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Summer 2024

Cereals Special Edition

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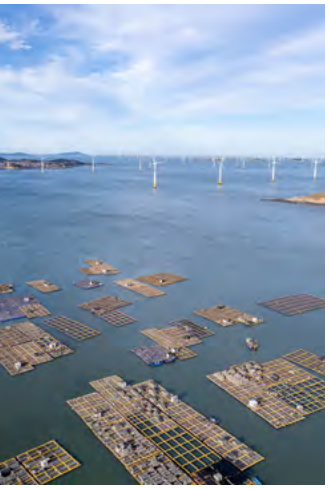

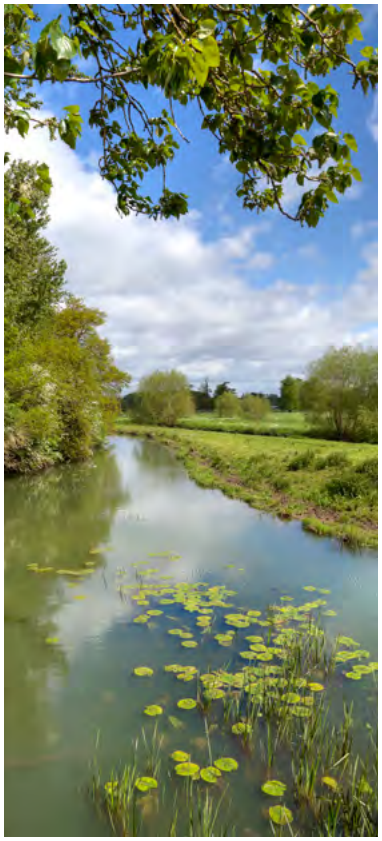

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Summer 2024
Cereals Special Edition

Welcome to this Summer 'Cereals' edition of AgriLore.

Our Agriculture team continues to grow with 5 partners, 6 senior associates, 12 lawyers, and 3 trainees, spread across London, Bristol, and Exeter. This year we welcomed two former trainees, Will Dyer, and George Carey. George is focussed on our traditional agriculture disputes practice of agricultural landlord and tenant, partnerships, succession, and real property. Will is joining Katharine Everett-Nunns to focus upon our contentious planning environmental and administrative law practice. We have also had some promotions this year. Jake Rostron qualified as a Chartered Legal Executive, and will continue to form a key part of our traditional agriculture disputes practice. Katharine Everett-Nunns and Seema Nanua have also been promoted to senior associate.

The Private Property and Landed Estates team led by Chris Massey and Tom Hyde continues to thrive and grow with the promotion of Kate Higgins to senior associate, and the recruitment of Jack Keats from Withers. Our strong Tax Trusts and Succession team now has 5 out of the 26 team focussed upon the rural sector, led by Iwan Williams. Iwan recently won 'Lawyer of the Year' at the CityWealth Magic Circle Awards in recognition of his excellent client relationships and the trusted advice he gives to high net worth individuals and families. Iwan has recently been joined by the excellent Charles Frost, formerly of Forsters.

Ben Sharples, our Head of Natural Capital, is maintaining his position as the Country's leading lawyer in this rapidly developing and interesting area, in recognition of which he was named as one of the Lawyer's "Hot 100" this year. This year we travelled the Country for a week on our Agriculture and Natural Capital Roadshow, and Ben's work continues to take him all over the Country.

As last year, we recorded and sent out a series of podcasts in the run up to the show, and have then provided related articles here. The podcast topics covered modern challenges and opportunities for rural businesses, landed estate management, strategic land, natural capital opportunities, and greenwashing branding and labelling in the food industry.

Thanks in particular to one of our newest recruits to the parentship, Fergus Charlton formerly of TLT, who I roped into a podcast within hours of his arrival!

Click here to listen to the podcasts

You will find our infamous quiz on page 32 - to be in with a chance of winning the sought after bottle of English sparkling wine, the podcasts are a must listen!

We are now firmly into show season, so I hope that - if we don't get the chance to catch up with you at Cereals this year - we see you at Devon County, Royal Cornwall, Royal Welsh, Bath and West, or one of the many other events we will be attending across England and Wales this year.

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Seaweed Farming:
Questions and answers with Mollie Gupta at WWF

Seaweed, a marine alga typically found in coastal areas, forms part of the rich biodiversity in the Earth's waters. The plant-like organism is well known to have a number of environmental, ecological and economic benefits for the planet.

In many countries, seaweed farming practices are already commonplace. Given the known potential benefits, seaweed farming has also become increasingly popular in the UK and we have been instructed by a variety of organisations operating in this fascinating and fast-growth sector.

Global environmental charity, WWF, is one of the key organisations actively supporting seaweed farmers in the UK and undertaking vital research in this area, including research into the use of seaweed as livestock feed and a biostimulant. Mollie Gupta, Seaweed Solutions Project Manager at WWF, provides an exclusive insight into the seaweed industry and the work she is involved in below.

What is your role at the WWF?

I am the Seaweed Solutions Project Manager, which means I coordinate with all partners to ensure delivery of our wider strategy and programme of work. This work seeks to support seaweed farms to deliver environmental benefits in the UK, both from the point of view of seaweed farms having positive impact in the ocean and from the way that seaweed products can be used to support wider food system transformation.

"...Seaweed farms are able to reduce acidification problems, help with eutrophication, and can help support biodiversity..."

What does the global and UK seaweed farming industry currently look like?

Seaweed aquaculture is already prevalent in many places around the world. The main producer regions include China, Japan, South Korea and Indonesia. Seaweed is often integrated into the cultures of some of these nations and seen as a delicious food ingredient.

In contrast in the UK, it is little known that before the industrial revolution, we've actually used seaweed for years in farming, pharmaceuticals and textiles. Most of this seaweed came from wild harvesting. In recent years there's been interest in seaweed farming and we've seen the number of farms grow significantly in the last 10 years; an exciting trend that we hope to see continue.

Why is seaweed farming considered "regenerative"?

Growing seaweed does not require any pesticide, fertiliser, freshwater, or feed. This makes it drastically different to many other forms of food and biomass production, which usually require significant input.

In addition, seaweed grows quickly, is diverse in nutrients and uses, and can be combined with other forms of aquaculture such as shellfish cultivation. Seaweed farms are able to reduce local acidification problems, help with eutrophication, and can support biodiversity by turning an empty water column into a 3D forest.

For these reasons we consider it to be regenerative for the environment. As well as helping to regenerate the ocean, seaweed farms can be supportive to local communities by offering jobs, supporting local tourism, and providing connection to the coast.

Why is the WWF particularly interested in seaweed farming?

The WWF is particularly interested in regenerative seaweed farming's ability to bioremediate excess nutrients – such as run off from agriculture and pollution from sewage. Such seaweed could then, once harvested, be used as biostimulant and returned to field to help support crops to grow, reducing the need for synthetic fertilisers.

This is just one example of how seaweed in the UK could support circularity in our food system and reduction in nutrient inputs, especially as we know nitrogen is a problem in our freshwater systems.

There are other innovative uses of seaweed which we are interested in, including seaweed as a possible feed protein in future. We are working with Oceanium to see if it is possible to extract high quality

"...Seaweed in the UK could support circularity in our food system and reduction in nutrient inputs..."

protein from UK grown seaweed species, which matches other feed proteins like soy and could therefore one day help to displace these. This is an example of how our overseas land footprint and carbon footprint could be reduced by seaweed innovation in years to come.

We think seaweed products could help to displace carbon intensive products such as fertiliser and feed protein, and therefore lead to overall reductions in the GHG emissions from our food system.

However, we need seaweed farms to reach a degree of appropriate scale to be able to support these ambitions, and hence our programme is looking to support UK seaweed farming.

What advice would you give to someone looking to enter the seaweed farming industry today?

This is an exciting sector with a future full of innovation and discovery. We would really encourage those interested to join the sector to closely consider the skillset they can offer, and place this towards an area in need of support.

That could be anything from hands on skills on sea farms, to marketing and communications support, to research and evidence building.

To find out more about the WWF, visit www.wwf.org.uk.

If you are operating in the Blue Sector and would like to explore how we may be able to help you, please contact Chloe Vernon-Shore and Seema Nanua.

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Agriculture and Rural Business:
Advice Hotline and Precedents Service

Michelmores expertise: looking after those who look after the land.

We offer a hotline providing practical and commercial advice in the Agriculture and Rural Business sector helping to balance progress with a purposeful agenda, in support of a more sustainable rural economy. Daily cover is provided for enquiries by phone or email for initial legal guidance on rural, commercial, and property matters.

Michelmores' expertise extends beyond rural and property advice As a full service Firm we are able to cover a wide variety of instructions, including: private wealth, employment, tax, corporate transactions, reputation management, intellectual property, and finance. The hotline team are ready to help direct these other queries to our colleagues where required.

We also maintain over 60 bespoke precedent documents for a large number of firms, institutional clients, and legal precedent libraries. Our packages include bespoke precedent design, initial training, ongoing training, and updating, as well as fixed fees for quick checks of negotiated documents or registration.

Contact Adam Corbin by email or by phone to discuss how we might help you and to organise a trial.

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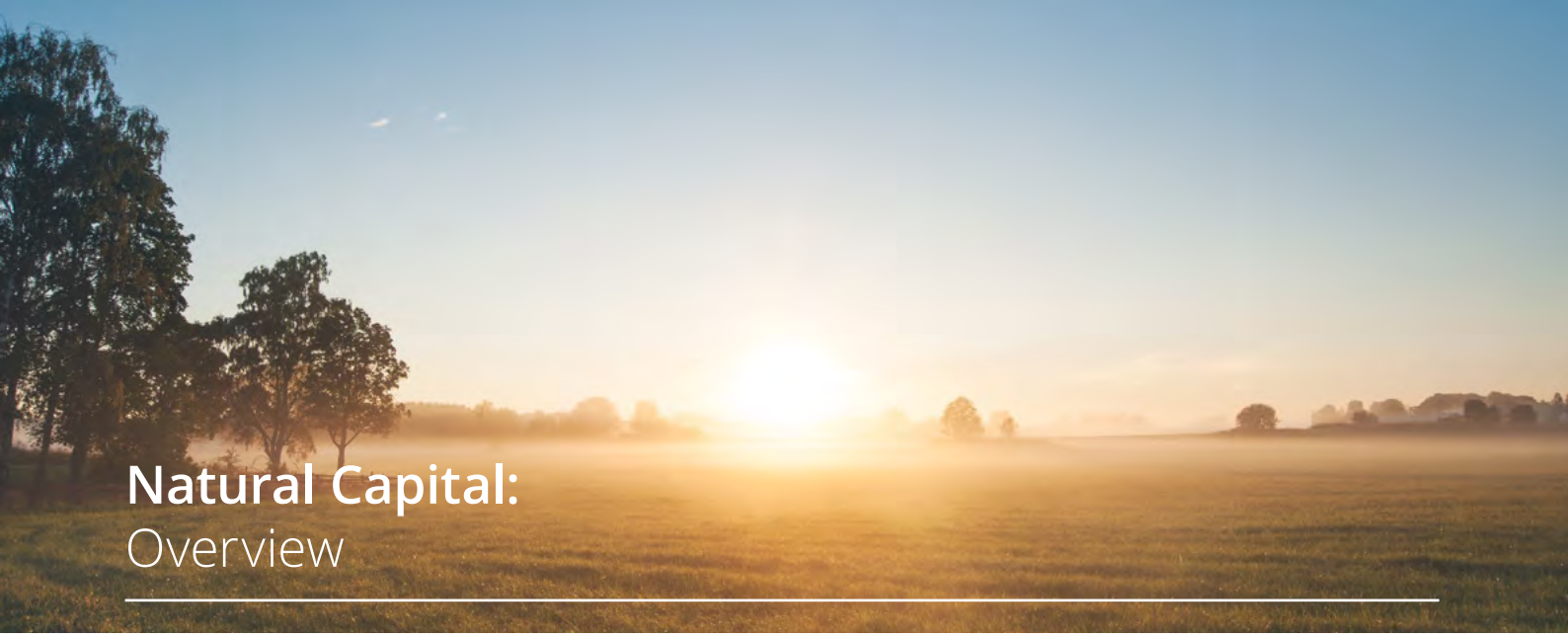
Hotline Terms

- 40 minutes provided per new matter
- the advice given is based only upon the information provided to us
- where required, we try to conduct a conflict search whilst you are on the phone, but we may need to call you back
- we will always follow up with a note detailing the advice given on the call
- we try to respond to all of your requests within 24 hours



Natural Capital: Overview

Our market leading Natural Capital team are at the forefront of advising on all elements of natural capital. We have built a wealth of knowledge and experience in recent years through our work with Land Managers, Developers, Investors & Funders, and Local & Central Government.

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Natural Capital team

Ben Sharples, a dual qualified solicitor and Chartered rural Surveyor and Valuer, leads our team of professional advisers covering areas such as environmental law, regulation, commercial law, corporate law, real estate, planning law and tax.

How we advise

We partner with our clients to help them to navigate their way through BNG, Nutrient Neutrality, landscape scale recovery and more. We work collaboratively across our legal teams within the firm and with other professionals involved in these often groundbreaking projects. We appreciate that this is a novel and complex area, which carries both risks and opportunities. We are well placed to assist our clients as they innovate and work to support a more sustainable economy.

Ask any of our team for further information or if you would like to meet up to discuss how we might help.

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Harvesting Power:
Planning for Renewable Energy Schemes

Renewable energy generation schemes come in many shapes and sizes. Agricultural land and buildings provide the opportunity to take advantage of these schemes be they for powering the farm operations or securing a regular income stream.

Energy generation schemes need planning consent. The various consent regimes available are tiered according to the scheme size. This article looks at those regimes across England, Wales and Scotland.

Permitted Development

All development needs planning permission, and energy generation schemes are development. However certain schemes have the benefit of permitted development rights. These rights 'grant' planning permission subject to certain conditions and restrictions. Where they exist, they can be relied-upon. Often no approval is required, and this makes them very attractive. However, caution is needed to ensure that the permitted development rights are properly available.

In England small-scale renewable energy schemes can be implemented under Part 14 of Schedule 2 of the 2015 General Permitted Development Order. These are for small schemes, which typically will only contribute to a farm's energy needs, but as energy prices rise, they may still be helpful.

They have recently become even more flexible. If you have a sufficiently large shed roof, it is now possible to install over 1 megawatt of solar panel capacity. There are also new rights permitting the installation of ground and water source heat pumps for certain sizes as well as biomass heating systems. The permitted development rights regime over the borders in Scotland and Wales are generally less flexible, but they may still be worth exploring.

Planning permission

The larger energy generating schemes require planning permission.

The route to consent depends on where in the UK you are: the consenting regimes differ between England, Scotland, Wales, or Northern Ireland.

In England, a solar farm with a generating capacity below 50 megawatts requires planning permission from the Local Planning Authority under the Town and Country Planning Act 1990. Above 50 megawatts the solar farm is considered to be a 'Nationally Significant Infrastructure Project' which requires a Development Consent Order (**DCO**) from the Secretary of State under the 2008 Planning Act.

In Scotland, the thresholds are currently the same as in England but schemes above 50 megawatts need to secure deemed planning permission under the section 36 of the Electricity Act 1989.

In Wales, a solar farm with a generating capacity between 10 and 350 megawatts is classified as a 'Development of National Significance' and applications for these schemes are decided by the Welsh Ministers. Above 350 megawatts a DCO is required.

Large and super-large scale solar is popular in England with many projects already consented and many more in the pipeline. There is a conflict between energy production and food production, and this is managed in the planning system through the encouragement of the use of less productive agricultural land.

Onshore wind projects in England are becalmed in the planning system's Doldrums. This is because England's national planning policy requires that the proposed turbine's impacts, as identified by the affected local community, have been appropriately addressed and the proposal has community support. Wind turbines are marmite: some like them some don't, and if a local objector doesn't like them it is hard for operators to appropriately address the objector's concerns.

The Welsh and Scottish administrations have taken a much more favourable approach towards the development of onshore wind. They typically allocate suitable areas for wind farms and have policies to deal with mitigation of the turbines' impacts.

Grid constraints

Whatever technology is proposed for electricity generation, the project will not progress unless it can be connected to the grid. Securing a viable grid connection is difficult across the UK. The national grid needs upgrading, and government is focusing on this, and as it does so, more sites will become viable.

Anaerobic digestion plants are capable of producing methane. This can be used to power an engine on site to produce electricity, or it supplied into the gas grid.

Opportunities

Large scale renewables projects are expensive to consent, expensive to construct and expensive to operate. This is a barrier to entry, but there still opportunities for landowners. Agricultural land is needed for solar and land near grid connections is particularly desirable to promoters of large-scale solar schemes. Those promoters will, through an option for lease agreement, take on the risk of obtaining planning permission and securing the grid connection and then construct the scheme on your land. In return you'll receive rental payment for the 30 or more years of the lease.

Conclusions

Planning and consenting are major elements to renewable energy projects, but often also major barriers. With this in mind, landowners considering renewable development should take appropriate advice at the earliest stage possible.

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Protecting your land for development:
Three topics to consider

There are many issues to consider when it comes to protecting your land for potential future development including knowing who owns the watercourses and your boundary features and another hot topic to also consider is water scarcity.

Watercourses

A developer when considering a site for development must consider how to deal with surface water accumulating on that development. Watercourses have an important part to play in development. If a site includes a watercourse within the site or on the boundary, this may allow for the developer to attenuate the surface water on the site and allow for a subsequent controlled flow into the watercourse on the site. This may avoid the need for a developer to seek easements from neighbouring owners or requisitioning a connection from a water authority.

A watercourse could be natural or artificial and for the purposes of this article, we will focus on natural non-tidal watercourses only. A watercourse has a regular channel with banks or sides and is one that usually flows in a certain direction – it doesn't need to flow continuously and therefore a stream that dries up in the summer can still be a watercourse.

Being able to prove ownership of the bank of the watercourse will enable a future developer to undertake works required to discharge surface water into the watercourse such as a water outfall or new head wall. It is important therefore to ascertain if you own the watercourse or if you merely have rights to drain into the watercourse.

Quite often title to the bed of watercourses is unregistered. It may be possible for the landowner to register the bed of the watercourse with the help of their solicitor. The first step would be to check the historic title deeds to see if the Land Registry has made a mapping error. If not, a search should be undertaken to ensure the land is not registered to someone else. Assuming it is not the landowner could make an application to the Land Registry under the "ad medium filum aquae" rule could be made – ad medium filum aquae meaning "to the middle line" of the watercourse. If the landowner owns both sides then registration of the whole of the watercourse should be achievable. If the landowner owns one side only of the watercourse, an application should achieve registration to the middle line of the watercourse thereby still enabling works that may be required for the surface water outfall to be constructed.

The ad medium filum aquae presumption can be rebutted if there is evidence to the contrary, for example, evidence that the previous owner did not own or did not intend to convey the bed of the watercourse to the landowner. It is worth noting that the ad medium filum rule does not apply to tidal rivers.

In addition consents may be required to carry out works to or near the watercourse from other bodies such as the Environment Agency and an Internal Drainage Board depending on the classification of the watercourse.

The law relating to watercourses is complicated and the nature of the watercourse and classification will impact what can or can't be done and it is important to seek legal advice.

Boundary issues

Ownership gaps between properties can be a major issue for developers. Therefore, knowing the extent of the land you own and who owns the adjoining land and the hedges, verges, water drains, or ditches is important when considering land for development. The importance of these features and who manages them can be often overlooked by landowners because they may not even be aware of the gap.

When a developer looks at a piece of land for development they will want to make sure there are no gaps between the parcels of land that they are buying or between the adopted highway and your red line boundary. If there is a gap, then potentially there could be a ransom strip which could be claimed by a third party as belonging to them, which could prevent development. Often when we are talking about gaps we mean very small areas of land which could be as little as a metre or less in width.

If a gap is identified your solicitor may be able get the gap incorporated into your already existing title because the Land Registry made a mapping error when they first registered the land. If the gap is between your property and the adopted highway your solicitor may be able to make an application under the 'ad medium filum viae' (to the centre line of the road) rule if certain conditions apply such as you have always considered the land yours and you have maintained that area and the Council claim that the land is not adopted. As with ad medium filum aquae, the 'ad medium filum viae' rule is the legal presumption that you own up to the middle line of the road and this presumption can be rebutted as mentioned above.

It is important to retain original copies of old deeds and correspondence as these can be important in terms of evidencing ownership or claiming rights over 'gap land'.

Obtaining defective title indemnity insurance can be a solution to this defect in title. Defective title indemnity insurance will in return for payment of a one off premium pay up to a capped amount towards the costs of dealing with any third party claim. Unfortunately, title indemnity insurance can be expensive and it does not prevent third parties bringing claims. The Highway Authority may refuse to rely on the benefit of such a policy and refuse to enter into a highways agreement to adopt the roads in a development and therefore the roads may need to remain private. Furthermore, the Utility Provider may refuse to adopt services laid within the 'gap land' which may mean services need to be laid in another more expensive and longer route.

If on the other side of the 'gap land' the land is owned by a private landowner, then this needs to be dealt with very sensitively as your neighbour might try and claim that 'gap land' as their own and discussing the gap with them will probably mean you are unlikely to obtain a title indemnity insurance policy in relation to that defect or potentially invalidate any existing policy.

Water scarcity

Water scarcity may not seem like a big concern given all the rain we have had this year. 2023 marked a milestone as the first time that the Environment Agency submitted objections to a new housing development on grounds of the shortage of a sustainable water supply. It's encouraging that water scarcity has now being recognised as a material planning issue. Much coverage has been given recently to the multi-billion infrastructure upgrades which have been brought about by recent Government announcements in response to criticism of the industry. These new upgrade projects can be to the advantage of landowners. For example, water companies are looking at investing in new reservoirs or taking new abstraction licences from other water bodies.

There are opportunities for landowners to negotiate abstraction royalties, set aside land or change their existing land use practices. We are just starting to see several of the first few projects and transactions coming through. To give some examples, we've seen the Ofwat Innovation Fund looking at sponsoring farmers for creating water storage batteries, utilising soil sponges in wetlands as well as turning existing lakes and ponds into reservoirs or supply reserves.

The Government is looking at encouraging farmers to undertake more efficient water management in their agricultural practices. It has set a target under its Defra Plan for Water Commitment to increase on farm storage of water by 66% by 2050. Other measures in consideration under the plan involve farming in a way that reduces run off and demand for supplemental water supplies. In East Cambridgeshire for example, the Government is looking at creating credit schemes to encourage nature based solutions to promote water retention. Water Positive Development - as it is being called - is expected to be rolled out in other regions once it has been proven in Cambridgeshire. We are also seeing water companies working with local authorities working up contingency plans which may involve utilising reserves held by private landowners.

If you sell off part of your land it is also essential that you consider if you need to retain any water abstraction rights/ licences in order for you to continue to use your retained land effectively.

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Landed Estates and Rural Business:
Bundle retainer offering

Michelmores is pleased to launch a new fee model to Landed Estates and Rural Businesses. As an alternative to the traditional model of charging on a time spent basis, we are now offering a retainer including a bespoke bundle of services which will give unlimited access to our specialist team of lawyers.

We will continue to offer the traditional time spent model, whilst this new approach means that we will share the cost risk with our clients and give them certainty on fees. Michelmores recognise the value of being an integrated part of a Landed Estate or Rural Business and believe that this model provides clients with the ability to fully involve us without fearing the cost.

The services included in the bundle will deliver the day-to-day legal advice such enterprises need at a highly competitive level. As a result of being an embedded part of the advisory team, Michelmores will then have the deep-rooted understanding of the Landed Estate or Business to advise effectively on significant events like large BNG schemes, new partnerships, succession and more.

Challenges we are hearing from Landed Estates and Rural Businesses

- reluctant to pick up the phone to advisers due to charging models
- nervous of unexpected bills at the end of the month / quarter
- find it difficult to see the value they have received against the fees incurred
- high hourly rates are not proportionate to the services provided
- inconsistent levels of client service such as in responding to emails and returning calls.

What are we offering to differentiate Michelmores?

- bundled retainer incorporating our services instead of charging on time spent basis
- unlimited access to our multi service team within the scope agreed at the outset
- monthly or quarterly retainer to provide certainty as to costs and aid cashflow
- sharing the cost risk with our clients
- we recognise the value in such a relationship and want to be there, as an integrated part of the enterprise, for big events like strategic land, succession events and Natural Capital schemes
- twice yearly report to show the value received during the period
- proactive advice where we will approach clients with suggestions rather than waiting for them to come to us
- joined up with other advisers such as accountants and land agents.

Value based offering: how it works and services we offer

We know that the requirements of each Landed Estate and Rural Business will differ. Therefore, at the outset we will take the time to understand the services you need and build a bespoke retainer to include the aspects you require from the following:

Tax, Trusts & Succession	Asset protection, tax and strategic advice from specialist Landed Estate and Rural Business lawyers including: • attendance of trustee, board, partnership meetings including minutes and project management • succession and asset protection strategy and review • *Balfour* review and general review of tax efficiency of structures • general strategic advice.
Agriculture	Advise from the leading Agricultural law firm in the country across a broad range of matters including: • Rural Property • Partnerships • Strategic advice • Disputes • Hotline.
Natural Capital	Access to our market leading expertise to explore the opportunities in this fast-moving area for your estate or business.
Real Estate	Leading residential development and strategic land advisers to enable clients to maximise opportunities they may have.
Employment	Advice across negotiations, incentive arrangements, terminations, restrictive covenants, and other employment matters.
Planning & Environmental	Significant expertise in key areas for Landed Estates including planning agreements and applications; enforcement, historic buildings and environmental liability.
Family	Supporting Landed Estate and Rural Business owning individuals and their families through all stages of life.
Banking	Nationally recognised solicitors with agriculture and farm finance specialism.
Corporate	Acting as advisers for start-ups and established players in natural capital and agri-tech.
Commercial	Advising businesses operating in sustainable agriculture and Agri-tech.
Intellectual Property	Enhancing and protecting the brand of your Landed Estate or Rural Business.

Illustrations

The following illustrations give an indication of the type of services which would be included within a fixed fee retainer model, focussed upon a minimal supportive service to maintain, as against a much more comprehensive service to support an evolving estate or business. These fee structures come with clear monthly or quarterly billing, set reporting, focussed client relationship management, a joined up team of advisors, and a service which is aligned to business and family requirements.

Service	Landed Estate/Rural Business - Evolve	Landed Estate/Rural Business - Maintain
Trustee, partnership and board meetings – attendance and project managing actions.	✓	
Natural Capital - assistance with drawing together Land Management plan.	✓	✓
Corporate and commercial – precedent contracts and support for corporate entities within the enterprise.	✓	
Agricultural property - new FBTs, surrender and re-grant, deeds of variation.	✓	✓
Residential property - maintaining of precedents, ASTs, support on rent reviews, specialist advice on Rent Act and Rent Agricultural Act properties.	✓	✓
Intellectual property – protecting the goodwill and reputation of the brand.	✓	
Employment – precedent employment contracts, hotline for grievances.	✓	
Family - asset protection guidance.	✓	
Guidance and high level review of Balfour structures - oversight of Balfour matrix.	✓	✓
General strategic advice.	✓	✓
Hotline for services within package	✓	✓

Contact a member of our team to discuss what a retainer model might look like for your Landed Estate or Rural Business.

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Partnerships, tax and succession:
Planning for the future

Partnerships are extremely efficient planning vehicles for tax and succession purposes, particularly in a rural business or landed estates context. They can be used to manage assets and income generated now, as well as being a mechanism for facilitating the orderly transfer of assets to the next generation. A key starting point is to identify the issues which frame the future direction and ultimate succession of a rural business. Once those (sometimes difficult) conversations have taken place, a partnership can often be the preferred business structure

Partnership property

The link between the partnership and the succession plan is pivotal. A crucial part of the process is to understand what assets are held within the business. Often, due to tax reasons and how the assets have been purchased or inherited over time, the main assets (such as the family farm) are held within the partnership and are therefore partnership property. Partners own a share in the partnership, and it is that partnership share (as opposed to the assets themselves) that can be transferred on death in accordance with the terms of their will (provided the terms of the partnership allow them to do so).

If there is no partnership agreement and the arrangement is undocumented, or governed by a very out of date document (both of which we commonly see), this could result in significant unintended consequences on the death of a partner.

The partnership agreement must therefore dovetail with the partners' wills since the partnership agreement will override. Partnership agreements can be drafted to include, for example, ring-fenced Land Capital Accounts, provisions for the appointment of successor partners, and "buy back" clauses, to help facilitate the continuity of the business upon the death of a partner.

Partnerships and tax

Partnerships play a key role in many inheritance tax (**IHT**) planning strategies for rural businesses, maximising both Agricultural Relief (**APR**) and Business Relief (**BPR**), for example, by helping frame a composite trading business as part of a *'Balfour'* planning strategy. They can also be used to strengthen claims for Business Asset Disposal Relief – a valuable Capital Gains Tax (**CGT**) relief if the business is sold.

It is important to be careful in relation to CGT and stamp duty land tax (**SDLT**) when assets are moved into, within, and out of a partnership.

SDLT is calculated by reference to the market value and the income entitlement acquired by the other partners 'sum of lower proportions' analysis, which is complex. Generally, as long as the same persons or connected persons are entitled to the land before and after the transaction, there will not be any SDLT arising. But parties aren't always connected, particularly where trustees are acting as partners, and so tax liabilities can sometimes be inadvertently triggered.

This underlines the importance of having a considered and robust partnership structure in place, as any potential tax issues can usually be navigated through proper structuring and advice.

New developments

With the general election now set for 4 July 2024, changes to the tax regime under a new government cannot be ruled out.

In April 2024, the Institute for Fiscal Studies (**IFS**) released a comment article recommending changes to the IHT regime. One of their proposed recommendations is to cap the amount of BPR and APR relief at £500,000 per person, which would obviously have profound effects on all business owners, and rural business owners and landed estates especially.

That said, there is likely to be strong pressure on politicians not to make a change that would raise taxes for those passing on family farms and businesses, and there are longstanding public policy reasons to support the existence of those reliefs.

In the March 2024 Budget, the government confirmed that they will extend the existing scope of APR to include environmental land management from 6 April 2025. This appears to be a positive first step towards establishing a tax framework which will help facilitate the growth of the Natural Capital economy, although further guidance and legislation is required, and consultations are ongoing. Whether an incoming government will implement the proposals in their current form is now uncertain.

The emergence of Natural Capital as a new asset class is leading to interesting conversations about effects on value. Increasing or decreasing values depending on the nature of the use of land has the potential to effect *Balfour* structures and their tax treatment. It is very important for tax (and the overall succession plan) to be part of the conversation when arrangements are being formulated, particularly as the longevity of many natural capital schemes means they will directly impact the next generation.

Summary

It is an uncertain time for the rural community, particularly from a tax perspective with the general election now on the immediate horizon.

When changes or opportunities arise, it is important for rural businesses and landed estates to have robust structures and forward plans in place, to provide agility and flexibility to react accordingly.

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Your food labelling and advertising:
Keeping it “legal, decent, honest and truthful”

There has been a small flurry of food related advertising and labelling issues that have arisen over the last few months. The topics covered are food labelling, the use of geographical indications and copycat products. After looking at these, we go on to discuss the latest developments which attempt to crack down on greenwashing.

Oatly AB v Dairy UK Ltd

In November 2019, Oatly filed a trade mark application for "POST MILK GENERATION". The UK Intellectual Property Office accepted the application but then Dairy UK (the trade association for dairy supply in the UK) objected to its registration.

Dairy UK argued that the term "POST MILK GENERATION" for a non-dairy product was likely to deceive the public into thinking that it was a dairy product when it was not. Dairy UK argued that the term "Milk" was inextricably linked to the dairy industry.

In January 2023, the UKIPO agreed with Dairy UK's arguments and rejected the trade mark for goods registered in the classes for various oat-based food and drink products.

Oatly appealed to the High Court and the court found for Oatly.

It held that the trade mark, "POST MILK GENERATION" was distinctive and not descriptive of the goods for which it was registered. Dairy UK argued that the EU Regulation which establishes common markets for the advertising and sale agricultural products prohibits use of the term "milk" on goods unless:

- they come from milking an animal
- are exclusively from animal milk; or
- animal milk is "an essential part" in either quantity or characterisation.

Oatly argued that the Regulation applied to:

- the description of a product rather
- than the use of a trade mark.

In other words, the Regulation only applied when describing the nature of the goods and not when "milk" was used as part of an indicator of the commercial origin of the goods. The Court found that Oatly's products were neither identified nor marketed as milk despite the inclusion of the word, milk, in the trade mark.

Comment:

The relationship between food labelling regulations and intellectual property rights is complex and need to be considered on a case by case basis. Therefore, this case is not a green light for the use of "milk" generally on plant based products. In fact, it is quite the opposite. Oatly's trade mark "POST MILK GENERATION" was allowed precisely because it was "not descriptive" so as to fall foul of the EU Regulation. If it had been descriptive, it could not function as a trade mark.

The Food Standards Agency – vegan labelling and allergies

The Food Standards Agency has launched a campaign highlighting the risks to people with animal based allergies of food labelled as vegan. Research conducted by the FSA has shown that consumers are extrapolating food labels too far finding that consumers with an animal-based allergy were too often confident that products labelled as 'vegan' were safe to eat.

The FSA says this confidence is incorrect and is putting people at risk.

Therefore, people who have allergies to milk, eggs, fish and crustaceans or molluscs, still need to check the precautionary allergen statement on products labelled 'vegan' in order to decide if it is safe to eat. Common mistakes include taking "vegan" labelling to indicate:

- a food is safe to eat for those with animal allergies
- a food will be tolerated by those with a food hypersensitivity, and
- there was no need to check for a precautionary allergen label.

"Free-from"

The campaign also explains what the 'free-from' label means. To use a free-from label, food businesses must follow strict processes to eliminate risks of cross-contamination with whatever you want to claim you are "free-from".

As counter-intuitive as it may seem, vegan food can still be prepared in areas alongside products such as egg, milk, fish, crustaceans or molluscs, whereas free-from foods cannot.

Protected Geographical Indications

Protected Geographical Indications (**PGIs**) are designations granted to products because of specific characteristics, reputation, authenticity, and/or origin. PGIs provide legal protection for the names of products with a specific geographical connection or that are made using traditional methods.

Over 3500 products are covered, such as Champagne, Melton Mowbray Pork Pies, Parma Ham, meaning that in order to describe your product as such, it must:

- be produced within the prescribed geographic region, and
- conform to the relevant standards

Exporters need to be aware of an update to the EU PGI regime which extends PGIs to cover "any misuse, imitation or evocation" of a PGI even if the true origin of the products is indicated. The New Regulation is very wide and seeks to prevent the use of descriptors stating a product is in the 'style' of, 'type', 'method', 'as produced in', 'imitation', 'flavour', 'like' or similar" to a PGI.

Thatchers' Cloudy Lemon Cider loses case against Aldi's imitation

The Thatchers case involved the discount supermarket, Aldi, producing a look a like of a market leading Cloudy Lemon Cider product. Thatchers is a Somerset-based cider maker, which, in 2020, launched its Cloudy Lemon Cider product in UK supermarkets.

Thatchers' Lemon Cider is sold in cans decorated with illustrations of lemons, and a UK trade mark was registered by Thatchers in May 2020 for the Thatchers' Lemon Cider logo. Two years after the launch of Thatchers' Lemon Cider, ALDI launched a newly branded version of its own lemon cider, which is part of its "Taurus" cider range.

Thatchers started legal action against ALDI in the High Court for trade mark infringement and passing off. The trade mark featured a combination of descriptive words and images of lemons.

Therefore, in its defence ALDI said that:

- the Thatchers trade mark, packaging and the words

"Cloudy Lemon Cider" were not sufficiently distinctive to be considered an "indication of origin".

- the lemon designs on a white background used on the Thatchers Lemon Cider can were not distinctive, and
- the only distinctive element of the Thatchers trade mark indicating origin was the Thatchers brand name.

The decision

The dominant features of the trade mark was found to be the "THATCHERS" brand. ALDI's "TAURUS" brand and bulls head device on its product served to prevent confusion.

The use of the colour yellow on both cider products and lemon products was ubiquitous, and the use of lemons and lemon leaves on lemon-flavoured beverages including lemon ciders was very common.

For the reasons given when reaching a finding of no likelihood of confusion in the context of trade mark infringement, the judge was satisfied that there was no misrepresentation that ALDI is connected in trade with Thatchers. Accordingly, both the trade mark infringement claim and the passing off claim failed.

Greenwashing

The Competition and Markets Authority is taking a much more interventionist role in an attempt to control greenwashing. The CMA took action against ASOS, Boohoo and Asda in respect of its investigation as to how these three companies labelled their clothes.

The CMA was concerned by:

- Statements regarding fabrics: such as "eco" or "responsible" without further explanation. and
- Use of imagery: such as green leaves, logos or icons in a way that suggested a product was more environmentally friendly than it is.

On 27 March 2024, Boohoo, ASOS and George at Asda entered into agreements ending the CMA's investigation without any admission of liability but with undertakings not to continue or repeat any act which the CMA believes infringes consumer law and which harms the collective interests of consumers. The retailers must ensure all green claims are accurate and not misleading.

While the undertakings are specific to the fast fashion sector, the following six key principles set out in the CMA's Green Claims Code will be enforced generally in respect of all consumer goods:

1. be truthful and accurate
2. be clear and unambiguous
3. not omit or hide important information
4. compare goods or services in a fair and meaningful way
5. consider the full life-cycle of the product or service
6. be substantiated.

All producers must consider their obligations under consumer protection law when making environmental claims and put in place robust internal processes to ensure that these principles are complied with.

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Agricultural Tenancies:
New code, changes to AHA tenancies & natural capital scheme collaboration

Since 2015 we have seen wholescale change to agriculture across the UK as we have moved from the EU Common Agriculture Policy to our own domestic agriculture policy in each of the devolved nations. Although the law relating to agricultural tenancies has always been governed domestically, other issues, fundamental to the success of agricultural businesses, have gone through wholescale change, which has prompted new modifications to tenancies.

As part of those developments, this year, we now have a new Landlord & Tenant Code of Practice, new changes on the horizon for tenancies governed by the Agricultural Holdings Act 1986 (**AHA**), as well as new opportunities arising from longer term natural capital schemes.

1. New Landlord & Tenant Code of Practice

In our recent article "Agricultural Landlord and Tenant Code of Practice for England: A new era?" (available on our website) we explained the main areas of the code. We will now consider how it affects the drafting of agricultural tenancies and how it will be enforced.

How is the code going to affect new tenancy agreements?

The code is entirely voluntary and does not affect underlying law or the terms of a written tenancy agreement. There is encouragement from within the industry to incorporate it into tenancy agreements and this, for new tenancies, can be done in a variety of ways. The most common is to include a clause requiring the parties to take account of its terms, during and on termination of the tenancy.

On wider drafting issues, the code encourages fairness, a written tenancy agreement and the inclusion of a schedule of condition at the outset of every tenancy. Blanket bans on participation in environmental and other opportunities are discouraged. These all seem very sensible measures and have been addressed in our in-house tenancy agreements for some time.

The interesting question which then arises is what will happen if the parties breach the code whether or not there's a clause in the tenancy agreement requiring them to comply with the code? Are we going to see parties suing each other for breach and, if so, how is that going to play out?

Enforcing the code

In general terms the code is setting out what the parties should do unless there is a good reason to suggest otherwise, which inevitably involves a subjective element to that judgment. This will make taking action to enforce the code through mechanisms like forfeiture more difficult; tenants are quite likely to obtain relief from forfeiture because of the subjective element involved. So, it is unlikely that the code will be enforced in that way.

However, where it is likely to have more impact is in the way the parties conduct disputes and even when considering whether the dispute is worth pursuing at all. The code's principles of clarity and communication in working through disagreements are set out, as is a statement that dispute resolvers, such as arbitrators, who have authority to make costs awards, may wish to take into account, whether the parties have acted in accordance with the code, when making their award.

So, for example, where a party loses a case, they generally have to pay the winner's costs. But the arbitrator then has discretion to decide how much those costs are and they can take the parties' conduct into account when assessing that quantum.

In view of the fact that all 3 industry bodies which appoint arbitrators, namely the RICS, the CAAV and the ALA, have endorsed the code, it follows that their members are likely to be influenced by its recommendations.

In addition, the RICS has said that "RICS Regulation will be mindful of the existence of this voluntary Code and will take due note of what best practice looks like", so RICS members may feel additional pressure to adhere to the terms of the code.

Very recently DEFRA has announced that it will be appointing a Commissioner for the Tenant Farming Sector (**CTFS**) this autumn. The role is planned to be a source of "neutral and confidential advice for tenants, landlords and advisors who have concerns about poor behaviour and complaints that the Code of Practice on responsible conduct is not being followed". Indications are that this will simply be a method of helping to resolve issues before they escalate to more formal dispute processes.

2. Changes to AHA tenancies

The Agriculture Act 2020 introduced some changes to AHA tenancies and the last of those changes comes into force on 1st September 2024. From that date, on succession applications, the commercial unit test will no longer form part of the eligibility test. Instead, succession applicants will only have to satisfy a 2-stage eligibility test comprising:

- close relationship test; and
- principal source of livelihood test.

They will also have to satisfy a revised suitability test, which will replace the current test. For this, the tribunal needs to take into account all relevant matters, including the capability and capacity of the applicant to farm, taking into account the need for high standards of efficient production and care for the environment. The tribunal then also needs to look at a person's experience, training and skills in agriculture and business management.

The two new elements in all of that are, first the reference to care for the environment, which now sits alongside efficient production and, secondly looking at a person's experience and skills in business management. These changes reflect the shift in government policy towards promoting protection of the environment, which we have seen in many different contexts.

With the commercial unit test falling away, we may see some fairly large-scale enterprises now eligible for succession, which would have been cut out by the previous test. This change reflects the government's desire to promote food production and large scale, efficient operations and also to encourage the handing down of businesses to the next generation.

This may result in more succession applications coming through on retirement, rather than on death, which effectively gives the successor a trial run at succession to see where any weaknesses or arguments lie.

For greater detail about these changes please see the article on our website "Agriculture Act 2020: England finalises new AHA succession rules".

3. Natural Capital Scheme opportunities

The top tier of DEFRA's Environmental Land Management Scheme comprises the Landscape Recovery Scheme (**LRS**), which is intended to involve large scale projects, covering a wide area, using blended public and private finance and is likely to require collaboration between multiple landowners and occupants.

DEFRA has made it clear it is keen for tenants to be part of that collaboration and there is plenty of opportunity for landlords and tenants to cooperate, both under existing tenancies and new agreements.

LRS legal framework

We expect LRS to work through a series of interconnected agreements. A lead applicant will be appointed by all the parties to deal with DEFRA. That applicant will often be a company set up for the role, known as a "special purpose vehicle" (**SPV**). The SPV will enter into a contract with DEFRA outlining the whole scheme. Beneath that each landowner will contract to take on the relevant obligations and commitments for their respective areas of land.

The landowners will also enter into conservation covenants or s106 planning agreements with local planning authorities (or other responsible bodies) which will bind their land to ensure performance of the environmental commitments (such as tree planting).

Where tenancies exist, the LRS obligations will be delegated further down the chain through sub-contracts between the landowners and their tenants for the relevant areas of land.

How can tenants be involved?

First, by managing land within the LRS in collaboration with their landlord – for this existing tenancy agreements may need to be varied by agreement.

Secondly, tenants can be appointed as contractor land-managers by landlords on in hand land within the LRS, Thirdly, tenants can become shareholders in the SPV, jointly with landlords, and their shareholding can reflect each party's input, taking account of time, financial contribution, risk etc.

Lastly tenants could also be involved in the management of the SPV as directors, employees etc.

Inheritance tax changes

One issue which has been holding landowners back from entering longer term schemes has been the knotty issue of IHT and the fact that land in new environmental schemes do not currently qualify for Agricultural Property Relief.

Fortunately, the government addressed this problem in the latest budget and confirmed that the scope of APR will be extended to encompass ELMS from 6th April 2025. For more details of this tax change see the article on our website "Budget update: Taxation of environmental land management and ecosystem service markets".

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Biodiversity Gain Site Register Regulations 2024: Structuring and documentation

In our podcast we discusssed how the publication of the secondary legislation under the Environment Act 2021 has hopefully clarified a few issues relating to deal structuring and documentation.

The major issue remains getting the section 106 agreements completed as this requires the approval of the (often under resourced) local planning authority (**LPA**). We have moved from drafting on an anticipatory basis to being able to fill in some, if not all, of the blanks.

That is good news because the aim is to get to a position where we have standard documents for these BNG deals. That is not an easy goal to achieve as every LPA and every advisor has a different view on these things. However, if we can simplify and streamline the transactions then the market will work more efficiently.

The Biodiversity Gain Site Register Regulations 2024 (Register Regulations) have clarified issues around registration of sites. Most of that detail is procedural but Regulation 8 of the Register Regulations confirms that your Section 106 agreement/ conservation covenant must specify the last date on which anyone will be obliged to carry out habitat enhancement works.

That means you do need to know how you're going to manage your site and when you're going to create the habitat because you need to then work out your 30 years from the completion of those habitat establishment works. As regards this end date the Register Regulations do caveat the requirement by stating "(if any)" when referring to the date. However, landowners are already carefully considering the implications of a 30 year commitment and it seems unlikely that they would sign up to a Section 106 agreement which does not have a finite termination date and which would therefore burden the land indefinitely.

The practical consequence of this requirement is that larger sites might be split so that, at least initially, only part is committed to habitat creation so that the establishment works are known and scheduled so the 30 year run off can be calculated. If those units are sold then more land on the site can be committed at a future date and a Section 106 agreement entered into accordingly. The first phase of habitat establishment can be further split into allocations of units for separate developments but another reason for splitting the overall site as set out above is that the costs of habitat monitoring are already looking very high. As with legal or other professional costs, this market will only get going if the economics stack up. Monitoring habitat on a site with different commencement dates will add an unwelcome layer of complexity and cost.

The high monitoring costs are part of the price of the credit that the developer pays so it's a key part of the sort of the economic equation. If it's not assessed properly at the start and the developer is undercharged the landowner loses. If it's too expensive and the credits are overpriced the developer goes elsewhere.

The list of responsible bodies has grown but not by much and that shortage is leading to an inertia in the uptake of conservation covenants. That seems a shame because they are tailor-made for this sort of project. They also have the advantage of removing the burden from the

LPA of approving the drafting. Of course, the LPA will have to be happy with the conservation covenant but if it ticks the relevant boxes then approval should be straightforward.

What's holding people back is the fear of the costs of having to enforce a breach of covenant against a defaulting landowner. That is what is worrying the trustees of wildlife trusts and commercial organizations alike.

Turning to nutrient neutrality, the mainstream creation of wetlands or cessation of agricultural use to produce phosphate and nitrate credits is well known but credits can be created by upgrading infrastructure such as replacing faulty septic tanks with decent package treatment plants. This could be an option for rural estates to upgrade infrastructure and derive a benefit at the same time.

The impact of the Levelling Up and Regeneration Act 2023 is considerable as that places an obligation on water companies to upgrade wastewater treatment works by 2030. The critical point here is that the calculations for working out the nutrient neutrality requirements on any particular project have to assume that those upgrades have taken place. This means that a developer will require far fewer phosphate and nitrate credits after 2030 than before because the upgrades are deemed to have taken place and those wastewater treatment plants are much more efficient at stopping the pollutants going into a river.

What that means is that there's an interim market for short-term mitigation from now until 2030 because if you're building houses now you might need, for example, 100 phosphate units for the period from now until 2030, but only 50 thereafter. As such, you might opt to purchase 50 long term credits for the post 2030 period and look for short term mitigation based credits in the interim. That short term solution is a far easier decision for a landowner to make when compared to a 80-125 year commitment.

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Agrilore Quiz
Summer Cereals 2024 Questions:

This quarter we are of course doing Cereals, and the questions are based upon our podcast series and the event.

1. **True or false, Partnership Agreement overrides a Will?**
2. **When did Biodiversity Net Gain become mandatory for development?**
3. **Why did the English Courts find Oatley's trademark valid despite the use of the term "Milk"?**
4. **True or false, from 1 September 2024 the suitability test for succession of Agricultural Holdings Act 1986 Tenancies will no longer apply?**
5. **What is a 'riparian owner'?**
6. **If development is taking place on farmland, can surface water accumulating on that development go into the public sewer network?**
7. **What is seaweed considered to be a good alternative source of for livestock?**
8. **What does Marine Net Gain apply to?**
9. **What are the 3 key principles of The Agricultural Landlord and Tenant Code of Practice?**
10. **Which tax does Agricultural Property Relief relate to and what is the maximum relief available?**
11. **What is Richard Walford excited to wear at Cereals?**
12. **When was Cereals Arable event launched?**
13. **Who is co-hosting Cereals 2024?**
14. **How many generations have the Farr family farmed Bygrave Woods?**

Answers to **adam.corbin@michelmores.com**.

The winner will receive a bottle of English Sparkling wine.

Agrilore Quiz
Early Spring 2024 Answers:

The quiz last quarter comprised some ‘gentle’ natural capital questions.

Congratulations to winner Nicola Quick MRICS FAAV, Associate Partner at Carter Jonas in Taunton pictured here.

A bottle of English Sparking is on the way to Nicola.

Thanks all for taking part!

1. **What is nutrient neutrality?**

   a. **A requirement to offset the contribution of nutrients to watercourses caused by development.**

   b. The effect of storm overflows allowed by water companies

   c. A popular Scandinavian moisturiser

2. **What is the definition of "additionality"?**

   a. 'additional or different outcomes and not paying for the same outcome twice'

   b. 'a real increase in social value that would not have occurred in the absence of the intervention being appraised'

   c. 'Property of measures to achieve biodiversity net gain, where the conservation outcomes it delivers are demonstrably new and additional and would not have resulted without it'

   d. **There is no official, across the board definition.**

3. **The Biodiversity Net Gain requirement to be set by all LPAs is?**

   a. 10%

   b. **a minimum of 10%**

   c. any figure which they can justify in policy terms

4. **What is 'stacking'?**

   a. A farm tenant also selling BNG credits over their land

   b. **Selling multiple natural capital benefits or improvement over the same land**

   c. Something which upland farmers do to block grips on moors

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