FARRER&Co

Rural Estates Newsletter

Spring 2018

Editorial

Running in the park this morning, for some reason I found myself reminiscing about the film, Dead Poets Society, in which Robin Williams plays John Keating, an unorthodox English teacher, who inspires pupils of a bleak and authoritarian school to think imaginatively, to challenge conventions and, of course, to *seize the day*. Heady stuff for a rather bookish teenager in 1990… gather ye rosebuds while ye may…

It often strikes me that one of the satisfactions of land management is identifying and seizing opportunities. With a government straining to meet its housing targets (and the opposition openly discussing CPOs for compensation at agricultural value), the time is now for pushing forward with the promotion of land for development. Paul Krafft and Robert Field consider development agreements and land pool trusts below; Karen Phull and Edward Banyard Smith make some practical points about barn conversions.

Broadband and the telecoms revolution bring opportunities for landowners (Shona Ferguson writes on the new Telecoms Code); as does the growing 'staycation' market for visitor attractions and estates holding events (see Jane Randell on Sponsorship for Events and Alan Baker on the implications of the GDPR).

These are uncertain times. Turn on the news, or look ahead beyond 2020, and sometimes the prospect appears bleak; but perhaps that should be a spur for us to seek out and seize opportunity, grasp the nettle, make things happen. A poem by Whitman featured in the film bemoans *"the endless trains of the faithless… the cities fill'd with the foolish… the struggle ever renew'd… the poor results of all"*. Well, I have certainly felt that on a Monday morning commute. But as John Keating reminds his gloomy pupils, the poem provides an answer:

That you are here – that life exists and identity
That the powerful play goes on, and you may contribute a verse.

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 contact 020 3375 7000 or email **marketing@farrer.co.uk**.

GDPR: Ten Things You Should Know

The General Data Protection Regulation (GDPR) will take effect in the UK and across the European Union on 25 May 2018. This has implications for all organisations, including estates with an agricultural or residential rent roll and, perhaps more significantly, for estates with an events or leisure business which involves the processing of personal data on a larger scale.

The basic structure of data protection law will remain the same after May 2018: individuals will continue to enjoy rights which must be observed and 'data controller' organisations – including estates and related businesses – will have to continue to comply with data protection principles. But the compliance burden will increase significantly, and you should be preparing for that in the diminishing window before the new law applies.

While many businesses will have focused on data protection compliance for some time, there are inevitably some who will only be turning their attention to GDPR now. This briefing looks at some of the key points that estate owners should be aware of.

GDPR – and existing data protection law – applies to all organisations in Europe

If you are established in the European Union then the GDPR will apply to your business or estate vis-à-vis your processing of personal data. 'Personal data' means any information relating to a living individual (for example, the name, address, age and date of birth of a tenant or potential tenant, as well as more sensitive data such as medical information) and 'processing' means virtually anything you do with personal data, including collecting it, storing it, analysing it, transferring it to someone else, and even deleting it. The GDPR will have 'direct effect' in the UK on 25 May 2018, which is long before the (still uncertain) date when the UK leaves the EU. As such, it is important to prepare for the GDPR now without being distracted by 'Brexit'.

There is no 'grace period'

The ICO (Information Commissioner's Office, which enforces data protection law in the UK) has made it clear that while the ICO intends to take a *'common-sense, pragmatic approach to regulatory principles'*, enforcement of the GDPR will start on 25 May 2018. Indeed, we have already seen the ICO interpret the existing law more assertively, taking a more 'pro-data subject' approach (emphasising individuals' privacy rights).

Individuals will have stronger rights

An individual's right of access to the personal data held about them (via 'subject access requests') will continue, although organisations can no longer request a token statutory fee and will have to provide a copy of the individual's personal data within one month (currently 40 days). They will also have to provide the individual with additional information on how their personal data has been used. The GDPR also gives individuals certain new rights such as the 'right to be forgotten' (a right of erasure), although, as with all the 'data subject rights', this is not an unqualified right and your estate or business should apply all relevant exceptions as and when you receive such requests from individuals to exercise their rights. These new rights for individuals mean that businesses should ensure that they are confident that all personal data they process is stored in only one (or a few) places or systems, and that those systems (and the people who operate them) are prepared to respond to individuals who seek to exercise their rights.

Appropriate data security remains paramount

One of the key themes of the GDPR is the need to take *'appropriate technical and organisational* *measures'* to safeguard personal data. This means 'appropriate' in terms of the nature and volume of the data you are processing but also in terms of how much of an effort is required, how much is spent on 'state of the art' (versus 'good enough') data security technology and indeed the lengths to go to in order to ensure there are no obvious data security vulnerabilities. It is worth remembering that emails are not a particularly secure means of sharing confidential information or personal data, and in any event you should be careful about what you put in writing concerning another person (or involving their personal data) and take care to ensure you are only processing the personal data that you really need to for the purpose you are trying to achieve. For example, do you need to send an entire spreadsheet with all of your tenants' information in it, or could you achieve the same purpose by extracting and sending just one tenant's record?

'Transparency' and 'Accountability' are key principles

Individuals will have a right to be provided with 'fair processing information' when an organisation processes their personal data. While your estate may already have a privacy policy, it will need to be updated to include the specific information that is required by the GDPR. This includes information about individuals' privacy rights; what personal data your business processes; the legal basis for processing the data; who the data is shared with; and how long the data will be retained for. Your privacy policy will also need to be actively provided to individuals when your business obtains their data; it will no longer be sufficient to simply 'make available' the information by hosting a privacy policy on a website. All of this goes to the 'transparency' principle under the GDPR, which means individuals should be in no doubt as to why and how you are processing their personal data. For estates, this could mean, for example, that tenants are clearly informed about the reason for carrying out immigration checks under the 'Right to Rent' provisions, the personal data that is involved in carrying out those checks (including passport details) and the legal basis for doing this – ie compliance with the Immigration Act 2014.

The GDPR's 'Accountability' principle requires organisations which process personal data not only to comply with the law but to be able to *demonstrate* their compliance with it, most obviously by keeping clear records of their processing activities, the reasons for processing personal data for various purposes, etc.

There are new contractual requirements for appointing data processors

Where your business contracts out data processing to a third party (for example, to a ticketing services provider for events), you are required to have in place contractual guarantees from the data processor about how they will process that data. Estate owners should pay particular attention to contracts that govern business-critical processing and ensure that they are updated before 25 May 2018 so that they are GDPR compliant. Where the 'data processors' are large, well established businesses, we would expect them to take the lead on updating their contracts (probably, their standard terms and conditions) for GDPR compliance – but data processors with fewer resources might need you as the landlord to take the lead on this.
A contrasting situation is where landlords appoint agents to manage their properties; in this case, it is likely that mainstream commercial land agents will be independent data controllers, and not data processors for the landlord – which means that any updates to service agreements with such agents are either unnecessary or can follow much less prescriptive terms.

> “The compliance burden will increase significantly, and you should be preparing for that in the diminishing window before the new law applies.”

Consent is becoming harder to achieve

Any business which makes use of customer and member lists for direct marketing should plan on reviewing marketing consents, wherever it relies on them. We are already seeing more rigorous ICO enforcement of existing rules with fines issued to major firms for their direct marketing (without consent). The GDPR requires consent to be a positive indication of the data subject's wishes (for example, using clear, unticked 'opt-in' boxes rather than confusing, pre-ticked 'opt-out' boxes or relying on an individual's silence or inactivity to assume their consent).

Fines are not the only enforcement tool available to the ICO

The media have so far tended to focus on the staggering maximum fines under the GDPR (up to 20 million euros or, if higher, four per cent of annual global turnover). However, the ICO has assured organisations that it will use fines 'proportionately and judiciously' while reminding organisations of the seriousness of the law and the range of enforcement tools available. Organisations should consider the risk of receiving an order to 'stop processing' which could have equally, if not more, serious repercussions as a fine.

You may still need to register with the ICO (but only to pay a 'data protection fee')

Registration with the ICO as a data controller in its current format will be abolished by GDPR but data controllers in the UK will still have to pay a fee to help fund the work of the ICO. If you are registered with the ICO now, you should be prompted to switch to the new system.

ICO guidance is available

A key role of the ICO is to educate data controllers as to their data protection obligations under what is widely acknowledged to be a very complicated area of law. Whilst guidance on GDPR, both from the European Commission and the ICO, has been limited in some areas, more detailed guidance is appearing. We suggest that all data controllers keep up to speed with ICO guidance, available on its website (ico.org.uk).

Alan Baker

The Promotion and Sale of Development Land

The message from the government is clear: the housing market is broken and more homes need to be built. The need for houses provides significant (sometimes life-changing) opportunities for landowners.

In the majority of cases where a landowner is looking to obtain planning permission for a development, and then sell the land, the landowner will need to rely to some extent on the expertise of a developer. The developer (sometimes called a promoter) should have a track record of successful planning applications in the local area and understand well how the planning authority works. They will often also have experience of selling sites with planning permission or building out sites themselves.

This article looks at the types of agreements which can be entered into with a developer where a landowner seeks a planning permission and a sale with the benefit of planning permission. The same principles apply regardless of the size of the project: whether it is a couple of homes in spare garden or the creation of a new community. Where more than one landowner is involved, generally an overarching (or collaboration or consortium) agreement is needed between the landowners to enable the pooling of land and resources. Collaboration and consortium agreements are complicated, particularly in relation to tax (see the following article from Robert Field).

Promotion Agreement

A promotion agreement contains a general obligation to promote a site for planning at the developer's risk. Sometimes it also provides for the marketing and sale of the site. The agreement is often entered into at a fairly early stage in the planning process, and the definition of 'development' can be quite indistinct. The landowner is relying on the expertise of the developer.

The size of the promotion fee will depend on the level of risk involved in obtaining planning and is usually a percentage of the sale price/market value. Where there is a sale, the promotion fee will be paid out of the sale proceeds and the promoter's costs will normally be reimbursed too.

Option Agreement

An option agreement gives the developer the right to buy in particular circumstances (generally the grant of a satisfactory planning permission). Typically the developer will pay (on exercise of the option) a percentage of market value. This creates a tension between the landowner and the developer, as the landowner will try to keep the land value high and the developer will want a lower value. It is essential for the landowner that the option agreement provides for a minimum sale price. The agreement will contain specific planning obligations on the developer.

Conditional Sale Agreement

Under a conditional sale agreement, a landowner is obliged to sell and the developer is obliged to buy if certain conditions are satisfied (again, generally the grant of a satisfactory planning permission). The agreement will normally tightly define what constitutes acceptable development. There should be a fixed price or pricing formula (not usually open market value) with deductible costs. A conditional sale agreement will typically have a tighter timescale than an option agreement but, again, must have a minimum price to protect the landowner's interest.

A conditional sale agreement will often contain overage provisions, which can be calculated in a variety of ways. The simplest is a percentage of gross receipts over a set figure.

Joint Venture

Joint ventures can take various forms but a typical arrangement involves the landowner putting in the land and the developer obtaining

“The same principles apply regardless of the size of the project: whether it is a couple of homes in spare garden or the creation of a new community.”

planning, building out the site and then marketing the built houses for sale. The landowner will often retain the freehold up to the point of sale to the ultimate house buyer. Generally, the developer will pay a sum up front to the landowner and the sale proceeds from the house sales are then split between the landowner and the developer on agreed percentages.

The identity of the developer is crucial. As the landowner still owns the freehold during construction, the landowner retains a certain amount of control, but the landowner will want the houses to be properly built. Planning and construction milestones are common.

Own Development

The landowner appoints (either through a development manager or itself) all the relevant professionals required to promote the site for planning and, if desired, to take it through to development and sale. Developing land oneself involves a number of contracts, with each contractor having a defined role.

The owner takes all the risk. Some costs may be considerable and there is no guarantee of a planning permission for an economic scheme. On the other hand, the landowner takes all the upside if the development is successful.

Which Type of Agreement?

Choosing the type of agreement which is suitable for the landowner will depend on a range of factors, including:

Appetite for Risk

The two extremes are to do it all oneself, or enter into an option with the developer and have no more to do with it. The more risk a landowner takes, the greater the potential upside.

Tax

Given the long-term nature of some agreements, tax planning is often difficult. Land receipts will generally be liable to Capital Gains Tax or Corporation Tax and thought should be given as to how best to ensure the structure does not attract disproportionate taxation. It will also be crucial for landowners to maintain any pre-existing Inheritance Tax reliefs.

If a landowner trades or becomes a 'developer', receipts will be taxed as income rather than capital. This is likely to be a particular issue if overage payments are involved. Given the difference in tax rates, this is more likely to be an issue for trusts and individuals than companies in the first instance, though it will also be relevant when proceeds are extracted from a company.

A charity is only permitted to carry out limited non-primary purpose trading without being subject to tax on the resulting profits. Often a trading subsidiary needs to be set up to allow development profits to pass to the charity with gift aid.

There are potential VAT and SDLT traps too and so specialist tax advice should be sought. Tax suspension provisions may be appropriate in longer term agreements where there are concerns over net receipts if tax rates reach a particular point.

Desire for Control

There is a balance here between the landowner imposing its wishes and putting off the developer. Sometimes a landowner will be happy simply to maximise value. In other cases, the landowner may want to influence the design of the project, particularly where it is close to a main house or it opens up the possible development of adjoining land where connecting roads or services may be required.

The length of the agreement and likely timing of a sale can be important. Capital may be needed at a particular time for, say, repairs to a house. In the longer term, generational change can lead to a different perspective on whether a development is worthwhile.

A minimum price or net sales receipt will often be required and deductions need to be monitored carefully and capped where appropriate.

Identity of the Developer

Even if the developer makes the planning application in its own name, it is the owner's land (and often reputation) at stake. It is important the developer understands and respects the landowner's values and that the landowner has seen other projects completed by the developer.

Most agreements will prohibit assignment by the developer and the agreement should also deal with what costs should be reimbursed if the agreement is brought to an end. In those circumstances, the landowner will want all surveys and plans to be handed over together with the relevant intellectual property.

There is no 'one size fits all' agreement. Landowners need to give careful thought to their objectives and professional advice should be taken. However, there are exciting opportunities and, given the housing shortage, we see the opportunities continuing for landowners for many years ahead.

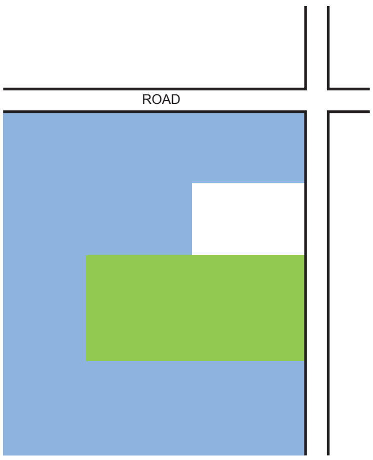
Paul Krafft

III Land Pooling for Development

If you are involved with development projects then sooner or later you come across a situation where adjoining owners wish to enter into some form of collaboration or co-operation agreement. A development site that brings together a number of separate land holdings is likely to be worth more than the sum of its parts, so the parties need to have some form of binding agreement for collective promotion that enhances the commercial viability of the project and optimises the value to be gained from it.

The Problem

The plan below shows schematically the land ownerships in a case we helped with recently. The Blue Land, Green Land and White Land together form a viable planning proposition; taken individually they would not. Together, the owners can share the planning and promotion costs, and reap the benefits of marketing a larger site.



The first idea usually suggested when this situation arises is a 'straightforward' co-operation agreement, with 'equalisation payments' being made to achieve the right economic result. In this case the costs and proceeds to be shared were allocated 60% to the Blue Land, 30% to the Green and 10% to the White. The acquisition cost of the White Land was £50,000 and planning costs for the whole site came to £200,000. But what happens if the White Land comes forward first and is sold for £750,000?

The problem with a simple co-operation agreement is that the tax consequences produce the wrong result. A contribution to promotion costs that does not relate directly to the land of a particular owner is unlikely to qualify for a tax deduction. An 'equalisation' amount received by way of reimbursement cannot be categorised as a receipt in respect of the developed land a particular landowner has sold. Finally, a contribution to the other landowners out of the proceeds of sale is not a deductible expense for the selling landowner, but is rather a distribution of a share of the profit.

This is illustrated by the specimen computation below. The White landowner recognises a disposal for tax purposes and gets a tax charge. However, under the terms of a co-operation agreement 90% of the disposal proceeds would be due to the owners of the Blue and Green Land. The White landowner doesn't get a tax deduction for the shares of proceeds paid over to the Blue and Green landowners, so the result is that White gets a tax charge while Blue and Green receive the bulk of the proceeds of sale of the White Land.

Proceeds	**750,000**	
Less base cost		(50,000)
Less 10% planning costs		**(20,000)**
Taxable		680,000
x 20% tax		(136,000)
Net after tax		**544,000**
90% share to Blue and Yellow		(490,000)
White landowner left with		**54,000**

If the project had been structured to achieve the right tax result, the White landowner would end up with £152,000 instead of £54,000.

So, how do you get this right? The answer is not simple and in our view there are only two approaches that can be made to work. One is to set up a land pooling arrangement under a form of trust.

Land Pooling

In the above example the Green, Blue and White landowners pooled their land so that the combined site could be marketed, developed and sold as a single unit under an option and promotion agreement. The first step was to transfer the land to a trustee to hold on bare trust for the participants. It is important to get the valuations right at this stage, because the participants' respective shares of the pool are defined by reference to the market value of the land they contribute. It is also important to ensure that the agreement does not give rise to a partnership between the participants. The three parties continued to farm their individual plots under licence pending draw down under the promotion agreement.

The critical point about a pooling arrangement is that there should be no disposal or acquisition for Capital Gains Tax purposes when the land enters or leaves the pool. A possible analysis of what is happening when land enters the pool is that there is an exchange of an interest in land for a share of the whole of the pool. That would have Capital Gains Tax, SDLT and VAT consequences. The reason there are no tax consequences of pooling is that in a case called *Jenkins v Brown* (decided in 1989) the Court decided that a contribution on terms that reflect precisely the respective beneficial interests of the participants is not a disposal. The trustee to whom the land is transferred is holding on bare trust for the participators, so the trustee is ignored for tax purposes. As the judge put it in an earlier case (*Booth v Ellard*): *'Their interests in the mass precisely reflect the individual interests which they had before the deed was entered into'*.

In practice HMRC accept the *Jenkins v Brown* principle, although their Capital Gains Tax Manual (at CG34411) does warn that *'The documentation needs to be carefully considered before it is accepted that the decision in Warrington (or Jenkins) v Brown applies'*. The most likely area for possible attack on the part of the Revenue is the valuations carried out for the purpose of the contributions. That is why it is so important to get them right.

Other Taxes

So far as other taxes are concerned:

- There should be no Inheritance Tax consequences for individuals contributing land to the pool, as there is arguably no transfer of value and it is a bargain at arm's length. If each participant pays a rent or licence fee for the part occupied then Business Property Relief should continue to be available, although views differ on this.

- There should be no SDLT on contributions to the pool – for the same reasons that there is no Capital Gains Tax. So far HMRC appear to have accepted this, having expressed a view on it publicly in 2008. While setting up the pool could be analysed as an exchange of land interests, giving rise to market value SDLT charges, the principle in *Jenkins v Brown* appears to hold good.

> The problem with a simple co-operation agreement is that the tax consequences produce the wrong result.

- There should be no VAT consequences of entering into the pooling arrangement. Exchanges of land interests would constitute taxable supplies, but HMRC has been known to accept that *Jenkins v Brown* applies. There is no change in beneficial interests, and legal ownership on the part of the trustee is ignored under the VAT legislation. Input tax should be recoverable by each participant in accordance with their percentage of the pool and any supplies of land are treated as supplies by each participant. This assumes that all participants are VAT registered, of course, and that they have opted to tax their land.

Other Considerations

Of course, the parties have to consider the fact that a pooling arrangement will involve working closely together for perhaps many years. It may be possible to collapse the trust if the wishes of the parties diverge over time, or a scheme changes materially, but the tax analysis of doing this becomes difficult if one or more disposals has already taken place.

While the trust itself is a relatively simple document (although the relating tax analysis is complex and detailed) it should not be forgotten that there needs to be an agreement alongside it under which the parties lay down how the planning, promotion and disposal processes are actually going to work. It is critical that they agree firmly in advance how the project is going to be controlled and managed.

It should also be noted that HMRC have never been happy with the tax neutrality of setting up land pool trusts and might choose to challenge the application of the principles expounded in the leading cases on the subject. It is always advisable to obtain Revenue clearance if you can.

Robert Field

IV Leases of Chattels – Full Consideration

There is a variety of circumstances in which it may be necessary for chattels to be leased or licensed from one party to another, and although it is very seldom for financial gain, it is frequently essential for tax purposes that the consideration paid is 'full'. Typical situations in which a chattels lease or licence may be created are:

- The passing of ownership and occupation of an historic house from one generation to another where it is not possible (eg because of an inherent CGT liability) for ownership of chattels to be passed at the same time, but where for practical or commercial reasons those chattels have to remain in the house.
- The passing of ownership of chattels from one person to another where occupation of the house is not simultaneously changing and the recipient cannot immediately take full use and enjoyment of them.
- The division of ownership of chattels into long-term ownership (eg by a trust) and temporary or fixed term use and enjoyment, whether by a beneficiary or a third party. Before the introduction of Pre-owned Assets Tax from 5 December 2005, such 'shearing' was not uncommon, and the lease terms would determine the relative values of the two interests.

Now, where a gift of chattels is made but the donee does not immediately take full use and enjoyment, it is essential for full consideration to be paid by the donor in the lease or licence back if the gift is to be effective for IHT purposes.

A separate set of circumstances in which tax legislation looks to assess the value of the use of chattels is where they are owned offshore but used in the UK. Here the Finance Act 2008 imposes a benefit charge on the user in certain circumstances. For this purpose, however, the legislation has provided a mathematical formula based on the value of the item(s) at a certain date and the official rate of interest, so that the question of an open market rental value does not arise.

In the open market, whilst chattels are frequently leased or licensed to museums or galleries for temporary or long-term exhibitions, it is very rare indeed for any consideration to be paid other than the licensee assuming responsibility for all insurance, security and transport costs, and the preservation and safe custody of the object. Those are themselves onerous obligations. Moreover, as anyone who has had to put furniture and effects into store (temporarily or long term) will know, the charges levied by commercial storage companies are substantial, so in many of the circumstances outlined above, the benefit is arguably flowing from lessee to lessor and not vice versa.

In the light of all this, it was for many years commonplace for a lease or licence of chattels to provide that the lessee took responsibility for insuring and maintaining the chattels in good repair, but the rental element of any consideration was purely nominal – often as little as 0.01% of value. At HMRC's Chattels Valuation Fiscal Forum in November 2006, possibly in the light of closer scrutiny by HMRC of some arrangements following the introduction of Pre-owned Assets Tax, the validity of nominal rents as full consideration was challenged. Although HMRC placed on record that every case would be treated on its own merits, an understanding seems to have been reached that in the absence of any real open market evidence for the rental value of particular chattels, a figure of 1% of value (in addition to the cost of insurance etc) would be generally regarded as full consideration and so prevent a reservation of benefit arising.

> "Special care should be taken in determining the rent for any items which have a commercial, fashion or utilitarian value such as designer watches, jewellery or sporting guns."

In late 2016 HMRC started to indicate that they were no longer satisfied that such a rent would constitute full consideration and that they had evidence of commercial businesses which were able to command rentals of around 10% of market value for the temporary hire of chattels. On investigation, it appears that the evidence which HMRC was citing consisted of two US companies, one of which hires expensive watches to individuals and the other hires large and valuable items of contemporary art to property developers fitting out new high-end developments of apartments in New York City. In each case the agreements also contemplate the possibility of purchase of the item and the offset of the hiring charge against the purchase price if that option is exercised. So both are clearly far from the normal circumstances seen in the context of family ownership.

Nevertheless, at HMRC's Chattels Fiscal Forum in October 2017, attended by representatives of the legal and fine art valuation professions, HMRC maintained their view that there is evidence in the marketplace to support rental higher than 1% of value, that they are examining such evidence and that they would be 'looking a little more carefully' at individual cases, for justification of the rates used.

In particular, it is clear that if a case is referred to HMRC's chattels valuation office, it will be looking for evidence of an arms-length negotiation of the rental between parties who are separately advised in that negotiation. This is in accordance with a long-standing HMRC Press Release dated 18 May 1987 on the subject of IHT – Gifts with Reservation.

Special care should be taken in determining the rent for any items which have a commercial, fashion or utilitarian value such as designer watches, jewellery or sporting guns, or in circumstances where there is a clear commercial benefit to be derived from the use of the chattels by the lessee or being relinquished by the lessor, which therefore affects the negotiating position of the parties.

Anyone therefore contemplating a lease or licence of chattels where it is necessary for full consideration to be paid should make certain that the terms are negotiated between suitably qualified professionals acting for each of the parties. The correspondence evidencing that negotiation and all the factors taken into account should be preserved so that it can be produced to HMRC if the terms are questioned. In the case of existing chattels leases and licences, they should be dusted off and the provisions for rent review considered and implemented if they have not been already. Where it is thought that the existing arrangements might not be sufficiently robust, it may be advisable to renegotiate them.

Rhoddy Voremberg

V Sponsorship of Rural Events

From agricultural shows to festivals of local food, events can be a valuable source of income for an estate. Sponsorship can be an important part of that revenue, whilst for the sponsor itself it can be a very effective way for the business to enhance its brand value among a core audience.

There are a number of factors that need to be considered by both parties prior to entering into any type of sponsorship deal to make sure it is a success, both from a commercial perspective as well as a legal one. This article provides a few useful pointers to bear in mind when negotiating and entering into sponsorship agreements.

Branding / Reputation

As far as the sponsor is concerned, the primary objective of any sponsorship deal is to enhance its brand and reputation in a safe and cost-effective way.

For the event holder, while this may be a secondary concern to the cash injection that comes with sponsorship, there will also be a concern to ensure that any tie-up with a sponsor does not adversely affect the estate's reputation.

This means that certain controls should be included within the agreement to give each party a say on how the other side is going to use their name, trade mark or logo in promotional material. As a minimum, we recommend to our clients that they have approval rights over any promotional material produced by the other side. Some clients have branding guidelines which must be followed whenever their name or logo is used; if you have such guidelines it would be very sensible to get the other party to commit to comply with these at all times.

The use by the other side of your name and logo should be permitted under licence; this licence should end upon expiry or termination of the sponsorship agreement.

Scope of Sponsorship Benefits

If you are the sponsor then you will need to make sure that the agreement sets out in fairly specific detail what benefits you will derive under this agreement.

Things to consider include:

- what designation will you be given (for example: 'title sponsor', 'affiliate sponsor', 'supporter', etc);
- how often will your name and logo be used by the event holder; where and how prominently;
- the extent to which you can refer to your sponsorship on your own platforms (website, social media channels, etc); and
- if there are other sponsors, how prominent your sponsorship will be compared to theirs, and whether you have approval rights over the appointment of any other sponsor.

Of course, if you are the event holder, you may want to introduce some flexibility into the contract, just in case you cannot provide exactly what you promised at the outset. A provision stating that you are able to replace the agreed benefits with similar benefits of equivalent value can be helpful here.

Sponsorship Fees or Value in Kind

Most sponsorship arrangements still involve the supply of sponsorship benefits in exchange for a fee. As the supply of these benefits amounts to a clear supply of value, this fee will usually be VAT-able.

However, we are increasingly seeing more innovative sponsorship arrangements where, instead of a fee, the sponsor is supplying something else of value to the event holder in exchange for the sponsorship benefits.

> As a minimum, we recommend to our clients that they have approval rights over any promotional material produced by the other side.

For example, providing the prizes for competitions held during the event, supplying the wine or catering for the event, or any other supplies useful to the event holder. This type of supply is typically referred to as *'value in kind'*.

While it is tempting to see this value in kind supply as being given 'for free', this would be wrong: something of value is clearly going from one party to the other. As such, and generally speaking, VAT will be payable on this supply, despite the fact that no money is actually changing hands, and the parties will be required to cross-invoice each other for the VAT attributable to the supply, typically assessed at the market rate of the value in kind. This obligation should be reflected in the sponsorship agreement. If in doubt, speak to your accountant or legal adviser about getting the mechanics right.

If you are the event holder, you will want to ensure that the value in kind supplies are of a sufficient quality, and a commitment to this quality should be included in the agreement. This isn't looking a gift horse in the mouth: as noted above, you will be providing something of significant value in exchange, and in most instances, the cost to the sponsor in providing such supplies will be much lower than a commitment to provide a fee for the same amount.

Term and Termination

Like all commercial contracts, it is important for your sponsorship agreement to clearly state how long it will continue for, and the circumstances in which it may be terminated early by either party. Termination for the other party's material breach of contract or insolvency is standard, but there are other triggers that you may want to include in the drafting. For example, termination if the event does not go ahead for whatever reason, or if one party does something that severely damages the other party's reputation.

The cost implications of early termination should also be thought through and, ideally, addressed in the contract. In particular, will the sponsorship fee be refunded if the event does not go ahead? This might be appropriate if the event is terminated well ahead of time, but what about termination the week before? If the sponsorship benefits include a lot of advanced promotional activity, one could argue that the sponsor has already derived significant value from the sponsorship, and so should not receive the full amount. Quite where you end up on this point is of course a commercial decision for the parties: either way, it is good to deal with this at the outset to avoid any surprises later down the line.

Jane Randell

VI The Scope of Shooting Rights

Whether running a commercial shoot or a more low-key private affair, it is critical to the success of the shoot that sufficient rights are enjoyed by those operating it. Of course, it is all too easy to think of those standing on the pegs and forget the hard work that goes into creating a good day's shooting. Mother Nature and Lady Luck both have their part to play, but behind every shoot there will be a keeper (and a team under him for the biggest shoots) who has been working hard to ensure the guns have a successful day. Rearing, feeding, dogging-in and all that goes into making a shoot must be undertaken diligently. Where you are shooting on your own property you will of course enjoy all the rights you could possibly require (so long as the shooting rights have not been separated from the freehold interest in your property). On larger and often commercial shoots those sporting rights have often been severed from the freehold and/or are let from various freehold owners.

The recent case of *Fuller v Kitzing* has put the spotlight on sporting rights. While this case is not particularly ground-breaking, it serves as a useful reminder that where sporting rights are granted to a third party, or where they are perhaps reserved on a sale of freehold property, it is of the utmost importance that the sporting rights are clearly and expressly stated in the transfer or lease in order to avoid any confusion and the potential for disputes.

Two particular questions reviewed in *Fuller v Kitzing* related to whether a grantee of sporting rights was entitled to 'preserve and rear' game and, if so, whether that included the right to introduce poults onto the property. This of course can be of huge significance where the shooting takes place on land owned by others. So, what does 'preserving and rearing' mean? The decision in the case confirms that preserving game includes protecting it against predators; rearing is, in the normal sense of the word, the basic husbandry of the game.

In this case, the ability to preserve and rear game applied (without express provision to the contrary) to game which were on the land in question and would therefore apply to birds if they were to wander onto the property in the future. However, the right to rear game in itself did not include the right to stock young birds on a property.

As we all know, commercial shoots would not be able to service their clients' demands without being able to introduce poults ahead of the shooting season and it is standard practice to ship in large number of poults to the land over which sporting rights are to be exercised.
The critical point for shoots is that, if there is no express reservation or grant of the right to introduce young poults, then the efficacy of the sporting rights is seemingly diminished if only 'wild' birds can be shot (whether they are native to the land or reared on neighbouring land and wander onto the land).

This position had previously been confirmed as far back as 1885 in the case of *Farrer v Nelson*, in which the holder of shooting rights had contended unsuccessfully that a right to bring birds onto and stock the land should be implied in a right to shoot.

The firm conclusion that must be drawn from the most recent case is fundamental: the nature of sporting rights and their exercise is determined by the express grant or reservation. It is therefore vital that the practical realities of a shoot are understood when undertaking any transactions where shooting rights are to be reserved and will continue to be enjoyed by the seller of property. If, for example, it is known that pens are used in a particular coppice, then any sale should reserve the right to continue to use any such pens and the right to introduce young birds into such pens and release them. Likewise, the smaller details such as rights to use water pipes for drinkers and the right to put down feeders or keep storage hoppers should ideally be expressly included in any grant or reservation as necessary.

Thomas Kirkman

> “The decision in the case confirms that preserving game includes protecting it against predators; rearing is, in the normal sense of the word, the basic husbandry of the game.”

VII The New Electronic Communications Code

The Electronic Communications Code, originally adopted in 1984, has undergone an overhaul after many years of criticism. The 2017 Code came into force on 28 December 2017 and brought with it some developments which will be welcome to landowners and others which, unfortunately, have proved somewhat more controversial.

A Brief Reminder

The Code deals with rights for 'operators' – certain telecoms network providers who have received a direction from Ofcom (including site managers, such as Arqiva or Cornerstone Telecommunications, as well as mobile phone companies like Vodafone) – to lay and maintain telecoms apparatus on other people's land and to access the land for those purposes.
The permitted apparatus is not restricted to masts; the Code can apply to copper telephone wires, fibre optic cables and other equipment used for the provision of an electronic communications network. The rights can be granted by agreement with the landowner or occupier or, in the absence of express agreement, the operator can apply to court to impose the rights. Apparatus which is governed by the Code benefits from security of tenure – it cannot be removed unless and until the procedures in the Code are followed.

Rent

One of the most controversial changes has been valuation. Under the 2017 Code, a market rent is payable but the value of the site to the operator will be disregarded. The rent will therefore reflect the land's value without any telecoms apparatus. Given masts are often erected in woods or field corners, this is likely to reduce rents.

Sharing, Assigning and Upgrading

Operators how have additional rights compared to the 1984 Code, which apply automatically whether the agreement mentions them or not.

An operator may share apparatus with another operator or upgrade the apparatus without asking for consent or paying any money, as long as there is no (or minimal) adverse effect on the appearance of the apparatus and there is no additional burden on the other party to the agreement (ie the landowner or occupier).

In addition, Code agreements must not restrict assignment by the operator, for example by requiring the consent of the other party to the agreement or the payment of money. However, the one restriction allowed is a requirement for a guarantee from the outgoing operator, to cover the performance of the agreement obligations by the assignee. Any attempt to restrict assignment in any other way will be void.

Termination and Removal

The security of tenure under the Code means that when a landowner or occupier wants to terminate the agreement and remove the apparatus, he must serve notice on the operator first and the operator may choose to agree or to apply to court. This principle remains in the 2017 Code, but with one major change – 18 months' notice is now required to terminate the Code rights, and even then termination can only happen if certain grounds are proved. The only ground for termination over which a landowner or occupier has control is redevelopment. The other grounds are persistent delay in making payments or substantial breaches of the agreement terms by the operator.

Once the Code rights have ended, there is a separate procedure to follow to remove the apparatus, again involving notice to the operator.

If the landowner or occupier wants to renew a Code lease or vary the terms once the lease has expired, six months' notice must be given.

> 18 months' notice is now required to terminate the Code rights, and even then termination can only happen if certain grounds are proved.

Landlord and Tenant Act 1954

Agreements affected by the Code can now only have security of tenure under the 2017 Code or the Landlord and Tenant Act 1954, not both. If the 'primary purpose' of a lease granted on or after 28 December 2017 is to grant Code rights, it will be a Code lease and the 1954 Act will not apply.

It is worth noting, however, that even if a lease's primary purpose is not the grant of Code rights (and so, for example, the redevelopment ground under the Code does not need to be satisfied), certain procedures contained in the Code need to be followed for apparatus to be removed.

Binding Agreements

One of the more confusing aspects of the 1984 Code was the complexity of the rules governing who would be bound by a Code agreement entered into by an occupier. The 2017 Code has improved this significantly. If an agreement is entered into by a farm tenant, the people bound are the farm tenant and those deriving their interest in the land from the farm tenant or the farm tenant's successors. The freeholder will not be bound if it is not a party to the agreement. We regularly see leases entered into between a tenant farmer and an operator and so operators may now be more inclined to check who owns the freehold to ensure that the freeholder also signs any agreement.

Existing Agreements

Any agreements with Code operators which were in effect before 28 December will remain valid. The 2017 Code does apply to them, but not to every aspect of the agreement. For example, any restrictions on assignment, upgrading or sharing apparatus in the agreement will continue to be enforceable.

In addition, the security of tenure provisions of the 2017 Code do not apply to existing leases protected under the Landlord and Tenant Act 1954, or to leases contracted out of the 1954 Act whose primary purpose is not to grant Code rights. To bring to an end such leases, a landlord still has to rely on the 1954 Act (where applicable), but as far as the Code is concerned, the landlord can go straight to the removal procedure under the 2017 Code without serving 18 months' notice and proving certain grounds to terminate the Code rights. Any other existing agreements, however, *will* have security of tenure under the Code (for example, leases contracted out of the 1954 Act whose primary purpose *is* the grant of Code rights) so 18 months' notice will need to be served and the grounds for termination will need to be proved (such as redevelopment).

Modus Operandi

The government's reasoning for these changes is laudable: to improve broadband networks which are vital to the economic and social fabric of the country. However, it is likely that some landowners will lose out as the new Code beds in. Much will depend on how willing operators are to use the full force of the Code – in the past, many have shied away for fear of bad publicity. Nevertheless, whatever an operator might agree to in writing, there is always a risk that they could apply to court to enforce their formal rights.

Shona Ferguson

VIII Case Law Buffet

Overage

A recent High Court case provides a reminder to consider all possible scenarios when drafting overage provisions.

In this case, the buyer was granted an option to purchase a piece of land which had residential development potential. Under the agreement, the buyer was required to apply for and use all reasonable endeavours to obtain planning permission and, if the option was exercised, to carry out the development as soon as practicable. In addition, the seller was entitled to an overage payment which was triggered on the sale of the newly constructed houses. However, the agreement did not require the buyer to market or sell those houses once built. In an attempt to avoid making the payment, the buyer occupied one of the houses and let out the others on short-term tenancies with the intention of delaying making the overage payment indefinitely.

The court held that a term should be implied into the agreement that required the buyer to sell the houses within a reasonable time, as without such a term, the agreement lacked commercial coherence.

Despite the court's ruling in this case, it is not easy to persuade the courts to imply a missing term into a contract. This case should therefore serve as a reminder to consider the possible ways in which developers may try to wriggle out of paying overage payments.

Sparks v Biden (2017)

Contaminated Land

The Court of Appeal recently held that a local authority was not an 'appropriate person' under the contaminated land legislation, as liability had not transferred to it from its predecessor local authority body. It was therefore not liable for contamination arising as a result of the predecessor local authority's activities.

By way of background, the contaminated land regime is a statutory regime for remediation of contaminated land that causes an unacceptable level of risk. If land is identified as contaminated, then clean-up costs can be imposed on the relevant 'appropriate persons' as follows:

- Class A persons – those who caused or knowingly permitted the contaminating substances to be present on the land;
- Class B persons – if no Class A person can be found, then liability passes to the current owner or occupier of the site.

In this case, the court held that the legislation transferring liabilities from the predecessor local authority body to Powys County Council in 1996 did not include the correct wording to transfer liability under the contaminated land regime.

The implication of this is that if an original landfilling or polluting council has been abolished by statute, it is possible that liability will not have passed to its successor body. The consequence would be that the current owner of the land would be liable on the basis that the original Class A person cannot be found. (Similar situations arise where the original polluter is a dissolved company.)

For buyers, this case highlights the importance of taking care with environmental due diligence, especially when the land is (or adjoins) ex-landfill. Where there is a risk, buyers should always seek indemnities from sellers on contamination and also consider environmental indemnity insurance.

However, it is important to remember that enforcement through the contaminated land

> Japanese knotweed can be classed as a nuisance before it spreads to neighbouring land, because of the impact on the amenity of the property.

regime is rare; councils have no funding for it and increasingly prefer to deal with clean up through the planning system.

Powys County Council v Price and another (2017)

Case D – Validity of Notice

A recent High Court case considered the requirements for a valid Case D notice to remedy a remediable breach under the Agricultural Holdings Act 1986. In this case, the court confirmed that a Case D notice was valid despite referring to the wrong clause of the tenancy agreement.

The tenant had built a path and wall, which he admitted breached clause 26 of his tenancy agreement. However, the landlord's notice erroneously referred to clause 27. The court considered that the error was trivial and could not reasonably have misled the tenant or caused substantial injustice and upheld the arbitrator's award in favour of the landlord.

It is also worth bearing in mind the judge's criticism of the conduct of the parties.
The arbitration had taken four years to reach a final award and both parties' legal costs had exceeded a total of £500,000. The judge commented that this was 'wholly disproportionate' given that the cost of removing the path and wall was around £9,000 and is a stark demonstration of the costs of litigation.

Sowden v Smyth-Tyrrell and another (2017)

Beach Huts – Licence or Tenancy?

The High Court has held that the owners of beach huts situated on fields in Dorset were occupying as tenants by an annual periodic tenancy rather than as licensees.

The court held that as the huts occupied the same extent of land for the entire time they were in use, the landowner was prevented from being able to use or occupy that land. Consequently, the hut owners had exclusive possession, for a term and at a rent, which are the three key elements of a tenancy.

The court was also asked to determine whether the huts were fixtures (and therefore part of the land) or chattels (personal property). The beach huts were held to be chattels as they were capable of being moved without significant damage being caused to them and they had not therefore been annexed to the land. The owners were therefore required to remove them at the end of the term.

Gilpin v Legg (2017)

Animals Act – Strict Liability for Escaped Cow

In a recent case, the Court of Appeal held that a farmer was strictly liable under the Animals Act 1971 for a road traffic accident caused by a cow which had escaped from his field.

The farmer had bought the Charolais steer and two others at a cattle market on the previous day. However, the steer had been spooked and had leapt over a six foot fence and escaped from the field. The steer had then jumped or forced its way through numerous hedges and fences before running onto a dual carriageway where it was hit by a car.

Although the court found the farmer's conduct 'impeccable', the court found that the characteristic of the steer acting unpredictably when frightened was causative of the accident. This met the required criteria under the Act for damage caused by an animal which does not belong to a dangerous species and therefore the farmer was held strictly liable.

This decision is another reminder to all livestock keepers to ensure that they are fully insured against such claims.

Williams v Hawkes (2017)

Japanese Knotweed

Truro County Court has held a woman liable for a 10% diminution in the value of a couple's neighbouring £500,000 property because she allowed Japanese knotweed to spread from her property to theirs.

The dispute arose some 17 years ago, after the couple purchased their house from the woman while she retained some neighbouring land. The woman claimed she had treated her land to try to eradicate the weed and that the claim was a veiled attempt to take possession of her property, but the court found against her.

This case serves as a warning to landowners to be vigilant about Japanese knotweed appearing on their land and to take steps early on to eradicate it. A separate case in 2017 (*Williams v Network Rail Infrastructure Limited*) confirmed that Japanese knotweed can be classed as a nuisance before it spreads to neighbouring land, because of the impact on the amenity of the property (although Network Rail is appealing this decision).

Adam and Eleanor Smith v Rosemary Line (2018)

Katy Tydeman

IX Small Sewage Discharges

A small discharge from a septic tank or small sewage treatment plant (also known as a Small Sewage Discharge or 'SSD') requires an environmental permit to authorise the discharge, unless the discharge meets specified exemption requirements:

- both a small sewage treatment plant and a septic tank can be exempt from requiring an environmental permit, if the discharge is made to groundwater;
- only a small sewage treatment plant (not a septic tank) can be exempt from requiring an environmental permit, if the discharge is made directly to surface water (eg rivers, streams, lakes, etc).

The 'operator' is responsible for ensuring that sewage discharges comply with the legal requirements, which are contained in the Environmental Permitting (England and Wales) Regulations 2016 ('EPRs'). The operator is either the person who owns the property where the sewage discharge system is situated or used, or the person who has a written agreement with the property owner to be responsible for the system's maintenance. A breach of the EPRs is a criminal offence.

Prohibition on Discharging from a Septic Tank Directly to Surface Water

A septic tank does not treat the liquid that passes through its system and therefore the discharge is not considered to be clean enough to enter directly into surface water. This form of discharge requires an environmental permit. However, the Environment Agency's ('EA') guidance for SSDs (dated 16 June 2015) states that permits for this form of discharge will only be granted in 'exceptional circumstances'. No further information is provided as to what this means, but it appears that such permits are very unlikely to be granted. Consequently, operators of septic tanks which discharge directly into surface water will generally need to change their arrangements.

Direct discharges from septic tanks to surface water which are not authorised by an environmental permit constitute a breach of the EPRs as no exemption is available. That said, the EA's online guidance for SSDs sets a timetable for operators to bring their discharges into compliance. It states that: *'If you have a septic tank that discharges directly to surface water you will need to replace or upgrade your treatment system by 1 January 2020.'* This appears to be the latest possible date for compliance. The guidance also provides that the septic tank will need to be replaced or upgraded before 1 January 2020, when you sell your property before that date or if there is evidence that the discharge is causing pollution.

Replacing or Upgrading a Septic Tank that Discharges Directly to Surface Water

The EA suggests the following options for replacing or upgrading a septic tank that discharges directly to surface water:

1. replace the septic tank with a small sewage treatment plant which discharges to surface water;
2. install a drainage field (also known as an infiltration system) so the septic tank can discharge to ground instead; or
3. connect to a mains sewer (where available).

Options 1 and 2 can be exempt from the requirement to obtain an environmental permit if the relevant criteria are met. The criteria are set out in the EPRs and are summarised below.

An Exempt Small Sewage Treatment Plant that Discharges Directly to Surface Water

A small sewage treatment plant (also known as a package treatment plant) is a part-mechanical system that treats the liquid. In England, an operator of a small sewage treatment plant that discharges directly to surface water can be exempt from the need to obtain an environmental permit to authorise the discharge, as long as:

1. the discharge is five cubic metres or less per day in volume and does not contain trade effluent;
2. the discharge does not cause pollution to surface water;
3. the discharge cannot reasonably be made to a foul sewer (see below), if the discharge first occurred on or after 1 January 2015;
4. the discharge and related infrastructure comply with the General Binding Rules (see below) for small sewage treatment plants that discharge directly to surface water;
5. all works and equipment used for the treatment of sewage effluent and its discharge are maintained in accordance with the manufacturer's specification;
6. all works and equipment used for the treatment of sewage effluent and its discharge are appropriately decommissioned when the facility ceases to be in operation; and
7. before the land or part of the land on which the sewage treatment plant is situated or being used is sold, the landowner gives to the purchaser a written notice which states that an exempt water discharge activity is being carried on and contains a description of the exempt facility.

An Exempt Septic Tank that Discharges to Ground

An operator who installs a drainage field for their septic tank can be exempt from the need to obtain an environmental permit to authorise the discharge. The operator must comply with the same requirements as for discharging from a small sewage treatment plant to surface water, subject to certain variations aimed at protecting groundwater. This is because the discharge could flow through the ground and enter the groundwater further below. These groundwater specific provisions are as follows:

1. the discharge is limited to two cubic metres or less per day in volume (rather than five cubic metres or less);
2. the discharge does not cause pollution to groundwater (rather than surface water);
3. the discharge follows the General Binding Rules for groundwater discharge (see below); and
4. the discharge does not result in an input of pollutants to groundwater within 50 metres of an abstraction point for domestic or food production purposes, or within a 50-day travel time for groundwater to reach such an abstraction point.

The above exemption is also available for an operator who discharges from a small sewage treatment plant directly to ground.

The General Binding Rules and Exemption Breaches

The General Binding Rules contain requirements relating to the form of discharge, where it must be located, and specifications for the treatment equipment and its maintenance. There are variations in the rules depending on whether the

> An operator must have an environmental permit for a Small Sewage Discharge if it does not meet the relevant exemption criteria.

discharge is to surface water or groundwater and whether the discharge is a 'new' discharge.

Under the EPRs a 'new discharge' is one 'which takes place for the first time on or after 1 January 2015'. However the EA's online guidance for SSDs indicates that where an operator changes its discharge from a discharge to surface water to a discharge to ground after 1 January 2015 (or the other way round), then the EA will classify such change as a 'new' discharge.

An operator whose discharge can benefit from an exemption must comply with the EPR requirements, including the General Binding Rules. Failure to comply with the exemption requirements without authorisation from the EA is a criminal offence.

Connecting to a Foul Sewer

As mentioned above, one of the exemption requirements for a discharge made directly to surface water, or to ground, is that the discharge cannot reasonably be made to a foul sewer if the discharge is a 'new' discharge.

Although there is no specific guidance on what is considered reasonable for connecting to foul sewer in this context, there is such guidance in the context of application forms for a bespoke environmental permit for surface water and groundwater discharges (known as 'B6 category'). Briefly, the operator will need to provide evidence that they have carried out checks to locate the closest public or private foul sewer and, where applicable, showing that they approached the owner to connect to the sewer, together with the owner's response. The B6 category application form contains a formula for calculating whether it is reasonable to connect to the sewer which takes into account distance, level of discharge and connection costs.

Additional Requirements for Wales

This article discusses the requirements in England. It should be noted that, in Wales, there are additional requirements that apply to both the exemption for a discharge from a septic tank or small sewage treatment plant to ground and to a discharge from a small sewage treatment plant that discharges directly to surface water.

Environmental Permits

An operator must have an environmental permit for an SSD if it does not meet the relevant exemption criteria. However, as noted above, there is a low likelihood of obtaining an environmental permit for discharges from a septic tank directly to surface water. For larger discharges (a maximum daily volume between five and 20 cubic metres per day) to surface water from certain types of treatment plant, the operator may be able to apply for a 'standard rules permit'. Again, the operator needs to show that the discharge cannot reasonably be made to a foul sewer. Failure to hold a permit where required and breach of a permit condition both comprise criminal offences under the EPRs.

Jay Sattin

X Building Conversions – Agricultural to Residential

Agricultural buildings have long held a cherished status as part of the rural landscape, but over time many of these buildings have become obsolete and conversion to residential use is the only viable future for them. This article examines the processes for converting agricultural property into residential use, and identifies certain pitfalls to be avoided.

Promoters and Developers

A reasonable starting point for a landowner is to assess whether it should delegate some of the development responsibilities to a specialist promoter or developer. 'Promoters' and 'developers' are often seen in the same light, but they do not offer the same service. Generally speaking, a promoter will seek planning permission for a development site, usually in return for a fee (or perhaps a share of the profits); a developer may also participate in the planning process, but will generally also agree to manage the construction process on behalf of the land owner.

Clearly, a promoter or developer will provide a useful service – managing the construction process can be time consuming – but the value will usually be measurable by reference to the level of expertise which the promoter or developer can bring to the development (and this should be reflected in a fee system which works for both parties). Often it will be appropriate to use the fee system to incentivise success. Some consideration of the tax implications of these arrangements also needs to be undertaken. The arrangement should then be documented in a formal promotion agreement or development agreement, as the case may be.

Obtaining Statutory Consents from the Local Planning Authority

The change of use of the building and the associated building operations will either require planning permission or they may benefit from permitted development rights. In an effort to relax planning laws the government has expanded permitted development rights to include the change of use of a building (and any land within its curtilage) from a use as an agricultural building to a dwelling house.
The permitted development rights also extend to those building operations that are reasonably necessary to convert the building into a dwelling. Only conversion works are permitted – this was clarified by the High Court in 2016; if the works amount to the agricultural building being rebuilt, that falls outside the permitted development regime and a planning application is required instead.

Planning legislation sets out a detailed list of criteria that the proposal must satisfy before it is considered to be eligible for permitted development rights. A prior approval application also needs to be submitted to the local planning authority to allow them to consider a limited number of matters including transport and highway impacts, flood risk, whether the location or siting of the building makes it undesirable for its use as a dwelling and the design and external appearance of the building.

Previously, permitted development rights could only be used to create no more than three separate dwellings with a maximum floor space of 450 square metres. That changed from 6 April 2018. Up to five new houses can now be created as follows:

- three larger homes with a maximum floor space of 465 square metres; or
- five smaller homes each no larger than 100 square metres; or
- a mix of both, with a maximum of five homes of which no more than three can be larger homes.

Where it is not possible to satisfy the permitted development criteria, a planning application will need to be submitted instead; this will be determined in accordance with the development plan, unless material considerations indicate otherwise.

Construction Contracts

Once statutory consents have been obtained, and all conditions attached to them have been satisfied, construction work can begin. It is always good practice to have a package of contracts in place, particularly before work starts on site.

Most development projects will require the participation of a number of professional consultants, including an architect, a structural engineer, a mechanical and electrical engineer and a health and safety consultant (called a 'Principal Designer'). In addition, there will be a construction team: a group of trade contractors, usually coordinated by a single main contractor, who contracts with the land owner or developer for the delivery of the project.

The shape of those contracts may be substantially influenced by arrangements made between the landowner and any developer. Typically, a developer will assume all construction risks – so it will enter into contracts with each contractor, architect, engineer etc – but where this is the case, the landowner should usually be provided with the right to take over the relevant contracts if the developer defaults. These rights – usually called 'step-in rights' – need to be agreed with each contractor or consultant concerned in a collateral warranty. Step-in rights represent an essential opportunity for the landowner to complete the development, even if the developer becomes insolvent, or simply fails to perform.

Disposing of Converted Property

Disposing of newly converted property can have its own challenges. It is preferable to plan early for these. The disposal of each unit will be substantially facilitated if the completed development complies both with established industry norms and with a specific set of rules laid out in the UK Finance Mortgage Lenders' (UKFML) handbook (previously known as the Council of Mortgage Lenders' or CML handbook). Indeed, unless it can be shown that the development complies with the UKFML handbook, it will not usually be possible for a buyer to obtain mortgage finance against it.

A buyer will also have specific expectations in relation to construction risks. Most buyers will expect a package of certificates and guarantees in relation to the completed works, including evidence of compliance with Building Regulations, but in addition, the UKFML handbook sets out certain expectations.
The UKFML handbook requires that any newly constructed or newly converted property is

insured against hidden construction defects, by one of a pre-approved list of insurance policies. This requires some early planning and some financial outlay. If this insurance is not available, some banks may accept a certificate from a suitably qualified architect or surveyor to the effect that the property has been built to a good standard – but this too will require early arrangement with the architect or surveyor asked to sign the certificate. It can be a real spanner in the works if this paperwork is not in place when a buyer instructs solicitors.

Another area that benefits from early attention is services. Each converted barn will be served by water, electricity, telecommunications, drainage etc; it will also require access, perhaps over a central common area. In a tightly packed group of buildings, careful thought needs to be given to the interrelation of these common services to ensure the legal rights (and responsibilities for repair or contribution) of the new units dovetail precisely. Ideally, the details should be sorted for the whole site by the seller's solicitor and land agent (and by reference to as-laid plans) before the first buyer is found.

> A reasonable starting point for a landowner is to assess whether it should delegate some of the development responsibilities to a specialist promoter or developer.

Edward Banyard Smith and Karen Phull

XI MEES Muddle

The regulations setting out the Minimum Energy Efficiency Standard (MEES) for private rented properties have come into force, in part – so, have all the uncertainties surrounding them been ironed out?

The Current Status

The government's planned 'soft start' for the MEES Regulations has begun, with new lettings (including lease renewals and extensions) of properties below an 'E' EPC rating being prohibited from 1 April 2018. This means that if a landlord wishes to let a property with an 'F' or 'G' EPC rating, he will either need to carry out works to increase the rating to an 'E' before letting it or register an exemption to avoid a substantial fine and publication of the breach.

Non-domestic leases for more than six months and less than 99 years are caught, and landlords need only do the works which pay for themselves within seven years according to a test set out in the legislation.

For domestic properties, only specific tenancy types are caught by the regulations: assured tenancies (including assured shorthold), assured agricultural occupancies, Rent Act 1977 tenancies and tenancies under the Rent (Agriculture) Act 1976. In addition, domestic landlords need only carry out works for which funding is available, for example from the Green Deal, energy companies or local authorities (although there is currently a proposal to introduce a requirement for landlords to contribute to costs up to a cap of £2,500 from April 2019).

The MEES Regulations only apply if the property is one which (i) requires an EPC on a sale, letting or development (ie it is not an exempt building, such as temporary buildings, those intended for demolition and agricultural buildings with low energy use); and (ii) actually has a valid EPC.

Government Confusion

The government guidance on the MEES Regulations was recently published. Unfortunately, in several areas uncertainties remain which are not in the least remedied by the guidance – in fact in places the guidance actually adds further confusion.

Voluntary EPCs

The government guidance on the MEES Regulations states that those who obtain EPCs voluntarily will not be required to comply with MEES. However, there is no such concession in the MEES Regulations themselves, and the government guidance is not legally binding.

What is meant by 'voluntary'? It is easy to see that EPCs obtained for buildings which are specifically exempt from the requirement to obtain one (eg temporary buildings and the like, mentioned above) would be 'voluntary'. But what about an EPC obtained for a building that *would* require one on a sale or letting, but where no such event is planned? The EPC might have been obtained for other reasons, but if it is later used for a sale or letting it would become 'compulsory'. What if the most recent EPC was obtained by a tenant – would a landlord always know the reason it was obtained?

Even if an EPC *is* considered voluntary, it will be difficult to prove this, and it is doubtful that local authorities will have the resources to go into this level of detail in enforcing the regime.

Listed Buildings

There has long been a debate about whether or not an owner of a listed building would be exempt from the requirement to provide an EPC on a sale or letting, because the government stated this was its intention but the legislation did not reflect that. Under the EPC legislation, the exemption is only for:

'…buildings officially protected as part of a designated environment or because of their special architectural or historical merit, in so far as compliance with certain minimum energy performance requirements would unacceptably alter their character or appearance.'

There is no definition of 'certain minimum energy performance standards' nor of 'unacceptably alter their character or appearance.'

In December, the government updated its guidance to state that the 'officially protected' buildings referred to are listed buildings and those within a conservation area. It goes on to confirm that owners should make their own decision as to whether minimum energy performance requirements – such as works indicated in EPC recommendation reports – would unacceptably alter the building's character or appearance, taking advice from local authority conservation officers if necessary.

This leads to a circular argument: it seems to be suggesting that you need an EPC to ascertain whether or not you need an EPC. Having obtained one, you might be putting the building within the scope of the MEES Regulations when it need not be.

Holiday Lets

The EPC legislation is fairly clear in setting out an exemption for buildings which are used or intended to be used for a maximum of four months per year, or where the energy usage is expected to be less than 25% of the expected usage for a full year. Unfortunately, the government guidance on EPCs refers to a different definition, 'furnished holiday lets', an existing concept in tax law. The definition is lengthy, but (to take the key points) it refers to properties occupied for the purpose of a holiday, for no longer than 31 days to any one occupant, where the occupant is not responsible for the energy costs.

Given that the government guidance is not legally binding, it is difficult to see how the latter definition could be defended in court, but the uncertainty is unhelpful. The government did not take the opportunity offered by the MEES Regulations to clarify the position – the 'furnished holiday let' definition has been repeated in the government guidance on the MEES Regulations.

The arrangement between the holiday maker and the provider of the holiday let is usually a licence, and therefore outside the scope of the MEES Regulations. However, if the provider of the holiday let is a tenant under a lease, the MEES Regulations will apply to that letting if the other criteria are met (for example, it is a type of tenancy specified in the legislation and there is a valid EPC).

Whether or not a holiday let needs an EPC is a key question in determining whether the MEES Regulations also need to be complied with. Whilst the majority of landlords might rely on the

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government guidance on EPCs, a more reliable position might be to follow the definition in the legislation, since ultimately this is what a court would use to determine a dispute.

Renewals

There is no exemption for lease renewals in the EPC legislation – simply a requirement to provide an EPC to a tenant on any letting. However, the government guidance on EPCs states that lease renewals do not trigger the need to provide an EPC, and the property industry has largely relied on this.

To add to the confusion, the government guidance on the MEES Regulations states clearly, in worked examples, that an EPC *would* be required on a lease renewal. Indeed, since the MEES Regulations apply on lease renewals, parts of the legislation would not work at all if this were not the case – how can there be a minimum EPC rating for a lease transaction which does not require an EPC?

What Hope of Clarity?

In all these scenarios, where there is doubt, for the moment it might be safest to assume that an EPC is required and to be prepared to comply with the MEES Regulations if necessary.

Looking ahead, the whole MEES regime is going to be reviewed by the government as part of their 'Clean Growth Strategy'. Whilst the primary goal will be to introduce more stringent requirements – for example, higher EPC ratings required for lettings and possibly even sales – we can but hope that the government will listen to the ongoing complaints and clarify these knotty issues.

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