Newsletter

Food, Farming and Land Quarterly

BURGES SALMON

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Welcome

Welcome to the latest edition of Food, Farming and Land Quarterly, discussing current issues in the food, farming and land sector.

If you would like further details on any of the areas covered in this newsletter then please contact one of the contributors or visit our website at www.burges-salmon.com

The Pink Book 2 is now out. If you would like to receive a complimentary copy please email: **PinkBook2@burges-salmon.com**

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From the editor

Opportunity Agriculture was the title of this year's Oxford Farming Conference paper sponsored by Burges Salmon Volac and Syngenta. Many of the speakers at the conference highlighted the extraordinary opportunities opening up in agriculture. Some are due to increased demand driving prices which encourages investment and some of the opportunities flow from innovation and technology. Combine innovation and technology with the still vital qualities of hard work, enthusiasm and good management and businesses with that winning combination are going places.

Whether it be poultry with a feed conversion ratio heading towards 1.2 : 1 or 90% reduction in use of active ingredient in sprays delivered by small precision machinery the future really does not look like more of the past. Proper concerns about the environment, bio diversity, water use and energy consumption are being addressed sustainably with smart solutions. I came away from Oxford in no doubt that the 21st century food production revolution is well underway and agriculture is once again viewed as a great industry for young people to get into.

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Valuation of Partnership assets on dissolution

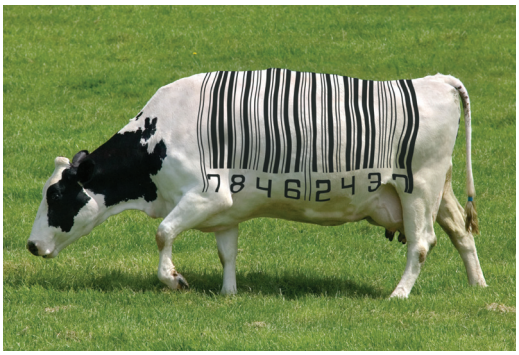
It is important for parties entering into a partnership not only to consider how assets are to be divided in the event that a partner leaves, but also how those assets are to be valued in those circumstances.

This issue was considered in the recent case of *Ham v Ham & another*.

The defendants were a married couple who worked as dairy farmers. They owned land, a sizeable dairy herd, machinery and other assets. Their son (the claimant) subsequently joined them in the business and a partnership agreement was draw up.

The deed entitled any of the partners to serve notice to dissolve the partnership on three months' written notice. In that event, the other partners were entitled instead to buy out the outgoing partner's share of the assets as an alternative to dissolution. However, the deed did not make it clear how those assets were to be assessed.

The claimant gave notice to terminate. A dispute arose as to the basis on which the buy-out was to take place. The judge at first instance determined that, as a matter of interpretation of the deed, the claimant's share was to be determined on the same basis as annual accounts were drawn during the continuation of the



partnership, rather than on the basis of an up-to-date market valuation of the partnership assets. The claimant appealed.

The Court of Appeal ruled that there are no presumptions or default rules pointing towards any single basis of valuation of an outgoing partner's share. Instead, it is necessary to take account of any relevant and admissible background in interpreting the partnership deed. In this case, it was important that the deed related to a family partnership. It was also important that the partnership was a dairy farming partnership which, by its nature, was likely to be asset rich but cash poor. The clause in this case was concerned only with the consequences of termination. The basis on which accounts were prepared during the continuance of the partnership was no real indication of how the partners intended to deal with or value the partnership assets once the partnership ended. In addition, in this case the ability to buy out the departing

partner's share was designed to be an alternative to winding-up the partnership. If the partnership was instead wound up then all the assets would be sold and the realised profits on such a sale would be shared between the partners according to their share of profits.

On the true construction of the partnership deed, the claimant's share in the partnership property was to be calculated on the basis of what he would have received on a winding up (i.e. at the current market value of the assets).

The Court was critical of poorly drafted partnership agreements and stated that it was to be hoped that in future those preparing partnership agreements would take note of the anxiety, expense and delay caused by imprecise drafting.

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Diversified farms hit by loss relief change

Changes to Income Tax loss relief may cause particular hardship to diversified farms says Tom Hewitt, a Partner in our Private Client Department.

Many diversified farm businesses have other activities sitting alongside the farm trade - such as a rental business letting out surplus farm properties.

Before April this year a loss on the farm in such a business could be used to offset the taxable income on the rental business. This relief is called *Sideways Loss Relief*. But since April the amount of the loss that the taxpayer can claim has been capped at greater of £50,000 or 25% of the taxpayer's total income.

For partnerships and sole traders where this cap operates there will be a real cost to the business.

These rules apply to all businesses but for farmers the impact is lessened because it is still possible to average the farm results over two consecutive tax years.

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Groceries adjudicator bares her teeth

When the Groceries Supply Code of Practice (the 'Code') came into force there were many in the food industry who thought it might be just another paper tiger. Well the tiger has shown its teeth and Tesco has been exposed for breaching the Code.

The background to this is that a Tesco buyer had written to suppliers requesting that they pay £30 per product per store for lines to be stocked on shelves at eye level. This is generally considered to be a prime position. The leading industry publication 'The Grocer' first revealed this back in October 2013. The Groceries Adjudicator, Christine Tacon, took this up with Tesco.

The Code provides that retailers must not directly or indirectly require a supplier to make a payment to secure better positioning unless this is for a promotion. Some thought that Tesco had done nothing wrong as they had 'requested' rather than 'required' a payment to be made. The Adjudicator made clear that Tesco's actions were not in the spirit of the Code and Tesco should recall the request. Tesco has since done this.

These are still early days for the Code but many in the supply chain will be impressed by the stance the Adjudicator has taken. As for supermarkets – they will be aware of the adverse publicity this has attracted and that from spring of this year fines will be introduced for breaches of the Code.

We will continue to monitor developments in the application of the Code and would be interested to hear from anyone who suspects a breach.

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What makes a sole occupier?

Agricultural land is subject to a variety of methods of occupation and one popular way is for an owner permitting another to use the land by granting them a licence.

This is an agreement that an occupier may use land but it stops short of being a tenancy. Part of the reason for its popularity is historic - many landowners did not want to create long term tenancies over their land under the Agricultural Holdings Act 1986. To prevent licences being used as an avoidance mechanism for that Act, it contains a provision at section 2 that converts some forms of licence into secure tenancies. That is frequently a major point of friction between owner and occupier.

This issue was been looked at closely in the case of *Creasey v Sole*, where it was one of the significant issues at stake, along with very detailed considerations about the terms of a farming family's will, and a proprietary estoppel claim made by one of the sons of the family. The licence issue was whether one son, who had his own farming enterprise on the land, but also managed his parents' enterprise which ran over some of the same land and used the same buildings, could be said to have a right of exclusive occupation.

The son was effectively in control of all the land but because he was managing his parents' enterprise as well as his own, in law they also had the right to use the land and buildings. The Judge said that for the son to have exclusive occupation of the land and buildings there would have to have been some form of express agreement to prevent his parents making any use of them, over and above the agreement that permitted his use of them.

Where there was land that was not so clearly shared, but was mainly used by the son, the Judge said that an exclusive licence could not be found there, because the son's case was that there was only one agreement that governed his use of all of the land, so the shared of occupation was imputed to that land.

This aspect of the case was a careful review of the law in this area. Given the importance of the outcome, where the land could have been subject to a long term secure tenancy, it is worth noting.

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Publication of the HS2 Hybrid Bill - a significant milestone...

The Government introduced the first Hybrid Bill for HS2 phase one – the *High Speed Rail (London-West Midlands) Bill* in November 2013.

Effects of the Bill

The Bill is effectively the planning application for the scheme and will give the Government the powers it needs to construct and operate phase one of HS2. Once Royal Assent has been achieved, the Government expects that construction of phase one will begin in 2016/2017, allowing the line to open circa 2026.

The Hybrid Bill specifically deals with the compulsory acquisition of land and separately airspace and subsoil; the grant of new property and statutory access rights (with criminal sanctions for obstruction) and the imposition of restrictive covenants which are required in connection with phase one. There is also a potentially limitless power for compulsory acquisition of land for regeneration and development opportunities. This is already attracting attention in the press for its unique and far-reaching remit.

Objections - Consultation and Petitions

Consultation on the content of the Environmental Statement closes/d on 24 January 2014. Objections raised will be compiled and presented to Parliament in the form of a Command Paper during the Second Reading of the Bill, which will not take place until February 2014 at the earliest. The Second Reading of the Bill is where the principle of the scheme is approved by Parliament.

Once the principle is established, by way of order of committal, the Bill is referred to a Select Committee where objectors' petitions are considered. An objector can only be heard at Committee where he has deposited a petition with the Private Bill Office of the House of Commons and has the necessary locus standi. The timescales for filing a petition will be contained in the committal order and are usually fairly short; only two weeks was given to the majority of objectors in relation to the Channel Tunnel Bill.

Petitions should focus on changes to the Bill which affected parties would like to see made so that their position is improved; this is usually done through seeking more stringent limits on the powers conferred in the Bill. A petitioner can only deal with the points raised in the petition so arguments need to be concise enough deal with the specific issue, yet broad enough to deal with each point a petitioner wants to address.

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Abuse of social media

At the recent Oxford Farming Conference, we heard how farming and food businesses can use social media to recruit, advertise, develop their brands and provide customer support and service. The use of social media is clearly a powerful tool for businesses, but it is not without hazards, not least (mis)use of social media by employees and ex-employees.

Surveys have shown that 22% of employees have tweeted about a colleague, 28% have posted photos of work events and 31% of employers have taken disciplinary action due to employees posting information about their employer. Employee misuse of social media can give rise to issues of misconduct, cyberbullying and harassment, damage to reputation/brand and employees simply not working because they are on Facebook.

Many employers have a knee jerk reaction when they see comments published on social media about their business or employees, but care should be taken not to rush to dismiss employees. In recent cases, employment tribunals have looked carefully at whether personal comments posted on social media sites by employees are sufficiently linked to the individual's employment to warrant disciplinary action. Important factors to consider will be the number of individuals to whom the comments have been disseminated, whether the employer was readily identifiable, whether there was in reality any risk or actual harm to reputation or relationships with clients, and whether there are any mitigating circumstances (e.g. was it a one off rush of blood to the head by a long-serving employee). The use of social media by employers and

employees is only set to grow and you may want to think about putting in place guidelines on its acceptable use. This will help compliance with data protection issues, help provide a basis for taking action when employees misuse social media and help protect the business. Social media is here to stay and employers should ensure that they have set clear standards for employees and implement those guidelines in a consistent and transparent manner for all employees.

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Renewable Energy and local opposition: the threat of private nuisance actions

It is not unusual for renewable energy projects in the rural environment to be met with local resistance at the planning stage. However, as a recent High Court battle demonstrates, in some cases the opposition might continue well into the operational phase and landowners need to be alive to the issues that this can raise.

Burges Salmon has successfully defended a High Court action brought by neighbouring landowners seeking an injunction to stop the operation of a 50 kW on-farm wind turbine. The Claimant alleged that a number of factors, including the colour of the turbine, the speed of rotation of the blades and the angle of the sun, combined to create a flashing or strobing effect at their home which was a nuisance at law.

The full judgment is not yet available, but in an oral judgment on 5 December 2013 the Court held that, although the reflection of sunlight could be a nuisance at law, on the facts of the case it was not appropriate to order an injunction. The Judge stated that the conduct of the Defendant dairy farming business was an important part of the equation, and found that the business had acted entirely reasonably, even offering to cover the costs of a planting scheme on the Claimant's property. A more detailed briefing will follow once the judgment has been released.

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