FARRER&Co

Rural Estates Newsletter

Summer 2017

Editorial

One of the delights of Springwatch is the way live webcams allow the office worker to peer from her desk into the alien world of a kestrel nest or a box of fledging blue tits. What an extraordinary thing, and how impoverished we would be without this perspective on such hidden lives. Politicians would still pursue policies; asset managers would consult spreadsheets; lawyers would produce articles about *The Cultural Gifts Scheme: a Heritage Tax Break for the Living* (see Isabel Paintin's article), *Restrictive Covenants as Clawback Devices* (Rose Gurney) and even *Badgers!* (Alice Groom); but we would all be missing something. Part of the wonder of watching wildlife is a quiet lesson in humility: it reminds us that our own perspectives and opinions are also tightly bounded and partial (and prompts us to be attentive to the differing viewpoints of others).

Watching the stoats at Sherborne Park on Springwatch this year caused my son to ask whether these were the same as the weasels in The Wind in the Willows ("No, they are different beasts: the weasel is weasily identified; the stoat is stoatally different") and something in this association of thoughts vividly brought to mind a vision of Kenneth Grahame's Mole, as he spring cleans his small, subterranean home:

Spring was moving in the air above and in the earth below and around him, penetrating even his dark and lowly little house with its spirit of divine discontent and longing. It was small wonder, then, that he suddenly flung down his brush on the floor, said 'Bother!' and 'O blow!' and also 'Hang spring-cleaning!' and bolted out of the house without even waiting to put on his coat. Something up above was calling him imperiously, and he made for the steep little tunnel which answered in his case to the gravelled carriage-drive owned by animals whose residences are nearer to the sun and air. So he scraped and scratched and scrabbled and scrooged and then he scrooged again and scrabbled and scratched and scraped, working busily with his little paws and muttering to himself, 'Up we go! Up we go!' till at last, pop! his snout came out into the sunlight, and he found himself rolling in the warm grass of a great meadow.

'This is fine!' he said to himself. `This is better than whitewashing!' The sunshine struck hot on his fur, soft breezes caressed his heated brow, and after the seclusion of the cellarage he had lived in so long the carol of happy birds fell on his dulled hearing almost like a shout.

James Maxwell

Contents

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.**

The Great Repeal Bill

When Theresa May called the snap election in April this year, her stated reason for doing so was to strengthen her hand in the Brexit negotiations. The Conservative Party was also hoping that with a beefed-up majority it would have an easier time pushing through legislative projects such as the Great Repeal Bill. The rural and agricultural community has always recognised the scale of the challenge posed by the need to legislate for Brexit. However, prior to the publication of the exit polls on election night it could not have predicted that the challenge was about to become even greater. The Conservatives' loss of majority in the Commons is likely to make what was already a daunting task significantly more difficult.

What is the Great Repeal Bill?

On 29 March 2017 the Conservative government triggered Article 50 of the Treaty of Lisbon starting the process which was intended to take the UK out of the European Union in March 2019.

The Article 50 process gives effect to the UK's withdrawal as a matter of EU Law. However, new legislation will be needed to ensure that domestic law accommodates and reflects the UK's withdrawal from the EU. To that end, the day after triggering Article 50 the government set out details of its Great Repeal Bill plan in a White Paper entitled *Legislating for the United Kingdom's withdrawal from the European Union*. This detailed the profound changes which the government intended to implement as the UK prepares for its departure from the EU's jurisdiction.

How will it work?

The government claimed that the bill will "put the UK back in control of its laws" and "maximise certainty for businesses, workers, investors and consumers across the whole of the UK".

To achieve those goals it said that the bill will do three main things:-

1. It will repeal the European Communities Act 1972 which says that EU law is supreme to UK law. By doing so, the government says it will return power to UK institutions.
2. It will convert EU law (as it applies in the UK) into domestic law on the day the UK leaves. These changes will come into effect only when the UK leaves the EU, not before. The government says that this will ensure "a stable and smooth transition".
3. It will create powers to make secondary legislation. According to the government, this will ensure that the UK legal system continues to function correctly outside the EU by enabling corrections to be made to the laws that would otherwise no longer operate appropriately once the UK leaves the EU.

In short, the government intends that the repeal will transpose existing EU legislation into domestic law. In doing so, Parliament will have power to amend and repeal laws as necessary. The government recognises that following Brexit it is inevitable that some legislation will no longer work (for example, legislation referring to the involvement of an EU institution or legislation predicated on UK membership of an EU regime). With this in mind, the government intends that the bill "will create a power to correct the statute book where necessary."

Speaking before MPs in Parliament on 30 March 2017, Brexit Secretary David Davis said, "The bill will convert EU law into United Kingdom law, allowing businesses to continue operating, knowing the rules have not changed overnight, and providing fairness to individuals, whose rights and obligations will not be subject to sudden change."

The Challenge

Following publication of the Great Repeal policy paper, the National Farmers Union was quick to comment on the scale of the challenge. The day after publication, NFU President Meurig Raymond said:

"The task of transferring the vast expanse of existing EU law into UK law will be one of the biggest legislative challenges this country has ever faced. And farming is probably impacted more than any other sector, with a huge number of pieces of directly applicable EU legislation and national implementing regulations governing the way our farmers carry out their day-to-day businesses."

Perhaps the most challenging and controversial issue raised by the White Paper is the proposal to use secondary legislation to "correct" laws that will not operate appropriately once the UK has left the EU.

In March critics of the proposed bill raised concerns that it allows the government to enact its corrections to the statute book without the usual parliamentary scrutiny. Shadow Brexit Secretary, Kier Starmer, said that the bill gave "sweeping powers" to the executive to change regulations and did not propose any safeguards against such powers. The government insisted that the new measures will not be used to make policy changes. It said that "secondary legislation is a legislative process of long standing" and that it "should not be misinterpreted as 'executive orders' issued by the government".

However, the recent decision by the government to cancel next year's Queen's speech is an indication that it now recognises the complexity of the task ahead and that Brexit related legislation cannot be passed and scrutinised in a single year. Speaking after the election on 18 June 2017, Leader of the Commons Andrea Leadsom said "We will build the broadest possible consensus for our Brexit plans, and that means giving Parliament the maximum amount of time to scrutinise these bills by holding a two-year session of Parliament".

Conclusion

All sectors of industry now face a period of uncertainty as the UK's negotiations with the remaining EU 27 nations get off to a start. As the NFU points outs, farming will be one of the sectors most affected by Brexit. The rural community will therefore be keen to have its voice heard throughout this crucial period. It has already welcomed confirmation in the Queen's Speech on 21 June that the government's legislative programme includes an Agricultural Bill intended to set out how farming will be supported after Brexit. CLA president Ross Murray said, "Getting Brexit right for farming is of fundamental importance to the rural economy and we welcome the fact this it will be subject to detailed scrutiny during the passage of a dedicated Agriculture Bill".

Under the formal timetable dictated by Article 50, the UK is due to leave the EU in March 2019 (although both sides can agree an extension). Putting the Great Repeal Bill at the heart of the EU exit legislation and cancelling next year's Queen's speech appears to be an attempt by the government to reassure significant stakeholders that there will not be a legal meltdown in March 2019. The government, which has always planned to implement its repeal proposals in parallel with the exit negotiations, has much to do and its reduced majority has increased the scale of its task both in Brussels and at home.

William Charrington

> The rural and agricultural community has always recognised the scale of the challenge posed by the need to legislate for Brexit.

II The Cultural Gifts Scheme: a Heritage Tax Break for the Living

"The advantage over the AIL regime is that the donor will see the object on display in an institution and being enjoyed by the public in his lifetime."

"You're better off waiting 'til you're dead". This is a not uncommon verdict on the Cultural Gifts Scheme (CGS). It refers to the belief that the more generous tax reliefs relating to heritage property available on death under the well-established acceptance in lieu (AIL) and conditional exemption regimes provide a better overall deal than the still relatively new CGS.

The Government's hope in establishing the CGS was that it would encourage owners of pre-eminent artworks and other important historical material to donate them to the Nation during their lifetimes. But is it working?

Overview

The CGS was introduced by the Finance Act 2012 and enables individuals with a liability to UK income tax (IT) or capital gains tax (CGT), or companies with a liability to UK corporation tax, to donate a pre-eminent object to the Nation in return for a reduction in that liability. The available reduction is 30% of the agreed value of the object for individuals and 20% for companies.

Crucially, trustees, personal representatives and other joint owners of objects are not eligible. Thus the CGS may be of limited use for those landed estates where most, if not all, of the chattels are held within trust structures.

The agreed value of the object is its fair market value (effectively an arms' length sale price) at the 'offer registration date' which is the date on which the application is registered with Arts Council England (ACE). Applicants are asked to submit their own valuations, which should be undertaken by a specialist in the relevant field. ACE will then take its own advice on value before settling the agreed value.

The object, if accepted under the CGS, must be allocated to an eligible institution; it cannot remain in a private house even if open to the public (there is no concept of 'in situ' offers as under the AIL regime). The applicant may specify a preferred institution; otherwise the availability of the object will be advertised by ACE and institutions will be invited to apply for it, following which ACE will make a recommendation to the relevant Minister (whether in England, Scotland, Wales or Northern Ireland).

Once a letter of acceptance has been agreed with the applicant donor, legal title will transfer to the eligible institution or Minister. The object cannot be sold or transferred to another institution in the future without the Minister's consent.

Pre-eminence

The object must be pre-eminent and the criteria for pre-eminence are set out in the Finance Act 2012:

- any picture, print, book, manuscript, work of art, scientific object or other thing that the relevant Minister is satisfied is pre-eminent for its national, scientific, historic or artistic interest;
- any collection or group of pictures, prints, books, manuscripts, works of art, scientific objects or other things if the relevant Minister is satisfied that the collection or group, taken as a whole, is pre-eminent for its national, scientific, historic or artistic interest; or
- any object (or collection of objects) that is or has been kept in a significant building if it appears to the relevant minister desirable for the object to remain associated with the building.

Although this is a slightly different formulation of the definition of pre-eminence than applies to the AIL regime, it appears that ACE is treating the criteria as the same for both schemes. Unlike AIL, historic land and buildings do not qualify.

Eligible Institutions

An eligible institution which can accept the donated object is described in the Government's guidance on the CGS as:

- any museum, art gallery, library, archive or other similar institution having as its purpose or one of its purposes the preservation of the public benefit of a collection of historic, artistic or scientific interest; or

- any body having as its purpose or one of its purposes the provision, improvement or preservation of amenities enjoyed or to be enjoyed by the public.

Given the relative infancy of the CGS, it remains uncertain whether the definition of eligible institution for the CGS is narrower than that of 'Schedule 3 body' – the bodies listed in Schedule 3 of the Inheritance Tax Act 1984 to which AIL objects must be donated. In particular, AIL allows offers to be made to universities; we understand that ACE would in theory be prepared to consider a CGS gift to a university, but as far as we are aware this has yet to be tested and the level of public access would be a key factor in such a case.

The Tax Reduction

An individual donor can apply the tax reduction to an IT or CGT liability (or both) which arises within the tax year in which the offer registration date falls or any of the following four tax years. For companies, the reduction can only be used for corporation tax arising in the accounting period in which the offer registration date falls.

However, the donor must decide before the gift is finalised in which years to apply the tax reduction (via the Agreed Tax Schedule). Once this is settled, it cannot be changed even if the tax arising in those years is less or greater than anticipated and some of the tax reduction is thus either lost or remains allocated to a different year.

The gift also cancels any inheritance tax (IHT) to which the object may be subject and there is no CGT on the donation. However, the gift does not necessarily wipe out any historic estate duty charge attaching to the object (where it has previously been exempted) and any such duty may become payable (although this is subject to limits). Artists may donate their own work, but may be liable to other taxes as a result of the gift, such as VAT.

Latest Figures

The CGS is now in its fifth year. In 2015-16, the latest year for which data is available, there were thirteen items accepted. This compares with six items in 2014/15, four items in 2013/14 and one item in 2012/13 (the first year of the CGS). 2016 also saw the first ever corporate gift, from the London based art dealer Daniel Katz, Ltd.

These figures suggest a definite uptake in use of the CGS in the last year, but it may be a while before it becomes "a major factor in enriching museum collections" as anticipated by ACE in their 2014 Cultural Gifts Scheme and Acceptance in Lieu Report. This is not least because the annual maximum of tax which can be forgone under the CGS and AIL regimes is a combined total of £40 million, ie the CGS does not have its own budget. So to some extent the CGS is limited as to how far it can expand; the AIL regime will inevitably take most of the joint budget because it tends to produce much larger tax credits.

Who Should Consider the CGS?

The CGS may be of interest to those who own pre-eminent objects and have or (in the case of individuals) anticipate having significant IT or CGT liabilities. However, given the relatively low percentage of the object's agreed value that translates into a tax reduction, the CGS is more likely to appeal to those donors who have philanthropic, rather than purely financial, motives. The advantage over the AIL regime is that the donor will see the object on display in an institution and being enjoyed by the public in his lifetime.

Where an object is subject to an IHT charge following a death, the CGS is unlikely to be more advantageous than the AIL regime to the new owner, except in limited circumstances. If the new owner has little or no other IHT liability against which he can use the AIL tax credit (for example, if he inherits three artworks only one of which is valuable) an offer of the valuable artwork under the CGS may be of more use to him if he has significant personal IT or CGT liabilities. This would extinguish the IHT due on the artwork and give him 30% of its value as a tax reduction to set against his personal tax liabilities.

The CGS may also be worth considering for someone who is intending to leave their entire estate to their spouse (in which case no IHT will be due on death) and is not concerned about any IHT liability which may fall on secondary beneficiaries after the death of the surviving spouse (for example, if most of the estate will go to charity, or there is life insurance in trust or sufficient liquid assets to pay the IHT). There would therefore be no need to retain a valuable object for the purpose of an offer under the AIL regime following their (or their spouse's) death.

Isabel Paintin

III Testamentary Freedom and Claims after Death

> "It is far from easy to anticipate how a claim by an independent adult child against a very large estate might be viewed by the courts."

As a general rule, under English law we are free to dispose of our estates by Will to whomsoever we wish, or for that matter not to make a Will so that the statutory intestacy rules apply: there is no law of forced heirship this side of the Channel. The exception is the Inheritance (Provision for Family and Dependants) Act 1975 (**the 1975 Act**), which in turn replaced an Act of 1938.

The 1975 Act enables an application to be made to the Court by certain specified individuals for financial provision to be made for them from a deceased's estate if the Will does not make such provision. An application may be made only by spouses, partners (civil or de facto), former spouses and partners, children and those who were actually being maintained by the deceased at the time of death. Apart from spouses and partners who were in that relationship at the time of death (whose rights warrant a separate article in future), all other applicants can claim only what is reasonably required for their maintenance: they cannot make a claim on the general basis that they did not receive any, or a larger, share of the estate. Spouses and partners have a wider claim based on reasonableness but not necessity.

In *Ilott -v- Mitson* the claim was made by an adult daughter (Mrs Ilott) against the estate of her deceased mother (the Testatrix). Mrs Ilott lived independently and had apparently been estranged from her mother for some 25 years. The Testatrix's Will left all her estate (valued at a little under £500,000) to various animal charities.

The case achieved considerable publicity, not just because it was heard by the Supreme Court immediately after the Brexit judicial review: it was the first time the 1975 Act had been scrutinised by the highest court in the land and it was felt that testamentary freedom was very much at stake.

Mrs Ilott, her husband and five children lived in circumstances which, in the words of Lord Hughes, "were conservatively described by the District Judge as 'modest'". They were tenants of a Housing Association property, substantially dependent upon state benefits including Housing Benefit, but not insolvent and, in current parlance 'just about managing'. At the original hearing of her application, the District Judge, having considered all the evidence including much history of Mrs Ilott's estrangement from her mother and the behaviour of both over the years, awarded her £50,000 from the estate as his assessment of what was reasonable for her to receive for her maintenance, emphasising that 'maintenance' is an income based provision and not for the acquisition of capital assets. There was an indication that this sum was based, amongst other things, upon Mrs Ilott's family's need for certain necessities for daily living which their ordinary income could not provide, such as essential white goods, basic carpeting, curtains and the replacement of worn out and broken beds.

Mrs Ilott, who had claimed a much greater sum amounting to most of the value of the estate, appealed and at this point the charities, who had not interviewed in the original application, cross appealed. Initially the District Judge's award was overturned by a High Court Judge who noted that Mrs Ilott was entitled to nothing from the estate. She appealed and the Court of Appeal increased the original award to £143,000 which was the sum required for her to purchase her home under the 'right to buy' legislation plus a further £20,000 for unspecified maintenance. The Court expressed particular regard for the effect of any award on the entitlement to state benefits.

The Supreme Court's decision was eagerly awaited, in the belief that their Lordships would provide a definitive ruling on what constitutes 'reasonable financial provision' in a range of circumstances. In fact the Court made a point of avoiding narrowing the scope of the definition of reasonableness, reinstating the District Judge's original award of £50,000 and preferring to leave it open for judges in future to decide each case on its facts.

Some important principles do, however, emerge from the Supreme Court's judgments:

1. There does not have to be a 'moral claim' on the part of the claimant, but that may form part of the case and it can be taken into account in the Judge's award.

2. 'Maintenance' is essentially an income related need but is widely defined and certainly includes one off necessities that generally have to be saved for.

3. Providing ownership of a house is not maintenance and if an award is to be made to enable a house to be bought for a claimant, rather than rented, it would normally take the form of a life interest.

4. The date at which the reasonable financial provision and needs of the claimant fall to be assessed is the date of the hearing and not the date of death, so circumstances could change substantially between the two and this would affect the claim.

Ilott -v- Mitson involved important legal principles and in some respects these have been clarified by the Supreme Court. Future cases will, however, depend heavily upon their facts and Ilott involved a relatively small estate. It is far from easy to anticipate how a claim by an independent adult child against a very large estate might be viewed by the courts: it seems to us, however, that the concept of reasonableness both in relation to 'provision' and 'need' is scalable.

Rhoddy Voremberg

IV Restrictive Covenants as Clawback Devices

Although a Victorian 'invention', the use of restrictive covenants is still a popular and effective way of retaining control over land sold by an estate. Sometimes they can be a way of preserving future value because the buyer (or successor) may be prepared to pay a release fee when they wish to develop or change the use of the land. However, care needs to be taken when using restrictive covenants as a clawback device in place of a pure overage arrangement.

Must Touch and Concern the Land

It was the case of *Tulk -v- Moxhay* [1848] which established that the burden of restrictive covenants can, in certain circumstances, be enforceable against successors in title to the person who originally gave the covenant (the covenantor). Before that, the common law was not prepared to accept that covenants could bind successors in title in this way. As is well known, the case involved a covenant to keep Leicester Square unbuilt upon. Mr Tulk, who owned properties on the south east side of the square, was able to enforce the covenant against Mr Moxhay, who had bought the garden square in the middle and was seeking to develop a bazaar on it. The key point is that Mr Tulk could only enforce the covenant against Mr Moxhay because he owned properties that were capable of benefitting from the covenant.

To be enforceable, a restrictive covenant must be intended to and be capable of benefitting the land of the person seeking to enforce the covenant. It must preserve the value or amenity of this land, both at the time the covenant is imposed and at the date of enforcement. This has practical implications for land agents wishing to impose restrictive covenants on sales off. You need to 'tag' the benefit of the covenant to nearby retained land. It is prudent to identify land that is long term hold for an estate, otherwise if part of the benefitting land is sold, there is a risk that the benefit of the covenant passes with that land, such that the estate no longer has the sole ability to release it. The Land Registry and a buyer's solicitors will usually expect a plan to be attached to a transfer indicating the extent of the land to benefit from a restrictive covenant, so giving thought to this issue early in the transaction can smooth the progress of a sale.

Must be Negative in Substance

Restrictive covenants must be negative in substance. It must be an obligation not to do something; not an obligation to pay or expend money (let alone pay a specific amount in certain circumstances). This obviously limits the practicality of restrictive covenants as a clawback device. Indeed, there have traditionally been difficulties for the beneficiaries of restrictive covenants in extracting money from them, as the willingness to accept a release fee can be evidence that the covenant does not in truth protect the amenity value of the retained land (thus acceptance of a licence fee in return for temporary permission to breach a covenant can be problematic).

> "...the willingness to accept a release fee can be evidence that the covenant does not in truth protect the amenity value of the retained land..."

In the case of *Douglas Gafford -v- A H Graham & Grandco Securities Ltd* [1998], the defendant converted a bungalow into a two storey house, extended a barn and built a riding school in breach of restrictive covenants. The fact that the claimant waited several years to complain of the conversion and barn extension was held to be an acquiescence in the breach. In addition, failed negotiations to release the covenant for cash consideration were later accepted as relevant evidence that the covenant should not be enforced. The lesson from *Gafford -v- Graham* is to act promptly in seeking to enforce breaches of a restrictive covenant and to ensure that any negotiations for a release are clearly without prejudice.

Release Fees

Despite these uncertainties, it is of course the case that without prejudice negotiations for the release of restrictive covenants are a common feature of rural management. The big question is: 'how much for a release of the covenant?'. This is informed by the question 'what will the Court do if this goes to court?'. Will the Court award an injunction or damages? And what is the measure of those damages?

Since the case of *Wrotham Park Estate Company -v- Parkside Homes* [1974] there has been a recognition that money payments in the form of damages are an appropriate remedy for breach of a restrictive covenant. The case involved a restrictive covenant not to build without the approval of plans by the adjoining estate. In 1971 Parkside started building and the estate sought a mandatory injunction for demolition. The Court decided it would not award such an injunction, but would award damages in the alternative (or 'damages in lieu'). Moreover, importantly, the measure of these damages would not be confined to the recoupment of the financial loss incurred by the estate (the usual measure of damages for breach of contract, which would have been negligible in the circumstances). Instead, the damages would recognise the benefit gained by the covenantee by the breach and have regard to the profits of the development. They were assessed through a 'hypothetical negotiation' between the two parties acting reasonably to agree a proper price for the hypothetical release of the covenant. In the Wrotham case, this amounted to 5% of the profit of the house building, but it has been as much as 40% in other cases and everything turns on the facts – there is no 'magic formula'.

Some Recent Cases

Some recent cases show the vulnerability of restrictive covenants as clawback devices.

Readers will be aware that owners of land burdened by restrictive covenants may apply to the Upper Tribunal (Lands Chamber) for their modification or discharge pursuant to section 84 Law of Property Act 1925. The grounds for a modification or discharge include those set out in section 84(1)(aa):

- either that the restriction does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
- that it is contrary to public interest; and
- in either case that those entitled to the benefit of it could be compensated in money for the discharge or modification.

In the case of *Millgate Developments Limited and Another -v- Smith and Another* [2016], the Tribunal exercised its discretion to modify restrictive covenants that prevented building. The developer had built properties for social housing, knowing that it was in breach of a covenant not to overlook the adjoining property (which was a hospice for terminally ill children). The Tribunal considered the balance of competing interests. The housing was desperately needed, and

on this occasion the Court held that damages would be an adequate remedy for the loss of privacy entailed. However, the Tribunal was keen to emphasise that this should not be taken as a licence to ignore restrictive covenants on development.

The case of *Cosmichome -v- Southampton City Council* [2013] involved a restrictive covenant that was drafted to secure specific money payments. The property in question was bought by the BBC subject to a covenant against use other than as a broadcasting centre by the BBC. The land was subsequently acquired by Cosmichome. The covenant was expressed to benefit so much of the adjoining or adjacent land of the Council as was capable of being benefitted. It went on to provide that the covenant could be removed and, where the restriction was lifted and planning permission granted, 50% of any enhanced value accruing should be payable to the Council. On the facts of the case it was decided that there was no land owned by the Council that was capable of benefitting from the restrictive covenant and that it was therefore a pure money payment obligation and consequently unenforceable against Cosmichome as a successor in title to the BBC.

The case of *Bryant Homes Southern Limited -v- Stein Management Limited* [2016] shows, however, that we should not readily assume that, just because a restrictive covenant appears to be an obvious device for extracting a specific money payment, perhaps by reference to a calculation formula, it is therefore unenforceable. In this case, Mr Boggis, the owner of Middle Field Farm on the outskirts of Witney, sold 127 acres in 1993 subject to an obligation 'not to use the Property for any purpose other than agriculture'. By a separate agreement with the buyers, which provided for them to seek planning permission and pay an overage payment in the event that planning permission was obtained, Mr Boggis promised to release the covenant imposed in the 1993 conveyance once the overage payment had been made. In contrast to Cosmichome, it was held that the restrictive covenant was entirely conventional and enforceable. The fact that a separate, collateral agreement contained a release mechanism for a specified money payment did not, on these facts, vitiate the restrictive covenant.

To conclude, restrictive covenants remain a familiar feature of rural land transactions. They also have the virtue of simplicity. As such, they can be an effective way for an estate to 'keep its hand in for the future', especially on sales of small plots and cottages where development or infill is speculative. That said, they are a blunt instrument and subject to a number of weaknesses, so where development is likely and/or an estate is looking for specified money payments in the future, more sophisticated overage arrangements are likely to be the way forward.

Rose Gurney

V Badgers!

> Crucially, the normal burden of proof is reversed...

Bovine tuberculosis is an infectious disease in cattle and one of the biggest challenges facing the cattle industry today. Badgers can also be infected by bovine TB and have been found to transmit the disease to cattle.

As part of its strategy to achieve Bovine TB free status for England, the previous coalition Government began piloting badger culls in 2013 in Gloucestershire and Somerset, before the culls were more widely rolled out in 2015. It has been a controversial policy, with strong views on both sides. Farmers who face the financial burden of bovine TB testing (and the fear of the compulsory slaughter of cattle found to be infected) want to do all they can to prevent the spread of the disease. However, others dispute the scientific evidence used to justify the culls or object to the culls on animal welfare grounds.

Background – the Law on Badgers

Badgers are protected by several pieces of legislation. They are amongst the species given general protection in the Wildlife and Countryside Act 1981 and are granted much wider protection in the Protection of Badgers Act 1992, commonly known as the Badger Act.

Under the Badger Act, it is a criminal offence to wilfully kill, injure or capture a badger, or to attempt to do so unless one of the act's limited exceptions or defences applies. Crucially, the normal burden of proof is reversed and if there is evidence from which it could be reasonably concluded that a person was attempting to kill, injure or take a badger then he is presumed to have done so unless the contrary can be shown.

The Badger Act also makes it an offence to cruelly ill-treat a badger, which has commonly been interpreted as inflicting unnecessary suffering. Selling or possession of badgers, whether dead or alive, can also be an offence, as can interfering with or disturbing a sett if it is in current use by a badger.

The Badger Act allows Natural England to grant licences to authorise a number of these activities, which would otherwise be unlawful, including licences to kill or take badgers for the purpose of preventing the spread of disease. This is the basis on which culling licences are granted.

Culling Policy in England

As a devolved issue, badger culling has only been implemented in England in recent years.

Groups of farmers and landowners, located within designated 'high risk' bovine TB areas, or 'edge areas' which form the buffer zones between high and low risk areas, can apply to Natural England for a licence to cull badgers by cage trapping and shooting. Most of South West England now falls within designated high risk areas as do parts of East Sussex.

When deciding whether to grant a licence, Natural England is obliged to follow guidance set by Defra. Under current rules, the minimum area over which a licence to cull will be granted is 100km2. Within this area at least 90% must be 'accessible areas' over which the cull can take place. The participants must agree to take part in the cull over at least 4 years within designated seasons and agree to a number of conditions, including bearing the operational costs of the cull.

Landlord and Tenant Issues

Where the land is tenanted, this guidance states that generally landlords must sign an undertaking to permit access to the land for culling if their tenant wishes to take part in the cull. However, Natural England may still grant a licence to the tenant even without the landlord's consent in certain circumstances.

Land managers may have cause to consider the terms of the tenancy agreement. The ability to grant licences over a holding is often reserved to the landlord; sometimes there are covenants preventing the tenant entering into licences without the landlord's consent.

It may also be relevant to consider whether any 'shooting rights' have been reserved to the landlord in the tenancy agreement and whether they may apply to this situation. Although it would be very unusual for a tenancy to expressly reserve the right to shoot badgers, given they are a protected species, a more generally worded shooting reservation that included all shooting on the property, subject to the tenants' statutory rights to shoot ground game, may mean that a tenant does not have a right to participate in the cull without the landlord's consent.

Given that participants are required to take part in the cull over a minimum of 4 years, you should consider the length of the tenancy remaining and whether there is any break clause. Even where there is agreement to participate in the cull, it would be prudent for landlord and tenant to agree what would happen if the tenancy were to be terminated in whole or part during the duration of the cull.

The Government appears to have no plans to discontinue its culling policy. In 2016, a licence was granted in Staffordshire, the first licence outside of South West England. It appears likely that many more landowners will have to consider whether to take part in the cull or allow their tenants to do so in the next few years.

Alice Groom

VI A Case Law Buffet

Japanese Knotweed

Japanese Knotweed is a notoriously invasive species that causes a headache for any property owner unlucky enough to encounter it on their land. In a recent case that will have particular implications for large landowners, Cardiff County Court held that the defendant, Network Rail, had caused an actionable nuisance by failing to take reasonable steps to prevent the plant from spreading to neighbouring properties adjoining the railway embankment. This is significant because the court held that there was an actionable nuisance before it caused any physical damage to the neighbouring properties. The court awarded the homeowners damages for (a) the cost of treatment to remove the knotweed, (b) the residual diminution in value of the property once the treatment is completed and (c) general damages for loss of amenity and interference with quiet enjoyment of the property.

Williams -v- Network Rail Infrastructure Limited [2017]

Occupier's Liability

For occupiers, a reassuring decision in the Court of Appeal has found that there is no need to provide signs warning visitors of an 'obvious' danger and, furthermore that absence of risk assessments need not be fatal to a defence.

In this case Mr Edwards, while cycling across an ornamental bridge, fell onto the rocks below and suffered severe spinal injuries. The bridge was humped and had low parapet sides (with no handrails and no sign warning the visitors of the possibility of falling). He attempted to sue the occupier, the London Borough of Sutton, on the grounds that it had not taken sufficient safety measures.

At first instance it was held that, while there was no obligation to update the bridge by installing hand rails, there was a foreseeable risk of injury and, as such, the Council should have completed a risk assessment and warned visitors or instructed them to take a different route through the park.

The Court of Appeal reconsidered the matter and disagreed with the lower court. In reaching its decision it found it relevant that there had been no previous accidents on the bridge and that the bridge presented an obvious danger; the approach allowed an unobstructed view of the bridge and the water below and, as such, any warning signs could not have said more than ought to be apparent to a visitor. The Court also determined that the lack of risk assessments did not change the outcome – any assessment could only restate the obvious; neither assessment nor sign would have been likely to change the actions of Mr Edwards.

This helpful decision has been heralded a victory for 'common sense' and personal responsibly. It is a useful reminder that an occupier is obliged to take 'reasonable care' for the safety of visitors; an occupier is not under an absolute duty to prevent all accidents. However, this should not be used as a green light to occupiers to disregard their obligations to consider the safety of visitors. This case may be construed quite narrowly so as only to apply when the state of premises have been in place for many years, rather than being applied where temporary hazards or a state of disrepair have caused an accident.

Edwards -v- London Borough of Sutton [2016]

Agricultural to Residential Permitted Development Rights

Redundant agricultural buildings can be 'converted' into residential dwellings without the need for full planning permission using permitted development rights. A recent case discussed whether these rights extend to permit structural works.

This case involved a 30 metre steel framed barn (largely open on three sides) which had been

used to house cattle. The steel frame roof and floor slabs would be retained and structural infill panels would be used to construct the walls.

Ruschliffe Borough Council determined that the works would go beyond a conversion and in fact would constitute a rebuild and refused prior approval. The developer's appeal was dismissed and challenged in the High Court.

The High Court determined that whether the works were a conversion or a rebuild was a matter of planning judgment and that, based on planning policy guidance, the development should not include new structural elements.

Would the decision have been the same if the structural elements were only internal and did not affect the external appearance of the building? Although the judge was not asked to consider this point, it raises a point of interest. If the new structural elements were only internal, and carried out before the 'conversion', arguably they would not need to form part of the prior approval application as they would not be defined as 'development'.

Hibbitt and Another -v- The Secretary of State for Communities and Local Government and another [2016]

Reminder to update replies to pre-contract enquiries

A recent case has served as a reminder to us all to be diligent in updating replies to pre-contract enquiries if the information given in the replies changes prior to exchange of contracts for a sale or entering into a lease. In this case, the landlord stated that it was unaware of any notices or breaches relating to environmental problems. Later, the landlord became aware of asbestos in the warehouse building but failed to update its replies. It was held that the landlord was liable for misrepresentation as it did not pass this information on to the tenant before entering into the lease.

First Tower Trustees Ltd and Another -v- CDS (Superstores International) Ltd [2017]

Can you ever have too many gates?

The High Court has held that the erection of a third gate on a track so that there were three gates in less than 100 metres was a substantial interference with a private right of way. This case serves as a warning to landowners to consider carefully the implications of gating a right of way. The starting point is that a gate does not necessarily amount to an interference with a right of way, but what is important is whether the gate (or gates) substantially interfere with the use of the easement granted. This case is also interesting for the weight that the court gave to the cumulative effect of three gates in close proximity to each other. It also made a distinction between electric gates that are operated by a button (which in this case the court deemed acceptable) and electric gates that require a fob or code which have previously been considered to be a substantial interference.

Kingsgate Development Projects Ltd -v- Jordan and another [2017]

Return to sender, address unknown…

A recent case has emphasised the importance of ensuring that the owner's address on a registered title at the Land Registry is kept up to date. This was a planning case, but specifically centred on the service of a notice. The relevant legislation stated that the notice should be served on the owner's 'last known address'. The Court of Appeal decided that the proprietor's address on the registered title was a good address for service – provided that no other address has previously been provided. This decision will make service of notices much easier in some cases, but does add to the importance of ensuring that the address for service is kept up to date so that all notices are served correctly and received by the right person. Adverse possession claims

> "…the approach allowed an unobstructed view of the bridge and the water below and, as such, any warning signs could not have said more than ought to be apparent to a visitor."

> If the new structural elements were only internal, and carried out before the 'conversion', arguably they would not need to form part of the prior approval application as they would not be defined as 'development'.

are particular examples which demonstrate the importance of ensuring that the Land Registry's address is correct as the landowner must respond within 65 working days of receiving notice of a claim. Clearly if the address at the Land Registry is out of date, land owners risk prejudicing their position in relation to objecting to such a claim.

Oldham Metropolitan Borough Council -v- Tanna [2017]

Beware mixing business and pleasure…

A common situation for many professionals is being asked to give free and informal advice to friends. In a recent case, the Court of Appeal found that a landscape garden designer was liable for flaws in a project design that she had provided to her friends. In this case, the designer had provided design and project management services for the project but no formal contract was entered into. She was found liable in tort for the economic loss that her friends incurred as a result of the flawed design, as the court held that she had assumed responsibility for the design. The warning here is that while giving the odd piece of advice down the pub may be fine, there is a risk that at the point your relationship becomes 'akin to a contract' you could owe a duty of care to your friend and be at risk if your advice is negligent.

Lejonvarn -v- Burgess and another [2017]

Katy Tydeman

VII Copyright in Planning Drawings

The process of applying for planning permission is recognised as a challenging process and, accordingly, a valid planning consent can add a significant amount to a property's value. However, the status of planning permission is sometimes misunderstood: subject to a handful of exceptions, planning permission is a necessary but not sufficient condition for development. Often, a number of other consents and permissions will also be required before the planning permission can be effectively utilised.

The point was well illustrated in the recent case of *Signature Realty Ltd -v- Fortis Development Ltd and Beaumont Morgan Developments Ltd*. In this case, a property developer had identified a development site in Sheffield, owned by a third party property owner. The developer engaged a firm of architects to prepare planning drawings, and the developer obtained planning permission based on those drawings. Because of funding constraints, the developer was not able to buy the site from the property owner, and instead, the site was sold to a second developer with the benefit of the planning permission. The second developer successfully developed the site, relying in part on the planning drawings prepared by the architect. It was held that the second developer had infringed the architect's copyright, and was required to pay substantial damages as a result. Whilst there was no copyright in the planning permission itself, there was copyright in the designs and drawings authorised by the planning permission. By developing the property, the second developer had breached that copyright.

These facts are slightly unusual, but the rationale is easy to follow: an architect will usually retain copyright in its designs and drawings, and the process of applying for planning permission will not automatically affect the allocation of that copyright. In certain circumstances, there can be an 'implied licence', where an architect implicitly authorises its client to use its design, but the law in this area is not well developed.

There are lessons to be learned in other scenarios which are much more familiar to land managers.

- **Promotion Agreements** – where a landowner agrees to allow a developer to apply for planning permission on its land, the landowner will not automatically be entitled to use the drawings and designs authorised by the planning consent. The landowner should insist that the developer procures a copyright licence enabling the landowner to use the design material if the need arises.
- **Sale Agreements** – where a land owner sells a property with the benefit of the planning permission, the purchaser should insist on an express copyright licence.
- **Option Agreements** – where a developer decides not to proceed with a planning permission, and does not exercise the option, the landowner should ensure that it has the right to use the drawings. This should include the right to grant sub-licences, enabling a second developer to use the drawings.

Of course, the issue is not limited to just design drawings; the same principles may also apply to surveys and site investigation reports which are critical to a successful development. In some cases, it will also be appropriate to transfer a duty of care in respect of these drawings and surveys, in addition to the simple right to use them. A duty of care may allow the right to recover damages if the drawings or surveys prove to be defective.

In either case, our experience has been that good and early planning is valuable. Most consultants are happy to discuss a reasonable allocation of copyright when they are first appointed; however, we have also seen situations where the architect has charged a premium to grant a copyright, where discussions have been left until the point of sale.

> "Whilst there was no copyright in the planning permission itself, there was copyright in the designs and drawings authorised by the planning permission."

Edward Banyard-Smith

VIII BPR and APR – an Introduction

Business property relief (BPR) and agricultural property relief (APR) can be crucial in reducing an estate's liability to inheritance tax (IHT). The charge to IHT typically arises on death but it can also arise on lifetime transfers, for example on gifts made less than seven years before death and/or gifts into (or distributions out of) certain trusts.

The reliefs may be unfamiliar to non-UK domiciled land owners who now fall within the IHT net as a result of the tax changes introduced in April 2017.

With those who are new to the IHT regime in mind, this article summarises the basics of APR and BPR and highlights some of the key planning opportunities. It is hoped that it will, in addition, provide a useful refresher to the wider landowning community. As ever, the devil is very much in the detail and it is important for clients and advisers alike to do as much as possible to maximise the chances that relief will be granted.

1. The Requirements for APR

The starting point is that APR is available for land that is occupied for the purposes of agriculture. The conditions for the relief are as follows.

1.1 Agricultural Property

Relief is only available on 'agricultural property', which means agricultural land or pasture. Specifically included within this definition are woodlands and buildings used in connection with the intensive rearing of livestock or fish, if the woodland or building is occupied with agricultural land and the occupation is ancillary to that of the land. Relief is also given to cottages, farm buildings and farmhouses together with the land occupied with them, provided they are of a 'character appropriate' to the agricultural property.

Relief applies to the property's 'agricultural value' – which is the property's hypothetical value if it were subject to a restriction that it could only be used for agriculture. In some instances (for example where there is extra value attributable to hope or development potential), the agricultural value may be significantly less than the market value.

Much has been written about the extent to which farmhouses, farm cottages and farm buildings can benefit from APR. This will often boil down to the difference between a working farmhouse or other building (which will usually qualify) and a house which is primarily a desirable residence with farmland attached. The size, layout, proportionality (to the requirements of the agricultural activities), history of agricultural production and profitability of the farming activities have to be considered when deciding whether a farmhouse is of a character appropriate to the land.

1.2 Occupation (or Ownership) for Agricultural Purposes

The agricultural property must have been owned (by the transferor or his spouse) for (i) at least two years (if farmed in hand); or (ii) at least seven years (if occupied and farmed as tenant or otherwise by someone else).

Advisers should pay particular attention to cases involving retired farmers as they may be treated as not being in occupation of the farmhouse for agricultural purposes – particularly if they have contracted out the day-to-day farming activities. HMRC are likely to show particular interest in cases where a farmer moves into a nursing home with no realistic prospect of returning.

Care should also be taken to ensure that relief is not lost as a result of the tenant diversifying and primarily using the land for activities that are not considered to be agricultural. 'Agriculture' is not specifically defined in the tax legislation but includes, for example, livestock breeding, dairy farming, fruit growing and market gardening. The tax legislation expressly includes short rotation coppice and the breeding and rearing of horses on a stud farm as agriculture.

1.3 Rate of Relief

This is 100% provided the land carries the right to vacant possession within 12 months or is subject to a tenancy which started on or after 1 September 1995, but drops to 50% if the land is subject to a tenancy granted before 1 September 1995 (ie under the Agricultural Holdings Act 1948 or 1986) which has more than a year to run.

2. The Conditions for BPR

We sometimes come across the notion that BPR is the business sibling of APR, but the reality is that these two reliefs have entirely different criteria.

2.1 Types of Property

BPR is only available for certain categories of property and the rate of relief varies depending on the category:

- interests in a business (100% relief);
- unquoted company shares (100% relief);
- land, buildings, machinery or plant used wholly or mainly for the purposes of a business carried on by a company controlled by the transferor or a partnership of which the transferor was a member (50% relief); and
- land, buildings, machinery or plant owned by a trust but used wholly or mainly for the purposes of a business carried on by a beneficiary with the right to trust income (50% relief).

2.2 Ownership Requirement

The general rule is that business property must have been owned for at least two years before the date of the event giving rise to the charge to IHT. However, there are two main exceptions. The first is for individuals who inherit business property from their spouse or civil partner. The second is for business property that is sold but replaced with other business assets. In both cases, the ownership period starts on the date when the original property was first acquired.

2.3 Requirement for Business

The underlying business must be carried on for gain and must be reasonably capable of being profitable (although this does not necessarily mean that the business must actually be making a profit).

2.4 Trading rather than Investment Activity

Much consideration has been given to this issue over the years, and it could form the subject of an entirely separate article. However, and by way of general summary, to qualify for BPR the business must not consist wholly or mainly of dealing in securities, stocks or shares, land or buildings or (crucially) making or holding investments.

In reaching a view on trading activity, it is necessary to consider all of the business activities and circumstances – including the relative importance to the business as a whole of any investment and non-investment activities over a period of time. It is not merely a case of comparing the net profit relating to each category of activity. Farming is, of course, a trading activity but the exploitation of land for a profit (eg letting property) is regarded as an investment activity.

> ...it should never be assumed that farms automatically satisfy the criteria for the reliefs...

2.5 Used Wholly/Mainly for the Purposes of the Business

When calculating the extent to which BPR is available, any value attributable to 'excepted assets' will be ignored. These are assets that were neither (i) used wholly or mainly for the purposes of the business for the previous two years, nor (ii) required for future use by the business.

3. Interplay between APR and BPR

Where property could qualify for both APR and BPR, APR takes precedence and has to be applied first.

A claim for BPR can be made on assets such as the following, provided they form part of a business:

- Non-agricultural elements of an estate (eg livestock, deadstock, farm plant and machinery, milk quota, basic payment scheme entitlements and bank balances which will not benefit from APR but can potentially attract BPR.)
- The development or hope value of agricultural property, which is not part of the agricultural value. It is therefore crucial, where there is such non-agricultural value, for the land to form part of the transferor's business and not be let to or merely used in the business since the former will exclude BPR and the latter will attract only 50% BPR.

In the above two scenarios, BPR can step into the void - resulting in significant tax savings. However, one particular pitfall involves farms let on pre-1995 tenancies. The rate of APR applicable here is 50% rather than 100% and because APR takes priority over BPR, the latter cannot generally provide relief for the other 50%. Efforts should therefore be made to convert pre-1995 tenancies so that they benefit from 100% APR.

4. Practical Tips

In our experience, HMRC scrutinise carefully claims for relief on land subject to leases or grazing agreements on farms, where the owner may no longer be actively involved in the farming business and where the estate includes high-value buildings. Small holdings where the value of the house is a large proportion of the whole also attract attention. The lessons are clear: it should never be assumed that farms automatically satisfy the criteria for the reliefs and clients (and advisers) should keep existing arrangements under careful review.

We find that the first submission to HMRC following a death (or as a result of a chargeable lifetime event) is crucial. The detailed information included in the valuation (including photographs) and HMRC's forms and guidance should be completed meticulously in order to demonstrate that the right legal questions have been asked and that the factual circumstances meet the criteria for relief. That said, the HMRC IHT and Valuation manual should not necessarily be taken as infallible, since they are just a reflection of HMRC's interpretation of the law. Essential to the submission are good valuation advice and consistent historic farm accounts. Of course, this is much easier when the claim has been planned far in advance and when all the advisers have been working together to ensure that the claim is consistent from all angles.

Richard McDermott

IX Grazing Agreements – Trading or Investment Activity?

In 2008 the McClean case left taxpayers concerned about the extent of relief available on land let out on grazing licences. In that case the Court considered the landowner had held the land as an investment and not a trading business asset and, as a result, business property relief for inheritance tax was denied. The Court considered that the level of work carried out on the land (such as fencing and weed control) on behalf of the landowner was merely sufficient to allow the land to be let for grazing. Any work to maximise the return from the land by way of fertilising the land, for example, was carried out by the grazier. Another more recent Northern Ireland case, the 2016 case of *Allen (T C Allen -v- HMRC TC05100)*, was decided in favour of the landowner and provides some useful practical points on how to maximise potential tax reliefs on land let out for grazing.

The Allen case was a capital gains tax decision on the availability of taper relief, which has now been abolished. It does, however, have useful implications for both (a) the availability of entrepreneurs relief and rollover relief for capital gains tax and (b) the availability of business property relief for inheritance tax. The principal question to be considered (as in McClean) is whether the landowner is 'mainly or wholly' trading or whether it is holding the land as an investment.

The Facts

John Carlisle Allen and his brother had inherited land in Northern Ireland from their grandmother in 1998. It consisted of around 10 acres and was for a number of years the subject of a 'conacre' arrangement to a Mr Crooks, a neighbouring livestock farmer. Conacre agreements are a form of grazing agreement used throughout Ireland.

The written conacre agreement was dated in 2001 and renewed orally on the same terms from year to year. It provided that:

1. Mr Crooks was able to have the grazing and silage from the land for a period of 7½ months per year from mid-March to November for a licence fee of £1,000;
2. Mr Crooks was not allowed to fertilise the land, only to use farmyard manure;
3. Mr Crooks was under an obligation to keep his animals under control and to repair any damage caused by his animals.

Mr Crooks grazed the land with suckling calves and store cattle. The number of cattle varied but was generally between 30-60 animals. As cows tug at the grass and its roots, rather than nibble as sheep do, it would be necessary to keep the grass strong and in good condition for future grazing. It was demonstrated that:

1. The Allen family would from time to time supply nitrogen-free fertiliser without charge. This did not happen every season but when the grass was getting weak.
2. For 4½ months each year the land was entirely at the disposal of the landowners. During this period each year the Allen family did graze a small number of animals but care was taken not to put too many animals on the land over the winter months for fear of the soil becoming trampled.
3. Water was supplied all year round which was paid for by the late Mr Allen.
4. The land had a mixture of hawthorn and post and wire fences; these were inspected on behalf of the landowners and were maintained in a stock-proof condition at the cost of the landowners.
5. The landowners engaged a contractor to cut the hedges and remove weeds, particularly ragwort.
6. The Allen family, together with their company which ran the local livestock mart also used the land for temporary housing of animals (lairage) throughout the year. It was therefore found that Mr Crooks did not have exclusive occupation of the land.

> "Care should be taken that whatever the landowner commits to on paper he carries out in practice."

7. Although the need did not arise, the landowners would also have been responsible for the repair of the field drains.

The Decision

The court in Allen had to consider whether the landowner was in occupation of the land and if so, whether that was 'wholly or mainly' for the purposes of husbandry, which would constitute a trading activity.

There is a traditional understanding that the grantor of conacre licences remains in legal ownership and possession of the land; the grazier only has the right to graze or harvest the grass. The court found that Mr Allen was in occupation of the land; even if Mr Crooks were in occupation it was not exclusive and only for part of the year.

As regards the question of husbandry, the court considered the guidance provided in the Agriculture Act 1947. Good husbandry requires the land to be managed in a suitable fashion having regard to the character and situation of the land and to maintain a reasonable standard of efficient production. Pasture should be "properly mown or grazed and maintained in a good state of cultivation and fertility and in good condition".

The provision of fertiliser to maintain the standard of the grass was considered an important piece of evidence as it demonstrated an awareness of the land, its condition and the need to maintain it, in accordance with good husbandry. It was clear from the evidence that there was work being carried out on the land on behalf of the landowners, such as hedging, maintaining stock-proof fencing and weed control.

The court decided the landowner was in occupation wholly and mainly for the purposes of husbandry and so relief was allowed.

Conclusion

The case has important lessons for landowners across the UK who are seeking to maximise tax reliefs on grazing land. A key factor was the provision of fertiliser by the landowners. This demonstrated their understanding of the land and the desire to manage the land to keep it in a good state of fertility and in good condition. The landowner grew the crop of grass to be eaten by the grazier's cows or turned into silage. If the grazier had been allowed to spread his own fertiliser the outcome may well have been different. The grazier would then be growing the crop eaten by his animals.

The application of fertiliser, together with weed control, the provision of water for the animals and the maintenance of hedges, fences and drainage, showed good husbandry which amounted to more than an investment activity. It was also in favour of the landowner that lairage took place throughout the year but was restricted during the winter months to ensure the soil was kept in good condition.

Landowners letting their land for grazing might wish to review their current grazing agreements to ensure they are fit for the purpose and include the obligations on the landowner demonstrated by the Allen case. Care should be taken that whatever the landowner commits to on paper he carries out in practice. Paperwork, such as invoices for hedge-cutting, should be kept in evidence. The soil should be tested periodically and the correct quantities of fertiliser applied to correct any deficiencies.

The courts are clear: each case of this type must be looked at on its particular facts; but by demonstrating good husbandry (and keeping the appropriate evidence) it will strengthen the chances of the landowner successfully claiming relief whether for inheritance tax or capital gains tax.

Ian Huddleston

X Fresh Governance for Rural Estates

Visitors can easily forget that beneath the picture-postcard exteriors, the historic houses and rural estates of England are at once both commercial enterprises and treasured family assets. Keeping both intact for the next generation increasingly means taking bold decisions relating to their management and family ownership structure. We are seeing more estates responding to modern challenges, such as rising costs and family apathy, by using governance structures from the corporate world to improve the organisation of their affairs. Alongside capital tax planning on any transfers of property and other assets into corporate vehicles, this approach has helped bring transparency and accountability to decision-making within the business and clarity of income, control and succession planning to the family.

Decision-making

Estates have many different facets: farming; property letting; visitor services in the house and gardens; events and weddings to name but a few. Yet day-to-day decision-making may historically have rested with one or two individuals, when it may now be more appropriate and efficient to delegate responsibility and (importantly) budgets to others (perhaps different family members or external professionals) with relevant skills and experience in specific areas of the business.

This can streamline and focus different elements of the business and energise the interest of family members. It can also be a good way to involve the next generation in certain aspects of the estate's affairs. Delegated management of a discrete part of the business can enable younger members of the family to gain practical experience, facilitating the taking on of more responsibility in the future. Interestingly, this approach often allows for more innovative ideas to be tested whilst minimising the risk of compromising the estate's core business.

Ownership

Most estates that have a corporate structure in place directly link the management of the business to the owner(s) of the estate. However, there is no reason why a majority "shareholder" need also play the key role in day-to-day management. It often makes more sense for the owner to have a role on a small board of directors, quite possibly as chair, to allow others to take charge of routine matters whilst he or she retains an appropriate degree of oversight and drives the overall strategy. An owner may decide to step back from the board entirely and retain only consent or veto rights on certain fundamental decisions pursuant to a family constitution or shareholders' agreement.

Nor does income need to be directly linked to the owner(s) of the estate. Family members involved in managing certain aspects of the business need to be appropriately incentivised, whether by way of salary, bonuses or dividend (or a mixture of all three). Again, a family constitution or shareholders' agreement can help strike an appropriate balance between rewarding hard work and innovation and ensuring older generations have a reliable income when they step back from the business.

Succession

Sensitive and carefully considered governance arrangements in relation to the ownership and management of a family business can assist greatly with succession planning. It is hard to step away from a lifetime's work, but involving external expertise and introducing the next generation as early as possible can help ensure a smooth and seamless transition. Those running a family business should take great care to ensure that their successors develop the skills and experience required both to sustain the business and manage family relations, through early involvement in the business or

> "We are seeing more estates responding to modern challenges... by using governance structures from the corporate world..."

training and working elsewhere to gain a fresh perspective. The successors should, where at all possible, be encouraged to play to their strengths and bring in external expertise in areas where they are less able.

Taxation

Every case has to be examined individually in order to decide whether, and if so how, a suitable corporate structure can be curated without an unacceptable tax charge on entry. Corporate structures can provide significant benefits by way of lower Corporation Tax rates on profits and discounted capital values for fragmented ownership through minority shareholdings. Achieving this, however, requires careful planning which may involve several stages of reorganisation over a period of years in order to make sure that the various reliefs (eg from Capital Gains Tax and Stamp Duty Land Tax) which can apply to the incorporation of businesses will be obtained and that the structure thereby achieved will be fit for purpose.

Whether it is wholesale change or fine-tuning that is required, establishing and monitoring a fresh and effective governance structure can have a critical impact on the success of the family business.

Richard Lane and Tom Bruce

If you require further information on anything covered in this Newsletter please contact

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