Agricultural Law Association
Case law update

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Giving a talk on agricultural case law in November 2019 is redolent of Scarlett O'Hara's final words in Gone with the Wind. After all, tomorrow is indeed another day, and whatever Brexit brings, the law – and other disputes – will carry on. This is my selection of cases that have particular significance to agriculture, whether to family succession and farms (proprietary estoppel), impediments to development of agricultural land (commons and Town and Village Greens), the extent of ancillary rights of access in agricultural leases, or notices to quit relating to Agricultural Holdings Act tenancies. The emphasis here is on land and succession, mainly because I am a country-based, traditional lawyer and these are the topics that tend to interest me, and interest country-based agricultural lawyers in general. And I have had to choose my topics for reasons of time and space. There has been much litigation on matters of planning and regulatory law, which would take me well over my allotted time were I to talk about it. There have been a number of interesting cases concerning the telecommunications code, and you will hear from one of the significant advocates in that litigation, Oliver Radley-Gardner. So I won't touch those.

Commons and Town and Village greens

In Re Yateley Common

(Decision of Mr. Alan Beckett BA MSc MIPROW 12 June 2019)

It is well known that registration of land as common land under the Commons Registration Act 1965 led to many instances of inappropriate registration (as well as some of inappropriate non-registration). This case concerned legislation intended to remedy the consequences of common land registering houses or garden, but in fact going rather wider than that. The Applicant sought to de-register common land by application under Schedule 2, para. 6 of the Commons Act 2006. This requires the Applicant to show that the land was covered by a building or its curtilege at the date of provisional registration, and that it was still so covered. This land in question was part of the operational area of Blackbushe Airport in Hampshire, and it was alleged that the whole airport was the 'curtilege' to the Terminal Building.

The Inspector in a helpful decision letter dealt with a number of preliminary points:

(1) Where the presence of a building is relied upon, it must be present at the date of the determination of the application, not simply at the date of the application;

(2) 'Building' is to be given its normal broad meaning; it is not limited to dwelling-houses;

(3) There is no requirement on an applicant to demonstrate that the initial registration was mistaken or unwitting;

He then turned to the real issue in the case – the meaning of 'curtilege'. He summarised the law and then set out the correct legal test, as he saw it contained in Challenge Fencing v Secretary of State for Housing, Communities and Local Government [2019] EWHC 553 (Admin) (Lieven J.)

> "From these cases I draw the following propositions:
>
> (i) the extent of curtilage of a building is a question of fact and degree, and it must therefore be a matter for the decision-maker, subject to the normal principles of public law;
>
> (ii) The three *Stephenson* factors must be taken into account; (a) physical layout; (b) the ownership past and present (c) the use or function of the land or buildings past and present;
>
> (iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration *Skerrits;*
>
> (iv) Whether the building or land within its claimed curtilage is ancillary
>
> to the main building will be a relevant consideration but it is not a legal requirement that the claimed curtilage should be ancillary; *Skerritts*;
>
> (v) the degree to which the building and the claimed curtilage fall within one enclosure is relevant and the quotation from the OED of curtilage as "*A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it*". In my view this will be one aspect of the physical layout, being the first of the *Calderdale* factors".

Summarising all of this into one paragraph, he decided:

> 54. "The guidance which appears to be given in the above cases is that land which may form the curtilage of a building is land which is part and parcel of the building (*Trim*), or forms one enclosure with the building (*Dyer*) which serves the purposes of the building in some necessary or reasonably useful way (*Sinclair-Lockhart*) or is intimately associated with the building such that the land is part and parcel of the building and an integral part of the same unit (*Methuen-Campbell*) and does not have to be small but relative size is a relevant consideration (*Skerritts*). "

He held that the entire airfield fell within the curtilege of the building. Whilst the outcome may at first glance be surprising, it shows that the use of this provision may be far wider than thought at first sight. The comments on the law appear sensible and correct; the decision is a matter of fact. The general approach is not binding on anyone, but likely to be followed at subsequent inquiries in the absence of judicial pronouncement.

Wiltshire County Council v Cooper Estates Strategic Land Ltd. [2019] EWCA Civ 840. Court of Appeal

Amendments made to the Commons Act 2006 by the Growth and Infrastructure Act 2013 provided for the suspension of the right to apply for the registration of land as a Town or Village Green where a 'trigger event' has taken place. Trigger events are steps in the planning process which might lead to land being developed; the purpose of the amendment was to prevent 'wrecking' applications for registration of land as a TVG to stymie development. The issue in this case was whether the inclusion of land on the outskirts of Royal Wootton Basset in the local planning authority's Development Plan as falling within a 'settlement boundary' satisfied the trigger in Schedule 1A para. 4:

> "4. A development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the 2004 Act."

So the question was whether the plan indicated this open space for 'potential development'. At first instance David Elvin QC held it did. The Court of Appeal agreed. It was sufficient that the Development Plan included the land within the settlement boundary, and that the consequence of that was that there would be a presumption of development applied to that land (see Lewison LJ at [47]). Both Lewison and Floyd LJJ noted that there might be cases where other provisions in the Plan, such as the identification of listed buildings or Sites of Special Scientific Interest might indicate that there was little or no prospect of development as regards a particular plot or parcel of land within land otherwise slated for development, but that did not arise in this case. 'Potential development' is a broad description, and the inference is that it would have to be a clear case for land falling within a zone of presumed development to fall outside para. 4 (see Floyd LJ at [54])

In these circumstances the policy of Parliament was to let the issue of public open space be decided through the planning process. The near-equivalent of a TVG was designation as a Local Green Space, which would provide some protection, albeit not as much as would arise from designation as a TVG (see Lewison LJ at [7] – [10]).

Ancillary Rights

Morris & Perry (Gurney Slade Quarries) Ltd. v Hawkins[2019] Lexis Citation 58;
HHJ Russen QC (Bristol County Court)

This case related to the exercise of a reservation of mineral rights in a transfer. The Claimant wanted to enter on to the Defendant's land for carrying out landscaping and tree-planting works which it alleged were reasonably necessary so that it could obtain planning permission to extract the minerals that it wished to extract under the reservation. The Defendant asserted that this was not permitted by the reservation and sought (and obtained) summary judgment to that effect. HHJ Russen QC heard and allowed the appeal, and subjected the transfer to some close textual analysis.

The reservation provided:

> Clause 2(a)
>
> "*All stone, clay, sand, gravel and other mines and minerals including gas, oil and water in and under the property (hereinafter called the minerals) together with a right of entry and all necessary ancillary rights in connection with winning and working the same including those set out in the first part of the schedule hereto but SUBJECT TO the observance and performance by the Transferor of the conditions and restrictions set out in the second part of the schedule hereto*".
>
> Part I of the Schedule was introduced by the following language:
>
> "*Liberties for the due and proper working and obtaining of the minerals included with the rights excepted and reserved to the Transferor by clause 2 of this Transfer to enter upon the property:-*"
>
> "*a) To erect such buildings, engines and machinery and to carry out such works and facilities as may be convenient for the purpose by any means of working, obtaining, processing, making, merchantable, adapting for sale, storing or disposing of any of the minerals .....*"

"h) Generally to do all things convenient or necessary for working obtaining making merchantable and disposing of the minerals subject to the provisions contained in the Second Part of the Schedule hereto."

The following general points can be taken from the discussions and decision:

(1) Whilst authorities suggest that ancillary rights concerning mining operations should be construed narrowly (see Hext v Gill (1872) 7 Ch. App. 699) these concern rights to damage the surface of the land without paying compensation (para. [52]).

(2) The references to 'convenient' in Part 1 of the Schedule, paras. (a) and (h) indicated that the ancillary rights were those that were reasonably necessary for winning minerals, not simply 'necessary'.

(3) Even in the absence of those words, the Court would have been minded to construe the reference to 'necessary ancillary rights' in cl.2(a) as 'reasonably necessary ancillary rights' – see para. [64] citing Jones v Pritchard [1908] 1 Ch 630 and Moncrieff v Jameson [2007] 1 WLR 2620.

(4) The mining right here was not limited to the physical act of removing the minerals but extended to preparatory acts, citing General Accident v. British Gypsum. [1967] 1 WLR 1215. The position was even stronger in the present case as the Transfer referred both to 'working' and 'winning' and 'obtaining' the materials (at [78-9]). Such torrential language indicates a wide, not a narrow right, and hence a right to do all such things as were necessary to obtain the minerals.

Earl of Plymouth v Rees [2019] EWHC 1008 (Ch)

HHJ Keyser QC

The Defendant held farming land from the Claimants under at least two leases, entered into in 1965 and 1968. The Claimant wished to develop this land as part of a much larger housing development on their land (incorporating the farm) in Cardiff. In order to succeed in their application for planning permission they needed to carry out an ecological survey (which included the drilling of boreholes) on the demised premises. The issue was whether they had power to do so under the leases.

The 1965 lease provided:

"7. Right for the Landlord and his Consultant and all others authorised by him with or without horses carriages and other vehicles to enter on any part of the Farm lands and premises at all reasonable times for all reasonable purposes."

The 1968 lease provided:

"AND FURTHER [Y] that the Landlord may at any time and at all times during the said tenancy enter upon the said premises with Agents Servants Workmen and others for the purpose of inspecting the same or for making roads sewers or drains or for any other purpose connected with his estate."

This was a matter for the construction of each lease in context. Counsel for the Claimant argued that in construing a periodic tenancy, the 'matrix of fact' had to be considered at each date the tenancy was extended. If right, the relevant factual context would have been the commencement of period of the last tenancy commencing before the litigation, by which time the Landlord had applied for planning permission. As the judge said, no authority was cited for this proposition and it was wrong (at [45]) A periodic tenancy is a 'springing interest' arising from contract, which continues automatically unless terminated, and stems in law from the date of its initial creation.

As far as the 1965 lease was concerned, the judge asked two questions. The first is 'what was meant by 'the Landlord's purposes''? Did it mean anything the landlord (reasonably) wished to do, or did it have to relate to the relationship of landlord and tenant? As to the second, he considered whether there was any limit as to what the Landlord might do when he gained access. As to the first question, he concluded that, as the tenant contended, it was the second possibility; the purpose of access had to relate to the lease. But that did not determine the case, as the landlord wished to carry out the survey so that he could serve a Case B notice as to part and re-enter; and that did relate to the relationship of landlord and tenant. He then considered the second question, and concluded that the purpose for which the inspection could take place either had to be set out in the lease; or it had to be a function that would be assisted by observation and inspection (the things the landlord could do merely by exercising access). As the digging of boreholes did not fall within either of these parameters, it followed that it was not permitted. This was

consistent with Heronslea (Mill Hill) Ltd. Kwik Fit Properties Ltd. [2009] EWHC 295 (QB) where a right to enter for the purpose of 'making surveys or drawings of the Premises' was held not to extend to the making of boreholes.

The judge did discuss generally what might or might not fall within such a reservation (at [64]); Causing damage to the farm, cordoning parts off or interfering with its operation were not permitted (in the absence of express stipulation). Installation of monitoring devices, or bat detectors, or marking the land ('discreet reference points') probably would fall within the right of entry.

On its true construction, clause Y of the 1968 land gave the Claimant no right to enter for any purpose connected with the demised land, but only to enter for the purpose of the Claimant's neighbouring land. The judge reached this conclusion because the Claimant had no right to make roads sewers or drains, and therefore the reference to such activities could only refer to activities on the adjacent land. However, the 'purposes' under clause Y were the same as those under clause 7 of the 1965 Act. They did not extend to the making of boreholes.

The conclusion to draw from this is that where a landlord wishes to retain *intrusive* rights of access over the demised premises, he needs to specify them, either specifically or generically. As the right restricts the grant of exclusive possession, it will ordinarily not be implied.

Notices to quit

Herefordshire County Council v Bayliss [2019] Lexis Citation 94 (FTT(PC))
First Tier Tribunal.
A landlord applied for planning permission for non-agricultural use of the holding. Before the planning permission had been determined, it served a plain notice to quit on the tenant and; the tenant served a counter-notice and the landlord then applied to the Tribunal for consent to its operation under section 27(3)(f), asserting that it proposed to terminate the tenancy of the holding for the purpose of the land's being used for a use other than for agriculture. Was it open to the tenant to use this procedure rather than, as the tenant contended, waiting until (and only if) it

received planning permission, and then serving a Case B notice? Section 27(3)(f) provides that;

> "23. The matters referred to in subsection (1) above are—
>
> .....
>
> (f) that the landlord proposes to terminate the tenancy for the purpose of the land's being used for a use, other than for agriculture, not falling within Case B."

Case B concerns intended changes of use from agriculture where planning permission has been granted; arises under the GDPO and statutory approval; arises statutory approval outside of the planning system; which is statutorily deemed not to be development; or falls under Crown immunity. Note that these categories do not include pending applications for planning permission, which was the case here.

The Tribunal held that the tenant was right. Section 27(3)(f) had to be understood as referring to an application that *could not* fall within Case B, rather than one where the application had not been made or determined.

This is consistent with the generally accepted textbook views of the legislation (referred to at para. [18] of the judgment) and North Berwick Trust v James B Miller & Co. [2009] CSIH 15 (whilst noting that the judge who delivered the lead judgment, Lord Gill, appeared to have subsequently resiled from his expressed view in his own textbook in the 2017 edition.)

The Tribunal noted that in the present case planning permission had been granted by the date of the hearing, and that therefore section 27(3)(f) could not be made out in any event. It went on to consider the position that would arise had permission not been granted. It reasoned that no reasonable landlord would have sought possession on the footing that planning permission, if otherwise required, would not be granted, and if the application required the Tribunal to consider that permission would be granted and thus to second guess the planning application, it was not equipped to do that. Nor was it willing to consider granting consent conditionally but adjourning the matter to the determination of the planning application.

The decision seems straightforward. Case B gives the landlord a right to possession where planning permission for non-agricultural use is granted. It is not the purpose of section 27(3)(f) to give the landlord a chance of obtaining possession where such planning position might be granted. If the landlord wants to change the use he should get on with obtaining planning permission, and if he fails there is no reason why possession should be granted. The consequence is that section 27(3)(f) will be available in those limited cases where a change of use *can* take place without a grant of planning permission.

Notices to Quit – Case D

Secretary of State for Defence v Spencer

[2019] EWHC 1526 (Ch) Birss J.

This is an interesting case concerning the scope of a plea of equitable set-off where raised against a Notice to Quit served under Case D for arrears of rent. Birss J heard it as an appeal from a reference to the county court from the arbitrator under the old-style case stated procedure. Mr. Recorder Norman had stated his view as follows:

> "the first and second defendants... can rely upon the equitable set-off of unliquidated claims for damages in order to invalidate the Notice to Pay dated 24th November 2004 because it overstates the rent due and so invalidate the Notice to Quit dated 28 January 2005, if, before the date of the Notice to Pay:
>
> 1. The claim to be set-off in equity has been asserted expressly in reduction or extinction of the rent claimed by the landlord in the Notice to Pay be due, and
>
> 2. The claim has been quantified, and
>
> 3. Both the assertion and the quantification of the claim were bona fide and on reasonable grounds.
>
> If these requirements are met the equitable set-off can be relied upon in reduction of the rent due as at the date of the Notice to Pay to the extent of the quantification of the claim and Case D paragraph (a) of the third Schedule to the Agricultural Holdings Act 1986 is to be so interpreted."

So there were two issues on the appeal:

(1) Whether equitable set-off applied to the statutory procedure under Case D at all; and

(2) Whether the Recorder was right in the qualifications he attached to the procedure.

The Judge started from the undoubted proposition that any overstatement of the arrears of rent in a Case D notice to pay rent renders it invalid (Dickinson v Boucher [1984] 1 EGLR 12.) It was then a matter of statutory construction as to whether the reference to 'rent due' in Case D as a reference to the rent due at law, or to the net balance of any rent due after any cross-claim deductible by equitable set-off had been taken into account. Case D provides:

> *"CASE D*
>
> At the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord, being either–
>
> (a) a notice requiring him within two months from the service of the notice to pay *any rent due* in respect of the agricultural holding to which the notice to quit relates, or
>
> (b) .....
>
> and it is stated in the notice to quit that it is given by reason of the said matter." (my emphasis)

He then found support from the Scottish authority of Alexander v Royal Hotel (Caithness) Ltd. [2001] EGLR 6 (Lord Gill) for the proposition that rent is not 'due' if it is not recoverable by legal process. He distinguished section 17 of the Act (which makes an express reference to set-off in the context of distress) as applying to set-off in the absence of court proceedings.

The Secretary of State made the practical point that all farmsteads are in disrepair and so a landlord could never know how much (net) rent is due. The Judge was not persuaded; the answers to these queries are first that it is for the landlord to base his Case D notice on what he contends is due. He can be safe rather than sorry. Secondly if the landlord is in breach of the tenancy agreement, he must take the consequences.

This conclusion is plainly right. The High Court had determined that as a matter of principle a claim to rent could be defeated by an equitable set-off in British Anzani (Felixstowe) Ltd. v. International Marine Management Ltd. [1980] QB 137, and when the AHA 1986 was enacted Parliament must have been aware of that.

As to the qualifications to be applied to the procedure, the Judge agreed with the Recorder. As I noted above, they are:

(1) The set off must be properly asserted;
(2) It must be quantified;
(3) Both assertion and quantification must be made in good faith.

The consequence of failure to adhere to these requirements is that the defence will be defeated. Moreover, Birss J. stated that once a set-off is made out that satisfies these three criteria, the Case D notice to quit must fail (see paragraph [30]).

I make three points about this. First, when must these requirements be satisfied? Following the reasoning in Spencer, the answer would seem to be 'on the date the notice to pay rent is served'.

Secondly, the rent said to be due need not be the full sum the Landlord considers is due. If a set-off has *previously* been asserted as to part of the rent, then the safe course may well be to base the notice to pay rent on the balance. Of course if it has not been asserted then the landlord may be none the wiser, although the landlord may assert that the failure to raise the set-off shows a lack of good faith.

But this still leaves difficulties if the tenant has asserted a set-off that would extinguish the rent due entirely. On this analysis the Landlord would have to litigate the claim in court and could only serve a valid Case D notice once the rent due had been conclusively determined.

Thirdly, the suggestion that an arguable set off amounts to an absolute defence to a Case D notice is I would suggest open to some doubt. It is based on authorities that relate to entitlements to summarily determine commercial contracts for alleged breach. In those cases there is a good commercial reason for construing the contract as meaning that a determination can only be claimed after the alleged set-off has been determined, and the right to determine the contract established. By contrast, Case D stipulates that it can be used where 'rent is due', and the Case makes provision for a warning notice to be served. The notice is either validly constituted as at that date, or it is not. There is no reason why an arbitrator could not determine

whether, as a matter of fact, a set-off is made out, and quantify its value if necessary and determine whether, at the date of the service of the notice to pay, the rent stated was due.

Sporting Rights and Damages

Clochfaen Estate Limited v Bryn Blaen Wind Farm Limited. [2019] EWHC 1562
HHJ Jarman QC

The Claimant was entitled to a grant of sporting rights as lessees over 4,000 acres in Powys, including 92 acres owned by the Second and Third Defendants. The First Defendant obtained planning permission to build 6 wind farms to the north of the servient land, together with ancillary access road and works. The works were carried out. The temporary works were on the servient tenement. The Claimant asserted that this was a trespass on its sporting rights, and that it should be compensated by an award of 'negotiating damages' (or as it used to be called 'wayleave damages').

The Claimant had an uphill struggle from the opening words of paragraph 2 of the judgment:

> "2. It is common ground that [Clochfaen] has not exercised or attempted to exercise its right over the servient land for over 60 years....."

The land that was affected was scrubby, and apparently only home to game birds unfortunate to stray from neighbouring estates and capable of finding nowhere better.

The Judge refused to award negotiating damages, an instead awarded a nominal £100 in damages. His reasoning is of interest:

(1) The Claimant had to show that there had been an interference with the reasonable exercise of his rights, or 'in other words', that there had been a fundamental change in the character of the servient land.

(2) The leading cases, Peech v Best [1931] KB 1 and Well Barn (Shoot) Ltd. v Shackleton [2003] EWCA Civ 2 demonstrate that loss of rights over a relatively small fraction of the servient land is nonetheless an actionable interference; and that although the holder of sporting rights has to balance them against, and therefore cannot complain about, other lawful agricultural uses, he does not contemplate being

prevented from sporting by competing non-agricultural uses. I would add that this is a principle of law, but one that will bend to any contrary wording in the grant (there was none here);

(3) Actual pecuniary loss need not be demonstrated to obtain damages or an injunction (citing Nicholls v Ely Beet Sugar Factory Ltd (No.2) [1936] Ch 343.). The loss of the right is loss in law.

(4) The temporary works were non-agricultural and amounted to a substantial interference with the sporting rights for about a year; financial compensation for the actual loss would be assessed at a nominal £100.

(5) Compensating for loss on the basis of Negotiating Damages was inappropriate where the value of the asset lost was not equivalent to the lost opportunity to negotiate. The Claimant had a weak case for an injunction, and had decided not to seek one because of the potential consequences of the cross-undertaking in damages he would have had to give. Even if this was a case of trespass, it had ceased. There was no basis for the grant of an injunction.

The result is unsurprising. This appears to have been something of a 'try-on' by the Claimant, using a technical infringement of a property to extract substantial damages, rather like the 'oversailing' cases that bloomed during development boom in the city of London – see e.g. Anchor Brewhouse v Berkeley Homes [1987] 2 EGLR 172. It serves as a warning that the court may treat what looks like a thin claim as just that. If the development had caused continuing or substantial loss, then negotiating damages would have been appropriate.

Fencing

Haddock v Churston Golf Club Limited

[2019] 4 WLR 60 Court of Appeal

This case deals with an old land law chestnut – the so-called 'quasi-easement' of fencing. This differs from all other (true) easements in that it imposes a positive obligation (to maintain the fence or boundary feature) upon the owner of the servient tenement. True easements simply require the servient owner to suffer the acts of the dominant owner on or over the servient tenement, and do not impose financial obligations on the servient owner (although they may cause financial

consequences). So a right of way imposes no obligation on the servient owner to repair the way. Haddock concerned a transfer of land by the Golf Club's predecessor in title in which a covenant was given by the Golf Club's predecessor in title to Mr. Haddock's predecessor in title to fence and maintain forever the fence on the boundary between the two titles in the following terms:

> "The purchaser hereby covenants with the trustees that the purchaser and all those deriving title under it will maintain and forever hereafter keep in good repair at its own expense substantial and sufficient stock-proof boundary fences walls or hedges along all such parts of the land hereby conveyed as are marked T inwards on the plan annexed hereto."

There was a dispute as to whether that obligation bound the Golf Club. The trial Judge and on appeal Birss J. ([2018] 4 WLR 53) held that:

(1) this covenant amounted to an easement that was capable of binding successors in title, and
(2) that a fencing easement was capable in law of being created by express grant.

The Court of Appeal held that this covenant was not a (quasi-) easement but a covenant intending to bind only the contracting party, and allowed the appeal. Although the Court therefore did not have to come to a conclusion as to whether it was possible to create a so-called fencing easement expressly, it suggested that it had doubts whether this would be possible, whilst noting that it appeared to be settled, at Court of Appeal level at least, that it could.

This is a significant decision, simply because the form of the covenant is not unusual in conveyances of parts of a larger plot of land, especially where that land is agricultural. But where does it leave the law, given that decisions on the meaning of documents are typically not authority on the meanings of similar documents? Some authors and bloggers have suggested that this is the end of the 'express fencing easement'. I don't think that that is correct.

The first place to start is the discussion of the express fencing easement point. Although the Court of Appeal did not enthusiastically approve the concept in Haddock, it appeared to recognise that parties could, theoretically, in law, create such an obligation that binds the land as if it were an easement. That I think must be

right. It follows from the earlier Court of Appeal decision in Crow v Wood[1], where the court considered that a fencing easement could be created by the operation of section 62 Law of Property Act 1925. As all conveyancers know, this is the 'general words' provision that imports appurtenant rights into conveyances. But it will only import rights known to the law. And if the parties can *impliedly* agree to create a fencing easement as a legal incident of land, binding successors in title, they can do it *expressly* as well. I would also add that notwithstanding the Court of Appeal's current lack of enthusiasm for this principle, the latest and indeed only authoritative reasoning on an express grant creating a fencing easement is that of Birss J. in the court below, which remains persuasive. So that is where the black letter law currently stands.

But then there is the meaning of the covenant itself. Both judges at first instance and on first appeal thought that the intention behind the covenant was to bind successors in title, relying on the provision that it was to apply 'forever', and therefore that it bound the land as a (quasi-)easement. Mr. Haddock also argued in the Court of Appeal that section 79 Law of Property Act 1925 operated to impose an obligation on the successors in title to the servient tenement to comply with the fencing obligation. If this provision could work as it did to make the benefit of restrictive covenants run with the land in equity[2], then (he argued) it must also make this obligation run as a fencing (quasi-)easement at law, whatever the parties chose call it. After all, first, if the parties create a four-pronged digging implement, it's a fork even if they call it a spade[3]. Secondly, section 79 is expressed to have this effect as regards 'covenants', so one might think that the mere fact that the obligation was called a covenant would not prevent it binding successors in title. But the Court of Appeal thought otherwise, relying on the fact that it was a positive covenant, and

[1] [1971] 1 QB 77

[2] The operation of section 79 appears to be that it causes the covenant to bind successors in title (1) where the law allows them to be bound, and (2) where the parties have not indicated a contrary intention. So, if the subject matter is a restrictive covenant (which is capable of binding successors in title in equity – since Tulk v Moxhay (1848) 2 Ph 774) that is its effect unless a contrary intention is expressed – see Morrells of Oxford v Oxford UFC [2001] Ch. 459. By parity of reasoning, if a fencing obligation is capable of binding successors in title by express grant, it should operate to do what the parties intend – bind successors in title where the covenant relates to a fencing obligation, unless they have expressed a contrary intention.

[3] See Street v Mountford [1985] 1 AC 809.

stated to be a covenant, and we are all taught in law school that positive covenants do not run with freehold land[4]. On this basis, it seems to me highly unlikely that any typical conveyance with a fencing covenant in it could ever be construed as a fencing obligation that binds the land (or fencing quasi-easement, if you like).

So is there are way around this as regards conveyances we are drafting now? I can think of two. First, as Birss J suggested, we could draft the covenant as an easement, using terms of grant. Secondly, the covenant could simply state that it is intended to bind the successors in title of the covenanting party. If it is a question of intention, then that should be sufficient. But in the light of the Court of Appeal's judgment I can offer no guarantees.

This may not be the end of the argument, as Mr. Haddock has sought permission to appeal to the Supreme Court. If he gets it, they may consider whether it is possible to create an express fencing obligation once and for all. For my part that would seem sensible, but then I would say that.

Estoppel

There have been a number of recent judgments concerning proprietary estoppel in the farming and succession context, most of which have been collected by Professor Martin Dixon in an Editor's Note to the Conveyancer and Property Lawyer [2019] 89. As in recent years, insofar as the cases have turned on matters of law, they have concerned the relief that the court should grant once that it has found a typical estoppel (farming child working long hours at low pay on farm on the back of more or less certain inducements of succession). As all farming families are unhappy in their own particular way, all cases are different. But as advisors and advocates we have to give our view as to what the outcome is likely to be. Recent cases give us some guidance as to how to approach these claims if they are successful. I am going to look at some of the principles involved, and how they have been dealt with by the cases.

[4] See Austerberry v Oldham Corporation (1850 29 Ch D 750 and Rhone v Stephens [1994] 2 AC 310 (neither of which were fencing cases).

Don't rely on the Court of Appeal to get you out of a mess.

Following Davies v Davies and Moore v Moore it might have been thought that the Court of Appeal was really keen to review any potentially out of the ordinary decision, notwithstanding that the award given by a judge is a matter of judicial discretion. However, Habberfield v Habberfield [2019] EWCA Civ 890 is an example of the Court of Appeal refusing to intervene even though it did not necessarily agree with the decision. The consequence was that the Defendant, the Claimant's mother was, in her 80s, likely to have to move out of the family farmhouse and be left with not much. But the judge had considered the pros and cons, and come to his view as to where fairness lay. The alternative had its downsides too. Contrast Davies v Davies [2016] EWCA Civ 463 where the Court thought the judge had used much too broad a brush in analysing the facts (and could therefore substitute its own view), and Moore where the judge had not considered the practical consequences of the order he made and its effect on the Defendants. Appealing an award is unlikely to be successful unless the Judge has gone 'plainly wrong'.

Estoppel needs to be taxing

Another ground of appeal related to the possibility that the decision might have left Mrs. Habberfield with a substantial tax bill, the quantum of which had not been explored at trial. This had been a specific and successful ground of appeal in Moore v Moore, with the Court of Appeal suggesting that evidence of and an analysis of the tax consequences of particular forms of relief should be a pre-requisite to the making of the award[5]. Of course, where an award is likely to leave a large tax bill, that is going to affect the award that should properly be made, especially where the estate is being 'split' between the parent(s) and child, as in Habberfield. Here, the position and the result was different for two reasons. First, the Judge was alive to the possibility of a tax bill; and crafted his award to allow Mrs. Habberfield to minimise her tax liability. Secondly the Court did not consider that the Appellant had shown that it was likely that there would be a substantial tax bill (see Lewison LJ at [84]). Merely asserting it did not make it so.

In Gee v Gee [2018] EWHC 3807 (ch), another decision of Birss J, the judge initially ordered that the farmland was to be divested from the corporate farming business. Both parties considered that this would have catastrophic tax consequences, and the

[5] See Henderson LJ at [96]

final order provided for the parties' interests in the holding company to be arranged by way of a (tax-efficient) variation in the company shareholding.

Expectation or Detriment?

Davies v Davies refers to the 'lively academic controversy' concerning whether the purpose of granting relief on a proprietary estoppel claim is to award the expectation or the value of the detriment[6]. This is not simply an academic controversy. How will parties know what to do if the lawyers cannot advise them as to where a successful claim might start from? Looking at recent judgments, the 'expectation' camp appears to be in the ascendant – see Habberfield [2019] EWCA Civ 890 at [33]; Gee v Gee [2019] 1 FLR 219 at [104] – [144]; Guest v Guest [2019] EWHC 869 (Ch) at [148] and James v James [2018] EWHC 43 (Ch) at [51]. I doubt that this is any rule of law, more than an example of what fairness requires, and what is likely to have happened, in cases of this sort. These are cases in which the child will have worked for most of his life on the strength of promises made by his parents. He cannot now go back and have his life again, and quantifying his loss in purely financial terms undersells it. Davies v Davies by contrast led to a different outcome because the assurances made differed from time to time; the reliance was itself periodic and intermittent, and the Claimant (ironically, and to her credit) from time to time made her own way in agriculture. In the typical case, where promises of succession have been made and continuously relied upon, the starting point will be the validation of expectation. Or as Lewison LJ quoting Robert Frost rather poetically put it:

> "[32]..... In Uglow, the court referred to Robert Frost's poem "The Road Not Taken" as illustrative of different life choices making all the difference. But there is another line by the same poet in "Stopping by Woods on a Snowy Evening" which is pertinent to this point:
> "The woods are lovely, dark and deep,
> But I have promises to keep."
>
> 33. Underpinning the whole doctrine of proprietary estoppel is the idea that promises should be kept. We were not shown any case in which the

[6] [2016] EWCA Civ 465. See Lewison LJ at [39]

rejection of an offer meant that the claimant, who had kept her side of the bargain, received nothing."

A Cliff Edge?

In many of the recent cases, especially those where one or more parents are still alive, the relief has tended towards a division of the assets claimed. That may result in an acceleration of the award, if what was promised was inheritance; or not, if succession was promised on retirement. In either case an event that was intended to occur with the parties living in harmony has ended up in bitter acrimony[7]. In these circumstances there will be a tendency for the court to split the pot, and provide a clean break. Neither of those aims is achieved where the court simply transfers the whole farm to the claimant, assuming that it comprises the bulk of the parents' assets. Cases where the child has scooped the pool either have been (Moore) or are being (Guest) reconsidered by the Court of Appeal. Is there a 'cliff-edge' between awarding the expectation or the detriment? Or can the court split the difference in all fairness?

In Davies Lewison LJ considered that a 'sliding scale' which took account of the expectation even where the financial detriment was awarded, might be a useful tool. That was a case where the Court had decided (at first instance) that it was not awarding the expectation, and so it was being used (at the hearing before the Court of Appeal) to try to justify an award that was greater than the financial detriment. Although that concept was discussed with somewhat lukewarm approval in Guest[8], the suggestion by Lewison LJ in Habberfield that all proprietary estoppel cases are on a spectrum (at [68]) might be an indication that fairness generally requires some compromise, down from the expectation as well as up from the detriment. Whether this is so we may discover when Guest reaches the Court of Appeal[9].

Postscript - Costs

Can expending a shedload of costs on litigation ever be a good thing? That was considered indirectly in Moore and Habberfield. In Moore one of the reasons the

[7] The extreme example of this is Gee v Gee, where the Mr. Gee senior supported his younger son against the Claimant, whilst Mrs. Gee supported the Claimant.

[8] at para. [154]

[9] I understand that permission to appeal on the issue of relief has been granted.

Court of Appeal gave for remitting the case for further consideration was that the enormous costs incurred would be borne by the parents, yet they had no assets with which to pay them[10]. The judge had erred in not taking this into account, and the costs were in effect rather like a poison pill. In Habberfield, the Court of Appeal was less impressed with the argument, Lewison LJ suggesting that the effect of the costs incurred by the losing party could not be relied upon to reduce the successful party's award (at [85]).

Secondly, I found it interesting that Professor Dixon's article listed twelve estoppel cases, with a success rate of one-third. No doubt many other cases settled at some stage, or were sensibly withdrawn. That level of success is high enough to encourage both parties, given what is being fought over. It has become conventional in reviewing proprietary estoppel cases for the lecturer to add a homily about the costs involved, the risk undertaken, and the sense in compromise and mediation. I share those sentiments. There can be few other areas of litigation where the description 'eye-watering' is so often placed adjacent to 'costs'. It behoves us all to advise our clients of the merits of reasonableness, however (self-) righteous the claim (or defence) might appear.

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[10] See Henderson LJ at [97].