in brief

When right of way is not enough

Most people would agree that it is usually preferable to own the access to your property but this is not always possible.

There are down sides to owning your own access, such as the costs of maintaining and repairing it and preventing trespass, so when owning the access is not possible the next best option is to be granted a right of way over an access that is owned by a third party.

The extent of the right of way is enormously variable and depends on what was granted at the time the right of way was given. For example, it may give you access on foot only or with vehicles or animals, for agricultural purposes, for all purposes or for access to and from a particular property.

Most modern farm machinery is much larger and wider than it was years ago, making some rights of way less than adequate. In a recent case (Oliver v Symonds) the question of the extent of the right of way arose and whether it included an implied right to overhang onto adjoining land.

In every case the starting point would be to examine the original grant of the right. This has to be looked at as if at the time of the grant and for the original purpose. Even if the right granted is not fit for purpose it might be interpreted as having additional flexibility that will allow an implied right. In the case of Oliver v Symonds, which was a lengthy and costly dispute, the court decided that the size of modern farming equipment was not a reason to imply an extension of the right of way.

The case shows that it is impossible to envisage every use that might be required in the future, especially with the amount of diversification on farms today. Make sure you are aware of the extent of your right of way and, if you have any doubts, contact us for advice at an early stage.

Disputes between neighbours can be particularly difficult and expensive. For this reason, we take the view that litigation should be avoided unless all other options have been exhausted.

For more information contact Annabelle Savage on 01245 453866 or email annabelle.savage@birkettlong.co.uk

Forthcoming events

21 November
Essex Farming Conference
"Farmers - Custodians of the countryside - Fact or fiction?"
held at Writtle College

We also look forward to seeing some of you at the Prime Stock show in December and at the dinner in January

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Rural Business Law

NEWS AND ADVICE FROM BIRKETT LONG

Managed realignment

No landowner wants to lose land, but with the ability to recover loss of revenue and additional Higher Level Scheme (HLS) income, coupled with creation of dwindling habitats and new approach to coastline management, managed realignment no longer needs to be our Dunkirk.

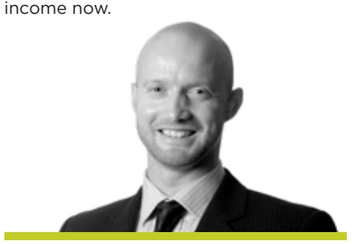
Generally the Environment Agency (EA) has a power, not a duty, to maintain coastal and estuary defences. Therefore if a cost/ benefit assessment proves damning, the authorities are entitled to withhold from carrying out further work and allow breaches. In Holland the consequences would be dire but here our lands largely rise away from the coast; consequentially a breach will rarely cause massive loss.

The continuing rise of agricultural land values strengthens the case for further protectionist coastal defence works, but labours against the Government's austerity agenda. The EA is reconsidering managed retreat in a number of coastal and estuary areas, especially as research suggests damage from tidal flooding could rise 200% over the next 50 years. The detail and legislation is considerable, but the headlines are:

- Sums offered in lieu of land lost are measured over a 20 year period based on consequential loss of revenue and may be capitalised
- Flooded land can continue to earn HLS revenue as it confers benefits of flood storage or habitat creation.

Disputes can be difficult and expensive. We take the view that litigation should be avoided unless all other options have been exhausted. To avoid significant scope for dispute with the Environment Agency, Local Authority or even adjoining landowners in the case of an inadvertent breach, we strongly advise coastal and estuarine owners to conduct a strategic review, carefully considering the position during the quiet moments (relatively!) of the winter months.

If no agreement is reached, the risk faced by coastal and estuary landowners is an inadvertent breach over time and is likely to receive little, if any revenue for consequential loss; whereas agreeing managed retreat terms now, guarantees income now.



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Make sure holiday lets are a business

In these difficult economic times, our farming clients are often looking for ways to diversify their businesses.

Many farms have cottages that used to house farm workers and now stand empty. The cottages may be in idyllic surroundings and are often a very attractive proposition for those who would like a break from city life. All of these factors mean we are seeing a growth in farmers who are branching out into holiday lets.

Although holiday lets are run as a business, the Revenue changed its guidance a few years ago. It has been taking a tough stance, stating that unless significant additional services are provided, over and above basic laundry and cleaning, then such lets do not qualify for the valuable Business Property Relief (BPR) on death. Essentially, the Revenue placed holiday lets in the same category as buy to let or other investment properties and therefore denied them relief. Without this relief, the value of these properties could attract Inheritance Tax (IHT) at the current rate of 40%.

The recent case of Pawson deceased showed the Court taking a different view to the Revenue. The case is close to home for many of us as the holiday let in question was in Thorpeness, Suffolk. Mrs Pawson owned a one quarter share in the property, which could accommodate eleven people and had access to the beach. Whilst the family occupied the property for three weeks of the holiday season, they paid rent for doing so; at other times it was rented to holiday makers in the normal manner.

By the time of her death, Mrs Pawson did not personally attend to the upkeep of the property but employed a cleaner and a gardener. The property was fully furnished and other items such as a telephone and bed linen were provided.

The Revenue sought to say that the property was an investment but the court was dismissive of this idea, noting: "We have no doubt that an intelligent businessman would not regard the ownership of a holiday letting property as an investment as such and would regard it as involving far too active an operation for it to come under that heading."

The result, therefore, is positive for the tax payer. It will certainly be worth claiming Business Property Relief on holiday lets as it could potentially result in 100% IHT relief. How can you give your claim the best chance of success? The key is in the phrase "active operation". The more services that are provided the more likely the claim will succeed. The holiday let in the case cited here was described by a judge as "a serious undertaking, earnestly pursued".

Executors will need to show that services provided were over and above those needed for the bare upkeep of the property as an investment. Rather than simply providing a shell for another person to use as their own house, a holiday let would offer additional services such as phone and television, clean bed linen, hot water and furnishings. Owners should also actively advertise the holiday let. If this is done, the executors of an estate will stand in good stead to pursue a successful claim for relief. Although each case will turn on its own facts and the Revenue is likely to appeal, for now the taxpayer can take heart in this recent victory.

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Bare essentials

Growing your opportunities in today's climate

The 2012 harvest has been challenging for our farming clients who faced drought conditions earlier in the year followed by a very wet spell that started within minutes of the introduction of a hose pipe ban.

Yields are down across the UK (15% or more in some areas) but East Anglia has fared better than most and a heat wave in Russia and drought conditions in the US have led to global shortages and increased wheat prices.

We are confident that our clients, with good land and a more stable climate than most for growing arable crops, are well placed to prosper in the coming years, particularly with a dynamic younger generation looking for opportunities to develop their businesses.

For more details about developing your business contact David Wybar, head of our rural business and real estate team, on 01206 217312 or email david.wybar@birkettlong.co.uk

Meet the team

Annabelle Savage

Annabelle specialises in agricultural property dealing with sales, purchases and management of farms and estates. She advises on tenancy issues such as succession and retirement, preparing farm business tenancies, land registration at the Land Registry, re-financing, overage agreements, agri-environmental schemes and farm cottages, etc.

Coming from a farming background, Annabelle is a fellow of the Agricultural Law Association. She also sits on the Essex Agricultural Society Council and on the Game and Wildlife Conservation Trust committee for Essex. Annabelle is a member of Suffolk Agricultural Association, Country Land Association, Hadleigh Farmers' Agricultural Association and Tendring Hundred Farmers Club.

Having studied pharmacology at Newcastle University, Annabelle went on to do a law conversion course at Northumbria University before completing the LPC at the College of Law in York.

Annabelle completed her legal training and joined us as a member of the rural business team at Birkett Long in 2008.

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