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Agrilore

Autumn 2024

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Contents

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Welcome to this Autumn edition of AgriLore.

Since the last edition of AgriLore we now have a new Labour Government at the helm, which inevitably means a change of approach. With such a lack of money to spend we will doubtless see cuts to departmental budgets as Rachel Reeves tries to squeeze funds out to spend on her priorities. It remains to be seen how this plays out within DEFRA and the financial support provided to farming businesses.

Many will be waiting to see in particular what the Autumn budget will bring, with the potential for some major changes to taxation, possibly affecting farming businesses more than others. This has inevitably meant a rush to get farm sales, tenancy surrenders and other transactions through before 30th October. Rumours of potential dramatic changes to IHT and CGT are swirling as Iwan Williams explains in his article on page 5.

As expected, changes to residential lettings are also high on the government's agenda and there were few great surprises in the Renter's Rights Bill, which started its passage through the Houses of Commons recently - for further details see the article on page 6. Farms and Estates with farm cottages should keep a close eye on this Bill as it is likely to affect both new and existing tenancies.

Over the last 6 months we have seen yet more growth in our Landed Estates and Private Property team and we are delighted to welcome Thomas Mawson as an Associate to that team. Thomas will be handling the usual farm sales and other transactions, alongside natural capital arrangements.

On the Natural Capital front, we continue to see huge growth in demand for advice from a wide range of businesses. Instructions in connection with Landscape Recovery Schemes are also picking up pace following a significant number of successful tender bids; all fascinating work which allows our natural capital team to be at the forefront of developing industry expertise, structures and documentation.

As a result of this developing expertise the Natural Capital team have been shortlisted as 'Team of the Year' for Bristol Law Society awards, whilst Michelmores as a Firm has been awarded "Law Firm of the Year – Regional/Offshore" by Legal Business awards.

In this bumper edition of AgriLore we cover a diverse array of topics, ranging from BNG, contract farming and planning to telecoms, employment and partnership issues and much more besides.

Finally, we land this edition with our usual quiz which this time focuses on AHA practice on page 26.

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Taxation:
Autumn Budget 2024 and potential tax changes

The Autumn Budget is set for 30 October 2024. Prime Minister, Sir Keir Starmer, is already on record as saying that it is going to be "painful" and that "those with the broadest shoulders should bear the heavier burden". These are uncertain times, but it is more likely than not that the existing tax regime is going to change. So, what could this mean for private clients and their businesses, and what tax changes might we expect? In this article, we focus on the two main capital taxes – Capital Gains Tax (**CGT**) and Inheritance Tax (**IHT**).

CGT

There has been much speculation about CGT rate increases (including a possible alignment with income tax rates – a potential jump from 20/24% to 45% for higher rate taxpayers).

The government could also look to remove or restrict the rebasing of assets on death, and it remains to be seen whether CGT related reliefs, holdover relief, rollover relief, and Business Asset Disposal Relief – are amended or restricted.

The government will be aware that any potential changes would need to be balanced with the risk of disincentivising long term investment and entrepreneurship. Significant rate increases could also have an adverse effect on the overall tax take, if individuals decide not to realise gains. For this reason, a relatively modest rate increase (or a phased increase) may be the most likely outcome at this stage.

With an eye on these potential changes, many private clients and business owners have been looking to crystalise gains before the Budget to "lock in" existing rates. However, any action should be very carefully considered; planning of this nature is best carried out as part of a well thought through estate planning strategy, and not as a tax-driven "knee jerk" reaction to what may or may not happen in the Budget.

IHT

There was only one mention of IHT in Labour's election manifesto, which promised to end "the use of offshore trusts to avoid IHT".

Potential changes to the "non dom" tax regime have been well publicised.

There is also uncertainty about the future of Business Property Relief (**BPR**) and Agricultural Property Relief (**APR**), much of which has been generated by a 2024 IFS report which suggested capping those reliefs at £500,000 per individual.

It remains to be seen whether the government explore this suggestion – if they did, it would have a profound effect on business owners, rural businesses, and Landed Estates. With rural businesses already operating within a challenging and evolving marketplace, it will be important for the government to balance any tax changes with the need to kickstart economic growth.

Indeed, there are longstanding policy reasons supporting the existence of these reliefs, and the government would need to consider carefully whether changes of this nature (which may be seen to disincentivise entrepreneurialism) would actually result in an increased tax take. The government may instead decide to tighten eligibility requirements for relief, potentially for AIM investments or qualifying criteria for let farmland or businesses, which are not purely trading.

There is ongoing speculation over the tax treatment of pensions for IHT purposes, and whether ultimately, they could be brought within the IHT net. It is increasingly likely that we will see some changes to the regime in this area.

Private clients are also exploring alternative methods of implementing their estate and succession plans; we have noticed an increase in the use of Family Investment Companies (**FICs)** as a vehicle to launch and manage long term succession strategies, including in a Landed Estate context.

Summary

Long-term decisions in relation to estate and succession planning should not be made in haste, and tax should not be the only driver. These decisions can have wide ranging consequences and require careful thought. We do not know what changes to the tax regime may come, and when.

As the government's tax policy starts to become clearer over the coming weeks and months, it will be important for private clients and businesses to reconsider their estate planning strategies. Having a well-defined succession plan can be extremely valuable and could help families and businesses navigate what may be a rapidly changing tax landscape.

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Renters' Rights Bill:
Proposed grounds for possession in a rural context

The Renters' Rights Bill (**Bill**) gives greater rights and protections to those renting their homes. In September, we set out the key proposals from the Bill (see Renters' Rights Bill: a new era for residential tenancies - Michelmores). Following the Bill's second reading we now focus on the grounds for possession and consider whether these proposals will be sufficient for rural lettings.

Mandatory grounds

As with the previous Conservative Government's Renters' (Reform) Bill, there are a number of mandatory and discretionary grounds for possession that are set out in Section 8 of the Bill.

Mandatory grounds are those which, if met, must result in a judge awarding possession. With discretionary grounds, a judge will grant possession only if it is reasonable to do so. There are certain mandatory grounds which are likely to be of particular interest to agricultural landlords and tenants:

Superior lease: Grounds for possession available for agricultural landlords where the superior lease (such as the FBT or the AHA tenancy) ends, or where the superior landlord becomes the tenant's direct landlord and seeks to take possession (Ground 2ZA and 2ZB). Four months' notice to the tenant is required.

Agricultural worker: Ground for possession if the property is required for occupation by an agricultural worker (Ground 5A). The landlord must be directly employing the agricultural worker. Two months' notice is required.

Employment: Ground for possession when an employment contract ends, if the dwelling was let out as a result of the tenant's employment by the landlord and the employment has come to an end, or if the tenancy was not intended to last for the duration of the employment and the dwelling is required by a new employee (Ground 5C). Two months' notice is required.

Notably, the above grounds for possession do not apply if the current occupier falls under an Assured Agricultural Occupancy (AAO).

Under the proposed Bill, there will be a mechanism to avoid creating an AAO (equivalent to the existing Form 9 notice). Landlords can serve an opt out notice in advance of the agricultural worker taking up occupation, and thereby avoid the risk of creating an AAO with security of tenure for the occupier.

Further notable mandatory grounds include:

Landlord's family: Occupation by the landlord or the landlord's family (Ground 1). This ground may only be used after the first 12 months of the tenancy and at least four months' notice to the tenant is required.

Sale: Sale of the dwelling-house (Ground 1A). Again, this ground may only be used after the first 12 months of the tenancy and four months' notice to the tenant is required.

Sale by mortgagee: Sale of the dwelling house that is subject to a mortgage, and the lender exercises their power of sale requiring vacant possession (Ground 2). Four months' notice is required.

Redevelopment: The landlord wishes to demolish or substantially redevelop the property (Ground 6). The landlord must prove that the works cannot be done with the tenant in occupation. This ground may only be used after the first six months of the tenancy and four months' notice is required.

Enforcement: The landlord is subject to enforcement action (such as by a Local Authority or the First-tier Tribunal) and needs to regain possession to be compliant (Ground 6A). Four months' notice is required.

Death of tenant: Death of the tenant (Ground 7). Possession proceedings must begin no later than 12 months after the date of death or the date that the landlord became aware of the death. Two months' notice is required.

Rent arrears: The tenant has at least three months' (or 13 weeks) rent arrears at the time the notice is served and at the time of the possession hearing (Ground 8). Four weeks' notice is required.

Notable discretionary grounds for possession are:

Suitable alternative accommodation: This is available to the tenant (Ground 9). Two months' notice is required.

Persistent rent arrears: The tenant is in any amount of rent arrears or persistently is late in paying their rent (Ground 10 and Ground 11). Four weeks' notice is required.

Tenancy breach: The tenant has breached the terms of the tenancy agreement (not including a failure to pay rent) (Ground 12). Two weeks' notice is required.

Deterioration to dwelling: The tenant has caused a deterioration in the condition of the property, or a deterioration in the furniture (Ground 13 and Ground 15). Two weeks' notice is required.

Note: *that the grounds detailed above are not an exhaustive list.*

Under the new Bill, the courts will not be able to award possession under any Ground, except Grounds 7A and 14 (anti-social behaviour), unless the landlord has protected the tenant's deposit.

Issues for rural businesses

There is concern that the proposed grounds under the Bill do not go far enough to meet the needs of rural landlords, many of whom need to supply accommodation to their employees. Organisations like the CLA are continuing to lobby the Government to widen the proposed grounds to better encompass the often-seasonal needs of rural businesses and to reflect the challenges that they can face. For example, they propose extending the new ground for incoming agricultural workers to a wider range of employees, such as those in hospitality.

The CLA are also lobbying for the inclusion of two further grounds to protect rural landlords adequately:

- "Persistent refusal by the tenant to allow the landlord (or their agents) access for statutory inspections (e.g. gas and electrical safety) and related compliance works"; and

- "The property is required to house an outgoing agricultural worker that the landlord has a statutory duty to house and who is being moved to suitable alternative accommodation".

Moreover, although the agricultural worker ground is interesting, difficulties could arise where dwellings are not owned by the business employing the tenant. It is fairly common for different parts of a farm or estate to be held by different individuals or legal entities. We will have to see if this ground is widened to provide sufficient flexibility to allow for this.

The Bill is still in its infancy. It needs be approved by MPs and peers, who may propose further changes, before it becomes law. In its current draft, it is a good indication of the direction of travel for residential lettings, especially in view of the size of the Government's majority in the House of Commons. For those affected by the Bill it's a case of watch this space!

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Biodiversity Net Gain:
Development Consent Orders and Compulsory Purchase

Earlier in 2024 Biodiversity Net Gain (BNG) requirements for planning permission were implemented under Schedule 7a of the Town and Country Planning Act 1989 - from 12 February 2024 for major sites, and from 2 April 2024 for small sites. Despite this progress, however, there remains a large gap regarding the implementation of BNG as a requirement for Nationally Significant Infrastructure Projects (**NSIPs**) under Development Consent Orders (**DCOs**).

Schedule 15 of the Environment Act 2021 sets out the prospective BNG provisions which will apply to DCOs once they are implemented. The key points to note are:

- The Secretary of State must make a BNG statement containing a BNG objective, which will apply to all DCOs during a specified period
- The statement must require a BNG value increase of at least 10%, mirroring the required gain for planning permission, though the Secretary of State has the power to make a BNG statement requiring additional BNG
- The statement must make provision that if a DCO includes land already registered on the BNG register, the value of pre-development habitat for the purposes of the DCO includes the value of the existing habitat enhancement
- The statement must set out whether and how the BNG objective applies to irreplaceable onsite habitat
- The statement must set out what evidence is required from any DCO applicants to demonstrate how the BNG objective is met.

There are subsequent provisions which set out procedure, if any developments are, or are not, covered by an existing national policy statement at the time at which Schedule 15 is implemented.

Acquisition of Land for BNG Purposes

In a decision letter dated 12 September 2024, a DCO was granted to National Grid for the upgrading of infrastructure running from Suffolk to Essex, known as the Bramford to Twinstead Reinforcement and associated development. Interestingly, this DCO dealt with BNG considerations for the NSIP, ahead of the requirements becoming mandatory.

National Grid argued that whilst BNG was not mandatory for NSIPs, within their 2021-2026 Environmental Action Plan, they had committed to delivering at least 10% or greater value on BNG in that period, and as such, it formed part of their application for the DCO.

The decision letter confirmed that whilst the government intends to commence mandatory BNG for NSIPs from November 2025, it supported National Grid's decision to commit to BNG on a voluntary basis ahead of the mandatory requirement being introduced.

Further, the Secretary of State used their discretionary power to grant compulsory purchase powers under a DCO pursuant to s122 of the Planning Act 2008, to give National Grid the power to acquire compulsorily, land it needed for its BNG requirements, in the event that voluntary agreements, with those whose interests it needed to acquire, could not be reached.

What this means for Landowners & Tenants

The implications of this decision are quite stark in respect of compulsory purchase; landowners will now need to concern themselves with developments, not only where their land may be required for the direct development of an NSIP, but also where their land is not directly required, but rather has simply been identified as suitable BNG land to support the NSIP.

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Food Security & the Great South West Partnership:
An interview with Chair, Mel Squires

Charles Courtenay is an IP litigation partner at Michelmores and leads our Sustainable Economy program. Charles also sustainably farms the Powderham Estate in Devon and sits on the cross benches in the House of Lords, as Earl of Devon. In those various capacities, Charles champions the region in Westminster with a particular focus on sustainable land management and agri-tech. Charles is also a member of the Great South West (GSW) All Party Parliamentary Group, and supports the broader work of the GSW – the pan-regional partnership that covers the Isles of Scilly, Cornwall, Devon, Somerset and Dorset.

The GSW recently launched an Independent Economic Review to promote economic growth and investment in the region, with a focus upon the provision of National Security in three key sectors – Energy, Food and Defence. Charles has been invited to join the GSW's Food Security programme board, and he recently sat down with the Board's chair, the NFU's Mel Squires, to discuss the work of the Board and its aspirations to support the Nation's Food Security.

Charles: Mel, please tell us about the Great South West region.

Mel: This area is home to over 3 million people, 133,000 businesses, 8 Universities, 700 miles of coastline, 1.7m hectares of land, including two national parks, and a wealth of natural capital and assets that are unparalleled elsewhere in the UK.

We have 1.7m hectares of farmed land accounting for 19% of the farms in England producing £3bn of food for the UK each year; the region accommodates approximately one fifth of English farms, and one third of the country's dairy farmers; with a growing agritech and aquaculture ecosystem supported by specialist research centres and education providers. It can mobilise data, technology, and innovation assets to ensure agile and sustainable methods of food production and supply.

Charles: What does the GSW partnership aim to achieve for this region?

Mel: The GSW partnership is here:

- to champion our incredible region nationally and internationally by convening the collective voice of business, local authorities, Universities and stakeholders, working with Government, investors and others to unlock our transformational opportunities of scale, that stretch beyond local boundaries
- to work intensively in Whitehall and Westminster, working closely with our parliamentarians through the GSW All Party Parliamentary Group, to make the case for the region to Ministers, Advisers and Senior Officials to ensure that our region is at the heart of Government plans in shaping, influencing and leading policy thinking and change
- to mobilise and attract UK and foreign investment into the region, to exploit the incredible opportunities we have here for our businesses to succeed and thrive in pioneering technologies and to win in key global markets, creating high value, well paid jobs for our communities and to deliver for the wider UK.

Charles: Tell us about the GSW's Independent Economic Review.

Mel: Our recently published Independent Economic Review sets out just how important the GSW is to the future success and security of the UK. It provides a new roadmap for collaboration with Government, regional partners and investors to help seize the moment of opportunity for our region and our country at this most pivotal of moments.

It was launched to an audience of 500 at our Sandy Park Conference in September, which included many of our new regional MPs and other political leaders. We have been fortunate that the Review was commissioned and drafted at a time that coincides with the new Labour administration, allowing us the perfect opportunity to drive policy and to deliver a clear message to Westminster and beyond about the GSW's strategic importance on a national and international stage.

Charles: What institutions are assisting with this?

Mel: We have great support in the science, academic and educational spaces via the regions' excellent universities, as well as Rothamsted (North Wyke), along with an agri-tech sector focus in all 4 counties supporting sustainable food, land and environment system management.

Charles: And why has the Great South West chosen to focus upon these specific sectors?

Mel: We know that the GSW is vital to the UK's economic security as the nation's powerhouse for food, defence, manufacturing, clean energy, climate resilience and nature recovery. It is home to a vast concentration of national assets, research and innovation capabilities and natural resources, meaning the UK's future and economic resilience are intertwined with the success of our region.

The core messaging of our offer of delivering for the UK is built around our role in:

- fortifying the UK's security as the country's manufacturing and defence powerhouse
- powering the UK's energy security to become a clean energy superpower
- delivering the UK's food security as the country's farm and food producer.

Charles: How is the food security element of this project supported and what specifically is it seeking to achieve?

Mel: Our GSW Food Security programme board is made up of related supply chain professionals, including representatives from local government (Dorset and Cornwall CC), hospitality (Michael Caines), academia (Exeter and Plymouth Universities), as well as food production (Wyke Farms, ABP Beef and St Ewe Eggs) and processing (Taste of the West and Food Works).. It was established last April and has the following focus for the coming year:

1. Food Security Position paper – launched 14 October 2024.
2. Westminster event – 14 October 2024.
3. Scoping commercial viability of innovative food systems.
4. Strategic business case for an Agritech Catapult.
5. Advocacy on food procurement and local supply chains.
6. Improving visibility of the region's offer to, and potential in, the food agenda.

Charles: What can those in the region and beyond do to support the work of the GSW Food Security Programme?

Mel: We will be engaging with those across the Great South West region and beyond who are involved in the food industry to understand what food security means to them and how we can best support the delivery of this crucial government policy. As the new Government unveils its rural policies and seeks to deliver on its manifesto commitments around food security, we will be looking for every opportunity to remind them of the importance of the GSW to this key mission. All support in that endeavour will be much appreciated.

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Planning:
Water neutrality and the lawfulness of development

The recent case of *Ward v Secretary of State for Housing, Communities and Local Government* [2024] has highlighted that only lawful developments will be exempt from the requirement to demonstrate water neutrality.

The case

The case began with a planning application submitted in 2018 for a dwelling and stable block on agricultural land in Horsham.

The application was refused in 2019 on the grounds that the proposed development was unsustainable. The refusal was appealed to the Planning Inspectorate, however, due to delays caused by the pandemic, the appeal decision was severely delayed, with the appeal not being heard until 2022.

Two things happened during the extended delay. In December 2020 the landowner had moved onto the land and was living in a caravan. Then in September 2021 Natural England issued water neutrality guidance for the catchment in which the land was located for conservation reasons.

That guidance advised that new developments would need to demonstrate water neutrality. Water neutrality is achieved where the use of water in the supply zone before the development is equal to or less than after the development.

The Applicants submitted a Water Neutrality Statement stating that their occupation of the site prior to the publication of the Natural England guidance removed the need for an appropriate assessment because the development would simply maintain the status quo with regards to water consumption.

Appeal to inspector

At the appeal hearing in 2022 the Natural England guidance was a material consideration to be considered by the Inspector. Due to the relative timing of the Appellant moving on to the site and the issue of the Natural England guidance, the Appellant argued that the guidance did not apply to their appeal.

In contrast, Natural England argued that unless the Appellant could demonstrate that their occupancy of the land was either (1) lawful because it had the benefit of a planning permission or (2) their water consumption was otherwise accounted for, the development described in the appeal must achieve water neutrality.

The Inspector followed the Natural England guidance and concluded that the Appellant's occupation of the land was unlawful, so their water consumption was not otherwise accounted for. The Appeal was refused on, among other things, water neutrality grounds.

Appeal to the High Court

The Inspector's decision was challenged in the High Court. The court upheld the decision of the Inspector's decision, concluding the Inspector had dealt correctly with the arguments on water neutrality.

What this case means

The Ward case confirms that when a water neutrality mitigation strategy is being proposed, only the consumption from existing lawful developments can be taken into account.

For proposed developments on land in catchments where Natural England has issued water neutrality guidance, an applicant needs an effective water neutrality mitigation strategy, and a water neutrality mitigation strategy will not be effective if it relies on a reduction of water consumption arising from an unlawful development located elsewhere in the catchment.

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Telecoms:
Landlords win as Tribunal increases base rent and clarifies redevelopment rights

In good news for landowners and landlords, a key recent decision of the Upper Tribunal has increased the rent that telecoms operators will have to pay for the siting of masts on "unexceptional rural sites". The case also provides useful guidance on the rights of landlords/landowners who require a redevelopment break right to be included in new leases.

Background

The decision was published on 29 July 2024 and relates to a renewal lease of a greenfield telecommunications site at Vache Farm near Chalfont St Giles in Buckinghamshire (**Site**).

The equipment on the Site consisted of a 20m high steel mast which was in a fenced 16m x 6m enclosure in a field. There were also several cabins housing telecoms apparatus. The parties to the lease were EE as tenant, and APW (also a telecoms company) as landlord. After the contractual term of the original 15-year lease expired in May 2020, the lease continued under the provisions of the Telecommunications Code (**Code**).

Code Reminder: *a lease that is subject to Code rights (generally most telecoms leases) will continue even after the contractual term ends, unless a prescribed procedure to terminate is followed.*

The parties could not agree on the renewal terms for the rent or the redevelopment break right and so the matter was referred to the Tribunal.

Rent for Unexceptional Rural Sites

The tenant, EE's position was that the annual rent should be based on the figure of £750 per annum. This was taken from several 2022 cases which set £750 as the precedent rent figure for unexceptional rural sites[1]. EE's surveyor conceded that the £750 should be increased to allow for inflation, taking it to £977, which they rounded to £1,000.

APW's case was that the rent should be £2,850 per annum, and they submitted detailed valuation evidence that the rent of £750 was too low based on market comparables, and the good access and size of the Site.

The Tribunal took the opportunity to revisit the appropriate rent for rural mast sites, which had not been considered since the 2022 cases[2]. The Tribunal set out the previous thinking on unexceptional rural site valuation and considered whether the guideline figures needed to be reviewed.

It was the first time that the Tribunal had carefully reviewed transactions in relation to setting a value for small rural sites in non-telecommunications use, which can then be used to get the no-network assumption value.

In summary, the Tribunal found that the previous case law determining a rural mast site rent at £750 was much too low. The found that inflation was particularly relevant to valuation and took into account the evidence on comparables for non-telecoms use sites. They concluded that the appropriate rent for this type of site is £1,750.

Redevelopment Break Right

The parties agreed on the principle that APW should have a right to terminate the lease on 18 months' notice, but they disagreed on how the re-development right should be worded.

[1] EE Ltd and Hutchinson 3G UK Ltd v Stephenson and another [2022] UKUT 180 (LC)

[2] where they did so in the following two cases: *EE Ltd and Hutchison 3G UK Ltd v. Affinity Water Ltd* [2022] UKUT 8 (LC)) and *EE Ltd and Hutchison 3G UK Ltd v. Stephenson and another* [2022] UKUT 180 (LC)).

APW wanted quite a widely drafted break right to be available to them whenever:

"(a) the Landlord desires to redevelop all or part of the Communications Site or any neighbouring land or any land under the ownership or control of the Superior Landlord (the site owner); or

(b) the test under paragraph 21 of the Code for the imposition of the agreement on the Landlord is no longer met."

Effectively, this was a right to terminate the lease whenever they want to redevelop the Site, or neighbouring land, for any purpose and at any time.

Code Reminder: *Paragraph 21 contains a 2-part test which sets out that for a Court to impose Code Rights. The Court must be satisfied that:*

1. *Any prejudice caused to the landlord/landowner by imposition of the code agreement can be adequately compensated by money.*

2. *The public benefit outweighs the prejudice caused to the landlord/landowner. If a Court is not satisfied that the test is met, then they do not need to grant Code Rights to the operator.*

EE wanted a more limited break right requiring APW to show:

1. a "settled intention" to develop the land; and

2. that the land could not reasonably be developed without obtaining possession of the Site.

EE expressly excluded "providing or operating an electronic communications network, or electronic communications services, or the provision of an infrastructure system" from the definition of "development", as they did not want APW to try and take the benefit of the Site for their own purposes.

The Tribunal decided it was not the Code's intention to stand in the way of the genuine redevelopment of land, regardless of whether that was for telecommunications purposes or not – and regardless of whether the operator enjoyed more favourable terms than before the lease renewal. The Tribunal refused to impose restrictions on the meaning of the word "development".

The Tribunal's imposed break clause wording was a compromise between the two positions:

"The break clause will therefore provide that the Landlord may terminate the new lease on giving 18 months' notice expiring on the fifth or any subsequent anniversary of the term commencement date if it intends to redevelop all or part of the Site and could not reasonably do so while the new lease continues."

Comment

This case provides helpful valuation guidance for unexceptional rural sites on which a vast majority of telecoms apparatus is situated and serves to increase the previous "base" rent of £750 to £1,750.

It also clarifies the position with regards re-development for landlords/landowners, which is that the presence of telecoms apparatus should not prevent development on land, even where that could lead to less favourable lease terms for the operator.

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Contract Farming:
How to avoid disputes

There are many reasons why Contract Farming Agreements (**CFAs**) are so popular in modern farming, ranging from a landowner scaling back from practical farming to taxation and bringing in expertise. If a CFA is prepared properly with a clear eye to the landowner's and contractor's aims and objectives, there is no reason why both sides should not benefit from such a joint venture.

Advantages for landowners

CFAs offer landowners the ability to earn a profit from land, retain the decision making and enjoy valuable tax reliefs, whilst not having to get their hands dirty. This is different from other farming arrangements, such as a tenancy or employment. CFAs are more flexible than tenancies; as a matter of law, they are simple contracts, which only offer a licence (permission) to the contractor to farm the land and can be terminated on whatever notice the parties agree.

Contractor's position

For a contractor, a CFA offers a fixed term to farm a unit with the potential (depending on terms) to advise on and make decisions regarding how the farm operates, what it farms, the equipment and feed and fertiliser to use. For many, this provides the experience of running a business without having to own land or pay rent to a landlord. Furthermore, unlike an employed farm worker, a contractor can share in the profits of the business.

Conversely, the lack of security of any statutory protection and the ability to terminate CFAs on limited notice is a disadvantage. In addition a CFA is not a form of employment so the contractor will not accumulate any statutory employment rights.

Written agreements

As with all complex farming arrangements, having a properly drafted written agreement is key to minimising the risk of disputes further down the line. The process of preparing this can prompt the parties to consider many issues which can otherwise be forgotten. The agreement should also reflect the reality on the ground and may need updating as the arrangement develops.

We often come across contracting arrangements with no written agreement. This risks disputes over status – contractors claiming they have a tenancy, a partnership or are employees of the landowner. This in turn can risk tax reliefs sought by the landowner, create difficulties getting the contractor to leave, incur potential joint and several liability for all debts of the contractor or risk the landowner becoming embroiled in employment claims. The risk of all of this can be minimised if the parties enter into a properly negotiated and drafted CFA. Some specific areas (amongst others) to cover in a CFA include:

Farm plan: The parties will want to agree, in a farm plan, the detail of how the farm is going to operate each year. This sets out the objectives for the year (e.g. cropping) and sits alongside the contract. It can be reviewed or amended during the farming year as necessary.

Contractor's remuneration: The contract usually provides a basic contracting charge payable to the contractor even if there is no profit generated by the business. In addition, assuming the farm has made a profit, and after the landowner has taken their first charge, the contractor will sometimes share in a percentage of any profit above that. These arrangements need to be clearly documented.

Natural capital, subsidies & environmental measures: The parties need to agree their approach towards entering into natural capital schemes and protection of the environment over issues such as soil improvement and habitat creation. They should also consider what should happen if new natural capital opportunities arise.

Termination: Adequate termination provisions are needed. If the relationship breaks down or there's a breach, either party should be able to terminate the agreement straightforwardly on providing reasonable notice. Annual reviews of the farming activity and remuneration at the end of each farming year can be very useful, coupled with the ability to terminate if agreement cannot be reached. The parties may also want a more general right to terminate the agreement early if the arrangement is not viable financially. Farming is an erratic and uncertain venture and often business performance is not down to the parties.

Accommodation: If the contractor is to be housed on the farm, how will that occupation be governed? Any document governing that occupation will need to dovetail with the CFA to ensure they are consistent.

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Farming Partnerships:
Buyout ordered on dissolution

In this article we consider the relatively recent decision in *Cobden v Cobden* [2024] EWHC 1581 (Ch). This is the first case concerning a family farming partnership where the court has made a Syers Order in a 50:50 partnership. Syers Orders are relatively rare in practice.

What is a Syers order?

In ordinary circumstances in which a partnership has dissolved, where there is no Syers order, the court would order the partnership be wound up and the assets sold on the open market.

A Syers order (deriving from the case *Syers v Syers* (1876)) is an order which allows one partner to buy out the interest of another.

Background

The case concerned a farming partnership between two brothers, Matthew and Daniel Cobden, who ran a large-scale dairy operation in Somerset. There was no written partnership agreement. The partnership existed as a partnership at will.

A partnership at will occurs when the duration of the partnership is for an undefined term. The partnership can be dissolved by any partner serving a notice of dissolution on the other partners and the provisions of the Partnership Act 1890 will apply in default of any express agreement to the contrary.

The relationship between the two brothers had irretrievably broken down. Matthew gave notice to dissolve the partnership and issued proceedings.

Matthew's claim for a Syers order in his favour was also supported by an estoppel claim based upon what would happen to the partnership shares on a dissolution. Matthew's position was there was an understanding that Daniel would at some point leave the business and Matthew would buy his share of the partnership from him, linking back to conversations they had in 2005/2006.

There was a valuation of the partnership assets which led to Matthew making an offer to purchase Daniel's share for £3 million. This was rejected. Daniel made a counter-offer to purchase Matthew's interest for £3.82 million.

The court was therefore asked to consider whether to grant a Syers order. Rather timely, before judgment was handed down, the Court of Appeal made a Syers order in *Bahia v Sindhu* [2024] EWCA Civ 605. That judgment is binding on the high court. It determined that a Syers order could only be made in exceptional circumstances.

What were the exceptional circumstances in *Cobden*?

They were summarised as follows:

- Where there is a partnership at will, equal partners share an understanding that when the partnership comes to an end, one partner could buy the other out at a fair price and that partner has devoted themselves to the partnership's business in anticipation of that event. There was a shared understanding between the brothers over the years that when the partnership was eventually dissolved, Matthew would be entitled to purchase Daniel's share, to enable him to continue running the business

- That understanding must be sufficiently clear from the dealings between them, the reliance sufficiently identifiable and substantial to support a conclusion that it would be unfair and inequitable that all assets be sold and liquidated.

- When considering "detriment" of the partner who has relied on the fact they could one day buy out the other, the court must make allowance for the

fact that the partners have continued in business with a view to making profit and have shared in that profit and any capital injections have been reflected correctly in the accounts. The court looked at Matthew's individual efforts in developing the business, which the judge held were responsible for the very substantial business that the partnership had.

Matthew had established an 'equity' which prevented the liquidation of the partnership assets. The court can make such conclusion where it considers "in all the circumstances, an order for sale would be unfair and unjust. Matthew had by far the stronger moral claim to carry on the business.

- The court could consider the effect a sale would have on third parties, such as employees or customers, the costs of a sale and any adverse tax consequences which may arise upon a sale.

- Where there is expert valuation evidence which supports the conclusion that the price payable under the Syers order is what the outgoing partner can expect to receive, then the court can act upon the equity. The court can factor in potential adverse tax consequences and sale costs into its comparison

- Even if the other partner offers to pay more than was offered in return, and a sale could result in a greater financial return than that suggested by expert evidence, the court is entitled to act upon equity.

Conclusion

Whilst there were a unique set of facts that also supported the Syers order in favour of Matthew (the tax bill that would have followed the sale to a third party; the fire sale of a large number of dairy cows under TB restrictions; the impact on farm workers), it does not get around the fact that not having a written partnership agreement in place can put the future of a farming business in jeopardy.

The Partnership Act 1890 is still the governing legislation where there is no written partnership agreement (or where gaps need to be filled in a partnership agreement). A Syers order is departure from the norm in terms of the dissolution of a partnership. Absent written agreement, partners can expect a winding up and sale of the assets.

It is therefore a worthwhile investment for partners to put in place a partnership agreement which makes provision for events that would otherwise trigger a dissolution; the ability to buy out another's share and mechanism for that; together with a dispute resolution provision which will, hopefully, in the unfortunate event of a dispute save the partners significant amounts litigating any dispute. The costs of litigation far outweigh the costs of a well-documented partnership agreement and any other relevant ancillary documents, such as wills.

For all partnership questions and drafting of partnership agreements, please contact the partnership team at Michelmores.

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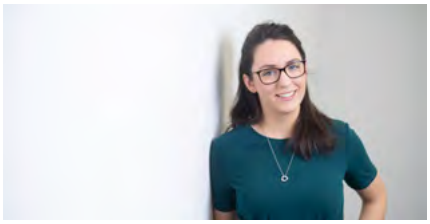

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Nitrate Vulnerable Zones:
Landowner prevails against new designation by questioning the science

N-V-Z, three letters that can send chills down a landowner's spine. However, one diligent landowner has been successful in challenging the imposition of a widened nitrate vulnerable zone (**NVZ**) designation. This highlights the flaws in the Environment Agency's methodology in assessing the significance of agricultural activity on the nutrient levels in the River Adur. This is no small feat, considering that the Tribunal self admittedly places significant weight on the Environment Agency's assessment of nutrient levels, and because the methodology is fiendishly complex to understand.

NVZ limitations

The significance of having land that falls within this designation is the limitations it imposes on spreading fertilisers or storing organic manures on a holding.

The Nitrate Pollution Prevention Regulations 2015 (Regulations) limit the amount of organic or inorganic nitrogen spread on the land and confine spreading activity to outside of the "closed periods", which vary according to the crop grown and the soil type.

The landowner or occupier is required to keep meticulous records, including spreading risk maps, calculations of nitrogen loads, and consideration of leaching quantities based on spreading rates, rainfall and soil type.

"Occupier"

Under the Regulations an "occupier" of a holding in an NVZ is directly responsible for complying with the NVZ rules. Whilst the legislation does not prescribe who an "occupier" is, it is taken to mean the person who owns the land or who rents it.

Appeals

Regulation 6 of the Regulations permits an owner or occupier to appeal a notice served on them of proposals to expand an NVZ catchment. It provides two limited grounds of appeal; either the land doesn't drain into the water identified or it drains into water which shouldn't be identified as polluted, the latter was the ground upon which the appellant relied.

Penalties

Failure to comply with the Regulations is a criminal offence with potential liability to an unlimited fine. It may also result in civil sanctions from the EA, lumbering the landowner or occupier with additional monetary penalties and compliance notices. Up until 2024 there was the additional risk of a penalty being applied to the occupier's Basic Payment Scheme payments, as it formed part of the (now abolished) cross-compliance rules.

The Nash case

This was the precipice on the edge of which R G Nash & Sons found themselves, as the Environment Agency sought to expand the River Adur catchment and envelope their land into an NVZ. However, the appellant was successful in challenging the EA's decision by addressing the flaws in their methodology.

The appellant's case was based on the argument that the methodology could not discernibly attribute nutrient figures in the River Adur to agricultural activity, as it had failed to consider the impact of a wastewater treatment works (WWTW) in the catchment. Indeed, consideration of the WWTW's impact fell short of the average nitrogen load expected from a WWTW; it was quoted at a lower level than the average, by assuming that it incorporated a nitrogen stripping process, which it did not.

The methodology additionally failed to account for land modelling, which would have reduced predicted concentrations from agriculture by 3-4 times than those observed. This would have pointed to the WWTW as the culprit for the surplus levels observed.

In their conclusion, the Tribunal acknowledged that on receipt of more conclusive data the decision to expand the NVZ may be justified. In the case presented, however, they found the Environment Agency was wrong to identify the water as polluted by agriculture.

For landowners and tenants facing a new NVZ designation this case should serve as an encouragement to consider critically whether the designation is appropriate and can be justified by the evidence – and if not then an appeal may be the best way forward.

For those within NVZs, the Nash case reminds us of the importance of complying with the Regulations. The most crucial point, perhaps, is to identify whether a holding falls within an NVZ, which can be identified through MAGIC maps. Landowners should also be cautious when granting leases and licences, carefully ensuring that responsibilities for compliance are covered appropriately in the drafting.

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Mixed-Use SDLT:
Rare taxpayer victories

Taxpayers seeking to pay Stamp Duty Land Tax (SDLT) at the lower non-residential (or 'mixed-use') rates is an area of high scrutiny from HMRC. Two recent taxpayer successes could easily have been missed among the litany of HMRC victories. In Suterwalla and Guerlain-Desai, the taxpayers prevailed against HMRC's contention that their properties were wholly residential.

HMRC v Suterwalla

The Suterwallas bought a substantial property with a paddock, and they paid SDLT at the lower, mixed-use rates. HMRC assessed the property as entirely residential, and the Suterwallas appealed.

On the day of purchase, Mr & Mrs Suterwalla had granted a lease of the paddock to a Ms Pragnell, for one year, at £1,000 rent, for the grazing of two horses for her private use (which was signed just after completion of the purchase). For the First-Tier Tribunal, this constituted commercial use and so the mixed-use SDLT rates applied.

Fairly surprisingly, this July the Upper Tribunal dismissed HMRC's appeal.

The point in time at which to assess whether the property was wholly residential or not was at completion. The judges agreed with HMRC that, because the lease had been granted immediately after completion, it was wrong that this meant the property was in mixed use at the point of completion. That said, the grant of such a lease can sometimes be relevant, for example where buyers grant leases to document what was previously an unwritten arrangement to evidence existing commercial use.

However, the key issue here was whether the paddock was part of the grounds of the house (and any commercial use of it was one of a number of factors). If it was part of the grounds, then the property was entirely residential. The Upper Tribunal agreed with the taxpayers that the layout of the property meant the paddock was not part of the grounds.

The most persuasive factors were that the paddock:

- had a separate HM Land Registry title
- was not close to the house and not visible from it
- was only accessed from the garden by one small gate
- did not support the dwellinghouse, garden or the tennis court
- did not form an integral part of the property.

Therefore, the Upper Tribunal dismissed HMRC's appeal.

Guerlain-Desai v HMRC

Ms Guerlain-Desai bought a house with four acres of garden and twelve of mature woodland. HMRC disagreed with her filing for SDLT at mixed-use rates and she appealed to the Tribunal.

The woods were part of a larger area of woodland open to neighbours and the general public. There was no view of the woods from the house because the private garden was screened by fences and hedges. Accordingly, Ms Guerlain-Desai argued it was not part of the grounds, and so not residential.

The Tribunal agreed that the woods provided neither security and privacy, nor a positive function for the house, and were not integral to its grounds, and so the property was not wholly residential.

What next

With the abolition of Multiple Dwellings Relief, we can expect even greater focus on SDLT mixed-use claims.

The decisions in *Suterwalla* and Guerlain-Desai illustrate every property is different and in assessing the residential or non-residential character, HMRC and the court will take a multi-factorial approach to all of the relevant circumstances. No single factor on its own is decisive. The physical attributes and facts on the ground need careful consideration – the physical layout of a property will not necessarily be determinative, as it was in *Suterwalla*.

But lawyers and agents can help buyers too, by gathering evidence of commercial use and working with sellers' advisors so that existing commercial use is recorded in leases before completion. Grazing arrangements often haven't been written down or were documented several years ago and allowed to roll on. Sellers may also be willing to provide a statement setting out that such use has been in place over a period of time and may even be able to provide invoices or evidence of payment.

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Employment:
Businesses face new positive duty to prevent sexual harassment

The risk of sexual harassment of staff at work is an issue high on the agenda for many larger businesses, with well publicised action being taken by the likes of IKEA UK and McDonalds. But the risk of these issues arising in the context of smaller rural business may well be just as high. This is especially so where employees are working alone or with just one other employee or manager or where older workers may not be so familiar with modern expectations for behaviour.

On 26 October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 (the **Act**) will come into force. The Act will introduce a new **positive** legal obligation on employers to take reasonable steps to protect sexual harassment of their employees. This shifts the emphasis so that employers take a more proactive approach to identifying and addressing risks of sexual harassment.

If an employer breaches the duty, the EHRC will have the power to take enforcement action against the employer. Further, whilst the new duty does not create a standalone claim that employees can bring in employment tribunals, it gives employment tribunals the power to increase compensation for successful sexual harassment claims by up to 25%.

It is not entirely clear what might constitute 'reasonable steps', though once the EHRC's technical guidance on the new preventative duty is updated, this should provide some helpful direction. Nonetheless, employers would be well-advised to consider the following:

Anti-harassment policy

Introduce (or, if one is already in place, update) an effective anti-harassment policy. The EHRC's current guidance contains helpful detail on what such a policy should cover. It is essential that any policy sets out a clear reporting procedure for any instances of sexual harassment. Policies should be regularly reviewed and updated, and employees should be familiar with the policy (see training).

Training

Run mandatory tailored training sessions so staff are familiar with your anti-harassment policy. Sessions should also explore what amounts to sexual harassment, the behaviour expected in the workplace, and how to make a complaint. Consider running additional training for senior employees who will be in charge of investigating and managing complaints under the policy. Refresher training should be provided.

Risk assessments

Conduct risk assessments to identify risks and introduce preventative measures. Conducting staff surveys and reviewing records of complaints and their progress can help identify risks. On this point, monitoring the progress of sexual harassment complaints helps ensure allegations are properly investigated and dealt with, and that any patterns of behaviour are identified. The types of risks will differ depending on the industry, but, for example, roles which are public-facing or involve lone working could result in increased risk. Once risks have been identified, specific measures should be introduced to mitigate those risks.

Reporting

Encourage the reporting of sexual harassment by providing different channels of reporting via different people or methods. Ensure the process is not unnecessarily restrictive (i.e. by requiring specific forms to be completed or deadlines to be adhered to). Ensure that allegations are investigated properly and take action where wrongdoing is identified.

It is easy for small rural businesses with few employees to consider themselves immune from this type of problem, but without taking the steps suggested above businesses may leave themselves open to the risk of enforcement action by the EHRC and more costly claims by employees.

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Agrilore Quiz
Autumn 2024 Questions:

This time we are exploring some of the more niche areas of AHA practice.

Two bottles of English sparking wine to the person with the highest score!

1. Can the party who serves a Notice to Quit unilaterally withdraw it?
2. Give two procedural criteria for a Tenant to make a claim for high farming?
3. Can a Tenant insist upon the making of a record of the condition of the fixed equipment on the holding and of the general condition of the holding?
4. Can a Landlord prohibit a Tenant from practicing a particular system of cropping of the arable area of a holding?
5. What procedural step does a Landlord need to take in order to claim end of tenancy compensation for general deterioration?

Answers by 30 November 2024 to **adam.corbin@michelmores.com**.

The winner will receive two bottles of English Sparkling wine.

Agrilore Quiz
Summer 2024 Answers:

The quiz last quarter comprised an eclectic mix of questions, based upon our podcast series and the Cereals event. Sadly there were no quiz entries last quarter, so we are having a rollover on the prize of a bottle of English sparkling. Here are the answers:

1. True or false, Partnership Agreement overrides a Will? - True.
2. When did Biodiversity Net Gain become mandatory for development? - 12 February 2024.
3. Why did the English Courts find Oatley's trademark valid despite the use of the term "Milk"? - The High Court held that although the mark contained the word "milk", it would not be used to market and sell the product as milk, so it was permissible when used in conjunction with an oat drink product. Oatley's products were neither identified nor marketed as milk despite the inclusion the word milk in the trademark.
4. True or false, from 1 September 2024 the suitability test for succession of Agricultural Holdings Act 1986 Tenancies will no longer apply? - False, the commercial unit test will no longer apply.
5. What is a 'riparian owner'? - A riparian owner is one whose land is either intersected by the watercourse or whose land is bounded by the watercourse – in short, they own the stream or riverbank - there must be contact with the stream or for there to be no separately owned intervening land. Being a riparian owner means the owner has a right of flow i.e. to have the water come to and go from him without interruption by the upstream or downstream owners.
6. If development is taking place on farmland, can surface water accumulating on that development go into the public sewer network? - No, it will need to be attenuated on site with a controlled flow into a watercourse.
7. What is seaweed considered to be a good alternative source of for livestock? - Alternative-protein
8. What does Marine Net Gain apply to? - Any development that takes place below the mean low water mark.
9. What are the 3 key principles of The Agricultural Landlord and Tenant Code of Practice? - Clarity, communication and collaboration.
10. Which tax does Agricultural Property Relief relate to and what is the maximum relief available? - Inheritance tax, 100%.
11. What is Richard Walford excited to wear at Cereals? - New hat.
12. When was Cereals Arable event launched? - 1979.
13. Who is co-hosting Cereals 2024? - Direct Driller Magazine & Cereals.
14. How many generations have the Farr family farmed Bygrave Woods? - Four generations.

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