Welcome to our New Year agriculture e-brief.

And here's to a productive and prosperous 2013 for all our agricultural clients and contacts.

2013: plenty of hazards along the way...

That may be easier said than achieved. 2013 looks as if it could be a challenging one for farms and estates in England, with plenty of hazards along the way to ensure a bumpy ride. From the impacts of last year's relentless rain to the outcome of this year's CAP reform negotiations, uncertainty certainly dominates the farming landscape.

So we've aimed to be constructive in this e-brief. Take a look at our *Two to do in 2013*. And be sure take advice from your accountants on how to make the most from the welcome – if short-lived – increase in the Annual Investment Allowance. Following requests, we've also included a brief introduction to pre-nuptial agreements.

And, while you're in resolution mode, don't forget to book your place at our **"Down on the Farm: Partnerships, Trusts and Getting it Right"** seminar on 13 February. Looking at the list of those already booked in, it promises to be a lively session with plenty of questions and comments from the floor.

We'll be at **LAMMA** on 16-17 January. Come and say hello at Stand 840 in Hall 8. And some of the team will be at the **NFU conference** on 27 & 28 February. Again, come and introduce yourselves if you catch sight of a Roythornes badge!

Failing that, there's always virtual contact. We have a new Roythornes Agriculture Team **twitter** account for sector updates and exchanges. Follow us here.

Vember Mortlock, Head of Agriculture

In this edition

CAP Reform: delays and dilemmas

Our full CAP Reform Winter Update, published at the end of December, is here.

The main focus of our update is the uncertainty created by the delay in agreeing the basic shape of reforms.

Nonetheless, looking at the **draft legal texts** produced by the Council, and the compromise amendments agreed by the Parliament's Agriculture Committee, the following features look likely to find their way into the final **direct payments** package:-

- the possibility for existing payment entitlements to carry through to the new scheme in England;
- if entitlements are not carried through, more flexibility regarding the 'qualifying' years needed for an allocation of new basic payment scheme entitlements;
- the ability for qualifying farmers to transfer land and the right to receive entitlements to more than one farmer ahead of the first application date of the new scheme;
- on the **active farmer** question, the non-mandatory introduction of a negative list (what is not an active farmer) rather than a complex and administratively burdensome calculation based on percentages of direct payments in relation to total business turnover;
- inclusion of exceptional circumstances/force majeure provisions in relation to the national reserve;
- progressive capping of direct payments above a certain threshold (€150,000?).

Having said that, there is plenty of ground still to cover, and the Council has stressed repeatedly that *nothing is agreed until everything is agreed*. That leaves plenty of scope for last-minute surprises.

Owners and managers of farm businesses need to proceed cautiously, particularly where restructuring and purchases or expansion are planned. Although there seems to be a head of steam behind the idea of entitlements in England being carried through to the new basic payment scheme, it is not a done deal until:-

(a) it is included in the final regulation, and
(b) a decision to take up that option is announced by Defra.

So, even if we have the general shape of the new scheme in the form of an agreed regulation in June 2013, the finer details will still be unclear. Some will be left to implementing regulations which rarely arrive until some months after the main regulation is adopted. And some decisions will be left with member states to take, usually by 1 August in the year before the new scheme starts.

It is certainly crunch time for those setting up **new businesses**. Should they be set up ahead of May 2013, ready to make a first claim as a new 'farmer' under the Single Payment Scheme? There are arguments both ways. There may be pressing reasons, quite apart from the single payment scheme, for a new business to be set up and make its first claim. Succession planning, death and divorce may overshadow concerns about the shape of the new scheme. In that case, farmers may just have to 'take a view' following advice. On the other hand, if there are no pressing reasons for change, it may be wiser to wait for agreement to be reached.

Anyone planning to expand, re-structure or set up a farming business should make sure they take advice on the possible implications. In the first instance, speak to Julie Robinson or to your usual contact.

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Two to do in 2013

Yes, they are office-based. And yes, they involve their fair share of paperwork. So they might not be everyone's idea of a fun way to spend the day. But keeping your Section 31(6) rights of way deposits/declarations in order, and sorting out what the green deal means for any farm cottages you have could save cash, and a lot of hassle, further down the line.

Dare to declare

Under Section 31(6) of the Highways Act 1980, landowners, tenants for life and trustees can deposit a map and statement with the local authority outlining the land they own and highlighting the public rights of way that cross it.

This is a well-known mechanism that offers **protection from routes being claimed as public rights of way** through public use following the deposit.

The **weak link** in all this is that in order to maintain the protection, landowners need to lodge a **statutory declaration** within 10 years from the original deposit (or within 10 years of each statutory declaration). The statutory declaration confirms the original intention of the deposit and map (or highlights any further ways that have been dedicated) and maintains their effectiveness for the next 10 years.

2012 saw yet another public footpath case in the High Court*. A developer's plans to build sheltered housing on a plot of land were held up when an application was submitted to the county council claiming a public right of way over part of the land. One of the questions at issue was whether there was **sufficient evidence that there was no intention to dedicate the highway** during the 20-year period of usage on which the claimants based their claim. A Section 31(6) deposit – followed by 10-yearly declarations – would have prevented the claim having to be fought, with all the attendant costs and delays.

So, check your records. Make your deposits and keep your declarations up-to-date.

**Kotegaonkar v SofS for EFRA [2012] EWHC 1976 (Admin)*

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Go green in 2013

The Government's **Green Deal** is up and running.

Householders will be able to sign up to finance plans from 28 January, as will landlords and tenants in the private rented sector. There is even a first-come, first-served cashback scheme to encourage early uptake; that, too, will be available to residential landlords and tenants as well as householders.

The basic aim of the Green Deal, the Government's flagship energy efficiency initiative, is to **remove the up-front costs of energy efficiency measures**. The driving principle is that improvements to properties pay for themselves through the savings that result.

To achieve this, the Green deal involves a pay-as-you-save financing mechanism which is available from accredited Green Deal providers. The liability for repayment of the Green Deal financing will attach to the property's energy bills (and will fall on the person who is liable to pay the bill).

How do I get Green Deal finance?

Make sure:-

1. the energy efficiency measure you are planning is eligible (a Green Deal assessor will advise on this);
2. it is suitable for the property concerned (again, the assessor will decide this);
3. it meets the golden rule (i.e. that the resulting savings in gas and electricity bills will pay for the improvements).

The Green Deal will not be for everyone. But it is worth getting to grips with the detail and seeing whether it stacks up in your own circumstances. Landlords may be approached by residential tenants and will – eventually – be prevented by legislation from unreasonably refusing consent to make energy efficiency improvements. At the same time, the introduction of minimum energy efficiency levels in parts of the private rented sector from April 2018 makes this a good time for landlords to take a serious look at what the Green Deal offers.

For further information, a sensible first port of call would be the **Energy Saving Advice Service** on 0300 123 1234.

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2013 Finance Bill brings good cheer (for some)

Annual Residential Property Tax

ARPT is chargeable on non-natural persons (NNPs) holding UK residential dwellings valued at over £2 million. It is set to apply to dwellings owned on, or acquired after, 1 April 2013.

We had raised concerns in our Michaelmas E-brief about the potential effects of this provision on residential farm property held within corporate structures (e.g. where farm business partnerships include a company as partner). However, the bill will introduce a relief for situations where a high-value farmhouse that would otherwise have been caught by the ARPT is occupied by the farmer who farms the associated farmland full time, and the farmhouse is 'of an appropriate character'. That relief, rather than the tax itself, is the reason for good cheer.

Given the track record on 'character appropriate' disputes when it comes to farmhouses and APR, there is a good chance we may have plenty to report on in due course as and when HMRC challenges ARPT relief claims.

Annual Investment Allowance

For farming businesses, the increase in the annual investment allowance (AIA) is particularly welcome. It will be raised to £250,000 for a period of two years from 1 January 2013.

Check with your accountants how best to manage purchases to tie in with the year-end of your own business.

Remember, too, that AIA cannot be claimed by partnerships in which there are trustee or corporate/company partners. Depending on the short-term investment plans of a particular business, those who have plans to introduce a company into their farm partnership (for otherwise very good reasons) may need to take advice on timing or find a different route.

Roythornes has a wealth of experience advising farming and estate clients on the advantages and disadvantages of different legal structures. Do contact us if you would like to review your affairs. A new year is as good a moment as any!

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What you need to know about pre–nuptial agreements

By Victoria Hope

We are regularly contacted by individuals who are contemplating entering into a pre-nuptial agreement with their future spouse. When a party has been through a previous divorce they can be anxious to protect their position the second time around. Pre-nuptial agreements are also particularly useful where a party wishes to protect their business assets, or any assets which they stand to inherit in the future from family members.

A pre-nuptial agreement will regulate the financial claims arising out of the breakdown of a marriage. The agreement should address all of the potential matrimonial issues including the position regarding maintenance payments, division of the parties' pension provision and also the position regarding the ownership of the matrimonial home.

At present the Court does still have the jurisdiction to vary the terms of a pre-nuptial agreement. If, however, the agreement follows certain requirements and produces a fair outcome it is likely that it would be upheld. There are a number of key features to an acceptable form of pre-nuptial agreement. These include: -

1. Both parties will need to be independently represented.

2. Both parties will need to make full and frank disclosure of their personal and financial circumstances before the agreement is executed.

3. The agreement will need to be executed in advance of the marriage. Good practice states that this should be executed at least 21 days before the date of the intended marriage, but in any event the sooner the better.

4. The agreement must provide reasonable financial provision for both parties in the event of a breakdown of the intended marriage. The objective at all times is to provide for a fair outcome.

The agreement will also need to be reviewed if there are any material changes in the parties' circumstances, for example, if a child is born. Most nuptial agreements include a review clause which will regulate this issue.

If a couple is already married, then it is also possible to enter into a post-nuptial agreement regulating the financial position should their marriage break down. The requirements for a valid post-nuptial agreement are similar to those for a pre-nuptial agreement.

At Roythornes we have an experienced team of lawyers who are skilled at dealing with both pre and post-nuptial agreements. If you need any more information or would like to arrange a meeting with one of the family team then please do not hesitate to contact us.

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When "Trust me, I'm a Trustee" is not enough

Some of you may have been following the long-running legal battle between Philip Howard and his father Sir John Howard-Lawson over proceeds from the sale of the Corby Castle estate in Cumbria. Sir John sold the estate in 1994 following the bankruptcy of his son.

In the latest judgment*, Mr Justice Norris had to decide whether Sir John had exercised undue influence over his son Philip in connection with a variation of trusts that took place in 1980 and with multiple breaches in the administration of those trusts. Philip's contention was that he was unduly influenced and, as a result, had been swindled out of his rightful inheritance.

The intricacies of trust law feature little in the case; much of the judge's work was to decide the facts. But two points will be of interest to those who are trustees or beneficiaries of trusts.

Philip Howard was just under 18 years old when he was first approached by the trustees with a view to varying the will trust of which, as the tenant in tail male in remainder, he was a beneficiary. His contention, over thirty years later, was that he was not given the necessary independent advice and was, in effect, bullied and coerced into signing disentailing and powers deeds once he reached his majority. These, he argued, put him at a disadvantage and enabled his father – with the connivance of the trustees and the trust's solicitor – to swindle him out of what was rightfully his.

The trustees had taken Counsel's advice on what had to be done in order to effect the planned variation and Counsel had advised that it was "*essential that he [Philip] be advised by Counsel before putting his name to any arrangement: otherwise there must clearly be a risk that if it is disadvantageous he will, on reaching a more mature age, be able to set it aside as an agreement made while he was subject to the influence of his father*".

As a result the **trustees were careful to ensure that the young Philip was advised by independent Counsel** both face to face and in writing and that Counsel's suggested amendments to the powers deed (aimed at safeguarding Philip's interests) were adopted. Their action in doing so – along with a lack of any contemporary evidence that Philip was reluctant to sign the deeds – led the judge to conclude that the evidence "*fell far short of what was needed*" to make out an undue influence claim.

The second point is about **delays in bringing claims to court**. Mr Justice Norris commented on more than one occasion in his judgment that even if the facts had favoured Philip's case (and, on almost all points, they did not), there could be no question of going back and re-writing the relevant agreements on more equitable terms. It was simply too late; the trust settlement had long come to an end and the doctrine of laches would put the claim out of Court. (The doctrine of laches basically says that delay in pursuing an equitable claim or remedy may result in the relief or remedy being lost.)

Summing up:-

- Trustees should make sure that young or otherwise immature and inexperienced beneficiaries are fully advised independently before they agree significant changes to settlements;
- Anyone with a claim should bring it in good time – the longer a claim brews, the less likely it is that things will be able to be put right however much equitable considerations suggest they should be.

* *Howard v Howard-Lawson [2012] EWHC 3258 (Ch)*

Clients and professional advisers interested in hearing more about the role of trustees and the governance of trusts are invited to attend our "*Down on the Farm: Partnerships and Trusts and Getting it Right*" seminar on Wednesday 13 February. Full details are here

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Farming family feuds: it's all about the documents

By Paul Hogarth-Blood

Anecdotal evidence gathered from professionals suggests that the number of disputes arising within farming families is rising consistently year on year and this is supported by the number of cases in our offices.

Many believe that the increase is occurring because of rising farm land values and, in a time where other areas of the business world are suffering, perhaps because a rosy view of farming is being taken by non-farming members of the family who work elsewhere but have a "sleeping" interest in the business.

There is no such thing as a typical case, but often clients experience problems with shared decision making and differing views about the direction to be taken. But when a difference of opinion escalates into a dispute, the starting point will almost always be the documents. The accounts, articles of association, shareholders' agreement, trust deed, partnership agreement, tenancy agreement, Wills of former business members and other documents all come under scrutiny, sometimes line by line. The fees for having these documents drawn up by experienced professionals is, all too often, an expense that the parties originally considered an unwanted cost.

In the case of a Partnership, the Agreement is critical because it must work with other documents. Difficult times should be contemplated and clauses dealing with the: expulsion of partners; provision of a voting structure; selection of a method of confidential dispute resolution; and processes for dissolution and winding up can all be considered and agreed before the (new) business relationship is commenced. Also, provided that it is within the bounds of any existing constitution, the partners can agree to vary their arrangements (using a Supplemental Partnership Agreement) whenever they can all agree,

In the case of a Private Limited or Unlimited Company, it will be worth reviewing the Articles of Association and, if necessary, considering Directors' Service Agreements, Shareholders' Agreements or plain amendments to the Articles. There may be tax consequences, but sometimes they can be to preserve or capture an advantage which was not known before. Issues to consider (for each class of shares if there is more than one) include: voting rights; pre-emption rights on share transfers; dividend policy; and director controls.

Many readers will have children who are returning to farm or getting involved in running the Estate. How many of them ask about how their involvement will be put on a formal legal footing? Many rely on guiding words of wisdom from an *éminence gris* and promises from siblings but, for what is at stake, a formal agreement really should be drawn up.

We firmly believe in the saying "where it is not necessary to change, it is necessary not to change", but where change is necessary, we will be happy to advise.

Contact Paul Hogarth-Blood in the first instance if you would like further information about any points raised in this article.

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On notices and notes

We have been involved in a number of landlord/tenant cases where the question of notices – and whether they were valid – has figured as a central issue.

If there is a form of notice prescribed by the relevant regulations or governing act, a notice in that form should be used. If the prescribed form contains notes which inform the other party about their rights, time limits for replies etc., then the notes should be served with the form. Failure to do so risks invalidating the notice.

If an agent serves a notice on behalf of a landlord, naming the landlord on whose behalf it is sent and stating the fact he is acting as agent can be fundamental. Not doing so could be fatal.

Getting dates and periods right can be important, particularly when exercising an option to break or serving a notice to quit. In other instances, following the Mannai case, getting dates wrong might not vitiate a notice.

Not every omission or deviation from a standard form will invalidate a notice, but – as far as possible – those drafting them should ensure that they are complete, correct and compliant with governing legislation.

In other words, approach notices with an abundance of caution. If in doubt, take advice.

Contact Alan Plummer or Caroline Gumbrell for advice on landlord/ tenant matters.

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Get in Touch

This Roythornes Agriculture e-brief has been prepared by Vember Mortlock, Julie Robinson and Paul Hogarth-Blood.

If you would like to comment on any of the items or to ask us to cover anything in particular in a future edition, please let Paul know PaulHogarth-Blood@roythornes.co.uk, or call him on 01775 842 515.

We have a Roythornes Agriblog too. Check in to see the latest news and comment from our agriculture team.

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