Welcome to our New Year agriculture e-brief.

We wish all our clients and contacts a productive and prosperous 2014.

The Oxford Farming Conference has kicked the year off with a debate about the kind of farm structures the industry will need if it is to make the most of growth opportunities, genuinely creative arrangements which allow both new blood and outside finance into the sector. At the same time, the importance of the 'family farm' was recognised; far from being threatened by new structures, the resilience of family farms will keep them at the forefront of progress.

Roythornes at Lamma 2013

In a timely move, then, family businesses - and how to protect farming assets - are the focus of our next ***Down on the Farm*** seminar on 18 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 don't have many places left so email us as soon as you can.

Ahead of that, we'll be at **LAMMA** on 22-23 January. Come and say hello at Stand 7103 in Hall 7.

And some of the team will be at the **NFU conference** on 25 & 26 February. Again, come and introduce yourselves if you catch sight of a Roythornes badge!

Julie Robinson,
Head of Agriculture

In this edition

Protecting your assets: 4 to do in 14

Below are four "*I know I should but*…" things that tend to get put to the bottom of the pile. Seize the bull by the horns in 2014 and protect your assets.

1. Do a Landowner Statement

Protect yourself in advance from tactical town and village green claims in the event your land is earmarked for development. Statements are good for 20 years (they need to be renewed within that period) and bring to an end any 'as of right' periods of recreational use.

Do your Highways Statement at the same time and on the same form. As from 1 October 2013 sworn statutory declarations are no longer necessary.

Contact Sarah Whitehurst (01775 842508) for further information.

2. Check your Shooting Agreements

Protect your position. We have seen a number of shooting leases where the landowner has inadvertently granted a business tenancy with a right of renewal because the procedures for contracting out of the Landlord & Tenant Act 1954 have not been complied with.

Watch too for TUPE and housing consequences of changes in gamekeeper arrangements.

If we can help with agreements, get in touch with Julie Robinson on 01775 842618.

3. Double-check official notices (e.g. about chancel repair/mineral rights)

Ask the party responsible for the notice to provide evidence. We have recently seen a 'manorial rights' notice removed once it became clear there was no documentation to support the applicant's claim.

It can be worth checking pre-registration deeds and documents. In a recent case, a landowner who received a chancel repair notice from the Land Registry was able to produce an old deed under which a predecessor had bought out ("compounded") the liability. There's a brief case study here.

If you have received a notice and would like advice on how to deal with it, get in touch with your usual Roythornes contact in the first instance. Alternatively, contact Julie Robinson on 01775 842618.

4. Lasting Powers of Attorney

For the last few years the uptake of Lasting Powers of Attorney (LPAs) has been steadily rising as people wake up to the prospect of incapacity (see Elizabeth Young's article below).

There are now two kinds of LPA. The first provides authority to your attorneys to make decisions and manage your **finances and property** if you are no longer able to do so yourself. It can be specific; you can limit an attorney's powers to particular

aspects of your affairs, e.g. just managing the farm/business/bank account. Or it can be general, leaving your attorneys to manage everything.

The second breed of LPA is of a more intimate nature. You can appoint attorneys to make decisions about your health care, medical treatment, where you might live, and ultimately about end of life treatment. They are big decisions, and are worth a family discussion.

As part of Roythornes Court of Protection offering we provide fixed quotations for the preparation of LPAs (including registration). We also advise attorneys about their ongoing obligations. In some cases we act as the attorney for clients who struggle to manage their own finances.

Where there is no LPA or EPA in place the alternative will be the Court of Protection and a full deputyship which can be unwieldy, expensive, and generally unsatisfying.

For more information about Lasting Powers of Attorney, and to arrange a visit, call any of the Private Client team.

CAP Reform: ducks in a row

Aside from the introduction of greening measures, one of the most significant changes in the new direct payment regime touches on what constitutes agricultural activity. Under the Single Payment Scheme, agricultural activity was not only producing crops and keeping animals etc., but also simply *maintaining the land in good agricultural and environmental condition*. This definition has now been dropped.

It has been replaced with what might turn out to be a more workable definition, particularly for field veg. and potato growers and for those who provide land to them for short-term cropping.

The Basic Payment Scheme defines agricultural activity as, among other things, "*maintaining an agricultural area in a state which makes it suitable for grazing or cultivation without preparatory action going beyond usual agricultural methods and machineries*".

A framework will now be drawn up by the European Commission. Based on that framework, Defra will fix criteria for the application of the definition here in England. So we are not home and dry yet; we need a pragmatic set of criteria from the Commission and the government that reflect the realities of rotational cropping, seasonal grazing and the role of long-term land managers.

Seminars

We are delighted to be joining up with the Game and Wildlife Conservation Trust for **two CAP Reform breakfast seminars,** on 27 and 31 March. The focus will be on the practicalities. On the legal side, we will be looking at how businesses can get ready for the new Basic Payment Scheme, focusing on business structures and particularly on short term cropping arrangements. The G&WCT will consider 'greening' options and measures farmers can put in place. Email us if you would like further details or to pre-register.

If you have any questions about the implications of the current reform, speak to your usual Roythornes contact, or Julie Robinson (01775 842618).

Farm partnerships and the TAAR trap

When the General Anti Avoidance Rule came into force this year, there were a few charming ingénues who thought it might herald an end to the era of continuous legislative tinkering by HMRC. They will be sorely disappointed, as a new targeted anti avoidance rule aimed at artificial profit allocation within partnerships emerged in the autumn statement. This raises the interesting question of what the point of the GAAR is if it is not going to be used, but that is a subject for another day.

The new targeted anti avoidance rule ("TAAR") aims to prevent what has become near standard practice in highly profitable partnerships, the allocation of profits earmarked for reinvestment to a corporate partner. Indeed, avid readers of the Roythornes Agri E-brief will remember that we discussed such a business structure in our Michaelmas E-brief last year.

The logic behind this kind of profit allocation is fairly straightforward. A company will pay only corporation tax whilst an individual will pay income tax, more than likely at the higher rate. Allocation of profits to a company thus preserves more money for the business in the short term. Of course, such a structure is not tax avoidance in the true sense since, on any distribution of profits from the company to individuals, there will likely be a further tax charge, so the advantage is usually one of timing only. Nevertheless, the arrangement has attracted the ire of HMRC, hence the new rule.

The draft legislation allows HMRC to reallocate profits back from a company to an individual where:

a) that individual has the ability to enjoy the profits of the company in question (directly or indirectly); and
b) it is decided that profit allocation to the company has been excessive.

This reallocation would make the profits subject to income tax on the individual, thus negating the tax saving by allocation to the corporate partner.

So what is excessive? In the draft legislation, an excessive profit allocation is one that exceeds the aggregate of a market rate of interest on capital and a fair arm's length price for services rendered by the company to the partnership as a whole.

In the most straightforward of cases, therefore, where a partnership contains a corporate member that is controlled by the partners and does nothing other than act as a warehouse for profits, the rule will certainly apply.

All is not lost, of course.

First, in many cases where a partnership has a corporate member, that member will exist for sensible, non-tax reasons (such as to act as a service company providing a vehicle for employing workers with the benefit of limited liability). In these cases, a fair arm's length price for the services rendered by the company will allow a sensible level of profits still to be allocated to the corporate partner without them being considered 'excessive'.

Second, the draft legislation does not just affect farming. It will also have a serious impact on large accountancy and other professional services firms which employ a mixed partnership model. The larger professional firms are almost certainly already lobbying hard for the dilution of the new measures. So we must wait to see whether they make it into the next Finance Act unscathed.

Roythornes has a wealth of experience in advising farms and estates about their legal structures. If you have any questions at all about the issues raised in this article, get in touch with your usual contact, or call Alex Keenan on 01775 842621.

Down on the Farm (3): divorce, family fall-outs and the farming assets

A Roythornes seminar for professionals, estates and clients

Tuesday 18 February 2014

Kingsgate Conference Centre, 2 Staplee Way, Peterborough PE1 4YT

3:30 – 6:30pm followed by buffet supper

Relationships are fundamental to good business, estate and land management. When things go smoothly, you hardly notice them. When things go wrong, it can lead to the break-up of the whole farming enterprise or worse.

This seminar is about how to protect farming and family assets in the face of relationship breakdown and conflict.

If you would like to pre-register for this event please complete our online form, or email us to reserve your place.

Distress and agricultural lettings

By Sarah Whitehurst

Distress has historically been used by landlords as a cheap and effective way of placing pressure on tenants when rent falls into arrears.

To exercise the common law right to distress, all the landlord need do is instruct a Certificated Bailiff to attend the premises and either:-

(a) collect the rent; or
(b) seize goods and hold them until the outstanding rent is paid by arrangement ("Walking Possession") or sell them at auction to recover the outstanding rent, any surplus being paid over to the tenant.

Under present law, there is no requirement for the landlord to notify the tenant of its intention or to apply for permission of the Court. There are stories of landlords waiting patiently until the tenant's crop is ready to be harvested before instructing a bailiff to attend the premises with contractors to distrain against the crop and sell it to cover the rent arrears.

After years of criticism (by both landlords and tenants) this ancient remedy of distress is to be abolished. It will be replaced by the **Commercial Rent Arrears Recovery** (CRAR) regime which will come into force on 6 April 2014. All landlords need to be aware of the implications.

The CRAR will only apply to purely commercial premises. That is a key change. So where rent arrears are due in respect of premises that are wholly or partly occupied

or let as a residential dwelling, including mixed-use premises (e.g. where the leased property includes a farmhouse), landlords will not be able to use CRAR. Landlords will, however, still be able to recover rent arrears through county court or bankruptcy proceedings.

The most controversial change is the obligation to notify the tenant at least seven clear days before using CRAR. The Court can order the notice period be shortened where it is satisfied that without such an order the goods are likely to be moved to avoid being taken control of. This is an unnecessary additional hurdle to what was once a cheap and effective self-help tool.

What else do landlords need to know?

1. Written tenancy:- CRAR only applies to a tenancy evidenced in writing. It can be used for written tenancies at will but not for licences to occupy.

2. Basic rent: CRAR is now only available for arrears of basic rent, VAT and interest. Service charges, insurance charges, rates etc. (even if reserved as rent in the tenancy) fall outside of CRAR and will not be recoverable by the landlord under this remedy.

   There are other remedies available to recover arrears other than basic rent, including drawing on a rent deposit or calling on a guarantor. In addition, a landlord can bring a debt claim or forfeit the lease but, in the current economic climate, there are not many landlords who would want to pay for the cost of court proceedings or have an empty property on their hands.

3. The CRAR has introduced a minimum level of rent arrears. A minimum of seven days' unpaid net rent will need to have accrued before CRAR can be exercised.

It is not all doom and gloom – one of the upsides of CRAR is that goods may now be removed between 6am and 9pm on any day of the week, including weekends and bank holidays. In addition, if the tenant's "business" does not operate within those hours, the enforcement agents may enter the premises when the business is open. Goods may also be recovered from the highway (e.g. by clamping vehicles).

What does this mean for landlords?

Landlords with mixed-use premises will be unable to use CRAR. Even where CRAR does apply, in reality it simply removes the landlord's power to take the tenant by surprise and places power back into the hands of the tenant. Landlords will, no doubt, take steps to minimise the effect of CRAR by insisting on rent deposits (or at a higher level than before) and requiring guarantors when leases are granted.

CRAR Timetable

Incapacity and the role of a Deputy

As well as heading up our Private Client team, Elizabeth Young is an experienced Court of Protection Panel Deputy. In this piece she considers the impact of lack of capacity on farming businesses.

Farmers have a bit of a reputation for being stubborn and private people who resist the involvement or opinion of others on how their farming business should be run. This is true not only when it comes to 'the man from the ministry', but also - it seems - when the opinion of the next generation is aired. Sometimes, just sometimes, members of the older generation do what their children consider to be the craziest of things. But does that make them incapable of running their own farm?

As a Panel Deputy I am called upon to act on behalf of clients who no longer have the mental capacity (though accident, illness or congenital condition) to make decisions about financial management, and have no-one in their circle of family or friends able and willing to act on their behalf. Alternatively, those potential candidates have fallen out with each other to the extent that they could never work together. At Roythornes the Private Client team is constantly called upon to advise on the challenges that arise when a family member is struck down with a debilitating capacity limiting event.

I am appointed by an order of the Court of Protection to act as Deputy with authority to manage property and financial affairs. My role varies depending on the extent and nature of a client's assets, but often it will involve an element of business management, or property disposal. It is not unknown for me to roll up my sleeves and don wellies to make sure farming businesses can continue to operate. Cases can

involve personal injury claims, partnership disputes, Inheritance Tax planning, all sorts. There have been cases where I have had to represent a client in divorce proceedings. Where significant decisions are to be made for those without capacity, the Court of Protection may need to be involved to adjudicate on what is in the best interests of the individual concerned. Deciding what *are* an individual's best interests is not as easy as you might think!

The guiding principles of the legislation in this area are that we should presume capacity - and facilitate decision-making by the individual affected. It is for those seeking to prove otherwise to deduce sufficient evidence, usually of a medical variety, to support their case. The fact that someone has made an unwise decision, or one which to the outside world seems ill-judged, does not mean they are not capable. (Actions that bring about a risk to the individual, those around them or the public at large are in a different category altogether.)

The Court of Protection has no jurisdiction as long as an individual has capacity, and – this is important – it is capacity to undertake the *specific task* that is being considered. The level of capacity needed to buy a pint of milk is fairly low. The capacity required to make a gift (whether a box of beetroots, a vintage tractor or 100 acres of grade 1 silt), execute a will, swap a pedigree bull with a neighbour, grant an option to a wind farm operator, let a barn for business purposes, plant an entire farm with banana trees, will be different in each case. The more complex and high value the subject matter of the decision, the higher the level of mental capacity is required. But who decides?

If a transaction is carried out by someone without capacity then the danger for the recipient of the gift, or the buyer of the property, or the grantee of the option is that the transaction could be set aside. If you are dealing with an elderly or infirm person, be careful. There are plenty of people able to act the part and appear coherent when behind the scenes they are in the early stages of Alzheimer's, have been kicked in the head by a heifer, are depressed or bereaved.

Conversely, just because an 86 year old widowed farmer lives alone surrounded by her cats and eats raw vegetables straight from the field, does not make her incapable. Eccentric perhaps, but not necessarily incapable. Children (or grandchildren) may view the fact that she has matured into a 'character' as a chance to step in and take over the farm. Again, be careful; you do so at your peril if you have no appropriate authority.

I have a range of horror stories I could recount but, in the interests of protecting my many clients to whom they relate, I will say just this; for the cost of a monthly shop at your local supermarket Roythornes can arrange for you to complete a power of attorney appointing the people closest to you, and those you trust the very most with your affairs.

Alternatively, if you don't trust those closest to you, you can appoint your professional advisers to make decisions for you in the event that that you can no longer make them for yourself.

Elizabeth can be contacted on 01775 842546 or by email.

Clawback, overage and uplift: a brief introduction

One of our experienced commercial property partners, Phil Brewster, gave a brief introduction to overage at a recent Agricultural Law Association seminar. His notes are available here.

Get in Touch

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

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 Julie know or call her on 01775 842 618.

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

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