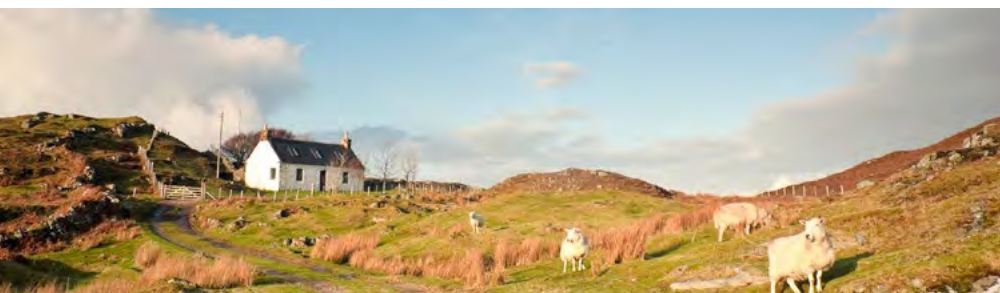


# michelmores

## agrilore

Autumn 2023

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# In this edition

<b>Welcome to AgriLore</b>	3
<b>Farming companies:</b> Unfair treatment by fellow shareholders	4
<b>Animal liability:</b> Cattle incidents and public rights of way	8
<b>Proprietary estoppel:</b> Some practical lessons	10
<b>Agricultural tenancies:</b> Tax on surrender and re-grant	13
<b>Residential tenancies:</b> Failing to notify tenant of landlord's UK address	15
<b>Wild camping:</b> What is permitted across the UK?	16
<b>Telecoms:</b> Court takes pragmatic and purposive approach to Code	18
<b>Rights of way:</b> The need to check what is actually granted	19
<b>Autumn quiz</b>	21
<b>Meet your team</b>	22

## Autumn Edition 2023

Welcome to this Autumn edition of AgriLore.

In recent months, there have been a few notable announcements from our governments which will impact the agricultural sector and will no doubt continue to keep our Agriculture team busy.

First, the Agriculture (Wales) Act 2023 came into force in August, providing a legislative framework for the future of Welsh agricultural policy. A summary of the key provisions of the Act can be found [here](#).

A notable difference from the English position is the dispute resolution provision for agricultural tenants. Whilst in England, only tenants under Agricultural Holdings Act 1986 tenancies can apply to override the terms of their tenancy agreements in certain circumstances, the Welsh government has extended this right to those farming under Agricultural Tenancies Act 1995 tenancies. This will have implications for the drafting of Welsh FBTs and landlords will need to bear this in mind when considering the restrictions they wish to place on their tenants.

Secondly, the government has announced that the second phase of High Speed 2 (HS2) will be cancelled. This will have a huge impact on landowners across the country and we wait with interest to see how the disposal of land acquired for this phase and no longer needed will be handled. More information on the rules

and HS2 land disposal policy is available from Adam Corbin and Marie-Louise King [here](#).

In this issue of AgriLore, we consider a wide range of topics, including the tax issues to be considered on the surrender and re-grant of a tenancy, the legality of wild camping, and what might happen if a shareholder in a farming company feels they are being treated unfairly by their fellow shareholders.

We also report on three cases which provide salient reminders of the issues which can arise when due process is not followed by professionals, or landowners rush to complete documents without proper understanding of their terms.

This Autumn sees the launch of our [Strategic Land Podcast](#) series, discussing issues relevant to the development of strategic land. Topics covered include demystifying tax when it comes to promotion agreements, addressing any legacy concerns landowners may have and of course considering how the natural capital potential of land can be captured when land is being sold for development or acquired under compulsory purchase. We hope that you find these podcasts enjoyable and informative.

Finally, we are pleased to announce that we will be holding an Agriculture Roadshow in February 2024 – details of dates will follow and we hope we will see many of you there.

### Welcome to the team



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Our Agriculture team is once again expanding. We are delighted to welcome both George Carey and Will Dyer as newly qualified solicitors who started in September.



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**Farming companies:**  
Unfair treatment by fellow shareholders





**M**any farming and other businesses operate through the structure of a limited company, which is owned by its shareholders, who hold shares in agreed percentages. Although this provides plenty of advantages for the owners, what happens when a shareholder is treated unfairly by their fellow shareholders?

### Unfair prejudice petition

A shareholder (A) of a company may find themselves in a position in which some of the other shareholders (typically those who own a majority %, but not always) are also directors who are conducting the affairs of the company in a way which is unfair and prejudicial to shareholder A's interests - or to the shareholders of the company more generally.

Conversely, shareholder A may be a shareholder or director-shareholder who is the subject of another shareholder claiming they are being unfairly treated.

In such circumstances, it may be open to the aggrieved shareholder(s) (**Petitioner**) to bring what is known as an Unfair Prejudice Petition (**UPP**) under section 994 of the Companies Act 2006 against the shareholders accused of treating the Petitioner unfairly (**Respondent**).

A vital starting point is that, whilst shareholders are entitled to assume the company is being managed properly, and there is no statutory time limit, they must not delay in bringing a petition. The Court will not allow a UPP to be used to rake "over old grievances" and delay can be fatal - so seeking advice and understanding the position from the outset is the first step.

### What must be established to bring a successful unfair prejudice petition?

Akin to its name, the aggrieved shareholder must establish that the conduct complained of is both unfair and prejudicial. However, conduct by the directors and/or other shareholders can be unfair without being prejudicial and vice versa. A petition will be unsuccessful should a petitioning shareholder fail to establish both elements.

*The Court will ask: would a reasonable person regard the conduct as having unfairly prejudiced the Petitioner's interests as a shareholder?*

### Unfairness

The key starting point is the express formal legal documents of the company such as the articles of association and any

shareholders' agreement(s), as well as the requirements of the Companies Act 2006. The conduct complained of need not be unlawful, but it must be inequitable.

*The Court will ask: is the conduct complained of contrary to (i) the company documents and/or (ii) what the parties agreed?*

### Prejudice

Though financial loss is not an absolute requirement, without financial loss it will be more difficult for the shareholder to establish prejudicial conduct.

*The Court will ask: can the Petitioner show he or she is substantially in a worse position as a result of the allegedly unfairly prejudicial conduct?*

### Typical examples of unfair prejudice

- **Exclusion from management:** It is only in special circumstances<sup>1</sup> that a shareholder has a right to be involved in management. Management is the realm of the company directors. Where a shareholder is also a director (as is common in privately held companies), failure to notify the director-shareholder of board meetings, unjustified removal of a director, or denial of access to company information could all constitute grounds for a UPP.

<sup>1</sup>See the section on quasi-partnerships below.



- **Breach of duty by the directors:** Although directors' duties are owed to the company, where the breaches cause the shareholder loss, a UPP can be brought.
- **Excessive remuneration and inadequate dividends:** Directors (who are often shareholders) paying themselves excessively frequently causes concern for minority shareholders as, subsequently, funds available for dividends are reduced. The failure of a board to recommend dividend payments is also a common unfair prejudice allegation.
- **Share dilution, sales, and takeovers:** Majority shareholders may create additional shares to allow them greater control or to diminish the minority shareholders' value. Where takeovers or bids arise, directors should be careful to advise the shareholders fairly – particularly if they have an interest in the outcome.
- **Serious mismanagement or procedural irregularity:** i.e. failure by those in control of the company to observe the rules of the articles of association, shareholders' agreement, or legal requirements under the Companies Act 2006.
- **Refusal to bring a claim on behalf of the company:** e.g. against a third party in relation to wrongdoing against the company.

### What might the court do if a petition is successful?

The court has very wide discretionary powers to make "such orders as it thinks fit" even if the Petitioner has not requested it. The most common remedy is a share purchase order or "buyout" where shareholder(s) (or the company itself) are ordered to purchase the shares of any other shareholder(s) at "fair value". Valuation is a complex area of law and accounting and needs to be carefully considered with experts.

The court may also:

- **regulate** the conduct of the company's affairs in the future (e.g. *order a meeting or confirm that a person is a director*);
- **require** the company to:
  - > **refrain** from doing or continuing an act complained of (e.g. *prevent the removal of a director*)
  - > **carry** out an act that the Petitioner has complained it has omitted to do (e.g. *declare a dividend*);
- **authorise** civil proceedings to be brought in the name and on behalf of the company (e.g. *where the company refuses to bring certain claims*); or
- **prevent** alterations to the company's constitutional documents (*note: injunctive relief can be sought in support of a UPP to "hold the ring" whilst a claim is resolved*).

### What can the Respondent do?

As mentioned above, the most common remedy for a successful UPP is a "buyout". If the relationships are irreparable, it is in all parties' interests to enter into dialogue about settlement or an exit without the need for costly and stressful court proceedings. The court may strike out a UPP where the Respondent makes a qualifying offer to buy out the Petitioner. To qualify the offer:

- must be at fair value determined by a competent independent expert;
- allow mutual access to the valuation information; and
- include an appropriate offer regarding legal costs.

Buyouts can however be tricky in agricultural disputes as farms need a certain amount of scale and may not be able to support the leverage or generation of liquid assets to fund a buyout.

The Respondent could also:

- consider alternative exit and buyout options in the company documents (and wording such as bad leaver provisions);
- argue the Petitioner has: (i) delayed in bringing its claim, or (ii) been complicit in the conduct being complained of; or
- contend that the exclusion from management or removal of a director was justified (particularly where there is



evidence that the Petitioner has committed serious misconduct such as transacting with rival businesses, lying or fraud).

The financial risks associated with a UPP are high as the default position is that the “loser” of a claim will be ordered to pay the legal fees and expenses of the “winner”. There are a host of options available to both parties for legal costs protection and funding.

### Breaking deadlock

Where relationships have broken down, it is common to find companies in voting deadlock - preventing legitimate company meetings from being called. It is possible in such circumstances for a director or shareholder to ask the court to order a meeting of the company in accordance with the Companies Act. The court could also confirm that one shareholder’s presence at the meeting constitutes a quorum, enabling management of the company to continue.

To avoid the costs of making such an application to court,

shareholders should not disregard the importance of a well-drafted shareholders’ agreement which, among other things, contains sensible provisions to resolve deadlock.

### Consider the inter-play with derivative claims

Derivative claims are claims brought by a shareholder in the name of the company (often against a director for breach of duty, negligence or breach of trust) to recover damages or secure other relief where the company has been wronged. The shareholder must apply to the court for permission to bring proceedings in the name of the company.

There is overlap between a derivative claim and UPP and a derivative claim can form part of a UPP.

A distinction is that derivative claims are designed to deal with obtaining relief for the company as a whole, whereas UPPs are typically brought seeking relief which is more personal in nature for shareholders.

### Quasi-partnerships

Quasi-partnerships (QP) may well arise where agricultural businesses are concerned. To establish a QP, there must be something special about the personal nature of the relationship between the shareholders to move it away from one that is purely commercial. QPs are built on trust and confidence where there is often an understanding that some or all shareholders will participate in management.

If this so-called “special relationship” can be established, rules from the law of partnership can be introduced, such that the shareholders in a quasi-partnership may be held to owe each other a duty of good faith.

A QP may also give rise to an expectation that QP shareholders are entitled to be involved in the management of the company.

This makes it easier for the excluded member of the QP to establish a UPP – even where the constitutional documents (if there are any) do not expressly require shareholders’ involvement in management.



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**Animal liability:**  
Cattle incidents and public rights of way





Following our article last year on animal liability (see [Animal liability: Assessing the risk of cow attacks](#)), and following further cattle trampling incidents in recent years, we now consider the implications of such incidents occurring on public rights of way.

Many public rights of way throughout the countryside cross over privately owned fields which are farmed and may therefore contain livestock (often cattle). Members of the public making use of these rights of way while walking dogs can potentially frustrate or disturb the livestock, causing them to act unpredictably and aggressively. The interests of members of the public in utilising rights of way therefore need to be balanced carefully against the interests of farmers to graze cattle on the land, particularly in light of safety concerns.

In 2022-23, three members of the public were killed in cattle trampling incidents while out walking their dogs.<sup>1</sup> In all cases, there were cows with calves in or near the fields where the incidents took place.

### HSE advice

The Health and Safety Executive (HSE) has publicised advice for farmers, landowners and other livestock keepers relating to cattle and public access in England & Wales suggesting “reasonably practicable ways” of minimising the risk to the public.<sup>2</sup>

The advice note explains that “Members of the public, including walkers and children, may not understand that cattle with calves at foot can present a risk due to protective maternal instincts, especially when a dog is present.” This is one of several

points that should feed into the farmer’s consideration of where to keep livestock, and what other precautions to take.

### Prevention of Future Deaths Report

In response to a trampling incident in 2020 which resulted in the death of one person and serious injury to another who were walking their dogs in a cattle field, a Prevention of Future Deaths Report (the **Report**)<sup>3</sup> published in January this year set out recommendations for preventing future deaths where public rights of way cross land containing cattle.

The Report noted that the “maintenance of safe public rights of way could be said to require oversight and management by public bodies as well as the landowners concerned.”

In response to the Report, Defra confirmed it is reviewing a “rights of way reform package”, but it is currently unclear what changes, if any, are envisaged towards applications to divert rights of way.<sup>4</sup>

### Applications to re-route footpaths

The Report encouraged the HSE to highlight in its Guidance the ability for individuals to make an application under section 119 of the Highways Act 1980 to re-route a public footpath crossing their land to separate cows with calves and walkers, as was done by the landowner in that case. The HSE said it would take these comments into consideration when the Guidance is next reviewed but maintained that it “is not the appropriate authority to comment on the Highways Act provisions and the oversight matters” mentioned.<sup>5</sup>

Nevertheless, landowners should be aware that this is an option available to them where a public right of way crosses grazing land.

While diverting a right of way will not relieve a landowner of their health and safety responsibilities, it could reduce the risk of cattle attacks. Although clearly case specific, the Coroner remarked in the Report that the landowner’s application to divert the public footpath “may well eliminate altogether the risk identified in the incident field.”

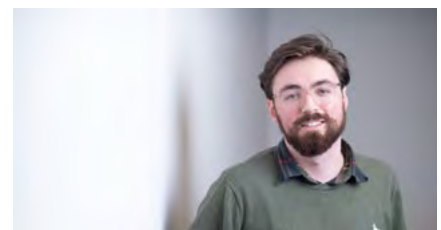
The landowner’s application in the incident highlighted in the Report is yet to be decided. Due to objections raised against the application, the matter has gone to a public inquiry to be heard by the Planning Inspectorate. Once decided, this could provide a useful precedent for landowners and local authorities when considering s119 applications.



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<sup>1</sup>HSE [Summary of individual fatal injuries 2022/23](#)

<sup>2</sup>HSE information sheet 17EW(rev2) [Cattle and public access in England and Wales. Advice for farmers, landowners and other livestock keepers](#) May 2019 (Guidance)

<sup>3</sup>Michael Holmes: [Prevention of future deaths report - Courts and Tribunals Judiciary](#)

<sup>4</sup>Michael Holmes: [Prevention of future deaths report - Response from Defra - Courts and Tribunals Judiciary](#)

<sup>5</sup>Michael Holmes: [Prevention of future deaths report - Response from Health and Safety Executive - Courts and Tribunals Judiciary](#)

# Proprietary estoppel: Some practical lessons





**P**roprietary estoppel is a topic regularly covered [see [Proprietary estoppel: How recent cases fit together | Michelmores](#)], [Proprietary estoppel: A tale of woe - Michelmores](#)]. Since June there have been three further judgments handed down by both the High Court and the Court of Appeal (*Spencer v Spencer* [2023] EWHC 2050 (Ch), *Morton v Morton* [2023] EWCA Civ 700 and *Hughes v Pritchard* [2023] EWHC 1382 (Ch)).

We now look at the decision in *Spencer*, where the Claimant succeeded in his estoppel claim, and consider some practical considerations arising out of the judgment. These could apply to any professionals involved in advising clients.

### **Spencer v Spencer**

Michael Spencer (“Michael”) brought an estoppel claim against the estate of his late father, John Spencer (“John”), in respect of around 405 acres of freehold land forming part of the farm. John and Michael also farmed around 411 acres of tenanted land. When Michael was 19, John formed a family farming partnership between the two of them, his daughter, Penny (23), and his wife, Jean. All were given equal shares. In 1996, Penny and Jean retired from the partnership. Michael was given a 95% profit share.

The freehold land was not a partnership asset. The partnership did not pay rent for the use of the land.

John and Michael’s relationship was up and down. John had made provision in previous wills for the farmland to pass to Michael. Just before his death, John made a new will in March 2018 which left the farmland to the trustees of a discretionary trust for his children and grandchildren. Michael brought an estoppel claim on the basis John had promised him that he would inherit the freehold land, he had relied on those assurances for 40 years to his detriment and as such, it would be unconscionable for John to break those promises.

### **The decision**

#### **Assurances**

The Judge found that assurances of a general nature were made to Michael. They were reasonably understood by Michael and the threat was there, that if Michael did not commit to the farm on his father’s terms, he would not inherit the farm.

John changed his testamentary wishes and it appeared to be linked to his concern Michael was going to die early (he was diagnosed with multiple sclerosis in January 2018), and ensuring the land was never sold.

#### **Detrimental Reliance**

Michael had received substantial benefits (rent free accommodation, majority living expenses paid, partnership capital of over £1.4m, pension provision of over £745,000). However, it was found that he had positioned his life based on his father’s assurances and as such it is “impossible now

to unpick what he might have done differently with his life over 40 years if there had never been such assurances”. One such opportunity was the running of a local truck stop, which John prevented. The Judge made the point that detriment has to be something substantial. It does not have to be quantifiable financial detriment, but it has to be judged at the moment when the assurance is repudiated. In this case, on John’s death.

#### **Unconscionability**

The Judge found that it was unconscionable in all the circumstances for the assurance to be repudiated, finding it a “quasi-bargain between father and son and Michael has done what was asked of him.”

There was no change in circumstances which justified revoking the assurances.

#### **Remedy**

The Judge directed that Michael should be transferred the farmland, excluding a parcel that had planning permission for mineral extraction. For the latter, Michael should have the agricultural value of that land so he could acquire replacement fields if he so chose.

### **Practical points arising from the judgment**

#### **Professionals’ files**

It is not uncommon in estoppel cases for professionals’ files to be disclosed unless documents are privileged. Even solicitors’ files which may be assumed to be



covered by legal advice or litigation privilege could be disclosed (e.g. will files or matrimonial files).

In *Spencer*, the solicitors' file, appertaining to a period of time (after the will was read and it became clear there was disagreement) when Michael and his sister, Jane, were both represented, had to be disclosed because a considerable amount of evidence/cross examination was directed at when Michael first raised the existence of assurances.

During that period, the solicitor kept two versions of the client file: an electronic and hardcopy file. A scanned copy of the hard copy file was disclosed in October 2022 and the solicitor later produced a witness statement (January 2023) after refreshing their memory of the hard copy file. The file did not contain documents Jane was expecting to see so the solicitors were asked to disclose the electronic file and its metadata. This was disclosed in April 2023. Around the same time the solicitor produced a second witness statement having read the electronic file. The second witness statement explained that the hard copy file did not contain a number of material documents that were on the electronic file which meant that some matters were not correctly recorded.

Further documents had to be disclosed close to the trial in July and no further explanation was provided. The Judge had to try and make sense of the disorganised file. This is unlikely ever to be seen in a positive light. Professionals'

files should be accurate and kept up to date in case they might have to be produced in court.

### Witness Evidence

We have commented before about the unpredictability of litigating estoppel cases through to trial. Much comes down to how the Judge perceives the evidence and how witnesses perform in the witness box.

It appears from the judgment that Michael may not have come across that well. The Judge commented: "his answers were often unhelpfully monosyllabic or terse", "not carefully prepared or thought through evidence", "not familiar with documents in the bundle", "adamant certain events had happened but quite often the documents showed they could not have happened in the way he remembered", "had a tendency to accept points put to him...too readily and often without....fully comprehending what was being put to him". This resulted in aspects of his case on alleged assurances and detriment having to be dropped because his evidence did not support them. Despite this, the Judge still found in his favour and found him to be an honest witness.

Witnesses who are professionals are subject to the same scrutiny as lay witnesses and their reliability can be called into question. In *Spencer* the Judge was critical of the solicitor's evidence. It transpired their evidence did not set out matters within their personal knowledge and recollection. They were unable

to account for why they gave evidence in their "witness statement of [their] memory or recollection of things when [they] in fact had no such memory or recollection". The solicitor accepted parts of their witness statement were "inference, supposition and reconstruction from a badly organised file of matters of which [they] had no recollection whatsoever." Thankfully the reliability of this witness did not hinder the claim. On other occasions, there may be more significant consequences.

### Lessons to learn

This a cautionary tale highlighting that cases should be pleaded correctly at the outset; witness evidence should be carefully prepared and based on personal knowledge and recollection (witnesses have to sign a statement of truth and in proceedings in the Business and Property Courts a certificate of compliance must be signed by a solicitor); witnesses should be prepared for trial, should have reviewed their evidence in advance and should be familiar with documents, about which they may be questioned.



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# Agricultural tenancies: Tax on surrender and re-grant



**A**side from the commercial reasons why a landlord and tenant may want to undertake a surrender and re-grant of a lease, there are a number of tax issues which must be borne in mind when considering an express surrender and re-grant of a tenancy.

### Stamp Duty Land Tax (SDLT)

A surrender and re-grant involves two acquisitions for SDLT: the landlord makes an acquisition on the surrender as the freehold is enlarged, and the tenant makes a separate acquisition when they are granted the replacement lease. A surrender and re-grant is therefore a land exchange.

The SDLT rules on land exchanges (where one of the limbs of the exchange is a major interest, such as a freehold or a leasehold) are ostensibly very punitive: SDLT is payable on the higher of the consideration passing (if any) or the market value of the interests acquired.

Some tax relief is available provided that the new lease is granted in return for the surrender of the existing lease and the surrender and re-grant are between the same parties. If so, the market value rule is switched off and SDLT is only payable by reference to any other chargeable "consideration" (i.e. money or other benefit) provided (for example, cash). Overlap relief on rent under the new lease may also be available.

### VAT

VAT can be complex as the transaction is a barter transaction (a supply of land is made from the tenant to the landlord and vice versa and the consideration for these supplies is not wholly in cash). Whether VAT actually arises depends on whether the landlord and tenant have "opted to tax" their interests. An option to tax is an election a party will have made in relation to that party's interest in land, which means that VAT is

charged on "supplies" of that land or property, such as when the party sells it or rents it out to a tenant.

On a barter transaction, even though no cash may be changing hands, VAT must still be charged and accounted for by the party that has opted to tax. Valuing the consideration which the landlord gives to the tenant for the supply on the surrender (and which the tenant gives the landlord on the re-grant) is a difficult exercise and should be considered carefully. If both parties have opted and where no cash is changing hands, actual accounting for VAT can be simplified by using VAT-only invoices.

### Inheritance Tax (IHT)

A typical surrender and re-grant scenario will not generally have any IHT implications unless there is a transfer of value under s3 Inheritance Tax Act 1984. There may be a transfer of value where there is a surrender for no consideration and no commercial negotiations. A transfer of value may also arise where the tenant and landlord are connected parties, for instance under the "close companies" provisions of the IHT legislation. Each case will turn on its own facts, so it is important to take proper advice from the outset.

### Capital Gains Tax (CGT)

The CGT position is generally more complex. For the landlord, the re-grant will usually amount to a part disposal of the freehold of the property out of which the new lease is granted. The landlord's position will also depend on whether they receive a premium from the tenant or whether the circumstances are such that a notional premium may be imputed.

A surrender is usually considered to be a disposal by the tenant for CGT purposes. Generally, the consideration for the surrender will be the value of the new lease granted by the landlord, in

addition to any consideration actually provided. However, this will not necessarily be the case where the parties are connected.

Where there is a disposal, whether there is CGT to pay will depend on whether there is a chargeable gain. This will be a question of valuation in each case. Certain reliefs may also be available to mitigate any tax liability. The tenant can often rely on HMRC's Extra Statutory Concession D39. Where the five conditions set out in the Concession are met, the surrender by the tenant will not be regarded as a disposal. The five conditions can be found here: [CG71240 - Leases: disposal: extension of lease: ESC D39 - HMRC internal manual - GOV.UK \(www.gov.uk\)](#)

In addition, the Concession will only apply where the new lease extends the term of the previous lease. Again, a case by case analysis of how the CGT rules apply to the facts is key.

Overall, a number of complex tax issues can arise on a seemingly straightforward surrender and re-grant, particularly where the parties involved are connected, the land in question is opted to tax or where one of them is a company.



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## Residential tenancies: Failing to notify tenant of landlord's UK address

**T**he recent case of *Sunset Ltd and Another v Al-Hindi* [2023] EWHC 2443 (Ch) serves as a cautionary reminder to landlords (and their agents) that they must comply with s.48 of the Landlord and Tenant Act 1987 ("the Act") or run the risk of being unable to claim unpaid rent or other overdue payments from a tenant.

### The provisions of s.48

Section 48 of the Act provides that a landlord of premises to which the Act applies (essentially lettings which include a dwelling but excluding 1954 Act lettings) must provide a tenant with an address for service in England and Wales. Failure to do so means any rent, service charge or administration charge due from the tenant to the landlord will not be deemed to be due until the landlord has provided the necessary address for service to the tenant.

### The case

Sunset Limited and Morville Limited ("Petitioners") filed a bankruptcy petition in respect of Mr Abdulla Al-Hindi on 23 June 2022. The petition was based on a failure by Mr Al-Hindi to comply with statutory demands dated

29 March 2022 relating to a debt of £248,750.00 for unpaid rent due under leases of four London properties.

The matter went back and forth in late 2022 and early 2023, with various procedural issues encountered. By the time of the final hearing on 5 October 2023, only one point remained in dispute: had the Petitioners acted in compliance with s.48 of the Act?

Mr Al-Hindi argued that the Petitioners had not complied as the address for service contained in his tenancy agreements was an address in Jersey. He was only given an address for service in England and Wales (as required by the Act) on 6 February 2023, and so no rent due before that date could be claimed.

The Petitioners attempted to show compliance with s.48 on the basis an address for service in England and Wales was given in the statutory demands served on Mr Al-Hindi in April 2022. The court did not accept this as the statutory demands served always gave the Jersey address for the Petitioners. The English address given in the statutory demands was for the

Petitioners' firm of solicitors and was expressly stated to be used for communications about the demand.

A "general address" in England and Wales for the service of notices on the landlord (in compliance with s.48 of the Act) was not given until 6 February 2023, and as such, the judge concluded that their petition for recovery of rent arrears prior to that date must be dismissed.

### Conclusion

It is of fundamental importance that landlords and their agents comply with s.48 of the Act and not only provide their tenants with an address for service of notices in England and Wales as soon as a tenancy agreement is entered into, but also serve new notices following any change of landlord. The consequences of not doing so could be extremely costly, as exemplified in this case.



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**Wild camping:**  
What is permitted across the UK?





The idea of escaping from the 'always on' work culture and heading out into the countryside with nothing but a backpack for company has become increasingly popular, especially since the pandemic. Whilst alluring for many, it can create problems for landowners. We look at the rules applying in England, Wales and Scotland and consider whether it is legal.

## In England

Wild camping is the act of camping anywhere other than a designated campsite and usually requires the landowner's permission to prevent a person committing the civil tort of trespass. In the UK, there are two very well-known exceptions to that requirement being wild camping in Scotland, and wild camping on Dartmoor National Park's commons.

Dartmoor National Park has a unique legal framework; it is subject to legislation which applies to all of England and Wales, but it also has an additional bespoke statute, the Dartmoor Commons Act 1985. The 1985 Act empowers the Commoners Council to impose and enforce regulations in relation to Dartmoor's privately owned common land, which comprises 40% of the Park's land. The aim of the regulations is to fulfil the objective to maintain the commons and promote proper standards of livestock husbandry.

The High Court decision earlier this year in *Darwall v Dartmoor National Park Authority* [2023] EWHC 35 (Ch) sparked a large debate over upland areas across England, Scotland and Wales with regards to the competing demands and objectives of agriculture, recreation and wildlife conservation and those of private common landowners and occupiers of the National Park.

Section 10(1) of the 1985 Act provides the public with a right of access to the common land on foot and on horseback for the purpose of "open-air recreation". The dispute between Dartmoor

National Park Authority (DNPA) and Mr and Mrs Darwall (the sixth largest common landowners on Dartmoor), considered this public access right in detail.

### The Darwall case

The Darwalls brought a claim in the High Court against DNPA disputing the public access over their land and contending that wild camping is an environmental threat. The court was asked to consider whether the public's right of access for "open-air recreation" included wild camping. The Darwalls contended that the scope of "open-air recreation" was limited to recreations on foot and horseback, whilst DNPA argued a wider interpretation encompassing wild camping within the definition.

Sir Julian Flaux, the Chancellor of the High Court, favoured the Darwalls more restrictive interpretation by relying on wording within the National Park and Access to the Countryside Act 1949, which considered camping to be a vehicle for recreation, and not the actual activity itself. Sir Julian held that the activity in which wild campers were engaging was actually hiking and that the act of camping was merely a facility enabling them to hike.

The DNPA appealed and the Court of Appeal ([2023] EWCA Civ 927) overturned the High Court's decision. It concluded that the words in the 1985 Act provide members of the public the right of access granted for the purpose of open-air recreation, which includes wild camping. *Sir Geoffrey Vos*, in the leading judgment stated that:

*"In my judgment, on its true construction, section 10(1) of the Dartmoor Commons Act 1985 confers on members of the public the right to rest or sleep on the Dartmoor Commons, whether by day or night and whether in a tent or otherwise, provided that the other provisions of the 1985 Act and schedule 2 to the 1949 Act and the Byelaws are adhered to."*

This decision means that landowners of commons in Dartmoor National Park cannot pursue an individual who wild

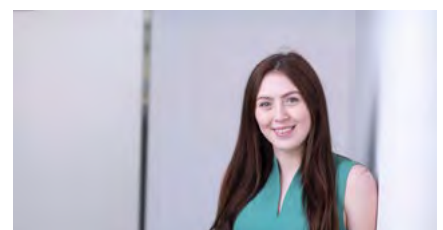
camp on the commons for the civil wrong of trespass. This case marks a reaffirmation of the public right to wild camp on Dartmoor commons without the landowner's express permission. One might assume that this decision would set a precedent for other parts of the UK, however it should be remembered that Dartmoor has its own particular rules which do not apply elsewhere. Landowners prior consent is therefore required in other parts of England if wild camping is intended.

## In Wales

Wales, unlike England, has no exceptions to the rule of obtaining the landowner's permission. In Welsh national parks such as Eryri (Snowdonia), Pembrokeshire Coast and Bannau Brycheiniog (Brecon Beacons), the landowner's permission to wild camp must be sought before striking camp, otherwise the camper commits the civil offence of trespass. Some national park authorities have already sought local landowners' consent to wild camp on their land in the National Park and a list is readily available to the public.

## In Scotland

Scotland's rules are different again; it is the only part of the UK with laws in favour of wild camping. The Land Reform (Scotland) Act 2003 provides the public with the right to roam in Scotland across most unenclosed land. However, there are some areas, such as Loch Lomond and the Trossachs National Park, which are protected and subject to wild camping local byelaws, which enforce restrictions due to overuse at popular sites.



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## Telecoms: Court takes pragmatic and purposive approach to Code

It will not come as a surprise to those who deal regularly with telecoms matters that yet a further gap was found in the Electronic Communications Code (**Code**) which required clarification by the court.

In this instance, the question was whether a tenant under a superior lease was a party to the Code agreement for the purposes of termination or renewal under the Code.

### The case

The case of *Potting Shed Bar & Gardens Ltd (formerly Gencomp (No. 7) (Ltd)) v AP Wireless II (UK) Ltd* [2023] EWCA Civ 825 concerned a lease of a telecoms site in Bingley, Yorkshire to Vodafone in 2003 by the then freehold owner.

In 2018 a subsequent freehold owner granted an intermediate lease to APW.

Vodafone wanted to renew its lease and whilst neither the freehold owner nor APW objected to the renewal, it was not clear which party could grant the new agreement.

### The Code provisions

The Code provides that a successor in title is to be treated as a party to the Code agreement, but there is no provision in the Code for a party whose interest arises out of a superior tenancy.

This is not just problematic when it comes to renewal, but also termination, as only a party to a Code agreement can exercise Code rights to terminate.

As such, it could have been argued that a tenant under a superior tenancy to a telecoms lease could not seek to terminate that lease even if it satisfied the grounds for termination in the Code.

### Tribunal decision

Vodafone's position was that although its lease was binding on APW, absent any specific provision in the Code, APW was not a party to the Code agreement and, therefore, it should seek renewal from the freehold owner. The Upper Tribunal accepted this argument.

### Court of Appeal

However, the Court of Appeal disagreed and followed the lead of the Supreme Court in taking a pragmatic and purposive approach to the interpretation of the Code.

It found that the Code was intended to work in such a way that the entities with the benefit and burden of the Code Agreement should be considered to be parties to the agreement for the purposes of exercising Code rights in respect of that agreement; be it renewal or termination.

The effect of the decision was that APW was a party to Vodafone's agreement and Vodafone was required to seek renewal from APW.

This decision provides welcome clarity to operators, but also comfort to parties with superior tenancies, particularly those who wish to develop and therefore seek termination of an existing Code agreement.



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## Rights of way:

The need to check what is actually granted





It is relatively commonplace for rights of access (easements) to be granted by rural landowners, especially when properties are developed and split up into several separate dwellings or parcels. The recent High Court decision in the case of *Weaver v Smith* [2023] EWHC 1200 (Ch) considers the construction and interpretation of deeds of easement and highlights the need for the parties to understand exactly what is granted before the deed is signed.

## Background

The claimant, Mr Weaver (Claimant), owns Cwymclydach and Ms Smith (Defendant), owns the neighbouring land, Blaencydach.

The dispute concerns a deed of easement made between the Claimant and executors for the former owner of Blaencydach (Executors). The Defendant had bought Blaencydach subject to the terms of the easement.

## The case

The deed granted a right of way for the Claimant across the Defendant's land.

The Claimant claimed the accessway extended to the highway beyond the Defendant's land, whilst the Defendant argued it stopped at a point in the yard, (Point A) halfway between an adjacent gate and the highway.

## Decision

HHJ Jarman KC considered the intention of the parties, and what

a reasonable person with all background knowledge available to them would have understood the language in the deed to mean in the context of the physical features of the land at the time.

He noted that "accessway" indicates an intention to obtain access to or from something (rather than stopping in the middle of a yard), and a covenant to close gates on the accessway after use was relevant as "*the ordinary meaning of the word "use" in respect of a gate is to go through it, rather than open it but not to go through it*".

He explored the possibility of a private arrangement covering Point A to the highway, but as the Claimant released any existing rights in the deed, this would extinguish any such arrangement.

He concluded that considering the wording of the deed as a whole and the context of the physical features on the ground, a reasonable reader would conclude that the parties intended the rights granted to extend to the highway and not stop at Point A.

If incorrect on construction, he stated he would accept the Claimant's request for rectification of the deed, given the correspondence between the solicitors and their clients produced to the courts, which clearly made reference to the right of way being to the road.

The solicitor for the Executors also stated to them that the deed would document the access as

per a Statutory Declaration by a previous occupier of Cwymclydach, referring to access being to the road.

The Executors suggested their solicitor had failed to explain the extent of the deed to them, but HHJ Jarman held this was not supported by the correspondence presented to the court, which showed he had acted properly; the Executors were eager to complete the sale and benefit from their inheritance and this is more likely to have caused any misunderstanding.

## Lessons from this case

This case reminds landowners to ensure when entering into agreements that the language is clear and reflects their intentions. It should also reflect the context of the land and take into account any physical features, historical use and declarations by previous owners.

It is also a reminder to read documents thoroughly to ensure they are understood before signing, rather than rushing to complete a deal – this will avoid misunderstandings or ambiguities going forward.



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# AgriLore quiz

## The Autumn quiz

This quarter we have some heavy legal questions, as a warm up for the upcoming CAAV Fellowship exams.

1. At what net estate value does the Inheritance Tax residence nil-rate band start to taper?
2. Do tenants pay Capital Gains Tax on statutory compensation paid under section 60 of the Agricultural Holdings Act 1986?
3. Is it possible to use express upwards only rent review clauses in tenancies governed by the Agricultural Tenancies Act 1995?
4. Do the Crichton Down Rules apply to a water undertaker?
5. How long does a claimant have to challenge a decision by an LPA granting planning permission?

Send your answers to [adam.corbin@michelmores.com](mailto:adam.corbin@michelmores.com).  
The winner will receive a bottle of English Sparking wine.

The quiz last quarter was based upon our recent podcast series, released in the run up to Cereals.

Congratulations to Chris Hyde of Cooke & Arkwright, (pictured opposite) who was the hands down winner!



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

Thanks all for taking part!

Answers below.

1. What percentage of farmed land in the country is represented by the landlord and tenant relationship?

Answer: About 30% / 30%

2. Which charity has recently launched an Advertising Standards Authority complaint in relation to an assurance scheme widely used by farms?

Answer: River Action

3. What has shown to be “a great soil conditioner and fertiliser”?

Answer: Insect frass / insect poo

4. Vivienne and Iwan gave us top tips for good succession planning. Please list any three of those top tips.

Answer: Any 3 from the below (or slight variation):

- Good communication
- Early dialogue
- Have an eye to the tax / tax
- Continual review
- Do what you say you're going to do and implement

5. Which framework is Ben most excited about (hint: it is most relevant for landowners and farmers)?

Answer: Nature market framework

6. What is the name of the tool used to measure biodiversity in a site?

Answer: Biodiversity metric

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