Newsletter

Food, Farming and Land Quarterly

BURGES SALMON

Summer 2013

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 our team or visit our website at www.burges-salmon.com

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From the editor

"How healthy is our food?" on the last page of this edition is a great article for everyone. Surely we have all fallen for many of these claims and paid the price. But, are we really being conned or is there middle ground where health claims cannot be proven but provided clear and accurate information is provided claims ought to be allowed? The argument put forward by the industry is that the current requirement of proof stifles research and product innovation. At first sight it sounds tempting to accept this argument but if we downgrade science in the context of something as vital as food labelling we could all end up at McDonald's getting our 5 a day from drinking Fruitizz.

It is interesting to note the health claims made about the (not so) Voluntary Dairy Industry Code for contracts are also looking somewhat extravagant. It will be intriguing to discover whether after a year of the Code there is "healthy competition within the market" (NFU President's words) or whether the market in raw milk remains mainly stagnant. My sense is that there has been no increase in producers changing purchasers and may be even the opposite.

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Energy

Renewable energy: Where are we now?

It is hard to remember a time in recent history when the UK's energy policy has had such a high profile in the national and local press. Whilst the Government's strategy on gas - and the exploitation of shale gas in particular - has made headlines, so too has increasingly vocal opposition from back-benchers to the Government's policies on onshore wind. UKIP's recent local election successes have also brought attention to its manifesto to 'scrap all subsidies for renewable energy' and 'cancel all wind farm developments'.

Whilst all of this has been going on, we are in the midst of the biggest reform of the electricity market in decades. The Energy Bill is being hotly debated by Parliament and along with various recent refinements being made to our existing renewable heat and electricity incentive mechanisms, DECC has also just published the proposed 'strike prices' (i.e. the incentive levels factoring in an electricity price) which are proposed to apply to renewable electricity projects larger than 5MW from 2017 onwards.

Westmill Solar Co-operative

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With the current level of uncertainty, you could be forgiven for thinking that renewable energy developers may be taking a breather to reflect. Not so. Despite the uncertainty, the UK is still very highly ranked globally in terms of being an attractive place to invest in the renewable energy sector, and certainly on the basis of current activity levels we are seeing in the market, projects are still coming to fruition at a significant rate. Admittedly, with reductions in incentive levels having taken place over the last couple of years under the Renewables Obligation (RO) and Feed-in Tariffs, developers (and their advisors) are having to be smarter, more streamlined and more cost-effective in bringing projects to the market, but for those that are successful, a number of new funding opportunities are out there, using mechanisms such as private equity funds, pension schemes and community-based funding models.

So which types of schemes are particularly hot at the moment, and where are the best opportunities for the agricultural sector?

Solar PV

When drastic cuts were made to the solar PV feed-in tariffs a couple of years ago, many (including us) thought that it would be quite a number of years before large-scale ground mounted projects became commercially viable again. However, the unexpectedly sharp decline in global panel prices instigated a significant resurrection of 'dead' projects. The last year or so has seen the revival of numerous land option agreements and there seems to be no shortage of appetite on the part of developers to find new and larger solar development opportunities – including under the RO. Planning consents for developments of up to 35MW (150 acres) have been secured.

Rental premiums may not quite be what they were in the land rush of 2011, but there remain significant opportunities for landowners with suitable sites with inexpensive access to grid capacity – which is fast becoming the main barrier to new projects. It remains to be seen whether this appetite will be reduced by the reduction in RO support levels from 1.6 to 1.4 ROCs next April and this may depend in part on the effect on panel prices of the anti-dumping settlement just reached between the EU and China.

We are also seeing numerous large rooftop solar PV projects being brought to fruition by agricultural businesses, with the economics of these projects often stacking up where the electricity generated is used to meet a significant on-site energy demand.

Anaerobic Digestion

AD projects seem to polarise opinion greatly within the agricultural community. Whilst poorly managed projects in the wrong place involving the wrong counterparties will always create bad news stories, developers are now devising models which better mitigate the risks of technology failure on an on-going basis. Funds are responding positively to the creation of pipelines of projects and we have seen a significant increase in the number of on-farm AD (and commercial waste fuelled) plants being funded. Opportunities created by the availability of Renewable Heat Incentive payments for the direct injection of gas produced by the AD process into the gas grid have also provided new opportunities and the prospect of more favourable returns. It remains an area where legal advice for farm businesses taking on feedstock supply or digestate offtake agreements remains critically important. Partnering opportunities allowing farmers and

landowners the ability to share in the long term success of projects are also being seen as desirable by many investors who recognise the crucial role played by agricultural businesses.

Small scale wind

Whilst larger onshore wind projects have been battling with uncertainty over the level of RO support post April 2014 (now resolved in the short to medium term), we are seeing a lot of activity at the smaller end of the market, with a number of developers securing funding to develop portfolios of 500kW single turbine projects. With margins lower, sites with inexpensive access to the grid remain top of the wish list for developers with potential upsides for neighbouring agricultural (and other) businesses able to offer private wire electricity offtake solutions.

Other opportunities of course remain, with a 'special mention' for biomass heat installations accredited under the RHI. Whilst many 'medium' scale projects have already been accredited, a proposed doubling in the tariff for large (>1MW) biomass boilers may have a boosting effect on this market also, with the most natural opportunities being for those estates with the potential for self-supply of feedstock. A number of landed estates with forestry have seized the opportunity to build up feedstock supply chain businesses already. With a new 'approved supplier' list expected to come into existence from next April, now may be the time to find out more.

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Partnership

What makes a Partnership?

A partnership does not need any formality to be created. It is defined as the relationship which subsists between persons carrying on a business in common with a view to profit. This meaning can result in the creation of partnerships where the partners were not aware that was what they were doing, usually in circumstances where no-one gave any thought to this or put the thinking off to another day.

In practice, the lack of formality necessary to create a partnership can also give comfort to people who are working together - they may think that they are protected by a partnership imposed by law, even if there is nothing between them in writing. That sense of comfort can be misleading, as not every case will lead to a partnership being formed.

The Court of Appeal looked at this issue in *Ilott v Williams and others*. The situation there was that four people had agreed a business idea but had not got so far as carrying on a business with a view of profit. The Court said that a partnership had not been created between them.

The reasoning behind this was based on an evaluation of what the four had done and how they regarded each other – they had taken limited steps towards the future operation of the business (such as acquiring a web domain name) but were still at the early stages of discussing where their funding would come from and had not financially committed to the business or sought to bind each other into it. At that stage, all they had was the concept, but no means of creating any profit, and that was not enough to say that there was a partnership between them.

The fact that a business is not fully operational and trading does not prevent there being a partnership – an earlier case had confirmed that where individuals are working together they become partners when they actually embark on the activity in question. An example is starting a shop or restaurant. The partnership does not start when the property opens its doors for business, but the start date will be a long time before, when the partners are taking steps like finding sites and purchasing stock.

This case is a useful example of one point on a scale that determines the nature of the legal relationship between individuals, and the obligations they will owe to each other. It is particularly relevant to this sector, given the informality that often surrounds the creation and on-going work of a partnership.

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Tax

Should tax on landowners be changed?

Major changes to the operation of inheritance tax relief and other taxes have been recommended by the report recently published by the Future of Farming Review group.

Back in January the group was asked to consider how new entrants to farming and agriculture can be encouraged. The report looks at a wide range of issues from education, the availability of council farms, planning, affordable housing, access to finance and tax.

The report proposed two radical changes to taxation. The first is that agricultural property relief (APR) for IHT should not be available to older farmers (the suggested age cut-off is 70). The authors of the report say that they are concerned that *"aspects of the operation of APR may encourage an occupying farmer to retain ownership of the farm until death"*. The authors accept that such a change could not be introduced without good notice.

The second major change is the suggestion that entrepreneurs' relief for capital gains tax should be available to landowners whose land is let on farm business tenancies. The authors say that farmers may be discouraged from letting land on an FBT if by doing so he ceases to qualify for entrepreneurs relief.

There are also suggestions for harmonising the tax treatment of companies and partnerships and sole traders (at the moment farming companies benefit from the low rate of corporation tax). Lessening the SDLT burden on long term farm business tenancies and tenancies from year to year is also recommended.

These and the other changes proposed by the report are very far reaching. What, if any, changes will be approved and implemented by government remains to be seen.

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VAT on storage surprise

A Revenue & Customs briefing published in August to clarify rules on VAT on storage facilities contained a potentially unwelcome surprise in confirming that those rules are wider than previously thought.

The briefing states in effect that if a landlord is registered for VAT and lets premises for storage the landlord must charge the tenant VAT at standard rate on the rent – even if the Landlord has not opted to charge VAT on the premises. This has been so since new rules were implemented on 1 October 2012. Before the briefing, those rules were believed to apply only to the supply of individual self-storage units like those provided by businesses such as "Big Yellow".

There are exceptions, including where the storage is ancillary to the main use of the premises (eg the stock room of a shop). The standard rate applies only where the tenant will be using premises to store their own goods. If the tenant is underletting for storage use or charging others for storing their goods - say a lease of a distribution centre - it is the tenant who must charge standard rate VAT to its undertenant or customers and the headlease rent will be exempt from VAT unless the landlord has opted to tax.

Many leases provide that rent is exclusive of VAT which is payable on top if due and so the landlord could charge VAT to the tenant retrospectively if necessary. But if the tenant is not VAT registered this would represent an unwelcome 20% rent increase.

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Employment

The end of the Agricultural Wages Order

For many years, the Agricultural Wages Order (AWO) has afforded greater protection and benefits to workers in agriculture. After much political wrangling, the current AWO will be the last and, from 1 October 2013, the AWO will cease to exist. There is much speculation as to what impact this may have, but the most immediate impact is that agricultural workers employed on or after 1 October 2013 will not be protected by the AWO, but will have non-agricultural statutory protection as follows:

	Agricultural Wages Order	Statutory Entitlement
Minimum rates of pay	Grade 1 worker: £6.21 per hour Overtime: £9.32 per hour	£6.19 per hour for workers aged 21 or above (basic and overtime).
Allowances	Various allowances (e.g. on call, dog etc).	None
Breaks	Rest break of at least 30 minutes where daily working time is more than 5.5 hours.	A daily rest period of 11 hours' uninterrupted rest per day. A weekly rest period of 24 hours' uninterrupted rest per week. A rest break of 20 minutes when a day's working time is more than six hours.
Annual holiday	31 days' holiday for a person working 5 days per week.	28 days' holiday for a person working 5 days per week.
Sick pay	Agricultural sick pay (ASP) entitlement varies according to length of continuous employment. For example, a worker with two years' service is entitled to 16 weeks' ASP. ASP = the worker's normal rate of pay.	If absent from work for four or more consecutive days, worker is entitled to receive statutory sick pay (SSP). Employees are entitled to up to 28 weeks' SSP in any period of incapacity for work. SSP = £86.70 per week.

However, it is worth noting that pre-October employees are likely to benefit from the entitlements under the 2012 AWO into the future and it will be difficult (although not impossible) to change an employee's 'AWO' terms and conditions. Advice should be taken to avoid employment claims.

In terms of steps that you should consider in advance of 30 September, we would recommend that:

- contracts of employment are reviewed to remove any AWO-specific provisions for employees from 1 October onwards
- clear records are kept of which employees are entitled to AWO entitlements and which are not (particularly if there is a transfer under the TUPE Regulations (e.g. if you are taking farming services in-hand or you are an in-coming contractor)
- large employers are prepared to deal with requests from trade unions for formal recognition for collective bargaining purposes.

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Land ownership

Reminder of the chancel repairing and manorial rights deadline

From 13th October 2013, chancel repair liabilities and manorial rights will lose their overriding status. The October deadline is not necessarily a "drop dead" date because the land remains subject to these liabilities and rights until, after the deadline, the surface owner sells the land (if it is registered) or unregistered land is registered, without the claimant having protected his interest.

The deadline does, however, account for the flurry of notices currently being disclosed to surface owners by the Land Registry, mostly in response to manorial rights registrations by large landowners interested in securing the mineral rights. Whether there are any minerals which the claimant can actually extract having proved ownership of them is of course another matter.

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Asset protection

Safeguarding the farm from divorce: Prest v Petrodel

Increasingly people are looking to take steps to safeguard assets such as farms from relationship breakdown, much as they do from tax and on death. In June, the Supreme Court gave a key judgment in, *Prest v Petrodel Resources*, a divorce case, which provides helpful guidance on the wide ranging powers of the family courts to distribute assets on divorce.

The most effective means of protecting assets from divorce is of course not to marry; as the law stands, cohabitants have much weaker claims for provision from the other than married couples. If a couple do marry, provided it is properly completed and not manifestly unfair on either party, a pre or post marital agreement is probably the next best means of protection.

Such agreements are, of course, not for everyone. They are after all hardly romantic! If not, it is worth considering to what extent the way in which assets are held provides any protection and how this ties in with other tax and estate planning advice.

Sometimes farms or specific assets are held in companies. On divorce, a farmer's shareholding in a company will be valued and that shareholding could be transferred to the other spouse in a divorce. This is, however, rarely a particularly attractive remedy for anyone concerned.

It is often preferable to "buy out" the other spouses claims, by transferring or selling parts of the farm (eg cottages or a development site). However, there may be a difficulty if those assets are actually owned by the company. This was the issue in *Prest v Petrodel.*

This case reaffirmed classic legal theory that a company is a separate entity from its shareholders and therefore the shareholders have no legal rights in any company assets. However, the Supreme Court held that although that legal principle was correct, based on the facts of the case, they could look behind the appearance of corporate ownership and treat the company assets as if they belonged to the husband.

The legal reason for this is that, in this case, the companies were held to be a trustee of the assets for Mr Prest, even though there was no

express paperwork to this effect. That relationship was established by the way in which the company acquired the assets and how they were subsequently treated.

When will the courts conclude there is a trust? Every case depends on its facts, but one key question will be "who paid for the asset"? If, for instance, the trading company is named as the buyer, but all of the money for the purchase comes directly from the farmer's pocket, with no evidence that that is a loan or gift, then that will indicate strongly that the company is a trustee and the asset is available for the family court judge to attack.

Any notion that transferring an asset into a company puts it beyond the reach of the courts on divorce is therefore questionable, quite apart from whether it is a sensible commercial or fiscal move (which it often will not be). Advice should certainly be taken before taking any such action.

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Food law

How healthy is our food?

Remember 2010, the year of "tummy loving care"? It was almost impossible to turn on the TV without seeing celebrities urging viewers to improve their digestive health by drinking certain probiotic yoghurts every day. The yoghurts are still on the market, but the health claims have mysteriously disappeared. Why?

The answer is simple. In 2006, EU legislation was introduced to regulate nutrition and health claims made by the food industry in an attempt to stop manufacturers making unsubstantiated claims about the health benefits of their products. The European Food Safety Authority was asked to investigate all such claims made by manufacturers and report back to the European Commission. In 2012, the Commission published a register of authorised and non-authorised claims, giving manufacturers of products bearing non-authorised claims six months to either change their branding or face prohibition.

80% of claims made by manufacturers were rejected by the Commission, including nearly all claims relating to the digestive benefits of probiotic yoghurt. Other unauthorised claims include the effects of whey protein on muscle growth and repair, table-top sweeteners on maintenance of a normal body weight, olive oil on the cardiovascular system and magnesium on blood pressure. Authorised claims include the effects of calcium on bone health, fluoride on oral health and the use of meal replacement products for weight loss. A wide range of claims relating to the nutritional benefits of vitamins and minerals were also approved. However, those wishing to make authorised claims must comply with strict requirements as to the quantity of the ingredient found in the product, and in some cases, the information which must be displayed on the packaging.

As consumers become increasingly health conscious, the market for products with perceived nutritional benefits is rapidly growing. However, manufacturers will need to be both more vigilant and more creative to ensure that their products and advertising campaigns comply with the legislation. For now, expect to see more products with added vitamins and minerals, and fewer extolling the virtues of probiotic bacteria or antioxidants!

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Planning

Judicial Review: change in time limits

Following a consultation in late 2012 on the judicial review regime, the time limit for applying to the Court for permission to bring a claim in a planning case has now been reduced from "promptly and within 3 months" to "six weeks" where the grounds relating to the challenge arose after 1 July 2013 (i.e. where planning permission has been granted after this date).

The purpose of this change is to reduce the number of un-meritorious claims which are brought and often delay the progress of a development. Landowners should bear the following points in mind:

- If you have secured planning permission after 1 July 2013, it will be free from the risk of judicial review after six weeks rather than three months. Any agreements, for example, contracts conditional on planning, should be amended to reflect this change. Any decision notices issued prior to 1 July 2013 will remain subject to the old timeframe.
- If you are considering commencing a claim to challenge the grant of planning permission, you will need to take steps to do so very soon after the grant of planning permission. This does not change the position considerably as, in practice, the previous requirement for promptness was often measured against the six week deadline for bringing a statutory challenge against a Planning Inspector's decision under the Town and Country Planning Act 1990.

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