Welcome to the Michaelmas edition of our agriculture e-brief.

As always there is plenty for farmers and their advisers to mull over at the start of the farming year.

We know only too well from our clients that farm businesses are dynamic and always moving. It's difficult to find time to step back and look at the underlying structure of the business. However, the benefits can more than outweigh the hassle of downing tools and sitting round a table with your advisers. One of the questions some clients are asking is whether their **farming partnerships** might benefit from having companies in them. We've written about it here.

Farm cottages are not just a roof over someone's head but a valuable asset in a property portfolio. It's not surprising, then, that quite a few housing issues have come across our desks recently. So we've covered two housing cases in this e-brief, both of which have important lessons.

A bit of **home news** from us too. This month saw the launch of our in-house **agri-academy**.

We may already have one of the largest agricultural law teams in the country but, whatever our specialism, we all need to have a good grasp of how legal regimes, court decisions, EU judgments etc. impact on our farming and estate clients.

We're very excited to have over 30 of the firm's lawyers and trainees enrolled in the first academy; it will run over 24 months and promises to be stimulating, stretching, and great fun.

Vember Mortlock, Head of Agriculture Team

PS Don't forget to let us know if you would like to come to our *"Down on the Farm: Partnerships, Trusts and Getting it Right"* seminar on 13 February 2013. It promises to be a meaty session - with a mock trustees meeting as part of the bill of fare - and, of course, it's a chance to say hello to contacts and clients old and new. We're expecting a large attendance so please contact markdodds@roythornes.co.uk to register your interest.

In this edition

CAP changes: a waiting game

We issued an update just ahead of harvest. Things have not moved on significantly since then. The adoption of a *'partial general approach'* on key elements of the package is planned for November. Watch this space for an update.

In the meantime, we have seen the 'entitlement' clauses in FBTs and purchase contracts get longer and longer. Usually the aim is very simple: to co-operate to keep the balance between landlord and tenant, or seller and buyer, as it is now or would be if the current regime continued. But with no clear legal framework from EU it can take quite a lot of clauses to say that!

We hope that existing English entitlements will continue through to the new scheme. That would certainly make life simpler for most farmers. However, until we see the detail of the legislation we advise including 'new allocation' provisions in agreements.

Should there be a company in your partnership?

Most farms trade as a partnership. Often, the partners are all members of the same family by birth or marriage. We find that some clients are nervous about changing the structure of their farming affairs, particularly if healthy profits are being made year after year.

People are often worried about the increase in paperwork that setting up a company involves, but the potential long-term tax benefits should not be ignored. The extent of those benefits will depend on how the farm intends to use its profits.

One advantage of a partnership is that the accounts remain private. On the other hand, a partnership does not have limited liability. A limited company limits liability but accounts will be in the public eye. If privacy is a major consideration, partners could think about setting up an unlimited company. An unlimited company is taxed in the same way as a limited company, does not have to have its accounts published and does not expose the shareholders to any more risk than they had when they were partners.

It may be unnecessary or seen as a step too far for a farm to change from a partnership to a company, whether limited or unlimited. In that case partners should think about the benefits of having a company as one of the partners. The trading name of the partnership would not have to change.

To maximise tax reliefs and maintain flexibility, the company should be a business which is wholly or mainly trading. The company could, for example, run a part of the farm's operations that was previously conducted by the partnership. There are many such operations that can be moved over without upsetting the farm's paperwork or public profile.

As a partner, the company would have a share of the profits, some of which it might re-invest in the farm, particularly if the profit is not needed for living expenses. Gradually, and perhaps over a number of years, the company might take on more of the farming and a larger profit share.

The beauty of introducing a company into the partnership is that it works however small or large the partnership is and whether the present partners are family, non-family or trusts.

Issues to bear in mind
Stamp Duty Land Tax should be considered. It should not be a problem if the company does not have a share in the partnership's property assets, but specialist advice will be needed. It

is frustrating that HMRC has still not finalised its guidance about this tax even though it was introduced by the last Government!

As a note of caution for some, there may be a trap opening up for partnerships which own a residential property worth £2m or more if those partnerships have a company partner as explained above. As such, a quasi "Mansion Tax" is emerging from this year's Budget and the Treasury has been consulting since May. From 2013, it is likely that such "non-natural" structures with residential properties worth £2m or more will face a self-assessed tax of somewhere around 0.7% of the property's market value per year.

Some will be aware that the Treasury is moving to develop a "general anti-avoidance rule" which will target transactions solely designed to avoid tax. We take the view that a company in partnership will not be affected by this rule and remains an excellent structure if the circumstances are right.

Roythornes has a wealth of experience advising about structures for farm businesses, so do contact us if you would like to review your affairs.

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Down on the Farm: Partnerships and Trusts and Getting it Right...

A Roythornes seminar for professionals, trustees and clients

Wednesday 13 February 2013

2:30 - 6:00pm followed by buffet.

Location: A1 corridor, P'boro area (tbc)

Please contact Mark Dodds on markdodds@roythornes.co.uk to confirm your interest now.

Another day, another designation

Last week's devastating floods have brought flood defences back into the news. The rural landscape is both at risk and a potential asset that can be used to manage water levels.

It is timely, then, that the 'designation of features' elements of the Flood and Water Management Act 2010 came into force over the summer. That Act came out of the Pitt Review that followed the widespread floods of 2007. One of Pitt's recommendations was that local flood authorities (and similar bodies, like IDBs) should list and take steps to protect physical assets which are relied on for flood (and coastal erosion) risk management but are privately owned.

This **designation process is now happening**. It is estimated that over 60,000 physical features e.g. walls, embankments and other 'raised features' (mounds, banks etc.) could be available for designation. Once a feature is designated, it will be registered in the Local Land Charges Register. Owners will then need to seek the consent of the authority before altering, removing or replacing the asset.

If you are the owner of a structure or feature, you:-

- will be consulted in writing before the asset is designated; and

- have a right to appeal against the initial designation.

'Owner' includes the relevant landowner or, if different, the person responsible for managing or controlling the structure or feature (e.g. depending on the terms of the tenancy, a tenant in occupation).

We are not aware of a raft of letters going out from local authorities, IDBs or the Environment Agency notifying owners of potential designations. Resources are tight and there are plenty of other demands on these bodies. However, following the recent floods it may be that there will be a move to get these private assets registered.

If you receive a letter talking about the "*Designation of third party structures and features for flood and coastal erosion risk management purposes*", let Julie Robinson know in the first instance. There are various opportunities to appeal if you believe your particular feature should not be designated.

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Ag tags and adequate market testing

It can be frustratingly difficult to show that an agricultural occupancy restriction on a property is obsolete. A recent decision by the Upper Tribunal (Lands Chamber)* contains some useful pointers about what a rigorous market testing exercise would look like.

The application to the tribunal related to a Welsh property and the Welsh planning regime, but the lessons are equally valid this side of Offa's dyke.

The property owners' land agent came in for some criticism from the tribunal for not:

- offering the property to rent as well as to buy (that was the only way to establish whether a rental market existed);
- carrying out an objective analysis of comparables;
- advertising in specialist farming publications such as the Farmers' Weekly/Farmers Guardian (thereby reaching the maximum potential market);
- making explicit adjustments to reflect general market movements (any adjustments were bundled in with the ag tag discount).

So, it is largely in the breach that we learn what good practice would look like. The overriding message for those looking to get ag tags removed is to take time to plan your market testing exercise. Be as thorough as possible, cover all the bases and keep meticulous records.

**Rasbridge, Re Cefn Betingau Farm [2012] UKUT 246 (LC) (23.08.2012)*

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The hare the tortoise and the farmworker's cottage

We were recently involved in a case which – like the ag tag case above – demonstrates the need for a plan of action, playing by the book and plenty of patience when it comes to freeing up properties on the farm.

A farmworker had worked on the same farm for 30 years. He was a protected worker under the Rent (Agriculture) Act 1976. When he was made redundant he and his wife had

three children still living with him. He had paid no rent on the cottage and his farmer landlord had never requested any.

The landlord served a notice to quit. He then offered his former worker an alternative property away from the farm. The new property could not comfortably house the whole family so the farmworker turned the offer down. The landlord re-let the alternative property and contacted his local authority, as he was perfectly entitled to do under the 1976 Act. The authority offered the worker a small flat, and gave him 7 working days in which to make a decision (the 1976 Act says that at least 14 days must be given).

The landlord applied to the court for possession of the cottage and for backdated rent. The case was withdrawn the day before trial. In reality, the landlord's claims were very weak. He could not argue that the tenant was being unreasonable in refusing the local authority's offer – for one thing, the authority had failed to give enough time for a decision. And, on the rent question, the landlord was restricted to the statutory maximum under the procedure laid down in the 1976 Act (i.e. a registered rent) and, if that procedure had not been followed (and it had not been), then no rent or occupation charges at all were due.

So, it is a case of back to the drawing board for the landlord, with a considerable amount of time and money lost in the meantime.

If you have any questions about these housing cases, or if you would like advice on agricultural occupancy restrictions or protected tenancies, please contact Emily Barker. Emily advises on a range of housing and planning issues.

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Getting to your stud: what's agriculture got to do with it?

A recent case* serves as a reminder about the reach of clauses in conveyances when buying land that depends on a private right of way.

In this case Mr Hayes bought a 37 acre block of farmland. Access to the land from the main road was via a private track that crossed the land of a neighbour, Mr Dutta. The two lots of land had originally been in the same hands and the right of way had been granted when the 37 acres were sold off.

The grant of the right was in the following terms: "... a right of way at all times with or without vehicles over and along the track ... for the purpose only of pursuance of the agricultural use of" the land.

Mr Hayes established a stud farm on his newly acquired land, but Mr Dutta objected to his use of the track for those purposes. The question at issue was whether running a stud farm on the land qualified as 'agricultural use'.

The judge found against the stud owner. "*Where the line is crossed is, in my judgment, in the operation of a stud farm. That falls outside the ordinary meaning of agriculture, outside the statutory definition of agriculture to which I have been referred, and outside the case law definitions of agriculture and agricultural use or operations....*"

Roythornes agricultural property team has a vast amount of experience in buying and selling farms and rural properties. Please get in touch with us if we can be of assistance.

** Dutta v Hayes [2012] EWHC 1727*

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Getting your insurance rent: do words matter?

On a similar note, we have a lesson for landlords from the snappily-named Upper Tribunal (Lands Chamber) or - for those of us who still use old money - the Lands Tribunal.

It is always worth reading the words in contracts and doing what they say rather than substituting your own broad interpretation of them and hoping for the best. In this case, a lease required the landlord to insure a property in the joint names of the landlord and his tenant. Nothing too unfamiliar there.

Instead of doing that, however, the landlord's insurance policy contained a 'general interest clause' that referred to all tenants, leaseholders etc.

In due course, the landlord tried to recover a share of the insurance premium (among other things) from his tenant. The tenant argued that because the Landlord had failed to comply with his insurance obligations, she was not required to pay.

The Lands Tribunal found in favour of the tenant.

So, whether you are landlord or tenant, check the terms of your lease and do what it says, to the letter, to be sure of your position.

**Green v 180 Archway Road Management co Ltd [2012] UKUT (LC)245 (17 July 2012)*

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On added-value venues and value-added tax

It may not have captured the nation's attention in the same way as the pasty tax, but the VAT status of the supply of a castle as a wedding venue has been the talk of the tribunal.

In the recent case of *Drumtochty Castle Limited v HMRC* the tax tribunal was asked to decide whether the fee for the hire of Drumtochty Castle as a functions venue was exempt for VAT purposes. Or did the provision of the Castle represent a composite supply of wedding facilities and services which should be taxed at the standard rate?

Unsurprisingly, the company argued that guests had the exclusive use of the castle and grounds for the duration of their visit and that it was, therefore, granting a licence that fell within the *'licence to occupy land...'* exemption contained in the VAT Act 1994. HMRC, for their part, argued that what was being supplied was quite clearly a 'package' and the provision of rooms had no independent purpose without the other event-related services; there was a composite supply of wedding facilities and services which should be taxed at the standard rate. Also relevant was the fact that the Drumtochty was in competition with local hotels.

The tribunal found in favour of HMRC. This wasn't a passive letting of land. It was best understood as the provision of a range of commercial services among which was the availability of the venue and the grounds for use by guests.

Any venue providers concerned about their VAT position should contact Paul Hogarth-Blood to discuss the implications of this tribunal decision and their options.

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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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