FARRER&Co

Rural Estates Newsletter

Winter 2016

Editorial

950 years ago the Norman Conquest joined England to the continent (BrEntry, if you like). Amongst other things, the Conquest brought Feudalism, a legal system based on doctrines of tenures and estates which formed the basis of land law for centuries. The pace of legal change was so glacially slow that, until the reforms of 1926, twentieth century land lawyers dealt day-to-day with a bafflingly complex system created 800 years before.

It is tempting to hope that the promised Great Repeal Bill (of the European Communities Act 1972) might result in simplification of our law today, but in the short term such an Act is likely to ensure the continuity of existing regulatory frameworks. Change will be slow. Besides, we have always been quick to blame Brussels.
Our own legislators will continue to generate law in vast quantities: there will always be tax (Rhoddy Voremberg writes on the extension of IHT to UK property held in overseas structures), divorce (Nick Bennett on the division of non-matrimonial property) and fly-tipping (Patrick Hammond considers the latest local authority powers).

This year is also the 500th anniversary of the publication of Sir Thomas More's *Utopia*. A lawyer himself, here is how More imagined the legal system in the fantasy island of Utopia (or "No Place"):

They have but few laws, and such is their constitution that they need not many. They very much condemn other nations, whose laws, together with the commentaries on them, swell up to so many volumes; for they think it an unreasonable thing to oblige men to obey a body of laws that are both of such a bulk, and so dark as not to be read and understood by every one of the subjects.

They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters…

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/**

IHT for Non-dom Estate Owners

As part of a package of reforms that have the aim of extending the scope of UK tax to non-UK domiciled individuals, the government has provided further details of its proposal to extend the scope of inheritance tax (**IHT**) to UK residential property held in offshore structures from 6 April 2017.

As well as adding flesh to the bones, the consultation paper published on 19 August 2016 has put an end to the suggestion of interim tax reliefs to allow properties to be removed from structures. All this means that a non-domiciled individual who owns an estate in the UK with residential property through an offshore structure will need to consider whether it is worthwhile keeping the property in a company. Many clients should also consider, possibly for the first time, the availability of any other reliefs and exemptions that could reduce the IHT exposure in relation to the property.

New tax changes

Currently, non-domiciled individuals are subject to IHT in relation to their UK assets only, so UK real estate held directly by a non-dom is caught by IHT. It has been very common in these situations, especially prior to the introduction of the annual tax on enveloped dwellings (**ATED**), for UK property to be held by an offshore company. This means that instead of owning property situated in the UK, the non-domiciled individual owns shares in a foreign company and these currently fall outside of the scope of UK IHT.

It has been estimated that the value of UK real estate held by these structures amounts to at least £170 billion. The government clearly sees this as ripe for the picking; the new rules seek to ensure that more is taxed in the UK, and it is residential property that is the focus of the new tax regime.

The changes will be relevant to non-UK domiciled individuals who own shares in a non-UK company that holds UK residential property or who have settled such property on offshore trusts. In the not uncommon situation where an agricultural estate which includes a range of dwellings is held in this way, it is now essential for the structure to be reviewed.

A broad summary of the new rules is as follows:

1. The amount exposed to IHT will be the value of the company shares referable to the underlying value of the UK residential property. The consultation paper uses the example of a property worth £1 million held by a company whose shares are worth £950,000. In those circumstances, only the value of the shares (£950,000) is exposed to IHT and not the full market value of the underlying residential property.
   Clearly, valuations of residential property comprised in an estate will be crucial as one can foresee complications establishing the value of the company's shares attributable to the property in question.

2. IHT in relation to the residential property will fall due if certain "chargeable events" take place after 6 April 2017. Chargeable events include:

   - the death of a shareholder (40% IHT exposure); and
   - the death of a shareholder within seven years of a gift of company shares (maximum 40% exposure, subject to taper relief if the shareholder survived more than three years from the date of the gift).

   For Trustee shareholders, IHT will be triggered on:

   - each ten year anniversary of the settlement (maximum 6% IHT exposure);
   - when company shares are distributed from the trust (calculated by reference to how many quarters have elapsed since the last ten year anniversary, rising by 0.15% per quarter); and
   - on the settlor's death if he/she was not excluded from the trust (in which case the property will be included in his/her estate on death and subject to IHT at a rate of 40%).

3. Borrowing relating exclusively to the property should in principle be deductible for IHT purposes. However, borrowing arrangements should be reviewed as there are many traps and pitfalls for the unwary (for example the consultation paper states that borrowing between connected parties will be disregarded but provides no further details).

4. An IHT return will need to be submitted wherever an IHT charge arises (and in some cases where there is no IHT actually payable but a reporting obligation arises). Responsibility for paying the tax will fall in the first instance on the trustees or the executors of the deceased shareholder's estate (failing which, the heirs) as appropriate. In addition, the UK tax authorities will be given extended powers to ensure that UK residential property cannot be sold until any outstanding IHT has been paid and a new liability to tax will be imposed on legal owners of properties (including directors). Professional directors will therefore need to have a clear understanding of their obligations and exposure to tax under the new law.

Unwinding company structures

This newsletter has previously highlighted the implications of ATED since it was introduced in 2013. Many landed estates holding residential property through companies have not had to pay ATED where residential property is let on a commercial basis with a view to a profit and if the main house is a farmhouse. For many of those not able to benefit from these reliefs, ATED was considered a price worth paying in the light of the continued IHT protection afforded by a company structure. Non-domiciled estate owners will now need to reconsider this in light of the new rules.

Even where ATED is not currently payable, non-domiciled individuals will need to weigh up the benefits of holding an estate through an offshore company against the lack of IHT protection under the new rules and the ongoing costs of this structure and should examine whether most or all of the value of the estate can in fact be made to qualify for 100% Agricultural or Business Property relief from IHT if owned directly.

Unwinding an existing structure may be sensible in the long run, but the initial tax costs should be considered carefully. De-enveloping may result in the following tax charges:

1. Capital gains tax (**CGT**) on a disposal of the property. This will be either "ATED-related CGT" or the non-resident CGT charge (or a combination of the two). To the extent that the company is not subject to CGT on any element of the gain, UK resident shareholders may be exposed to CGT under the anti-avoidance legislation attributing certain company gains to shareholders.

2. Stamp duty land tax (**SDLT**). If there is outstanding borrowing, a distribution of the property subject to the debt may give rise to an SDLT charge (up to 12% on the amount of the outstanding debt).

If the decision is made to remove the property from the company, then the timing needs to be considered carefully, not least because there will be formalities and certain procedures required in the offshore jurisdiction to liquidate the company.

> "All this means that a non-domiciled individual who owns an estate in the UK with residential property through an offshore structure will need to consider whether it is worthwhile keeping the property in a company."

Rhoddy Voremberg

Fly-tipping: Offences, Penalties and Prevention

Fly-tipping is an ever growing problem in rural areas. Not only is it an unsightly nuisance, it can cause serious pollution and be a hazard to human health and that of wildlife and livestock. It can also be very expensive to remedy. There are believed to be nearly a million incidents of fly-tipping each year and it is estimated to cost landowners and local authorities £50-150 million per annum to clean up. The issue is growing as landfill tax increases and the onerous environmental permitting regime makes illegal dumping more attractive.

Fly-tipping can be defined as the illegal and uncontrolled disposal of waste (contrary to section 33 of the Environmental Protection Act 1990 (EPA 1990)). Anything can be fly-tipped but, commonly it is items which are expensive, or difficult, to dispose of legally, such as old domestic appliances, household goods or hazardous items such as asbestos or chemicals.

Offences and penalties

The principal fly-tipping offence is set out in section 33(1) of the EPA 1990, which makes it illegal to either deposit waste or to knowingly permit any such waste to be disposed of, except in accordance with an Environmental Permit obtained under the Environmental Permitting Regimes 2010 (EPR 2010). The penalties for each offence include substantial fines and imprisonment and the court might also require the offender to pay for the costs of enforcement and of removing the fly-tipped material. Vehicles used in connection with the fly-tipping may also be confiscated. The local authorities will continue to prosecute larger-scale or repeat offenders, but in May of this year new regulations (the Unauthorised Deposit of Waste (Fixed Penalties) Regulations 2016) came into force, which amend the EPA 1990, to allow local authorities in England to issue fixed penalty notices (FPNs) for small scale fly-tipping offences and charge a penalty of between £150 and £400. It is hoped that the ability to issue FPNs will act as a deterrent to fly-tipping while also reducing the cost of pursuing convictions in the courts.

The problem

This of course pre-supposes the guilty party can be found, whereas it is common for a fly-tipper to dump waste on private land and for the identity of the fly-tipper to be unknown. If this happens, the Local Authority can take action under either:

- section 6 of the Refuse Disposal (Amenity) Act 1978, where they can remove abandoned waste (other than vehicles) after serving notice on any occupier and recover the removal and disposal costs from the person who deposited the waste; or
- section 34 of the Public Health Act 1961, whereby the Local Authority can deal with any rubbish which is seriously detrimental to the ‘amenity of the neighbourhood’ (removal can take place 28 days after serving notice on the landowner but there is no ability to recover costs).

However, in practice, often the liability to dispose of the fly-tipped material and to deal with any resulting contamination will fall to the landowner if the identity of the fly-tipper cannot be ascertained. The landowner can, and should, report the waste to the local authority; they have discretion to choose whether to investigate, but they have no obligation to clear the waste and are unlikely to do so free of charge.
The Environment Agency will investigate the most significant incidents and might also clear the waste if the environment, or human health, is threatened.

Landlords and tenants

Landlords can also find themselves responsible for fly-tipping offences caused by their tenants. If a tenant has illegally deposited waste on the property, the local authority can serve a notice on the landlord as the occupier of land if the tenant has vacated. If the landlord knew that their tenant was unlawfully depositing or storing waste and the Landlord took no action, they could be guilty of the ‘knowing permitter’ offence under s.33 of the EPA 1990. Similarly, landowners should be particularly careful when permitting waste disposal companies to deposit waste on their land, perhaps to help level uneven ground; if the waste is illegally dumped, in breach of the EPR 2010, the landowner could be criminally liable as well as obliged to remove the illegally dumped waste.

Practical prevention

Catching fly-tippers is notoriously difficult, as the tipping is generally carried out in secluded areas, away from watchful eyes and the waste itself is often not traceable. Preventing fly-tipping will always be a challenge, but the risk can be mitigated by installing gates and barriers to prevent access to susceptible areas.
Erecting signs and CCTV can also help deter fly-tipping. Fly-tipping is often a self-perpetuating problem; if fly-tippers get away with it once, they are likely to try again at the same place, so clearing waste quickly may assist. Analysis of the waste itself may also give up clues as to its source: discarded correspondence or invoices may help identify the offender and can assist in obtaining a successful conviction.

“Catching fly-tippers is notoriously difficult, as the tipping is generally carried out in secluded areas, away from watchful eyes and the waste itself is often not traceable.”

Patrick Hammond

Alternative Sources of Long-Term Finance for Rural Estates: Private Placements

Financing for rural estates has traditionally taken the form of loan facilities provided by a bank and secured against property in the form of a legal mortgage. The onset of the financial crisis triggered a significant reduction in the overall number and value of mortgages and many estates continue to find that banks are either less willing to lend or unable to lend in the larger sums and on the longer maturities desired by estates. As a result, many estates are increasingly looking to alternative sources of capital to meet their long-term financing requirements. One alternative source of funding which has proved attractive in recent years is the private placement market.

1. Why alternative sources of long-term finance?

There are several factors which have impaired the traditional use of the bank loan market as a means of raising long-term finance and encouraged borrowers to look for alternatives:-

- New capital and regulatory restrictions on banks introduced in the wake of the financial crisis mean that they are typically less willing than before to lend substantial sums on the long-term basis which borrowers are seeking.

- Interest rates continue to remain at historically low levels such that, even where banks are prepared to lend, they are not prepared to do so on a fixed interest rate. Instead, they prefer to lend on shorter maturities (providing an opportunity for them to reset margins) and/or to offer floating interest rates (which can expose borrowers to interest rate rises, which can be mitigated by hedging arrangements but at a cost and on fairly bank-friendly terms).

- The ongoing obligations and financial covenants under bank loan facilities have become more onerous in recent years, whereas alternative funders are more willing to offer less stringent covenant packages.

- There has been an accelerated growth in the number of alternative non-bank debt capital investors in the market. These are typically insurers, pension providers, and debt funds, who have cash (but are receiving low interest rates on deposits), who may have long-term fixed liabilities for which they will require longer term investments, and who have the internal infrastructure to enable them to provide the long-term debt funding required by borrowers.

- Depending on the financial strength and credit-worthiness of the estate, it may be possible to obtain unsecured debt. This clearly contrasts with the bank loan market where security over land and other assets will usually be a fundamental condition to the provision of any loan facilities.

2. What is a private placement?

A private placement is a private debt arrangement (often in the form of bonds or notes) between a borrower and a non-bank lender or a small group of non-bank lenders.

Historically a form of financing much used in the United States, private placements are increasingly being used in Europe as a means of raising alternative finance and diversifying borrower capital structures.

Whilst UK borrowers can look to US investors directly for this type of funding (particularly where large sums of liquidity are being sought), many

UK pension funds and insurance companies are now offering this type of finance as a means of bridging the funding gap created by the recent reduction in available bank funding.

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

The commercial terms of the private placement will be crucial in ensuring both a positive uptake from the investment community and managing the estate's risk over the life of the private placement.

It would be common for an estate to appoint an experienced financial adviser to provide guidance on the appropriate commercial terms for the private placement and to facilitate discussions between the estate and potential investors.

Key upfront matters for estate management teams to consider will include the following:-

Quantum

How much is the estate looking to raise? Generally the private placement market will only be open to those estates looking to raise a minimum of £10 million.

Tenor

One of the key attractions of private placements is that their maturity tends to be longer than ordinary bank loan debt. A term of anywhere between 10 and 30 years would be normal (although it is possible for maturities to extend beyond even 30 years). For estates this can enable funding to be procured for large-scale, long-term capital projects (e.g. new developments, new estate activities, new visitor attractions etc.) and can also enable estates to align their funding needs with the maturity of trusts affecting their landowning families.

Repayment

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

Are the estate's finances, both in terms of revenue streams (e.g. from rental properties, commercial estates activities, investments) and balance sheet, robust enough to sustain payments of interest over the life of the debt as well as repayment of capital at the end of the private placement's life?

Interest

The rate of interest that the estate might target and how often interest will be paid will be important elements to consider.

Interest rates in private placements will generally be fixed rather than floating, although interest rates tend to be higher than on traditional bank financing to reflect the longer tenor of the debt.

Make-whole provisions

Are estates willing to be locked in to the private placement for its entire term?

Private placements are attractive because of the length of maturity available. However, investors are also looking for that long-term investment; in order to protect their investment position they will very commonly include prepayment fees on an early repayment of the debt (sometimes termed "make-whole" provisions) which ensure they receive their expected rate of return on the full term of the debt.

A "make-whole" amount is typically calculated by reference to the discounted value of the interest which would otherwise have been payable on the prepaid amount.

The inclusion of make-whole provisions can make early repayment of a private placement costly and so estates should consider carefully whether they are content for the debt to remain outstanding to scheduled maturity.

Where an investor is from the US and has been prepared to make sterling available (usually by itself swapping US dollars for sterling over the period of the private placement), such an investor will also seek prepayment protection by requiring the borrower to indemnify it for any costs in breaking its original currency swap.

Financial covenants

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

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

Information undertakings

Another important matter will be the information regarding its financial performance and activities the estate will be required to provide to investors and the frequency with which such information will need to be provided.

Investors will expect audited annual financial statements for the estate and possibly also unaudited semi-annual financial statements. Any financials will need to be prepared using generally accepted accounting principles and consistently with the original financial statements provided at the outset of the transaction.

4. Documentation

The key documentation required for a private placement will generally comprise the following:-

- Confidentiality Agreement: this will establish obligations as to confidential information between the estate and the investors (and is required because of the absence of the common law duty of confidentiality owed by bankers to borrowers).
- Term Sheet: this will summarise the key commercial terms of the private placements and pricing.
- Note Purchase Agreement: this is the equivalent of the facility agreement on a more traditional bank financing and will contain all the terms governing the placement. In general the terms of the note purchase agreement will be less restrictive than the terms of a facility agreement. For estates looking to diversify capital structures and have bank debt sitting alongside a private placement, it is usually possible to align the provisions of both to ensure consistency.

One of the previous cited barriers to the growth of the private placement in the UK was the lack of standard documentation in the market. This has been partially overcome following the development by the Loan Market Association (a body which represents the interests of banks and other financial institutions in the debt markets) of a suite of standard documents for use on private placement transactions.

> "…many UK pension funds and insurance companies are now offering this type of finance as a means of bridging the funding gap created by the recent reduction in available bank funding…"

However, this documentation is unlikely to be used where the investors are based in the US. US investors will expect the form of note purchase agreement to be in line with the model form produced by the American College of Investment Counsel, albeit that investors will accept that the agreement is governed by English rather than US law.

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

5. Private placements – here to stay?

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

Marc Glancy

IV Scared of Heights?

Are you scared of heights? Well, many are, and understandably so, as falls from height are one of the main causes of workplace fatalities and major injuries. The responsibilities imposed on employers by the Health and Safety at Work Act 1974 (HSWA) and the Working at Height Regulations 2005 (the Regulations), and the necessity of working at heights in maintaining historic properties, mean that heights concern not just those on top of ladders but also those responsible for their safety.

Recent Cases

By way of context, we should start by considering the Court's approach to employers who fail to comply with the HSWA and the Regulations.
In February 2015, at the Grade II listed Newnum House, which is part of Brentwood School, Mr Chandler sustained serious injuries after falling 2.6 meters from the roof. On investigating, the Health and Safety Executive (HSE) found that, whilst safety procedures were in place and the employer had produced a safety handbook which covered working from height, these documents were routinely ignored as the culture was one of "getting the job done". The School was prosecuted and, in August of this year, fined £40,000 plus costs.

In 2015 Sir Robert McAlpine Limited and London Fenestration Trades Limited (a roofing contractor, to whom McAlpine had delegated work) were both fined £200,000 plus costs for breaches of the HSWA and the Regulations, following a fatal accident when a self-employed bricklayer fell through a hole created in a glass canopy by previous maintenance works. It was found that the canopy was not a safe working platform and the companies were criticised for the lack of edge protection.

The second case illustrates a point that was also highlighted by the prosecution of a farmer and a building contractor in Yorkshire in 2011. In that case a contractor fell when repairing a barn roof and sustained permanent injuries. Both the farmer and the contractor were fined, emphasising that an employer with responsibility for selecting contractors is also responsible for ensuring the work is completed safely and in compliance with the Regulations.

The Regulations

In this context the term "working from height" is any work undertaken where there is the risk of falling to a lower level, whether from a roof, a ladder or a raised platform. It can also include work at ground level over an opening in the floor or work on fragile surfaces over a void.
The distances involved do not need to be great as injuries can be sustained should an individual fall a relatively short distance.

Under the Regulations, employers must ensure that work is properly planned, supervised and carried out by competent people with the skills, knowledge and experience to do the job. Equipment should be appropriate and well maintained. Should an accident happen, employers will be expected to produce evidence that these requirements have been met, so risk assessments must be conducted and recorded along with a plan for the works. As illustrated by the Brentwood School case, it is not sufficient for this exercise to be carried out by a manager with HSE responsibilities and for the fruits of their labour to sit, unread and unheeded, in a file in an office: the procedures and policies should be understood and put into practice by staff at all levels.

The Regulations advise a three-tier approach to considering working from height:

1. avoid working at height whenever possible;
2. if working at height cannot be avoided, take all reasonable steps to prevent a fall; and
3. where falls cannot be prevented, minimise the distance and consequences of any fall.

These core principles are worth examining in further detail.

Avoid

In a 2010 Court of Appeal case, Fountain Motors Limited was criticised after an employee fell when retrieving bumpers stored in a loft space which was accessible only by a ladder. Although the employee had ignored the health and safety procedures put in place by the employer, the Court of Appeal found that the Regulations should be the starting point, not the employee's actions. The Court held that the employer had breached the Regulations by failing to ensure that work was not carried out at height where reasonably practicable; the fact that the employee had failed to comply with the employer's health and safety procedures was considered to be contributory negligence.

Methods to avoid working at height include storing items at ground level; using tools with extended handles; introducing fittings that can be lowered to clean/maintain; and performing as much assembly work as possible at ground level.

Prevent

Where work at height cannot be avoided, the employer's next task is to ascertain how falls can be prevented. Considerations here will include whether a protective guard rail can be used around the perimeter of a relevant area, what equipment can be utilised to prevent a fall and whether it may be appropriate to use harnesses.

Minimise

After it has been established that work at height cannot be avoided, and all steps to prevent falls have been taken, the employer must take sufficient measures to minimise the distance and/or consequences of the fall. This may include introducing soft landing systems (eg air bags/matting/safety netting) or fall-arrest systems using a high anchor point.

What about Ladders?

There is a myth that work with ladders is forbidden under the Regulations, or else it is only permitted after an intensive training regime conducted by an independent expert. This is not the case. In many instances, usually those involving working at height infrequently for periods of less than half an hour, ladders offer a sensible, practical and safe way of completing work at height. However, an employer should still follow the procedure set out above and give thought to the equipment and the manner in which the tasks are to be performed.

Particular points to consider are:-

- Is the ladder well maintained? There should not be any broken rungs, the locking mechanism should be fully operational and the stiles parallel.
- Is the ground suitable for work from a ladder? Is the ground level and flat?
- Has the individual performing the work undertaken the necessary training? This need not be a formal course: on the job training from someone with appropriate expertise is often sufficient.
- Overreaching should be avoided, and staff should clearly be told this. The waistband of the worker should remain within the stiles of the ladder at all times.

Further Reading

The British Safety Council offers excellent guidance in its 2014 guide to working at heights (available online), as does the HSE, which has a dedicated "Working at Heights" section on its website. This includes useful documents that can be downloaded and used when briefing staff who work at height.

Jo Ord

> "…it is not sufficient for this exercise to be carried out by a manager with HSE responsibilities and for the fruits of their labour to sit, unread and unheeded, in a file in an office…"

V Stodday Land Ltd v Pye

"Although the property may have changed hands physically, and the deeds been executed, the new owner really only has an equitable interest…"

Notices to quit under the Agricultural Holdings Act 1986 (the Act) are increasingly prepared and served by land agents rather than solicitors. This recent case provides a salutary reminder to all property practitioners of the need to take care to identify correctly the legal owner of the holding.

Mr Pye had a periodic agricultural tenancy under the Act. In 2013, Stodday Land Ltd (Stodday), the registered proprietor of the freehold interest in the holding, sold part of it to Ripway Properties Ltd (Ripway). Although the sale completed on 19 June 2013, it was not registered at the Land Registry until 16 July 2013. On 1 July 2013, two notices to quit were served on Mr Pye: one from Ripway in relation to the part it owned and one from Stodday in relation to the rest of the holding. Mr Pye contested these notices in court, claiming that they were not valid.

The court held that:

- Ripway's notice was not valid, because although the sale to it had completed, it had not been registered at the Land Registry so Ripway was not the legal owner (more on which below); and
- therefore Stodday's notice was also invalid, because it only related to part of the holding and, at common law, notices to quit can only be given in relation to the whole of the holding.

The reason that Ripway was not the right person to serve the notice relates to what is known as the "registration gap" – the period between completion and registration of a transaction. The gap is not easy to navigate and there is much case law on what the new owner can and cannot do during this time. Although the property may have changed hands physically, and the deeds been executed, the new owner really only has an equitable interest – effectively as a beneficiary under a trust – and the seller remains the legal owner (or trustee).

Whilst this case concerns land that had just been purchased, similar issues can arise in relation to land held in trust where the Land Register has not been kept up to date on change of trustees, or where the Register is for some other reason out of kilter with the person or entity that is treated as the landlord for day-to-day purposes in the estate office.

Shona Ferguson

VI The Residence Nil Rate Band

The residence nil rate band (RNRB) is the latest change to our already complex inheritance tax (IHT) regime. Available from April next year, it provides another tool for estate-planning. However, this new provision will leave losers as well as winners, particularly in the agricultural context.

The principle behind the change is that people ought to be able to leave a family home to their children without being penalised for the property price inflation of the last twenty years. It is aimed at those estates where the family home is the main asset, in the hope that they will be excluded from IHT altogether. This is obviously more complicated in an agricultural context where home and business are often inseparable.

What is the RNRB?

The RNRB is an additional IHT-free allowance in respect of a residential property that is "closely inherited" on death. It will apply to any deaths after 6 April 2017. There will be a sliding scale of reliefs starting at £100,000 in 2017/18 and growing to £175,000 in 2020/21. The RNRB will be index-linked thereafter.

Like the standard nil-rate band, the RNRB is transferable between spouses. If a surviving spouse dies after 6 April 2017 their deceased spouse's RNRB (assessed as £100,000) applies to the estate as well. The surviving spouse need not have owned the residence before the deceased spouse's death.

The interaction between the two NRBs means that estates to which it applies will have an effective threshold of £500,000 at 0 per cent IHT for individuals and £1m for married couples and civil partners.

Qualifying Residential Interest (QRI)

In order to claim the RNRB, the deceased must have had a QRI in the relevant property.
This means that they were the main occupant. The property does not have to have been the deceased's main residence, nor do they have to have occupied it as a residence throughout their ownership. It is sufficient that the property was occupied as the deceased's residence at the time of death or that it is comprised in the deceased's estate, even if they were not living there at the time of death.

Of particular interest from a rural perspective is the rule that a QRI includes any land "occupied and enjoyed [with a dwelling] as its garden or grounds." How strictly HMRC will define "grounds" remains to be seen, but there is no statutory basis for their using the same definitions as for CGT. This may be of particular interest to those with small houses on larger plots, like smallholdings, which are not strictly agricultural property for the purposes of agricultural property relief (APR).

The rules can preserve QRI where the deceased has downsized. This means having sold a property without replacing it or buying another which is bigger but less expensive. There also appears to be nothing to prevent the RNRB being used where the deceased bequeaths their less expensive property and the difference in cash as long as it is "closely inherited".

A rural owner could, therefore, ensure that their farmhouse is occupied by the successor farmer (thus allowing APR to apply) while moving to a smaller residence on the farm where the RNRB could be used.

“It is aimed at those estates where the family home is the main asset, in the hope that they will be excluded from IHT altogether.”

"Closely inherited"

The main caveat behind all the above is that the RNRB can only be used against property that is "closely inherited". This means the QRI must pass to the deceased's issue, including children, grandchildren, step-children, adopted children and foster children. It also includes the spouses or civil partners of their children and the widow or widowers of their deceased children who have not remarried.

The QRI must be inherited outright or under certain specific trusts with fixed beneficiaries.

Tapering

Having discovered that you have a QRI that is to be "closely inherited" you could be forgiven for beginning to count the money your estate will save. However, for those with agricultural holdings of any substance, it is not so simple.

The RNRB is tapered, so that it reduces by 50p for every £1 by which the qualifying property exceeds £2m in value. There is further bad news, because the value is assessed before any deductions for APR or business property relief (BPR). This means that, when planning for IHT, farmers must not ignore the value of their holding.

One possible way around the tapering is to make absolute lifetime gifts. A deathbed gift of farmland, for example, could remove it from the estate altogether. However, any donor must beware of reservation of benefit which can render gifts ineffective for IHT purposes, even if they are made correctly.

It should also be noted that a failed PET (potentially exempt transfer) does not qualify for the RNRB: it applies only to transfers made on death. Any gifts must be very carefully given with full awareness of the consequences.

Interaction with trusts

The final disappointment is that the RNRB cannot be used against a gift made into a discretionary trust. The RNRB is designed principally to benefit those leaving their main residence to close family, and discretionary trusts are considered to introduce too much flexibility. You might want to consider fixing the interests in any trust you intend to create to ensure your estate will still benefit from the RNRB.

Will Cudmore

VI Entering the Maze: Inherited Property on Divorce

We'll just go in here, so that you can say you've been, but it's very simple. It's absurd to call it a maze. You keep on taking the first turning to the right. We'll just walk around for ten minutes, and then go and get some lunch.

Jerome K. Jerome, Three Men in a Boat (1889) ***– at Hampton Court, where he, George and Harris are then lost for hours***

Re-reading this old Victorian favourite reminded me of a frustrating aspect of practice as a matrimonial lawyer. Getting to the right result on a divorce involving inherited property is rather like tackling the garden maze at Hampton Court. Nothing is quite as it seems; a bewildering range of arguments are thrown up, like high hedges, to confuse; blind alleys are legion.

In many legal systems, inherited or gifted property is automatically "quarantined" from financial claims on divorce and left with the party who holds it. It is a common misconception that this applies in England too. In fact the English courts' primary concern is not the source of property, but the parties' financial needs.

These needs are generously interpreted to reflect the marital standard of living. So, in most cases involving substantial estates, "needs" actually means a mortgage-free property and an income-stream (payable, if possible, by a single lump sum). As an example, in our case of ***Y*** v. ***Y*** in 2012 the only asset available after twenty-six years of marriage was a country estate, in the husband's family for two generations, worth £27 million. The wife was awarded £8.8 million (so just under one-third of the total). The judge ignored the husband's plea that an order at that level would force a sale of the estate.

However, the simplicity of that summary belies conflicting authority on precisely when an inheritance should be taken into account. A short glossary may help:-

- the "sharing principle" holds that it is reasonable and fair that assets built up during a marriage should be shared between spouses on divorce;
- an asset will form part of "non-matrimonial property" if it has been brought into the marriage by one party, or inherited by or gifted to that party during the marriage (plus the fruits of passive economic growth on that property); "matrimonial property" is the rest;
- "mingling" is the concept that non-matrimonial property can become ***"merged or entangled"*** with other property over the course of a marriage if it is used to support the parties' standard of living.

Logic would assume that the "sharing principle" does not apply to non-matrimonial property; but this is not so. According to the Court of Appeal in K v. L ***(non-matrimonial property)***, a case from 2011, it ***"also falls within the sharing principle,*** [but] ***equal division is not the ordinary consequence of its application … the ordinary consequence of the application to it of the sharing principle is extensive departure from equal division, often (so it would appear) to 100%-0%".*** In other words, the property will be shared as a matter of principle, but probably not as a matter of fact. Only the most sophisticated of lawyers could develop a formula so perfect in theory and baffling in practice.

> It seems unsatisfactory for an inheritance to be ignored because the quantification of its value in real terms is problematic; that, surely, is the purpose of the court process.

If non-matrimonial property ***can*** be shared, there are two factors apart from financial need which seem to justify it.

The first is how the parties have treated particular assets. A matrimonial home will ***"always"*** be classed as matrimonial property, according to Lord Nicholls in ***Miller and Macfarlane*** in 2005; although this cannot surely be right in the vast majority of landed estates, given the central importance of the manor-house to the value of the estate as a whole. Anecdotal experience suggests that this rule is often ignored.

Mr Justice Munby suggested in ***P*** v. ***P*** in 2004 that a ***"pecuniary legacy that accrues during the marriage"*** should be treated differently to ***"a landed estate that has been within one spouse's family for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations".*** However, six years later in ***D*** v. ***D*** Mr Justice Charles said that there was ***no*** special rule ***"simply because the relevant assets are, or derive from, gifted or inherited farms or farming assets (or estates)".*** This, then, is clear as mud.

The second factor is that the significance of non-matrimonial property appears to diminish the longer the marriage lasts. In other words, spouses separating after five years can expect to have their inheritance respected; spouses separating after twenty-five years cannot (or at least not to the same extent). I write ***"appears to diminish"*** because the judges have failed to agree on this too.

Baroness Hale, in ***Miller and Macfarlane***, wrote that the importance of the property ***"will"*** diminish over time; Lord Justice Wilson (as he then was), said in ***K*** v. ***L*** that it ***"may".*** He justified the word ***"may"*** for two reasons. One was if the property had been used to purchase a home, as above; second, ***"matrimonial property of such value has been acquired as to diminish the significance"*** of the non-matrimonial property; third, that mingling may have taken place so that the ***"contributor*** [of non-matrimonial property] ***may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult".*** It seems unsatisfactory for an inheritance to be ignored because the quantification of its value in real terms is problematic; that, surely, is the purpose of the court process.

Judges have justified the maze because they want to preserve their right to give different weight to non-matrimonial property on a case-by-case basis, in their overall task of creating a "fair outcome". This is understandable, but the upshot is that the spectrum of possible outcomes is very broad; and the system carries a strong sense of the lottery.

The best advice is not to enter the maze at all. Instead, sit outside while others try their luck, armed with a stiff drink and a pre-nuptial agreement which spells out the importance of inherited property to the family in no uncertain terms.

Nicholas Bennett

VIII Read the Signs

"Most people do not seek confrontation… Most people do not have the means to bring legal proceedings."

And nor should they have to, states the judgment in ***Winterburn v Bennett***, a recently heard case concerning rights to use a private car park. The case brings to light the various ways in which signs – carefully worded, clearly visible and sometimes in combination with other deterrents – can be used to defeat the attempts of neighbours and members of the public to acquire rights over land, without the need for confrontation or legal action. Defeating these rights can ensure that the landowner is free to put the land to good use or redevelop it.

"As of right"

The principle of "user as of right" underpins much of the law concerning a person's ability to acquire rights to use another's land based on a private right, a public right of way or a town and village green. To establish that someone's use of land has been "as of right", it must be shown that the use was without force, without secrecy and without permission. Signs can be particularly helpful in showing that someone's use of land was not without force or not without permission.

Private rights: without force

Private rights for the benefit of neighbouring land (easements) can be acquired in a number of ways, most often by an express deed of grant. However, it is possible for rights to be acquired through a period of at least 20 uninterrupted years of use, provided that the use is "as of right". This is known as "prescription".

The case of ***Winterburn v Bennett*** (2016) concerned a club car park that had clearly visible signs stating that the car park was private and for club patrons only. The suppliers and customers of a neighbouring fish and chip shop had ignored the signs for many years and regularly parked there anyway. In 2012 the tenant of the club obstructed the car park entrance, and the shop owners objected on the basis that they had accrued rights to use the car park by prescription due to long use of the land.

There was no doubt in this case that the club owners were aware of the use (so it was without secrecy) and no permission had been granted for it. The main issue, therefore, was whether the use was "without force".

The judgment makes clear that the concept of "without force" is much wider than the wording suggests. The owner does not necessarily have to take physical steps or legal proceedings to prevent the wrongful use of land. All that is required is for the use to have been contentious or allowed only under protest. The fact that there were clearly visible signs in the car park which made the club owners' position transparent meant that the use was obviously contentious. Because of this, the use was not "without force", and could not therefore be "as of right".

Private rights: without permission

Many landowners will want to avoid creating a rift with their neighbours, or alerting them to the contentious nature of the use and thereby inviting legal action. Strangely it is possible to defeat a permanent right by granting permission for it, making it clear that the permission can be revoked at any time – but this only works if a permanent right has not already arisen due to 20 years' continuous use.

If permission is revoked, be wary of any continuing use of the land after the revocation. The 2010 case ***London Tara Hotel Ltd v Kensington Close Hotel Ltd*** confirmed that once a licence no longer applies, a 20-year period of unauthorised use can continue to run, possibly resulting in a prescriptive right.

Public rights of way: overt action

A new public right of way can arise if the public have used it "as of right and without interruption for a full period of 20 years…unless there is sufficient evidence that there was no intention during that period to dedicate it" (section 31(1) Highways Act 1980).

In 2007 the House of Lords considered what form that evidence might take.
The ***Godmanchester*** cases of 2007 clarified that a private letter or a private conversation were not sufficient to show that there was no intention to dedicate the land as a highway – some overt act on the part of the landowner is required, commanding the attention of the public using the way.

Erecting a sign stating that there is no public right of way could be one such act, as could fencing off the land or padlocking a gate. If any signs are torn down or vandalised, it would be wise to notify the local council that the way is not dedicated as a highway – section 31(5) of the Highways Act states that this would be sufficient, in the absence of contrary evidence, to negate the intention of the landowner to dedicate the way as a highway.

Although one of the standard ways of preventing a public right of way arising is to block access by closing a gate, say, one day a year – so that a 20-year uninterrupted period never accrues – care should be taken when deciding the appropriate date. In the 2015 case ***Ali v Secretary of State for Environment, Food and Rural Affairs***, an alleyway which provided access to shops and businesses was closed over the Christmas period by locking the alleyway door. The High Court held that this was not sufficient to alert the public to the landowner's lack of intention to dedicate a highway because the businesses and shops were closed over Christmas, so users of the alleyway would not have had the opportunity to notice its closure.

Town and village greens (TVGs)

Signs either prohibiting or permitting use for recreational activities can be used to prevent a successful town and village green application under section 15 of the Commons Act 2006. In a similar way to private rights and highways, the relevant period is 20 years – an application for a TVG can be made if "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years".

Prohibitory signs, such as "Keep Out" or "Private Land", can be enough to prevent the use of land being held to be "as of right", provided they are sufficient in number, location and clarity of wording to make it plain to any reasonable user of the land that their use of it is contentious. This was the decision in ***Taylor v Betterment Properties (Weymouth) Ltd and another*** (2012), where a town and village green was cancelled nine years after it was originally registered, because the required 20 years' user as of right was not established. Even better, the Court held that this was the case even though the prohibitory signs had often been vandalised or removed.

However, there is always the risk of igniting a public reaction with a negative sign, so permissive signs may be preferred, perhaps worded as follows:

"[The Landowner] grants permission for the recreational use of this land within the area shaded red on the plan until further notice. Please note that this permission may be withdrawn at any time."

Signs such as this can prevent a TVG application being successful provided the 20 years' use has not already accrued.

Highways and TVGs: fool-proof prevention

If the wording and placement of signs seems too uncertain, help is at hand in the form of a procedure which will definitively prevent either a highway or – since 2013 – a TVG.

Section 31(6) of the Highways Act 1980 has long provided a mechanism to prevent public rights of way arising by long use. The landowner serves on the local council a statement together with a map showing the public rights of way which already exist over the land, accompanied by a statutory declaration stating that no other public rights are intended. The statutory declaration must be made again every 10 years, otherwise any use by the public starts to count towards the required 20 years again.

Thankfully, the Growth and Infrastructure Act 2013 extended this procedure to TVGs by adding a new section 15A to the Commons Act 2006 – although this only applies in England.
Care should also be taken with this procedure because the local authority is obliged to advertise the application (by the use of signs on the site itself) which may prompt local inhabitants into making an application they otherwise would not have made.

Actions, not words

Signs will only be effective if they are worded appropriately, clearly visible and can be evidenced. Taking certain action in relation to your signs can ensure that they remain as effective as they can possibly be:

- Take legal advice on how to word signs for particular circumstances;
- Check the signs regularly and replace them if they are removed;
- Take photos of any defaced or damaged signs; and
- Keep records of the timing of any works to repair signs or render them visible.

Shona Ferguson

> "The case brings to light the various ways in which signs – carefully worded, clearly visible and sometimes in combination with other deterrents – can be used to defeat the attempts of neighbours and members of the public to acquire rights over land, without the need for confrontation or legal action."

IX VAT in the Country

The volume of HMRC guidance and regulations relating to rural property demonstrates the far-reaching application of VAT to rural land. However, the worlds of VAT and rural property can sometimes seem uneasy bedfellows, not least because of the potential for seemingly minor factual changes to trigger significant VAT consequences. Some of the most common VAT issues that affect transactions in rural land are explained further below, along with some practical tips in how to best handle them.

Selling land - options to tax

The starting point when considering any sale, transfer or grant of an interest in land is that it is exempt from VAT. However, this general rule can be overridden in a number of circumstances, most commonly where a landowner opts their land to tax. Opting land to tax means that certain dealings in the land become taxable at the standard rate of VAT (20%), which can help landowners to recover VAT they incur on their own related costs. Although making an option to tax is voluntary, there are a number of mandatory rules and restrictions tied with them which have the potential to catch out landowners and parties dealing with them.

One situation where some of these rules will be of particular relevance is where an estate consists of both agricultural or commercially operated land as well as residential property (such as a farmhouse). If the landowner has opted their property to tax, they may assume that they must charge VAT on any dealing with any part of the estate and that a sale of the entire estate would attract VAT in full.

However, in the case of a mixed estate such as that identified above, this will very likely not be the case. The most common reason for this is because an option to tax is automatically disapplied from residential property (in this example, the farmhouse), which will remain exempt from VAT. In addition, if there is a clear distinction between plots, or significant barrier between parts of the estate, the option to tax may cease to apply beyond that point. This is because although an option to tax cannot generally be exercised over part of a property, any non-agricultural land or intervening land owned by a third party can break the flow of the option to tax.

Landowners who have opted land to tax and persons dealing with them should therefore take particular care to consider the extent of the option rather than automatically assume VAT is chargeable on the entire property.

From a practical perspective, when selling land that is only partly subject to an option to tax, plans should be drawn up to identify those areas subject to the option and those outside its scope. When selling the land, a fair apportionment of the sale price should be attributed between the amount paid for the area subject to the option to tax (on which VAT may be charged) and the area outside the scope of the option or residential in use (which may be exempt from VAT).

Residential developments and conversions

In light of the increasing value of residential property in certain areas of the UK (which in many cases seems to be withstanding prevailing economic turmoil), many landowners have sought to develop parts of their land to residential use. Although potentially lucrative, developments and conversions of rural property can lead to a range of VAT issues.

As mentioned above, non-residential rural land is often subject to an option to tax, generally making dealings in it subject to VAT at the standard rate rather than exempt. However, this is not always the case when constructing, developing or converting property to residential use by virtue of the fact that it is not possible to opt to tax residential properties and charge VAT. Whilst disapplying an option to tax may be attractive for a purchaser of the completed home (who no longer has to pay VAT on the purchase price), it can be costly for the original landowner or developer. This is because the sale of the VAT exempt residential property would, on the face of things, preclude the seller from recovering VAT costs incurred in respect of the sale or development of the property, in effect adding up to 20% to the overall development cost.

Building it yourself

However, landowners who construct residential properties themselves are generally able to benefit from "zero rate" VAT treatment on selling the completed property. The effect of this is that the sale is technically subject to VAT, but at a rate of 0%, meaning that the purchaser has no VAT to pay but that the seller can continue to recover VAT they have incurred on their own costs. In order for the sale to be zero rated, the development either needs to have been completed or have reached a certain stage of construction (known as the 'golden brick' stage, after the requirement for a course of bricks to be laid above the foundations).

Whilst zero rating the sale of the property is advantageous, since it allows VAT costs incurred during the development to be reclaimed, a developer or landowner could nevertheless face cash flow issues while undertaking the development from any VAT they are charged in the meantime by contractors. Fortunately, it is possible for certain costs incurred in the course of development to be either zero rated (in the case of new constructions of residential property) or reduced rated at 5% (in the case of conversions from non-residential to residential use) to mitigate this. In most cases, contractors will require a VAT certificate from the landowner confirming that the property is to be used for residential purposes in order for them to reduce their VAT.

Selling to a developer

Alternatively, many landowners may prefer to sell their undeveloped or unconverted property to a developer, saving them from carrying out the development themselves. In these circumstances, it is generally possible to disapply any option to tax over the building even though the development or conversion to residential has not started, allowing the sale to be exempt from VAT. Landowners should note though that this treatment is not automatic and requires the purchaser to issue a VAT certificate to the landowner confirming that the building is to be used for residential purposes after the sale. From a practical perspective, landowners seeking to rely on this treatment should ensure that the sale contract obliges the purchaser to provide this certificate and that it properly protects the landowner in the event of any default by the purchaser.

However a development or conversion is undertaken, getting the VAT treatment wrong can have significant cash flow implications and has the potential to add up to 20% to the developer's or seller's costs. Getting VAT advice on how best to structure the development or conversion as early as possible is therefore crucial.

Sporting and fishing rights

Unlike land, the sale or grant of any right to hunt or take game or fish is generally subject to VAT at the standard rate by default. However, there are a range of nuances to this general rule. For example, any specific charge by reference to the number of fish or game caught may be exempt from VAT, as may charges for shooting in hand and similar private, non-commercial sporting events.

The general treatment that sporting and fishing rights attract VAT may also differ if land is sold along with those rights, since the sporting or fishing rights attached to the land can effectively piggy back off the VAT treatment of the land. It is therefore possible for the combined sale of land and sporting or fishing rights to be exempt from VAT.

In order for a combined sale to be exempt from VAT, the land in question must not be opted to tax and the value of the sporting or fishing rights must represent no more than 10% of the total value of the transaction. If the value of the sporting or fishing rights exceeds 10% of the total value, the sale price must be fairly apportioned between those rights and the land, with VAT being charged on the sporting rights at the standard rate.

From a practical perspective, it may sometimes be helpful to record an apportionment of the price payable for any sporting rights sold together with land in the relevant contract. In addition, it may on occasion prove advantageous to buyers who are not able to recover VAT to purchase additional land alongside sporting rights, if doing so would dilute the value of the sporting rights to less than 10% of the total sale price and lead to a VAT saving.

Transfers of going concerns

The most common misunderstanding of the VAT treatment of a sale is whether the sale qualifies as a transfer of a going concern (TOGC). This is significant because, although opting land to tax generally means that any sale would attract VAT at the standard rate, sales that meet the conditions for TOGC treatment fall outside the scope of VAT altogether and therefore do not attract VAT.

In order for a sale to qualify as a TOGC, a number of conditions must be met. Many of these can be satisfied as long as proper advice is sought at an early stage (they generally require, among other things, both parties to register for VAT and opt the relevant land to tax).
However, one condition that can be overlooked is a requirement for the buyer to carry on the same kind of business as the seller.

Many buyers and sellers might think that it sufficient that both parties carry on a business, but this is not sufficient for TOGC purposes, since the requirement is for the parties to carry on the same ***kind*** of business. This can be problematic if, for example, the seller's business is property investment (receiving rent from tenants) and the buyer's business is that of an owner occupier with an agricultural venture.
In this case, the seller and buyer do not have the same kind of business and so cannot meet the conditions for a TOGC. Buyers will often argue that investment landlords who have experienced a period of owner-occupation have thereby become farmers (and that is an area that may benefit from specialist advice).

Whilst, with proper planning, solutions may sometimes be available to sellers and buyers wishing to benefit from TOGC treatment, it is important to note that this treatment is automatic based on the facts of the sale and is not optional. Moreover, recent case law demonstrates that contrived arrangements and steps which are taken specifically to take advantage of TOGC treatment may well be challenged by HMRC and fail.

Those considering selling or buying rural land and estates would therefore be well advised to undertake a proper VAT analysis of the proposed transaction at an early stage, rather than simply assume a TOGC will or will not take place without a full assessment of the facts.

James Bromley

> “However a development or conversion is undertaken, getting the VAT treatment wrong can have significant cash flow implications and has the potential to add up to 20% to the developer's or seller's costs.”

X An Introduction to Construction Law

> "…the guiding principle is that the estate should expect to have some form of written contract in place with each project participant as soon as conveniently possible."

Most actively managed estates will need to undertake construction works at one time or another, in order to either maintain or develop the property for future use. This article is intended as an introduction to construction law for estate managers.

Who does what?

On a relatively simple construction project, it may be possible to find a single organisation to deliver the project without the assistance of any third parties. However, this is the exception rather than the norm. Most projects will require a diverse set of skills, generally purchased from a number of independent contractors and consultants. The manner in which those contractors and consultants work as a team will often be critical to the success of the project.

On most substantial construction projects, the client will engage a team of professional consultants. This might comprise an architect, a structural engineer, a mechanical and electrical engineer, a quantity surveyor (or "cost consultant") and a principal designer (a health and safety expert appointed under statute). There may be others depending on the nature of the works, such as an independent project manager to oversee the project on behalf of the client.

Once the project has advanced from design and planning into construction, the consultants will be joined by at least one contractor, who is responsible for the construction of the works, and also – on "design and build" projects – the design. On larger projects, most construction works are sub-contracted to specialist trade contractors, with the main contractor's role often limited to co-ordination.

Finally, the client also has an important role to play in delivering a successful project: in particular, it must provide the project with a sense of direction. The construction process can be demanding and time-consuming, so many clients call in a project manager to assist them with the process.

The Main Procurement Routes

Until the early 1980s, "traditional procurement" was close to universal – and it is still very popular. This model provides for the designers to be appointed by the client to produce a very full design, which is passed to the contractor for construction. The contractor is generally not responsible for design, except (in some cases) the design of a limited section of the works where a specialist contractor may be better placed to produce a design. In traditional procurement, a client may find himself frustrated trying to establish whether a defect is caused by the architect or contractor, so it may come with enhanced risk of time and cost overrun. It may be more suitable where the client wishes to prioritise excellent design and quality of finish.

The "design and build" model provides for the appointment of a single contractor, who accepts responsibility for both the design and construction of the works. In order to deliver design, the contractor may need the services of specialist architects and engineers; sometimes, these will be directly engaged by the contractor, but on other occasions, the client's existing architects and engineers will have their appointments transferred ("novated") to the contractor. This may affect the working relationship between the client and the architect. As such, it may not be appropriate where good design and quality of finish are essential, and may be more appropriate to those projects where management of time and cost are higher priorities.

Construction Contracts

Building Contract

The building contract is the central document, requiring the contractor to undertake the building works in accordance with very detailed provisions. On design and build projects, it will also set out the contractor's responsibility for design.

As a general rule, domestic construction contracts will be based on a published standard form building contract, such as the one published by the Joint Contracts Tribunal (JCT). The JCT form is generally understood to be relatively neutral; there is a slight slant in favour of the contractor, which is often altered by clients, using Schedules of Amendments.

Letters of Intent

Building contracts are lengthy documents and take time to negotiate. Often there is a commercial advantage to starting the building works before a full building contract is executed, so the market has developed the letter of intent as a pragmatic solution. This is a relatively brief letter, authorising the contractor to start work in anticipation of a building contract being completed, subject to payment up to an agreed maximum sum.

Letters of intent are not without risk, and should not be used permanently in place of a full contract. Given their brevity, they are frequently litigated and the preference must always be to complete a building contract as soon as possible.

Appointments

In addition to appointing the contractor, the client should enter into contracts of appointment with its professional consultants: the architect, engineers, surveyors, etc.

The correct approach to this will usually depend on a balance of proportionality and risk management. It is possible to conclude the appointments of architects and engineers relatively quickly, using standard forms of appointment published by institutions such as RIBA and ACE. These forms are convenient but they include some terms which are very favourable to the consultant, and they are generally not acceptable to external financiers.

Collateral warranties and third party rights

It is relatively difficult for third parties (such as purchasers, tenants or lending banks) to recover damages from contractors and consultants, because they have no direct contract with them.

Construction law's answer is the collateral warranty. This is a relatively brief contract under which the contractor or consultant warrants to the bank, purchaser or tenant that it has exercised reasonable skill and care in the performance of its works or services. In some cases, a bank might have the right to take over the contract in the event that the contractor wishes to terminate it, so the bank can complete the building work and realise its security.

Because collateral warranties take time to agree, and it can be difficult to persuade some contractors and consultants to execute them (particularly after the works have been completed), practitioners have started using "third party rights". These are rights to third parties granted pursuant to the Contracts (Rights of Third Parties) Act 1999, which mirror the rights which would have been granted pursuant to collateral warranties. However, many financiers and investment purchasers will refuse to proceed with transactions unless they are provided with a full package of collateral warranties.

Construction Law

There is much law to consider when dealing with construction contracts. For example, the law of contract can at times be complex, and there are recent changes to legislation which can have serious implications in relation to payment and disputes.

Perhaps most significantly, the Construction (Design and Management) Regulations 2015 (CDM Regulations) regulate health and safety and place significant obligations on the client. Among these are the obligations to appoint a "principal designer" and "principal contractor", responsible for managing health and safety in the design phase and the construction phase, respectively. The CDM Regulations merit proper management, because the client may face prosecution by the Health and Safety Executive if it is in breach of its obligations.

Managing Construction law

It is obviously good practice to ensure that an estate has an appropriate package of construction contracts to manage any significant project. The approach to these contracts will vary in each case, depending on the nature and complexity of the project, but the guiding principle is that the estate should expect to have some form of written contract in place with each project participant as soon as conveniently possible. It pays to obtain professional advice early on.

Edward Banyard Smith

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