FARRER&Co

Rural Estates Newsletter

Spring 2016

Editorial

The Hitchhiker's Guide to the Galaxy reports that the political leaders of the planet Golgafrincham tried to solve their intractable political difficulties by tricking the middle classes into believing the planet was doomed and an exodus of the entire population was the only escape. The leaders would leave in one starship; the workers in another; the lawyers, accountants, hairdressers etc in "Golgafrinchan Ark Fleet Ship B". Of course, Fleet Ship B was persuaded to leave first and nobody else followed.

The story tickles me, not least because it is such a good example of treating the symptom not the cause. For if our leaders will create tax law of ever-increasing complexity (see James Bromley on the new SDLT difficulties) and keep fiddling with our planning system (Karen Phull writes on the Housing and Planning Bill) – and I won't even *mention* Health & Safety (although Jo Ord does later on) – then we must not be surprised at the proliferation of professionals required to understand all this regulation. As economies become more sophisticated, it seems inescapable that there are more lawyers, consultants, agents and hairdressers.

Incidentally, the inhabitants of Golgafrinchan Ark Fleet Ship B finally found their promised land on pre-historic Earth. On arrival they immediately set to work holding meetings in which nothing was accomplished. We are all their descendants.

James Maxwell

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In addition to the Rural Estates Newsletter, we publish newsletters and bulletins dealing with Art & Heritage, Banking, Charities, Contracts, Employment and Pensions, Financial Services, Higher Education, Intellectual Property, Media, Professional Practices, Property & Planning, Publishing, Schools, Sports and matters of interest to private clients, both onshore and international. If you would like to receive a copy of any of these other briefings (which are mainly in electronic version only), please visit our newsletter subscription page at: **http://www.farrer.co.uk/News/Newsletter-subscription/**

Stamp Duty Land Tax Update

In November last year, the government announced new additional rates of stamp duty land tax (SDLT) that will be charged on purchases of additional homes (such as second homes and buy-to-let properties). The new rates will apply to purchases of additional homes completed from 1 April for more than £40,000, and the essence is to increase the amount of SDLT payable by 3% for each 'slice' of the purchase price charged to tax.

In addition, the Chancellor more recently announced at Budget 2016 an immediate change in the way SDLT is charged on purchases of commercial and 'mixed use' properties. The commercial SDLT rates will now be levied on 'slices' of the purchase price, rather than at one rate on the whole price as was the case previously, bringing the treatment into line with the way in which the residential rates of SDLT have been charged since last year.

These changes will have particular importance for buyers of additional homes and for buyers of properties with commercial, farming or other agricultural operations. Existing owners of larger-scale property portfolios should also consider how the changes affect them when acquiring new properties.

How the additional residential rates work

If a buyer owns more than one residential property at the end of the day of purchase, then the additional SDLT rates will be charged, unless the property being purchased is replacing the buyer's main residence (which is being sold). If the main residence has not been sold by the time of purchase but is later sold within three years, a refund of the extra SDLT paid will be available.

Whilst the additional rates are only charged on properties bought in England, Wales and Northern Ireland, a buyer's worldwide properties are all relevant for the purposes of the additional rates test outlined above. For example, if a buyer (of any residence) already owns an overseas main residence which they are keeping when they purchase an English property, the additional SDLT rates will apply to the English purchase. Conversely, if that same buyer were to sell their overseas main residence and replace it with an English property, the additional rates would not apply. There is therefore no distinction between English (or Welsh or Northern Irish) properties and overseas properties for the purposes of applying the additional rates test.

Whether or not a property is the purchaser's 'main residence' will be judged on the facts. In particular, it will not be possible to simply elect a property as a main residence for SDLT purposes (as it is for capital gains tax). As to what facts will be looked at, we expect that HMRC will consider things like the relative amounts of time spent in different properties, the correspondence addresses given to third parties, degrees of furnishings and proximity to family places of work/school.

Buyers should also be aware that if a property is purchased by joint owners, any joint owner with more than one property can potentially trigger the additional SDLT rates for the whole of the new purchase. Whilst the way in which an existing property is held can vary whether the additional rates apply (for example, see below in relation to properties held in trust), buyers should not assume that properties already held by prospective joint owners (even as minority interests) will be irrelevant when considering the SDLT treatment of their purchase.

Mixed use properties

Importantly, purchases of 'mixed use' properties will not come within the scope of the additional SDLT rates. 'Mixed use' properties are broadly those that consist of both residential and non-residential elements. For example, a farmhouse with a working farm, or an estate with dedicated commercial premises, shops or forestry business.

In addition to falling outside the scope of the additional SDLT rates, purchases of this nature can also be taxed under the lower commercial rates (as applied to 'slices' of the purchase price) of SDLT instead of the residential rates.
Given that the commercial rates apply up to a maximum of just 5% (as opposed to up to 12% under the standard residential rates, or 15% under the new additional rates) this can lead to a significant SDLT saving for buyers, making it increasingly important to identify whether a proposed purchase qualifies as 'mixed use' as early as possible.

Whilst it will often be clear from the outset whether a property is 'mixed use', the position can be more nuanced in some cases.
For example, HMRC may not accept that a property with a small office or business area is 'mixed use', even if that part of the property is being used for commercial purposes.
In essence, the rationale appears to be that if a property remains suitable for use as a home (notwithstanding how parts of it may actually be used) and only superficial modifications are required to make it fully residential, it will not be 'mixed use'.

However, buyers of properties with dedicated business or agricultural operations that are properly 'mixed use' will continue to be able to benefit from the commercial rates of SDLT.

Multiple properties and portfolios

Larger-scale purchases of properties will also benefit from advantageous SDLT treatment as compared to stand-alone purchases.
Acquisitions of six or more properties will continue to attract the commercial rates of SDLT and will not be subject to the new additional SDLT rates, even where the buyer already has existing properties.

However, purchases of fewer than six properties (such as one-by-one additions to a portfolio or estate) will not be able to benefit from this treatment and will potentially be taxed at the additional rates. One option that might mitigate the SDLT payable in such cases could be to purchase multiple properties at one time, even if fewer than six are purchased. This is because, although the commercial tax rates cannot apply under the treatment outlined above, multiple purchases will continue to be eligible for existing multiple dwellings relief (albeit with the additional rates taken into account).

Claiming multiple dwellings relief means that tax is paid on the average value of each property added together (rather than on the total value of the whole transaction). Because the additional SDLT rates are progressive and increase with the amount of purchase price falling within them, this can lead to a valuable SDLT saving even though the additional residential rates apply.

Application to trusts and trustees

Purchases of properties by trustees will be assessed to the additional rates based on the terms of the relevant trust and, in some cases, the status of the beneficiaries.

Broadly speaking, a purchase by trustees of any trust other than a bare trust will be subject to the additional rates unless the beneficiaries are

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entitled to occupy the property for life or are entitled to income from the property. This is the case irrespective of whether the trustees hold any other properties themselves.

However, purchases by bare trustees or trustees of trusts in which beneficiaries are entitled to occupy the property for life or entitled to income will continue to be treated as made by their beneficial owners for SDLT purposes. This means that the test for whether the additional rates will apply will be assessed by reference to the beneficiaries and not the trustees.

Whilst the test for the additional SDLT rates may prove difficult to apply in more complex trust arrangements, as a general rule, if a beneficiary has a right to occupy the property or a right to income from it, they may be treated as owning the property for the purposes of the test and not the trustees. In other cases, where a beneficiary's interest in the property is more remote, beneficiaries may be ignored and trustees will be liable to pay the additional SDLT rates as described above.

In conclusion

Property owners with portfolios or large estates, buyers of additional residential properties and buyers of properties with non-residential elements (such as shops, offices, agricultural land and forests) should carefully consider their SDLT position in light of the recent SDLT changes. In particular, the amount of SDLT chargeable is capable of having an increasingly significant impact on the costs of a purchase in light of the new additional rates. The greater amounts of tax at stake also mean that HMRC may further scrutinise more borderline cases where 'mixed use' treatment, commercial tax rates or relief from SDLT is claimed, making obtaining proper tax advice at the outset all the more important.

James Bromley

Rented Homes in Wales

In using their increased devolved powers, the Welsh ministers have not shied away from implementing real reform to the private rented sector in Wales. The Renting Homes (Wales) Act 2016 (the Act) will, when in force, create an entirely new structure for rented property in Wales which will not only apply to new tenancy agreements, but convert all relevant existing agreements into new forms of contract.

A new vocabulary

The basis of the changes is the distinction between 'secure' and 'standard' contracts. With a few exceptions, all rental occupation contracts of dwellings in Wales – whether tenancies or licences – will become either secure contracts (based on the existing secure tenancies issued by local authorities) or standard contracts (based on the existing assured shorthold tenancies). Standard contracts can be either periodic or fixed-term. Contracts issued by 'community landlords' such as local authorities and registered social landlords will be secure contracts, and those issued by private landlords will be standard contracts, unless certain notice procedures are followed.

The Act also brings with it some new definitions: for example, what we currently call tenancies and licences will be called 'occupation contracts', and tenants and licensees become 'contract-holders'. Whilst the distinction between tenancies and licences has not been entirely done away with in the Act, its significance is hugely diminished and may become largely academic.

The occupation contracts must be in writing and the terms are determined by reference to the Act itself. There is a series of 'fundamental terms' which are automatically incorporated into the occupation contracts, only some of which can be departed from by agreement between the parties, and only then if the contract-holder benefits (in the opinion of the contract-holder). In addition there are 'supplementary terms' which again are automatically incorporated but which can be departed from by agreement.
Any additional terms can be agreed between the landlord and the contract-holder in order to deal with points of detail – but judging by the wide-ranging provisions of the Act, there may be few points of detail left to resolve.

What happens to existing tenancies and licences?

Any tenancies and licences in Wales (other than those outside the Act) which are in existence at the date the Act comes into force will cease to be known by their previous names. They will not cease to exist, but will continue as occupation contracts – assured tenancies (including assured shorthold tenancies) becoming standard contracts – and will be treated as if they came into being on the date the Act is in force.
The fundamental and supplementary terms set out in the Act will automatically be incorporated, but (a) the fundamental terms will override any conflicting existing terms, and (b) any existing terms will override any conflicting supplementary terms.

These new contracts formed from existing arrangements are referred to in the Act as 'converted contracts'. Although no action is needed for tenancies and licences to become converted contracts, landlords will need to provide a written statement of the contract (see below) within six months of the date the Act comes into force – so they should keep an eye on developments so as to judge when this needs to be done.

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Exceptions

Estates owners will be pleased to learn that farm business tenancies and agricultural holdings under the Agricultural Holdings Act 1986 are excluded from the new regime, so even if there are dwellings included in the area let under those leases, they will not become standard or secure contracts under the Act. Other exclusions include tenancies under the Rent (Agriculture) Act 1976 and the Rent Act 1977, and tenancies for terms of over 21 years. Licences and assured tenancies, including assured shorthold tenancies, are firmly within the Act.

In relation to some arrangements, landlords can choose whether they are occupation contracts or not. For example, arrangements which do not include a rent (and therefore fall outside the main definition of occupation contracts) may become occupation contracts if the landlord serves a certain notice on the contract-holder. Holiday lets and shared accommodation may become occupation contracts if the landlord serves a similar notice.

Familiar ground?

On the whole, the 'fundamental' and 'supplementary' terms of the contracts which are set out in the Act consolidate provisions which already exist in English law, so much will be familiar to those who have recently worked with assured shorthold tenancies. However, there are some changes of substance which may be surprising. One example is that the Act abolishes the tenant's duty to use the premises in a tenant-like manner – a key principle found in section 11 of the Landlord and Tenant Act 1985.

The 'fundamental terms' include certain restrictions on ending occupation contracts as well as a requirement to use an authorised deposit scheme to protect any deposit paid by the contract-holder. The deposit provisions are similar to the current regime in force in England, though there is no need to take further action on renewals or when a periodic standard contract arises at the end of a fixed term.

The landlord's ability to regain possession on giving two months' notice remains, for periodic standard contracts, in provisions similar to the current section 21 of the Housing Act 1988, and the Act includes a prohibition on the landlord serving the notice within the first four months of the term. Provisions have been included to prevent evictions in retaliation for contract-holders' repair claims, although the Act relies on the court to decide whether the actions of the landlord amount to retaliatory eviction rather than the complex test which currently applies in England.

On the grant of any new occupation contract, the landlord will need to give the contract-holder a 'written statement' within a period of 14 days starting on the occupation date (and a new one within 14 days of a change in the contract-holder). The statement must include the names of the parties and certain key matters (the dwelling, the occupation date, the rent, the rental period, and if it is a standard contract, which type). It also needs to include the fundamental terms, the supplementary terms and any additional terms. Effectively this will be the contract, and in practice it is envisaged that landlords will usually provide it on or before the

occupation date. Unfortunately for landlords, renewals will require a new written statement within 14 days.

In a similar way to the existing fixed-term assured shorthold tenancies, once the fixed term of a standard occupation contract ends, a new periodic contract will take its place. Again, a new written statement will be needed within 14 days of the start of the periodic contract, but here the Act allows for landlords to deal with this in the initial written statement they provide in relation to the fixed term contract, assuming a periodic contract is envisaged at that point.

There are further detailed provisions about variations to the contract, how the landlord should deal with applications for consent, who may succeed a contract-holder (including where a joint contract-holder leaves) and the grounds for termination. There are even provisions to address anti-social behaviour and domestic violence, making it easier for the landlord to take action. Landlords will benefit from being able to recover possession of an abandoned property without a court order, allowing for a quicker re-let.

Thankfully the Welsh ministers are to provide free model contracts and written statements to make granting these new interests easier.

Compensation

Failure to comply with the Act can result in the landlord being liable for compensation to the contract-holder. In the case of failure to give a written statement, the compensation is the amount of the rent at a daily rate, although in some circumstances a contract-holder can apply to court for it to be increased up to double that amount. For failure to adhere to the deposit scheme provisions, the landlord could be liable for up to three times the deposit amount, as in England. In a departure from English law, in certain cases contract-holders will be able to set off the amount of compensation against any rent owed to the landlord.

When will the Act be in force?

There is no date yet appointed for the Act to come into force; further legislation is awaited to set the date. Details about the Act can be found here:

http://www.legislation.gov.uk/anaw/2016/1/contents/enacted

Shona Ferguson

III The Housing and Planning Bill

The Housing and Planning Bill was introduced to the House of Commons in October 2015. It will bring comprehensive changes to accelerate the provision of new housing and to make changes to the planning system. These are the key provisions.

Starter Homes

The 2015 Conservative party manifesto had a commitment to create 200,000 starter homes in England. Starter homes can only be bought by first time buyers under 40. The Bill envisages the imposition of duties on local planning authorities to promote starter homes in the preparation of their local plans and only to grant planning permission for certain residential developments if they include starter homes. Starter homes will be offered for sale at a minimum of 20% below open market value. Prices are capped at £250,000 outside London and £450,000 in London. A source of controversy has been the ability for owners to sell their home on the open market after five years. The House of Lords has recently amended this provision so that repayment of the 20 per cent discount operates on a sliding scale if the property is sold during the first 20 years. The Lords also ensured that local planning authorities have the discretion to decide the proportion of Starter Homes that are to be provided in new housing developments.

Planning Permission in Principle

Local planning authorities will have to prepare a register of brownfield land that is suitable for housing. Once on the adopted register the land is considered in principle to be acceptable for housing, in a way similar to having an outline planning permission. The criteria for inclusion on the register includes: the land being capable of being developed within at least 10 years; being able to accommodate five or more dwellings; and being free from unacceptable constraints such as those relating to the historic and natural environment. Once a site has been allocated in the brownfield register, technical details consent needs to be obtained from the local planning authority to secure full planning permission. Although the government originally envisaged that brownfield sites would deliver less than 10 residential units, they have now confirmed that they will consider extending the process to larger developments, including mixed use development.

Section 106 dispute resolution

Local planning authorities and planning applicants will be able to make use of a dispute resolution mechanism where section 106 agreements cannot be concluded. There will be a two-week cooling-off period before the Secretary of State appoints an independent body to resolve the dispute. The independent body will produce a report containing recommendations. Where the local planning authority refuses to follow the obligations the applicant can complete a unilateral undertaking that follows the recommendations. In these circumstances the local planning authority cannot refuse the application on the grounds that the unilateral undertaking is insufficient. The report produced by the independent body will not be binding on an Inspector determining any planning appeal, although this will no doubt form a central part of any appeal where the section 106 obligations are a key issue.

Local plan intervention

For those local planning authorities without an up-to-date local plan, there is scope for government intervention, particularly in areas where housing is not being delivered on a sufficient scale. Separately, the government wishes to introduce competition in some pilot areas relating to the management of planning applications. In these areas applicants can choose whether they wish to have their application managed by an external provider or the local planning authority. Where the scheme operates, the local planning authority can permit an approved external provider to manage the planning application process, but the final decision on the application will still have to be made by the local planning authority. For those local planning authorities that are under-performing the legislation envisages the ability to apply for planning permission directly to the Secretary of State.

Rogue landlords and letting agents

A local housing authority can seek an order from the First Tier Tribunal which bans a person from letting housing in England, engaging in letting agency work which relates to housing in England or engaging in property management work that relates to housing in England. This will be available where a person has been convicted of a banning order offence, though we will not know what these offences are until regulations have been made. Landlords and letting agents will be given notice and an opportunity to make representations where a banning order is being sought against them.

“The provisions of the Bill are far-reaching, which reflects our creaking planning system and the lack of new housing.”

In addition, all local housing authorities in England will have to establish a database of rogue landlords with banning orders made against them and those that the authority thinks suitable for inclusion. Rogue landlords are also susceptible to rent repayment orders, refunding rent to a tenant where housing legislation has been breached (such as unlawful evictions) and breaches of improvement orders or licensing requirements.

The Housing and Planning Bill also includes changes to the compulsory purchase process, including rights to enter and survey land. There is also a proposal to expand permitted development rights to support the delivery of new state-funded schools and the expansion of existing ones. The provisions of the Bill are far-reaching, which reflects our creaking planning system and the lack of new housing.

Karen Phull

IV Right to Rent

From 1 February 2016 the 'Right to Rent' regime (as it is commonly known) applies to all private landlords in England by virtue of the Immigration Act 2014 (**the Act**). The Act aims to prevent people who are in the UK unlawfully from being able to access the private rented sector. The legislation prohibits private landlords of residential property from allowing certain categories of people to occupy their properties. It has created yet another layer of administration for landlords (or their agents), who must now check the status of any prospective tenants or other authorised occupiers. These rules are widely known as the Right to Rent regime.

The Right to Rent regime prohibits private landlords of residential properties from authorising an adult to occupy premises under a residential tenancy agreement if that adult is disqualified as a result of their immigration status. Landlords and agents will therefore have to check the status of prospective tenants to ascertain whether those parties do have a right to occupy the premises before granting a tenancy. Additionally, landlords of residential properties will also need to verify that someone's right to occupy the premises does not lapse once the tenancy agreement has been granted. This is a fairly burdensome obligation given the length of some tenancies. Any breach of the Right to Rent regime could lead to a fine of up to £3,000 but carrying out the necessary checks in accordance with the Act will provide any landlord with a 'statutory excuse' against the penalty.

The Right to Rent regime generally only applies to residential tenancy agreements which are entered into on or after 1 February 2016 (although there are some minor exceptions to this). Generally, therefore, the requirements do not apply to existing tenancies, nor to a renewal after 1 February of a tenancy agreement which was granted before that date (provided the renewal is between the same landlord and tenant and there has been no break in the tenant's occupation of the property).

Which tenancy agreements does it apply to?

The criteria for ascertaining whether a tenancy will be subject to the Right to Rent regime are as follows:

1. The tenancy grants one or more adults the right to occupy the premises as their **only or main residence**;
2. The tenancy agreement provides a **payment of rent** (of whatever level);
3. The tenancy agreement **is not excluded**.

A 'tenancy', for these purposes, includes a licence.

There are various nuances as to what constitutes a person's only or main residence and as to what constitutes rent and the Home Office has given some practical guidance on these issues in the form of a revised code of practice and also a user guide to assist with the Right to Rent document checks. There is also a Right to Rent tool available online to check whether a property will be affected and how to go about carrying out the relevant checks.

Estates and other landlords will be pleased to note that holiday lettings which are for a short or limited time period are not included where it is clear that the people occupying intend to use the property for leisure-related purposes and will not remain in the property after that period.

Landlords must however remain vigilant to a situation where holiday accommodation is booked for a period of three months or more, which could indicate that people are intending to use the accommodation as their only or main home.

House guests do not fall within the Right to Rent regime, provided that they are not paying rent and they are not living in the accommodation as their only or main home.

Excluded agreements

Some notable types of tenancy are excluded from the Right to Rent regime including:

- Social housing;
- Care homes, hospitals and hospices and other accommodation relating to healthcare provision;
- Mobile homes;
- Tied accommodation;
- Student accommodation; and
- Long leases.

It is worth noting that an agreement granting a right of occupation for tied accommodation which is provided by an employer to an employee in connection with a contract of employment (which would include genuine service occupancy agreements) is excluded from the regime.

It is also worth noting that an agreement granting a right of occupation for seven years or more, granted under the provisions of the Leasehold Reform Housing and Urban Development Act 1993, is also excluded. This does not include an agreement which can be terminated at the option of either party before the end of the seven years from the start of the tenancy.

Estate owners should, however, be mindful of Right to Rent when granting a farm business tenancy which includes a residential dwelling. In such circumstances it is highly likely that the regime will apply and the appropriate checks will need to be undertaken.

Who needs to be checked?

The Right to Rent regime only applies to prospective tenants or licensees who are adult; landlords do not therefore need to check the immigration status of children under the age of 18 years (as long as they are satisfied that they are under 18 at the time the tenancy or licence agreement is entered into). The Government guidance states that, where children who are under 18 subsequently turn 18 during the course of the tenancy agreement, they would not need to be checked unless the tenancy is renegotiated or any repeat checks are due anyway because the initial right to rent was time-limited.

It is important to note that landlords need to check the immigration status of all adults occupying the property **whether or not they are named in the tenancy agreement**. The code of practice guidance suggests where a landlord is unsure of the immigration status of an immediate family member who will be staying in the property it is advisable to conduct the necessary Right to Rent checks.

We should note that where a tenant sublets all or part of a property or allows occupiers to occupy premises then Right to Rent checks must also be

carried out, but this would usually be the tenant's responsibility. It is however possible for a tenant to agree with their landlord that the landlord should accept responsibility for carrying out the necessary Right to Rent checks. **It is important to note that any such agreement would need to be made in writing.**

Landlord's obligations pre-grant

Where a prospective tenant or licensee has an unlimited right to rent the landlord only needs to carry out checks on their immigration status at any time before the tenancy or licence agreement is entered into. However, where a prospective tenant or licensee only has a time-limited right to rent, the landlord must check the prospective tenant or licensee's immigration status within a period of 28 days ending on the day before the day on which the tenancy or licence agreement is entered into, and then again before the time-limited right to rent expires, or once 12 months has passed (whichever is the later).

Initial checks

The initial checks which a landlord must carry out before a tenancy is entered into consist of taking the following actions:

- Identifying the adults who occupy the premises as their only or main residence;
- Obtaining originals of one or more acceptable documents for adult occupiers;
- Checking the original documents in the presence of the holder;
- Making copies of the documents and retaining the copies with a record of the date on which the checks were made (all copies of documents taken should be kept for the duration of the tenancy agreement and for at least one year thereafter).

A landlord must make reasonable enquiries of the prospective tenant as to any adult occupying the premises under the agreement before the agreement is entered into in order to avoid contravening the requirements.

The landlord will be in breach of this requirement if reasonable enquiries are not made or if reasonable enquiries were made and it was (or should have been) apparent that the adult in question was likely to be an adult occupying the premises under the agreement. What amounts to reasonable enquiries will depend on the specific situation. No doubt this will be related to the size of the property and other such factors. We would advise landlords to keep a record of the enquiries made and responses obtained. A landlord will then need to establish whether the occupying adult will occupy the premises as their only or main home.

Acceptable documents

Landlords must obtain original documents from either list A or list B set out in the schedule to the prescribed requirements. The acceptable documents are set out on the Home Office published user guide.

Importantly landlords are able to pass on responsibility for carrying out Right to Rent

checks to their agents, providing the agent is acting in the course of business and the landlord and agent have agreed **in writing** that the agent is to take responsibility for carrying out Right to Rent checks on behalf of the landlord.

An agent who has accepted responsibility in writing for carrying out Right to Rent checks will have a similar 'statutory excuse' over any penalties, provided they have carried out the requisite checks and reported back to the landlord on these before the tenancy agreement is entered into.

Landlords should review their lettings procedures to ensure that the Right to Rent checks are being covered at the early stages of any lettings (either in-house or by an agent) and to ensure that records are kept with appropriate diarised reminders to ensure continuing compliance where necessary. Precedent tenancy agreements (including FBTs) need to be reviewed to oblige the tenant to cooperate with Right to Rent checks in respect of any new occupier. The key to avoiding any penalties will be ensuring records are organised and updated on a regular basis.

> “Landlords need to check the immigration status of all adults occupying the property whether or not they are named in the tenancy agreement.”

Thomas Kirkman

V Lights, Cameras… Film Location Agreement

Landed estates make great locations for period and historical TV programmes and films. At the most high-profile end of the spectrum, locations such as Alnwick Castle (the Harry Potter films), Castle Howard (the Brideshead Revisited series and more recent film) and Highclere Castle (Downton Abbey) have all entered the popular consciousness as iconic locations forever associated with the films or programmes in which they appear.

The reality for most estates is unlikely to be quite that level of fame (which may be a good thing, not least to avoid being pigeon-holed), but there are still significant opportunities both in terms of additional revenue and profile-raising for landed estates to take advantage of as filming locations.

Allowing a third party to use your premises inevitably comes with risk, which is why putting in place a robust contract can pay dividends in making the venture successful. Indeed, the very act of populating a contract with the relevant details can be a good way to flush out some of the issues and make sure that both sides are on the same page from the outset.

In this article we highlight five key elements which should be borne in mind during the process.

1. Contract clarity

For all the potential complexity of a contract, it is generally possible to reduce the fundamental points down to these three key questions:

- **Who are you contracting with?** It is important to clarify this at an early stage, particularly as the initial contract may have been with location agents. In some scenarios the production company might be a new corporate vehicle set up with just this one film in mind, so consider any possible due diligence that may be needed and whether to require a guarantor. It could also be worth hedging your risk by requiring payment of the hire fee – and a damage deposit – in advance.
- **How much?** Be clear on your charges and whether the fee is calculated on a daily rate. Will there be a different rate for set-up and dismantling days as opposed to filming itself? What about overrun fees?
- **Where and when?** What areas are in and out of bounds for filming and are some areas to be used for certain purposes only? When access is granted it is important to be clear about the days and times when the production can be on-site and by when they have to leave. Clarity over this can then feed into any overrun fees to be charged.

2. Invest in your own terms and conditions

As the owner or manager of the estate you will know better than anyone what your venue can and cannot handle and the film location contract is the one opportunity to record those details. It is essentially your place to set all the 'do's and don'ts' for use of your venue.

3. Liability and insurance

The production company should be under a contractual commitment not to damage (or cause damage to) the venue and should reimburse you for any damage that does occur. This is especially important at venues of historical or architectural importance.

The venue owner will usually exclude all liability arising from the filming (although note that liability for death or personal injury due to the negligence of the venue owner cannot be excluded).

The interplay between liability and insurance is easily confused. It is not necessarily prudent to allow a production company to limit its liability to the amount for which it has insurance. Although it would give comfort to a venue knowing that the production company's insurance will cover up to £10 million when the damage is at the £8 million mark, if you cap liability at the value of the insurance cover it is most likely the venue (through its insurance) that would have to pay the difference if the damage was in fact £12 million. So it is worth thinking carefully about allowing liability limits to be tied to levels of insurance, unless you are sure that any liability that may be suffered will be adequately covered, or you are prepared to accept the risks, such as they are.

4. Control

Although you can expect little editorial control over what is filmed and how the footage is used, it is worth requiring a detailed synopsis so that you can make access conditional on those representations being true and accurate. That way you avoid surprises about the subject matter of the film.

Consider, too, making the grant of access conditional on the material being used for a specific purpose – for example, the final cut of a feature film or the final edit of the documentary in question, so that other uses of the material can be blocked or at least require the production company to come back to you for further permission (giving you additional reputational protection) and potentially further payments. If someone has paid you to shoot a feature film at your property, you do not want them using this same footage in, for example, a video game, without your prior permission and possibly payment of an additional fee.

5. Assignments

Production companies may need to assign contracts to third parties (such as banks or distributors). This may well pose no problems for the venue, provided it is not a blanket assignment. For example, consider restricting the assignment of the actual right of access to the venue for the filming – ideally to no-one, or perhaps just to the completion guarantor who may need access to complete the filming. Once the filming has been completed and your venue has served its purpose, any rights and benefits of the contract can be more freely assignable.

Following these pointers may not guarantee a hit at the box office, but they should at least help you mitigate risk, pre-empt issues and get the most out of a potential film location agreement.

Sam Talbot Rice and Jane Randell

> “Allowing a third party to use your premises inevitably comes with risk, which is why putting in place a robust contract can pay dividends in making the venture successful.”

VI Balfour Revisited

The farming and landed estates community (and their advisers) breathed a collective sigh of relief in 2010 when the Upper Tier Tribunal (**UTT**) in the case of ***Brander v Revenue and Customs Commissioners*** (otherwise known as the Balfour case) confirmed the availability of business property relief (**BPR**) on the death of Lord Balfour in the context of the succession of a rural, diversified Scottish estate. The facts of the case are common to many similar diversified farming and landed estates, which increasingly have been driven to put their assets to maximum income-producing potential. As properties are let or developed and become income-generating, however, that will mean introducing what is categorised in tax terms as 'investment income' and mixing it with pre-existing 'trading income', which has a potential effect on the availability of BPR. In the ***Balfour*** case the Wittingehame Estate consisted of 1907 acres – comprised of two inhand farms; three farms let on secure agricultural tenancies; sporting rights; woodlands; parkland let on a seasonal grazing basis and, finally, 26 dwellings let mostly on assured shorthold tenancies. In its analysis the UTT held, firstly (but crucially) that the various operations constituted a single composite business (as opposed to individual businesses) and that, secondly, when viewed 'in the round' that the composite business itself sat on the trading side of the spectrum and, accordingly, qualified for BPR in its entirety.

The Ground Rules

In approaching any case where BPR is potentially available there are a number of preliminary conditions which need to be satisfied:-

- Fundamentally there must be a **business** to which BPR can apply and then one which has been owned for a minimum qualifying period of two years;
- S. 103 (3) IHTA 1984 requires that the business must be carried on for **'gain'**.

Whilst those conditions may seem obvious, collectively they can operate to exclude ‘hobby’ farming – and may be interpreted in the current economic climate to exclude from BPR those farming businesses with a history of marginal profitability, of which there are a growing number in the UK.

Assuming those conditions are met, the final hurdle – and the one that is potentially the most difficult one for the rural diversified business – is the question posed in section 105(3) IHTA 1984: namely, whether the resultant business is disqualified from availing of BPR because ***'the business carried on ... consists … wholly or mainly of … making or holding investments'***.

In other words, whilst it can be a 'business' which is carried on for 'gain', it may then be ruled out from availing of BPR because its nature is such that it is treated as an investment undertaking which is not, given the current policy basis upon which BPR is based, deserving of such a valuable relief.

If that final hurdle is failed then the application of BPR to the business as a whole is denied in its entirety, although there remains the possibility of agricultural property relief applying to exempt agricultural assets (at their agricultural value). That, however, will not rescue ‘hope’ value or those assets which might only qualify for 50% relief.

The Quantitative Test

It was just such a challenge that HMRC mounted on the facts in ***Brander***, but the challenge failed, substantially because on the wide spectrum that exists between a pure 'trading' activity (where 100% BPR will generally be available) and a passive 'investment' (where it will be denied) the UTT confirmed that the activities which constituted the business carried on by Lord Balfour were predominantly at the trading end of the spectrum and thus qualified for BPR. The guidance or qualitative analysis undertaken by the court (and now by advisers) was adapted from the 1999 case of ***Farmer*** and in the main looked at the following decisive factors:

a) the **turnover** of the various components – both trading and non-trading – that comprise the business;

b) the **profitability** of those components, both on a gross and net basis and importantly taken over a 'reasonable' period of time – which in ***Brander*** was 8 years but in other cases have been as few as 4 years;

c) the **time** spent by those involved in the business by (both employees and others) again as a comparison between the trading and non-trading elements;

d) the **capital** employed – again as a comparison of the relative values as between the trading and non-trading components which comprise the business – for example in ***Brander*** the ratio between the values was 1:1.88.

Each of those factors was taken into account in the overall context of the actual operation of the business 'as viewed by an intelligent businessman' looking at it 'in the round'. It is that qualitative assessment which now constitutes the '***Brander*** test'.

Plan, plan and plan again

Insofar as the ***Brander*** test (and its predecessor in ***Farmer***) provides a useful qualitative analysis which can guide advisers, nonetheless it is the application of those factors on a case by case basis which makes it a live question whether BPR is to be available or not. The very reasons that lead rural businesses to diversify are, ironically, those very same indices that can tip them onto the 'investment' side of the spectrum – for example where the letting of ancillary buildings becomes predominant to the trading activities previously carried on as part of the farming enterprise. That risk is particularly acute when there is a presumption that the generation of income from the exploitation of an interest in land is an investment activity – unless it is coupled with significant additional services of the type that distinguish a B&B from a holiday let or full livery from its DIY cousin.

Concern about the application of ***Brander*** is heightened in the current economic climate where farm incomes are very much in decline across a broad spectrum of activities from livestock and cereal production through to dairy farming. The consequences of such a decline in 'trading' incomes can mean that the 'investment' (or more accurately 'non-trading' side) of the equation of total income can (inadvertently) dominate – with a corresponding and unintentional change in the nature of the business in terms of its tax treatment for IHT purposes.

Given that the trigger for carrying out any such assessment (in IHT terms at least) is generally an unknown – occurring most obviously on the death of the business owner or partner – **and** from that point is applied retrospectively over the accounting periods prior to death, then there is an inherent risk that the application of the ***Brander*** test on the particular facts may not, in fact, produce the desired result. One can see cases where HMRC may seek to challenge the availability of BPR either where there is marginal profitability or, in the case of larger diversified businesses, where the trading nature of the businesses has become overshadowed by its investment profile.

Mitigation

The action which may be taken to mitigate against such an undesirable result is to apply the ***Brander*** test frequently as part of ongoing tax planning, but also, most particularly, where there is a change in the components of the underlying business. This may come about either as a result of a falloff in trading revenue or, indeed, as a result of an increase in investment income (as may be the case, for example, through a particularly advantageous rent review in relation to a commercial property held within the business or the creation of hope value through a planning permission).

> “The very reasons that lead rural businesses to diversify are, ironically, those very same indices that can tip them onto the 'investment' side of the spectrum.”

In those situations one option is to consider removing assets that are very clearly 'investment' in nature and/or have the potential to increase in terms of either income generation or capital value and thus (either directly or indirectly) affect the factors which are brought into consideration under the ***Brander*** test in trying to assess where the business sits on that invidious line between investment and trading. Either way, the lesson for all of us is the need not just to plan, but to revisit that plan frequently, and to do so from the viewpoint of that ever elusive ‘intelligent businessman’ as opposed to the sceptical lawyer.

Ian Huddleston

VII Case B Notices to Quit

Landlords of agricultural holdings often look to release old farm buildings from tenancies for the purpose of residential conversion. Where the tenancy is an Agricultural Holdings Act tenancy, this will often involve the service of a Case B notice to quit, perhaps in tandem with carrying out without prejudice negotiations for an agreed surrender. The application of Case B in practice is not always straightforward.

An Incontestable Notice to Quit?

Notices to quit served pursuant to the Cases in the Agricultural Holdings Act 1986 (**1986 Act**) are sometimes referred to as 'incontestable notices to quit'. This is because a tenant cannot serve a counter-notice (under section 26) to these notices to quit, whereas a tenant ***can*** in response to other notices to quit under the 1986 Act. However, whilst the tenant cannot serve a counter-notice, this does not make a Case B notice to quit incontestable. A tenant has one month from service of a Case B notice to serve a demand for arbitration on the landlord to dispute any reason stated in the notice. Even if arbitration is determined in the landlord's favour, a tenant who refuses to budge can only be removed by court order, so there remains considerable space for intransigent tenants to cause trouble and delay.

Case B – the detail

A notice to quit under Case B can be served where land:

'is required for a use, other than for agriculture… for which planning permission has been granted under the enactments relating to town and country planning'.

What does ***'is required'*** mean? Case law suggests that the landlord must have a firm and settled intention to develop the land and a reasonable prospect of carrying out that intention. The land need not be required by the landlord; it can be required for a developer satisfying the above test. Legal questions about enforceability may arise where that developer has yet to be identified at the time of service of the notice.

Planning permission must have been granted for a Case B notice to be valid, so Case B cannot be used where planning permission is not required for the development (so for private forestry, you might need to serve a standard notice to quit to which a tenant would have the right to serve a counter-notice under section 26). With limited exceptions, Case B cannot be used where development is permitted by the GPDO, so Case B cannot be used for the new permitted development rights allowing conversion of redundant agricultural buildings to residential use. Outline planning permission will generally be sufficient for a Case B notice to be valid. One key drafting point when preparing a notice to quit is to ensure that the notice plan exactly reflects the planning permission red line (and does not include any land for which planning permission has not been granted).

The land must be required for use ***'other than for agriculture'***. Lawyers continue to scratch their heads over what this might mean for the provision of green infrastructure (especially, if it is to be grazed) in urban extensions, but case law is moving in the direction of allowing for subsidiary and ancillary agricultural uses within the area covered by a Case B notice.

> “With all these potential pitfalls, it is obviously in the landlord's interest if he can secure an early agreed surrender from the tenant through without prejudice negotiations.”

Notices to quit part

Notices to quit part are invalid at common law, but the 1986 Act provides statutory exceptions to this in section 25. The most important exception is where there is an express provision in the tenancy agreement allowing termination of part for non-agricultural purposes. This is one of the most important clauses in any 1986 Act tenancy. The clause will normally also contain a short notice provision allowing termination on three months' notice under this clause, rather than the usual 12 months.

Getting it right

In drafting the Case B notice, practitioners will wish to have an eye to precedents for Case B, but they also need to recognise that the notice must comply with the requirements of the short notice provision in the tenancy, as well as any other relevant terms of the tenancy, such as those relating to service. Errors can easily be exploited by a tenant's advisers.

One thing to look out for is situations where a tenant may have an argument based on estoppel. It sometimes arises in practice that a planning permission has been obtained for residential conversion with the support of the tenant in return for a promise from the landlord that never comes to fruition. Where this happens a landlord may be estopped from enforcing a Case B notice on the basis that it would be unconscionable for the landlord to obtain possession in such circumstances.

Agreed surrenders of part

With all these potential pitfalls, it is obviously in the landlord's interest if he can secure an early agreed surrender from the tenant through without prejudice negotiations.

When agreeing a surrender of part, it is important to remember that a developer may also require rights outside the planning red line (for example, drainage, cables, buffer zones etc).
The surrender needs to make provision for these, so that you do not have to go back to the tenant for more later. Sometimes it will be helpful to surrender back more land than is required, on the basis that you can always relet or licence the balance to the tenant if it is not needed.
A surrender of part will often grant (temporary) rights over the surrendered land to the tenant, as well as rights for the surrendered land over the retained adjoining tenancy.

Of course there will be a price: the tenant will usually want something equivalent to the statutory compensation available pursuant to a Case B notice to quit plus a premium. It is usually helpful to be very clear between the parties how an agreed sum breaks down into its different elements (e.g. entitlements, compensation for improvements, premium etc), as the different elements have different tax consequences for both landlord and tenant.
Very often it is useful to ensure that a tenant has thought about the surrender from a tax perspective from the outset, so that this issue does not upset your carefully constructed surrender deal at the last minute.

James Maxwell

VIII Flood Re Again

George Clooney's Berkshire mansion may have been the most high-profile property to feel the effects of the rising Thames in January, but the recent devastation caused by storms Desmond and Eva has once again blighted the lives of thousands. A particular worry for affected householders is the availability of competitively-priced household insurance. Flood Re, the long-awaited flood reinsurance scheme, seeks to put those minds at rest.

What is it and what will it do?

Flood Re, a not-for-profit scheme, finally became operational on 4 April 2016. It follows a Memorandum of Understanding between the government and the Association of British Insurers and takes its powers from the Water Act 2014. The scheme will offer financial backing to commercial insurers by allowing them to purchase subsidised reinsurance against flood risk, enabling them to transfer the flood risk element of home insurance policies to Flood Re. It is designed to be in place for the next 23 years.

This is not a new idea. The scheme has been in the pipeline since a successor was required for the Flood Insurance Statement of Principles, established in 2000 and deemed unsustainable by the time of its expiration in 2013. Unlike the Statement of Principles, Flood Re will be available to insurers' new customers as well as existing ones.

The scheme will be funded by insurance companies paying capped premiums to the scheme based on the properties' council tax bands and policy excesses. The insurance industry is also to pay an annual statutory levy, expected to be £180m for the first five years of the scheme, which may or may not be recovered from householders.

Who will be covered?

Flood Re's stated aim is to cover the estimated 350,000 UK households at risk of flooding that would otherwise struggle to find affordable home insurance policies. However, the following properties will not be covered:

- residential property built on or after 1 January 2009;
- commercial property;
- mixed-use property;
- purpose-built blocks of flats;
- buy-to-let properties where the landlord arranges the buildings insurance; and
- most houses converted into flats.

Eligibility rests on whether the property in question comprises 'household premises'. This basically means a single dwelling in private residential use, or a building containing two or three private residential units.

The household premises must also be in a domestic council tax band, be insured in the name of an individual and that policy-holder or their immediate family must live in the dwelling for all or some of the time, or leave the dwelling unoccupied.

So, a bed and breakfast whose owner pays domestic council tax may be eligible, whereas one who pays business rates will not.
If farmhouse dwellings and cottages are included in a commercial policy, the dwelling elements may be eligible so long as they can be split from the commercial policy. However, farm outbuildings not used for residential purposes (and which do not form part of and are not enjoyed with the residential unit) cannot be split off in this way.

Commercial property is excluded on the basis that there are sufficient competitively priced policies already available in the market.

The majority of flats are not eligible. Even if tenants hold a long lease, have paid a premium and occupy as their home, so long as the building insurance is held in the name of, say, a landlord or management company, then they are not eligible. Converted houses with no more than three flats may be eligible so long as the policy is taken out by one of the freeholders who either lives there or leaves their unit empty.

The 2009 cut-off for new residential property has been retained from the original Statement of Principles. Its purpose is to encourage developers and planning authorities to make responsible planning decisions and to avoid building on flood-risk areas. However, if a pre-2009 building is demolished and rebuilt, that property is still eligible.

Initially, properties within Council Tax Bands H and I were also to be excluded.
This controversial decision was made by Ministers on the basis that lower income households should not be subsidising those of a higher income. That position has changed and these properties will now be included in the scheme. Many will consider this fairer, given the universal devastation that flooding can cause, especially those who are asset rich but cash poor.

What does this mean for landowners?

Flood Re should mean that those living in flood-risk areas will have a larger selection of affordably-priced home insurance policies to choose from. The benefits of low premiums and excesses for insurers should be passed on to their customers, although as the insurers will remain responsible for the policy pricing, whether this will be the case remains to be seen.
Speculation has also arisen surrounding the insurance company levy. Many believe it will be funded by an additional cost to every policy holder, estimated at roughly £10.50, regardless of whether they are eligible for Flood Re cover or not.

The process of purchasing and claiming on insurance will not change; customers will deal solely with their insurer and have no direct contact with Flood Re.

Owners and prospective buyers should be mindful of the exclusions from the scheme and consider whether their proposed property is at risk of flooding and, if so, whether it falls within Flood Re. Those not covered by the scheme will be subject to market-driven premiums and excesses. Some property values may be affected, as buyers may offer less for property which cannot be covered. Surveyors are being encouraged to take flood risk into account in their valuations, with the RICS issuing new guidance for residential valuers last year.

> “Flood Re should mean that those living in flood-risk areas will have a larger selection of affordably-priced home insurance policies to choose from.”

Claudia Levine

IX Protecting Your Brand when Working with Others

By design or accident, and to varying degrees, most rural estates will have their own 'brand'. In the strict legal sense, the 'brand' will be a combination of its name, the associated goodwill and reputation and any brand 'get-up' (visual artistic elements, such as a logo and marketing/promotional material).

These intangible elements are protected via a range of legal rights: principally common law rights which protect goodwill (passing-off) and reputation (libel, and malicious falsehood) as well as statutory rights such as registered trade mark rights (where marks are registered), and copyright.

The more one can do to promote one's brand, the stronger and more valuable it will become. Of course, the stronger the brand and the more it is used, the more important it becomes to protect it.

Working with others

Collaborating with others and becoming part of a joint promotional activity (for example to celebrate a particular location, historical figure or the anniversary of a key event) can be a way to boost an estate's brand while relying on the economies of scale that collaborations can bring.

When seeking to commercialise a property's brand or to expand its reputation by working with third parties, it is important that these rights are clearly defined and protected. Property owners will also need to be clear on the scope of any licence granted in respect of the constituent elements of the property's brand and related intellectual property rights.

It is important that a contract is put in place which clearly documents the rights and responsibilities of the other party or parties. If you are contracting on another party's standard terms, as well you might in a large-scale collaborative project, it is important to read and assess the proposed contract carefully to ensure that you are not giving away more rights than is intended or appropriate in the circumstances.

Helpful hints

- **Use of your property's name and logo:** whether your property's name (and logo, if any) is a registered trade mark or not, it is sensible to include controls over any other party's use of your name and logo, especially when that other party is suggesting an association or connection with your property. You will probably want the other party's use of your name and logo to come to an end when the collaborative programme ends (if this is not practical or possible, ensure that any subsequent use is limited or controlled).
- **Press releases / publicity:** having approval rights over any public statement or press release relating to your involvement in the collaboration is a good way to ensure that your property, and its involvement in the collaboration, is publicised correctly, in a way that builds on and positively reflects your brand.

- **Use of your pre-existing copyright:** if you are licensing third parties to use any copyright material owned by you, be careful that the licence is limited in scope. Again, you will probably want the licence to expire at the end of the collaboration.
- **Copyright created in the course of the collaboration:** be careful when jointly producing copyrighted material in the course of the collaboration – the contract should be clear on which party owns the copyright, and the scope of the other party's ability to use it. Avoid jointly owning the copyright if you can help it, as co-ownership can be fraught with practical and legal complexities.
- **Consider IP warranties and indemnities:** when one party to a contract is granting the other party or parties a licence to use its intellectual property rights, it is quite standard for the parties receiving the licence to ask for a warranty that the other party owns or is entitled to licence the IP in the manner anticipated in the agreement. This can also be backed up with an indemnity in the event that the proposed use of the IP provided amounts to an infringement of a third party's IP rights. While these sorts of provisions can be helpful if you are the party relying on them, just remember that if you are the party granting such warranties and indemnities you will need to be sure that you are able to licence the IP in the manner stated in the contract.

> “Collaborating with others and becoming part of a joint promotional activity can be a way to boost an estate's brand while relying on the economies of scale that collaborations can bring.”

Jane Randell

X Health and Safety on Rural Estates

Discussions concerning health and safety legislation often prompt anecdotal tales of window cleaners prevented from using ladders, maypoles deemed unsafe or playground games of conkers banned by overzealous teachers. Given the nature of the legislation and regulations which govern this area it is perhaps understandable why often considered neither accessible nor pragmatic.

Over recent years the Health and Safety Executive (**HSE**) has done much to dispel this perception and has encouraged people and corporate entities to take sensible, proportionate steps to ensure that risks are minimised within the work place. Here we consider some of the practical steps that can be taken to minimise the risk of accidents (and prosecution) on rural estates.

Prevention

An employer is obliged to comply with the Health and Safety at Work etc Act 1974 and the various ancillary regulations (e.g. Working at Height Regulations 2005, Lifting Operations and Lifting Equipment Regulations 1998, and the Control of Substances Hazardous to Health Regulations 2002 (to name but few)).

While most estates already have individuals with defined responsibilities and with considerable expertise in health and safety issues, it is worth running through some practical steps that are sometimes overlooked (the list below is by no means exhaustive).

- **Defined Areas of Responsibility** - Ensure the job description of the individual(s) with responsibility for health and safety is thorough, written, regularly reviewed and updated, and read and understood by the individual(s) in question.

- **Risk Assessments** - Under Regulation 3 of the Management of Health and Safety at Work Regulations 1999 there is a requirement to make **suitable** and **sufficient** risk assessments. Ensure that the estate, as a whole, is regularly reviewed and that the appropriate risk assessments are carried out to a sufficient level of detail.
  Take particular care to ensure that these assessments are reviewed and updated at key junctures (ie when further land/premises are acquired/constructed).

- **Record Keeping** - Ensure risk assessments and training logs are kept in a central location and that the record system is understood by a number of different people. The dates of key maintenance tasks should be identified and a mechanism put in place to record that the necessary inspection has been completed.

- **Training and Provision of Equipment** - Ensure that staff required to fulfil specific functions are fully trained to enable them to perform their roles safely and that such training is recorded. Specific, tailored training should be given in relation to machinery/ chemicals and the necessary safety equipment should be provided.
  Safety equipment should be sufficient, well maintained and readily available; it should be used as a matter of course by all relevant employees.

- **Delegation** - A company may delegate its health and safety responsibilities to an external consultant/entity and there are a number of specialist companies providing a 'comprehensive' health and safety service (often at significant cost). While there is nothing wrong with contracting out responsibility in this way (indeed it is often advisable) it is important to realise that the estate will remain liable should there be any breach of health and safety law. It is the estate's responsibility to ensure that it is satisfied regarding the experience of the third party and that the scope of the retainer is comprehensive. The relationship with the consultancy should be actively managed and an estate should ensure that the relevant documents are delivered in compliance with the retainer.

Reaction

In even the most well-managed estate accidents can happen. It is therefore important to put in place a detailed incident response plan setting out responsibilities should a serious accident occur. Any action plan should contain contingencies in case the individual responsible for implementing the plan is the individual that has been injured. All relevant staff should be familiar with this plan. Among other things, the action plan should contain the following.

Practical Steps

- Ensure that the ambulance service is called promptly. Consider whether the police should be called (in instances when there may be a fatality) and/or the fire brigade (in instances when someone may be trapped).
- Notify the family/next of kin (to make this process smooth ensure that the information is centrally recorded and easily accessible).
- As far as possible, preserve the scene of the accident.
- Take any necessary steps to make the area safe and to minimise the chance of a repeat occurrence (e.g. if an accident is caused by a piece of equipment, take steps to ensure no one else can use that equipment until it has been deemed safe by an expert).
- Consider contacting a PR agency if the incident may generate public interest. Your legal advisers should be able to assist in this regard.

Legal and Regulatory Requirements

- Call the insurers.
- Call your legal advisers.
- If there has been a fatality, an injury which resulted in medical care at hospital, 'specified injuries' (including breaks and factures) or someone has been unable to work for seven days as a result of the incident, it is necessary to make a RIDDOR report (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013). Online submission is strongly encouraged. There is a ten-day period from the date of the incident to complete this report (however, it should be completed as soon as possible). Note that the report includes a requirement to provide details of the steps taken to minimise any recurrence of the accident; ensure this is given thought (and acted upon) before the report is filed.

- Preserve evidence and take steps to secure further evidence – speak to the employees around at the time, ask them to write their account of the incident. Discuss how best to record the contemporaneous accounts with your legal advisers – materials generated by the estate may be disclosable to the HSE on any investigation; correspondence between an estate and its legal advisers will be protected by litigation/legal advice privilege.
- Consider obtaining separate legal representation for your employees – your usual legal advisers will not be able to represent both employee and employer as a conflict may arise.

In the event of prosecution

Should the HSE prosecute, the estate will receive a notice of contravention which will detail the regulations the HSE considers the estate has failed to comply with.

The estate will need to consider carefully its next move, often with both its solicitors and its insurers. Many health and safety offences are strict liability, meaning that there may be little option but to enter a guilty plea and then negotiate the content of the schedule which will set out the applicable mitigating and aggravating circumstances. This schedule known as the 'Friskies Schedule' will be relevant when the Court considers the level of fine and whether to impose a custodial sentence, although quite how this schedule will interact with the new sentencing guidelines which came into force on 1 February is as yet unknown.

Jo Ord

> “While there is nothing wrong with contracting out responsibility… it is important to realise that the estate will remain liable should there be any breach of health and safety law.”

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