**Welcome to our June agriculture e-brief.**

There seem to be even more changes than usual to the policy landscape in which farm businesses operate. It is not just the upcoming reform of the CAP that needs to be factored in, but changes to employment, agricultural re-housing, development rules and taxation.

So there is plenty to talk about at the shows this summer. We have a stand at Cereals; do come and meet the team, and sample the best cakes on the showground.

It will be the first Cereals event for Elizabeth Young (left) our new head of Private Client; please pop along and introduce yourselves! We are delighted Elizabeth has made the decision to join us; she brings a wealth of experience and technical expertise to the role.

It will also be the first Cereals for Julie Robinson in her new role heading up our Agriculture Team. I am delighted that Julie has stepped up to oversee our work in this sector; it is at the heart of so much of what Roythornes does. The combination of her experience and enthusiasm makes her the perfect choice.

I look forward to seeing you at Cereals or at the Lincolnshire Show. If we miss each other, all the best to everyone for a successful harvest.

**Vember Mortlock**

## In this edition

## Taxation of farming partnerships – time to get serious

By Paul Hogarth-Blood

As we have said in earlier editions of this Briefing, this year's Budget announced that HMRC has been asked to consult the taxpayer about the taxation of partnerships. On 20th May, HMRC published some serious documents.

If changes to the law are enacted in line with the consultation proposals, it could lead to many farming businesses having to look again at their business structure. Ideal timing with reform of the CAP! Sadly, the consultation document does not specifically mention farms or estates.

For several decades it has been common for farms and estates to trade as partnerships involving trusts and, in increasing numbers, a company or two. The Chancellor appears to believe that Income Tax is being sheltered by the partners deciding to credit the corporate or trust partner(s) with more partnership profit compared to the individual partners, with the aim of avoiding the individual partners having to pay Income Tax.

HMRC appears to be threatening commercial freedom and this has led some to suggest that the proposed changes potentially conflict with Human Rights. HMRC appears to be having a closer look at partnership taxation because of the aggressive tax planning taken by a few which, whilst often within the law, pays little if any attention to morality. For example, the financial services and fund sectors have been identified as problem areas where HMRC suggests that structuring has taken place mainly with the aim of avoiding tax. It has always been crucial to have a commercial justification for a structure, although it appears that HMRC is firming up its views about how much commercial justification is enough.

Many participators in the aggressive planning have responded to the government by saying "if you're not happy then change the law". Now that HMRC's consultation has emerged, it may be that the law will indeed change. Amending the statutes and waiting for case law to fill in any gaps is a traditional way for the law to develop in England. Sadly, it can often mean prolonged uncertainty which cannot be encouraging for business.

We are actively involved with cross-industry groups which are making representations to HMRC to highlight the potential effects of reforms on farms and estates. Over the coming months, we will continue to try and ensure that genuine commercial arrangements set up for good business reasons are not caught by any new provisions.

*Keep an eye out for more information. Any client who is concerned should contact their usual adviser, or any member of the private client team.*

## Hanson*: farmhouses and APR revisited

"Beware exercises in legislative archaeology."

That was the message from the Upper Tribunal as it dismissed HMRC's appeal against the first tier tribunal decision in *Hanson*, reported in our e-brief a year ago.

HMRC had sought to draw on definitions from old estate duty, capital transfer tax and initial IHT regimes to establish that there must be common ownership – and not merely common occupation – of the farmhouse and the agricultural land by which the appropriate character of the farmhouse is judged.

The Upper Tribunal accepted that there has to be some nexus which connects "in a relevant way" the agricultural land with the cottage, farm building or farmhouse that is being assessed for APR, but was unconvinced by HMRC's arguments. It decided, instead, that the farmhouse and the land to which it is of a "character appropriate" must be in the same *occupation* but not necessarily in the same ownership.

Although this is an instructive and useful decision, it also serves to remind us that HMRC are prepared to invest significant resources in challenging claims where they have doubts.

*Roythornes is well known for its IHT planning expertise and receives a steady stream of referrals from accountants and agents. We are also experienced in dealing with HMRC challenges. You can find details of our private client team here.*

*[2013] UKUT 0224 (TCC)

## Discretionary trusts – starter for ten

By Paul Hogarth-Blood

Even though it depends on the type of discretionary trust and the circumstances, it is more likely than not that a trust falls into what the statutes call "the relevant property regime".

The relevant law, which could look more like a mathematics textbook, was ushered in several years ago following some swift consultation and attention from the government of the time.

If the relevant law applies to a trust, it means that on every tenth anniversary of the trust's commencement the trustees potentially need to pay up to 6% Inheritance Tax charge (although the exact rate depends on the somewhat obscure calculations mentioned above). To date, the process of paying the tax, or more importantly finding out from HMRC whether the tax needs to be paid, and at what rate, has been bothersome for many more diversified trust funds. In many cases the charge will be waived because of the Inheritance Tax reliefs available for Agricultural and or Business Property or because of adjustments that take account of the Nil Rate Sum (currently £325,000) and other bits and pieces.

In encouraging news, on 31st May HMRC launched its consultation on *simplifying* ten year anniversary charges. Many trustees have found it hard to decide whether it is best to make a distribution well before a ten year anniversary, just before, just after, a few months after or not at all. Hopefully, some clarity will be forthcoming which will help advisers and clients alike.

Unfortunately, the consultation could mark the start of yet another round of disappointing reforms to trust taxation. A central proposal is the spreading of a settlor's single Nil Rate Band across all of his or her trusts. The suggestion is that this

will simplify the calculation of the anniversary charges, but it could have serious real money consequences for clients with multiple trusts where assets are unrelieved, including those who have entered into so-called 'pilot trust' planning.

For all trustees, it is well worth dusting off the trust deed, noting when it started, putting the ninth or an earlier anniversary in the diary with a note to review matters and find out if a tax charge is going to be due. Trustees are obliged to know this sort of information anyway and most do, but they are not necessarily obliged to budget for the tax charge. A pro-active approach to trust administration is essential, especially where a fund comprises illiquid assets such as valuable art or non-relieved property where the settlor would be horrified if all or part of the fund has to be charged to a lender or, in the worst case scenario, sold to pay the tax.

Roythornes manages the tax affairs and administration of many millions of pounds worth of assets comprised in trust funds and advises people making trusts, trustees and beneficiaries throughout the lifespan of trusts. Often assets with the highest growth in value are acquired by a chance opportunity, but why leave proper trust administration to chance? Getting it right from the start and maintaining proper administration is crucial.

*For further advice on taxation and trusts, contact any of our private client team.*

## CAP reform: *pick n mix* or hard-boiled?

It is unthinkable that we should publish an e-brief without an article on the current round of CAP reform. But there is little point in saying anything at this stage; we – like everyone else – await news of the hoped-for final agreement two weeks from now. In the meantime, the tensions between the Commission's hard-boiled approach and the Council's preference for *pick n mix* are all too clear. We blogged about it recently.

## Life after the Agriculture Wages Board: A Seminar for employers

Date: 10 September 2013
Time: 8:15 - 10:00
Venue: Roythornes Offices, Enterprise Way, Pinchbeck, Spalding PE11 3YR

A breakfast seminar providing practical guidance on what the abolition of the AWB means for employers, with a particular focus on the arable and horticulture sectors. It will cover the position in relation to both new and existing workers.

We are expecting demand for the seminar to be high. To express your interest and reserve a place, please email us.

## Development unblocked?

That might be too optimistic a spin on some of what has emerged recently in legislation and elsewhere. But there are serious moves afoot to kick-start growth by loosening some of the ties that have been holding development back.

### Permitted Development

Although not allowing direct change to residential use, nonetheless the new permitted development rules increase farmers' options as regards the conversion of agricultural buildings to various commercial uses, with less cost, less paperwork and less delay.

There is some small print worth bearing in mind:-

- buildings must have been in agricultural use on and since 3 July 2012;
- even for small changes under the new GPDO, farmers need to notify their local planning authority;
- for units of between 150 sq. and 500 sq. metres, an application to the local authority should be made to see whether prior approval regarding certain impacts (on transport, noise, contamination and flood risk) will be needed;
- there is a 500 sq. metre threshold, above which the GPDO does not apply;
- any external alterations or additional development outside the building may still need consent in the usual way;
- listed buildings and scheduled monuments are not eligible.

### Town and Village Greens

As well as making headline changes to the planning regime, the Growth and Infrastructure Act 2013 has introduced some welcome changes to town and village green registration rules in England. When fully implemented, these will make it more difficult for those who seek to register land as a town or village green in order to block development.

The changes are as follows:-

- the period for registration following 20 years recreational use "as of right" has been cut from two years to one;
- landowners will be able to deposit a statement and map to bring any "as of right" recreational use period to an end;
- registration will be restricted where a trigger event has taken place.

Trigger events are:

- publication of a planning application;
- a draft or full development plan document or proposal for neighbourhood plan which identifies land for development;
- publication of an application for an order granting development consent.

The trigger event provisions are already in force. The other two provisions will take effect by the end of this year.

## Restrictive Covenants

Restrictive covenants can rear their heads and block development even when planning consent has been granted. However, such covenants are not necessarily binding for ever and in every circumstance, as two recent cases demonstrate.
In the case of *Re Brainshaugh House*, John and Elizabeth Coombes wanted to redevelop property which had been part of Sir Anthony Milburn's estate. A number of covenants restricting development had been put in place when the couple bought the property in 2002, for the benefit of Sir Anthony, his wife and descendants. Sir Anthony at that time still owned the rest of the estate.

Sir Anthony sold the majority of the estate to unrelated parties in 2008. After obtaining planning permission for their planned redevelopment, Mr and Mrs Coombes applied to the Upper Tribunal (Lands Chamber) under s84 of the Law of Property Act 1925 to have the restrictive covenants discharged on the grounds that they were obsolete. For a covenant to be deemed obsolete an applicant needs to show that it is no longer possible for it to serve its original purpose, because of changes in the character of the property or the neighbourhood, or other circumstances which the tribunal may deem material.

Despite a previous decision interpreting "change of circumstances" to include only physical changes and not changes in legal status, the Upper Tribunal in *Re Brainshaugh* House agreed with the applicants that a change in legal status – namely the sale of most of the remaining estate to unrelated parties – was a material change of circumstances. Seven out of eight covenants were discharged; the one remaining covenant was modified in return for compensatory payment.

A second case, *Cosmichome Ltd v Southampton City Council*, dealt with the payment of overage on the grant of planning permission. The city council had sold some land to the BBC for use as a television studio; the court was asked to decide on the enforceability of a clause which, although referred to repeatedly as a restrictive covenant, was in reality an obligation to pay money to the city council if planning permission for change of use from a television studio was granted.

The clause was expressly stated to be for the benefit of "*the adjoining and adjacent land of the Council*…." Hence the overlap with restrictive covenants, which must "touch and concern" neighbouring land held by the covenantee. Unfortunately for the council, it was unable – by any stretch – to establish that a change of use would have a negative effect on the neighbouring land which it owned. The court was robust in finding that, despite the terms in which the covenant was couched, it was about keeping the BBC on the site and extracting payment should the BCC try to move on.

Overturning restrictive (or purported restrictive) covenants is far from a foregone conclusion, and compensation to those with the benefit of the covenants is likely to be payable, along with the costs of the application. Each application will depend on its own facts, but these cases – and others – show that the tribunal and the courts are prepared to take a practical view when balancing the need for development against the rights of those who have the benefit of restrictions.

**Conservation covenants – a help or a hindrance?**

Looking at things through a slightly longer lens, we see conservation covenants being proposed by the Law Commission. Not everything the Commission consults on makes it onto the statute book, but there is a head of steam building behind the creation of a new creature of law, the **statutory conservation covenant**.

It is not immediately apparent how these long-term, binding and fully enforceable conservation covenants might facilitate development. But they can and will, if designed and promoted so that they are used within the planning system to help offset the harm to biodiversity that a particular development may cause.

Biodiversity offsetting is one way of compensating for harm; and conservation covenants can both secure offsetting measures and ensure that they are maintained even when offset sites change hands. That should give greater assurance to planning authorities, enabling them to be more confident about granting permission for development.

*Roythornes has unrivalled experience assisting its farming clients with planning,* development *and protecting their position. If you would like to discuss any of the above, call Julie Robinson in the first instance.*

## The AWB: gone but not forgotten

"The Agricultural Wages Board for England and Wales is abolished."

With those ten words section 72 of the *Enterprise and Regulatory Reform Act 2013* brings to an end almost a hundred years of agricultural wages board history. The first boards were set up in 1917 in tandem with the introduction of subsidies for cereals production.

The plan to abolish the board has not been without controversy (we blogged about it here), but the die is now cast and it only remains for the Secretary of State for Business Innovation and Skills to make the Commencement Order that brings section 72 into force.

We are led to believe that will happen before the end of this month, and that the current Agricultural Wages Order will be the last. This means that from 1 October 2013 ag and hort businesses will be operating in a new, AWO-free, landscape.

Just to give an idea of how something so apparently simple as removing a wages board can involve serious complexity behind the scenes, **over 60 amendments** to existing legislation are needed in order to remove provisions that relate to the outgoing wages regime.

### What are the implications for employers?

Agricultural employment – just like other sectors of the economy – will be covered by national minimum wage legislation, the working time regulations and other employment provisions that apply generally.

However, where existing workers are concerned, employers cannot simply ignore the old AWO terms. They should take seek case by case advice before amending

contracts unilaterally. Ignoring the general protection the law affords to employees could land employers on the wrong side of an employment tribunal claim. Businesses planning to take people on between now and 1st October may be able to build some flexibility into their standard contracts that takes the upcoming change of regime into account.

Where new, post-AWB employees are concerned, employers will be free to negotiate terms and conditions unbound by what many in the industry view as the outdated and sometimes rigid framework imposed by the old ag wages legislation.

### How does the new regime compare to the old?

Below are just a few of the expected differences between the old and new regime, although some or all of the existing AWO provisions may remain in place depending on legislative amendments and how they interact with current employment contracts.

| Element of employment package | Before 1st October 2013 (under the AWO 2012) | After 1st October 2013 (if no AWO is in place) |
|---|---|---|
| Overtime | Overtime rates are fixed by grade. | There are no specific statutory provisions requiring overtime to be paid at a higher rate. |
| Piece work | Hourly wages must not be below the min. hourly rate for the grade as set out in the AWO. | Employers must calculate and pay a 'fair' piece rate which is the same rate as the national minimum wage for a worker who works at just below the average rate. |
| Holidays | Holiday entitlements are defined on the basis of days worked each week (for workers who work 5 days a week a minimum of 35 days holiday p.a. inc. public & bank holidays is provided for). There are rules on how much holiday can be carried over from year to year, how much can be bought out etc. | Current statutory holiday entitlement of 5.6 weeks (28 days including public & bank holidays) applies. |
| Sick Pay | After 12 months' continuous employment agricultural sick pay is provided for. This is paid at the same rate as holiday pay for the worker's grade. Where absence is less than 14 days, there is no entitlement to sick pay for the first 3 days. | From 6 April 2013, statutory sick pay of £86.70/week is payable. The first 3 days of absence do not have to be paid. |
| Flexible workers | There are defined pay arrangements e.g. a premium for workers who do their weekly hours over 6 days. | The Part-time Workers (Prevention of Less Favourable Treatment) Regulations apply, protecting P-T workers against less favourable treatment compared to their F-T counterparts. |
| Accommodation offset | The maximum deductible is set out in the AWO and subject to National Minimum Wage regs (subject to a worker having worked a minimum of 15 hours in any particular week). | The offset rate for accommodation charges is £4.91/day (from October 2013). If an employer charges more than this, the difference is taken off the worker's pay that counts for the minimum wage. No 15-hour minimum applies. |

### Where and when can I find out more?

We are holding a "**Life after the Agriculture Wages Board"** breakfast seminar on **Tuesday 10 September 2013** in Spalding, Lincs. It is for employers in the arable and horticulture sectors and will offer focused, practical advice about how AWB abolition affects businesses. It will cover the position in relation to both new and existing workers.

We are expecting demand for the seminar to be high. To express your interest and reserve a place, please **email** us.

*In the meantime, if you have any questions at all about the implications of AWB abolition for your business, please do give Phil Cookson a call on 01733 898970.*

## When did you last see an ADHAC report?

You are unlikely to have seen many in the last few years. There are 16 agricultural dwelling-house advisory committees in England, available to advise local councils about the re-housing of certain protected occupiers (usually former farm workers). But according to Defra figures from 2008-2009, references to the committees have dwindled to very low levels.

Along with the Agricultural Wages Board, their abolition is now written into legislation. We understand that no further ADHAC applications will be possible after 30 September this year.

### What impact will abolition have on the re-housing of agricultural workers?

Farmers will still be able to ask local authorities to re-house a protected worker if they cannot provide suitable alternative accommodation and need the house for a replacement worker *in the interests of efficient agriculture*. But there will no longer be the right – as there is now – for the council or the parties involved to apply to an ADHAC for advice on whether the re-housing is in the interests of efficient agriculture which must be *taken into account* by the local authority.

That may mean a greater focus on those issues in a farmer's re-housing application; he or she may want to commission an expert report to assist the housing authority. Equally, authorities will still be able to seek advice, perhaps in the form of an expert appraisal or perhaps from an informal 'committee' made up of workers' and farmers' representatives. They will not, however, be bound under statute to take that advice into account in reaching their re-housing decision, and they will have to foot the costs.

In reality, given the pressure on social housing stock, applications to re-house former farm workers are a long shot, particularly where occupation began after 15 January 1989.

For the technically-minded, the possibility of a reference to an agricultural dwelling house advisory committee by local authorities, or farmers or protected occupiers in England has simply been cut from the relevant legislation (s28 of the Rent (Agriculture) Act 1976) by virtue of the Enterprise and Regulatory Reform Act 2013,

s72 ss(3) and (4). Once those subsections are brought into force, the Rent (Agriculture) Act will refer only to ADHACS in Wales. The Welsh Government is currently consulting on the future of its own committees.

*For advice on agricultural housing issues, contact Alan Plummer, Caroline Gumbrell or Julie Robinson.*

## "Down on the farm (2): stepping back, starting up and maximising returns"

Date: 22 October 2013
Time: 14:30 - 19:30
Venue: Cedric Ford Pavilion, Newark Showground

This seminar follows on from our well-received "*Down on the farm: partnerships and trusts and getting it right…*" seminar, in which we looked – among other things – at the story of *Jack and Jill and George Thomas's will*.

This time, with the help of expert consultants and agents, we will be considering the Trustees' options for their soon-to-be-vacant farm. How can they maximise their returns while ensuring that there will be an opportunity, now or in the future, for young Jack, one of the Trust beneficiaries. There will be mock Trustee's meeting "*Jack and the farming ladder…*" which will see Jack once again in search of the golden-egg-laying goose.

To reserve a place for you and your colleagues email Mark Dodds.

## Furnished Holiday Lettings: life after Pawson

By Neil Irvine

Now that the Pawson case has been put to bed, what do Furnished Holiday Letting ("FHL") owners need to be focussing on?

They might need to revisit the revised qualifying tests for FHL status which came into effect from the 6th April 2012. These new tests have to be met for both UK FHL properties and FHL properties elsewhere in the European Economic Area ("EEA"). All three tests must be met. They are as follows:-

(a) the FHL must be available for letting to the public as holiday accommodation for at least 210 days (it used to be 140 days) in a year (usually a tax year);

(b) the FHL must in fact be let as holiday accommodation to the public for at least 105 days (it used to be 70 days); and

(c) the pattern of letting should be such that periods of larger accommodation do not exceed 155 days during the year.

**Averaging and grace period**

For those FHL owners with a number of holiday properties, it is still possible to adopt an average rate of occupancy across all properties so as to qualify under the new

letting conditions. However, post 6th April 2012 it is not possible to treat UK FHLs and other EEA FHLs as one business for the averaging claim. In effect, two separate averaging claims will be needed.

For those FHL owners for whom the new tests are causing some difficulty, there is now a "grace period" which is available to supplement the letting condition. If lettings fail to meet the 105 day test, an election may be made in the first year in which the property fails to qualify as an FHL. The election can only be relied upon for a maximum of two consecutive years. The election allows a non-qualifying FHL year to be treated as a qualifying year if the FHL qualified in the previous year. This is a concession and it is only available where there was a genuine intention to let the properties in the relevant year. So, greater attention to the marketing of FHLs will be needed, not only to achieve the enhanced qualifying conditions, but also the concession.

The averaging and grace period elections should give FHL owners some time to adapt the marketing of their business to the new rules. The struggle to do so should be worth it, if only to benefit from the generous Capital Gains Tax reliefs available on a sale. It is worth noting that a qualifying FHL property will benefit from Entrepreneurs' Relief. So, on a sale, the CGT bill would be reduced to 10% rather than 28% on disposals within the lifetime allowance of Entrepreneurs' Relief, currently £10 million. (Remember, however, that ER must be claimed and it is easy to slip out of the qualifying conditions. It is important to consider the ownership of the property, the timing of the disposal and the question of whether the relevant criteria relating to withdrawal from the business, in this case holiday letting, have been met.)

*For further information and advice, please contact Neil Irvine in the first instance, on 01775 842 507.*

## Arbitration: good reasons for good reasoning

The legal point in *Compton Beauchamp Estates Limited v Spence* was important, but the decision was not actually focused on the underlying legal dispute which tested part of the Agricultural Holdings Act 1986. Rather, the judgment is a salutary tale for arbitrators who might, for whatever reason, be tempted to cut corners in the drafting of their award.

The arbitrator in *Compton* was given quite a roasting:

*"I consider that the standard of reasoning in this award was poor. It was in no sense a model for an award of this kind. The arbitrator could easily have given much fuller reasons and it is not obvious why he did not do so. It is not obvious why he was not prepared to be more helpful when he was specifically requested by the parties, after his initial award, to give further reasons. The arbitrator was no doubt appointed because he had expertise in carrying out rental valuations of agricultural land. The dispute before him involved his assessment of expert evidence on that subject. To reach his conclusions, he had to think through all of the points made by the rival experts. There should not have been any difficulty in him explaining more fully his reasoning on the important points in dispute. His approach has generated unnecessary suspicion and distrust on the Claimant's part."*

Many months after the original arbitration award and therefore after many months of uncertainty for the parties and further costs incurred making and defending the claim, the High Court upheld the arbitrator's award, but made their dissatisfaction clear:

*"This has placed a considerable burden on the court of informing itself by reference to the evidence and the parties' submissions of what the parties themselves are taken to know about the issues in the case.*

*If one is informed in that way, then save in a minor respect the reasoning in the award, although unimpressive, is just about enough to explain the conclusions reached."*

Many agreements include arbitration as the method of dispute resolution if things go wrong. The attraction of confidentiality and often-made assumption that arbitration will be quicker (and potentially cheaper) than going to court makes it an attractive option. It behoves those of us who are appointed to arbitrate or act as independent experts to ensure the parties in dispute can follow the reasoning behind our award and understand how we came to the decisions we did.

*For further information in relation to arbitration or contractual disputes, contact Alan Plummer on 01775 842551.*

## 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 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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