Rollits LLP

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Agriculture Focus

Restrictive covenants and what they mean for landowners

What is a restrictive covenant? A restrictive covenant is a promise made in an agreement, whereby one party restricts the use of its land in some way for the benefit of the other party's land.

By way of example, if a landowner sells part of his/her land, he/she might want to restrict the use of the land being sold so that it can only be used for a specific purpose. To achieve this, the Transfer from the Seller to the Buyer would include a restrictive covenant, stating that the land cannot be used for any purpose other than that particular purpose and the Buyer must then comply with that restriction.

Other examples of how restrictive covenants may restrict the use of land could include the following:

- Limiting the possible use of a building for a specific purpose, such as limiting a building for residential purposes only
- Prohibiting particular trades or businesses, or certain activities, on the land
- Restricting the number or type of property from being built on the land, such as a single residential dwelling

Therefore, a restrictive covenant might affect your use, or intended use, of land that you own or land that you are considering acquiring.

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The existence of a restrictive covenant will be shown on the Register of Title (for registered land) or the title deeds (for unregistered land). As a result, it is prudent to be familiar with your Register of Title or title deeds (as appropriate) so that you are aware of any restrictive covenants that may be in place, which may affect your intended use of the land.

Why is it important to be aware of restrictive covenants?

Restrictive covenants are enforceable between the original parties to the agreement as a matter of contract law. However, restrictive covenants may also be enforceable between subsequent owners of the relevant land. This means that if a restrictive covenant is valid and enforceable, subsequent owners of the burdened land must comply with the restriction and they can also be liable for any breach of the restrictive covenant.

Consequences of a breach of restrictive covenant

If a restrictive covenant is breached, the beneficiary of the covenant might be able to obtain damages but in most cases, an injunction to stop the breach will be sought. Not only can this be very costly, it can also prevent you from using the land for your intended purpose. Even if it is a previous owner of the property who has initially breached the restrictive covenant, a successor in title to the property could still be liable for the breach.

There are a number of ways to deal with the breach of a restrictive covenant.

For example, it may be possible to negotiate an express release or variation of a restrictive covenant but this method should only be attempted if certain pre-conditions are met.

Alternatively, indemnity insurance may be obtained to protect against the risk of someone seeking to enforce the restrictive covenant. If this is the preferred option, it is very important that it is investigated before any beneficiary of the covenant is approached because it may prevent an insurance company from providing any cover.

Another option is to make an application to the Upper Tribunal (Lands Chamber) for the modification or discharge of a restrictive covenant, under section 84(1) of the Law of Property Act 1925. This will be a costly and time consuming process and there are no guarantees that the Tribunal would agree to modify or discharge the restrictive covenant. Even if no objections are raised, an application can take three months.

Each of these methods involve different criteria and a different level of cost. As a result, it is prudent to seek professional advice before carrying out any of these options to ensure that the most appropriate method is chosen in the particular circumstances.

If you have any concerns about a potential restrictive covenant affecting your land, or if you would like to discuss any of the above in further detail, please do not hesitate to contact a member of our Agriculture Team.

Amy Clarkson

Having your cake and eating it? A thumbnail sketch of overage

At its most basic Overage (or clawback as it is usually called by local authorities and similar bodies) is a means by which a landowner can reserve the right to share in future increases in the value of land which are not simply price inflation such as the grant of planning permission for a more valuable use of the land notwithstanding the sale of the land.

There are a few things which the selling landowner should consider in relation to overage, the first being what has to happen to make overage payable - "The Trigger".

The second is how the overage payable to the selling landowner is to be calculated.

The third is how long the obligation to pay overage should last.

And the fourth and final consideration is how to ensure it binds the buyer/the land.

This is a thumbnail sketch, overage is complex and there is no such thing as "standard overage" each case will have its own unique characteristics, however a few general guidelines can be set down.

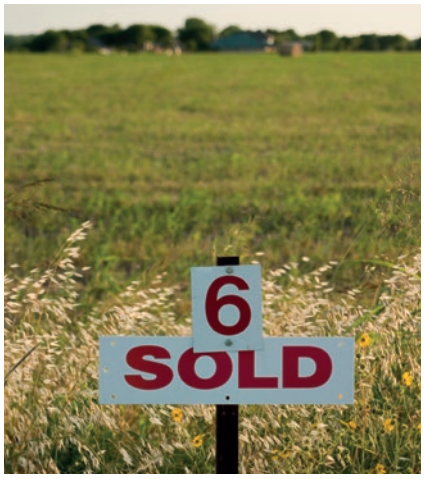
Triggers will be events which give rise to an immediate increase in the value of the land, typically by the grant of planning permission for a more lucrative use of the land, for example agricultural land getting planning consent for residential development.

This is an area where expert advice is invaluable, covering practical issues like will the then owner have money to pay overage at the time and legal ones like what happens if the planning consent is subject to a Judicial Review challenge, is the consent capable of being replaced by a more valuable one in the future and others.

Calculation of overage will require the services of an experienced valuer as, although overage is relatively easy to state as a percentage of the difference in value between the land without the new planning consent ("base value") and the value of the same land with the new consent, there are numerous factors to consider, such as is the base value taken as at the date of planning or some other date, is any 'hope' value to be considered in assessing the base value (i.e. the likelihood of getting an enhanced planning permission), is the current owner to be given credit for the costs of getting the new planning consent?

Timescale: how long is the obligation to pay overage to subsist? It needs to last long enough to make it worth the then owner paying overage rather than simply waiting until the obligation to pay overage expires. However, it is hard to justify periods at the opposite end of the scale such as 80 years where the obligation may be spanning generations.

The final concern is making sure the obligation to pay overage binds the buyer and/or the land subject to the overage obligation. Again this is where



an experienced adviser earns his keep. A mortgage over the subject land will work, but may prove inconvenient to the owner if he needs development finance or similar. Restrictive covenants have their place as do obligations on the buyer not to sell or otherwise dispose of the land without the disponee entering into a direct covenant with the party entitled to overage, to pay any overage which may become due. Ideally a restriction will be placed on the title to the land preventing the registration of any dealing without the person entitled to overage confirming all requirements have been met.

As stated above, overage is complex and a prudent landowner or buyer will need expert legal and valuation advice. It cannot be one hundred percent effective, but good advice will make it much harder to avoid.

However, complexity inevitably brings with it significant cost and the owner must assess whether the likelihood and value of potential overage payments justify the cost of putting them in place.

Douglas Oliver

Family matters: Pre Nuptial Agreements – where are we now?

Pre Nuptial Agreements have a real relevance to farming families as property and land are more often than not gifted to or inherited by the younger generations and hold a particular significance to the families that have owned them for many, many years. Any change to a families make up, whilst welcome, can bring worry. We all want marriages to last but with the latest statistics predicting the divorce rate at 42% it is entirely reasonable to be concerned about the implications on the family business structures should the marriage breakdown. We advise many parents and their children anxious to protect hard earned long established family assets in the unfortunate event of a breakdown in marriage.

It has been 6 years since the Supreme Court judgment of *Radmacher v Granatino* gave legal practitioners the confidence to advise that a Pre Nuptial Agreement was really worth considering following the much quoted passage in the Judgment "*Courts should give effect to a nuptial agreement, freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the party to their agreement*". The Agreement must also meet the needs of the parties.

This was followed by a Law Commission Report proposing requirements for an "*enforceable qualifying nuptial agreement*" which if made law will allow couples to agree how assets should be divided provided needs are met, which would not be subject to scrutiny by the Court in a subsequent divorce.

Subsequent case law has shown that time and time again Judges are following the Supreme Courts lead and upholding or giving very great weight indeed to Pre Nuptial Agreements, if subsequently challenged. If wanting to enter into an Agreement you should be prepared to provide proper disclosure of your financial circumstances, obtain independent legal advice and there must not be pressure or duress placed on either party. As, Pre Nuptial Agreements are still open to challenge specialist legal advice is always required to make sure the document follows the guidelines provided by these cases to have the best possible chance for the Agreement to be upheld.

Sheridan Ball

Ag Ties – How do you remove them?

"Ag Tags", also known as agricultural occupancy conditions and agricultural ties, are conditions imposed within planning permissions which prevent a dwelling being occupied by a person unless they are employed, or were last employed, in agriculture.

Agriculture is defined in planning legislation as horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock, the use of land as grazing land, meadow land, osier land (growing of willow), market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land.

Ag Tags are not popular as they limit who can buy a dwelling in the event of a sale and as a consequence this may reduce the market value of the property and/or affect the availability of a mortgage or the amount a lender is willing to lend.

Ag Tags are also notoriously difficult to remove as they are often imposed in planning permissions for the construction of a farmhouse in a green belt where planning permission would have been refused but for the condition. The three potential ways in which an Ag Tag can be removed are as follows:

1. Apply for a Certificate of Lawful Development

Where an agricultural occupancy condition has been breached for over ten years, i.e. where the owner (and/or any occupier(s)) of the dwelling has not been employed (or last employed) solely or mainly in agriculture for over ten years, the owner can apply to their Local Planning Authority for a Certificate of Lawful Development. A Certificate of Lawfulness of Existing Use or Development is a certificate issued by the Local Planning Authority which provides that the use of the property in breach of the Ag Tag is lawful, and once issued, enforcement action cannot be taken by the Local Planning Authority in relation to the breach.

In order to make a successful application the owner must evidence they have continually occupied the dwelling in breach the Ag Tag (i.e. without being employed in agriculture) for over ten years and that the breach is continuing at the time the application is made, on the balance of probabilities. Unlike a planning application, the Local Planning Authority must only consider the facts of the case when deciding whether to grant the Certificate and cannot consider the planning merits of the case or any planning considerations.

Depending on the wording of the Ag Tag, an agricultural tenancy of land at the property will not preclude a Certificate being granted by the Local Planning Authority, provided that it can be proven that the rental income received is nominal and that the alternative non-agricultural employment income is the main source of income.

Applying for a Certificate of Lawful Development is the most straightforward way to remove an Ag Tag, as if it can be proven that the Ag Tag has been breached for over ten years on the balance of probabilities, the Local Planning Authority must grant the Certificate.

2. Apply for the restriction to be removed

The second option is to make an application to the Local Planning Authority or the Upper Tribunal (Lands Chamber) to lift the Ag Tag, if it can be demonstrated that the dwelling is no longer necessary for agricultural purposes within the community.

In order to establish that there is no demand for the use of the dwelling for agricultural purposes, the owner must carry out an involved market testing exercise. This exercise involves putting the dwelling on the market at a price, being the value of the dwelling with the Ag Tag, for both sale and to rent and then providing evidence that no genuine offers were received. This exercise must be carried out for a lengthy period – usually 12 months or more. Evidence will also need to be supplied showing how the valuation was calculated by the agents together with evidence of the marketing process. A record of any interest received will also need to be supplied.

This method of removing an Ag Tag is the most time-consuming and costly with no guarantee that the Ag Tag will be removed once the marketing exercise has been completed (especially if viable offers are actually received). There are a number of cases where the Local Planning Authority or Tribunal have refused to lift an Ag Tag as they have held that the applicant has been unable to satisfy that there is no demand for the Ag Tag, or they have held that the market testing exercise was not carried out correctly.

3. Argue the planning permission was not implemented

The final route to remove an Ag Tag is to argue that the planning permission containing the condition was never implemented and consequently the Ag Tag does not apply to the dwelling.

This argument can be made where a planning permission contains a pre-commencement condition which was not discharged. The general rule is that if a pre-commencement condition has not been discharged, any subsequent works carried out will not implement the permission. The planning permission would then lapse on the date specified in the permission and consequently the planning permission, and the Ag Tag contained therein, would not bind the property. This would also mean however that any works carried out, or any change of use, granted by the planning permission would be carried out without planning permission and in breach of planning control.

This route is therefore the most dangerous as there is a risk that the Local Planning Authority could bring enforcement action for not only a breach of the pre-commencement condition but for the carrying out of the works or the change of use (where relevant) without planning permission. It would therefore need to be established that any change of use had taken place, or any works had been completed, over ten years ago so the owner had immunity from enforcement action.

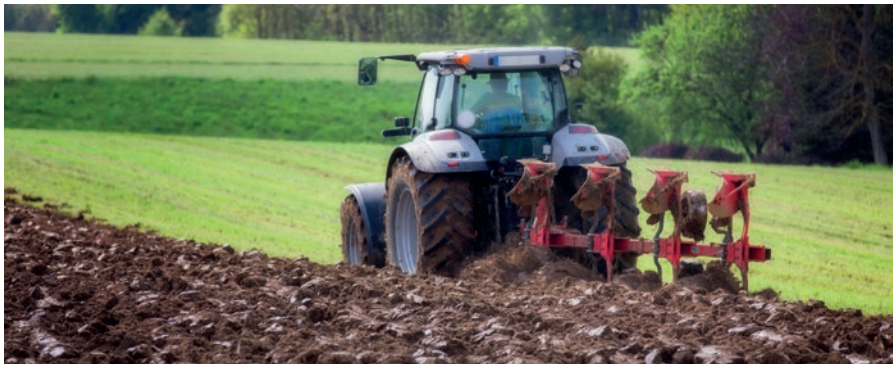
The ethics of this method have also been called into question, as it has been argued that it is unfair for an owner to breach a planning permission and then benefit from the removal of an Ag Tag following the breach. The Local Planning Authority is therefore likely to use their best endeavours to prevent an application to remove an Ag Tag on this basis from succeeding.

Rollits have recently submitted a number of applications for Certificates of Lawful Development which have successfully been granted by the Local Planning Authority. This accordingly still represents the most common method of overcoming an Ag Tag that we deal with. The benefits of the Ag Tags removal are clear with a likely increase in land value being a prime example.

Libby Clarkson

Brexit, agriculture and the law

Post Brexit and the General Election a great deal of uncertainty remains. This relates to all aspects of life and business but European regulations have been central to agriculture in the UK for several decades. Clearly, whilst we do not know what 'Brexit' will look like, much is bound to change in the agricultural sector.



We do not intend to air any views as to the pros and cons of Brexit but we just want to identify some issues that will arise.

The outcome of the General Election has seen a change of the leading personnel in the political parties. In terms of Government, whilst Theresa May remains as PM for the present time, Michael Gove has been brought back into the cabinet as Secretary of State for Environment, Food and Rural Affairs and George Eustice remains as Minister of State for Agriculture, Fisheries and Food. These three are now probably the key political players in the sector.

So far, the Government has confirmed that the Basic Payment Scheme will remain until 2020, and most view this as meaning that payments for 2020 will be made even if (as happens) some payments slip in to the next year (2021 in this case). In relation to Pillar II (Countryside Stewardship etc) payments, the Government has stated that agreements entered into before the Autumn Statement 2011 will be honoured – however long they may go on for.

The UK Government has, it is said, for many years preferred paying money out for Pillar II rather than Pillar I (Basic Payments). European countries have, generally seen this differently, but post-Brexit that conflict will disappear and perhaps farmers can expect less by way of a BPS payments and more by way of Stewardship arrangements or other similar support.

Looking to other outside arrangements gives little hint of what may happen in terms of future trade deals with Europe and the rest of the World. The European Free Trade Association (e.g. Norway) and the Customs Union (e.g. Turkey) do not deal with agriculture. The World Trade Organisation (WTO) relies on the parties agreeing their own deal. In terms of employment, it is still not certain what will happen to the supply of (generally) eastern European workers who have been employed in significant numbers in the agricultural sector for many years (more in some regions than others).

The quantity of regulations from Europe is notorious, and the rules relating to the agricultural sector in the UK comprised a substantial amount of EU regulations. Some will clearly be replaced by new UK rules but perhaps there will be an opportunity for the Government to reduce and simplify the rules that farmers have to consider and comply with.

Some elements of agriculture are more heavily EU governed than others. Whilst there are no answers, Cross Compliance, Annual Health and Welfare and GMO, may all be much different in the post Brexit era.

Neil Franklin

An introduction to the Agriculture Team

The Rollits Agricultural Team consists of 9 lawyers although there are many others within the firm who also assist clients with their specific expertise. Pictured are; **Neil Franklin** who heads the team, **John Lane** head of our Private Capital team, **Caroline Hardcastle**, a member of our Dispute Resolution team, **Sheridan Ball** who deals with family issues, **John Flanagan** a member in our Company Commercial team who deals with corporate and partnership matters, **Clair Douglas** and **Amy Clarkson** who are based in our York office and specialise in property matters. All team members work across both offices and are happy to meet clients and contacts at either base or come out to see you at your place of business.

Information

If you have any queries on any issues raised in this newsletter, or any agricultural matters in general please contact Neil Franklin on 01482 337250.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE.

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