

agriculture news



Issue 1

Restrictive Covenants

At a time when development for residential housing continues to be at the forefront of the political agenda, you might be considering whether your land is suitable for residential development.

Alternatively you may simply be considering changing the use of your land and/or buildings. Either way you should consider at an early stage whether there are restrictive covenants on your title which could be problematic. This will avoid later delay or wasted costs.

Contact:

For further information or advice please contact Lupton Fawcett's Senior Associate, **Kirsty Barsby** on **01904 561411** or kirsty.barsby@luptonfawcett.law

Even if there are restrictive covenants then there may be various options available to you to enable you to proceed:

1. Firstly take legal advice. Is the covenant enforceable? Does the covenant actually benefit land owned by the party seeking to rely on it? Has it been correctly protected?
2. Would an indemnity insurance policy be available or would it be cost prohibitive? Such policies can sometimes be an effective solution for older covenants although the terms of any policy will need careful consideration;
3. Consider contacting the person(s) with the benefit of the covenant to secure its release or variation. The benefitting party may want some form of consideration for the release. Please note once you contact the benefitting party you are unlikely to be able to obtain the insurance referred to above.
4. Consider the possibility of an application to the Upper Tribunal to modify or discharge the covenant. If successful the Tribunal will normally require the applicant to compensate the person(s) entitled to the benefit of the covenants.
5. In *Millgate Developments Limited v Smith* [2016] the land in question was subject to a restrictive covenant not to use as anything other than a car park. Residential housing was built and the developer successfully applied for modification. Commentators have been quick to note however that one of the key aspects in the *Millgate* case was that the land was required for social housing.
6. In the *Millgate* case the benefitting party argued they should be paid an amount commensurate with the profit but the tribunal advised that the proper measure of compensation was the objector's loss not the applicant's gain.
7. In another case the applicant applied for the discharge of a restrictive covenant restricting the use to agricultural and equestrian use so that housing could be built. In defence the benefitting party sought to prevent the application or alternatively argued that if the application was successful they should be paid £250,000 compensation. They were ultimately awarded £3,000.
8. Proceed anyway regardless of the covenants. We would not recommend this as there is a strong possibility the benefitting party will seek an injunction!

Each case is different and the appropriate course of action will vary.

Preventing the creation of rights of way over your land



It is possible for both public and private rights of way to be created over farmland and landowners should be vigilant and take steps to protect themselves if they are aware that members of the public are trespassing on their land.

Public rights of way

Public rights of way can come into existence where a way over land is 'deemed' to have become a public right of way by virtue of it being used by the public for an uninterrupted period of twenty years; this is referred to as 'dedication'. The use by the public has to be 'as of right' so that it must be used without secrecy, without force and without permission; so if force is used to gain access to land, such as by cutting wire fencing, it cannot be 'as of right'.

Once a right of way has been dedicated as a public right of way it will be shown on the definitive map and statement maintained by your local authority; this is the map on which all footpaths, bridleways and roads considered to be public rights of way are shown.

What can a landowner do to prevent a right of way over their land being added to the map? You can prevent a right of way being added if you can show that you had no intention to dedicate a public right of way; this can be done by communicating your lack of intention to dedicate to members of the public by maintaining suitably visible signs, by locking gates or erecting barriers and (politely) turning users back. There is also a statutory procedure where a landowner can deposit a map and other documents with the appropriate council to 'rebut the presumption' that they intend to dedicate the right of way.

Above all else, be vigilant

Private rights of way

Rural landowners can also be vulnerable to a user acquiring a right of way over their land through long use; again erecting warning notices stating that the land is private and for the landowner's exclusive use, is a sensible step in preventing users from acquiring rights over your land. It may be that you are already aware of a neighbour that routinely uses a track or path over your land and you are happy for them to do so but may not be happy for the use to become a permanent right of way that can be transferred to a third party with the land if your neighbour sells. In this situation the landowner should consider creating a document which acknowledges the use and states that use is enjoyed with your permission and that no right of way is claimed.

Contact:

For further help or advice, please contact Partner and Head of Agriculture and Landed Estates **Johanne Spittle** on **01904 561425** or johanne.spittle@luptonfawcett.law



The Family Farm Succession and Inheritance Tax Planning

Farming businesses are often the principal family business. When they are passed to the next generation, there can sometimes be unnecessary tax, costs and even family disputes but careful estate planning can enable a smooth succession.

Inheritance Tax: What is it?

Inheritance Tax (“IHT”) is a charge on your assets at death. Each individual has a basic nil rate band (“NRB”), meaning that currently no IHT is paid on the first £325,000 of your estate. Once your NRB has been used up, the balance of the estate is charged at 40%.

If, on your death you do not “use up” all of your NRB this can be passed on to your surviving spouse or civil partner. This will increase the surviving spouse’s NRB and reduce their IHT bill. This can be a useful way in which IHT can be mitigated when passing the family business to the next generation.

Other exemptions and reliefs are available for the farming business owner. These potentially significant reliefs can be successfully applied with careful estate planning and can include Agricultural Property Relief (“APR”) or Business Property Relief (“BPR”).

APR and BPR: How do they work?

If APR and BPR are successfully applied they can reduce the amount of IHT, sometimes to nil. These reliefs are available for agricultural land and buildings, certain business interests and qualifying company shares. The extent of the relief will depend on the circumstances and you cannot assume they will apply in every case.

New Inheritance Tax Rules from April 2017: Residence Nil Rate Band

This will be an important change as individuals who die on or after 6th April 2017 could also be entitled to an extra NRB of between £100,000 and £175,000 if the family home is left to children or grandchildren.

It is important to note that this change will not automatically apply to every estate (even if your circumstances seemingly fit the criteria). Your ability to successfully claim the **Residence Nil Rate Band** will depend largely on your circumstances and how your Will is drafted.

The Importance of Regular Will Reviews

To ensure that you fully utilise the maximum reliefs available, it is important to review your Will. The distribution of family assets should also be reviewed to ensure that you retain control over who should benefit from savings, property and personal possessions and how the family business might be preserved for future generations – either in value or as a viable and sustainable business for your children and grandchildren. If you haven’t reviewed your Will recently (or indeed have never made a Will before) then really, now is the time to do so!



Contact:

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Things to Consider when Selling your Farm

With over 20,000 acres of farmland marketed across Great Britain already in 2016 (with more in the pipeline following the outcome of the June referendum) an increasing number of sales are now being agreed.

Contact:

For further help or advice, please contact Lupton Fawcett's Senior Solicitor, **Jessica Richardson**, on **01904 561 420** or jessica.richardson@luptonfawcett.law

Early consideration of the following are vital to ensure a smooth sale process:-

1. Tax

Seeking tax advice before you commit to sell is essential. A farm sale is most likely to attract a CGT liability and your professional advisors will work with you to establish any reliefs available. Consider the VAT position and make sure you have evidence of any elections to provide to the buyer.

2. Title

Locate your title deeds. Determine whether the farm is registered at the Land Registry. If not, consider lodging an application for first registration in advance of a sale. If the farm is registered check that plans accurately reflect the boundaries on the ground and that all rights and reservations are correctly noted on the title.

Common issues arising include historic covenants limiting the use of the farm and missing title documents. These issues can be overcome, e.g. with indemnity insurance but will need to be dealt with well in advance.

3. Vacant Possession

If the farm is tenanted you need to establish if and when vacant possession can be achieved. This depends on the type of tenancy that has been granted. Notices to quit will need to be served on tenants in accordance with prescribed timescales.

When selling with vacant possession have arrangements in place so that you can physically vacate by the completion date. Consider holding a sale prior to completion to dispose of unwanted machinery or stock.

4. Replies to Enquiries

You will need to provide a buyer with replies to enquiries in a standardised format together with supporting documentation. Collate leases, consents, environmental licences, utilities information, planning permissions, BPS statements and copies of any agri-environmental schemes.

Establish whether any third party consents are required, e.g. bank consents. Dealing with this at the outset can avoid a situation where a third party holds you to ransom.

5. Special Conditions

Consider whether you require any special conditions in the sale contract, e.g. a right of holdover to harvest any crops following completion of the sale. Does the farm have development potential and do you wish to impose overage on future development? Are you retaining any land and wish to impose restrictions on how the farm can be used going forward? Do you require the buyer to take over any agri-environmental schemes?

Being fully prepared for the sale process will stand you in good stead to achieve a smooth, cost-effective and timely completion.

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