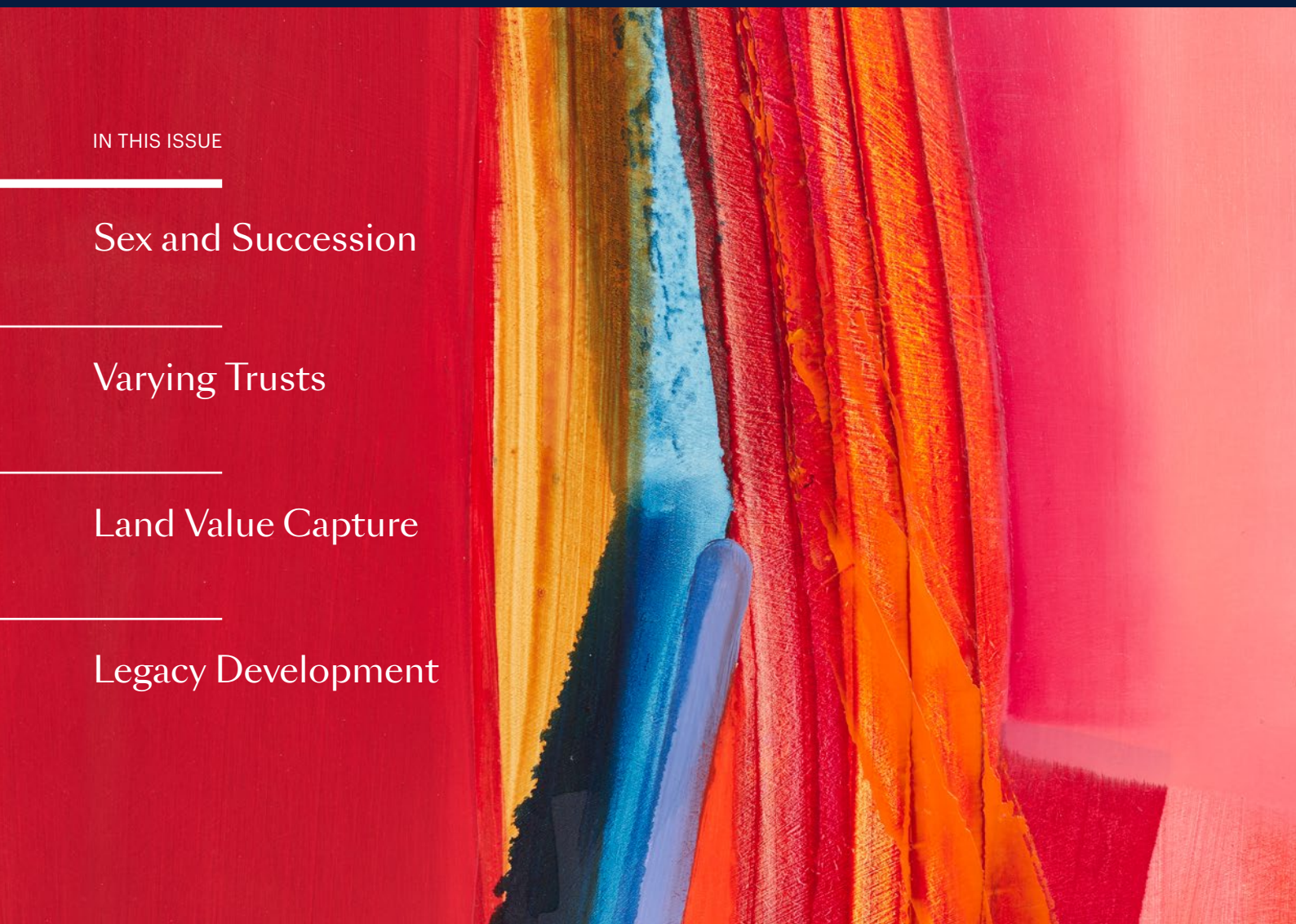
FARRER&Co

Winter 2018/19

# Rural Estates Newsletter



IN THIS ISSUE

James Maxwell

In an old Indian parable a group of blind men hear that a strange animal, an elephant, has been brought to the village. Curious to know what an elephant is like they pay it a visit.

One of them touches the trunk and says, "The creature is like a thick snake". Another touches a leg and says, "No, the elephant is a pillar, like a tree-trunk". The blind man who places his hand on the elephant's side says, "Not so, it is like a wall". The one who feels its tail describes a rope. And the last, holding a tusk, says, "You are all wrong: an elephant is hard and smooth like a spear."

Unable to agree, and each convinced they alone are correct, the friends argue bitterly, come to blows and are never reconciled.

There is an elephant in the room that this newsletter intentionally avoids, not least because it is rather pleasant to think about other things for a change. Instead of airy speculations about the Agriculture Bill, we consider the practicalities of greenfield development – both the beginning of the process (Tom Kirkman on 'Preparing the Ground') and long-term stewardship (Charles Anderson on 'Legacy Developments'). Anthony McNamee takes on the controversial topic of 'Land Value Capture' and whether compulsory purchase legislation will change to make greenfield development easier and cheaper.

And something completely different – in 'Sex and Succession' Rhoddy Voremberg looks at assisted conception, same-sex marriage and transgender issues, and asks what implications these changes have for succession to property and hereditary titles.

From green belt development to gender politics, there is no shortage of things to disagree about. Let us hope we do so with civility and respect for contrary opinions.

# 1 – Sex and Succession

Rhoddy Voremberg

Much of our law relating to the ownership of property, rights of succession and the interpretation of Wills and Trusts is of great antiquity. Whilst structurally it has stood the tests of time well, there are areas where changes in society and attitudes are creating the need for clients and their advisers to address questions which were hitherto unthinkable. In the 20th Century changes in social attitudes and the law in relation to the legitimacy and adoption of children had implications for the interpretation of Wills and Trusts; in the 21st Century similar challenges are arising because of civil partnerships, same-sex marriage, assisted conception and gender reassignment.

## Pride and Prejudice Revisited

A 21st Century Mr Bennett (who has disentailed Longbourne), having seen Jane, Elizabeth, Mary and Kitty all advantageously married, makes a Will which is dated 1 January 2014. In it he leaves Longbourne in trust for the wayward Lydia (expressed as 'my youngest daughter') for life and thereafter for her children, granting her power to appoint a life interest to her surviving spouse. Mr Bennett dies on 30 November 2017. Lydia, who has for some time been living as a man, has been in a relationship with Georgiana Darcy and in 2010 they entered into a civil partnership. In 2017 Lydia applies for a gender reassignment certificate, which is issued on 31 October 2017. Following Mr Bennett's death they both settle at Longbourne, and by means of an in vitro procedure, to which they both agree, Georgiana gives birth to a daughter, Anne. By her Will, Lydia appoints a life interest to Georgiana (thus securing IHT spouse exemption). Lydia dies suddenly in 2018.

## Marriage and Civil Partnership

The Civil Partnership Act 2004 introduced an equivalent status to marriage for persons of the same sex and gave civil partners the tax exemptions previously only available to married couples. A civil partner is not automatically treated as a spouse for the interpretation of legal documents, although in some circumstances this will be the case. Since 13 March 2014 The Marriage (Same Sex Couples) Act 2013 has also enabled same-sex marriage in England and Wales. In Scotland it took effect on 16 December 2014. It is not recognised in Northern Ireland, but the Act provides that a same-sex marriage entered into in England and Wales is recognised as a civil partnership there. The 2013 Act provides that a same-sex marriage has the same legal consequence as an opposite-sex marriage, but it does not alter the effect of any legal instrument made before the Act came into force.

Mr Bennett's Will was made before the 2013 Act came into force. If he did not refer to 'spouse or civil partner' then Lydia will be unable to appoint a life interest to Georgiana. If Mr Bennett had made his Will after 13 March 2014, that appointment would be valid. Wills and Settlements should be reviewed where there are possible questions arising from a beneficiary entering into a Civil Partnership or same-sex marriage.



## Assisted Conception

There have been two Human Fertilisation and Embryology Acts (**HFEA**) – 1990 and 2008. With effect from 1 August 1991 a woman who is pregnant and has a child as a result of an in vitro procedure (regardless of the source of egg(s) and/or sperm) is to be treated for all purposes as the mother of the child. This is retroactive and applies, for instance, to entitlement under pre-existing Settlements. It is possible to exclude its application, but the practical implications of doing so should be considered carefully, bearing in mind the comprehensive effect of the legislation and the extremely private and confidential nature of the in vitro procedure.

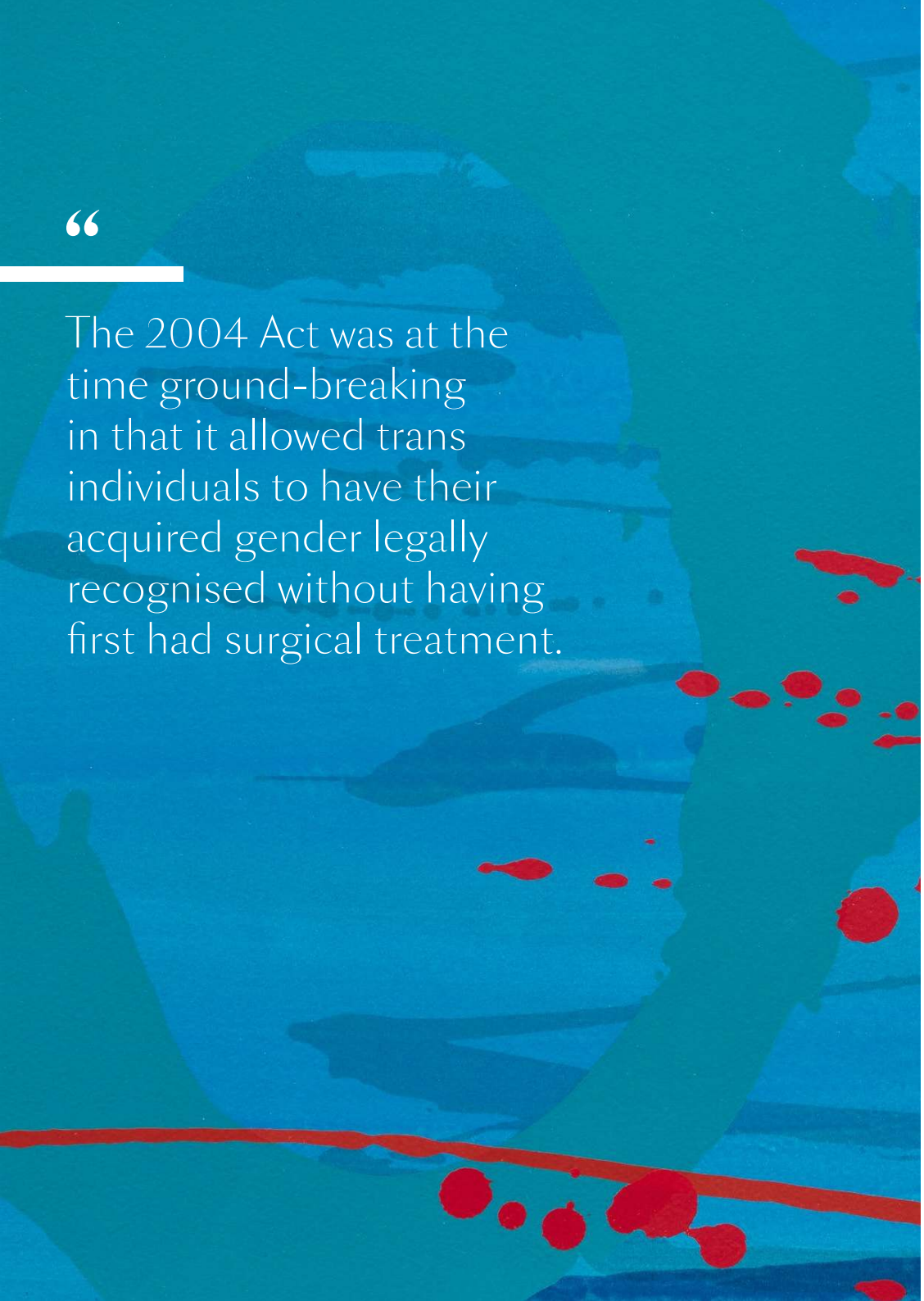
The paternity of a child conceived by this means is a little more complicated. Under the 1990 Act, when the mother is married, regardless of the source of the sperm, her husband will be regarded as the father unless it is shown that he did not consent to the procedure. A man is not treated as the father if he is merely the donor of the sperm or if his sperm is used after his death. Under the 2008 Act, the other parent can be either a man (in which case the rule is broadly the same as the 1990 Act) or another woman if the mother is, at the time of the assisted fertilisation, party to a civil partnership or same-sex marriage, unless it is shown that she (the other woman) did not consent to the procedure. A woman is not treated as the other parent merely because of egg donation. Whilst these rules can affect the devolution of property within a Settlement, none of them affects the passing of a hereditary title or of property devolving with that title.

Anne will therefore be treated for all purposes as the child of Lydia and Georgiana and will be able to inherit Longbourne on Lydia's death, regardless of the date of Mr Bennett's Will, provided he did not exclude the application of the 2008 Act.

## Surrogacy

Under the HFEA 2008 referred to above two people may apply to court for a Parental Order providing for a child to be treated as theirs in law if (1) the child has been carried by another woman as a result of an in vitro procedure, (2) the eggs or sperm of one of the applicants was used to create the embryo, and (3) the applicants are married, civil partners or living as partners in an enduring relationship. If the order is made, the child will be treated in law as the child of the applicants with effect from the date of the order. The actual legal provisions are more detailed than this. Whilst this could have obvious consequences for the succession of property, a Parental Order under the 2008 Act does not affect the passing of hereditary titles or of property devolved with that title.

The effect of a Parental Order is subject to express contrary intention in the legal documents. So, if, instead of giving birth to Anne herself, Georgiana had one of her eggs used in an in vitro procedure using donated sperm and a surrogate mother, provided Lydia consented and a Parental Order is made, Anne would be entitled to inherit Longbourne.



> The 2004 Act was at the time ground-breaking in that it allowed trans individuals to have their acquired gender legally recognised without having first had surgical treatment.



## Gender Reassignment

Until the Gender Recognition Act 2004 a person's gender was determined at birth and thereafter could not be changed – by surgery, choice or other event. Under the 2004 Act a person of either gender who is at least 18 may apply for a Gender Recognition Certificate on the basis of either living in the other gender or having changed gender under the law of another country. The issue of a Gender Recognition Certificate and a new Birth Certificate mean that, from the date of issue, the individual will be considered in the eyes of the law to have the gender they identify with (man or woman only) rather than the gender that was recorded at birth. The 2004 Act was at the time ground-breaking in that it allowed trans individuals to have their acquired gender legally recognised without having first had surgical treatment.

The Act does not have retrospective effect, does not affect the person's status as mother or father of a child, and does not affect the passing of hereditary titles or devolution of property devolved with such a title. Its effect may also be expressly excluded from a Will or Settlement. Subject to that, it does apply to any Will or instrument made on or after 4 April 2005. Mr Bennett left Longbourne to his 'youngest daughter'. His Will was made before the issue of Lydia's Gender Recognition Certificate, so as a matter of construction it is probable that her life interest will take effect even though her Gender Recognition Certificate was issued before his death. It is not clear how the 2004 Act affects existing interests: for instance, whether an income interest given exclusively to a male beneficiary under a Settlement ceases on the issue of a Gender Recognition Certificate under which that beneficiary becomes recognised as a female. There is protection for trustees in the legislation in so far as they are not under a duty to enquire, before distributing property, whether a certificate under the Act has been issued or revoked.

## The Future

The Government has recently consulted upon possible changes to the Gender Recognition Act, to make the process for a trans person obtaining a Recognition Certificate less intrusive and bureaucratic. They are also considering whether to recognise non-binary gender identity – a concept hitherto unknown to the law. That could give rise to some even more difficult succession questions.

It is noteworthy that virtually all the legislation that has been passed to give effect to these changes in society has expressly excluded application to the passing of hereditary titles and property devolved with those titles. Moreover, so far, the various attempts to reform the devolution of hereditary titles and to introduce gender equality have (with the notable exception of the Succession to the Crown Act 2013) failed to pass through Parliament. None of the legislation has inhibited the succession of property down a line limited by gender, despite the wide-ranging anti-discrimination measures contained in the Equality Act 2010. Nevertheless, in the right circumstances an application to the Court under the Variation of Trusts Act 1958 could surely provide a means to secure female succession to property devolved with a title, or the means to overcome an outdated Settlement providing exclusively for male (or female) beneficiaries.

# 2 – Varying Trusts

Adam Carvalho

There are various reasons why it may be desirable to vary the terms of a trust, including succession, taxation and governance considerations. Where the class of beneficiaries includes minor beneficiaries (beneficiaries who are under 18) or unborn beneficiaries (beneficiaries who could, potentially, be born in the future) a variation of the terms of a trust must be approved by the court.

## The Variation of Trusts Act 1958: An Overview

Adult beneficiaries who are of full capacity will have the ability to consent to a variation of the terms of a trust (or to its termination). However, in most landed settlements there will be classes of beneficiaries who cannot consent, such as minor beneficiaries, unborn beneficiaries or unascertained beneficiaries (such as future spouses). The Variation of Trusts Act 1958 (**VTA**) enables the court to provide consent on behalf of such beneficiaries. The court may only sanction a variation if this would be for the 'benefit' of the relevant beneficiaries. The term 'benefit' has a wide meaning here; it could even include, for example, postponing the vesting of a capital interest in a minor beneficiary, if this would otherwise have happened at too early an age.

## When Might an Application under the VTA be Made?

Landed settlements will usually evolve gradually, with conversations about the direction of travel happening in different settings (such as trustee meetings, gatherings of the professional team and conversations with the 'next generation'). An application under the VTA will often arise out of such conversations as a method of achieving long term goals and addressing potential challenges.

Some of the most commonly seen scenarios for applications under the VTA are:

**Extending the lifetime of the trust**
A number of settlements may now be nearing the end of their lives. Before 2009, UK trusts were limited to a fixed term of 80 years or a 'life in being' plus up to 21 years. The termination of a trust will inevitably have important ramifications for the beneficiaries and the preservation of the estate itself and is likely to result in significant tax charges (together with the need to revisit any arrangements in relation to heritage land and chattels if conditional exemption from IHT applies).

Following legislative changes in 2009, trusts may now last for 125 years and an existing trust can be extended for this full further period. This can often provide the impetus for an application under the VTA.

**Extending the accumulation period**
An application to extend the lifetime of the trust may also seek to extend the 'accumulation period'. This is the period during which the trustees may accumulate trust income by adding it to capital, rather than paying it out to or for the benefit of beneficiaries. Before 2009, accumulation periods were generally limited to 21 years. From 2009, this limitation was removed, so trustees can in principle accumulate income for the entire lifetime of the trust.

This may be important where, for example, a landed settlement holds a large proportion of illiquid assets (such as land) as against a relatively small proportion of readily available assets, and the trustees wish to build up a reserve for meeting, say, IHT charges. It will also allow trustees a greater degree of flexibility – for example, income distributions to a particular beneficiary could be delayed if necessary for tax reasons.



**Strategic considerations**
The VTA may be used to achieve strategic objectives. A beneficiary or class of beneficiaries may become entitled to an absolute interest under the terms of a settlement, which may not be desirable for succession or governance reasons. The court can, under the VTA, postpone this entitlement (which may also be prudent for tax reasons).

An application under the VTA could also be used to grant a spouse of a life tenant a life interest (for IHT planning) or to rationalise the beneficial class. Rhoddy Voremberg's article in this newsletter examines recent issues in relation to succession and gender. Future applications under the VTA may wish to address such issues as part of wider variation exercises.

**Governance**
Older, less flexible, trusts may include administrative powers which are not ideal for running a modern estate. For example, the investment and sale provisions are often more restrictive than modern trust instruments, or Settled Land Act 1925 provisions may apply which make the settlement more difficult to administer. Applications under the VTA will usually seek, alongside other changes, to modernise specific administrative powers to address these issues.

> "The assumption, increasingly, is that hearings under the VTA will be heard in public.

## How is an Application Made?

Applications under the VTA are almost invariably made on an agreed, consensual, basis, which make them more predicable than other types of court application.

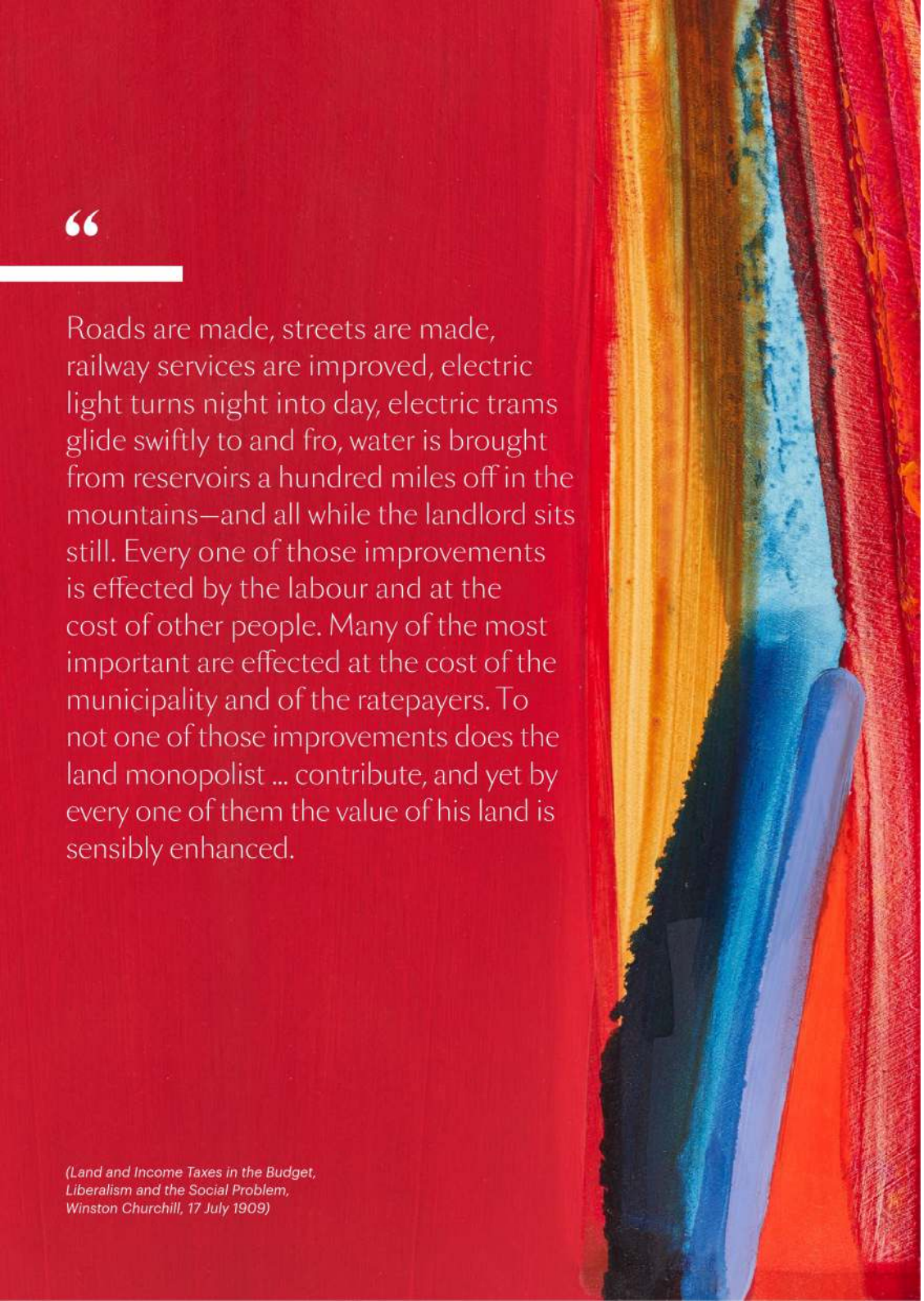
A formal application to court will need to be prepared. The role of claimant (the party who makes the claim) is often taken by an adult beneficiary. The other parties (who will, technically, be defendants) must include all the trustees and the other adult beneficiaries. The minor and unborn beneficiaries can be represented by the trustees.

A claim form is filed at court, with evidence in support of the application set out in a witness statement. The counsel for the unborns will need to explain why, in their view, the application is for the benefit of those beneficiaries. Provided the judge is satisfied with the proposal, the arrangement will then be approved, and the trust will have been varied.

## Privacy

It is worth touching on one further procedural point. The court had, traditionally, often been prepared to hear claims under the VTA in private. Recently, there has been a change of approach and the assumption, increasingly, is that hearings under the VTA will be heard in public.

Before the claim under the VTA is filed at court, the parties may now attend a 'pre-issue' hearing. This will deal with various procedural matters, including any request for privacy orders. While the direction of travel is away from blanket privacy orders, the court will frequently make orders to preserve an element of privacy, such as appropriate reporting restrictions. When taken together with other practical measures it will often be possible to ensure that information that needs to be kept confidential remains so.



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Roads are made, streets are made, railway services are improved, electric light turns night into day, electric trams glide swiftly to and fro, water is brought from reservoirs a hundred miles off in the mountains—and all while the landlord sits still. Every one of those improvements is effected by the labour and at the cost of other people. Many of the most important are effected at the cost of the municipality and of the ratepayers. To not one of those improvements does the land monopolist ... contribute, and yet by every one of them the value of his land is sensibly enhanced.

*(Land and Income Taxes in the Budget, Liberalism and the Social Problem, Winston Churchill, 17 July 1909)*

# 3 – Land Value Capture

**Anthony McNamee**

The quote opposite could easily have been taken this year. Parliament is again grappling with the issue of how best to pay for infrastructure works necessary to promote development and, more generally, how to ensure that the public purse benefits from decisions which increase property values (**Land Value Capture**). It is a question that the Housing, Communities and Local Government Committee of the House of Commons (**the Committee**) considered in its Examination and Tenth Report of Session 2017-19 on the topic of Land Value Capture (**the Report**) published on 13 September 2018.

According to some estimates, landowners currently retain on average 75% of the uplift in land values arising from the granting of planning permission. That said, according to the Minister for Housing, in 2016/2017 developers/landowners involved in residential development contributed approximately £6 billion to their local communities for infrastructure and affordable housing. That £6 billion was ultimately paid for by landowners accepting a reduced price and/or developers accepting a reduced profit for the relevant land. Put crudely, that £6 billion was the value captured for the public.

In considering how to increase the £6 billion figure the Committee gave thought to existing methods of Land Value Capture, how to improve those methods and potential for new methods to be introduced. A key output of that consideration was that compulsory purchase of land by local authorities should be made easier (in terms of process) and cheaper (in terms of cost of land) – at the expense of landowners.

## Recommendations of the Committee

The Committee made numerous recommendations, but the most controversial relate to reform of compulsory purchase:

- There is scope for central and local government to claim a greater proportion of land value increases through reforms to existing taxes and charges, improvements to compulsory purchase powers, or through new mechanisms of land value capture;
- The Compulsory Purchase Order (**CPO**) process should be further simplified, to make it faster and less expensive for local authorities, whilst not losing safeguards for those affected; and
- The Land Compensation Act 1961 (**1961 Act**) requires reform so that local authorities have the power to compulsorily purchase land at a fairer price.

In reaching their conclusions, the Committee considered two broad approaches:

- The development of ‘Garden Cities’ and ‘New Towns’ in the last century; and
- Capturing increases in land value after ‘development events’ (planning permission etc).

The UK’s first Garden City of Letchworth relied on land being purchased at below market value at the start of the last century. However, the Committee was persuaded that this model (and that of the post-war New Town Development Corporations) could not be repeated because of current legislation and compulsory purchase compensation rules which create ‘hope value’ in land (an increase in the value of land to account for potential planning permissions).

Capturing increases in value after ‘development events’ was also considered. From the 1940s onwards various development taxes have been tried. Most were introduced by Labour governments and repealed by Conservative ones, which led the Committee to conclude that any new general levy must have cross party support and consensus to survive.

Given that lesson, the Committee also considered how best to improve existing methods of capturing development values by way of Section 106 agreements and the Community Infrastructure Levy (**CIL**).

The Committee highlighted flaws and the need for reform in the Section 106 Agreement system but also praised it for being responsive to local needs and recommended that it should be part of a future mix of Land Value Capture methods.

As for CIL, whilst it was noted that it does effectively raise revenue from development, CIL's weakness is that as an overall system it is not applied uniformly across the country because some local authorities consider that its introduction is not financially viable. For those areas that have introduced CIL it was noted that CIL itself has been undermined by various exemptions and reliefs.

In addition to Section 106 agreements and CIL the Committee considered changes to CPO legislation and 'hope value'. The 1961 Act operates to ensure that compensation reflects the market value of land (assuming a willing buyer and seller). Part of that value relates to potential planning permission. Incorporating this prospect gives the market value an uplift commonly referred to as 'hope value'. Removing hope value and simplifying the compulsory purchase process were both recommended by the Committee. It was suggested that this would prevent land hoarding and allow local authorities to buy land at its existing use value with no benefit of planning permission taken into account.

"

It is doubtful that the government's response will silence calls for reform of compulsory purchase and the elimination of hope value.

## Responses to the Committee's Recommendations

Many voices were raised against changes to CPO valuation as proposed (and there are human rights as well as technical arguments against it) but there are also important voices in support.

The charity Shelter considers that the current operation of CPO compensation law has a distorting effect on land prices in general. Their premise is that landowners are holding out for compensation and not releasing land at a 'fair' price. Accordingly, they argue that this has a distorting effect on the entire land market. In the long-term, Shelter would like to see systematic changes to the land market to bring land into development at lower values. To achieve this the "primary technical change" needed is to alter the 1961 Act and remove hope value. Shelter consider that amending the 1961 Act would allow us to "unleash a new model of development across England. One where the possibility of affordable housing, community infrastructure and quality are not stripped out up front due to high land values".

Having acted for promoters of, and parties affected by, compulsory purchase it is definitely not our impression that people hold out for excessive compensation. Any reform that offers compensation below market value will just encourage more vigorous resistance to compulsory purchase proposals. Shelter looks to the historic examples of Bourneville and New Lanark or the more recent Garden Cities of Letchworth and Welwyn through to the post-war New Towns like Milton Keynes, as successful examples of Land Value Capture in action. Those examples were brought forward in a vastly different legal, social and political environment than exists today.



## Future Reform

Of the two main parties Labour look more likely to propose wide ranging reforms to compulsory purchase. The Labour Party launched a Planning Commission on 23 September 2018 to conduct a root and branch rethink of the planning system. Labour's Commission, amongst other issues, will examine the role of infrastructure and its provision for new development and report back in 2019.

The government published its response to the Committee on 29 November. In relation to compulsory purchase the government appears to have rejected any fundamental changes for the moment, instead committing to:

> *Let these recent reforms [in the Housing and Planning Act 2016 and Neighbourhood Planning Act 2017] bed in but ... continue to monitor their practical application and remain open to considering practical improvements to the framework.*

In relation to hope value the government emphasised that benefits as a direct result of public schemes are not taken account of:

> *Compensation includes 'hope value' (ie value based on the land's development potential) only insofar as it can be demonstrated to exist in that no-scheme world. The extent of this hope value will reflect the prospects of obtaining planning permission for an alternative development in the absence of the scheme, taking into account the risks, uncertainties and costs associated with implementing such a development. This includes the costs of providing the affordable housing, infrastructure and supporting facilities required to make the development acceptable in planning terms, as well as any Community Infrastructure Levy liability.*

It is doubtful that the government's response will silence calls for reform of compulsory purchase and the elimination of hope value. Whilst politicians may currently have their hands full elsewhere, Land Value Capture remains a pressing political issue which is likely to move up the agenda in the coming years. The next milestone to keep an eye on is the government's response, expected in February 2019, to Sir Oliver Letwin's Independent Review of Build Out. The review has set out recommendations to increase the market absorption rate of new homes including, effectively, using the threat of compulsory purchase to encourage build-out.

The debate on Land Value Capture is one in which landowners need to make their voices heard to shape the agenda and ensure that reform is genuinely 'fair'. In considering the challenge facing landowners it is worth taking note that even Conservatives are proposing reform. In an echo of Churchill's quote from the start of this article, Nick Boles MP recently noted that:

> *We need to give ourselves the power to acquire land at a price that is fair to the community as well as to the landowner. Why should landowners benefit from the fluke that gives them planning permission to build on their land when none of their neighbours receives it? Why should the taxpayer bear the cost of the infrastructure–the roads, the sewerage and the schools–that makes land developable in the first place? We need to revert to the situation that led to Milton Keynes and the other new towns, where we were able to acquire the land at a reasonable price, a small multiple of its agricultural land value, and then use the uplift in that land value to fund the infrastructure that the community needs.*
>
> (Nick Boles MP, House of Commons Debate on 'Housing, Planning and Green Belt', February 2018)

# 4 – Preparing the Ground for Development

Tom Kirkman

The recent case of *Banner Homes Ltd v St Albans City and District Council* (reported in the Case Law Buffet) reminded landowners that where they have land earmarked for development they need to be thinking ahead to avoid impediments to development arising.

Let us consider some suburban playing fields. The fields are surrounded by houses which have been built right up to the boundaries of the property. It is possible that these homes have unauthorised gates accessing the fields directly from their gardens which back onto them; they may even use the land for dumping their hedge clippings and lawn trimmings. Locals are sometimes seen walking their dogs around the perimeter.

So, what do we need to consider with an eye to future development of this field? A title audit is a good place to start and should highlight immediate points of action.

## Title Audit

First, the boundaries of the property need to be walked to ensure that the Land Registry title plan or, if the land is unregistered, the plan to the root conveyance, accurately reflects the ownership on the ground. This is a good opportunity to spot encroachments and any unauthorised access (eg from garden gates). Don't forget that private rights of way can arise by implication based on 20 years' user as of right.

A review of the title will elicit a list of the rights and reservations which burden the land (including restrictive covenants) and which could inhibit development. Are there third party access rights which need to be modified by negotiation, or maybe restrictive covenants prohibiting development along the easement strip for an electricity cable or high pressure gas main?

Understanding who currently occupies the property (and on what basis) is also key to delivering vacant possession of a development site. Are there any tenancies affecting the property? Do the tenants have security of tenure, or do the tenancies include break clauses for the landlord? It is important that these break clauses (and any statutory provisions that govern them) are understood in order to deliver vacant possession when required.

## Searches

A **local search** should reveal the planning history of the site and will also tell you if the property is:

- Affected by Tree Preservation Orders

This may affect the ability to develop the site and may influence the layout of your development.

- Registered as common land

If the land (or part of it) is registered common land, this is bad news for development, since generally development of common land is unlawful.

- Registered as a Town or Village Green (**TVG**)

A TVG can be registered where a significant number of inhabitants in the locality have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years (think of those dog walkers around the field). Again, this would stymie development. Landowners can be proactive and take steps to avoid this by various means, including permissive signs, but advice must be taken where this risk is identified.

- Registered as an Asset of Community Value (**ACV**)

Where land is listed as an ACV, it cannot be sold until notice has been given to the local authority, allowing community interest groups to come forward as bidders. If any such bidders come forward, the land cannot be sold for six months which can put the kibosh on a speedy sale. Quite apart from that, the fact that land is listed as an ACV can be a material consideration for planning purposes, which might have implications for development.

- Subject to public rights of way

Consider whether any public rights of way cross the land and might need to be diverted to achieve the full potential of the site. Remember also the risk of public rights of way arising by 'deemed dedication' after 20 years' public use as of right.

- Subject to landowner statements deposited under section 31(6) of the Highways Act 1980

Statements such as these can stop the clock running on the accrual of new public rights of way by deemed dedication. If they have not been lodged for a development site a prudent landowner may be well-advised to consider doing so. Similar statements can be used to combat TVG rights arising, although care needs to be taken not to precipitate the very applications by local residents that you are aiming to avoid.

> "Don't forget that private rights of way can arise by implication based on 20 years' user as of right.

A **utilities search** will undertake a wide-ranging search across numerous utility companies including statutory undertakers and commercial providers covering telecoms, broadband, water, gas and electricity. This will flag any large scale pipelines, pylons and cables which may affect development.

A **water and drainage search** will provide information as to whether the property is (or can easily be) connected to the mains for both water supply and surface and foul sewers.

Crucially, a **highways search** will confirm whether the property has direct access to a public highway. Where access is not direct from the highway care will need to be taken to ensure the property has sufficient rights of access for all uses envisaged by the development. It is not uncommon for access across third party land to be restricted to particular uses and this may require a negotiation to acquire the necessary rights to allow the development to take place.

These are just some of the issues that may arise to impede development. The message is: address them at an early stage so there are no nasty surprises late in the day.


# 5 – Legacy Development

Charles Anderson

Rural estate owners are increasingly promoting mixed use developments to deliver vibrant communities with high quality buildings and public spaces. Stewardship is the watchword in both construction and estate management and there is growing evidence of its role in the success of these legacy projects – financial, social and (most simply) what is visible in terms of placemaking.

A successful legacy outcome depends upon a working partnership between promoters and developers. The promoter’s design brief will set the standard, but market factors may present challenges: build costs, materials and labour, house tenure types and significant capital costs, whether upfront infrastructure (such as highways and services) or down-the-line community facilities (such as schools and leisure). Promoters may need to find a balance between firm stewardship and collaborative guidance to ensure that the principles of a high quality masterplan are not diluted.

## Construction Period

For the construction period an estate promoter will want a robust development agreement to ensure that the outline concept in the masterplan evolves through to detailed planning in a way that is true to the project’s standards. It is important for the promoter to retain design approval, indeed discretionary approval, often through a specific role for the promoter’s architect. This role may be carried through to construction and works completion, at which stage (importantly) it is the promoter’s architect who certifies completion of the buildings and the public realm. Approvals control will extend to matters such as modifications of the planning permission by section 73 applications and the ‘on site’ working drawings – it is this latter stage that may otherwise see inappropriate departures from the design scheme.

These principles require a firm stance in negotiations but there may be some ‘reassurance’ provisions such as:

- A statement as to a ‘Common Aspiration’ by reference to which both parties must act, for example: “the promotion of a development at the highest class and quality so as to enhance the estate owner’s reputation”. Clarity may be given by a reference to a set of Common Aspiration documents covering different design aspects, such as facades, street layouts, materials and landscaping. There may additionally be a reference to securing maximum realisable value and commercially viable objectives but with regard to the Common Aspiration.
- Reference of design disputes to determination by a responsible third party such as an architectural foundation or a trust body.
- Deemed approvals where there has been no response from the estate owner.

However, it is fundamental to enforcement that the promoter’s architect will retain control over design, particularly on a multiphase development where appropriate delivery of the first phase is essential to set the standard and secure the returns (financially and socially) for later phases.

## Estate Management Period

In the estate management period there are two particular elements:

- Protection and promotion of the estate design; and
- Management of the estate, particularly the provision of services and works.

For design protection and promotion, a ‘Design and Community Code’ (**Code**) and ‘Estate Stipulations’ or covenants (**Stipulations**) are important. The Code imposes the design and the works standards as achieved during the construction period and will be part of the legal

title to the estate. The Stipulations contain a general obligation to comply with the Code, particularly in relation to alterations and necessary consents. The Stipulations also set out use and amenity regulations. Use stipulations are increasingly important with potentially more flexible use of buildings, some of which may not be fully aligned with project aspirations (particularly for an owner-occupied residential community). Principles of working from home and home businesses may be permitted, but on clear 'no-nuisance' terms. Issues arise with more intensive uses such as holiday lettings, taxi services and child care operations.

## Which Legal Structure?

The estate promoter will want to establish a satisfactory legal structure for the Code and Stipulations. Traditionally, this has been by way of restrictive covenant provisions, but the legal community acknowledges that this regime is not entirely satisfactory and is bedevilled with technical issues such as:

- Whether the covenants bind or benefit land;
- Who may enforce and be enforced against; and
- Statutory rights to modify or discharge the covenants.

As long ago as 2008 the Law Commission indicated the "urgent need for reform" with a new category of land obligations being proposed, but there is little likelihood of change in the near term.

A promoter may wish to use a legal structure known as a 'Building Scheme' – a special term applied to estate developments. A properly constituted Building Scheme imposes a clear set of obligations (including the Code and Stipulations) which are enforceable by all owners against other owners. It is important for the scheme to have clarity on such details as:

- Identification of the relevant estate and the relevant obligations;
- All dwellings on the estate being within the scheme;
- All owners being entitled to enforce and being liable to be enforced against;
- The estate owner developing and disposing on the basis of the scheme; and
- Rights to vary the estate and modify the scheme.

However, Building Schemes also need well-considered provisions particularly as they are based on fairly limited principles from a 1908 legal case – a number of recent cases have challenged their operation where there is lack of clarity.

One important consideration concerns the role of the entity entitled (a) to issue and vary the Code and the Stipulations from time to time and (b) to grant the consents under the Code and Stipulations.

Estate owners will want to ensure that this role (and thus control) is retained by the estate until such time as is appropriate for handover to a responsible trust or management body. The concern is to ensure no dilution of the standards in the Code and the Stipulations.

The management of the estate, and particularly the provision of services and works, is a related concern. Generally, a management company will be set up to hold and manage the public realm, although it will often contract out responsibilities to a local management firm. Again, a key issue is the extent to which the estate promoter retains control or involvement, for example through a 'special A share' which may give rights to promote or to block matters. The management company, and indeed its constituent directors, are important because of their leading role in securing the quality of commissioned services and enforcing the provisions of the Code and the Stipulations.

Legal structures for design control and estate covenants may involve a necessary balance of promoter and developer interests but the evident success of now-established legacy schemes (and the failings of inappropriately regulated developments) endorse the fundamental importance of estate owner stewardship.



# 6 – Cases D and E – AHA 1986

James Maxwell

The Agricultural Holdings Act contains a complex statutory scheme which governs how landlords serve notices to quit on tenants who are in breach of the terms of their tenancy. Serving notices under Cases D and E of the Act can exert pressure on tenants, but choosing the correct notice is not always straightforward and the potential benefits of serving the notice must be weighed against the risk of initiating a potentially costly statutory process.

## Case E – Irremediable Breaches

A landlord can serve a notice to quit under Case E if:

> *"At the date of the giving of the notice to quit the interest of the landlord in the agricultural holding had been materially prejudiced by the commission by the tenant of a breach, which was not capable of being remedied, of any term or condition of the tenancy that was not inconsistent with the tenant's responsibilities to farm in accordance with the rules of good husbandry.*

The breach must be one that is not capable of being remedied. This generally excludes all breaches of repair covenants. A clear-cut assignment of the tenancy in breach of a prohibition on assignment will be irremediable, but a mere sharing of possession (so common in agricultural holdings) in breach of a well-drafted alienation clause prohibiting sharing will not be irremediable.

The breach must also materially prejudice the landlord's interest and this may not be easy to establish. A subletting in breach of an alienation clause may be irremediable, but it may not amount to a material prejudice if the sub-tenancy ends prior to the head tenancy (and does not afford security of tenure).

Whilst a Case E notice to quit is often spoken of as an 'incontestable' notice to quit, that is not strictly true: the tenant can seek a demand for arbitration within one month of the service of the notice to quit, and given the dire consequences of failing to do so, a landlord must expect a tenant will do exactly that.

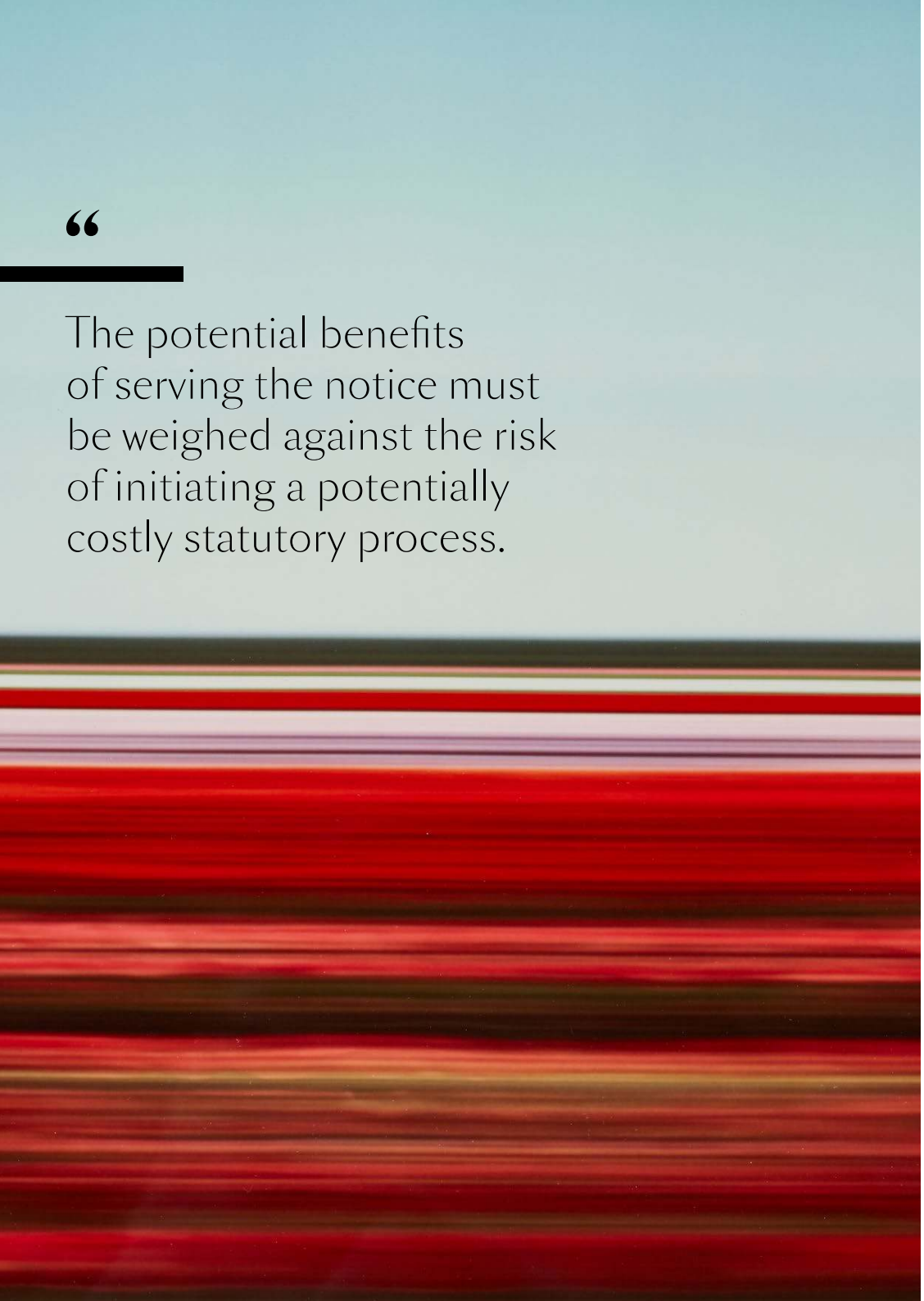
## Case D – Remediable Breaches

Case D differs from Case E in that there is a two stage process: the notice to quit must be preceded by service on the tenant of a notice to pay or a notice to remedy.

**Non-compliance with Notice to Pay**

When preparing the notice to pay care must be taken to use the correct prescribed form and to state with precision the 'rent due'. There has been uncertainty in the past as to whether VAT should be included in the notice as part of the rent due. The case of *Mason v Boscawen* (2009) confirmed that where VAT is payable on rent it is correct to include it in the notice to pay as part of the rent due. This does not extend to other payments due under the tenancy agreement, for example contributions to the cost of running a private water supply; these should be the subject of a notice to remedy (non-work notice).

If the tenant fails to pay the rent due within two months from the notice to pay, the landlord may serve a Case D notice to quit. The tenant then has one month in which to demand arbitration.



> The potential benefits of serving the notice must be weighed against the risk of initiating a potentially costly statutory process.



**Non-compliance with Notice to Remedy**
There are separate prescribed forms for use where the remedy requires the tenant to do work (work notices) and where the remedy does not require work (non-work notices). The notices must give a reasonable period for the tenant to remedy the breach, which often begs the question what is 'reasonable'. With work notices the statute requires a minimum of six months to remedy, but there is no statutory minimum for non-work notices and land managers must use their common sense (and err on the side of caution) when choosing a reasonable period.

## Challenging Notices to Remedy

Tenants can demand arbitration of notices to quit served pursuant to any notice to remedy, but tenants have particular scope for disputing work notices.

Where a notice to remedy (work notice) is served the tenant can demand arbitration of the notice within one month of service. Whatever the outcome of that arbitration, the tenant can also (within one month of the arbitrator's award or service of a notice to quit) serve a counternotice under section 28 of the Act, which forces the landlord to apply for consent to operation of the notice to quit within one month. That means the landlord has to apply to the Tribunal and persuade it that, in all the circumstances, a fair and reasonable landlord would insist on possession. No easy task.

## High Stakes

Landlords must be judicious in using Case D and Case E. The stakes are high for tenants and they are very likely to challenge the notices. The stringent deadlines for counternotices and applications mean landlords can swiftly be drawn into potentially costly proceedings. There is a considerable risk that proceedings will be decided not on the merits of the case but on procedural shortcomings such as missed deadlines or mistakes in the notices.

The 2017 case of *Sowden v Smyth-Tyrrell* is a signal example of this. The case considered the validity of a notice to remedy which erroneously identified a breach by referring to the wrong clause number in the tenancy. Happily for the landlord this mistake was not fatal to the notice on this occasion, but of more interest were the comments of the judge as to whether the case should have been brought before him at all:

> *Before I turn to the substance of the applications, I wish to record that I consider the present situation unacceptable. The arbitration commenced in May 2013 has taken 4 years to reach a final award. Thereafter the parties have chosen to make a series of applications to court under the 1996 Act, at least one appeal to the Court of Appeal, and an application for judicial review. I was told that, as at 4 July 2017, the legal costs to both parties in total exceeded £500,000 plus VAT. They must now be considerably higher... the dispute in this case is not only not yet finally concluded, but has also led to legal costs which are wholly disproportionate. I was told that the cost of removing the wall and path to which the tenant so strenuously objects would cost about £9,000.*

# 7 – Case Law Buffet

Katy Tydeman

## Anti-Development Tactics

Earlier this year, the Court of Appeal held that St Albans City and District Council was entitled to list a potential greenfield development site used by trespassers as an Asset of Community Value (**ACV**). Under section 88 of the Localism Act 2011, local residents are able to apply to the local authority to have land listed as an ACV if they are able to show that the actual use of the land furthers the social wellbeing or social interests of the local community and it is realistic to think that such use can continue. In this case, the landowner argued that the words 'actual use' for the purposes of s.88 of the Localism Act must mean lawful use. Since the use of the field by the community was trespass, and therefore unlawful, it was argued that it could not be listed as an ACV. The Court of Appeal disagreed and held that the words 'actual use' were unambiguous and were meant to cover the actual use that the local residents made of the field. As is well known, once listed as an ACV, the landowner is unable to dispose of the ACV unless they first offer the asset to a community group. The land's status as an ACV also becomes a material consideration for planning prospects.

*Banner Homes Ltd v St Albans City and District Council and Another* (2018)

## Japanese Knotweed

The Court of Appeal has recently upheld the County Court's decision that an actionable nuisance can arise before knotweed causes physical damage to neighbouring land. In this case, knotweed had spread from the railway embankment on to the neighbouring homeowners' land. Importantly for landowners, this means that the 'mere presence' of knotweed on land could be enough for a claim of actionable nuisance on the basis that it affects the owner's ability to fully use and enjoy the land. Network Rail was ordered to pay their neighbours' costs for treating the knotweed and pay the reduction in value of the properties (approximately 10% of the market value). The message is clear: if Japanese knotweed is present on your land, ensure it is treated appropriately before it spreads.

*Network Rail Infrastructure Ltd v Williams and another* (2018)

## Overage

The Court of Appeal has held that an obligation to pay overage had been triggered when prior approval was granted for a development, even though the development could not be constructed because it would be in breach of building regulations. The developer argued that the payment was not due as the residential units were not capable of being built. However, the Court of Appeal disagreed as compliance with building regulations was not a condition of the overage payment and the trigger event was clearly defined by reference to prior approval for the proposed development. The developer was left in the position of needing to make a substantial overage payment, despite not being able to develop the property. This is a reminder to developers, surveyors and solicitors to take extra care when negotiating and drafting overage provisions. It is usually more appropriate to have an overage payment triggered on the implementation of planning permission (or sale with the benefit of permission) rather than on planning permission being granted.

*London and Ilford Ltd v Sovereign Property Holdings Ltd* (2018)

## Registration Gap

The Court of Appeal has held that a right of way granted during the gap between purchase and registration of the land was ineffective. In this case, the owners sold a piece of land and then granted a right of way over that land to a third party. Overturning the High Court's decision, the Court of Appeal held that the grant of an easement was not a conveyance of the 'legal estate in land' and did not take priority over the purchaser's right to be registered as the owner of the land free from the easement. The purchaser was in actual occupation of the land and therefore had an overriding interest.



This decision will provide comfort to potential purchasers as the High Court decision did raise doubts about the position of a purchaser during the gap between completion and the date the transfer is registered at the Land Registry. However, the case does leave open the question as to what the result would have been if the purchaser had not been in actual occupation when the easement was granted.

*Baker v Craggs* (2018)

## IHT – Holiday Lets

Recent cases on Inheritance Tax relief on holiday cottage businesses have concluded that it is exceedingly difficult to qualify for business property relief (**BPR**). However, in this case, HMRC lost the challenge and the tribunal found that a furnished holiday letting business did not consist wholly or mainly of making or holding investments and so qualified for BPR. In reaching the decision, the judge reviewed the extensive list of additional services and personal care provided, which he considered distinguished it from other holiday lettings businesses. He also viewed the business in the round and compared how much time was spent on property investment activities (such as maintenance and property management) compared with time spent providing additional services. The judge found that the time spent on providing services slightly trumped the investment activity. The case was decided on its facts and was exceptional, but it does prove that it is possible for a holiday lettings business to qualify for BPR in certain circumstances.

*Personal Representatives of Grace Joyce Graham deceased v HMRC* (2018)

## Right to Use a Golf Course

The Supreme Court has recently upheld a decision that the right to use a golf course, swimming pool or tennis court was capable of being an easement. The court decided that the grant of recreational rights could be an easement if the four well-established conditions for easements could also be demonstrated. In this case, the first two conditions could easily be satisfied: (1) there was dominant and servient land (ie land that benefits and land that is burdened by the easement) and (2) the dominant and servient owners were different people. The third requirement of whether the easement accommodated and served the dominant land was a question of fact. In this case, the dominant land was timeshare apartments, which itself is a recreational use by holidaymakers. The court held that the grant of rights to use the adjacent leisure facilities was of service, utility and benefit to the timeshare apartments, which satisfied the third condition. The final requirement was the question of whether the right is capable of forming the subject matter of a grant, which the court held it could. Therefore the grant of purely recreational rights to use the golf course, swimming pool and tennis courts was capable of being an easement in the circumstances.

*Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and another* (2018)

## What is a Listed Building?

The Court of Appeal has upheld a listed building enforcement notice served by Stratford-on-Avon District Council on a landowner who removed two listed limestone piers and lead urns without Listed Building Consent (**LBC**). The landowner sold the items at auction in 2009. He was not aware that the items were listed and made a retrospective application for LBC. He argued that the urns and piers were not 'buildings' and therefore should not have been listed. The Council refused the application and served an enforcement notice that required him to reinstate the piers and urns. Both the enforcement notice and refusal of LBC were appealed, but the Inspector decided it was not open to him to review whether the items listed were buildings. The Court of Appeal upheld the Inspector's decision and confirmed that 'building' includes structures such as the piers and lead urns in this case.

*Dill v The Secretary of State for Communities and Local Government and Another* (2018)

# 8 – Leasehold Reform

Kate Chatters

The government has tasked the Law Commission with reviewing the legislation which gives residential tenants of long leases rights to extend those leases or, in some circumstances, rights to collectively or individually acquire the freehold of the building in which they live. The Law Commission has published a Consultation Paper, *Leasehold home ownership: buying your freehold or extending your lease* (the **Consultation**).

The government wishes to promote transparency and fairness in the leasehold sector and to provide a better deal for tenants. More specific goals are simplification of the existing legislation and consideration of improving access to enfranchisement across the country. In part, it is the well-publicised unfair practices relating to leasehold houses and escalating ground rents (which have been the subject of a separate consultation, *Tackling Unfair Practices in the Leasehold Market*) that are driving this desire for more general and wide-ranging change in the leasehold sector.

Whilst still in the consultation stage, it is clear the direction of travel is in favour of tenants as 'consumers'. The proposals set out by the Law Commission aim to make enfranchisement easier, quicker and more cost-effective by simplifying the processes and removing a number of the complications that lead to legal and other costs but often have little effect on outcome.

The Consultation asks various key questions with the ultimate aim of devising an improved enfranchisement regime.

## What Should Enfranchisement Rights Be?

One of the main criticisms of the existing legislation is that different statutes apply to houses and flats. One proposal is to create a new enfranchisement regime which no longer turns on the distinction between houses and flats, but rather has a single set of criteria based on a definition of 'residential unit'. The existing rights to a lease extension and individual or collective freehold purchase would be retained, but in a slightly enhanced and modified form.

A further proposal is a new right for leaseholders who did not participate in a previous collective acquisition to do so at a later date. This seeks to deal with the situation where one group of tenants excludes another group of tenants from ownership of the freehold. This will be a welcome and valuable right for such excluded tenants.

## Who Should Be Entitled to Exercise Enfranchisement Rights?

The current legislation sets out complex and at times archaic qualifying criteria that tenants must satisfy in order to qualify for enfranchisement rights.

Tenants of houses must satisfy a low rent test and other financial criteria to extend their leases or, in certain rural areas, to acquire the freehold of their homes. The proposal is that any qualifying criteria based on financial limits is abolished. While this does make sense, given that it is very difficult to apply such criteria in practice, it will have the knock-on effect of removing what is seen by some as a valuable exemption which prevents enfranchisement of houses in rural areas. It is arguable that this exemption preserves rural communities by preventing the sale of houses at high prices which then become out of reach for local people. Does this proposal for reform run counter to the wider policy objective of preserving rural communities?

To counter this the Consultation does consider different treatment of shared ownership leases in 'designated protected areas' and that appears to be some recognition at least that different areas of the country have different social challenges and a simplified 'one size fits all' system may not work. Perhaps such special treatment should extend to all leases in rural areas, not just those part of shared ownership schemes.

A two-year ownership condition currently applies to tenants who wish to extend their leases of flats or buy the freehold of their houses. There is concern that this can lead to unfair outcomes, in particular where tenants' claims are denied in a rapidly rising market. In such cases tenants are often forced to pay much higher sums when they become entitled to make a valid claim two years later. The proposal that the two-year ownership condition is abolished seems sensible.

> There is an increasing appreciation that valuation is not just a question of law but involves also principles of valuation, economics and politics.

## What Should it Cost to Enfranchise?

The most significant (but still unclear) part of the reform proposals concerns how landlords will be compensated for the loss of their reversions. While the Law Commission would prefer to adopt a consistent valuation methodology with a 'one size fits all' approach, there is an increasing appreciation that valuation is not just a question of law but involves also principles of valuation, economics and politics. How could the same valuation method apply to a £35 million penthouse on the Grosvenor Estate with a sub-20 year lease as to a £150,000 new-build flat in Manchester on a 125 year lease? How can capitalisation rates be set when interest rates over the last 20 years have fluctuated so much? Such issues will need to be tackled to ensure compensation is fair, particularly if a landlord is set to lose a valuable reversion with significant development potential.

## Conclusion

The reform proposals are radical in the sense that the existing legislation will be torn up so that the rulebook on enfranchisement can be rewritten in favour of 'the consumer'. If the outcome is that existing rights are retained with slight modifications, but the processes leading to the exercise of those rights are simplified, then this may benefit landlords and tenants. However, if more significant changes are made, such as to the valuation methodology, then it is quite likely that change will have an adverse effect on landlords throughout the country.

# 9 – Removing Ag Tags

Jay Sattin

The revised National Planning Policy Framework permits isolated homes in the countryside in limited circumstances. One of these is that there is an essential need for a rural worker, including those taking majority control of a farm business, to live permanently at or near their place of work.

The planning permission for the new agricultural dwelling will have a condition attached to it, restricting the occupation of the dwelling to an agricultural worker and their dependants. The model form of Agricultural Occupancy Condition (**AOC**) restricts the occupation of the dwelling to:

> *a person solely or mainly working, or last working, in the locality in agriculture or in forestry, or a widow or widower of such a person, and to any resident dependants*

The problem for landowners is, of course, that an AOC radically limits the potential market for a property and depresses its value (on average by 30%). If the AOC has been breached for many years, the Local Planning Authority (**LPA**) may not be able to require the landowner to comply with it. However this 'immunity' from enforcement is subject to conditions and limitations.

If there is no immunity to enforcement action, as an alternative, the landowner may be able to show that the AOC does not serve a useful purpose and should therefore be removed.

## Breaching an AOC

If an AOC is being breached and the LPA becomes aware of this, it may take enforcement action and require non-conforming occupants to vacate the dwelling. If the AOC has been breached for a continuous period of ten years it is advisable to obtain a certificate of lawfulness (commonly known as a **CLEUD**), to guard against any such enforcement action.

The application for the CLEUD should be submitted to the LPA with sufficient evidence to demonstrate a continuous breach in the preceding ten-year period, working back from the date of your application. The breach should also be subsisting on the date of the application. One of the most common reasons to refuse such an application is where there is a gap in the ten-year period, either because the property is vacant (which may constitute compliance with the AOC) or because it is occupied by a person able to satisfy the AOC.

Unfortunately a CLEUD only confirms that enforcement action cannot be carried out at the time of the application. Therefore, even if you do obtain a CLEUD, the AOC will become enforceable again if it is complied with in future. Remember that a period of vacancy could make the AOC enforceable again.

To ensure the AOC is removed and no longer enforceable, a landowner will need to apply to the LPA to vary the planning permission and remove the condition. If you have breached an AOC continuously for ten years, you would normally apply for a CLEUD and to remove the condition at the same time. You could use the grant of the CLEUD as justification that the AOC is no longer necessary, and the LPA could then remove the condition.

## Removing an AOC

However, this twin-tracked approach may not be open to a landowner if, for example, the landowner is not eligible for a CLEUD (eg where there is no continuous breach over the last ten years) or the LPA considers that a CLEUD is not sufficient to remove the AOC. In these cases, a landowner will normally need to carry out a marketing exercise to demonstrate there is no potential buyer who satisfies the AOC. The marketing exercise usually includes advertising the property for sale or rent, making it clear that occupancy is limited to those who comply with the AOC. The sale or rental amount will be at a discount to reflect the AOC. The marketing exercise is normally sustained over a period of twelve months. Each LPA will have its own specific requirements, so you should check what these are before you embark on the marketing exercise. An application can be refused if the LPA considers that the exercise was inadequate, for example where the advertised purchase price was too high. Determining the right price at which to market the property is therefore of crucial importance.

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Each LPA will have its own specific requirements, so you should check what these are before you embark on the marketing exercise.

A landowner's marketing exercise was criticised in *Re Cefn Betingau Farm* (2012). The criticisms included insufficient comparison with other similar properties to demonstrate the price reduction, not advertising in the specialist farming press and a failure to make price changes to reflect fluctuations in the wider property market.

In a recent 2018 decision, an Inspector removed an AOC from a planning permission even though he criticised the market testing exercise. Planning permission was granted in 1981 for the construction of a dwelling and garage subject to an AOC. The Inspector agreed with the Council that additional land included with the property for the purpose of marketing had inflated its price and the discount was too low. However, even if the property was valued with a more realistic discount and without the additional land, it would still have been around £850,000. The Council confirmed that the only class of people likely to satisfy the AOC criteria for a property of this value in the area would be retired farmers with considerable financial resource. The inclusion of the additional land would make little difference to this very limited class of people and the AOC was unnecessary for such a high value dwelling.

So – there is hope for estates with high value properties subject to an AOC. The lesson to be learnt is to follow the LPA's requirements for the marketing exercise to reduce the risk of being refused and to maximise your chances of a successful appeal.

# 10 – Woodland Tax

Marcus Maxwell

Whether your woodland forms part of a shoot or is used for commercial timber, a forest school, paintballing or glamping, it is well worth considering the inheritance tax (**IHT**) implications of passing it on to the next generation and the capital gains tax (**CGT**) consequences of selling the timber or the land.

## Inheritance Tax

**Woodland Relief**
Under section 125 of the Inheritance Tax Act 1984 (**IHTA**), it is possible to claim relief on the value of any trees or underwood growing on the land provided the woodlands are not occupied or ancillary to agricultural land. This provides a 'deferral relief' so that an IHT charge does not arise until the timber is sold in the future. However, such claims are rarely made because they apply only to the trees and not the land. Business Property Relief (**BPR**) or Agricultural Property Relief (**APR**) are often available with significantly more favourable tax consequences.

**Business Property Relief**
Commercial woodland can qualify for 100% BPR from IHT (section 104 IHTA). The effect is that no IHT will be payable on the owner's death on either the land or the trees.

In order to qualify as commercial, woodland must:

- Constitute a business;
- Be managed with a view to profit; and
- Have been owned and occupied by the transferor for two years before the transfer.

It is crucial to be able to show HMRC that woodland fulfils these requirements. Recent IHT tribunal cases attest to the importance of being able to provide evidence of commerciality. Woods managed as a business include those used for commercial shooting, fishing, residential letting or commercial timber harvesting.

A good place to start is to keep separate woodland accounts. If direct labour is employed, contracts of employment and copies of worksheets may be requested by HMRC to substantiate a claim. If contractors are used, invoices and details of work will be needed, so must be retained. Badges of trade can also be useful. These include:

- Subject matter – do woodlands constitute an asset that is often used to generate a trading profit?
- Length of period of ownership – is the asset held on a long term basis to benefit an increase in investment value?
- Frequency of transactions
- Supplementary work (eg seasoning wood)
- Circumstances of sale – market price, contracts, customer registrations, marketing activity
- Motive – is the main reason behind sales to make a profit?



As for profitability, the life cycle of woodland is such that it is not always possible to make a profit in years where regeneration and planting take place. However, what HMRC are looking for are viable long term intentions which can be satisfied with regular budget reviews and business/management plans (for example using the Forestry Commission's Woodland Management Plan template). Having a formal written document setting out strategy and operations is invaluable for this.

**Agricultural Property Relief**
In order to benefit from this relief, the woodland must either be classed as agricultural property or be ancillary to agricultural property which is occupied for agricultural purposes (section 115(2) IHTA). Ancillary uses include tree nurseries, 'shelter belts', or where the activity of short rotation coppice is carried out eg for woodchips, firewood and fencing. As with BPR, accounts should be kept to clearly reflect the exact nature of the activity in order to satisfy HMRC.

Note that where a new wood has been planted subject to a grant to take land out of agricultural use, it cannot qualify as agricultural property as it is no longer being used for this purpose.

**Heritage Relief**
If the woodland is in an area of "outstanding scenic, historic or scientific interest", then it may qualify for conditional exemption from IHT under section 31 IHTA. On a transfer of value it may be exempted on the condition that the new owner agrees to maintain the woodland and grant access to the public. Claims for heritage relief can apply to both ancient woodland and new plantations.

## Capital Gains Tax

**Commercial Woodland**
The sale of timber or standing timber from commercial woodlands is exempt from CGT (section 250 Taxation of Chargeable Gains Act 1992 (**TGCA**)). The sale of the land, however, is not. Where the woodland is sold as a whole, an apportionment is made between the value of the standing trees, timber and underwood and the value of the land.

The capital gain on the land is taxable but should qualify for reliefs such as Holdover, Rollover and in some instances Entrepreneurs' Relief (**ER**) (see overleaf). Relief on the sale of timber and standing timber is restricted to commercial woodland. This apportionment is not applicable to agricultural or amenity woodland.

**Agricultural and Amenity Woodland**
Any sums received in respect of felled trees from agricultural or amenity woodlands are within the charge to CGT. However, each tree is treated as a single chattel and a chargeable gain could therefore only arise in the unlikely event of the single tree being sold for more than £6,000.

**Entrepreneurs' Relief**
There has been some debate as to whether ER is available on the disposal of purely commercial woodland. The answer is that it is not available because occupation of commercial woodland is explicitly defined as not being a trade (section 11 Income Tax (Trading and Other Income) Act 2005).

However, ER is available if the woodland and the business are sold or valued as one entity and the business that uses them qualifies for the ER. If the woodland forms part of a larger farming estate, it constitutes part of the asset used for the purposes of a business.

The legislation contains no provision requiring an apportionment to be made in circumstances where part only of an asset is so used, and so the whole gain can benefit from the relief. The effect is to apply a CGT rate of 10% to qualifying gains up to a lifetime limit of £10 million.

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Recent IHT tribunal cases attest to the importance of being able to provide evidence of commerciality.

**Rollover Relief**
By contrast to entrepreneurs' relief, rollover relief under section 152 TCGA specifically extends to woodlands where these are managed by the occupier on a commercial basis and with a view to the realisation of profits. Whether the sale is purely of woodland or of a larger estate is therefore irrelevant.

Rollover Relief enables any CGT due on a disposal of the woodland ('the old asset') to be deferred when 'new assets' are acquired costing the same as, or more than, the amount realised on disposal of the old asset. The relief enables the tax to be postponed until disposal of those new assets.

**Holdover Relief**
Holdover Relief under section 165 TCGA similarly extends to include woodlands. Holdover Relief applies to gifts and means you do not pay CGT when you give away the assets but the person you give them to pays CGT, if any is due, when they sell or dispose of them.

**Heritage Relief**
Heritage relief can also apply to capital gains. As above, the requirement is that the woodland is of "outstanding scenic, historic or scientific interest" and the effect is to render the sale as a conditionally exempt transfer. This means it is exempt from CGT on the condition that the new owner agrees to maintain the woodlands and grant access to the public.



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