

SUMMER 2019



Agriculture and Estates

NEWS AND ADVICE FROM BIRKETT LONG

Tenancy Agreements

The importance of reviewing your farm's business structure.

Modernising agricultural tenancy legislation

DEFRA opens a consultation to run from April to July.

Farming is one of the most dangerous professions

Every farmer should have a lasting power of attorney in place.

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Farm business structures: Tenancy Agreements

Farming families are becoming increasingly aware of the importance of reviewing their business structures, as well as their personal affairs.

More and more are taking professional advice. Unfortunately, there are a number of circumstances where failure to review affairs has resulted in taxation which could possibly be avoided. For those left after the death of a loved one, this can cause significant difficulties emotionally and financially. One such area often overlooked is the review of any farm licence or lease.

Reviewing tenancies is fundamental. Whenever farming businesses are being reviewed, whether considering and signing off the annual accounts, succession or otherwise, such tenancies must not be forgotten. Identifying the type of tenancy and ascertaining the tenant's occupational right is the starting point. Let property can qualify for Inheritance Tax Relief in the form of

Agricultural Property Relief. However, this valuable benefit may be lost if the agricultural activity is no longer carried out. Increasingly, HM Revenue and Customs looks closely at tenancies to ensure that the land is still occupied for agricultural purposes. It often requires evidence that extends beyond any agreement.

The type of tenancy also affects the tax position. For example, an Agricultural Holdings Act Tenancy only attracts 50% Agricultural Property Relief and not 100%, as will be the case with the use of a Farm Business Tenancy or Share Farming Agreement.

Of course, for a tenant of Agricultural Holdings Act (AHA) tenancy there are a number of benefits. These come mainly

in the form of succession and protection. Surrendering an AHA Tenancy and putting a Farming Business Tenancy in place would increase a landlord's Inheritance Tax position, but in reality this is often unacceptable to a tenant without some means of compensation giving up those substantial rights. Further, other taxes have to be considered such as Capital Gains Tax and, on occasions, Stamp Duty Land Tax.

There are, however, alternatives enabling tenancies to be changed whilst still offering the same protection under the Agricultural Holdings Act.

In conclusion, tax implications of tenancies, regardless of whether they are Agricultural Holdings Act Tenancies or Farm Business Tenancies, must not be ignored. The ramifications for the landlord and the tenant could be significant. It is equally as important, having reviewed the tenancy arrangements, that any updated

Presumably to give the farming community a well-deserved break from worrying about Brexit, DEFRA has opened a consultation to run from April to July with the aim of 'modernising and updating agricultural tenancy legislation'.

Agricultural tenancy legislation - modernising and updating?

The consultation is at an embryonic stage and outlines that it is seeking to 'remove barriers to productivity improvements' and to 'facilitate structural change in the tenant farming sector'. However, in spite of its premature and sweeping intentions,

we are given an indication as to what this may mean. There are already fourteen proposals for change, some of which are outlined in detail and evidently have an agenda in mind: to give tenants more security.

agreements do not have adverse effects on other areas of tax planning. A review, therefore, does involve the need for both legal and tax professionals working together. Hopefully a little time and money spent reviewing affairs will reap significant benefit upon the death of the landlord or tenant.

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Demystifying diversification!

Today, land owners consider various ways to produce income from their land, instead of relying solely on farming. You must ensure you are protected correctly if allowing others to occupy your land, for example, leisure pursuits, offices, tea room or petting farm!

Always take independent legal advice, but invariably you should document any arrangement as a lease. A licence is likely to expose you to risks, and a tenancy-at-will won't be acceptable to your tenant, or to you, if you're looking for a decent period of rental income. I often see what can only be described as 'messy arrangements', causing owners difficulty. Correct documentation puts you in control.

Other considerations:-

- Should the tenant supply a guarantor and/or a rent deposit?

- How long should the lease be?
- What rent should be paid and when should it be reviewed?
- Should you or the tenant be able to end the lease early?
- Can the tenant pass the lease to someone else?
- Can they carry out alterations or change the use?

Renewable energy installations will need these considerations and specific additional ones.

Finally, you will want to insure the building, but recover the costs from the tenant. You may need a service charge to be included, and you will probably want to exclude the lease from the statutory protection given to tenants by the 1954 Landlord and Tenant Act.

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For example, currently, tenancies caught under the Agricultural Holdings Act 1986 (AHA) can be passed under succession rights to close relatives, subject to further criteria, on two occasions at most. DEFRA is proposing a new provision so that, on one single occasion only, the tenant can assign their tenancy to a new tenant altogether – one that is not subject to the succession rights. The landlord is afforded a pre-emptive right to stop the assignment, but only in exchange for buying out the departing tenant.

Any negotiation stance for this pre-emptive right will depend on the circumstances. One instinctively worries at the difficulties facing a landlord seeking to exercise that pre-emptive right, now that a tenant has a broader

scope for passing on their tenancy. Any assignment of the tenancy is likely to be for a fee – the landlord would surely, at the very least, have to match that. In addition, although unclear at this stage, this could allow for an AHA tenancy to pass on a third occasion.

We are at a premature stage; however, it provides a reminder to landlords and tenants of agricultural property, whether under the AHA legislation or otherwise, to encourage succession planning and organisation for the current generation in the short term and future generations in the long term. Most immediately, it should encourage a dialogue between landlords and tenants. What are each party's intentions, now and in the future? What are each party's options? Does the written agreement reflect the day-to-day

running of the farm? Is there even a written agreement? If not, should there be one?

We consider these issues, and more, daily for our clients. If you have concerns about the issues raised in this article, please contact me to discuss.



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Agricultural lasting powers of attorney

It is commonly reported that farming is one of the most dangerous professions.

When running an agricultural business as a sole trader, partnership or limited company, planning can often be overlooked. However, every farmer should ensure that they have a lasting power of attorney (LPA) in place so that, should they no longer be able to manage their financial and personal affairs, they are able to continue on their behalf by someone they trust.

Increasingly, the courts are requiring a specific LPA or some other provision which enables a business to continue. Legislation does not appear to prevent an attorney acting in any trade, profession or business, but without express powers in place, businesses could grind to a halt.

Consideration also needs to be given to the type of business. A farmer in business as a sole trader does not have a separate legal entity. This probably means that a simple power of attorney will suffice.

Those in partnership will rely on provisions within a partnership agreement. If there is no written partnership agreement the courts are likely to dissolve the partnership. The position with limited companies can be even more complex. Directors can be removed by the shareholders applying to the court, but this can be costly and timely. Again, much will depend on the company's articles or the model articles, which may be too restrictive.

Failure to review the position, and ensure that the correct documents are in place, could mean that an application to the court would be needed if there was an accident or a farmer became ill, having potentially disastrous effects on a farming business.

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